SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 30, 2021

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

DECISIONS FILED APRIL 30, 2021

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

759

CA 20-00366

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

AUDREY ELAINE SILLS, AS EXECUTOR OF THE ESTATE OF ANGELINE V. SILLS, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOAN ROYSTON, DEFENDANT-RESPONDENT.

IN THE MATTER OF AUDREY ELAINE SILLS, AS EXECUTOR OF THE ESTATE OF ANGELINE V. SILLS, DECEASED, PETITIONER-APPELLANT,

V

FLEET NATIONAL BANK, JOAN ROYSTON, KIRK RICHARDSON AND COMMUNITY BANK, N.A., FORMERLY KNOWN AS WILBER NATIONAL BANK, RESPONDENTS-RESPONDENTS.

PAUL A. ARGENTIERI, HORNELL (HEATHER ODOM OF COUNSEL), FOR PLAINTIFF-APPELLANT AND PETITIONER-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF COUNSEL), FOR RESPONDENT-RESPONDENT COMMUNITY BANK, N.A., FORMERLY KNOWN AS WILBER NATIONAL BANK.

Appeal from an order of the Supreme Court, Steuben County (Robert B. Wiggins, A.J.), dated August 9, 2019. The order, among other things, denied plaintiff-petitioner's motions seeking to hold defendant-respondent Joan Royston and respondent Kirk Richardson in civil contempt.

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

Memorandum: After over two decades of litigation, involving multiple appeals to this Court (*Matter of Sills v Fleet Natl. Bank*, 81 AD3d 1422 [4th Dept 2011]; *Matter of Sills v Fleet Natl. Bank*, 81 AD3d 1424 [4th Dept 2011]; *Matter of Sills v Fleet Natl. Bank* [appeal Nos. 2 & 3], 81 AD3d 1425 [4th Dept 2011]; *Matter of Sills v Fleet Natl. Bank*, 81 AD3d 1426 [4th Dept 2011]; *Sills v Royston* [appeal Nos. 1 & 2], 78 AD3d 1621 [4th Dept 2010]; *Matter of Sills v Fleet Natl. Bank* [appeal No. 2], 32 AD3d 1157 [4th Dept 2006]), plaintiff-petitioner (plaintiff) appeals from an order that, among other things, denied her

motions seeking to hold defendant-respondent Joan Royston and respondent Kirk Richardson in civil contempt.

Subsequent to the order in this appeal, the parties to this action and proceeding executed a global settlement of all actions and proceedings. Royston, however, later sought to void the settlement agreement on various grounds. Supreme Court ultimately granted plaintiff's motion to enforce the settlement agreement and directed Royston to comply with its terms.

"Inasmuch as the parties have executed a stipulation of settlement completely resolving the underlying dispute, we find that this appeal is now moot" (*Wegmans Food Mkts. v New York State Div. of Human Rights*, 245 AD2d 685, 685 [3d Dept 1997]; *see Lawyers Tit. Ins. Co. v Weiser's Poultry Farm*, 289 AD2d 739, 739 [3d Dept 2001]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]), and does not fall within any exception to the mootness doctrine (*see Hearst Corp.*, 50 NY2d at 714-715). No useful purpose would be served by modifying or reversing an order in a case that has been settled.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

857

CA 20-00369

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

ALEJANDRINA TORRES-CUMMINGS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA FALLS POLICE DEPARTMENT, CITY OF NIAGARA FALLS AND KELLY ROUGEUX, DEFENDANTS-RESPONDENTS.

BERGEN & SCHIFFMACHER, LLP, BUFFALO (JOSEPH R. BERGEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CHRISTOPHER MAZUR, CORPORATION COUNSEL, NIAGARA FALLS (THOMAS J. DEBOY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered August 5, 2019. The order denied in part plaintiff's motion for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she sustained when the vehicle she was driving collided at an intersection with a police vehicle operated by defendant Kelly Rougeux (defendant officer), a police officer employed by defendant Niagara Falls Police Department who was patrolling the area. Plaintiff thereafter moved for summary judgment on the issues of negligence and serious injury and to dismiss certain affirmative defenses, and Supreme Court issued an order granting the motion in part and denying the motion in part. Plaintiff now appeals from the order to the extent that it denied those parts of the motion seeking summary judgment on the issue of negligence and dismissing the affirmative defenses of emergency operation under Vehicle and Traffic Law § 1104 and comparative negligence. We affirm.

It is well settled that "[t]he proponent on a summary judgment motion bears the initial burden of establishing entitlement to judgment as a matter of law by submitting evidence sufficient to eliminate any material issues of fact" (*Rice v City of Buffalo*, 145 AD3d 1503, 1504-1505 [4th Dept 2016]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). We conclude that plaintiff failed to meet her initial burden on the motion with respect to the issue of negligence, and thus the court properly denied that part of her motion seeking summary judgment on that issue, "regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853).

Plaintiff's submissions included her own deposition testimony and that of the defendant officer. In her deposition testimony, plaintiff testified that she had a green traffic signal as she approached the intersection traveling northbound, and that the traffic signal remained green from the time that she first saw it half a block from the intersection up until the time of the collision. Conversely, the defendant officer testified that she saw a green traffic signal controlling the westbound direction in which she was traveling when she was "[a]bout fifty feet" or "[o]ne to two car lengths" from the intersection, but she had looked away from the road as she entered the intersection to assess a vehicle that was stopped at a gas station. The defendant officer testified that she suspected that the vehicle she saw at the gas station was the same vehicle that she had previously been pursuing, but had lost sight of, minutes beforehand. Because she had looked away from the road, however, the defendant officer could not unequivocally state that the traffic signal remained green in her direction at the time of the collision. Viewing the facts in the light most favorable to the nonmoving party, as we must (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]), we conclude that plaintiff's submissions raise a material issue of fact with respect to the color of the traffic signals facing the respective parties at the intersection at the time in question, and thus plaintiff failed to establish the defendant officer's negligence as a matter of law (*see generally Fayson v Rent-A-Center E., Inc.*, 166 AD3d 1569, 1570 [4th Dept 2018]; *Buffa v Carr*, 148 AD3d 606, 606 [1st Dept 2017]). Similarly, inasmuch as plaintiff also failed to establish as a matter of law that she was not negligent in operating her vehicle at the time of the collision, we conclude that the court properly denied that part of her motion seeking summary judgment dismissing the affirmative defense of comparative negligence (*see Vari v Capitano*, 130 AD3d 1475, 1476-1477 [4th Dept 2015]; *Leahey v Fitzgerald*, 1 AD3d 924, 926 [4th Dept 2003]).

We further conclude that the court properly denied that part of plaintiff's motion seeking summary judgment dismissing the emergency operation affirmative defense under Vehicle and Traffic Law § 1104. With respect to that defense, "the reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence" (*Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]). Initially, we note that there is no dispute that the defendant officer was operating an authorized emergency vehicle at the time of the collision (*see* § 101). Furthermore, we reject plaintiff's contention that, because the vehicle that the defendant officer believed she had been pursuing had stopped, the defendant officer as a matter of law was not "pursuing an actual or suspected violator of the law" within the meaning of Vehicle and Traffic Law § 114-b (*see generally Lacey v City of Syracuse*, 144 AD3d 1665, 1666 [4th Dept 2016], *lv denied* 32 NY3d 913 [2019]; *Williams v City of New York*, 240 AD2d 734, 736 [2d Dept 1997]). Inasmuch as plaintiff failed to establish as a matter of law

that the defendant officer was not involved in an emergency operation at the time of the collision, and inasmuch as plaintiff's submissions themselves raise an issue of fact whether the defendant officer was engaged in the exempt conduct of proceeding past a steady red signal at that time (*see* § 1104 [b] [2]; *see also Oddo v City of Buffalo*, 159 AD3d 1519, 1521-1522 [4th Dept 2018]; *see generally Lindgren v New York City Hous. Auth.*, 269 AD2d 299, 303 [1st Dept 2000]), plaintiff failed to meet her initial burden on her motion of establishing that the emergency operation defense under section 1104 " 'is without merit as a matter of law' " (*Jackson v Rumpf*, 177 AD3d 1354, 1356 [4th Dept 2019]; *see Anderson v Suffolk County Police Dept.*, 181 AD3d 765, 767 [2d Dept 2020]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

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CA 19-01875

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

DIMARCO CONSTRUCTORS, LLC, KENNEDY MECHANICAL PLUMBING & HEATING, INC., LANDMARK ELECTRIC, INC., U.S. CEILING CORP., SWAN TILE & MARBLE, INC., KORNERSTONE KITCHENS, LLC, BBT CONSTRUCTION SERVICES, INC., NORTHEAST COMMERCIAL FLOORING, INC., AND JAMES C. DELLY, DOING BUSINESS AS JAMES C. DELLY CUSTOM PAINTING, ON THEIR OWN BEHALF AND ON BEHALF OF OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOP CAPITAL OF NEW YORK BROCKPORT, LLC, PERSISTENCE PATH, LLC, ZHENG ZHOU, TIMOTHY COOPER, TIMOTHY POLEY, MICHAEL PALUMBO, DEFENDANTS-RESPONDENTS-APPELLANTS, AND LOUIS GIARDINO, DEFENDANT-RESPONDENT.

ADAMS LECLAIR, LLP, ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

BOYLAN CODE LLP, ROCHESTER (ROBERT J. MARKS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered September 26, 2019. The order, among other things, denied that part of the cross motion of plaintiffs seeking partial summary judgment and denied in part the motion of defendants-respondents-appellants for partial summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the motion in its entirety and as modified the order is affirmed without costs.

Memorandum: Plaintiffs, the general contractor and subcontractors in a construction project, commenced this action seeking, inter alia, to recover the balance allegedly due under a construction contract between defendant Top Capital of New York Brockport, LLC (Top Capital) and the general contractor, i.e., plaintiff DiMarco Constructors, LLC (DiMarco). Plaintiffs allege that $1,783,320.22 remains due, and assert causes of action including breach of contract, diversion of trust funds against Top Capital, and participation in diversion of trust funds against the individual

defendants (*see* Lien Law art 3-A). Supreme Court granted in part the motion of defendants-respondents-appellants (defendants) for partial summary judgment dismissing the causes of action asserting diversion of trust funds and participation in diversion of trust funds (diversion causes of action) by limiting plaintiffs' potential damages on those causes of action to a maximum of $104,205.99, and otherwise denied defendants' motion. Furthermore, insofar as relevant here, the court denied that part of plaintiffs' cross motion seeking partial summary judgment on the issue of liability with respect to the cause of action asserting diversion of trust funds against Top Capital. Plaintiffs appeal and defendants cross-appeal.

"[T]he primary purpose of [Lien Law] article 3-A and its predecessors . . . [is] to ensure that those who have directly expended labor and materials to improve real property [or a public improvement] at the direction of the owner or a general contractor receive payment for the work actually performed" (*Matter of RLI Ins. Co., Sur. Div. v New York State Dept. of Labor*, 97 NY2d 256, 264 [2002] [internal quotation marks omitted]). "Use of trust assets for any purpose other than the expenditures authorized in Lien Law § 71 before all trust claims have been paid or discharged constitutes an improper diversion of trust assets, regardless of the propriety of the trustee's intentions" (*id.* at 263). Under Lien Law article 3-A, a trust beneficiary may maintain an action "to recover trust assets from anyone to whom they have been diverted with notice of their trust status" (*LeChase Data/Telecom Servs., LLC v Goebert*, 6 NY3d 281, 289 [2006]; *see* Lien Law § 77).

Initially, with respect to the appeal and cross appeal, the parties dispute the total amount of assets that are subject to the protection of the Lien Law's trust provisions. Defendants contend on their cross appeal that the trust fund consisted of only $12,728,764 and that the diversion causes of action should have been dismissed in their entirety because it is undisputed that Top Capital made payments totaling $13,230,794 to DiMarco for plaintiffs' services related to the construction contract. We agree with plaintiffs, however, that, as a matter of law, "[t]he trust fund is that portion of the [building] loan [contract] received by the owner or contractor" (*Caledonia Lbr. & Coal Co. v Chili Hgts. Apts.*, 70 AD2d 766, 766 [4th Dept 1979], citing Lien Law § 70 [1]; *see also* § 70 [5] [a]), and the parties do not dispute that Top Capital received disbursements totaling $13,334,999.99 as a result of the relevant building loan contract between Top Capital and a nonparty bank.

We further agree with plaintiffs on their appeal that the court erred in granting defendants' motion in part by limiting the potential damages in the diversion causes of action to a maximum of $104,205.99 based on Top Capital's alleged restoration of trust assets through payments made with non-trust assets, and we therefore modify the order by denying defendants' motion in its entirety. Plaintiffs allege that approximately $1.4 million in trust assets was improperly diverted by defendants. The court, in limiting the potential recovery on the diversion causes of action, credited not just Top Capital but all

defendants for the approximately $1.3 million Top Capital paid DiMarco from non-trust assets after the trust fund was depleted. That was error because defendants failed to establish their entitlement to a restoration defense as a matter of law. Contrary to defendants' assertion, the Court of Appeals has rejected the argument that a defendant can cure an improper diversion of trust assets, and therefore avoid liability for that diversion, by a subsequent payment from non-trust assets (*see Caristo Constr. Corp. v Diners Fin. Corp.*, 21 NY2d 507, 512-513 [1968]). Defendants rely on dicta in that case wherein the Court of Appeals posited that, if non-trust fund assets are used "to pay trust claims *and there had been no loss to anyone*, [then] there would have been no ultimate diversion or loss for which the [defendant] would be liable" (*id.* at 513 [emphasis added]). Under such circumstances, "the salutary purposes of the rather rigorous regulations of the Lien Law [would not be] avoided or blunted" (*id.*). Here, however, plaintiffs allege that $1,783,320.22 remains due for labor and materials and that approximately $1.4 million of the trust assets intended to pay for the same was improperly diverted by defendants. Thus, this is not the hypothetical double-recovery situation envisioned by the Court of Appeals where "there ha[s] been no loss to anyone" even assuming funds were improperly diverted (*id.*). Indeed, to hold otherwise would open the door to "the practice of 'pyramiding,' in which [owners or] contractors use loans or payments advanced in the course of one project to complete another," one of the very evils that the Lien Law was intended to guard against (*RLI Ins. Co., Sur. Div.*, 97 NY2d at 264; *see generally Aquilino v United States of Am.*, 10 NY2d 271, 275 [1961]).

Finally, we conclude that, contrary to plaintiffs' contention on their appeal, the court properly denied that part of their cross motion seeking partial summary judgment on the issue of liability with respect to the cause of action asserting diversion of trust funds against Top Capital inasmuch as there are "triable issues of fact as to whether, and to what extent, trust funds may have been diverted" (*Roos v King Constr.*, 179 AD3d 857, 859 [2d Dept 2020]).

All concur except CURRAN, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent and would affirm Supreme Court's order. I agree with the majority that, with respect to the appeal and cross appeal, the trust fund in this case "is that portion of the [building] loan [contract] received by the owner or contractor" (*Caledonia Lbr. & Coal Co. v Chili Hgts. Apts.*, 70 AD2d 766, 766 [4th Dept 1979]), and that therefore the amount of the trust fund is, as a matter of law, valued at $13,334,999.99. I also agree with the majority that, contrary to plaintiffs' contention on their appeal, the court properly denied that part of their cross motion seeking partial summary judgment on the issue of liability with respect to the cause of action asserting diversion of trust funds against defendant Top Capital of New York Brockport, LLC (Top Capital) because there exist triable issues of material fact "whether, and to what extent, trust funds may have been diverted" under Lien Law article 3-A (*Roos v King Constr.*, 179 AD3d 857, 859 [2d Dept 2020]).

I disagree with the majority, however, that the motion of

defendants-respondents-appellants (defendants) for partial summary judgment should be denied in its entirety because I conclude that there are no issues of fact with respect to the maximum amount of plaintiffs' potential damages on the causes of action asserting diversion of trust funds and participation in diversion of trust funds (diversion causes of action). In my view, because it is undisputed that plaintiffs have been paid the amount of $13,230,794, which has been "applied for payment of the cost of improvement" (Lien Law § 71 [1]), defendants are entitled to interpose a payment defense for that amount (*see* CPLR 3018 [b]) against plaintiffs' diversion causes of action. In other words, even assuming that Top Capital diverted trust funds to some defendants, all defendants are entitled to a credit on the diversion causes of action for the amount already "applied for payment of the cost of improvement" to plaintiffs (Lien Law § 71 [1]; *see Travelers Indem. Co. v Central Trust Co. of Rochester*, 47 Misc 2d 849, 852-853 [Sup Ct, Monroe County 1965], *affd* 27 AD2d 803 [4th Dept 1967]; *Raisler Corp. v Uris 55 Water St. Co.*, 91 Misc 2d 217, 222-223 [Sup Ct, NY County 1977]). Consequently, the court properly invoked CPLR 3212 (g) to determine that plaintiffs' relief on those causes of action is limited to the difference between the undisputed amount of the trust fund and the undisputed amount already paid by defendants, i.e., $104,205.99.

I respectfully disagree with the majority's conclusion that defendants are not permitted to assert a partial payment defense, also known as a restoration defense, because defendants could not establish that the trust fund beneficiaries, i.e., plaintiffs, suffered "no loss" whatsoever (*Caristo Constr. Corp. v Diners Fin. Corp.*, 21 NY2d 507, 513 [1968]). As I understand the majority's conclusion, which is primarily based on dicta in *Caristo*, defendants are not entitled to *any* credit for the amounts they indisputably paid for the "cost of improvement" (Lien Law § 71 [1])—to the extent such amounts may have been diverted by Top Capital—because *all* of those purportedly diverted funds have not been paid to plaintiffs. In my view, adopting such an all or nothing approach to the applicability of a payment defense—i.e., rejecting the concept that partial payment may be an available defense—finds no direct support in *Caristo*, any other precedent, or any provision of Lien Law article 3-A. Indeed, "the defense of partial payment" is well established under the law (*P.B. Ogden, Inc. v Jordache Dev.*, 298 AD2d 976, 976 [4th Dept 2002]; *see generally* CPLR 3018 [b]; *Ross v Ross Metals Corp.*, 111 AD3d 695, 696-697 [2d Dept 2013]; *State of New York Higher Educ. Servs. Corp. v Starr*, 179 AD2d 992, 994 [3d Dept 1992], *lv denied* 80 NY2d 757 [1992]).

Additionally, I do not share the majority's concern about " 'pyramiding' " (*Matter of RLI Ins. Co., Sur. Div. v New York State Dept. of Labor*, 97 NY2d 256, 264 [2002]) here because this case involves a single project for which there was just one "building loan contract" (Lien Law § 70 [5] [a]). The proceeds of the building loan contract were disbursed to an "owner" as trust assets pursuant to Lien Law § 71 (1), and not to a "contractor or subcontractor" pursuant to Lien Law § 71 (2). Thus, there is no danger that "*contractors* [will]

use loans or payments advanced in the course of *one project to complete another*"—the peculiar evil that Lien Law article 3-A was intended to vitiate (*RLI Ins. Co., Sur. Div.*, 97 NY2d at 264 [emphasis added]).

In short, taken to its logical conclusion, I fear that the majority's analysis could potentially result in plaintiffs obtaining what is in effect a double recovery from defendants on the diversion causes of action—i.e., an amount that exceeds the undisputed amount of the trust fund corpus. I respectfully submit that a double recovery is contrary to the Lien Law, unsupported by precedent, and inconsistent with the concept of a payment defense.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

861

CA 19-02326

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

IN THE MATTER OF FORECLOSURE OF TAX LIENS BY PROCEEDING IN REM PURSUANT TO THE IN REM PROVISIONS OF THE ERIE COUNTY TAX ACT AND THE RESOLUTION OF THE ERIE COUNTY LEGISLATURE AS SHOWN BY RESOLUTION NO. 54 AT PAGE 179 OF THE MINUTES OF THE PROCEEDINGS OF SAID LEGISLATURE FOR THE YEAR 2019.

MEMORANDUM AND ORDER

MELISSA NEAL, APPELLANT;

FEDDER LOFTS, LLC, AND COUNTY OF ERIE, RESPONDENTS.

JAMES I. MYERS, PLLC, WILLIAMSVILLE (JAMES I. MYERS OF COUNSEL), FOR APPELLANT.

HODGSON RUSS LLP, BUFFALO (MICHAEL B. RISMAN OF COUNSEL), FOR RESPONDENT FEDDER LOFTS, LLC.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR RESPONDENT COUNTY OF ERIE.

Appeal from an order of the Erie County Court (Susan M. Eagan, J.), entered November 25, 2019. The order, inter alia, granted the motion of Fedder Lofts, LLC to vacate the sale of property to Melissa Neal.

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

Memorandum: In this in rem tax foreclosure action pursuant to the Erie County Tax Act (ECTA), respondent County of Erie (County) obtained a judgment of foreclosure with respect to certain property owned by Black Rock Trade Center, Inc. (Black Rock) based on Black Rock's tax delinquency, and the County then sold the property to appellant at a public auction. Respondent Fedder Lofts, LLC (Fedder) thereafter moved by order to show cause seeking, inter alia, to vacate the sale of the property. Appellant now appeals from an order that granted the motion by, inter alia, rescinding her purchase of the property on equity grounds. We reverse.

As a threshold issue, we reject respondents' contention that this appeal is moot on the ground that the property was purportedly

redeemed and transferred subsequent to the order on appeal, rendering unavailable the relief now sought by appellant. After County Court entered the order on appeal, the delinquent taxes were paid, the County issued a certificate of redemption to Black Rock, and Black Rock thereafter purportedly sold the property and transferred title to Fedder. Contrary to respondents' assertions, however, this is not a mortgage foreclosure action, where the "equity of redemption" permits property owners "to redeem their property by tendering the full sum" owed before a valid sale is effectuated (*NYCTL 1999-1 Trust v 573 Jackson Ave. Realty Corp.*, 13 NY3d 573, 579 [2009], *cert denied* 561 US 1006 [2010]). Here, instead, the right to pay the delinquent taxes by virtue of the equity of redemption was extinguished several months prior to Fedder's motion by order to show cause, according to the ECTA, the public notice of foreclosure, and the terms of the judgment of foreclosure (*see* ECTA §§ 11-10.0, 11-12.0; *see also* RPTL art 11; *see generally Matter of Orange County Commr. of Fin. [Helseth]*, 18 NY3d 634, 640 [2012]; *Matter of Johnstone v Treasurer of Wayne County*, 118 AD3d 1378, 1380 [4th Dept 2014]). Consequently, we conclude that the purported redemption, the issuance of the certificate of redemption, and the purported sale and transfer of title from Black Rock to Fedder are nullities, and that the appeal is therefore not moot.

We agree with appellant that Fedder did not have standing to seek equitable relief in this case. Pursuant to ECTA § 7-10.0, the court could not set aside the sale to appellant "except upon a proceeding brought therefor by the owner of such real property within three months from the date of such sale." Here, no such proceeding was brought. Instead, Fedder, a nonowner, filed a motion by order to show cause in this foreclosure action, and Black Rock, the owner, was not a party to the motion. In light of the " 'clear legislative intent' " of section 7-10.0 (*Matter of District Attorney of Suffolk County*, 58 NY2d 436, 442 [1983]; *see Matter of Fritz v Huntington Hosp.*, 39 NY2d 339, 345-346 [1976]), Fedder did not have standing to seek rescission of the sale.

Morever, even assuming, arguendo that Fedder had standing to seek rescission of the sale, we conclude that the court abused its discretion in exercising its equitable power in this case (*see generally Wayman v Zmyewski*, 218 AD2d 843, 843-844 [3d Dept 1995]). As the Court of Appeals has noted, "equity will act only when no adequate remedy is available at law" (*Breed v Barton*, 54 NY2d 82, 87 [1981]). Here, inasmuch as the court failed to analyze the potential legal remedies offered by the parties, the court abused its discretion in invoking its equitable jurisdiction and rescinding the sale to appellant.

In light of our determination, appellant's remaining contentions are academic.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

896

CA 19-02041

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

FRANCES MARRERO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

OAK-MICHIGAN HOUSING DEVELOPMENT FUND COMPANY, INC., AND BELMONT MANAGEMENT CO., INC., DEFENDANTS-RESPONDENTS.

SHAW & SHAW, P.C., HAMBURG (BLAKE J. ZACCAGNINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (CORY J. WEBER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered October 28, 2019. The order granted defendants' motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she slipped and fell on ice while walking on a sidewalk located on real property owned by defendant Oak-Michigan Housing Development Fund Company, Inc. and managed by defendant Belmont Management Co., Inc. Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint. Defendants "established their entitlement to judgment as a matter of law on the issue whether plaintiff's fall occurred while a storm was in progress or within a reasonable time thereafter" (*Santerre v Golub Corp.*, 11 AD3d 945, 947 [4th Dept 2004]; *see Hyde v Transcontinent Record Sales, Inc.*, 111 AD3d 1339, 1340 [4th Dept 2013]) and, in opposition, plaintiff failed to raise a triable issue of fact "whether the accident was caused by a slippery condition at the location where [she] fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and [whether] the defendant[s] had actual or constructive notice of the preexisting condition" (*Quill v Churchville-Chili Cent. Sch. Dist.*, 114 AD3d 1211, 1212 [4th Dept 2014] [internal quotation marks omitted]).

Contrary to the contention of plaintiff, she failed to raise a triable issue of fact by establishing that it was not raining or snowing in the area at the time of her accident, i.e., at 7:15 p.m. It is well settled that "[a] landowner is not responsible for a

failure to remove snow and ice until a reasonable time has elapsed after cessation of the storm" (*Cerra v Perk Dev.*, 197 AD2d 851, 851 [4th Dept 1993]; *see Brierley v Great Lakes Motor Corp.*, 41 AD3d 1159, 1160 [4th Dept 2007]; *Baia v Allright Parking Buffalo, Inc.*, 27 AD3d 1153, 1154 [4th Dept 2006]), and evidence that it was not precipitating or only lightly precipitating at the time of an accident does not render the storm in progress doctrine inapplicable (*see generally Alvarado v Wegmans Food Mkts., Inc.*, 134 AD3d 1440, 1441 [4th Dept 2015]). Here, the meteorological evidence submitted by defendants in support of their motion established that approximately two inches of snow accumulated in the area during the late morning and afternoon and then freezing rain fell from 3:07 p.m. until 7:03 p.m., and from 7:03 p.m. throughout the remainder of the evening, the area saw a light rain. That evidence was not contradicted by plaintiff's meteorologist. Thus, "[e]ven if there was a lull or break in the storm around the time of plaintiff's accident, [that would] not establish that [defendants] had a reasonable time after the cessation of the storm to correct hazardous snow or ice-related conditions" (*Brierley*, 41 AD3d at 1160 [internal quotation marks omitted]; *see Krutz v Betz Funeral Home*, 236 AD2d 704, 705 [3d Dept 1997], *lv denied* 90 NY2d 803 [1997]).

In light of our determination, plaintiff's remaining contentions are academic.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

897

CA 19-02098

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

RYAN STEMPIEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GREGG K. WALLS AND MARY E. WALLS,
DEFENDANTS-APPELLANTS.

HAGELIN SPENCER LLC, BUFFALO (MATTHEW D. PFALZER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered November 18, 2019. The order denied defendants' motion seeking, inter alia, summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this premises liability action seeking damages for injuries he sustained when he fell 15 feet from the top of a seawall while attending a party at defendants' lakefront vacation home. Plaintiff alleged that the accident occurred at "the unguarded and unlit rear northwest corner of the [subject] property" and that defendants failed to, inter alia, put up a barrier, properly illuminate the area, or correct or warn of the dangerous condition. Defendants appeal from an order that denied their motion seeking summary judgment dismissing the complaint or, in the alternative, a bifurcated trial. We affirm.

On the night of the incident, around 11:00 p.m., plaintiff discovered that the downstairs bathroom in the house was occupied, and he exited the house and proceeded toward the back right corner of the property, intending to relieve himself near some bushes. Defendants' backyard is approximately 20 feet above the lake, separated by a natural cliff that runs along the shoreline. Built into the face of the cliff is the 15-foot-high seawall, which consists of two levels, with an upper and a lower platform, and a cement staircase built into the center of the seawall that permits access from the backyard to the lower platform. Defendants' backyard includes a cement sidewalk that leads to the top of the seawall's staircase. Plaintiff fell off the seawall down to the beach below and sustained various injuries.

Contrary to defendants' contention, Supreme Court properly denied the motion insofar as it sought summary judgment dismissing the complaint. It is well settled that "[a] landowner has a duty to exercise reasonable care in maintaining [his or her] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property . . . However, a landowner has no duty to protect or warn against an open and obvious condition that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it" (*Preston v Castle Pointe, LLC*, 173 AD3d 1709, 1710 [4th Dept 2019] [internal quotation marks omitted]; *see also Carol S. v State of New York*, 185 AD3d 1385, 1386 [4th Dept 2020]). Under the circumstances of this case, we conclude that defendants failed to meet their initial burden on their motion of establishing that the cliff, together with the manmade seawall, constituted an open and obvious condition inherent or incidental to the nature of the property that could be reasonably anticipated by plaintiff (*cf. Preston*, 173 AD3d at 1710; *see also Barry v Gorecki*, 38 AD3d 1213, 1215 [4th Dept 2007]; *Walter v State of New York*, 185 AD2d 536, 538 [3d Dept 1992]). The issue whether a condition is open and obvious is generally fact-specific and depends on the circumstances of the case, and "something that ordinarily would be readily observable may be obscured by inadequate illumination" (*Bissett v 30 Merrick Plaza, LLC*, 156 AD3d 751, 751 [2d Dept 2017]; *see Twersky v Incorporated Vil. of Great Neck*, 127 AD3d 739, 740 [2d Dept 2015]; *see generally Tagle v Jakob*, 97 NY2d 165, 169 [2001]). Here, defendants failed to eliminate all triable issues of fact whether the alleged hazard posed by the cliff and seawall, given the lighting conditions at the time of the accident, "was visible and obvious or presented a latent, dangerous condition" (*King v Cornell Univ.*, 119 AD3d 1195, 1197 [3d Dept 2014]; *see Bissett*, 156 AD3d at 751-752; *see also Simon v Comsewogue Sch. Dist.*, 143 AD3d 695, 696 [2d Dept 2016]).

We further conclude that defendants failed to establish as a matter of law that plaintiff's conduct was the sole proximate cause of his fall (*see Mooney v Petro, Inc.*, 51 AD3d 746, 747 [2d Dept 2008]). Typically, the question "whether a particular act of negligence is a substantial cause of the plaintiff's injuries is one to be made by the factfinder, as such a determination turns upon questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences" (*Hain v Jamison*, 28 NY3d 524, 529 [2016] [internal quotation marks omitted]). Additionally, "it is well settled that there may be more than one proximate cause of the accident" (*Przesiek v State of New York*, 118 AD3d 1326, 1327 [4th Dept 2014]). " '[U]nder the circumstances presented, it cannot be said that plaintiff's conduct . . . was unforeseeable . . . [and rose] to such a level of culpability as to replace [defendants'] negligence as the legal cause of the accident' " (*Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1319 [4th Dept 2012]; *see generally Potter v YMCA of Kingston & Ulster County*, 136 AD3d 1265, 1266 [3d Dept 2016]; *Proulx v Entergy Nuclear Indian Point 2, LLC*, 98 AD3d 492, 493 [2d Dept 2012]).

We also conclude that defendants failed to establish as a matter of law that plaintiff could not identify the cause of his fall without engaging in speculation (*see Dixon v Superior Discounts & Custom Muffler*, 118 AD3d 1487, 1488 [4th Dept 2014]). Although plaintiff was unable to identify the precise cause of his fall, the record establishes that he fell in the immediate vicinity of uneven terrain at night, "thereby rendering any other potential cause of [his] fall sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*id*. [internal quotation marks omitted]).

Finally, we conclude that the court did not abuse its discretion in denying defendants' motion insofar as it sought bifurcation of the trial. Contrary to defendants' contention, "plaintiff established that bifurcation would not 'assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action' " (*Turnmire v Concrete Applied Tech. Corp*., 56 AD3d 1125, 1128 [4th Dept 2008]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

899

CA 19-01206

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF PHILIP Q., FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Michael L. Dwyer, A.J.), entered May 31, 2019 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, adjudged that petitioner is subject to strict and intensive supervision and treatment.

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

Memorandum: In this proceeding pursuant to Mental Hygiene Law article 10, petitioner appeals from an order determining that he is a detained sex offender who suffers from a mental abnormality and ordering his release to a regimen of strict and intensive supervision and treatment (*see* § 10.03 [i], [r]).

We reject petitioner's contention that the evidence is not legally sufficient to establish that he has a " '[m]ental abnormality' " (Mental Hygiene Law § 10.03 [i]), which is defined as a "congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (*id.*). Respondents' evidence at the hearing consisted of the report and testimony of a psychologist who evaluated petitioner and opined that he suffers from antisocial personality disorder and three substance abuse disorders, and that he possesses a moderate degree of psychopathic traits. The

psychologist testified regarding the early onset of petitioner's "recurrent and intense" sexual fantasies and the repetitious and chronic nature of petitioner's offenses over time, and further testified that petitioner continued to commit sexual offenses despite facing legal consequences on prior occasions, and that his score on a VRS:SO test placed him in a high-risk category for recidivism. The psychologist opined that petitioner is predisposed to commit sex offenses and that he has serious difficulty in controlling such conduct. Viewing the evidence in the light most favorable to respondents (*see Matter of State of New York v Floyd Y.*, 30 NY3d 963, 964 [2017]; *Matter of State of New York v John S.*, 23 NY3d 326, 348 [2014], *rearg denied* 24 NY3d 933 [2014]), we conclude that it is legally sufficient to establish by clear and convincing evidence that petitioner has a mental abnormality (*see* § 10.03 [i]; *see generally Matter of Derek G. v State of New York*, 174 AD3d 1360, 1361 [4th Dept 2019]; *Matter of Luis S. v State of New York*, 166 AD3d 1550, 1551 [4th Dept 2018], *appeal dismissed* 35 NY3d 985 [2020]; *Matter of Suggs v State of New York*, 142 AD3d 1283, 1284 [4th Dept 2016]).

Lastly, we reject petitioner's contention that the determination that he suffers from a mental abnormality is against the weight of the evidence (*see generally Matter of State of New York v Stein*, 85 AD3d 1646, 1647 [4th Dept 2011], *affd* 20 NY3d 99 [2012], *cert denied* 568 US 1216 [2013]). Although petitioner presented expert testimony that would support a contrary finding, that merely raised a credibility issue for Supreme Court to resolve, and its determination is entitled to great deference given its " 'opportunity to evaluate [first-hand] the weight and credibility of [the] conflicting expert testimony' " (*Luis S.*, 166 AD3d at 1554).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

901

CA 20-00031

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

DAVID SZUBA AND RACHEL SZUBA,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-RESPONDENT.

LOTEMPIO P.C. LAW GROUP, BUFFALO (BOYD L. EARL OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered July 12, 2019. The order granted the motion of defendant for summary judgment and dismissed the amended complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by David Szuba (plaintiff) when he allegedly slipped and fell on an ice-filled pothole on a street in defendant, City of Buffalo. Defendant moved for summary judgment dismissing the amended complaint, and Supreme Court granted defendant's motion. We affirm.

"Where, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective street . . . condition unless it has received prior written notice of the defect, or an exception to the written notice requirement applies" (*Zielinski v City of Mount Vernon*, 115 AD3d 946, 947 [2d Dept 2014]; *see Hawley v Town of Ovid*, 108 AD3d 1034, 1034-1035 [4th Dept 2013]). Here, defendant "met its initial burden by establishing that it did not receive the requisite written notice of the allegedly defective [street] condition as required by section 21-2 of the [Charter of the City of Buffalo (City Charter)]" (*Davison v City of Buffalo*, 96 AD3d 1516, 1518 [4th Dept 2012]). Defendant submitted the affidavit of its City Clerk, who stated that the City Clerk's office had conducted a comprehensive search of the database in which such complaints are entered, and no complaints regarding a defective condition in or on the subject street were found (*see Scafidi v Town of Islip*, 34 AD3d 669, 669 [2d Dept 2006]). Thus, the burden shifted to plaintiffs to raise a triable issue of fact

whether prior written notice was given (*see Scovazzo v Town of Tonawanda*, 83 AD3d 1600, 1601 [4th Dept 2011]) or "to demonstrate [the existence of a triable issue of fact as to] the applicability of one of [the] two recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality" (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see Groninger v Village of Mamaroneck*, 17 NY3d 125, 129 [2011]; *Horst v City of Syracuse*, 191 AD3d 1297, 1297-1300 [4th Dept 2021]).

We conclude that plaintiffs failed to meet that burden. Although plaintiffs submitted evidence establishing that plaintiff had called defendant's 311 call center several months prior to the accident to report the poor condition of the subject street and to ask that potholes in the street be paved, that evidence does not raise a triable issue of fact whether prior written notice was given inasmuch as section 21-2 of the City Charter requires that such notice be provided to the City Clerk (*see Gorman v Town of Huntington*, 12 NY3d 275, 279-280 [2009]) and, in any event, it is well settled that verbal or telephonic communications to a municipal body, even if reduced to writing, do not satisfy a prior written notice requirement (*see id.* at 280; *Hernandez v City of Syracuse*, 164 AD3d 1609, 1609 [4th Dept 2018]; *Rile v City of Syracuse*, 56 AD3d 1270, 1271 [4th Dept 2008]).

Furthermore, plaintiffs failed to demonstrate the existence of a triable issue of fact as to the applicability of either of the two recognized exceptions to the prior written notice rule (*see Gorman*, 12 NY3d at 279; *Tracy v City of Buffalo*, 158 AD3d 1094, 1094 [4th Dept 2018]). To the extent that plaintiffs contend that they demonstrated the existence of a triable issue of fact whether defendant should be estopped from relying on its prior written notice provision under "a third exception to excuse lack of prior written notice" (*Gorman*, 12 NY3d at 280), we reject that contention. "Even assuming that estoppel could serve as a third exception to excuse lack of prior written notice," we conclude that plaintiffs failed to raise a triable issue of fact whether plaintiff justifiably relied on any representations by defendant (*id.*). Contrary to plaintiffs' contention, their submissions do not establish that plaintiff was directed by an employee of defendant to make his complaint about potholes to the wrong person or office (*cf. Schutz-Prepscius v Incorporated Vil. of Port Jefferson*, 51 AD3d 657, 658 [2d Dept 2008]; *see also Gorman v Town of Huntington*, 47 AD3d 30, 38 [2d Dept 2007], *revd* 12 NY3d 275 [2009]), and the record does not support the conclusory allegation of plaintiffs that defendant's 311 call center was "advertised" as the means to report dangerous conditions to defendant (*see Groninger*, 17 NY3d at 129-130; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

902

CA 19-02021

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

ANTONIA BARONE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES D. HASKINS, COMMONWEALTH EQUITY SERVICES, INC., DOING BUSINESS AS COMMONWEALTH FINANCIAL NETWORK, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

JOANNE A. SCHULTZ, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

PADUANO & WEINTRAUB LLP, NEW YORK CITY (KATHERINE B. HARRISON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, J.), entered October 18, 2019. The order denied the motion of plaintiff to vacate an arbitration award and granted the cross motion of defendants-respondents to confirm the award.

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

Memorandum: Plaintiff commenced this action alleging fraud, negligence, breach of contract, breach of fiduciary duty, and violations of the General Business Law. James D. Haskins and Commonwealth Equity Services, Inc., doing business as Commonwealth Financial Network (defendants), brought a motion seeking, inter alia, to compel arbitration pursuant to CPLR 7503 (a). On a prior appeal, we concluded that Supreme Court erred in denying the motion to compel arbitration on the ground that arbitration in this case would be financially prohibitive to plaintiff without first directing plaintiff to apply for a waiver of the arbitration fee charged by the Financial Industry Regulatory Authority (FINRA) (*Barone v Haskins*, 132 AD3d 1422, 1423 [4th Dept 2015]). We therefore reversed the order and remitted the matter to Supreme Court for that purpose (*id.*). Upon remittal, plaintiff brought a motion to, inter alia, apply this Court's directive. Plaintiff argued that she had complied with this Court's decision by applying for a waiver and that, because a full waiver was not granted, the court should proceed with trial. During motion practice, however, defendants agreed to pay any and all fees assessed by FINRA. Thereafter, the court denied plaintiff's motion to, inter alia, apply this Court's directive, and determined that, in light of defendants' agreement to pay any fees imposed on plaintiff by FINRA, it was not necessary to address whether the steps that

plaintiff had already taken would satisfy this Court's directive. The court further noted that "plaintiff clearly cannot satisfy the [relevant] criteria . . . required for proceeding in Supreme Court and she must now submit her claims against . . . defendants through FINRA." Plaintiff did not take an appeal from the ensuing order (April 2017 order), which directed that plaintiff's claims proceed through FINRA. The matter proceeded to arbitration and the arbitration panel, inter alia, denied all of plaintiff's claims and assessed all fees to defendants. Plaintiff then moved pursuant to CPLR 7511 to vacate the arbitration award, and defendants cross-moved pursuant to CPLR 7510 to confirm the arbitration award. Plaintiff now appeals from an order (October 2019 order) that denied plaintiff's motion to vacate and granted defendants' cross motion to confirm.

We note, initially, that this appeal does not bring up for our review the April 2017 order, which effectively compelled arbitration (*see generally Matter of Sanders Constr. Corp. [Becker]*, 292 AD2d 155, 155 [3d Dept 2002], *lv denied* 98 NY2d 614 [2002]; *Matter of Allstate Ins. Co. [Schlueter]* [appeal No. 2], 267 AD2d 1098, 1099 [4th Dept 1999]; *Matter of Morrow [Paragon Enters.]*, 135 AD2d 931, 932 [3d Dept 1987]). Consequently, the only contentions properly before us are those relating to the October 2019 order.

Contrary to plaintiff's contention, the court properly denied her motion to vacate and properly granted defendants' cross motion to confirm. Preliminarily, we reject plaintiff's contention that this case should be reviewed pursuant to a standard of review applicable where compulsory arbitration is provided by statute. Plaintiff was not compelled statutorily to arbitrate. Rather, she was compelled to arbitrate based on contract (*see Mount St. Mary's Hosp. of Niagara Falls v Catherwood*, 26 NY2d 493, 507 [1970], *rearg denied* 27 NY2d 737 [1970]; *see also Matter of Fiduciary Ins. Co. v American Bankers Ins. Co. of Florida*, 132 AD3d 40, 45-46 [2d Dept 2015]).

"Courts are bound by an arbitrator's factual findings," and a court may not "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes that its interpretation would be the better one" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]; *see Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534 [2010]; *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479-480 [2006], *cert dismissed* 548 US 940 [2006]). Indeed, even where an arbitrator makes errors of law or fact, "courts will not assume the role of overseers to conform the award to their sense of justice" (*New York State Correctional Officers & Police Benevolent Assn.*, 94 NY2d at 326; *see Wien & Malkin LLP*, 6 NY3d at 479-480).

Although "judicial review of arbitration awards is extremely limited" (*Wien & Malkin LLP*, 6 NY3d at 479), a court may vacate an arbitrator's award where it finds that the rights of a party were prejudiced when "an arbitrator . . . exceeded his [or her] power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR 7511 [b] [1] [iii]). An

arbitrator exceeds his or her power only where his or her award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power (*see Falzone*, 15 NY3d at 534; *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" where "there is no proof whatever to justify the award" (*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] [internal quotation marks omitted]). Where, however, "an arbitrator offer[s] even a barely colorable justification for the outcome reached, the arbitration award must be upheld" (*id*. [internal quotation marks omitted]).

While " 'courts are obligated to give deference to the decision of the arbitrator . . . even if the arbitrator misapplied the substantive law' " (*Schiferle v Capital Fence Co., Inc.*, 155 AD3d 122, 125 [4th Dept 2017]), an arbitrator can exceed his or her power when he or she "manifestly disregard[s]" the substantive law applicable to the parties' dispute (*Wien & Malkin LLP*, 6 NY3d at 481). "To modify or vacate an award on the ground of manifest disregard of the law, a court must find both that (1) the arbitrator[] knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrator[] was well defined, explicit, and clearly applicable to the case" (*Schiferle*, 155 AD3d at 127 [internal quotation marks omitted]). Finally, " 'it is well established that an arbitrator's failure to set forth his [or her] findings or reasoning does not constitute a basis to vacate an award' " (*Whitney v Perrotti*, 164 AD3d 1601, 1602-1603 [4th Dept 2018]).

Here, upon our application of the above-referenced legal principles, we conclude that there is a colorable justification for the award rendered by the arbitration panel, and thus the award cannot be said to be irrational (*see id.* at 1602). We have reviewed plaintiff's remaining contentions and conclude that none warrants modification or reversal of the order.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

943

CA 20-00112

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

ABLE MEDICAL TRANSPORTATION, INC., AND
WILLIAM TADDEO, INDIVIDUALLY, AND AS SOLE
SHAREOWNER OF ABLE MEDICAL TRANSPORTATION, INC.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PARAGON ENVIRONMENTAL CONSTRUCTION, INC.,
DEFENDANT-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MARLA RAUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE MATHEWS LAW FIRM, SYRACUSE (DANIEL F. MATHEWS, III, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered January 13, 2020. The order, insofar as appealed from, denied defendant's motion for summary judgment dismissing the complaint and granted in part plaintiffs' cross motion for partial summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the cross motion is denied in its entirety, the motion is granted and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for purely economic losses alleged to have resulted from a motor vehicle accident involving an employee of plaintiff Able Medical Transportation, Inc. (Able Medical) and an employee of defendant. During the incident, defendant's employee was standing on the shoulder of an interstate highway after having pulled over the 10-wheel dump truck he was driving because two rear wheels had fallen off of it. Meanwhile, an employee of Able Medical was driving a van owned by Able Medical, and the van struck one of the wheels that had fallen off of the dump truck, and then struck defendant's employee. Defendant's employee commenced an action against, inter alia, Able Medical, and that action was settled for a sum of $900,000. In this action, plaintiffs alleged in their complaint that the settlement in defendant's employee's action resulted in an unsustainable increase in insurance premiums that eventually caused plaintiffs to close their business. Defendant moved for summary judgment dismissing the complaint on the ground that, inter alia, defendant did not

proximately cause plaintiffs' alleged injuries, and plaintiffs cross-moved for partial summary judgment on the issue of liability. Defendant now appeals from an order to the extent that it denied its motion and granted plaintiffs' cross motion in part. We reverse the order insofar as appealed from.

Defendant met its initial burden on its motion by establishing as a matter of law that plaintiffs' alleged economic damages resulting from Able Medical having gone out of business were not proximately caused by defendant's alleged negligent maintenance of its truck (*see generally Williams v State of New York*, 18 NY3d 981, 982-984 [2012], *rearg denied* 19 NY3d 956 [2012]). Here, plaintiffs' theory of causation is based on a lengthy chain of events spanning the course of two and a half years. In their complaint, plaintiffs alleged that defendant failed to maintain its truck, that rear wheels fell off of the truck causing a motor vehicle accident, that the accident resulted in a lawsuit, and that the settlement of the lawsuit ultimately resulted in an increase in insurance premiums for plaintiffs, which caused plaintiffs to close their business. On its motion, defendant established that those alleged economic injuries were not a foreseeable consequence of defendant's alleged negligent maintenance of its truck and, thus, the connection between defendant's activities and plaintiffs' economic losses is too tenuous and remote to permit recovery (*see generally Dunlop Tire & Rubber Corp. v FMC Corp.*, 53 AD2d 150, 154-155 [4th Dept 1976]). Inasmuch as plaintiffs, in opposition to the motion, failed to raise an issue of fact on the issue of proximate causation, we conclude that defendant is entitled to summary judgment dismissing the complaint (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

955

KA 17-00744

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM J. ROBINSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered April 26, 2016. The judgment convicted defendant upon a jury verdict of grand larceny in the fourth degree (two counts), petit larceny and scheme to defraud 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 a jury verdict of two counts of grand larceny in the fourth degree (Penal Law § 155.30 [1]) and one count each of petit larceny (§ 155.25) and scheme to defraud in the first degree (§ 190.65 [1]), defendant contends that he was denied the right to appear before the grand jury and that he was deprived of effective assistance of counsel by his attorney's failure to effectuate his desire to testify before the grand jury. We reject those contentions. Although "the right to testify before a grand jury is significant and 'must be scrupulously protected' . . . , 'a prospective defendant has *no constitutional right* to testify before the [g]rand [j]ury' " (*People v Hogan*, 26 NY3d 779, 786 [2016]). Moreover, even when it is due to attorney error, "a '[d]efense counsel's failure to timely facilitate defendant's intention to testify before the [g]rand [j]ury does not, per se, amount to a denial of effective assistance of counsel' " (*id.* at 787). Here, Supreme Court properly denied defendant's motion to dismiss the indictment based on an alleged violation of his right to testify before the grand jury because it is undisputed that defendant failed to invoke that right in accordance with the strict requirements of CPL 190.50 (*see People v Kirk*, 96 AD3d 1354, 1358-1359 [4th Dept 2012], *lv denied* 20 NY3d 1012 [2013]). We further conclude that defendant's related contention that he was deprived of effective assistance of counsel lacks merit (*see People v Hall*, 169 AD3d 1379, 1380 [4th Dept

2019], *lv denied* 33 NY3d 976 [2019]; *People v Smith*, 121 AD3d 1568, 1569 [4th Dept 2014], *lv denied* 26 NY3d 1150 [2016]).

We reject defendant's further contention that the court erred in granting his request to proceed pro se. The record establishes that defendant made a "knowing, voluntary and intelligent waiver of the right to counsel" (*People v Arroyo*, 98 NY2d 101, 103 [2002]). Defendant's request was unequivocal and was not made as an alternative to seeking substitute counsel (*see People v Paulin*, 140 AD3d 985, 987 [2d Dept 2016], *lv denied* 28 NY3d 935 [2016]), and the court made the requisite inquiry to ascertain that defendant understood the "risks inherent in proceeding pro se, and . . . the singular importance of the lawyer in the adversarial system of adjudication" (*People v Smith*, 92 NY2d 516, 520 [1998]; *see e.g. People v Chess*, 162 AD3d 1577, 1579 [4th Dept 2018]; *People v Spirles*, 275 AD2d 980, 981 [4th Dept 2000], *lv denied* 96 NY2d 807 [2001]).

Defendant failed to preserve for our review his contention that his right to a fair trial was violated because he was required to wear jail attire at trial (*see People v Irizarry*, 160 AD3d 1384, 1385 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]; *People v Brown*, 256 AD2d 1110, 1110 [4th Dept 1998], *lv denied* 93 NY2d 851 [1999]), and we decline to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that the conviction is not supported by legally sufficient evidence with respect to the issue of his intent. Defendant failed to preserve that contention for our review inasmuch as his "motion for a trial order of dismissal was not specifically directed at the issues raised on appeal" (*People v Pittman*, 109 AD3d 1080, 1082 [4th Dept 2013], *lv denied* 22 NY3d 1043 [2013]; *see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a "valid line of reasoning and permissible inferences" that could lead a rational person to conclude beyond a reasonable doubt (*People v Delamota*, 18 NY3d 107, 113 [2011]) that defendant did not act under a good faith claim of right (*see generally People v Kachadourian*, 184 AD3d 1021, 1027 [3d Dept 2020], *lv denied* 35 NY3d 1113 [2020]; *People v Hurst*, 113 AD3d 1119, 1120 [4th Dept 2014], *lv denied* 22 NY3d 1199 [2014], *reconsideration denied* 23 NY3d 1021 [2014]) and that when defendant took deposits from the victims, he was acting with the intent required for the larceny and scheme to defraud counts. Consequently, we conclude that the evidence is legally sufficient to support the conviction (*see People v McCoy*, 188 AD3d 1262, 1262 [2d Dept 2020], *lv denied* 36 NY3d 1058 [2021]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant further contends that the verdict is against the weight of the evidence. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the People established beyond a reasonable doubt that defendant did not have a subjective, good faith belief that

he had a claim of right to the property (*cf. People v Rios*, 107 AD3d 1379, 1381-1382 [4th Dept 2013], *lv denied* 22 NY3d 1158 [2014]; *see generally People v Zona*, 14 NY3d 488, 492-493 [2010]) and, moreover, that defendant acted with the requisite intent regardless of whether he had such a belief. Consequently, we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

963

CA 20-00504

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

JOSEPHINE ARGHITTU-ATMEKJIAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE TJX COMPANIES, INC., DEFENDANT-RESPONDENT.

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

MCANDREW, CONBOY & PRISCO, MELVILLE (MARY C. AZZARETTO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered December 10, 2019. The order granted the motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint insofar as it alleges that defendant had constructive notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she slipped on water inside a store owned by defendant. Defendant moved for summary judgment dismissing the complaint. Supreme Court granted the motion, and plaintiff appeals.

Preliminarily, we note that, " 'by briefing the issue of constructive notice only, [plaintiff has] abandoned any claims that defendant[] had actual notice of or created the dangerous condition' " (*Miller v Kendall*, 164 AD3d 1610, 1611 [4th Dept 2018]). We agree with plaintiff that the court erred in granting the motion with respect to the claim that defendant had constructive notice of the allegedly dangerous condition, and we therefore modify the order accordingly. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). A "defendant cannot satisfy its burden merely by pointing out gaps in the plaintiff's case, and instead must submit evidence concerning when the area was last cleaned and inspected prior to the accident" (*Lewis v Carrols LLC*, 158 AD3d 1055, 1056 [4th Dept 2018] [internal quotation marks omitted]). While defendant submitted evidence that it hired a contractor who was generally expected to

clean up any hazards, such as water on the floor, it did not submit evidence establishing when the area of plaintiff's fall was last inspected (*see Farrauto v Bon-Ton Dept. Stores, Inc*., 143 AD3d 1292, 1293 [4th Dept 2016]; *Salvania v University of Rochester*, 137 AD3d 1607, 1609 [4th Dept 2016]; *Johnson v Panera, LLC*, 59 AD3d 1118, 1118 [4th Dept 2009]). As a result, " '[a] triable issue of fact exists as to when the [area of plaintiff's fall] was last inspected in relation to the accident and, thus, whether the alleged hazardous condition . . . existed for a sufficient length of time prior to the incident to permit . . . defendant to remedy that condition' " (*Lewis*, 158 AD3d at 1057). Furthermore, "[t]he fact that plaintiff did not notice water on the floor before [s]he fell does not establish defendant['s] entitlement to judgment as a matter of law on the issue whether that condition was visible and apparent" (*id.* [internal quotation marks omitted]; *see Farrauto*, 143 AD3d at 1293; *Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469-1470 [4th Dept 2013]). The failure of defendant to meet its initial burden on the motion regarding the issues related to constructive notice requires denial of the motion, " 'regardless of the sufficiency of the opposing papers' " (*Ferguson v County of Niagara*, 49 AD3d 1313, 1314 [4th Dept 2008]).

Defendant also failed to meet its burden on its alternative ground for dismissal, which was based on a storm in progress theory. Plaintiff did not "expressly state that it was snowing at the time [s]he entered the [store], and thus it cannot be said that defendant established as a matter of law, based on that deposition testimony, that there was a storm in progress" (*Helms v Regal Cinemas, Inc*., 49 AD3d 1287, 1288 [4th Dept 2008]; *see also Smith v United Ref. Co. of Pennsylvania*, 148 AD3d 1733, 1734 [4th Dept 2017]). In any event, even assuming, arguendo, that defendant met its initial burden, we conclude that plaintiff raised a triable issue of fact sufficient to defeat that part of defendant's motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In opposition to the motion, plaintiff submitted a record of the weather showing that there was only a trace amount of snowfall in the area of the store on the day in question (*see Helms*, 49 AD3d at 1288). We thus conclude on the record before us that there is an issue of fact whether there was a snowstorm in progress when plaintiff entered the store (*see id.*).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

965

CA 20-00514

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

ROGER HANLEY AND KATHLEEN BECKER,
CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 120675.)

THE LAW OFFICE OF PARKER R. MACKAY, KENMORE (PARKER R. MACKAY OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered October 2, 2019. The order granted defendant's motion for summary judgment dismissing the claim.

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

Memorandum: Claimants commenced this private nuisance action seeking to recover for property damage allegedly caused by certain alterations defendant made to the road adjacent to claimants' home. Claimants alleged that defendant installed a curb along the road in a manner that obstructed lateral water drainage from claimants' land, thereby causing water to accumulate on claimants' upgradient property and to saturate the ground and flood the surface. Defendant moved for summary judgment dismissing the claim, contending, among other things, that claimants could not recover against it for damages caused by the sort of water flow present on claimants' property. The Court of Claims granted defendant's motion, and claimants appeal. We affirm.

A party "seeking to recover [from an abutting property owner for the flow of surface water] must establish that . . . improvements on the [abutting property owner's] land caused the surface water to be diverted, that damages resulted and either that artificial means were used to effect the diversion or that the improvements were not made in a good faith effort to enhance the usefulness of the [abutting owner's] property" (*Wicks v Kelly*, 120 AD3d 977, 979 [4th Dept 2014]; *see Barkley v Wilcox*, 86 NY 140, 144-148 [1881]; *Kane v Shephard*, 255 AD2d 917, 918 [4th Dept 1998]). In other words, although a landowner cannot "by drains or other artificial means, collect the surface water into channels, and discharge it upon the land of [its] neighbor," such

a landowner is nevertheless permitted to "in good faith, and for the purpose of building upon or improving [its] land, fill or grade it, although thereby the water is prevented from reaching [the land] and is retained upon the lands above" (*Barkley*, 86 NY at 147-148). Contrary to claimants' contention, we conclude that those principles apply to the circumstances of this case in which, according to the allegations in the claim, defendant's construction of a curb allegedly prevented water from discharging through defendant's land, causing it to saturate the ground and flood the surface of claimants' property (*see generally Barkley*, 86 NY at 144-148; *Robb v State of New York*, 262 App Div 37, 38 [4th Dept 1941]).

Here, defendant met its initial burden on the motion by establishing both that artificial means were not used to effect the diversion of water and that the improvements were made in good faith as part of a larger road improvement project (*cf. Kane*, 255 AD2d at 917), and claimants failed to raise an issue of material fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Contrary to claimants' contention in opposition to defendant's motion for summary judgment, defendant here did not use prohibited artificial means to "collect the surface water into channels, and discharge it upon the land of [its] neighbor" (*Barkley*, 86 NY at 147-148; *see Wicks*, 120 AD3d at 978-979). Defendant was not barred from improving its land, only from redirecting water onto claimants' land using artificial "drains, or ditches" (*Barkley*, 86 NY at 147; *see Prachel v Town of Webster*, 96 AD3d 1365, 1366 [4th Dept 2012]; *Musumeci v State of New York*, 43 AD2d 288, 291 [4th Dept 1974], *lv denied* 34 NY2d 517 [1974]). To this end, "[t]here is a distinction between casting water on the land of another and the right of that other to prevent the flow of surface water on [its] land" (*County of Nassau v Cherry Val. Estates, Inc.*, 281 App Div 692, 692 [2d Dept 1952]; *see Bennett v Cupina*, 253 NY 436, 439 [1930]), and claimants failed to raise an issue of fact whether defendant "cast" or "discharged" water upon claimants' land or whether defendant employed an artificial drain or ditch as contemplated by the above principles.

We reject claimants' further contention that the court erred in granting defendant's motion because defendant failed to establish that its construction was "reasonable." Defendant was not required to establish that the construction was reasonable in order to meet its initial burden on the motion (*see generally Wicks*, 120 AD3d at 979), and claimants do not dispute that defendant installed the curb "in a good faith effort to enhance the usefulness" of the road (*Villafrank v David N. Ross, Inc.*, 120 AD3d 935, 936 [4th Dept 2014]; *see Barkley*, 86 NY at 148; *Wicks*, 120 AD3d at 979).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

966

CA 19-02272

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

PATRICIA A. LACEY,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

LANCASTER DEVELOPMENT AND TULLY
CONSTRUCTION CO., LLC, DEFENDANT-APPELLANT,
AND SAUNDERS CONCRETE CO., INC.,
DEFENDANT-RESPONDENT.

COUGHLIN & GERHART, LLP, BINGHAMTON (KEITH A. O'HARA OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

LAW OFFICES OF JOHN WALLACE, SYRACUSE (MICHELLE M. DAVOLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANTACROSE & FRARY, ALBANY (KEITH M. FRARY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 3, 2019. The order granted the motion of defendant Saunders Concrete Co., Inc. for summary judgment dismissing the complaint against it and granted in part and denied in part the motion of defendant Lancaster Development and Tully Construction Co., LLC for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in part the motion of defendant Saunders Concrete Co., Inc. and reinstating the first cause of action against that defendant and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action to recover damages for injuries that she sustained while working on a construction site. Defendant Saunders Concrete Co., Inc. (Saunders) moved for summary judgment dismissing the complaint against it, and defendant Lancaster Development and Tully Construction Co., LLC (Lancaster) moved for summary judgment dismissing the complaint and all cross claims against it. Plaintiff appeals from an order insofar as it granted Saunders's motion in its entirety, and Lancaster appeals from the same order insofar as it denied in part Lancaster's motion.

Plaintiff contends on her appeal that Supreme Court erred in granting Saunders's motion in its entirety. We agree. As an initial matter, plaintiff has abandoned any opposition to the dismissal of the Labor Law § 200 cause of action against Saunders (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Nevertheless, even where Labor Law § 200 does not apply because a defendant lacked the authority to supervise and control the plaintiff's work or the work site, a defendant "may be held liable for negligence where the work it performed created the condition that caused the plaintiff's injury" (*Burns v Lecesse Constr. Servs. LLC*, 130 AD3d 1429, 1433-1434 [4th Dept 2015] [internal quotation marks omitted]; *see Allington v Templeton Found.*, 167 AD3d 1437, 1440 [4th Dept 2018]). Even assuming, arguendo, that Saunders met its initial burden on its motion, we conclude that plaintiff raised a triable issue of fact whether Saunders created the hazardous concrete slurry condition in which plaintiff allegedly fell (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Witnesses testified that plaintiff slipped in slurry and that, although Lancaster had set up designated washout areas to contain the slurry and prevent it from creating a hazardous condition on the work site, Saunders employees routinely failed to comply with that protocol, causing slurry to be deposited by the roadside. Furthermore, although the concrete by the area where plaintiff fell had been poured seven days before the incident, witnesses testified that slurry takes up to five days to harden in dry weather and longer if it rains. To the extent that Saunders established through its expert affidavit that any slurry it created in that area would have hardened by the day of the accident, plaintiff raised an issue of fact through the affidavit of her own expert (*see Nowelle B. v Hamilton Med., Inc.*, 177 AD3d 1256, 1258 [4th Dept 2019]; *Mason v Adhikary*, 159 AD3d 1438, 1439 [4th Dept 2018]). Therefore, we modify the order by denying that part of the motion of Saunders seeking summary judgment dismissing the common-law negligence cause of action against it and reinstating that cause of action.

We reject Lancaster's contention on its appeal that the court erred in denying its motion in part. As an initial matter, because the parties agree that the accident is alleged to have occurred as a result of a dangerous condition on the premises, the court's determination that Lancaster did not supervise or control plaintiff's work is irrelevant (*see Perry v City of Syracuse Indus. Dev. Agency*, 283 AD2d 1017, 1017 [4th Dept 2001]; *see generally Hargrave v LeChase Constr. Servs., LLC*, 115 AD3d 1270, 1271-1272 [4th Dept 2014]). Rather, in order to establish its entitlement to judgment as a matter of law under plaintiff's theory, Lancaster had the burden of establishing either that it lacked control over the area where she was injured or that it lacked actual or constructive notice of the dangerous condition (*see generally Burns*, 130 AD3d at 1434; *Hargrave*, 115 AD3d at 1272). Where plaintiff is able to establish such notice and control, defendant's "status as a prime contractor is not dispositive" (*Mitchell v T. McElligott, Inc.*, 152 AD3d 928, 929 [3d Dept 2017]; *cf. Knab v Robertson*, 155 AD3d 1565, 1566-1567 [4th Dept 2017]). Here, Lancaster's own evidentiary submissions created questions of fact with respect to control and notice (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Several witnesses testified that Lancaster exercised continuing control over the site where plaintiff was injured (*cf. Knab*, 155 AD3d at 1566-1567). Lancaster employees oversaw the pouring and finishing of concrete in that area, directed Saunders's delivery drivers from the moment they arrived on site, and, upon the completion of the drivers' work, were responsible for directing them to the designated washout areas. Furthermore, Lancaster maintained a continuing presence in the area of the accident through the date of the accident. With respect to constructive notice, one witness testified that she walked through the area where plaintiff fell earlier in the day, observed slurry in that location, and almost slipped in it (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1026

CA 19-01692

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

JOHN C. VAN SCOTER, INDIVIDUALLY AND AS TRUSTEE OF THE JOHN VAN SCOTER 2010 REVOCABLE TRUST, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

SARAH RUTH PORTER, DEFENDANT-RESPONDENT-APPELLANT.

UNDERBERG & KESSLER LLP, BUFFALO (THOMAS F. KNAB OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HARTER SECREST & EMERY LLP, BUFFALO (DANIEL J. ALTIERI OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered July 29, 2019. The order, inter alia, granted in part and denied in part the motion of defendant to dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by denying that part of defendant's motion seeking dismissal of the first cause of action insofar as it was asserted by plaintiff, individually, and reinstating that cause of action to that extent, and as modified the order is affirmed without costs.

Memorandum: Defendant, who is plaintiff's daughter, provided financial and estate planning advice to plaintiff and his now-deceased wife. Based on defendant's advice, plaintiff established Cockaigne Holdings, LLC (LLC), transferred real properly valued at approximately $3.6 million to the LLC, and gave defendant a 90% interest in the LLC. The remaining 10% interest was held by the John Van Scoter 2010 Revocable Trust. According to plaintiff, defendant had promised that, if plaintiff created the LLC and gave her a 90% membership interest in the LLC and control as sole manager, she would "help [plaintiff] manage his businesses and real property interests, help take care of [plaintiff and his wife], help ensure their financial well-being, and visit them often." After plaintiff's wife died, defendant allegedly ended all direct communication with plaintiff and gave "sporadic and cursory" attention to plaintiff's business and real property interests, prompting him to commence this action.

In his first cause of action, plaintiff sought an accounting and the imposition of a constructive trust, claiming that defendant had been unjustly enriched. Plaintiff's second cause of action was for

promissory estoppel. Defendant filed a motion seeking, inter alia, dismissal of the amended complaint for failure to state a cause of action (*see* CPLR 3211 [a] [7]). Supreme Court granted that motion in part, dismissing the first cause of action. Plaintiff appeals and defendant cross-appeals.

Addressing first plaintiff's appeal with respect to the dismissal of the first cause of action, it is well established that "a constructive trust may be imposed '[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest' " (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]; *see Simonds v Simonds*, 45 NY2d 233, 241 [1978]; *Beason v Kleine*, 96 AD3d 1611, 1613 [4th Dept 2012]). To establish a basis for a constructive trust, a plaintiff must allege "(1) a confidential or fiduciary relation, (2) a promise, express or implied, (3) a transfer made in reliance on that promise, and (4) unjust enrichment" (*Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939, 940 [1980], *rearg denied* 50 NY2d 929 [1980]; *see Rossi v Morse*, 153 AD3d 1637, 1638 [4th Dept 2017]; *Beason*, 96 AD3d at 1613). Inasmuch as the amended complaint alleged a confidential or fiduciary relation, a promise, and a transfer made in reliance on that promise, the issue concerning the first cause of action is whether the amended complaint adequately alleged unjust enrichment.

"[I]n order to sustain an unjust enrichment claim, '[a] plaintiff must show that (1) the other party was enriched, (2) at [the plaintiff's] expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered' " (*E.J. Brooks Co. v Cambridge Sec. Seals*, 31 NY3d 441, 455 [2018]). Nevertheless, " '[t]he theory of unjust enrichment lies as a quasi-contract claim' . . . It is an obligation imposed by equity to prevent injustice, *in the absence of an actual agreement between the parties concerned*. Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009], *rearg denied* 12 NY3d 889 [2009] [emphasis added]; *see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]; *Micro-Link, LLC v Town of Amherst*, 155 AD3d 1638, 1642 [4th Dept 2017]).

Here, there is a written contract that covers the particular subject matter, i.e., the LLC's operating agreement. That agreement, however, was executed by defendant and plaintiff in his role as trustee. " 'It has been repeatedly held that persons suing or being sued in their official or representative capacity are, in contemplation of law, distinct persons, and strangers to any right or liability as an individual' " (*Tuper v Tuper*, 34 AD3d 1280, 1281 [4th Dept 2006], quoting *Leonard v Pierce*, 182 NY 431, 432 [1905]; *see Magid v Sunrise Holdings Group, LLC*, 155 AD3d 717, 718 [2d Dept 2017]). Inasmuch as plaintiff, individually, was not a party to the operating agreement, his first cause of action, insofar as it was asserted by him, individually, is not precluded by the written contract (*see e.g. Ahlers v Ecovation, Inc.*, 74 AD3d 1889, 1890 [4th

Dept 2010]; *Marc Contr., Inc. v 39 Winfield Assoc., LLC*, 63 AD3d 693, 695 [2d Dept 2009]). We therefore modify the order accordingly.

Addressing next defendant's cross appeal, we reject her contention that the court erred in denying that part of her motion that sought dismissal of the second cause of action. "The elements of a cause of action based upon promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise . . . However, the doctrine of promissory estoppel is limited to cases where the promisee suffered an unconscionable injury" (*Zuley v Elizabeth Wende Breast Care, LLC*, 126 AD3d 1460, 1461 [4th Dept 2015], *amended on rearg* 129 AD3d 1558 [4th Dept 2015] [internal quotation marks omitted]). Accepting plaintiff's allegations as true (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that the amended complaint states a cause of action for promissory estoppel. We respectfully disagree with our dissenting colleague that the promises alleged by plaintiff were too vague to support a promissory estoppel cause of action (*see generally Dombrowski v Somers*, 41 NY2d 858, 859 [1977]). While some promises were vague, others were not, such as defendant's promise to help plaintiff manage his business and real property interests, particularly in light of the allegation that defendant, who worked at Morgan Stanley, had been the personal financial adviser for plaintiff and his wife for many years.

All concur except LINDLEY, J., who dissents and votes to further modify in accordance with the following memorandum: Although I agree with the majority's resolution of plaintiff's appeal, I respectfully disagree with the resolution of defendant's cross appeal. In my view, Supreme Court erred in denying that part of her motion seeking dismissal of the second cause of action for promissory estoppel. The promises alleged by plaintiff, i.e., that defendant would "take care of" plaintiff, visit "often," and help him with the business, are "too vague to spell out a meaningful promise" (*Dombrowski v Somers*, 41 NY2d 858, 859 [1977]; *see Rogowsky v McGarry*, 55 AD3d 815, 817 [2d Dept 2008]; *James v Western N.Y. Computing Sys.*, 273 AD2d 853, 855 [4th Dept 2000], *abrogated on other grounds by American Tower Asset Sub, LLC v Buffalo-Lake Erie Wireless Sys. Co., LLC*, 104 AD3d 1212, 1213 [4th Dept 2013]) inasmuch as such promises are "not subject to specific measurement" (*Lowinger v Lowinger*, 287 AD2d 39, 45 [1st Dept 2001], *lv denied* 98 NY2d 605 [2002]; *see Yedvarb v Yedvarb*, 237 AD2d 433, 434 [2d Dept 1997], *lv denied* 90 NY2d 804 [1997]).

"[B]efore the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained. Otherwise, a court, in intervening, would be imposing its own conception of what the parties should or might have undertaken, rather than confining itself to the implementation of a bargain to which they have mutually committed themselves" (*Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]). I would therefore further modify the order by granting that part of

defendant’s motion that sought dismissal of the second cause of action.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1068

CA 19-01886

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

DAN'S HAULING & DEMO, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GMMM HICKLING, LLC, HICKLING POWER DEVELOPMENT, LLC, POWER DEVELOPMENT HOLDINGS, LLC, AND JOHN PACHECO, DEFENDANTS-RESPONDENTS.

THE STEELE LAW FIRM, P.C., OSWEGO (KIMBERLY A. STEELE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, ROCHESTER (JAMES M. PAULINO, II, OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Matthew A. Rosenbaum, J.), entered October 3, 2019. The order, among other things, denied the cross motion of plaintiff seeking, inter alia, summary judgment on the breach of contract cause of action and granted defendants summary judgment dismissing that cause of action.

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

Memorandum: This appeal arises from an asset purchase and sale agreement (agreement) between plaintiff and defendants in which plaintiff agreed to remove hazardous materials from defendants' power plant, perform demolition work, and pay a sum of money to defendants, and in exchange plaintiff could remove salvaged metal generated by the project, which plaintiff would then sell to others. Pursuant to the agreement, plaintiff agreed to pay defendants the "purchase price" in four installments. As relevant here, the agreement's payment clause states: "First Installment: Due and payable on the earlier of (i) 30 calendar days after completion of the Abatement or commencement of the Demolition portion of the Work, whichever occurs first; and (ii) the Removal . . . of 3,500 tons of Salvaged Metals . . . from the Property."

While the project was underway, defendants terminated the agreement pursuant to the payment clause on the ground that over 30 days had passed after the commencement of demolition and plaintiff had failed to make the first installment payment. On appeal, it is not disputed that the abatement work had not been completed and that

plaintiff had not removed 3,500 tons of salvaged metals from the property.

Plaintiff thereafter initiated this action, asserting, inter alia, a breach of contract cause of action based on allegations that defendants breached the agreement by terminating it before plaintiff's first installment became due. According to plaintiff's interpretation of the payment clause, its obligation to make the first installment payment required two triggering events: (1) 30 days passing from either the completion of the abatement or the commencement of demolition, whichever occurred first; and (2) the removal of 3,500 tons of salvaged metals from the project. Plaintiff alleged that its payment obligation had not triggered because it had not removed 3,500 tons of salvaged metals.

Defendants answered and asserted various counterclaims, including a counterclaim for breach of contract. According to defendants' interpretation of the payment clause, plaintiff's obligation to make the first installment payment required one triggering event, which could be either: (1) 30 days passing from the completion of abatement; (2) 30 days passing from the commencement of demolition; or (3) removal of 3,500 tons of salvaged metals. In other words, defendants applied the phrase "on the earlier of" in the payment clause to mean the earlier of romanette "i" or romanette "ii," whereas plaintiff applied "on the earlier of" to apply only to the two events described within romanette "i," rendering both romanette "i" and "ii" necessary prerequisites to its first installment obligation.

Shortly after plaintiff commenced this action, Supreme Court granted plaintiff's request for preliminary injunctive relief and directed defendants to, inter alia, allow plaintiff back onto the property to continue its work pursuant to the agreement.

Following other motion practice not at issue on appeal, plaintiff cross-moved for, among other things, summary judgment on the complaint or, alternatively, on the issue of liability only, and an order holding defendants in contempt of the court's order granting preliminary injunctive relief.

The court, inter alia, denied plaintiff's cross motion for summary judgment and, sua sponte, searched the record and granted defendants summary judgment dismissing plaintiff's breach of contract cause of action and on their first counterclaim, for breach of contract. In its decision, the court adopted defendants' interpretation of the payment clause, holding that plaintiff's obligation to pay triggered, as relevant here, upon the earlier of 30 days passing from the start of demolition or the removal of 3,500 tons of salvaged metals. Plaintiff appeals.

Contrary to plaintiff's contention, plaintiff failed to meet its initial burden on its cross motion for summary judgment. " 'The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning' " (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]). " '[A] written agreement

that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' " (*Auburn Custom Millwork, Inc. v Schmidt & Schmidt, Inc.*, 148 AD3d 1527, 1529 [4th Dept 2017]; *see Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 31 NY3d 1002, 1006 [2018], *rearg denied* 31 NY3d 1141 [2018]). " 'Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous' " (*Auburn Custom Millwork, Inc.*, 148 AD3d at 1529; *see generally Tomhannock, LLC v Roustabout Resources, LLC*, 33 NY3d 1080, 1082 [2019]; *Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378 [4th Dept 2017]). "An agreement is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Ellington*, 24 NY3d at 244 [internal quotation marks omitted]). "Ambiguity in a contract arises where the contract, read as a whole, fails to disclose its purpose and the parties' intent . . . , or where specific language is susceptible of two reasonable interpretations" (*id.*; *see Ames v County of Monroe*, 162 AD3d 1724, 1726 [4th Dept 2018]). If a contract is ambiguous, "extrinsic or parol evidence may be then permitted to determine the parties' intent as to the meaning of that language" (*Ames*, 162 AD3d at 1726 [internal quotation marks omitted]). "[A] party seeking summary judgment has the burden of establishing that the construction it favors is the only construction which can fairly be placed thereon" (*Auburn Custom Millwork, Inc.*, 148 AD3d at 1529 [internal quotation marks omitted]).

We conclude that plaintiff failed to establish that the construction it favors is the only one that can be fairly placed upon the payment clause (*see generally id.*). As noted above, according to plaintiff's interpretation, its obligation to make the first installment payment required two triggering events. Plaintiff's interpretation largely relies on the presence of the word "and" between the two romanettes, which plaintiff contends means that each romanette provides a separate and necessary prerequisite, and plaintiff contends that the phrase "the earlier of" applies only to the two events listed within romanette "i." Contrary to that interpretation, however, the placement of the phrase "the earlier of" preceding romanette "i" suggests that there is only one triggering event, i.e., either an event described in romanette "i" or an event described in romanette "ii," and that "the earlier of" refers to both romanettes. Further, applying "the earlier of" to only the two events described in romanette "i," without applying it to the event described in romanette "ii," would render superfluous the phrase "whichever occurs first" within romanette "i."

On the other hand, according to defendants' interpretation of the payment clause, plaintiff's obligation to make the first payment required the occurrence of one triggering event. That interpretation applies the phrase "on the earlier of" to mean "on the earlier of" the events described in romanette "i" or romanette "ii." Although that interpretation solves the inconsistencies created by plaintiff's interpretation, it creates two new ones. First, the use of the term "and" between the two romanettes suggests that there are two

conditions, and that both of those conditions must be satisfied. Although defendants contend that "and" should be read as the equivalent of "or," the payment clause distinctly uses the word "or" within romanette "i," thereby suggesting that the drafters intended a difference between the disjunctive "or" and conjunctive "and." Second, treating "and" as the equivalent of "or" contravenes the use of only two romanettes in the clause's overall organization. If, as defendants contend, the payment clause is read to mean that the payment obligation is triggered upon the earlier of either (i) 30 days passing from the completion of abatement *or* commencement of demolition; *or* (ii) removal of 3,500 tons, then logically the clause would have been drafted with three romanettes instead of two, i.e., (i) 30 days from completion of abatement; or (ii) 30 days from commencement of demolition; or (iii) removal of 3,500 tons. Although the parties cite to language in other sections of the agreement in order to support the two opposing interpretations of the payment clause, we conclude that none of those provisions resolve the dispute regarding the interpretation of the payment clause.

Thus, we conclude that the payment clause is ambiguous inasmuch as it does not possess "a definite and precise meaning" and there is a "reasonable basis for a difference of opinion" (*Ellington*, 24 NY3d at 244 [internal quotation marks omitted]; *see Ames*, 162 AD3d at 1726-1727). Because it is ambiguous, we may look to extrinsic evidence to determine the meaning of the payment clause (*see Ames*, 162 AD3d at 1726). Nevertheless, even considering the extrinsic evidence submitted by plaintiff, plaintiff failed to meet its initial burden "of establishing that the construction it favors is the only construction which can fairly be placed thereon" (*Auburn Custom Millwork, Inc.*, 148 AD3d at 1529 [internal quotation marks omitted]; *see Romilly v RMF Prods., LLC*, 106 AD3d 1465, 1466 [4th Dept 2013]; *Morales v Asarese Matters Community Ctr.* [appeal No. 2], 103 AD3d 1262, 1264 [4th Dept 2013], *lv dismissed* 21 NY3d 1033 [2013]).

Plaintiff also contends that it is entitled to summary judgment on its breach of contract cause of action because 30 days had not passed after the commencement of demolition, and thus, regardless of which interpretation of the payment clause is used, none of the possible triggering events had occurred. We reject that contention, however, because the evidence submitted by plaintiff raises an issue of fact whether the work that plaintiff performed on the project over 30 days before defendants terminated the contract constituted "demolition" as contemplated by the payment clause. Contrary to plaintiff's further contention, defendants did not breach the agreement by failing to afford plaintiff an opportunity to cure prior to defendants' termination of the agreement, because the agreement does not contain a provision requiring that defendants give plaintiff an opportunity to cure a failure to make a timely installment payment (*see generally Awards.com, LLC v Kinko's, Inc.*, 14 NY3d 791, 793 [2010]; *Nader & Sons, LLC v Hazak Assoc. LLC*, 149 AD3d 503, 505 [1st Dept 2017]).

For similar reasons, however, we agree with plaintiff that the court erred in sua sponte searching the record and granting defendants

summary judgment dismissing plaintiff's breach of contract cause of action and with respect to liability on defendants' first counterclaim. We therefore modify the order accordingly. As discussed above, the payment clause is ambiguous, and the record does not establish that the construction favored by defendants is the only construction that can be fairly placed on that clause (*see generally Auburn Custom Millwork, Inc.*, 148 AD3d at 1529; *Romilly*, 106 AD3d at 1466; *Morales*, 103 AD3d at 1264). Further, there is a question of fact whether 30 days had passed after the commencement of demolition as contemplated by the payment clause, and thus there is an issue of fact whether any of the possible three triggering events described within the payment clause had occurred.

Lastly, contrary to plaintiff's contention, the court properly denied that part of plaintiff's cross motion seeking to hold defendants in contempt for violating the order granting plaintiff preliminary injunctive relief. That order did not provide a clear and unequivocal mandate prohibiting the specific conduct that plaintiff alleges was performed by defendants (*see generally Dotzler v Buono*, 144 AD3d 1512, 1513-1514 [4th Dept 2016]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1089

CA 20-00722

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

RYAN J. MCELHINNEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY W. FITZPATRICK, INDIVIDUALLY AND IN HIS CAPACITY AS A MONROE COUNTY SHERIFF'S DEPUTY, DEFENDANT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (ADAM M. CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROTHENBERG LAW, ROCHESTER (DAVID A. ROTHENBERG OF COUNSEL), AND CERULLI MASSARE & LEMBKE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Christopher S. Ciaccio, A.J.), entered February 24, 2020. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries he sustained when the vehicle he was driving was struck by a patrol vehicle operated by defendant, a deputy sheriff employed by the Monroe County Sheriff's Office, who was at the time responding to a call. Defendant appeals from an order denying his motion for summary judgment dismissing the complaint. We affirm.

Even assuming, arguendo, that defendant met his initial burden on the motion, we conclude that, in opposition, plaintiff raised triable issues of fact whether, at the time of the accident, defendant was operating his vehicle with "reckless disregard for the safety of others" (Vehicle and Traffic Law § 1104 [e]). Whether a defendant acted with "reckless disregard" is a "fact-specific inquiry" that focuses on "the precautionary measures taken by [the officer] to avoid causing harm to the general public weighed against his [or her] duty to respond to an urgent emergency situation" (*Frezzell v City of New York*, 24 NY3d 213, 217-218 [2014] [internal quotation marks omitted]; *see Szczerbiak v Pilat*, 90 NY2d 553, 557 [1997]).

Here, it is undisputed that defendant was traveling between 72 and 78 miles per hour on a road in a residential area that had a posted speed limit of 35 miles per hour. It was dark, and defendant

had not activated his siren or his emergency lights. He also did not slow down before the impact, did nothing to try to avoid the accident, and was apparently accelerating at the time of the collision. Although Vehicle and Traffic Law § 1104 authorizes the driver of an emergency vehicle to "[e]xceed the maximum speed limits," he or she may do so only "so long as he [or she] does not endanger life or property" (§ 1104 [b] [3]). We conclude that the evidence demonstrating that defendant did not take any precautionary measures raises triable questions of fact whether his conduct leading up to the accident endangered life or property (*see Perkins v City of Buffalo*, 151 AD3d 1941, 1941-1942 [4th Dept 2017]; *Connelly v City of Syracuse*, 103 AD3d 1242, 1242-1243 [4th Dept 2013]). Furthermore, evidence establishing that defendant did not activate his emergency lights or siren, even though he would have been justified in doing so and was reprimanded for *not* doing so, also raises an issue of fact with respect to defendant's recklessness (*see O'Banner v County of Sullivan*, 16 AD3d 950, 952 [3d Dept 2005]; *see also Regdos v City of Buffalo*, 132 AD3d 1343, 1343 [4th Dept 2015]; *O'Connor v City of New York*, 280 AD2d 309, 309 [1st Dept 2001], *lv denied* 96 NY2d 716 [2001]). Thus, viewing the facts in the light most favorable to plaintiff as the nonmoving party and drawing all inferences in his favor (*see Williams v Beemiller, Inc.*, 159 AD3d 148, 152 [4th Dept 2018], *affd* 33 NY3d 523 [2019]), we conclude that Supreme Court properly denied the motion (*see Spalla v Village of Brockport*, 295 AD2d 900, 900-901 [4th Dept 2002]; *see also McCarthy v City of New York*, 250 AD2d 654, 655 [2d Dept 1998]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1108

KA 05-02775

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES L. JONES, ALSO KNOWN AS JIMMY JOE JONES,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, A.J.), rendered October 25, 2002. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of murder in the second degree (Penal Law § 125.25 [1]), arising from an incident in which he shot and killed the victim. We affirm.

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Specifically, defendant contends that the testimony of the eyewitness who identified him as the shooter (identifying witness) should be discredited because, inter alia, she made statements identifying someone other than defendant as the shooter and other eyewitnesses testified that defendant was not the shooter. However, the jury "chose to credit the identification of defendant as the shooter" (*People v Lanier*, 130 AD3d 1310, 1311 [3d Dept 2015], *lv denied* 26 NY3d 1009 [2015]; *see People v Cross*, 174 AD3d 1311, 1314 [4th Dept 2019], *lv denied* 34 NY3d 950 [2019]). The issues of credibility and identification, including the weight to be given to any inconsistencies in the testimony of the various eyewitnesses, " 'were properly considered by the jury and there is no basis for disturbing its determinations' " (*People v Kelley*, 46 AD3d 1329, 1330 [4th Dept 2007], *lv denied* 10 NY3d 813 [2008]; *see Cross*, 174 AD3d at 1315). Indeed, we note that the jury could have reasonably credited

the testimony from the identifying witness—despite some inconsistencies in her account—because she identified defendant as the shooter several times on the night of the shooting and had prior familiarity with defendant (*see People v Simmons*, 145 AD2d 516, 517 [2d Dept 1988]).

We also reject defendant's contention that County Court erred in limiting testimony about inconsistent statements made by the identifying witness. The court did, in fact, permit defense counsel to elicit testimony from another witness regarding inconsistent statements made by the identifying witness with respect to her identification of the shooter. Further, in addition to the other witness's testimony regarding the inconsistent statements, defense counsel elicited testimony from the identifying witness herself about the inconsistent statements, and thus any precluded testimony by the other witness regarding the inconsistent statements was essentially cumulative (*see generally People v Jones*, 147 AD3d 1521, 1522 [4th Dept 2017], *lv denied* 29 NY3d 1044 [2017]; *People v Ramsey*, 59 AD3d 1046, 1048 [4th Dept 2009], *lv denied* 12 NY3d 858 [2009]).

Defendant's contention that the court's limitations on the witness's testimony deprived him of his constitutional right to present a defense is unpreserved for our review (*see People v Lane*, 7 NY3d 888, 889 [2006]; *see also People v McCullough*, 141 AD3d 1125, 1126 [4th Dept 2016], *lv denied* 28 NY3d 972 [2016]), and we decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Similarly, defendant failed to preserve his contention that the court deprived him of his right to due process and his constitutional right to present a defense when it precluded him from calling two assistant district attorneys as witnesses to impeach the credibility of the identifying witness (*see Lane*, 7 NY3d at 889), and we decline to exercise our power to reach that contention as a matter of discretion in the interest of justice as well (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, we also conclude that he was not deprived of effective assistance of counsel when defense counsel failed to cross-examine the identifying witness about her purported vision problems, which were noted in school records disclosed before trial. In our view, the failure to cross-examine the identifying witness with respect to her vision problems did not involve an issue that was "so clear-cut and dispositive that no reasonable defense counsel would have failed to assert it" (*People v Nellons*, 187 AD3d 1574, 1575 [4th Dept 2020], *lv denied* 36 NY3d 1058 [2021] [internal quotation marks omitted]). That is especially so given that other evidence in the record established that the identifying witness had good vision, which also suggested that defense counsel's decision was grounded in legitimate trial strategy (*see generally People v Keschner*, 25 NY3d 704, 723 [2015]; *People v Botting*, 8 AD3d 1064, 1066 [4th Dept 2004], *lv denied* 3 NY3d 671 [2004]). In any event, defense counsel provided effective representation to defendant in his cross-examination of the identifying witness by impeaching her credibility with respect to her identification of defendant as the shooter through her prior inconsistent statements. " '[S]peculation that a more

vigorous cross-examination might have [further] [undermined the credibility of a witness] does not establish ineffectiveness of counsel' " (*People v Lozada*, 164 AD3d 1626, 1628 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]).

Defendant contends that the court abused its discretion in denying him access to certain confidential records relating to the identifying witness, which defendant had sought via a judicial subpoena duces tecum. Confidential records "will not be discoverable in an open-ended 'fishing expedition searching for some means of attacking the [witness's] credibility' " (*People v Bowman*, 139 AD3d 1251, 1253 [3d Dept 2016], *lv denied* 28 NY3d 927 [2016]; *see People v Brown*, 24 AD3d 884, 887 [3d Dept 2005], *lv denied* 6 NY3d 832 [2006]). In considering a request to disclose such information, the court, in conducting its in camera review, must determine whether "the records [at issue] contain data relevant and material to the determination of guilt or innocence" (*Bowman*, 139 AD3d at 1253 [internal quotation marks omitted]; *see People v Kiah*, 156 AD3d 1054, 1056 [3d Dept 2017], *lv denied* 31 NY3d 984 [2018]; *see also People v Kozlowski*, 11 NY3d 223, 241-242 [2008], *rearg denied* 11 NY3d 904 [2009], *cert denied* 556 US 1282 [2009]). Here, the court did not abuse its discretion in declining to disclose all but nine pages of the requested confidential documents because those documents had little, if any, relevance to defendant's case and were not exculpatory. Indeed, defendant was "simply fishing for 'general credibility' evidence" (*Kozlowski*, 11 NY3d at 242; *see also People v Bassett*, 55 AD3d 1434, 1437 [4th Dept 2008], *lv denied* 11 NY3d 922 [2009]).

We have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1109

KA 19-00447

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISREAL HERNANDEZ, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SHERRY A. CHASE 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 October 1, 2018. The judgment convicted defendant upon a nonjury verdict of burglary in the second degree and menacing in the third degree.

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

Memorandum: Defendant, who was indicted on one count each of burglary in the first degree (Penal Law § 140.30 [4]) and menacing in the second degree (§ 120.14 [1]), appeals from a judgment convicting him upon a nonjury verdict of the lesser included offenses of burglary in the second degree (§ 140.25 [2]) and menacing in the third degree (§ 120.15). Defendant contends that Supreme Court failed to comply with CPL 320.20 (5) because the court failed to inform defendant of its intention to consider unindicted, lesser included offenses prior to rendering its verdict. Initially, we agree with defendant that preservation of that contention is not required in this case because defendant learned of the court's consideration of the lesser included offenses only when the court rendered its verdict and, once the verdict was rendered, the court was without a remedy to correct it (*see People v Carter*, 63 NY2d 530, 533 [1984]). Thus, defendant was deprived "of a practical ability to timely and meaningfully object" to any violation of CPL 320.20 (5) (*People v Harris*, 31 NY3d 1183, 1185 [2018]). Although we also agree with defendant that the court failed to comply with CPL 320.20 (5), we conclude that such error was harmless (*see People v Kurkowski*, 83 AD3d 1595, 1596 [4th Dept 2011], *lv denied* 16 NY3d 896 [2011]).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we reject defendant's further contention that the evidence is legally insufficient to

support the burglary conviction. The victim's testimony that defendant forcibly pushed his way into her apartment without her permission is legally sufficient to establish that he unlawfully entered the apartment (*see People v Cotton*, 184 AD3d 1145, 1147 [4th Dept 2020], *lv denied* 35 NY3d 1112 [2020]; *People v Shay*, 85 AD3d 1708, 1709 [4th Dept 2011], *lv denied* 17 NY3d 822 [2011]). Defendant's intent to commit a crime inside the apartment may be inferred from the "circumstances of the entry" (*People v Standsblack*, 162 AD3d 1523, 1525 [4th Dept 2018], *lv denied* 32 NY3d 1008 [2018]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1119

CA 20-00680

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

KRYSTALO HETELEKIDES, INDIVIDUALLY AND AS THE EXECUTRIX OF THE ESTATE OF DEMETRIOS HETELEKIDES, ALSO KNOWN AS JIMMY HETELEKIDES, DECEASED, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ONTARIO AND GARY G. BAXTER, AS TREASURER OF COUNTY OF ONTARIO, DEFENDANTS-APPELLANTS-RESPONDENTS.

JASON S. DIPONZIO, P.C., ROCHESTER (JASON S. DIPONZIO OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

ADAMS LECLAIR, LLP, ROCHESTER (MARY JO S. KORONA OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Ontario County (John J. Ark, J.), entered January 3, 2020. The order, among other things, awarded plaintiff money damages as against defendants.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first, seventh, eighth, tenth and eleventh ordering paragraphs and as modified the order is affirmed without costs.

Memorandum: Defendants appeal and plaintiff cross-appeals from an order entered after a nonjury trial that, inter alia, awarded plaintiff damages, interest, and costs after determining that a tax foreclosure proceeding with respect to certain property was a nullity and dismissed plaintiff's fifth cause of action. Plaintiff is the current owner of property in the Town of Hopewell on which a restaurant is located. Until his death on August 1, 2006, plaintiff's husband, Demetrios Hetelekides, also known as Jimmy Hetelekides (decedent), was the sole owner of the property and the sole shareholder of Geo-Tas, Inc., the corporation that ran the restaurant. After property taxes were not paid on the property for the year 2005, the property was placed on a list of properties affected by delinquent tax liens, and that list was filed in accordance with RPTL 1122 (1), (4) and (7). As required by statute, that list must include "[t]he name or names of the owner or owners of each such parcel as appearing on the tax roll," i.e., in this case, decedent (RPTL 1122 [6] [b]).

On October 2, 2006, after the property taxes remained unpaid, the enforcing officer here, defendant Gary G. Baxter, as Treasurer of the County of Ontario (*see* RPTL 1102 [3]), commenced a tax foreclosure proceeding by executing and filing with the County Clerk a petition of foreclosure pertaining to, inter alia, the subject property (*see* RPTL 1123 [1], [2] [a]). Pursuant to RPTL 1125 (1) (a) (i) and (b) (i) notices of foreclosure are to be sent by certified mail and ordinary first class mail to "each owner and any other person whose right, title, or interest was a matter of public record as of the date the list of delinquent taxes was filed, which right, title or interest will be affected by the termination of the redemption period, and whose name and address are reasonably ascertainable from the public record" (RPTL 1125 [1] [a] [i]). "The notice[s] shall be deemed received unless both the certified mailing and the ordinary first class mailing are returned by the United States postal service within forty-five days after being mailed" (RPTL 1125 [1] [b] [i]). Here, three notices of foreclosure were sent by certified mail to "James Hetelekides," "Hetelekides[,] James," and "Geo-Tas[,] Inc." First class mailings were sent "to the same people" that received certified mailings.

An employee of the restaurant signed the certified mail receipts, and none of the first class mailings were returned to defendants. In addition to the mailings, Baxter listed the foreclosure notices on three dates in two local newspapers, as required by RPTL 1124 (1), and posted the notices as required by RPTL 1124 (4). The last day for payment of delinquent taxes on the subject property for purposes of redemption was January 12, 2007.

In late December 2006 or early January 2007, Baxter reviewed properties from the list of delinquent taxes that had yet to be redeemed. Upon seeing that the subject property had not been redeemed, he called the restaurant on January 9 and January 10, 2007 and informed the employee who answered the telephone that it was "very imperative or very important" that he speak to an owner or manager. Both times, he was told that no such person was available, prompting him to leave messages requesting a return telephone call. After receiving no return telephone call, Baxter visited the property on January 11, 2007, and again asked to speak with an owner or manager, telling the employee with whom he spoke that it was "very important" that he talk to such a person. Again, he was told that no owner or manager was available. As a result, Baxter left his business card with the employee.

The property was not redeemed by January 12, 2007, and a default judgment of foreclosure was entered on February 8, 2007. Plaintiff subsequently attempted to repurchase the property pursuant to RPTL 1166, to no avail. The property was sold at auction for $160,000, and the purchaser then assigned his bid to plaintiff. Plaintiff thereafter commenced this action seeking, inter alia, damages that in effect represented the difference between the amount of taxes owed on the property, which was $21,343.17, and the auction price plus interest. Defendants' motion to dismiss the complaint was denied, and we affirmed that order (*Hetelekides v County of Ontario*, 70 AD3d 1407

[4th Dept 2010]). Following discovery, defendants moved for summary judgment dismissing the complaint. After that motion was denied, the matter proceeded to a nonjury trial.

Following the trial, Supreme Court determined, inter alia, that the tax foreclosure proceeding was a nullity and that plaintiff was owed damages, interest and costs. The court, however, concluded that there was legally insufficient evidence to support plaintiff's fifth cause of action, which alleged that defendants were liable for damages and attorney's fees under 42 USC §§ 1983 and 1988, and therefore dismissed that cause of action.

We conclude that the court erred in determining that the tax foreclosure proceeding was a nullity and in awarding damages, interest and costs to plaintiff, but we further conclude that the court properly dismissed the fifth cause of action.

Contrary to defendants' initial contention on appeal, we conclude that the court did not err in denying their motion for summary judgment. Defendants failed to establish their entitlement to judgment as a matter of law on any of plaintiff's causes of action (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

With respect to the determination after trial, we conclude that the evidence established that defendants fully complied with all of the statutory and due process requirements related to this tax foreclosure proceeding and that any determination to the contrary could not be reached under any fair interpretation of the evidence (*see generally Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992], *rearg denied* 81 NY2d 835 [1993]; *Cianchetti v Burgio*, 145 AD3d 1539, 1540-1541 [4th Dept 2016], *lv denied* 29 NY3d 908 [2017]). We thus conclude that plaintiff was not entitled to any relief.

In addition to persons not relevant to this appeal, RPTL 1125 former (1) and current RPTL 1125 (1) (a) (i), specify that the only other people entitled to notice of a tax foreclosure proceeding are those persons whose right, title or interest in the property was a matter of public record "*as of the date the list of delinquent taxes was filed*" and whose "right, title or interest will be affected by the termination of the redemption period" (emphasis added). Here, the list of delinquent taxes was filed on November 14, 2005, when decedent was still alive. Plaintiff was thus not entitled to notice under that statute (*see Matter of Barnes v McFadden*, 25 AD3d 955, 957 [3d Dept 2006], *appeal dismissed* 6 NY3d 890 [2006]).

In October 2006, when the notices were sent, RPTL 1125 former (1) provided that each owner would be notified of the tax foreclosure proceeding by "certified mail" and that any other person with an interest in the property would be notified "by ordinary first class mail" (*see* L 2006, ch 415, § 1). Amendments to the statute became effective November 23, 2006 (*see* L 2006, ch 415, § 1). The amended statute requires that all notices be mailed "both by certified mail and ordinary first class mail" (RPTL 1125 [1] [b] [i]; *see* L 2006, ch 415, § 1).

Although it appears that, at the time the notices were sent, defendants were not required by statute to mail notices by both certified mail and ordinary first class mail, they did so, thus complying with both the former statute and the amended statute. As noted, pursuant to the amended statute, "notice shall be deemed received unless *both* the certified mailing and the ordinary first class mailing are returned by the United States postal service within forty-five days after being mailed" (RPTL 1125 [1] [b] [i] [emphasis added]). If *both* are returned, then and only then is the enforcing officer, i.e., Baxter, obligated to investigate alternative addresses for the relevant person (*see id.*). Inasmuch as none of the mailings were returned, Baxter was under no further obligation to obtain alternative addresses.

Nothing in RPTL 1125 shall be construed to preclude the enforcing officer from issuing, at his or her *discretion*, duplicate notices or informal notices to interested persons (*see* RPTL 1125 [4] [a], [b]). Nevertheless, "[t]he failure of the enforcing officer to mail any such discretionary notice, or the failure of an intended recipient to receive such a notice, shall not invalidate any tax or prevent the enforcement of the same as provided by law" (RPTL 1125 [4] [c]).

Inasmuch as Baxter fulfilled all of his statutory requirements, we conclude that the court could not have reached its determination that defendants failed to comply with RPTL 1125 under any fair interpretation of the evidence (*see generally Cianchetti*, 145 AD3d at 1540-1541). That does not end the analysis. Although meeting the statutory notice requirements will generally suffice for due process purposes, there are times that due process requires more (*see United States v Braunig*, 553 F2d 777, 780 [2d Cir 1977], *cert denied* 431 US 959 [1977]).

"Under both the federal and state constitutions, the State may not deprive a person of property without due process of law" (*Matter of Harner v County of Tioga*, 5 NY3d 136, 140 [2005]; *see* US Const 14th Amend; NY Const, art I, § 6; *Kennedy v Mossafa*, 100 NY2d 1, 8-9 [2003]). Although due process does not require actual notice (*see Jones v Flowers*, 547 US 220, 226 [2006]; *Matter of City of Rochester [Duvall]*, 92 AD3d 1297, 1298 [4th Dept 2012]), the United States Supreme Court has stated that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314 [1950]; *see Kennedy*, 100 NY2d at 9). The *Mullane* standard has been strengthened by language contained in *Mennonite Bd. of Missions v Adams* (462 US 791, 800 [1983]), wherein the Court wrote "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." Additionally, "[d]ecisions following *Mullane . . .* , including *Covey v Town of Somers*, [351 US 141, 146 (1956)], and, more recently, *Robinson v Hanrahan*, [409 US 38,

39-40 (1972)], make clear that where a State or municipality knows that the person's condition or location is such that he [or she] will not be adequately apprised of the proceeding in question through the statutory method of notice used, the [requirements of the] due process clause will not have been [met]" (*Braunig*, 553 F2d at 780).

In addressing the concept of due process under *Mullane*, the Court of Appeals has written, "[d]ue process is a flexible concept, requiring *a case-by-case analysis* that measures the reasonableness of a municipality's actions in seeking to provide adequate notice. A balance must be struck between the State's interest in collecting delinquent property taxes and those of the property owner in receiving notice . . . In striking such balance, the courts may take 'into account the status and conduct of the owner in determining whether notice was reasonable' " (*Harner*, 5 NY3d at 140 [emphasis added]; *see Kennedy*, 100 NY2d at 10-11).

Inasmuch as Baxter complied with the statutory requirements, the question is whether due process required defendants to do something more where, as here, there is evidence that defendants became aware of decedent's death after the notices were sent but before the redemption period expired. Assuming, arguendo, that due process did require more under the circumstances of this case (*but see Matter of County of Ontario [Helser]*, 72 AD3d 1636, 1637 [4th Dept 2010]; *Barnes*, 25 AD3d at 956), we conclude that defendants took steps beyond what was required in the statute in an attempt to provide notice to interested persons (*see Bender v City of Rochester*, 765 F2d 7, 9-12 [2d Cir 1985]; *cf. Orra Realty Corp. v Gillen*, 46 AD3d 649, 651 [2d Dept 2007], *lv denied* 10 NY3d 712 [2008]).

In striking the balance that the due process analysis requires, we note that, inasmuch as no Surrogate's Court proceeding had been commenced, defendants could not have been aware of those people whose interests in the property arose after decedent's death. Moreover, despite three personal attempts to talk to someone with authority at the restaurant and provide that person with actual notice, no owner or manager was ever made available until after the redemption period had ended. To require more of defendants would be unreasonable.

The court further determined that the tax foreclosure proceeding was a nullity because "[d]efendants commenced the foreclosure action against a deceased party." In support of that determination, the court cited *Matter of Foreclosure of Tax Liens* (165 AD3d 1112, 1116 [2d Dept 2018], *appeal dismissed and lv denied* 35 NY3d 998 [2020] [*Goldman*]), *Wendover Fin. Servs. v Ridgeway* (93 AD3d 1156, 1157 [4th Dept 2012]), and several in personam jurisdiction cases. We agree with defendants that *Goldman* should not be followed and that the remaining cases cited by the court are distinguishable.

The Second Department, in *Goldman*, relied upon in personam jurisdiction cases in support of the general proposition that a legal action or proceeding cannot be commenced against a dead person (165 AD3d at 1116, citing *Krysa v Estate of Qyra*, 136 AD3d 760, 760-761 [2d Dept 2016], *lv denied* 27 NY3d 907 [2016]; *Marte v Graber*, 58 AD3d 1, 3

[1st Dept 2008]; *Jordan v City of New York*, 23 AD3d 436, 437 [2d Dept 2005]) and one mortgage foreclosure action (*id.*, citing *Dime Sav. Bank of N.Y. v Luna*, 302 AD2d 558, 558 [2d Dept 2003]). Our decision in *Wendover Fin. Servs.* also dealt with a mortgage foreclosure action. Aside from *Goldman*, all of the cited cases must be distinguished from in rem tax foreclosure proceedings.

Individuals, as well as entities, are necessary parties in *in personam* cases (*see generally Gager v White*, 53 NY2d 475, 485 [1981], *cert denied* 454 US 1086 [1981]) and, as a result, reliance on such cases is misplaced in this *in rem* proceeding. In addition, by statute, mortgagors are necessary party defendants to mortgage foreclosure actions (*see* RPAPL 1311 [1]). In contrast, a petition in a tax foreclosure proceeding relates only to the property and not any particular person (*see* RPTL 1123 [2] [a]). The distinction between in rem tax foreclosure proceedings and mortgage foreclosure actions with respect to the "parties" is critical. While an action or proceeding cannot be commenced against a dead person who, by necessity, is a named party to the action (*see Wendover Fin. Servs.*, 93 AD3d at 1157; *Marte*, 58 AD3d at 3), a tax foreclosure proceeding is not commenced against any person; it is commenced against the property itself. The owners are not necessary "parties" to the tax foreclosure proceeding; they are only "[p]arties entitled to notice" of the proceeding (RPTL 1125 [1] [a]; *see* RPTL 1123 [1], [2] [a]; *cf.* RPAPL 1131). As a result, the tax foreclosure proceeding was properly commenced even though decedent had died (*see generally Bender*, 765 F2d at 8-9), and there was no need to substitute someone for the dead owner (*see* CPLR 1015).

We thus conclude that the court's determination that the tax foreclosure proceeding was a nullity could not be reached under any fair interpretation of the evidence (*see generally Cianchetti*, 145 AD3d at 1540-1541) and that the court erred in awarding plaintiff damages, interest and costs. We thus modify the order accordingly.

With respect to plaintiff's cross appeal, we have reviewed her contentions and conclude that they lack merit. Contrary to plaintiff's contention, the court's decision on her fifth cause of action is based on a fair interpretation of the evidence (*see generally id.*).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1159

CAF 20-00705

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

IN THE MATTER OF MARY JO ANDALORA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DAVID J. DIX, JR., RESPONDENT-RESPONDENT.

UBER LAW OFFICE, PC, JAMESTOWN (R. SHANE UBER OF COUNSEL), FOR PETITIONER-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, III, OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Chautauqua County (Michael J. Sullivan, J.), entered September 13, 2019 in a proceeding pursuant to Family Court Act article 4. The order, among other things, reversed an order of the Support Magistrate and dismissed the amended petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the amended petition and the order of the Support Magistrate are reinstated, and the matter is remitted to Family Court, Chautauqua County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 4, petitioner mother appeals from an order that granted in part respondent father's written objections to the order of the Support Magistrate and, inter alia, dismissed the amended petition. We reverse.

The parties were divorced pursuant to a judgment that, insofar as relevant here, fixed a monthly child support obligation and provided that "each party has a right to seek a modification of the child support [obligation] upon a showing of [inter alia] substantial change in circumstances." In the judgment, Supreme Court further decreed that "all future matters involving custody, visitation, and child support are referred to the Family Court of Chautauqua County to hear, determine and enforce."

The mother thereafter petitioned Family Court to modify the child support obligation and alleged in her amended petition that, insofar as relevant here, a substantial change in circumstances had occurred. The amended petition did not seek to invalidate the child support provisions of the parties' separation agreement as violative of the Child Support Standards Act (CSSA).

The Support Magistrate granted the amended petition on two grounds. First, the Support Magistrate found that the mother established a substantial change in circumstances that warranted modification of the parties' child support obligations. Alternatively, the Support Magistrate determined, sua sponte, that the child support provisions of the parties' separation agreement violated the CSSA such that a de novo computation of child support was required.

The father filed objections to the Support Magistrate's determinations. Family Court granted one such objection and, inter alia, dismissed the mother's amended petition solely on the ground that Family Court, as an entity, lacked subject matter jurisdiction to invalidate the child support provisions of a separation agreement. The court did not address the father's objections to the Support Magistrate's primary determination, i.e., that a substantial change in circumstances required modification of the child support obligation.

As the mother correctly contends, the court erred in dismissing the amended petition without first ruling on the father's objections to the Support Magistrate's change-in-circumstances determination. Given Supreme Court's referral to Family Court of "all future matters involving . . . child support," Family Court had subject matter jurisdiction to entertain the mother's petition to modify the child support order on the ground of a substantial change in circumstances (*see* NY Const, art VI, § 13 [c]; *Matter of Quiggle v Quiggle*, 144 AD2d 1011, 1011 [4th Dept 1988]). Thus, the court should have addressed the father's objections to the Support Magistrate's primary rationale for granting the amended petition, i.e., a substantial change in circumstances (*see generally Matter of Paul v Rodems*, 226 AD2d 1047, 1049 [4th Dept 1996]; *Matter of Cain v Cousar*, 52 AD2d 924, 924 [2d Dept 1976]). We therefore reverse the order on appeal, reinstate the amended petition and the order of the Support Magistrate, and remit the matter to Family Court for further proceedings on the father's remaining objections (*see Matter of Spilman-Toll v Toll*, 209 AD2d 1015, 1016 [4th Dept 1994]). The mother's remaining contention is properly considered on remittal in connection with the father's remaining objections.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1175

KA 19-01495

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN R. CHRISLEY, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Genesee County Court (Charles N. Zambito, J.), entered July 24, 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: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). On a prior appeal, we determined that County Court had erred in assessing points for a continuing course of sexual misconduct on a theory that was not raised by the Board of Examiners of Sex Offenders (Board) or the People (*People v Chrisley*, 172 AD3d 1914, 1915-1916 [4th Dept 2019]). "The Board [had] recommended no point assessment under that category, and the People [had mistakenly] recommended that points be assessed under that category on the sole ground that, as indicted, defendant had committed two acts of sexual *contact* against the victim" (*id.* at 1915). The court, however, properly determined that "points could not be assessed for only two acts of sexual contact inasmuch as neither of [those] incidents involved 'an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact' " (*id.*). Relying on a third, uncharged incident, the court sua sponte assessed points under that category on the theory that defendant engaged in three or more acts of sexual contact with the victim over a period of at least two weeks (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006] [Guidelines]).

Inasmuch as defendant was not provided notice that he would be assessed points as a result of a third uncharged incident and thus was not given a meaningful opportunity to respond, we concluded that he

was denied his right to due process. After determining that defendant's remaining challenges to the risk level determination lacked merit, we reversed the order, vacated the risk level determination and remitted the matter to County Court for a new risk level determination, and a new hearing if necessary (*Chrisley*, 172 AD3d at 1916).

On remittal, defendant provided the court with a letter from his counselor wherein the counselor noted that, in the two years since his release, defendant had "actively engage[d]" in treatment; "routinely participate[d]" in treatment; and "ma[d]e positive changes to his life." In addition, defendant's risk level had also been recently assessed on three separate risk assessment instruments, the STATIC-99R, the STABLE-2007 and the ACUTE-2007. On each assessment, defendant had scored as a low risk. Based on his treatment of defendant and the scores on the recent assessments, the counselor opined that defendant was a "low risk for recidivism sexually, violently, and in general" and supported "the courts [sic] consideration for re-leveling of [defendant]."

At the subsequent SORA hearing, the court concluded that there was clear and convincing evidence of a third incident and assessed defendant 20 points under the category of continuing course of sexual misconduct. As a result, defendant's total risk assessment score was 110, making him a presumptive level three risk. The court, however, concluded that the information from the counselor justified a downward departure, and determined that defendant should be classified as a level two risk.

We agree with defendant that there is not clear and convincing evidence of a third incident of sexual contact. The evidence presented at the SORA hearing on that issue was the grand jury testimony of the victim's mother who stated that, on one occasion, the victim had been "fidgeting" while sitting on defendant's lap. Although defendant had told the victim to sit still, the mother removed the victim from his lap and told her to go play. Shortly thereafter, the mother observed what she thought to be a "wet spot near his privates on his pants."

It is well settled that, at a SORA hearing, the People have "the burden of proving the facts supporting the determinations sought by clear and convincing evidence" (Correction Law § 168-n [3]). The clear and convincing standard requires evidence that "makes it highly probable that the alleged activity actually occurred" (*People v Warrior*, 57 AD3d 1471, 1472 [4th Dept 2008] [internal quotation marks omitted]; *see People v Stewart*, 61 AD3d 1059, 1060 [3d Dept 2009]). In our view, the evidence submitted to the SORA court does not establish a high probability that sexual contact actually occurred.

" 'Sexual contact' means any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor

upon any part of the victim, clothed or unclothed" (Penal Law § 130.00 [3]). Here, unlike many other cases involving victims who sat on the respective defendants' laps, there is no evidence that defendant otherwise touched the victim inappropriately during that incident (*see People v Scerbo*, 59 AD3d 1066, 1067-1068 [4th Dept 2009], *lv denied* 12 NY3d 821 [2009]; *cf. People v Scerbo*, 74 AD3d 1730, 1733-1734 [4th Dept 2010], *lv denied* 15 NY3d 757 [2010]; *People v Hicks*, 55 AD3d 1138, 1140 [3d Dept 2008], *lv denied* 12 NY3d 758 [2009]). Although it appears that something nefarious *might* have happened while the victim was sitting on defendant's lap, causing a wet spot, the presence of what appeared to be a wet spot on defendant's pants does not, without more, rise to the level of clear and convincing evidence of sexual contact. As a result, we remove those points from defendant's risk assessment score, resulting in a total score of 90 points. That score makes defendant a presumptive level two risk.

Defendant further contends that he should be granted a downward departure to level one. Inasmuch as he contended, at the hearing, that he should be granted such a downward departure to level one in the event he was scored a level two risk, we conclude that the issue is preserved for our review. We conclude, however, that "the mere fact that the . . . [c]ourt granted his application for a downward departure from a presumptive risk level three to a risk level two does not require this Court to grant him a downward departure from a presumptive risk level two to a risk level one" (*People v Williams*, 186 AD3d 883, 884 [2d Dept 2020], *lv denied* 36 NY3d 903 [2020]). Although we could remit the matter for a new hearing regarding the application for a downward departure from a presumptive level two risk (*see People v Filkins*, 107 AD3d 1069, 1070-1071 [3d Dept 2013]; *People v Cruz*, 28 AD3d 819, 820 [3d Dept 2006]), where, as here, "the record is sufficient for this Court to make its own findings of fact and conclusions of law, this Court may decide a defendant's application for a downward departure instead of remitting the matter" (*Williams*, 186 AD3d at 884).

We agree with defendant and the court that the letter from defendant's counselor and the risk assessment instrument evaluations scoring him to be the lowest possible risk of reoffending constituted mitigating circumstances that, as a matter of law, were of a kind or degree that were not adequately taken into account by the Guidelines (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). We also agree with defendant that he met his initial burden of establishing the existence of those mitigating factors by a preponderance of the evidence (*see id.* at 864). Thus, it is up to the court to "exercise its discretion by weighing the mitigating factor[s] to determine whether the totality of the circumstances warrants a departure to avoid an over-assessment of the defendant's dangerousness and risk of sexual recidivism" (*People v McKinney*, 173 AD3d 1074, 1075 [2d Dept 2019], *lv denied* 34 NY3d 906 [2019]). Here, under the totality of the circumstances, we conclude that defendant's proffered mitigating factors are not sufficient "to warrant a downward departure from a presumptive risk level two to risk level one" (*Williams*, 186 AD3d at 885). Before our determination to reduce his risk assessment score to 90 points, defendant's score placed him at the very bottom end of level three,

and the mitigating evidence established that he was over-assessed at that highest risk level. We cannot say the same when considering the mitigating evidence in relation to a presumptive risk level of two. With a score of 90 points, defendant is in the middle of the range for risk level two, and his history does not warrant a reduction to the lowest possible risk level (*cf. People v Stevens*, 55 AD3d 892, 893-894 [2d Dept 2008]; *see generally People v Lewis*, 156 AD3d 1431, 1432 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1224

CA 20-00633

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

ALEXANDER ZALEWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EAST ROCHESTER BOARD OF EDUCATION AND EAST ROCHESTER UNION FREE SCHOOL DISTRICT, DEFENDANTS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (RICHARD C. BRISTER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DOLCE PANEPINTO, P.C., BUFFALO (SEAN E. COONEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered August 23, 2019. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: In this negligence action, plaintiff seeks damages for injuries he sustained while participating in a water polo game as part of a physical education class at East Rochester Junior/Senior High School. During that game, plaintiff was injured when his head hit the bottom of the swimming pool after contact occurred between him and another student while plaintiff was attempting to gain control of the ball. In the complaint, as amplified by the bill of particulars, plaintiff alleged that defendants were negligent in, inter alia, supervising and directing students in the pool and allowing students to engage in inappropriate activities. Defendants now appeal from an order denying their motion for summary judgment dismissing the complaint, and we affirm.

Although schools are not insurers of the safety of their students, they have a duty to provide adequate supervision for them and will be held liable when students sustain foreseeable injuries proximately related to the school's breach of that duty (*see Mirand v City of New York*, 84 NY2d 44, 49 [1994]). "In carrying out that duty, schools are obligated to exercise such care of their students as a parent of ordinary prudence would observe in comparable circumstances" (*Milbrand v Kenmore–Town of Tonawanda Union Free School Dist.*, 49 AD3d 1341, 1342 [4th Dept 2008] [internal quotation marks omitted]). "In determining whether the duty to provide adequate supervision has been

breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" (*Mirand*, 84 NY2d at 49). "Actual or constructive notice to the school of prior similar conduct is generally required because, obviously, school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily" (*id*.). Generally, whether a school has failed to fulfill its duty and whether that failure was a proximate cause of the injury are questions of fact reserved for the jury (*see Oakes v Massena Cent. School Dist.*, 19 AD3d 981, 982 [3d Dept 2005]).

Here, we conclude that defendants failed to meet their initial burden inasmuch as their own submissions on the motion raise triable issues of fact whether they engaged in negligent supervision and whether that negligence was a proximate cause of plaintiff's injuries. While defendants' submissions established that the physical education teacher who supervised water polo had modified the typical rules thereof to prevent contact, defendants' papers raise issues of fact whether those rules were enforced, the water polo game as modified was safe and age-appropriate, and the supervision of the game was reasonable under the circumstances. Among other things, defendants submitted the deposition of the physical education teacher, wherein he provided conflicting testimony as to whether he actually allowed contact during the water polo game and whether he allowed students to take the ball from each other. His testimony therefore created an issue of fact whether defendants had notice of students engaging in dangerous conduct similar to the conduct that caused plaintiff's injuries and, thus, whether such conduct was preventable (*see id.*). We therefore conclude that defendants failed to establish their entitlement to judgment as a matter of law (*see id.*)

Inasmuch as defendants failed to meet their initial burden, we do not address the sufficiency of plaintiff's opposing papers (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1225.2

CA 19-01323

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

IN THE MATTER OF BISON ELEVATOR SERVICE, INC.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, STEVEN STEPNIAK, AS COMMISSIONER
OF CITY OF BUFFALO DEPARTMENT OF PUBLIC WORKS,
RESPONDENTS-APPELLANTS,
AND D.C.B. ELEVATOR CO., INC., RESPONDENT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

Appeal from a judgment of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered June 26, 2019 in a CPLR article 78 proceeding. The judgment, inter alia, granted money damages to respondent City of Buffalo.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part of the decretal paragraph ordering respondents-appellants to deduct the damages award from any unpaid invoices from petitioner for February and March 2019 and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the award of an elevator maintenance contract by respondents City of Buffalo (City) and Steven Stepniak, as Commissioner of the City Department of Public Works (collectively, City respondents), to respondent D.C.B. Elevator Co., Inc. (DCB). After initially granting a preliminary injunction in petitioner's favor in December 2017 (2017 order), Supreme Court effectively granted the petition in February 2018 (2018 judgment) by annulling the award of the contract to DCB and directing the City respondents to readvertise for bids under the terms of the original request for proposals (RFP). On a prior appeal, we reversed the 2018 judgment, denied the petition, reinstated a $30,000 undertaking that petitioner had provided in connection with the preliminary injunction, and remitted the matter to Supreme Court to provide respondents an opportunity to make a motion for a determination of the damages, if any, sustained by reason of the preliminary injunction (*Matter of Bison El. Serv., Inc. v City of Buffalo*, 170 AD3d 1567, 1569-1570 [4th

Dept 2019]).

On remittal, the City respondents moved for a judgment increasing the amount of petitioner's undertaking and determining the damages they sustained as a result of the preliminary injunction. The court, in effect, granted the motion in part and determined that the City respondents were entitled to $6,995 in damages, i.e., the difference paid by the City respondents as a result of contracting with petitioner rather than DCB for the 76-day period between the 2017 order granting the preliminary injunction and the 2018 judgment granting the petition. The court further ordered the City respondents to deduct the damages award from any unpaid invoices from petitioner for February and March 2019 and determined that the costs associated with the City respondents' prior appeal did not constitute damages related to the preliminary injunction. The City respondents appeal.

The City respondents contend that they are entitled to damages for the 17-month period between the 2017 order and this Court's reversal of the 2018 judgment, and costs associated with the prior appeal. We disagree.

Any party wrongfully enjoined by a preliminary injunction may recover only damages and costs that "may be sustained by reason of the injunction" (CPLR 6312 [b]). "[T]he party seeking such damages bears the burden of proof on each element of his [or her] claim" (*Cross Props. v Brook Realty Co.*, 76 AD2d 445, 458 [2d Dept 1980]). Any damages must arise directly from the injunction, and damages cannot be recovered for costs related to litigating the merits of the case or other underlying issues (*see id.* at 458-459; *Maltz v Westchester County Brewing Co.*, 167 App Div 95, 97-99 [2d Dept 1915]; *Eisen v Post*, 15 Misc 2d 59, 63-64 [Sup Ct, NY County 1958]). Here, the 2018 judgment granting the petition effectively terminated the preliminary injunction by granting relief on the merits to petitioner, and the City respondents thus are not entitled to damages that arose after that date (*see Maltz*, 167 App Div at 97-99; *Eisen*, 15 Misc 2d at 64). Nor are the City respondents entitled to costs associated with the appeal from the 2018 judgment because the appeal concerned the merits of the case and not the propriety of the preliminary injunction (*see Maltz*, 167 App Div at 97-99; *see generally Republic of Croatia v Trustee of Marquess of Northampton 1987 Settlement*, 232 AD2d 216, 216 [1st Dept 1996]; *Matter of Sweets v Behrens*, 118 Misc 2d 1062, 1066 [Sup Ct, Schenectady County 1983]). In light of our determination that the City respondents are not entitled to damages that exceed the amount of petitioner's undertaking, their contention that the undertaking should be increased is academic.

However, we agree with the City respondents that the court erred in offsetting the damages award against unpaid invoices from a period outside the scope of the preliminary injunction and therefore not relevant to the damages calculation (*see generally Ell-Dorer Contr. Co. v P.T.&L. Constr. Co.*, 85 AD2d 866, 866 [3d Dept 1981]). Thus, we

modify the judgment accordingly.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1244

KA 17-00529

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD K. JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered April 7, 2016. The judgment convicted defendant, upon his plea of guilty, of rape 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.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of rape in the second degree (Penal Law § 130.30 [1]) in full satisfaction of a two-count indictment charging him with rape in the first degree under section 130.35 (2) and rape in the second degree under section 130.30 (1). Defendant contends that County Court erred in denying his motion to dismiss the indictment on the ground that, inter alia, his state constitutional due process rights were violated by extensive preindictment delay. We reject that contention and affirm.

The Court of Appeals "ha[s] long held that 'unreasonable delay in prosecuting a defendant constitutes a denial of due process of law' " under article 1, section 6 of the New York Constitution (*People v Singer*, 44 NY2d 241, 253 [1978], quoting *People v Staley*, 41 NY2d 789, 791 [1977]). The "*Taranovich* factors [are] employed to determine whether there has been a violation of the due process right to prompt prosecution" (*People v Decker*, 13 NY3d 12, 15 [2009]; *see People v Taranovich*, 37 NY2d 442, 445 [1975]). Those factors are: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*Taranovich*, 37 NY2d at 445). Where, as here, "there has been a

protracted delay, [i.e.,] a period of years, the burden is on the prosecution to establish good cause" for the delay (*Singer*, 44 NY2d at 254). "[N]o one factor [is] dispositive of a violation, and [there are] no formalistic precepts by which a deprivation of the right can be assessed" (*People v Romeo*, 12 NY3d 51, 55 [2009], *cert denied* 585 US 817 [2009]).

Here, the parties agree that the first factor favors defendant and that the fourth factor favors the People. Moreover, we will assume, arguendo, that the People failed to establish "good cause" for the "protracted" preindictment delay in this case such that the second and third factors favor defendant (*Singer*, 44 NY2d at 254).

We nevertheless conclude that, after considering all of the relevant factors, defendant's state constitutional due process rights were not violated because his defense to the charge of which he was convicted was not prejudiced in any conceivable respect by the preindictment delay (*see People v Grady*, 111 AD2d 932, 932 [2d Dept 1985]). Specifically, although defendant correctly notes that the extensive preindictment delay undoubtedly compromised his ability to contemporaneously investigate the facts and circumstances of the underlying incident, he concedes that no amount of contemporaneous investigation could have revealed a defense to the strict-liability crime of which he was ultimately convicted, namely, rape in the second degree under Penal Law § 130.30 (1). Thus, under the circumstances of this case, the preindictment delay could not have "impaired" defendant's ability to defend himself on the charge of which he was convicted (*Taranovich*, 37 NY2d at 445). Whether and to what extent the preindictment delay impaired defendant's ability to defend himself on the separate count of rape in the first degree is irrelevant to our analysis because defendant was not convicted of that count (*see generally People v Brown*, 53 NY2d 979, 981 [1981]; *People v Singh*, 185 AD3d 480, 480 [1st Dept 2020], *lv denied* 35 NY3d 1070 [2020]; *People v Cutaia*, 167 AD3d 1534, 1534-1535 [4th Dept 2018], *lv denied* 33 NY3d 947 [2019]; *People v Yu*, 166 AD2d 249, 250 [1st Dept 1990], *lv denied* 76 NY2d 992 [1990]). In that respect, we emphasize that defendant did not plead guilty to rape in the second degree as a lesser-included offense of rape in the first degree. Moreover, defendant's assertion that the preindictment delay deprived him of the ability to negotiate a sentence that would have run concurrently with a prior unrelated burglary sentence is without merit as "there is no reason to believe that his counsel . . . would have been able to obtain a plea [with concurrent time]" (*People v Heywood*, 138 AD3d 607, 608 [1st Dept 2016], *lv denied* 28 NY3d 971 [2016]; *see People v Allende*, 206 AD2d 640, 642 [3d Dept 1994], *appeal dismissed* 84 NY2d 921 [1994]), and defendant does not assert that any of the prejudice considerations described in *Moore v Arizona* (414 US 25, 26-27 [1973]) are implicated here (*see People v Wiggins*, 31 NY3d 1, 18 [2018]).

In reaching our determination, we acknowledge that the law does not require a specific demonstration of prejudice in order to prevail on a due process claim stemming from preindictment delay (*see Wiggins*, 31 NY3d at 13, citing *Singer*, 44 NY2d at 253-254). That said,

however, the fact that a *Singer* claim does not necessarily require a showing of prejudice does not mean that relief must invariably be granted where the defendant suffered no prejudice at all. In that respect, an analogy can be drawn to ineffective assistance caselaw: although prejudice is not invariably required to prevail on that type of claim, the complete absence of prejudice will typically foreclose relief (*see e.g. People v Vasquez*, 20 NY3d 461, 468 [2013]; *People v Simmons*, 10 NY3d 946, 948-949 [2008]). Thus, although defendant was not obligated to show how exactly he was prejudiced, the complete absence of prejudice in this case weighs most heavily against him when determining whether he was deprived of due process by the preindictment delay.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1245

KA 17-00530

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RONALD K. JOHNSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Monroe County Court (Vincent M. Dinolfo, J.), rendered August 18, 2016. Defendant was resentenced upon his conviction of rape in the second degree.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Griffin*, 151 AD3d 1824, 1825 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1253

CA 20-00438

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

SHAFI MUTOMBO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CERTIFIED DOCUMENT DESTRUCTION & RECYCLING, INC., AND JAMIE L. O'CONNOR, DEFENDANTS-APPELLANTS.

SMITH SOVIK KENDRICK & SUGNET, P.C., SYRACUSE (THOMAS J. DEBERNARDIS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (MARTHA PIGOTT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered March 2, 2020. The order denied defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when the vehicle he was operating was struck by a vehicle operated by defendant Jamie L. O'Connor and owned by defendant Certified Document Destruction & Recycling, Inc. In the complaint, as amplified by the bill of particulars, plaintiff alleged that, as a result of the collision, he suffered a serious injury within the meaning of Insurance Law § 5102 (d) under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of section 5102 (d) that was causally related to the accident. Supreme Court denied the motion, and defendants appeal. We affirm.

We reject defendants' contention that they met their initial burden of establishing that plaintiff did not sustain a serious injury that was causally related to the subject accident. As the proponents of the motion for summary judgment "dismissing a complaint that alleges serious injury under Insurance Law § 5102 (d), . . . defendant[s] bear[] the initial burden of establishing by competent medical evidence that . . . plaintiff did not sustain a serious injury caused by the accident" (*Gonyou v McLaughlin*, 82 AD3d 1626, 1627 [4th Dept 2011] [internal quotation marks omitted]; *see Woodward v Ciamaricone*, 175 AD3d 942, 943 [4th Dept 2019]). Here, defendants

submitted an affidavit of their expert radiologist, who reviewed an MRI of plaintiff's lumbar spine and concluded that plaintiff's injury was the result of a chronic degenerative condition that predated the accident. Defendants, however, also submitted the deposition testimony of plaintiff, who testified that he did not sustain any injuries or experience any back pain as a result of a prior motor vehicle accident and had not experienced back pain at any time prior to the subject accident, and defendants' expert radiologist "fail[ed] to account for evidence that plaintiff had no complaints of pain prior to the accident" (*Sobieraj v Summers*, 137 AD3d 1738, 1739 [4th Dept 2016]; *see Thomas v Huh*, 115 AD3d 1225, 1226 [4th Dept 2014]).

Moreover, even if defendants met their initial burden on the motion on the issue whether plaintiff's spinal injuries were causally related to the subject accident, we conclude that plaintiff raised a triable issue of fact by submitting the opinions of several other medical professionals, including two chiropractors, a physician who is a spinal specialist, and an orthopedic physician, who concluded that plaintiff's condition is causally related to the accident (*see generally Thomas*, 115 AD3d at 1226).

Defendants further contend that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d) under the categories of permanent consequential limitation of use and significant limitation of use because the medical assessments of his injuries were based on his subjective complaints. We reject that contention. Even assuming, arguendo, that defendants met their initial burden with respect to that issue, in opposition to the motion plaintiff submitted objective evidence that the range of motion of his lumbar spine was limited in excess of 20% when compared to the normal range of motion (*see Grier v Mosey*, 148 AD3d 1818, 1819 [4th Dept 2017]), and the conclusions of plaintiff's experts were supported by the chiropractors' observations of plaintiff's muscle spasms during physical examination, and by their clinical observations and plaintiff's various test results (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]; *Pastuszynski v Lofaso*, 140 AD3d 1710, 1711 [4th Dept 2016]).

Furthermore, with respect to the 90/180-day category, defendants failed to meet their initial burden on their motion inasmuch as their own submissions, which included the deposition testimony of plaintiff, raise triable issues of fact (*see Smith v State Farm Mut. Auto. Ins. Co.*, 176 AD3d 1608, 1609 [4th Dept 2019]; *Hint v Vaughn*, 100 AD3d 1519, 1520 [4th Dept 2012]; *see generally Limardi v McLeod*, 100 AD3d 1375, 1376-1377 [4th Dept 2012]). During depositions conducted in 2018 and 2019, plaintiff testified that, since the accident in 2016, he had not been able to perform any activity that involved sitting for longer than a short period of time or bending over (*see Martin v Fitzpatrick*, 19 AD3d 954, 957 [3d Dept 2005]). Those activities included cooking, cleaning, driving, and going to the movies, all of which plaintiff did routinely prior to the accident (*see Limardi*, 100 AD3d at 1377). Thus, plaintiff's testimony raised an issue of fact whether he was prevented from performing his usual and customary

activities during the requisite time period (*see Hint*, 100 AD3d at 1520).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1254

CA 19-01847

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

IN THE MATTER OF BRANDON M. BRADY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MYRON O. BRADY AND MYRON C. BRADY,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BOND SCHOENECK & KING PLLC, ROCHESTER (JOSEPH S. NACCA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Matthew A. Rosenbaum, J.), entered October 3, 2019. The order, inter alia, granted petitioner's application for dissolution of Brady Farms, Inc.

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

Memorandum: Petitioner-plaintiff Brandon M. Brady (petitioner), individually and derivatively as a shareholder of Brady Farms, Inc., commenced an action based on, inter alia, allegations that respondents-defendants Myron O. Brady and Myron C. Brady (respondents) breached their respective fiduciary duties to defendant Brady Farms, Inc. (company). Soon thereafter, petitioner commenced a special proceeding pursuant to Business Corporation Law § 1104-a against respondents for the judicial dissolution of the company. In appeal No. 1, respondents appeal from an order in the special proceeding that granted petitioner's application for dissolution and appointed a temporary receiver. In appeal No. 2, respondents appeal from an order in the action that, inter alia, granted petitioner's motion for the appointment of a temporary receiver. We affirm.

In appeal No. 1, we reject respondents' contention that Supreme Court abused its discretion in granting the application for dissolution of the company (*see generally Matter of Kemp & Beatley [Gardstein]*, 64 NY2d 63, 73-74 [1984]; *Matter of Inzer v West Brighton Fire Dept., Inc.*, 173 AD3d 1826, 1827 [4th Dept 2019], *lv denied* 35 NY3d 903 [2020]). The record does not include a request from respondents for an evidentiary hearing and, on appeal, respondents

concede that they failed to make such a request. Consequently, respondents' contention that the court abused its discretion in ordering dissolution summarily, without a hearing, is unpreserved (*see Matter of Clever Innovations, Inc. [Dooley]*, 94 AD3d 1174, 1176-1177 [3d Dept 2012]; *Matter of Quail Aero Serv.*, 300 AD2d 800, 803 [3d Dept 2002]; *see also Seligson v Russo*, 16 AD3d 253, 253 [1st Dept 2005], *lv denied* 5 NY3d 706 [2005]). In any event, a hearing was not warranted (*see generally Matter of Goodman v Lovett*, 200 AD2d 670, 670 [2d Dept 1994], *lv denied* 84 NY2d 850 [1994]; *Matter of Garay v Langer*, 37 AD2d 545, 545 [1st Dept 1971]). Contrary to respondents' contention, even if there is a disputed issue of fact with respect to the extent of petitioner's ownership interest in the company, there was no need to resolve that issue at a hearing prior to determining whether dissolution is appropriate. Respondents do not dispute that petitioner is a shareholder and that he owns at least a 20% interest in the company, which is the requisite ownership interest needed to have standing to commence the proceeding in appeal No. 1 pursuant to Business Corporation Law § 1104-a (*see Matter of Twin Bay Vil., Inc.*, 153 AD3d 998, 1000 [3d Dept 2017], *lv denied* 31 NY3d 902 [2018]). Contrary to respondents' related contention, we conclude that the court properly determined on the record before it that dissolution was required inasmuch as respondents engaged in "oppressive actions toward the complaining shareholder[]," i.e., petitioner (§ 1104-a [a] [1]).

In appeal Nos. 1 and 2, we reject respondents' contention that the court abused its discretion in granting petitioner's requests to appoint a temporary receiver (*see* Business Corporation Law § 1113; CPLR 6401; *see generally Suissa v Baron*, 107 AD3d 689, 689 [2d Dept 2013]; *Silvestri v Ferrara*, 270 AD2d 19, 19 [1st Dept 2000], *lv dismissed* 95 NY2d 825 [2000]; *Rosan v Vassell*, 257 AD2d 436, 437 [1st Dept 1999]).

Finally, we have reviewed the remaining contentions of respondents and conclude that none warrants reversal or modification of the orders in appeal Nos. 1 or 2.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1255

CA 19-01849

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

BRANDON M. BRADY, INDIVIDUALLY AND
DERIVATIVELY AS A SHAREHOLDER OF BRADY
FARMS, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MYRON O. BRADY, MYRON C. BRADY,
DEFENDANTS-APPELLANTS,
AND BRADY FARMS, INC., DEFENDANT.
(APPEAL NO. 2.)

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOND SCHOENECK & KING PLLC, ROCHESTER (JOSEPH S. NACCA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Matthew A. Rosenbaum, J.), entered October 4, 2019. The order granted the motion of plaintiff for an accounting and the appointment of a receiver.

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

Same memorandum as in *Matter of Brady v Brady* (— AD3d — [Apr. 30, 2021] [4th Dept 2021]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1257

CA 20-00030

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

6115 NIAGARA FALLS BOULEVARD, LLC,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

CALAMAR CONSTRUCTION MANAGEMENT, INC.,
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (ELIZABETH A. KRAENGEL OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SARAH K. HYMAN, WHEATFIELD, FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Timothy J. Walker, A.J.), entered December 13, 2019. The order, among other things, granted that part of plaintiff's motion seeking to enforce the stipulation of settlement and settlement agreement and denied that part of plaintiff's motion seeking attorneys' fees, costs and disbursements.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in its entirety plaintiff's motion to enforce the stipulation of settlement and settlement agreement and rescinding the stipulation of settlement and settlement agreement, and as modified the order is affirmed without costs.

Memorandum: Plaintiff, a property owner, contracted with defendant as the general contractor on a construction project. After plaintiff commenced an action against defendant for breach of contract, the parties entered settlement discussions and thereafter ostensibly reached an agreement that was memorialized by an oral stipulation of settlement in court (stipulation) and a written settlement agreement (settlement) (collectively, agreement). A dispute subsequently arose with respect to the meaning of the terms of the agreement. Plaintiff asserted that a credit or reimbursement of approximately $97,000 included in the stipulation and settlement constituted a separate payment that defendant was required to pay in addition to the separately-identified lump sum payment of $150,000. Defendant, conversely, asserted that the approximately $97,000 was not a separate payment due to plaintiff, but instead merely represented a credit or reimbursement that was to be reflected in the final payment application for the construction project.

Plaintiff moved to enforce the stipulation and settlement, and also sought attorneys' fees, costs, and disbursements pursuant to the agreement. Upon consideration of the parties' submissions and after hearing oral argument, Supreme Court determined, inter alia, that defendant had failed to establish a mutual mistake that would warrant setting aside the stipulation and settlement. In appeal No. 1, defendant cross-appeals from an order insofar as it granted that part of plaintiff's motion seeking to enforce the stipulation and settlement, and plaintiff appeals from the order insofar as it denied that part of its motion seeking attorneys' fees, costs, and disbursements. Following entry of the order in appeal No. 1, plaintiff moved for various relief related to payment under the agreement. In appeal No. 2, plaintiff appeals from an order insofar as it denied that part of its motion seeking attorneys' fees, costs, and disbursements.

Defendant contends in appeal No. 1 that the court erred in enforcing the stipulation and settlement because there was no meeting of the minds whether the approximately $97,000 credit or reimbursement constituted a separate amount payable to plaintiff or, instead, merely showed how that amount would be allocated in the final payment application. Initially, we reject plaintiff's assertion that defendant's contention is improperly raised for the first time on appeal. Defendant specifically contended before the court that, if plaintiff truly believed that it was entitled to more than the $150,000 lump sum payment, which was different than the understanding had by defendant, then "there was no meeting of the minds" and the agreement should be set aside. On the merits, we agree with defendant for the reasons that follow.

"To form a binding contract there must be a 'meeting of the minds' . . . , such that there is 'a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms' " (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]; *see Gupta v University of Rochester*, 57 AD2d 731, 731 [4th Dept 1977]). "Where the offeror, using ambiguous language, reasonably means one thing and the offeree reasonably understands differently, there is no contract" (*Gupta*, 57 AD2d at 731; *see Computer Assoc. Intl., Inc. v U.S. Balloon Mfg. Co., Inc.*, 10 AD3d 699, 700 [2d Dept 2004]). Ambiguity in an agreement arises "when specific language is 'susceptible of two reasonable interpretations' " (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 [2014]; *see Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 25 NY3d 675, 680 [2015]; *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). Conversely, an agreement "is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion' " (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "Whether an agreement is ambiguous is a question of law for the courts" (*Kass v Kass*, 91 NY2d 554, 566 [1998]; *see Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009]).

Here, we conclude that the language in the stipulation and settlement regarding the nature of the approximately $97,000 is ambiguous inasmuch as it is susceptible of more than one reasonable interpretation. With respect to the stipulation made in open court and stenographically recorded, which "is governed by general contract principles for its interpretation and effect" (*Carr v Sheehan*, 148 AD3d 1618, 1619 [4th Dept 2017] [internal quotation marks omitted]), plaintiff's counsel first stated that the parties had "agreed to a payment in the amount of [$150,000] from [defendant] to [plaintiff]" and then, after explaining how that payment would be made through the final payment application process and some additional terms, further stated that, "[i]n addition, certain credits to [plaintiff] under the contract shall issue in the amount of [approximately $97,000]." As defendant contends, unlike the language used to describe the lump sum payment, plaintiff's counsel never characterized the approximately $97,000 as a separate "payment" or that it would be paid to plaintiff through the final payment application process; instead, plaintiff's counsel referred to the approximately $97,000 as a "credit" to plaintiff (*compare* Black's Law Dictionary [11th ed 2019], payment, *with* Black's Law Dictionary [11th ed 2019], credit). Moreover, it has been defendant's position that it did not object to that part of the stipulation as articulated in court because, as defendant's counsel understood, the use of the "[i]n addition" phrase by plaintiff's counsel simply conveyed that there was more to the agreement, one component of which was that certain credits would be accounted for in the final payment application, but that no separate payment beyond the $150,000 lump sum was owed to plaintiff. Given the discrepant and ambiguous language used by plaintiff's counsel in articulating the lump sum payment and the credit, we conclude that defendant's interpretation of the stipulation was reasonable.

We also agree with defendant that the settlement, which notably uses language that is markedly different from the stipulation, is likewise ambiguous. The paragraph of the settlement addressing the lump sum provided that "[defendant] shall cause to be paid to [plaintiff] . . . in full and final satisfaction and settlement of any and all claims between the [p]arties as set forth herein, the lump sum of $150,000[ ]." That paragraph further described the manner in which the lump sum would be paid. The paragraph of the settlement addressing the approximately $97,000 provided that "[plaintiff] shall receive reimbursement from [defendant] in the amount of $97,475.46 as included in the Final Payment Application." In our view, it is unclear whether that "reimbursement," which was previously called a "credit" in the stipulation, was intended to be a separate payment owed to plaintiff, or if it simply represented how such amount would be accounted for in the final payment application. Indeed, the lump sum "payment" was "in full and final satisfaction and settlement of any and all claims between the [p]arties as set forth herein" and, as defendant has asserted, the paragraph describing the "reimbursement" contained no language suggesting that the approximately $97,000 represented a payment in addition to the lump sum settlement amount.

Given that ambiguity, "[e]xtrinsic evidence of the parties' intent may be considered" (*Greenfield*, 98 NY2d at 569). Here, during

the drafting phrase of the settlement a couple weeks after the stipulation was placed on the record in court, plaintiff originally included language stating that the "reimbursement" was "[i]n addition to the Settlement Amount." In an email, defendant's counsel informed plaintiff's counsel that defendant would "not agree to the language '[i]n addition to the Settlement Amount[ ]' " because such language "implies a 'plus/plus' "—i.e., requiring payment by defendant of both the $150,000 lump sum and the approximately $97,000—which defendant's counsel did not believe was plaintiff's intent. Defendant's counsel expressed her opinion that the change orders and reimbursement were really not "[i]n addition to" the lump sum settlement amount; rather, these items were incorporated by reference in the final payment application. In direct response to the request of defendant's counsel, the "in addition" language was removed and not included in the settlement as signed by the parties. Plaintiff's counsel was therefore aware of defendant's interpretation at the time that the settlement was drafted. Plaintiff's counsel later explained at oral argument that she had agreed to strike the "in addition" language from the written settlement because she knew that the stipulation would be attached. As previously discussed, however, the language used in the stipulation was also ambiguous with respect to the nature of the approximately $97,000. Additionally, defendant submitted the affidavit of its executive vice president of construction and development, who averred that the parties had agreed to a lump sum payment of $150,000 only, and that the inclusion of itemized amounts other than the lump sum payment was merely the result of a short discussion just prior to the stipulation in which plaintiff's representative indicated that such itemization would be helpful to plaintiff's relationship with its lending institution.

Based on the foregoing, the record demonstrates that defendant reasonably thought that it was settling all claims for a total of $150,000 only, whereas plaintiff reasonably thought that it would separately receive from defendant a payment of $97,000 in addition to the lump sum payment (*see Gessin Elec. Contrs., Inc. v 95 Wall Assoc., LLC*, 74 AD3d 516, 516-520 [1st Dept 2010]). "There is a reasonable basis for the parties' difference of opinion as to what the [agreement] included or did not include, and therefore the [agreement] is unenforceable for lack of a meeting of the minds regarding a material element thereof" (*Computer Assoc. Intl., Inc.*, 10 AD3d at 700). Under the circumstances here, we conclude that denial of plaintiff's motion in its entirety and rescission of the stipulation and settlement is the appropriate relief (*see generally County of Orange v Grier*, 30 AD3d 556, 556-557 [2d Dept 2006]). We therefore modify the order in appeal No. 1 accordingly.

Contrary to plaintiff's contention on its appeal in appeal No. 1, inasmuch as it is no longer the prevailing party as a result of our decision, it is not entitled to attorneys' fees, costs, and disbursements (*see Jordan v Bates Adv. Holdings, Inc.*, 46 AD3d 440, 444 [1st Dept 2007], *lv denied* 11 NY3d 701 [2008], *rearg denied* 11 NY3d 817 [2008]). Finally, contrary to plaintiff's contention in appeal No. 2, we conclude that the court properly denied that part of its motion seeking attorneys' fees, costs, and disbursements (*see*

Cayre v Pinelli, 172 AD3d 611, 611 [1st Dept 2019]; *Chainani v*

Lucchino, 94 AD3d 1492, 1494 [4th Dept 2012]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

1258

CA 20-00044

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

6115 NIAGARA FALLS BOULEVARD, LLC,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CALAMAR CONSTRUCTION MANAGEMENT, INC.,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (ELIZABETH A. KRAENGEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SARAH K. HYMAN, WHEATFIELD, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Timothy J. Walker, A.J.), entered January 3, 2020. The order, insofar as appealed from, denied that part of plaintiff's motion seeking attorneys' fees, costs and disbursements.

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

Same memorandum as in *6115 Niagara Falls Blvd., LLC v Calamar Constr. Mgt., Inc.* ([appeal No. 1] — AD3d — [Apr. 30, 2021] [4th Dept 2021]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

34

TP 20-01012

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

IN THE MATTER OF CHAD SLEIMAN, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT, NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES AND ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, CPS UNIT AND OFFICE OF LEGAL AFFAIRS, RESPONDENTS.

KELIANN M. ARGY, ORCHARD PARK, FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENTS NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT, AND NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Frank A. Sedita, III, J.], entered August 10, 2020) to review a determination of respondent New York State Office of Children and Family Services. The determination denied in part the request of petitioner to amend to unfounded an indicated report of maltreatment.

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, made after a fair hearing, insofar as it denied in part his request to amend to unfounded an indicated report of maltreatment with respect to his son and to seal the amended report (*see* Social Services Law § 422 [8] [a] [v]; [c] [i]; [e]).

We reject petitioner's contention that respondent Erie County Department of Social Services, CPS Unit and Office of Legal Affairs (DSS) failed to sustain its burden at the fair hearing of establishing that petitioner committed an act of maltreatment (*see* Social Services Law § 422 [8] [b] [ii]). Our review is limited to "whether the determination to deny the request to amend and seal the [indicated] report is supported by substantial evidence in the record" (*Matter of Kordasiewicz v Erie County Dept. of Social Servs.*, 119 AD3d 1425, 1426 [4th Dept 2014]). Substantial evidence in the record is " 'such relevant proof as a reasonable mind may accept as adequate to support

a conclusion or ultimate fact' . . . [, and] hearsay evidence alone, if it is sufficiently reliable and probative, may constitute sufficient evidence to support a determination" (*id.*, quoting *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). "To establish maltreatment, [DSS] was required to show by a fair preponderance of the evidence that the physical, mental or emotional condition of the child had been impaired or was in imminent danger of becoming impaired because of a failure by petitioner to exercise a minimum degree of care in providing the child with appropriate supervision or guardianship" (*Matter of Gerald HH. v Carrion*, 130 AD3d 1174, 1175 [3d Dept 2015]; *see* § 412 [2] [a]; Family Ct Act § 1012 [f] [i] [B]; 18 NYCRR 432.1 [b] [1] [ii]).

The evidence at the hearing established that, during a heated domestic dispute, petitioner approached his wife, who was in a vehicle with their son. Petitioner pulled the child from the vehicle against his will and placed the child behind the vehicle. He then smashed the window in the child's presence and approached the wife at the driver's window, causing the wife, who was unaware of exactly where the child was standing, to lock the door and put the car in reverse. Taking all the facts and circumstances into account, we conclude that the determination is supported by substantial evidence in the record that petitioner's conduct and judgment fell short of objectively acceptable standards (*see Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011]; *Matter of Anonymous v Poole*, 162 AD3d 598, 598 [1st Dept 2018]).

We also reject petitioner's contention that annulment of the determination is an appropriate remedy for the delays attributable to respondents between the commencement of the investigation into the allegations that petitioner maltreated the child and the date of the determination (*see generally Matter of Warren v New York State Cent. Register of Child Abuse & Maltreatment*, 164 AD3d 1615, 1617 [4th Dept 2018]). We have considered petitioner's remaining contentions and conclude that none warrants annulling the determination.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

43

TP 20-01152

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

IN THE MATTER OF YVONNE GRAY, PETITIONER,

V MEMORANDUM AND ORDER

R. ANTHONY LAFOUNTAIN, AS TOWN SUPERVISOR OF TOWN OF PENFIELD, TOWN BOARD OF TOWN OF PENFIELD AND TOWN OF PENFIELD, RESPONDENTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JOHN G. POWERS OF COUNSEL), FOR PETITIONER.

HARRIS BEACH PLLC, PITTSFORD (EDWARD A. TREVVETT OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Monroe County [James J. Piampiano, J.], entered July 9, 2020) to review a determination of respondents. The determination, among other things, terminated petitioner's employment with respondent Town of Penfield.

It is hereby ORDERED that the determination is modified on the law and the petition is granted in part by annulling that part of the determination finding petitioner guilty under charges 1 and 2 and vacating the penalty of termination, and as modified the determination is confirmed without costs and the matter is remitted to respondent Town Board of the Town of Penfield for further proceedings in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul a determination that terminated her employment with respondent Town of Penfield (Town). Petitioner's termination was based on charges of misconduct and insubordination arising from an incident in which petitioner took approximately $181 from a petty cash fund. At a Civil Service Law § 75 hearing, petitioner maintained that she intended only to borrow the money and to replenish the fund later, and it was undisputed that she left a note in the petty cash envelope indicating that she owed money to the fund. Nevertheless, the Hearing Officer found petitioner guilty of all four charges against her. Respondent Town Board of the Town of Penfield (Town Board) adopted the Hearing Officer's findings of guilt and terminated petitioner's employment.

We agree with petitioner that the determination of guilt on charges 1 and 2, which charged her respectively with theft and larceny, is not supported by substantial evidence. A person "commits

larceny when, with intent to deprive another of property or to appropriate the same to him[- or her]self or to a third person, he [or she] wrongfully takes, obtains or withholds such property from an owner thereof" (Penal Law § 155.05 [1]). "Theft" is a synonym of "larceny" (Black's Law Dictionary 1780 [11th ed 2019]). We conclude that petitioner's actions, particularly the creation and placement of the note, are inconsistent with an intent to deprive or appropriate (*see* § 155.00 [3], [4]; *People v Jennings*, 69 NY2d 103, 119 [1986]). We therefore modify the determination by annulling that part finding petitioner guilty under charges 1 and 2. With respect to charges 3 and 4, which charged petitioner with violations of the Town's policies, petitioner's contention that the charges are not supported by substantial evidence of insubordination is not properly before us because it is not raised in the petition (*see Matter of Alvarez v Fischer*, 94 AD3d 1404, 1407 [4th Dept 2012]).

Further, in light of petitioner's 32 years of service to the Town, her impending retirement, and the absence of grave moral turpitude (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 235 [1974]; *Matter of Grady v New York State Off. of Children & Family Servs.*, 39 AD3d 1157, 1158-1159 [4th Dept 2007]), we conclude that the penalty of termination is " 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness' " (*Pell*, 34 NY2d at 233; *see Matter of Ansley v Jamesville-DeWitt Cent. Sch. Dist.*, 174 AD3d 1289, 1291-1292 [4th Dept 2019], *appeal dismissed* 34 NY3d 942 [2019], *reconsideration denied* 34 NY3d 1035 [2019]). We therefore further modify the determination by vacating the penalty, and we remit the matter to the Town Board for imposition of an appropriate penalty less severe than termination (*see Ansley*, 174 AD3d at 1292; *Matter of Harwood v Addison*, 118 AD3d 1484, 1484-1485 [4th Dept 2014]).

Finally, we address in the interest of judicial economy petitioner's challenge to the legality of the penalty that was recommended by the Hearing Officer. As petitioner contends and respondents correctly concede, a six-month unpaid suspension is illegal (*see* Civil Service Law § 75 [3]).

All concur except CARNI, J.P., and CURRAN, J., who dissent and vote to confirm in the following memorandum: We respectfully dissent and vote to confirm the determination in its entirety. In our view, the determination of petitioner's guilt with respect to charges 1 and 2 is supported by substantial evidence, i.e., by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]; *see generally Matter of Marentette v City of Canandaigua*, 159 AD3d 1410, 1412 [4th Dept 2018], *lv denied* 31 NY3d 912 [2018]). Specifically here, contrary to the conclusion of the majority, we conclude that there was evidence from which a reasonable mind could conclude that petitioner did not intend to return the funds taken. Considering all four of the charges sustained against petitioner, we further conclude that the penalty of termination is not "so disproportionate to the offense[s] as to be shocking to one's

sense of fairness" and thus does not constitute an abuse of discretion as a matter of law (*Marentette*, 159 AD3d at 1412 [internal quotation marks omitted]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

61

CA 19-00144

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

STEPHEN T. DIVITO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PETER J. GLENNON AND SHANNON B. MEEGAN,
DEFENDANTS-RESPONDENTS.

FRANK A. ALOI, ROCHESTER (ROBERT J. LUNN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (LAURA K. FIGUERAS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered December 27, 2018. The order granted the motion of defendants to dismiss the complaint, dismissed the complaint and denied the cross motions of plaintiff for recusal and disqualification.

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

Memorandum: Plaintiff commenced this action after two judgments in two prior actions between, inter alia, plaintiff and defendant Shannon B. Meegan (defendant) were entered, awarding defendant attorneys' fees. In his complaint, plaintiff alleges that defendants fraudulently obtained those awards. Significantly, defendant did not appeal from the prior judgments or otherwise challenge those awards until he commenced this action almost a year later. Defendants moved to dismiss the complaint pursuant to, inter alia, CPLR 3211 (a) (1), and plaintiff now appeals from an order that, inter alia, granted defendants' motion on the ground that the complaint is barred by the doctrine of res judicata. We affirm.

Initially, defendant contends that Supreme Court erred in considering the attorney affirmation of defendant Peter J. Glennon submitted in support of the motion because, as a party to the action, Glennon could not submit an affirmation in lieu of an affidavit. As relevant here, CPLR 2106 (a) provides that "[t]he statement of an attorney . . . , who is not a party to an action, when subscribed and affirmed by him [or her] to be true . . . , may be served or filed in the action in lieu of and with the same force and effect as an affidavit." Although plaintiff is correct that Glennon, as both the attorney and a party, was required to submit an affidavit rather than

an affirmation, we nevertheless conclude that the court did not err in disregarding that defect because it did not prejudice "a substantial right" of plaintiff (CPLR 2001). In any event, defendants remedied the defect by supplementing their motion papers and submitting a properly notarized affidavit from Glennon that was identical to the previously submitted affirmation.

We further conclude that the court properly granted defendants' motion to dismiss the complaint based on the documentary evidence. "A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiff's] claim[s]' " (*Baumann Realtors, Inc. v First Columbia Century-30, LLC*, 113 AD3d 1091, 1092 [4th Dept 2014]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "[J]udicial records, . . . and any other papers, the contents of which are 'essentially undeniable,' would qualify as 'documentary evidence' in the proper case" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84-85 [2d Dept 2010]).

"[A] party seeking to invoke [res judicata] must show: (1) a final judgment on the merits, (2) identity or privity of parties, and (3) identity of claims in the two actions" (*Phillips v Burgio & Campofelice, Inc.*, 181 AD3d 1276, 1278 [4th Dept 2020] [internal quotation marks and emphasis omitted]; *see Paramount Pictures Corp. v Allianz Risk Transfer AG*, 31 NY3d 64, 73 [2018]; *see generally Matter of Hunter*, 4 NY3d 260, 269 [2005]; *Zayatz v Collins*, 48 AD3d 1287, 1289 [4th Dept 2008]). As relevant here, "absent unusual circumstances or explicit statutory authorization, the provisions of [a] judgment are final and binding on the parties, and may be modified only upon direct challenge" (*Rainbow v Swisher*, 72 NY2d 106, 110 [1988]; *see LoMaglio v LoMaglio*, 104 AD3d 1182, 1183 [4th Dept 2013]; *see also Matter of Allstate Ins. Co. v Williams*, 29 AD3d 688, 690 [2d Dept 2006]).

Here, the two prior judgments submitted by defendants constituted documentary evidence that conclusively demonstrated that plaintiff's underlying claims are barred by res judicata. It is undisputed that plaintiff did not appeal from, or otherwise directly challenge, either judgment. Moreover, this action involves the same relevant parties and arises out of the same transaction or series of transactions that served as the basis for those judgments (*see generally LoMaglio*, 104 AD3d at 1183; *Covanta Niagara, L.P. v Town of Amherst*, 70 AD3d 1440, 1441-1442 [4th Dept 2010]). Thus, plaintiff's claims here constitute an impermissible collateral attack and should have been resolved by either an appeal from or a motion to vacate the judgments (*see generally DeMartino v Lomonaco*, 155 AD3d 686, 688 [2d Dept 2017]).

In light of our determination, plaintiff's remaining contentions are academic.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

63

CA 20-01128

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

AMY L. ALEXANDER, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 131694.)

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (DAVID B. GEURTSEN OF COUNSEL), FOR CLAIMANT-RESPONDENT.

ROEMER WALLENS GOLD & MINEAUX LLP, ALBANY (MATTHEW J. KELLY OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered May 12, 2020. The order denied the motion of defendant for summary judgment.

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

Memorandum: Claimant commenced this action seeking damages for injuries that she sustained after she fell while participating in an obstacle course race at defendant's park. Defendant appeals from an order denying its motion for summary judgment dismissing the claim. We affirm.

Defendant contends that it established as a matter of law that it maintained the subject property in a reasonably safe condition under the circumstances and thus that the Court of Claims erred in denying its motion. As the party seeking summary judgment, defendant bore the initial burden of establishing as a matter of law that the defect that allegedly caused claimant's fall did not constitute a dangerous condition (*see generally Wiedenbeck v Lawrence*, 170 AD3d 1669, 1669 [4th Dept 2019]), that defendant did not create and lacked actual or constructive notice of the allegedly dangerous condition (*see Parslow v Leake*, 117 AD3d 55, 63 [4th Dept 2014]; *see generally Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]), or that the allegedly dangerous condition was not a proximate cause of claimant's fall (*see Smith v Szpilewski*, 139 AD3d 1342, 1342-1343 [4th Dept 2016]). Contrary to defendant's contention, we conclude that it failed to meet that burden.

" '[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar

facts and circumstances of each case' . . . , and the existence or nonexistence of a defect or dangerous condition 'is generally a question of fact for the jury' " (*Wiedenbeck*, 170 AD3d at 1669, quoting *Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). Here, we conclude that defendant failed to establish as a matter of law that the defect that allegedly caused claimant's fall did not constitute a dangerous condition (*see generally Beagle v City of Buffalo*, 178 AD3d 1363, 1366-1367 [4th Dept 2019]). We also reject defendant's contention that it met its initial burden on the motion by establishing as a matter of law that claimant could not identify a specific defect that caused her fall without engaging in speculation. "It is well established . . . that [a] moving party must affirmatively [demonstrate] the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof" (*Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364 [4th Dept 2012] [internal quotation marks omitted]; *see Brady v City of N. Tonawanda*, 161 AD3d 1526, 1527 [4th Dept 2018]). Here, in support of the motion, defendant submitted, inter alia, claimant's testimony that she fell into a hidden rut that measured five inches deep by five inches wide and ran the length of the field, thereby rendering any other potential cause of her fall "sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Artessa v City of Utica*, 23 AD3d 1148, 1148 [4th Dept 2005] [internal quotation marks omitted]; *see Nolan v Onondaga County*, 61 AD3d 1431, 1432 [4th Dept 2009]). Contrary to defendant's further contention, we conclude that it failed to meet its initial burden by establishing that it lacked constructive notice of the defect inasmuch as that "burden cannot be satisfied merely by pointing out gaps in [claimant's] case, as . . . defendant did here" (*Baines v G&D Ventures, Inc.*, 64 AD3d 528, 529 [2d Dept 2009]).

Additionally, defendant contends that the court erred in denying its motion because claimant's claim is barred by the doctrine of assumption of the risk. It is well settled that "[a claimant] will not be held to have assumed those risks that are not inherent . . . , i.e., not ordinary and necessary in the sport" (*Lamey v Foley*, 188 AD2d 157, 164 [4th Dept 1993] [internal quotation marks omitted]; *see Wyzykowski v State of New York*, 162 AD3d 1705, 1706 [4th Dept 2018]). Here, although the risk of falling while running an obstacle course race is " 'inherent in and arise[s] out of the nature of the sport generally' " (*Custodi v Town of Amherst*, 20 NY3d 83, 88 [2012], quoting *Morgan v State of New York*, 90 NY2d 471, 484 [1997]; *see Litz v Clinton Cent. Sch. Dist.*, 126 AD3d 1306, 1309-1310 [4th Dept 2015]), we conclude that the evidence submitted by defendant in support of its motion failed to establish that the alleged defect was inherent in the sport (*cf. Sykes v County of Erie*, 94 NY2d 912, 913 [2000]; *see generally Morgan*, 90 NY2d at 488). Contrary to defendant's final contention, under the circumstances presented here, claimant's awareness of the generally poor condition of the race course and her decision to participate in the race relate only to the

issue of her comparative fault, if any (*see Wyzykowski*, 162 AD3d at 1706).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

68

CA 19-01941

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

IN THE MATTER OF ACADEMY SQUARE APARTMENTS
HOUSING DEVELOPMENT FUND COMPANY, INC.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ASSESSOR OF CITY OF UTICA AND THE CITY OF UTICA,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (KATHRYN F. HARTNETT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered September 26, 2019 in a proceeding pursuant to RPTL article 7. The order, among other things, denied respondents' motion to dismiss and granted petitioner's cross motion for, inter alia, summary judgment on the petition.

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

Same memorandum as in *Academy Square Apts. Hous. Dev. Fund, Inc. v Assessor of City of Utica* ([appeal No. 2] — AD3d — [Apr. 30, 2021] [4th Dept 2021]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

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CA 20-00169

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

IN THE MATTER OF ACADEMY SQUARE APARTMENTS
HOUSING DEVELOPMENT FUND COMPANY, INC.,
PETITIONER-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ASSESSOR OF CITY OF UTICA, RESPONDENT-DEFENDANT,
AND THE CITY OF UTICA, RESPONDENT-DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (KATHRYN F. HARTNETT OF COUNSEL), FOR RESPONDENT-DEFENDANT-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Erin P. Gall, J.), entered January 22, 2020 in a hybrid RPTL article 7 proceeding and declaratory judgment action. The judgment, among other things, granted the amended petition-complaint.

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

Memorandum: The petitioner in appeal No. 1 and the petitioner-plaintiff in appeal No. 2 (petitioner) is the titled owner of four tax parcels in the City of Utica (City), a respondent in appeal No. 1 and a respondent-defendant in appeal No. 2, and is a New York not-for-profit charitable corporation pursuant to section 201 of the Not-for-Profit Corporation Law and article XI of the Private Housing Finance Law. In 2017, petitioner submitted an application to respondents in appeal No. 1 and respondents-defendants in appeal No. 2 (respondents) for a real property tax exemption on the subject parcels pursuant to RPTL 420-a. That application was denied, and that denial was upheld by the Board of Assessment Review. Petitioner then commenced a proceeding pursuant to RPTL article 7 seeking an order "correcting the assessment of real property of the [p]etitioner to wholly exempt" pursuant to RPTL 420-a. In appeal No. 1, respondents appeal from an order that, inter alia, denied their motion to dismiss the petition; granted petitioner's cross motion for, among other things, summary judgment on the petition; and determined that the subject parcels shall be placed on the wholly exempt tax roll pursuant to RPTL 420-a. After that order was entered, respondents moved for clarification of the order regarding, inter alia, whether a 1993 tax agreement was

still in effect and binding on petitioner. The parties thereafter agreed to have petitioner amend its petition to add a cause of action for declaratory judgment regarding the effectiveness of the tax agreement in lieu of a determination of respondents' motion for clarification. Petitioner filed an amended petition-complaint (amended petition) wherein it again sought, as a first cause of action, a tax exemption under RPTL 420-a. In its second cause of action, petitioner sought a judgment declaring that the 1993 tax agreement had no force and effect as of August 1, 2017 and that petitioner had no obligation to make payments in lieu of taxes under that agreement. Thereafter, respondents moved to dismiss the amended petition, which Supreme Court, with consent of the parties, converted to a motion for summary judgment. In appeal No. 2, the City appeals from a judgment that, inter alia, denied respondents' motion and instead granted petitioner summary judgment on the amended petition after searching the record.

Preliminarily, the amended petition superseded the original petition and became the only operative pleading; thus, we dismiss appeal No. 1 as moot (*see generally Basile v Riley*, 188 AD3d 1607, 1608 [4th Dept 2020]).

Contrary to the City's contention in appeal No. 2, we conclude that the court properly determined that the evidence established as a matter of law that petitioner was entitled to a tax exemption pursuant to RPTL 420-a. The City concedes that petitioner satisfied the requisite criteria for the RPTL 420-a tax exemption inasmuch as petitioner is organized and exists only for charitable purposes and owns the subject parcels to provide housing for persons of low income at below market rates (*see generally Matter of Adult Home at Erie Sta., Inc. v Assessor & Bd. of Assessment Review of City of Middletown*, 10 NY3d 205, 214 [2008]; *Matter of TAP, Inc. v Dimitriadis*, 49 AD3d 947, 947-948 [3d Dept 2008]). Instead, the City contends that petitioner, which is organized and operated as a Housing Development Fund Company (HDFC) pursuant to the Private Housing Finance Law, cannot be considered a "charitable operation" under RPTL 420-a "because it has a special corporate form and receives state benefits in exchange for enhanced regulation." We reject that contention. There is nothing in RPTL 420-a or the Private Housing Finance Law that disqualifies an HDFC from receiving a tax exemption under RPTL 420-a. Furthermore, there is nothing in either statute that supports the City's position that the receipt of assistance and favorable mortgage terms by petitioner negates its charitable status. Upon our review of the relevant sections of the Private Housing Finance Law, including sections 571 and 577, petitioner's classification as an HDFC does not affect whether it qualifies for a tax exemption pursuant to RPTL 420-a.

We further agree with petitioner that the relevant sections of the RPTL and Private Housing Finance Law do not conflict and can be read together. Specifically, an HDFC project is eligible for a tax exemption under RPTL 420-a only if it satisfies the requirements of that section. An HDFC project that is not eligible for an exemption under RPTL 420-a is eligible for the permissive exemption under

Private Housing Finance Law § 577. Consequently, we reject the City's contention that the "legislature clearly intended for [the] Private Housing Finance Law to sweep all HDFC's into its tax exemption regime."

Contrary to the City's final contention in appeal No. 2, petitioner did not ratify the 1993 tax agreement. "The doctrine of ratification presupposes the existence of a contract which by all appearances is valid and binding" (*Leasing Serv. Corp. v Vita Italian Rest.*, 171 AD2d 926, 927 [3d Dept 1991]). Here, there is no dispute that petitioner was not a party to the 1993 tax agreement and that the tax agreement was not assigned to it. Consequently, the doctrine of ratification is not applicable here (*see generally id.*).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

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TP 20-01098

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

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

V MEMORANDUM AND ORDER

GSN TRANSPORTATION, GURNAKE SINGH, OWNER AND DARELL HARLOW, RESPONDENTS.

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

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Gerard J. Neri, J.], entered August 27, 2020) for enforcement of the final order that petitioner issued on September 21, 2017.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is granted, and respondents GSN Transportation and Gurnake Singh are directed to pay respondent Darell Harlow the sum of $7,500 as compensatory damages with interest at a rate of 9% per annum commencing September 21, 2017 and to pay the State of New York the sum of $2,000 for a civil fine and penalty with interest at a rate of 9% per annum on any amount paid after November 20, 2017.

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to enforce the final order of its Commissioner that, inter alia, found that respondents GSN Transportation and Gurnake Singh (collectively, respondents) unlawfully discriminated against respondent Darell Harlow (complainant) by subjecting him to a hostile work environment on the basis of his disability. Our review of the determination, which adopted with one amendment the findings of the Administrative Law Judge who conducted the public hearing, is limited to the issue whether it is supported by substantial evidence, i.e., whether there exists " 'such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' " (*Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331 [2003]; *see Matter of Russo v New York State Div. of Human Rights*, 137 AD3d 1600, 1600 [4th Dept 2016]; *Matter of Bowler v New York State Div. of Human Rights*, 77 AD3d 1380, 1381 [4th Dept 2010], *lv denied* 16 NY3d 709 [2011]). "Courts may not weigh the evidence or reject the [Commissioner's] determination where the evidence is

conflicting and room for choice exists. Thus, when a rational basis for the conclusion adopted by the Commissioner is found, the judicial function is exhausted" (*Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106 [1987]; *see Russo*, 137 AD3d at 1600).

Here, upon our review of the record, we conclude there is substantial evidence supporting the Commissioner's determination that respondents subjected complainant to a hostile work environment inasmuch as " 'the workplace [was] permeated with discriminatory intimidation, ridicule, and insult that [was] sufficiently severe or pervasive to alter the conditions of the [complainant's] employment and create an abusive working environment' " (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 310 [2004], quoting *Harris v Forklift Sys., Inc.*, 510 US 17, 21 [1993]; *see Matter of Anagnostakos v New York State Div. of Human Rights*, 46 AD3d 992, 993 [3d Dept 2007]). In addition, we agree with petitioner that "[s]ubstantial evidence further supports the determination that [Singh], as owner . . . of [GSN Transportation], was individually liable for the discrimination" (*Matter of State Div. of Human Rights v Koch*, 60 AD3d 777, 777-778 [2d Dept 2009]; *see Matter of New York State Div. of Human Rights v Nancy Potenza Design & Bldg. Servs., Inc.*, 87 AD3d 1365, 1365-1366 [4th Dept 2011]).

We also agree with petitioner that the award of $7,500 in compensatory damages for mental anguish and humiliation is "reasonably related to the wrongdoing, . . . supported by substantial evidence, and . . . comparable to awards in similar cases" (*Matter of Stellar Dental Mgt. LLC v New York State Div. of Human Rights*, 162 AD3d 1655, 1658 [4th Dept 2018]; *see Matter of Mohawk Val. Orthopedics, LLP v Carcone*, 66 AD3d 1350, 1351 [4th Dept 2009]; *Matter of Manhattan & Bronx Surface Tr. Operating Auth. v New York State Div. of Human Rights*, 225 AD2d 553, 554 [2d Dept 1996]). Finally, we agree with petitioner that the Commissioner properly imposed a $2,000 civil fine and penalty. "Judicial review of an administrative penalty is limited to whether the measure or mode of penalty . . . constitutes an abuse of discretion as a matter of law . . . [A] penalty must be upheld unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law" (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001], *rearg denied* 96 NY2d 854 [2001]) and, here, the penalty is not an abuse of discretion as a matter of law (*see Matter of County of Erie v New York State Div. of Human Rights*, 121 AD3d 1564, 1566 [4th Dept 2014]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

152

CA 19-02301

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

KARLA W., INDIVIDUALLY AND AS PARENT AND
NATURAL GUARDIAN OF T.H., AN INFANT,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CARLISHA K.M., AS PARENT AND NATURAL GUARDIAN
OF A.H., AN INFANT, ET AL., DEFENDANTS,
CITY OF BUFFALO, AND BOARD OF EDUCATION FOR
CITY SCHOOL DISTRICT OF CITY OF BUFFALO,
DEFENDANTS-RESPONDENTS.

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFF-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CHRISTOPHER R. POOLE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered November 25, 2019. The order granted the motion of defendants City of Buffalo and Board of Education for City School District of City of Buffalo to dismiss the complaint against them.

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

Memorandum: Plaintiff commenced this action against defendants Charter School of Applied Technologies (CSAT), the City of Buffalo (City), and the Board of Education for the City School District of the City of Buffalo (Board), among others, to recover damages for personal injuries sustained by her daughter when her daughter was assaulted by three other students in a restroom at CSAT middle school. As relevant on this appeal, plaintiff asserted causes of action against the City and Board (collectively, defendants) for negligence, negligent supervision, negligent monitoring, inadequate security, and negligent performance of a governmental function. Defendants thereafter moved to dismiss the complaint against them pursuant to CPLR 3211 (a) (7) on the ground that they had no authority over CSAT. Supreme Court granted the motion without prejudice, and we affirm.

In the context of a motion to dismiss the complaint, we must "accept the facts as alleged in the complaint as true, accord plaintiff[] 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]). "It is

well established that affidavits and other evidentiary materials are admissible to support a motion to dismiss pursuant to CPLR 3211 (a) (7) . . . , and it is equally well established that such affidavits and materials will warrant dismissal under that provision if they establish *conclusively* that [the] plaintiff has no cause of action" (*Jeanty v State of New York*, 175 AD3d 1073, 1074 [4th Dept 2019], *lv denied* 34 NY3d 912 [2020] [internal quotation marks omitted]).

Contrary to plaintiff's contention, defendants' submissions on their motion, including the affidavit of the executive director of plant services and school planning of the Buffalo Public Schools, established conclusively that plaintiff has no cause of action. The executive director stated that CSAT is not in the City of Buffalo Public Schools system, but rather is an independently operated charter school. Consequently, CSAT is not under the purview of defendants. Although "a school has a duty of care while children are in its physical custody or orbit of authority" (*Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 378 [1995]) and has "a duty to adequately supervise the students in [its] charge" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]), defendants owed no duty to plaintiff's daughter here inasmuch as the alleged assault took place at CSAT, an independent and autonomous public school with its own employees, oversight and compliance authority (*see* Education Law §§ 2853 [1] [c], [f]; [2-a]; 2854 [3] [a]; 2855; *see generally Matter of DeVera v Elia*, 32 NY3d 423, 429-431 [2018]).

Contrary to plaintiff's related contention, the court did not abuse its discretion by refusing to deny the motion as premature pursuant to CPLR 3211 (d) (*see generally Herzog v Town of Thompson*, 216 AD2d 801, 803-804 [3d Dept 1995]; *Copeland v Weyerhaeuser Co.*, 122 AD2d 561, 561 [4th Dept 1986]; *cf. generally Gonzalez-Doldan v Kaleida Health, Inc.*, 160 AD3d 1384, 1384 [4th Dept 2018]). We have reviewed plaintiff's remaining contention and conclude that it does not warrant modification or reversal of the order.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

157

CA 20-00665

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

COUNTY OF ERIE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GATEWAY-LONGVIEW, INC., ET AL., DEFENDANTS,
AND PHILADELPHIA INSURANCE COMPANIES,
DEFENDANT-RESPONDENT.

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

MARSHALL CONWAY BRADLEY GOLLUB & WEISSMAN, P.C., NEW YORK CITY (CHRISTOPHER T. BRADLEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered November 7, 2019. The judgment, insofar as appealed from, granted the motion of defendant Philadelphia Insurance Companies for summary judgment declaring that it had no obligation to defend or indemnify plaintiff.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Philadelphia Insurance Companies is denied, and the declarations are vacated.

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that the Philadelphia Insurance Companies (defendant) is obligated to defend and indemnify it as an additional insured in the underlying actions. Defendant moved for summary judgment, inter alia, declaring that it had no obligation to defend or indemnify plaintiff on the ground that plaintiff is not an additional insured under the relevant policy. Supreme Court granted the motion. Plaintiff appeals from the ensuing judgment to the extent that it granted the motion, and we reverse the judgment insofar as appealed from.

Contrary to plaintiff's initial contention, the court did not abuse its discretion in allowing defendant on its motion to submit a certified copy of the subject insurance policy in reply (*see* CPLR 2001; *Bacon & Seiler Constructors, Inc. v Solvay Iron Works, Inc.*, 185 AD3d 1390, 1391-1392 [4th Dept 2020]; *Gallway v Muintir, LLC*, 142 AD3d 948, 949 [2d Dept 2016]; *see also Calhoun v Midrox Ins. Co.*, 165 AD3d 1450, 1451 n [3d Dept 2018]). Defendant raised no new arguments regarding the policy and, instead, simply corrected the defect in admissibility by providing a certified copy of the same policy that it

had provided in its moving papers (*cf. DiPizio v DiPizio*, 81 AD3d 1369, 1370 [4th Dept 2011]; *Oeffler v Miles, Inc.*, 241 AD2d 822, 824 [3d Dept 1997]).

We agree with plaintiff, however, that defendant failed to satisfy its initial burden on the motion of establishing that plaintiff was not entitled to additional insured coverage under defendant's policy. "It is well established that a certificate of insurance, by itself, does not confer insurance coverage, particularly [where, as here,] the certificate expressly provides that it is issued as a matter of information only and confers no rights upon the certificate holder [and] does not amend, extend or alter the coverage afforded by the policies" (*Landsman Dev. Corp. v RLI Ins. Co.*, 149 AD3d 1489, 1490 [4th Dept 2017] [internal quotation marks omitted]). "A certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists" (*id*. at 1490-1491 [internal quotation marks omitted]). " 'Nevertheless, an insurance company that issues a certificate of insurance naming a particular party as an additional insured may be estopped from denying coverage to that party where the party reasonably relies on the certificate of insurance to its detriment' " (*id*. at 1491). " 'For estoppel based upon the issuance of a certificate of insurance to apply, however, the certificate must have been issued by the insurer itself or by an agent of the insurer' " (*id*.).

Here, we conclude that there is an issue of fact whether defendant is estopped from denying additional insured coverage to plaintiff. In its moving papers, defendant did not present any evidence addressing plaintiff's reliance on the certificate of insurance or establishing that "neither it nor an authorized agent issued the certificate[] of insurance" (*id*.; *cf. Sevenson Envtl. Servs., Inc. v Sirius Am. Ins. Co.*, 74 AD3d 1751, 1753 [4th Dept 2010]). Defendant's "[f]ailure to make such a [prima facie] showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Finally, even assuming, arguendo, that defendant is correct that the court's earlier denial of a prior motion made by plaintiff for summary judgment declaring plaintiff to be an insured under defendant's policy constitutes law of the case, "we are 'not bound by the doctrine of law of the case, and may make [our] own determinations' " (*Durham Commercial Capital Corp. v Arunachalam*, 181 AD3d 1348, 1349 [4th Dept 2020]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

164

KA 16-01902

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN R. MCLAUGHLIN, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered June 23, 2016. The judgment convicted defendant upon his plea of guilty of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]). As an initial matter, we agree with defendant that he did not validly waive his right to appeal because County Court's oral colloquy and the written waiver of the right to appeal provided defendant with erroneous information about the scope of that waiver and failed to identify that certain rights would survive the waiver (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Crogan*, 181 AD3d 1212, 1212-1213 [4th Dept 2020], *lv denied* 35 NY3d 1026 [2020]).

We reject defendant's contention that the court erred in refusing to suppress evidence obtained as the result of warrantless searches of the home in which defendant resided and the surrounding premises. "It is well established that the police need not procure a warrant in order to conduct a lawful search when they have obtained the voluntary consent of a party possessing the requisite authority or control over the premises or property to be inspected" (*People v Adams*, 53 NY2d 1, 8 [1981], *rearg denied* 54 NY2d 832 [1981], *cert denied* 454 US 854 [1981]). Here, the testimony at the suppression hearing established that the homeowner "read the form containing the consent to search the premises, indicated that he understood it, and signed it" (*People v Colon*, 151 AD3d 1915, 1918 [4th Dept 2017]). We conclude, under the totality of the circumstances, that the homeowner provided voluntary consent and was not "under duress or compelled by law enforcement to

consent to the search" (*People v Nance*, 132 AD3d 1389, 1389 [4th Dept 2015], *lv denied* 26 NY3d 1091 [2015]).

Contrary to defendant's further contention, the court did not err in refusing to suppress evidence obtained during the execution of a warrant to search defendant's cell phone. "It is well settled that a search warrant may be issued only upon a showing of probable cause to believe that a crime has occurred, is occurring, or is about to occur . . . , and where there is sufficient evidence from which to form a reasonable belief that evidence of the crime may be found inside the location sought to be searched" (*People v Moxley*, 137 AD3d 1655, 1656 [4th Dept 2016]). Here, the factual allegations in the warrant application "provided probable cause to search the cell phone that was recovered from defendant at the time of his arrest" (*People v Hackett*, 166 AD3d 1483, 1484 [4th Dept 2018], *lv denied* 32 NY3d 1204 [2019], *reconsideration denied* 33 NY3d 949 [2019]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

176

CA 20-00857

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

SUSAN E. HINT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL D. HINT, DEFENDANT-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, FOR DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Terrence M. Parker, A.J.), dated October 29, 2019. The order, among other things, ordered defendant to pay maintenance and child support to plaintiff.

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

Memorandum: In this divorce action, defendant husband appeals from an order that, inter alia, imputed to him an annual income of $54,995 for purposes of calculating child support and maintenance payments. We affirm.

"Trial courts . . . possess considerable discretion to impute income in fashioning a child support award . . . [, and such an] imputation of income will not be disturbed so long as there is record support for [it]" (*Matter of Muok v Muok*, 138 AD3d 1458, 1459 [4th Dept 2016] [internal quotation marks omitted]). Contrary to the husband's contention, when determining his imputed income, Supreme Court did not abuse its discretion in considering his gross income as "reported in the most recent federal income tax return" (Domestic Relations Law § 240 [1-b] [b] [5] [i]), and the husband's non-income producing real property holdings (*see* § 240 [1-b] [b] [5] [iv] [A]), which consist of three homes on significant acreage with a total value of nearly $300,000. Although the husband contends that his gross income as reported in his tax return is a misrepresentation of his actual income due to significant expenses, " 'where a party's account is not believable, the court is justified in finding a true or potential income higher than that claimed' " (*Matter of Monroe County Support Collection Unit v Wills*, 21 AD3d 1331, 1332 [4th Dept 2005], *lv denied* 6 NY3d 705 [2006]). Here, the record establishes that the husband's "credibility was impeached, and thus the court was entitled to discredit the accounting of . . . financial resources [that he]

provided" (*id.*; *see Coleman v Coleman*, 82 AD3d 1635, 1635 [4th Dept 2011]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

190

KA 18-00837

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MEMPHIS DELACRUZ, DEFENDANT-APPELLANT.

ANTHONY J. LAFACHE, UTICA, FOR DEFENDANT-APPELLANT.

MEMPHIS DELACRUZ, DEFENDANT-APPELLANT PRO SE.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (EVAN A. ESSWEIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Matthew J. Doran, A.J.), rendered September 12, 2017. The judgment convicted defendant upon a jury verdict of robbery in the first degree (two counts), robbery in the second degree (two counts), burglary in the first degree (three counts), burglary in the second degree and assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts each of robbery in the first degree (Penal Law § 160.15 [2], [3]) and robbery in the second degree (§ 160.10 [1], [2] [a]). We affirm.

Contrary to defendant's contention in his main brief, viewing the evidence in the light most favorable to the People (*see People v Williams*, 84 NY2d 925, 926 [1994]), we conclude that the evidence is legally sufficient to establish his identity as one of the perpetrators of the crimes (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). 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 also reject defendant's contention in his main brief that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although defendant contends that the victim's testimony was not credible, we note that " '[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury' " (*People v Carson*, 122 AD3d 1391, 1393 [4th Dept 2014], *lv denied* 25 NY3d 1161 [2015]), and we see no reason to disturb the jury's resolution of those issues.

Contrary to defendant's further contention in his main brief, the charges against defendant and the codefendants were properly joined inasmuch as they were based upon a common scheme or plan (*see* CPL 200.40 [1] [b]; *People v Wright*, 166 AD3d 1022, 1023-1024 [2d Dept 2018], *lv denied* 32 NY3d 1211 [2019]). Moreover, the evidence against defendant and the codefendants was "supplied by the same eyewitness . . . , and . . . defendant's defense was by no means 'antagonistic' to that of the codefendant[s]" (*Wright*, 166 AD3d at 1024, citing *People v Mahboubian*, 74 NY2d 174, 186 [1989]).

Defendant's contention in his main brief that the People improperly failed to seek an advance ruling concerning the admissibility of evidence of defendant's involvement in a drug transaction is preserved for our review only insofar as it relates to the victim's testimony regarding that transaction; defense counsel failed to object to any such references made by the prosecution during opening statements (*see People v Strauss*, 147 AD3d 1426, 1426 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017], *reconsideration denied* 30 NY3d 953 [2017]). In any event, we reject that contention. "The court has discretion to admit evidence despite the failure of the People to provide advance notice of their intent to present such evidence . . . , particularly where[, as here,] the defendant [is] aware of the evidence" (*People v MacLean*, 48 AD3d 1215, 1215 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008], *reconsideration denied* 11 NY3d 790 [2008]). Defendant's contention in his pro se supplemental brief that County Court erred in failing to give a limiting instruction with respect to that evidence is unpreserved for our review (*see People v Couser* [appeal No. 1], 126 AD3d 1419, 1420 [4th Dept 2015], *affd* 28 NY3d 368 [2016]).

Defendant also failed to preserve for our review the contention in his pro se supplemental brief that the court erred in sua sponte instructing the jury not to draw any adverse inference from defendant's failure to testify (*see People v Robinson*, 1 AD3d 985, 986 [4th Dept 2003], *lv denied* 1 NY3d 633 [2004], *reconsideration denied* 2 NY3d 805 [2004]). In any event, under the circumstances of this case, we conclude that the court did not abuse its discretion in giving that instruction (*see People v Scully*, 61 AD3d 1364, 1365 [4th Dept 2009], *affd* 14 NY3d 861 [2010]; *see generally People v Vereen*, 45 NY2d 856, 857 [1978]). Contrary to defendant's contention in his main brief, the sentence is not unduly harsh or severe.

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

198

CA 20-00701

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

AUDREY E. SILLS, AS EXECUTOR OF THE
ESTATE OF ANGELINE V. SILLS, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOAN ROYSTON, DEFENDANT-APPELLANT.

IN THE MATTER OF AUDREY E. SILLS, AS EXECUTOR
OF THE ESTATE OF ANGELINE V. SILLS,
DECEASED, PETITIONER-RESPONDENT,

V

FLEET NATIONAL BANK, ET AL., RESPONDENTS,
JOAN ROYSTON AND KIRK RICHARDSON,
RESPONDENTS-APPELLANTS.

LAW OFFICE OF RONALD R. BENJAMIN, BINGHAMTON (RONALD R. BENJAMIN OF COUNSEL), FOR DEFENDANT-APPELLANT AND RESPONDENTS-APPELLANTS.

LAW OFFICE OF PAUL ARGENTIERI, HORNELL (PAUL A. ARGENTIERI OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Patrick F. McAllister, A.J.), entered January 24, 2020. The order, insofar as appealed from, granted the motion of plaintiff-petitioner to enforce a settlement agreement and directed defendant-respondent Joan Royston to pay $300,000 to the Estate of Angeline V. Sills.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We write only to note that the contentions of defendant-respondent Joan Royston and respondent Kirk Richardson questioning whether all the material terms for a contract or an intent to be bound were established are raised for the first time on appeal and thus are not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

269

CA 19-01140

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

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

V MEMORANDUM AND ORDER

MICHAEL M., AN INMATE IN THE CUSTODY OF NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-APPELLANT, FOR CIVIL MANAGEMENT PURSUANT TO ARTICLE 10 OF THE MENTAL HYGIENE LAW.

THE SAGE LAW FIRM GROUP PLLC, BUFFALO (KATHRYN FRIEDMAN 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, Niagara County (Sara Sheldon, A.J.), entered January 24, 2019 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 reversed on the law without costs and a new trial is granted.

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility. Contrary to respondent's contention, petitioner established by clear and convincing evidence that respondent suffers from a mental abnormality as defined by Mental Hygiene Law § 10.03 (i) by establishing "the existence of a predicate condition, disease or disorder" that it linked "to [respondent's] predisposition to commit conduct constituting a sex offense and to [respondent's] serious difficulty in controlling such conduct" (*Matter of State of New York v Dennis K.*, 27 NY3d 718, 726 [2016], *cert denied* — US —, 137 S Ct 579 [2016] [internal quotation marks omitted]).

We agree with respondent, however, that Supreme Court erred in denying his request to proceed pro se. We have recognized that a respondent in a Mental Hygiene Law article 10 proceeding "can effectively waive his or her statutory right to counsel" once the court "conducts a searching inquiry to ensure that the waiver is

unequivocal, voluntary, and intelligent" (*Matter of State of New York v Joseph R.*, 189 AD3d 2126, 2128-2129 [4th Dept 2020] [internal quotation marks omitted]; *see Matter of Richard R. v State of New York*, 189 AD3d 2119, 2121 [4th Dept 2020]; *Matter of State of New York v Raul L.*, 120 AD3d 52, 63 [2d Dept 2014]). In the instant case, respondent made a timely and unequivocal request to proceed pro se, the court conducted the requisite searching inquiry, and respondent repeatedly evinced an understanding of each of the court's warnings to him regarding the possible consequences of proceeding pro se (*see generally People v Hall*, 49 AD3d 1180, 1181 [4th Dept 2008]). The court, however, denied the request because it believed that respondent "[had] a good chance of prevailing" but did not believe that respondent "[had] a chance . . . of prevailing if [the court] let [respondent] go pro se."

On the record before us, we conclude that the court's sole rationale for denying the request was its belief that respondent lacked legal training and an understanding of the law, but that is not an appropriate basis on which to deny a request to proceed pro se (*see id.*). "[M]ere ignorance of the law cannot vitiate an effective waiver of counsel as long as the defendant was cognizant of the dangers of waiving counsel at the time it was made" (*id.*; *see People v Ryan*, 82 NY2d 497, 507 [1993]). Thus, under these circumstances, we agree with respondent that the court's rationale for denying his request to proceed pro se was error requiring reversal of the order and a new trial (*see Hall*, 49 AD3d at 1182).

In light of our determination, we do not address respondent's remaining contentions.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

290

CA 19-00879

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

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

V MEMORANDUM AND ORDER

STEVEN A., A PATIENT AT CENTRAL NEW YORK PSYCHIATRIC CENTER, RESPONDENT-APPELLANT, FOR CIVIL MANAGEMENT PURSUANT TO ARTICLE 10 OF THE MENTAL HYGIENE LAW.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered December 27, 2018 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, adjudged that respondent is a dangerous sex offender requiring confinement.

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

Memorandum: Respondent appeals from an order revoking his regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement, and committing him to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*). We affirm.

Contrary to respondent's contention, petitioner established by clear and convincing evidence (*see* Mental Hygiene Law § 10.11 [d] [4]) that respondent is a dangerous sex offender requiring confinement (*see* § 10.03 [e]; *see generally Matter of State of New York v George N.*, 160 AD3d 28, 30 [4th Dept 2018]). The evidence at the SIST revocation hearing established that respondent had scored "[w]ell [a]bove [a]verage" for sexual recidivism based on the Static-99R assessment tool; that he failed to fully engage in sex offender treatment; that he committed multiple SIST violations that bore on his risk of sexually reoffending, including possession of a smart phone containing, among other things, a pornographic video of himself engaging in group sex; and that he had violated other conditions of SIST that, although not sexual in nature, nevertheless also bore on

his risk of recidivism (*see generally Matter of State of New York v Jamaal A.*, 167 AD3d 1526, 1527 [4th Dept 2018], *lv denied* 33 NY3d 902 [2019]; *Matter of State of New York v Edward T.*, 161 AD3d 1589, 1589 [4th Dept 2018]).

We also reject respondent's contention that he was denied effective assistance of counsel. Respondent was entitled to meaningful representation in the context of this Mental Hygiene Law article 10 proceeding (*see Matter of State of New York v Campany*, 77 AD3d 92, 93, 98-99 [4th Dept 2010], *lv denied* 15 NY3d 713 [2010]), but it is his burden on appeal to demonstrate the absence of strategic or other legitimate explanations for his attorney's alleged deficiencies (*see Matter of State of New York v Carter*, 100 AD3d 1438, 1439 [4th Dept 2012]; *see also People v Caban*, 5 NY3d 143, 154 [2005]). Respondent contends that his counsel was ineffective for allowing the expert testifying on his behalf at the SIST revocation hearing to concede that he suffers from a mental abnormality. However, the issue whether respondent suffers from a mental abnormality was not before Supreme Court at the SIST revocation hearing (*see Matter of State of New York v Breeden*, 140 AD3d 1649, 1649 [4th Dept 2016]; *see also Matter of State of New York v David HH.*, 147 AD3d 1230, 1233 [3d Dept 2017], *lv denied* 29 NY3d 913 [2017]) and, in any event, conceding the issue could have been part of a legitimate strategy to present expert testimony that shared some common ground with the testimony of petitioner's expert, but that differed from the testimony of petitioner's expert with respect to the issues of respondent's dangerousness and need for confinement.

We have considered respondent's remaining contentions and conclude that they do not warrant modification or reversal of the order.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

316.1
CA 20-00651
PRESENT: SMITH, J.P., CARNI, LINDLEY, TROUTMAN, AND BANNISTER, JJ.

SHENNA SNOW, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROCHESTER POLICE OFFICER CHRISTOPHER SCHREIER
AND ROCHESTER POLICE OFFICER T. WASSINGER,
DEFENDANTS-APPELLANTS.

TIMOTHY R. CURTIN, CORPORATION COUNSEL, ROCHESTER (CHRISTOPHER S. NOONE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered November 14, 2019. The order denied in part defendants' motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking summary judgment dismissing the first cause of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she suffered when defendants arrested her at a restaurant following a dispute between plaintiff and members of the restaurant's staff. The record establishes that plaintiff purchased food from the restaurant but became upset and confronted the staff at length after concluding that she had been given the wrong order and incorrect change. The restaurant staff called the police. Defendants responded and, upon their arrival, ordered plaintiff to leave the restaurant as requested by its staff. Defendants then spoke with plaintiff outside; according to defendants, plaintiff was still upset and refused to leave the storefront. Defendants then attempted to handcuff plaintiff and, while moving her hands behind her back, broke plaintiff's arm.

Plaintiff's amended complaint asserted causes of action for false arrest in violation of 42 USC § 1983, use of excessive force in violation of 42 USC § 1983, battery, and assault, as well as a claim for punitive damages. Defendants moved for summary judgment dismissing the amended complaint. Supreme Court denied the motion except insofar as it sought dismissal of the punitive damages claim. Defendants appeal.

We agree with defendants that the court erred in denying their motion with respect to the first cause of action, for false arrest, and we therefore modify the order accordingly. Defendants met their initial burden on the motion by establishing that they had probable cause to arrest plaintiff, and plaintiff failed to raise a triable issue of fact in opposition (*see Durand v South Nassau Hosp.*, 172 AD3d 1318, 1320 [2d Dept 2019]). "[T]he existence of probable cause is an absolute defense to a false arrest claim" (*Jaegly v Couch*, 439 F3d 149, 152 [2d Cir 2006]). This is so even if probable cause exists with respect to an offense other than the one actually invoked at the time of arrest (*see Devenpeck v Alford*, 543 US 146, 153 [2004]; *see generally Brown v Hoffman*, 122 AD3d 1149, 1150 [3d Dept 2014]). Here, although plaintiff lawfully entered the restaurant premises as a customer, her license to remain was revoked when she was asked to leave after she began arguing with the staff. When plaintiff refused to leave the restaurant property at the request of its staff, she committed a trespass (*see People v Sylvester*, 52 Misc 3d 144[A], 2016 NY Slip Op 51286[U], *1 [App Term 2016], *lv denied* 28 NY3d 1075 [2016]; *People v Seabrook*, 46 Misc 3d 152[A], 2015 NY Slip Op 50338[U], *1 [App Term 2015], *lv denied* 26 NY3d 1112 [2016]; *see generally People v Leonard*, 62 NY2d 404, 408 [1984]; *People v Licata*, 28 NY2d 113, 117 [1971]). Inasmuch as plaintiff committed an ongoing trespass in defendants' presence (*see* CPL 140.10 [1] [a]), defendants had probable cause to arrest plaintiff for that violation (*see Durand*, 172 AD3d at 1318, 1320; *Downs v Town of Guilderland*, 70 AD3d 1228, 1232 [3d Dept 2010], *appeal dismissed* 15 NY3d 742 [2010]).

We reject defendants' further contention that the court erred in denying the motion with respect to the cause of action for use of excessive force. "Claims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness" (*Bridenbaker v City of Buffalo*, 137 AD3d 1729, 1730 [4th Dept 2016] [internal quotation marks omitted]; *see Jones v Parmley*, 465 F3d 46, 61 [2d Cir 2006]). "The test of reasonableness under the Fourth Amendment 'requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he [or she] is actively resisting arrest or attempting to evade arrest by flight' " (*People v Smith*, 95 AD3d 21, 26 [4th Dept 2012], quoting *Graham v Connor*, 490 US 386, 396 [1989]). "The fact that a person whom a police officer attempts to arrest resists, threatens, or assaults the officer no doubt justifies the officer's use of *some* degree of force, but it does not give the officer license to use force without limit. The force used by the officer must be reasonably related to the nature of the resistance and the force used, threatened, or reasonably perceived to be threatened, against the officer" (*Sullivan v Gagnier*, 225 F3d 161, 165-166 [2d Cir 2000]).

Here, defendants' submissions in support of their motion raised triable issues of fact as to the degree of plaintiff's resistance, the threat she posed, and the degree of force defendants used. Defendants

thus failed to meet their initial burden on the motion of establishing that "no reasonable factfinder could conclude that the officers' conduct was objectively unreasonable" (*Amnesty America v Town of West Hartford*, 361 F3d 113, 123 [2d Cir 2004]; *see Macareno v City of New York*, 187 AD3d 1164, 1166-1167 [2d Dept 2020]). For similar reasons, we conclude that defendants failed to establish that they were entitled to summary judgment on the excessive force cause of action on the ground of qualified immunity (*see Lennox v Miller*, 968 F3d 150, 157 [2d Cir 2020]). Inasmuch as defendants on appeal further contend that the causes of action for assault and battery should be dismissed for the same reasons as the cause of action for excessive force, we likewise reject that contention (*see generally Wright v City of Buffalo*, 137 AD3d 1739, 1741-1742 [4th Dept 2016]; *Holland v City of Poughkeepsie*, 90 AD3d 841, 846 [2d Dept 2011]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

339

KA 19-00488

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEENAN MCGRIFF, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Matthew J. Doran, J.), rendered February 11, 2019. The judgment convicted defendant upon his plea of guilty of manslaughter in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the second degree (Penal Law § 125.15 [1]), defendant contends that his waiver of the right to appeal is invalid and thus does not encompass his challenge to the severity of his sentence. Even assuming, arguendo, that defendant's waiver of the right to appeal was invalid (*see People v Bisono*, 36 NY3d 1013, 1017-1018 [2020]; *People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US — 140 S Ct 2634 [2020]), and thus does not preclude our review of his challenge to the severity of his sentence (*see People v Baker*, 158 AD3d 1296, 1296 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]), we conclude that the sentence is not unduly harsh or severe.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

340

KA 19-01302

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA WRIGHT, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EDWARD P. DUNN 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 (Stephen J. Dougherty, J.), rendered April 29, 2019. The judgment convicted defendant upon a plea of guilty of murder in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of murder in the first degree (Penal Law § 125.27 [1] [a] [vii]; [b]). As the People correctly concede, defendant's purported waiver of the right to appeal is invalid. During the plea colloquy, County Court " 'conflated the right to appeal with those rights automatically forfeited by the guilty plea' " (*People v Chambers*, 176 AD3d 1600, 1600 [4th Dept 2019], *lv denied* 34 NY3d 1076 [2019]; *see People v Mothersell*, 167 AD3d 1580, 1581 [4th Dept 2018]) and, therefore, the record does not establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]). Moreover, the court's explanation that the waiver would foreclose *any* review by a higher court "utterly 'mischaracterized the nature of the right [to appeal that] . . . defendant was being asked to cede' " (*People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US — , 140 S Ct 2634 [2020]; *see People v Youngs*, 183 AD3d 1228, 1229 [4th Dept 2020], *lv denied* 35 NY3d 1050 [2020]).

Although the waiver of the right to appeal is invalid and does not preclude consideration of defendant's challenge to the severity of the sentence, we nonetheless conclude that it is not unduly harsh or

severe.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

342

KA 19-00347

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER VEGAS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered January 7, 2019. The judgment convicted defendant, upon a plea of guilty, of attempted murder in the second degree, assault in the second degree, and endangering the welfare of a child (three 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 attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the second degree (§ 120.05 [2]), and three counts of endangering the welfare of a child (§ 260.10 [1]). Even assuming, arguendo, that defendant did not validly waive his right to appeal (*see generally People v Davis*, 189 AD3d 2140, 2141 [4th Dept 2020]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

345

KA 19-01577

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH A. CAFARELLI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered August 18, 2017. The judgment convicted defendant upon his plea of guilty of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). We affirm.

Defendant contends that the plea should be vacated on the ground that the plea colloquy was factually insufficient because it undermined his admission of guilt and on the ground that his decision to plead guilty was not voluntary. Defendant failed, however, to preserve that contention for our review (*see People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *People v Sheppard*, 154 AD3d 1329, 1329 [4th Dept 2017]; *People v Brinson*, 130 AD3d 1493, 1493 [4th Dept 2015], *lv denied* 26 NY3d 965 [2015]), and this case does not fall within the narrow exception to the preservation requirement. To the extent that defendant negated an essential element of the crime during the plea colloquy when he denied intending to sell the drugs found in his possession (*see People v Lopez*, 71 NY2d 662, 666 [1988]), we note that County Court immediately conducted the requisite further inquiry to ensure that defendant's guilty plea was knowing, intelligent, and voluntary (*see id.*; *People v Rojas*, 147 AD3d 1535, 1536 [4th Dept 2017], *lv denied* 29 NY3d 1036 [2017]; *People v Waterman*, 229 AD2d 1013, 1013 [4th Dept 1996]). We conclude that "defendant's responses to the court's subsequent questions removed [any] doubt about [his] guilt" (*People v Vogt*, 150 AD3d 1704, 1705 [4th Dept 2017] [internal quotation marks omitted];

see People v Bonacci, 119 AD3d 1348, 1349 [4th Dept 2014], *lv denied* 24 NY3d 1042 [2014]; *People v Ocasio*, 265 AD2d 675, 677-678 [3d Dept 1999]).

We also conclude that defendant was not deprived of effective assistance of counsel. " 'In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Singletary*, 51 AD3d 1334, 1335 [3d Dept 2008], *lv denied* 11 NY3d 741 [2008]). Here, defendant received a very favorable plea, and he has not demonstrated "the absence of strategic or other legitimate explanations" for counsel's alleged shortcomings at the plea colloquy (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Booth*, 158 AD3d 1253, 1255 [4th Dept 2018], *lv denied* 31 NY3d 1078 [2018]; *People v Meddaugh*, 150 AD3d 1545, 1547-1548 [3d Dept 2017]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

346

KA 19-00371

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERNEST A. SMITH, ALSO KNOWN AS ERNEST SMITH, ALSO KNOWN AS EARNEST A. SMITH, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered October 5, 2018. The judgment convicted defendant upon a plea of guilty of attempted forgery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted forgery in the second degree (Penal Law §§ 110.00, 170.10 [2]). Defendant's sole contention on appeal is that the waiver of indictment is jurisdictionally defective because the written instrument did not include statements required by CPL 195.20 (a) through (c). Contrary to defendant's contention, the written waiver of indictment, which was filed with the Genesee County Clerk together with the superior court information and the order of County Court approving defendant's waiver of indictment and consent to be prosecuted by superior court information, contains all of the information required by CPL 195.20 and is therefore not jurisdictionally defective.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

347

KA 16-02151

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JADIE M. DAVIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered August 11, 2016. The judgment convicted defendant upon a plea of guilty of arson in the second degree and aggravated family offense (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law and as a matter of discretion in the interest of justice by vacating that part of the sentence ordering restitution and by amending the order of protection, specifying that the order of protection in favor of Catherine Clark is to be a no-offensive-contact order, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of arson in the second degree (Penal Law § 150.15) and two counts of aggravated family offense (§ 240.75 [1]).

Initially, we agree with defendant that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *see People v Josue F.*, 191 AD3d 1483, 1484 [4th Dept 2021]; *People v Davis*, 189 AD3d 2159, 2159 [4th Dept 2020]). Contrary to defendant's contention, the investigator's statements prior to issuing the *Miranda* warnings to defendant did not vitiate or neutralize the effect of the warnings (*cf. People v Dunbar*, 24 NY3d 304, 315-316 [2014], *cert denied* 575 US 1005 [2015]), and therefore County Court did not err in refusing to suppress his statements to the police (*see People v Box*, 181 AD3d 1238, 1239 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020], *cert denied* — US —, 141 S Ct 1099 [2021]; *People v Jemes*, 132 AD3d 1361, 1362 [4th Dept 2015], *lv denied* 26 NY3d 1110 [2016]).

Defendant failed to preserve for our review his challenge to the voluntariness of his plea because he did not move to withdraw the plea

or to vacate the judgment of conviction (*see People v Shanley*, 189 AD3d 2108, 2108 [4th Dept 2020]). There is a narrow exception to the preservation requirement for the "rare case . . . where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea," thereby imposing upon the trial court "a duty to inquire further to ensure that defendant's guilty plea is knowing and voluntary" (*People v Lopez*, 71 NY2d 662, 666 [1988]). "Where the court fails in this duty and accepts the plea without further inquiry, the defendant may challenge the sufficiency of the allocution on direct appeal, notwithstanding that a formal postallocution motion was not made" (*id.*). Here, nothing defendant said during the plea colloquy itself required the court to inquire further before accepting the plea (*see Shanley*, 189 AD3d at 2109). Moreover, even assuming, arguendo, that the court's duty to inquire as contemplated by *Lopez* may be triggered by a defendant's statements at junctures subsequent to acceptance of the plea (*see People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]; *see generally People v Delorbe*, 35 NY3d 112, 121 [2020]), defendant did not say anything during sentencing that required any inquiry (*cf. Shanley*, 189 AD3d at 2109). We reject defendant's contention that statements appearing in his pre-plea report, which was prepared approximately one year prior to the plea, could trigger the court's duty to inquire (*see generally id.*; *People v Herrera*, 150 AD3d 625, 625 [1st Dept 2017], *lv denied* 29 NY3d 1127 [2017]).

Although defendant failed to preserve his further contentions regarding restitution and the no-contact order of protection for our review, we exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). The People correctly concede that the court erred in ordering restitution, and we therefore modify the judgment by vacating that part of the sentence ordering restitution (*see People v McBean*, — AD3d —, —, 2021 NY Slip Op 01931, *1 [4th Dept 2021]; *People v Meyers*, 182 AD3d 1037, 1042 [4th Dept 2020], *lv denied* 35 NY3d 1028 [2020]). We further modify the judgment by amending the order of protection to specify that the order of protection in favor of Catherine Clark is to be a no-offensive-contact order, rather than a no-contact order, in light of the fact that defendant and Clark share children in common, the court agreed to a no-offensive-contact order during the plea proceeding, Clark requested a no-offensive-contact order, and the People did not object to that modification at the time of the plea (*see People v Jenkins*, 184 AD3d 1150, 1151 [4th Dept 2020], *lv denied* 35 NY3d 1067 [2020]; *see generally People v Griswold*, 186 AD3d 1104, 1105 [4th Dept 2020], *lv denied* 35 NY3d 1113 [2020]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

348

CAF 19-01476

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

IN THE MATTER OF CRYSTAL S., DEANNA P.,
ELAINA P., GABRIELLA S., AND KAYDALIN P.
---------- MEMORANDUM AND ORDER
ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

PATRICK P., RESPONDENT-APPELLANT.

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

PETER M. RAYHILL, COUNTY ATTORNEY, UTICA (MARYANGELA SCALZO OF COUNSEL), FOR PETITIONER-RESPONDENT.

DIANE MARTIN-GRANDE, ROME, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Paul M. Deep, J.), entered July 12, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent abused and neglected one of the subject children and derivatively neglected four of the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent appeals from an order in which Family Court determined, inter alia, that he abused and neglected a child, i.e., the daughter of his long-term live-in girlfriend, and derivatively neglected his four biological children. Contrary to respondent's contention, we conclude that the court's determination that the child was abused as a result of respondent's sexual abuse is supported by the requisite preponderance of the evidence (*see generally* Family Ct Act § 1046 [b] [i]; *Matter of Sean P. [Brandy P.]*, 156 AD3d 1339, 1339 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]) inasmuch as the child's out-of-court statements describing the abuse are sufficiently corroborated by other evidence (*see generally Matter of Timothy B. [Paul K.]*, 138 AD3d 1460-1461 [4th Dept 2016], *lv denied* 28 NY3d 908 [2016]). "A child's out-of-court statements may form the basis for a finding of [abuse or] neglect as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability" (*Matter of Nicholas L.*, 50 AD3d 1141, 1142 [2d Dept 2008]; *see* § 1046 [a] [vi]; *Matter of Nicole V.*, 71 NY2d 112, 117-118 [1987], *rearg denied* 71 NY2d 890 [1988]). "Courts have considerable discretion in determining whether a child's out-of-court statements

describing incidents of abuse have been reliably corroborated and whether the record as a whole supports a finding of abuse[or neglect] . . . , and [t]he Legislature has expressed a clear intent that a relatively low degree of corroborative evidence is sufficient in [child protective] proceedings" (*Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011] [internal quotation marks omitted]).

Here, the child disclosed to a caseworker and a police investigator that respondent had repeatedly demanded to examine her genitals in order to determine whether she was a virgin. The child further disclosed that respondent had placed his hand on her genitals and used his hands to spread them open, and also once requested to "do more" with his finger. When confronted with those allegations, respondent told the caseworker and the police investigator that he had inadvertently observed the child while she was naked from the waist down and that he was able to tell from 10 feet away that her hymen was intact. That partial admission by respondent, together with testimony from the child's mother that was consistent with some details of the child's allegations, including that respondent had access to the child at the times of day when the child said that the abuse occurred, was sufficient to corroborate the child's out-of-court statements (*see* Family Ct Act § 1046 [a] [vi]*; see generally Matter of Sandra S.*, 195 AD2d 1070, 1071 [4th Dept 1993]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

349

CAF 19-02036

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

IN THE MATTER OF BILINDA S.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CARL P. AND SUZANNE P.,
RESPONDENTS-RESPONDENTS.

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

ELIZABETH deV. MOELLER, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Stacey Romeo, J.), entered October 4, 2019 in a proceeding pursuant to Domestic Relations Law § 112-b. The order dismissed the petition.

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

Memorandum: In this proceeding pursuant to Domestic Relations Law § 112-b, petitioner, the biological mother of the subject child, appeals from an order that, inter alia, determined that she violated the provisions of her post-adoption contact agreement (agreement) with respondents, the child's adoptive parents. The order also determined that it was in the best interests of the subject child that the provisions of the agreement be enforced and, in effect, dismissed the petition. We affirm.

The agreement, which was incorporated into a judicial surrender of petitioner's parental rights to the subject child, provides that petitioner shall have four visits per year with the child, but that visitation will be in the sole discretion of respondents if, for a period of six months, petitioner failed to phone respondents to schedule a visit, or if petitioner missed two consecutive visits. The evidence at the hearing on the petition, including petitioner's testimony, establishes that she did not visit the subject child during 2018 nor schedule a visit during that time. Thus, contrary to petitioner's contention, Family Court properly determined that petitioner violated the provisions of the agreement (*see Matter of Mya V.P. [Amber R.—Laura P.]*, 79 AD3d 1794, 1795 [4th Dept 2010]; *see also Matter of Noah W. [Laura B.F.]*, 158 AD3d 1258, 1259 [4th Dept 2018]).

Furthermore, it is well settled that an order incorporating a

post-adoption contact agreement "may be enforced by any party to the agreement . . . [, but t]he court shall not enforce an order [incorporating such an agreement] unless it finds that the enforcement is in the child's best interests" (Domestic Relations Law § 112-b [4]; *see Matter of Rebecca O.*, 46 AD3d 687, 688 [2d Dept 2007]). Thus, this agreement should be enforced only if it is in the child's best interests (*see Matter of J.B. [Lakoia W.–Paul B.]*, 188 AD3d 1683, 1683 [4th Dept 2020]; *Matter of Kristian J.P. v Jeannette I.C.*, 87 AD3d 1337, 1337 [4th Dept 2011]). Here, the court's determination that is in the child's best interests to enforce the relevant provision in the agreement, i.e., that all future visitation shall be at respondents' sole discretion because, for a period of over six months, petitioner failed to phone respondents to schedule a visit and failed to attend two consecutive visits, is supported by the requisite sound and substantial basis in the record (*see generally Matter of Yasmine T. [Aeisha G.–Keisha G.]*, 161 AD3d 1179, 1180 [2d Dept 2018], *lv denied* 32 NY3d 903 [2018]; *Matter of Kaylee O.*, 111 AD3d 1273, 1274 [4th Dept 2013]; *Kristian J.P.*, 87 AD3d at 1337).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

353

CA 20-00730

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

UTICA MUTUAL INSURANCE COMPANY,
PLAINTIFF-APPELLANT,

V ORDER

ABEILLE GENERAL INSURANCE CO., NOW KNOWN AS
21ST CENTURY NATIONAL INSURANCE CO., ET AL.,
DEFENDANTS-RESPONDENTS.

FELT EVANS, LLP, CLINTON (KENNETH L. BOBROW OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NORTON ROSE FULBRIGHT US LLP, NEW YORK CITY (JOHN F. FINNEGAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

O'MELVENY & MYERS LLP, NEW YORK CITY (ANTON METLITSKY OF COUNSEL), FOR DEFENDANT-RESPONDENT CENTURY INDEMNITY COMPANY, AS SUCCESSOR TO CCI INSURANCE COMPANY, AS SUCCESSOR TO INSURANCE COMPANY OF NORTH AMERICA.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 21, 2020. The order denied in part the motion of plaintiff seeking to compel disclosure.

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

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

359

TP 20-01644

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

IN THE MATTER OF RAHIM THOMAS, 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 (KEVIN C. HU OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered December 15, 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 the determination, following a tier III disciplinary hearing, that he violated inmate rules 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats]), 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]), 104.12 (7 NYCRR 270.2 [B] [5] [iii] [demonstration]), and 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with employee]). Contrary to petitioner's contention, the misbehavior report and hearing testimony constitute substantial evidence supporting the determination that he violated those inmate rules (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *Matter of Williams v Annucci*, 162 AD3d 1530, 1531 [4th Dept 2018]). Petitioner failed to raise in his administrative appeal his contention that the Hearing Officer improperly relied upon confidential information. Petitioner thus failed to exhaust his administrative remedies with respect to that contention, and this Court lacks the discretionary authority to consider it (*see Matter of Yarborough v Annucci*, 164 AD3d 1667, 1668 [4th Dept 2018]; *Matter of Rodriguez v Fischer*, 96 AD3d 1374, 1375 [4th Dept 2012]; *see generally Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]).

Petitioner contends that the misbehavior report lacked specifics regarding his role in the incident, recited the wrong date of the incident, and was not properly endorsed. We conclude that the misbehavior report was sufficiently detailed to enable petitioner to present a defense (*see Matter of Toro v Fischer*, 104 AD3d 1036, 1037 [3d Dept 2013]; *see generally Matter of Abdur-Raheem v Mann*, 85 NY2d 113, 123 [1995]; *Matter of Jones v Fischer*, 111 AD3d 1362, 1363 [4th Dept 2013]). During the hearing, the author of the misbehavior report explained the error with respect to the date of the incident listed on the report, and we conclude that petitioner was not prejudiced by the error (*see Matter of Werner v Philips*, 20 AD3d 711, 712 [3d Dept 2005]). Petitioner also failed to demonstrate that he was prejudiced by the failure of the employee who observed the incident to endorse the report. That employee's name and position appeared on the face of the report, and petitioner had the opportunity to question him during the hearing (*see Matter of Winbush v Goord*, 6 AD3d 821, 822 [3d Dept 2004]; *see also Matter of Blackwell v Goord*, 12 AD3d 816, 817 [3d Dept 2004]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

361

KA 20-00147

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLENE CHILDERS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered June 27, 2019. The judgment convicted defendant upon her plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting her upon her plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). In appeal No. 2, defendant appeals from a judgment convicting her upon her plea of guilty of manslaughter in the first degree (§ 125.20 [1]). As defendant contends in both appeals, and the People correctly concede, defendant's waiver of the right to appeal is invalid because County Court mischaracterized it as an absolute bar to the taking of an appeal (*see People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Harlee*, 187 AD3d 1586, 1587 [4th Dept 2020], *lv denied* 36 NY3d 929 [2020]). The better practice is for the court to use the Model Colloquy, which " 'neatly synthesizes . . . the governing principles' " (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *Thomas*, 34 NY3d at 567; *see* NY Model Colloquies, Waiver of Right to Appeal). Nevertheless, contrary to defendant's contention in both appeals, the sentences are not unduly harsh or severe.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

362

KA 20-00148

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLENE CHILDERS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RYAN JAMES MULDOON, AUBURN, FOR DEFENDANT-APPELLANT.

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered June 27, 2019. The judgment convicted defendant upon her plea of guilty of manslaughter in the first degree.

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

Same memorandum as in *People v Childers* ([appeal No. 1] — AD3d — [Apr. 30, 2021] [4th Dept 2021]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

363

KA 18-00653

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WILLIAM LEWIS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN 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 January 31, 2018. The judgment convicted defendant, upon a plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

371

TP 20-01643

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

IN THE MATTER OF DARRELL GRAHAM, 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.

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 December 15, 2020) to review a determination of respondent. The determination upheld the denial of the grievance petitioner had filed at the Attica Correctional Facility.

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

Memorandum: Petitioner filed a grievance against prison authorities contesting his removal from the Alcohol and Substance Abuse Treatment (ASAT) program at the Attica Correctional Facility. Petitioner commenced this CPLR article 78 proceeding challenging the denial of his grievance on administrative appeal by respondent's Central Office Review Committee.

As a preliminary matter, we note that Supreme Court erred in transferring this proceeding to us pursuant to CPLR 7804 (g) on the ground that the amended petition raises an issue of substantial evidence. The determination was not "made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law" (CPLR 7803 [4]), and thus no issue of substantial evidence has been raised (*see Matter of Butler v Town of Throop*, 303 AD2d 976, 976 [4th Dept 2003]; *see also Matter of La Rocco v Goord*, 19 AD3d 1073, 1073 [4th Dept 2005]; *Matter of Wal-Mart Stores v Planning Bd. of Town of N. Elba*, 238 AD2d 93, 96 [3d Dept 1998]). We nevertheless retain jurisdiction in the interest of judicial economy (*see Matter of Shomo v Zon*, 35 AD3d 1227, 1227 [4th Dept 2006]).

We conclude that the determination removing petitioner from the ASAT program is supported by a rational basis and is neither arbitrary and capricious nor an abuse of discretion (*see Matter of Sylvester v*

Fischer, 126 AD3d 1330, 1330 [4th Dept 2015]; *La Rocco*, 19 AD3d at 1073; *Matter of Restituyo v Berbary*, 278 AD2d 859, 859 [4th Dept 2000]; *see also Matter of Harty v Goord*, 3 AD3d 701, 702 [3d Dept 2004]). The determination was based on petitioner's refusal to sign, in violation of a provision in the ASAT operations manual, his substance abuse treatment continuing recovery plan. In addition, there is a progress note dated January 17, 2018, which recites that petitioner was removed from the ASAT program because he could not identify his treatment plan goals. We therefore confirm the determination and dismiss the amended petition.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

382

KA 18-01028

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSE L. TORRES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN 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 24, 2017. The judgment convicted defendant, upon a plea of guilty, of criminal mischief in the third degree, endangering the welfare of a child and aggravated family offense (three counts).

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

383

KA 18-02046

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSE L. TORRES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN 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 24, 2017. The judgment convicted defendant, upon a plea of guilty, of aggravated family offense.

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

385

KA 20-00141

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSEPH A. SANFILIPPO, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Onondaga County Court (Matthew J. Doran, J.), entered October 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.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

392

CAF 19-01876

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

IN THE MATTER OF CRYSTAL WINGO,
PETITIONER-APPELLANT,

V ORDER

ROMAN THOMAS, RESPONDENT-RESPONDENT.

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

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered April 18, 2019 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking modification of a prior order of custody.

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

393

CAF 18-02375

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

IN THE MATTER OF KATHRYN L. SCHRAM,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOSHUA A. NINE, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT OF COUNSEL), FOR PETITIONER-APPELLANT.

D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Onondaga County (Salvatore A. Pavone, R.), entered November 1, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted respondent sole legal and primary physical custody of the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that, inter alia, granted respondent father sole legal and primary physical custody of the parties' three children. We affirm.

In making a custody determination, "numerous factors are to be considered, including the continuity and stability of the existing custodial arrangement, the quality of the child's home environment and that of the parent seeking custody, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, and the individual needs and expressed desires of the child" (*Matter of Wojciulewicz v McCauley*, 166 AD3d 1489, 1490 [4th Dept 2018], *lv denied* 32 NY3d 918 [2019] [internal quotation marks omitted]). Contrary to the mother's contention, although the record reflects that both parties are loving parents who care deeply for their children, we conclude that Family Court's determination that the children's best interests would be served by awarding the father sole legal and primary physical custody is supported by a sound and substantial basis in the record (*see generally Hendrickson v Hendrickson*, 147 AD3d 1522,

1523 [4th Dept 2017]). "The court's determination following a hearing that the best interests of the child[ren] would be served by such an award is entitled to great deference . . . , particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses . . . , [and] [w]e will not disturb that determination inasmuch as the record establishes that it is the product of the court's careful weighing of [the] appropriate factors" (*Matter of Timothy MYC v Wagner*, 151 AD3d 1731, 1732 [4th Dept 2017] [internal quotation marks omitted]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

403.2

TP 20-01455

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

IN THE MATTER OF LANCE CARTER, PETITIONER,

V ORDER

H.O. FISCHER, DIRECTOR OF SPECIAL HOUSING,
D. VENETOZZI AND SUPERINTENDENT W. FENNESSY,
RESPONDENTS.

LANCE CARTER, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Patrick F. MacRae, J.], entered October 28, 2020) to review a determination of respondents. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

405

KA 19-01914

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KEITH J. FRAREY, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, LYONS, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JOHN MORRISSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered April 22, 2019. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

408

KA 17-01855

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL T. SCOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered December 5, 2016. The judgment convicted defendant upon a plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: 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]), defendant contends and the People correctly concede that his waiver of the right to appeal is invalid because Supreme Court's oral colloquy and the written waiver of the right to appeal "mischaracterized [the waiver] as an 'absolute bar' to the taking of an appeal" (*People v Dozier*, 179 AD3d 1447, 1447 [4th Dept 2020], *lv denied* 35 NY3d 941 [2020], quoting *People v Thomas*, 34 NY3d 545, 565 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]). We note that the better practice is for the court to use the Model Colloquy, which "neatly synthesizes . . . the governing principles" (*People v Brooks*, 187 AD3d 1587, 1588 [4th Dept 2020], *lv denied* 36 NY3d 1049 [2021] [internal quotation marks omitted]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

417

CAF 19-01841

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

IN THE MATTER OF NABYHA N., MUHAMMAD N. AND AHLUM N.

---------- ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

TARIQ N., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

REBECCA J. TALMUD, WILLIAMSVILLE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered August 27, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, found that respondent had abused the subject children.

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

418

CA 20-01139

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

TAMARA LEIGH GUTIERREZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM MICHAEL GUTIERREZ, DEFENDANT-APPELLANT.

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

RUPP BAASE PFALZGRAF CUNNINGHAM, LLC, WILLIAMSVILLE (MICHAEL J. COLLETTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 6, 2020 in a divorce action. The judgment, among other things, directed defendant to pay maintenance to plaintiff.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the second decretal paragraph, and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following memorandum: Defendant husband appeals from a judgment of divorce that, inter alia, directed him to pay plaintiff wife $750 a week in maintenance for a period of 17 years. On appeal, he contends that Supreme Court erred in awarding maintenance for a period of time in excess of the recommendation set forth in the advisory schedule in Domestic Relations Law § 236 (B) (6) (f) (1) without adequately demonstrating its reliance on the relevant statutory factors enumerated in section 236 (B) (6) (e) (*see* § 236 [B] [6] [f] [2]). We agree and further conclude that the court erred in awarding plaintiff maintenance without sufficiently setting forth the relevant factors enumerated in section 236 (B) (6) (e) that it relied on in reaching its determination. Although the court need not specifically cite the factors enumerated in that section, its analysis must show that it at least considered the relevant factors in making its determination (*see St. Denny v St. Denny*, 185 AD3d 1246, 1247 [3d Dept 2020]; *Gordon-Medley v Medley*, 160 AD3d 1146, 1147 [3d Dept 2018]; *Johnston v Johnston*, 156 AD3d 1181, 1184 [3d Dept 2017], *appeal dismissed* 31 NY3d 1126 [2018], *lv denied* 32 NY3d 1053 [2018]). The determination must also "reflect[] an appropriate balancing of [the wife's] needs and [the husband's] ability to pay" (*Stuart v Stuart*, 137 AD3d 1640, 1640-1641 [4th Dept 2016] [internal quotation marks omitted]; *see Richeal v Richeal*, 63 Misc 3d 1205[A], *5 [Sup Ct, Niagara County 2016], *affd for reasons stated* 170 AD3d 1534, 1534 [4th Dept 2019]).

Here, the court stated that it awarded plaintiff $750 per week—an amount deviating from the statutory guidelines—for a duration in excess of the statutory guidelines based on the length of the marriage, the parties' disproportionate earning capacities, and defendant's tax debt. However, although the statutory guidelines use the length of the marriage to calculate the duration of the maintenance award (*see* Domestic Relations Law § 236 [B] [6] [f] [1]), the length of the parties' marriage is not a factor enumerated in section 236 (B) (6) (e). Further, the court did not state what factors it considered, in addition to actual earnings, in determining the parties' earning capacities (*see Scher v Scher*, 91 AD3d 842, 848 [2d Dept 2012]; *Dietz v Dietz*, 203 AD2d 879, 883 [3d Dept 1994]). Moreover, the court did not determine whether defendant's substantial tax debt would impede his ability to pay plaintiff's maintenance award (*see Myers v Myers*, 87 AD3d 1393, 1394 [4th Dept 2011]). Thus, the court failed to show that it considered any of the factors enumerated in section 236 (B) (6) (e) (1) in making its determination of both the amount and duration of the maintenance award.

Because we are unable to determine whether the amount and duration of the maintenance awarded "reflects an appropriate balancing of [the wife's] needs and [the husband's] ability to pay" (*Myers*, 87 AD3d at 1394), we modify the judgment by vacating the second decretal paragraph, and we remit the matter to Supreme Court to determine the amount and duration of maintenance, if any, after setting forth all relevant factors that it considered in making its decision (Domestic Relations Law § 236 [B] [6] [e] [1], [2]; [f] [2]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

427

KA 19-00512

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISAAIAH ROGERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (James F. Bargnesi, J.), rendered January 9, 2019. The judgment convicted defendant upon his plea of guilty of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), arising from the death of the victim, who defendant shot multiple times. Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 564-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Stephens*, 189 AD3d 2142, 2142 [4th Dept 2020]; *People v Alls*, 187 AD3d 1515, 1515 [4th Dept 2020]) and thus does not preclude our review of his challenge to the severity of his sentence (*see Stephens*, 189 AD3d at 2142; *Alls*, 187 AD3d at 1515), we conclude that the sentence is not unduly harsh or severe.

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

431

KA 19-00803

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD D. ROBINSON, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TODD G. MONAHAN, LITTLE FALLS, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (NOLAN D. PITKIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered June 23, 2017. The judgment convicted defendant, upon a plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon a plea of guilty, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). In appeal No. 2, defendant appeals from a judgment convicting him, upon a plea of guilty, of attempted assault in the second degree (§§ 110.00, 120.05 [2]). The two pleas were entered in a single plea proceeding. Although not raised by the parties, the purported waiver of the right to appeal here is invalid (*see People v Cruz*, 182 AD3d 999, 999 [4th Dept 2020]; *People v McKenzie* [appeal No. 2], 181 AD3d 1319, 1320 [4th Dept 2020]; *People v Bumpars*, 178 AD3d 1379, 1379-1380 [4th Dept 2019], *lv denied* 36 NY3d 1055 [2021]).

In both appeals, defendant contends that his guilty plea was the result of undue coercion by County Court. That contention is unpreserved inasmuch as defendant failed to move to withdraw his plea or vacate the judgment of conviction (*see People v Lopez*, 189 AD3d 2152, 2152 [4th Dept 2020]; *People v Ingram*, 188 AD3d 1650, 1651 [4th Dept 2020]; *People v Bellamy*, 170 AD3d 1652, 1653 [4th Dept 2019]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant also contends that he received ineffective assistance of counsel, which concerns matters outside the record. Defendant brought a CPL article 440 motion to address that contention, which the

court denied. Because defendant did not obtain permission to appeal that order, his contention is not properly before us (*see* CPL 450.15 [1]; *see generally People v Dewitt*, 52 AD3d 1184, 1185 [4th Dept 2008], *lv denied* 11 NY3d 787 [2008]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

432

KA 19-00804

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD D. ROBINSON, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TODD G. MONAHAN, LITTLE FALLS, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (NOLAN D. PITKIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered June 23, 2017. The judgment convicted defendant, upon a plea of guilty, of attempted assault in the second degree.

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

Same memorandum as in *People v Robinson* ([appeal No. 1] — AD3d — [Apr. 30, 2021] [4th Dept 2021]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

437

KA 18-00511

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAQUAN HILL, DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Orleans County Court (Sara Sheldon, A.J.), rendered January 8, 2018. The judgment convicted defendant upon his plea of guilty of attempted promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a guilty plea of attempted promoting prison contraband in the first degree (Penal Law §§ 110.00, 205.25 [1]). As an initial matter, we agree with defendant that his waiver of the right to appeal is invalid (*see People v Thomas*, 34 NY3d 545, 565-566 [2019], *cert denied* — US —, 140 S Ct 2634 [2020]; *People v Biaselli*, 191 AD3d 1400, 1401 [4th Dept 2021]; *People v Wasyl*, 186 AD3d 1071, 1071 [4th Dept 2020]; *People v Baxter*, 185 AD3d 1452, 1452 [4th Dept 2020], *lv denied* 35 NY3d 1092 [2020]). Contrary to defendant's contention, the investigator's statements prior to issuing the *Miranda* warnings did not vitiate or neutralize the effect of the warnings (*cf. People v Dunbar*, 24 NY3d 304, 315-316 [2014], *cert denied* 575 US 1005 [2015]), and therefore County Court did not err in refusing to suppress defendant's statements to the investigator (*see People v Box*, 181 AD3d 1238, 1239 [4th Dept 2020], *lv denied* 35 NY3d 1025 [2020], *cert denied* — US —, 141 S Ct 1099 [2021]; *People v Jemes*, 132 AD3d 1361, 1362 [4th Dept 2015], *lv denied* 26 NY3d 1110 [2016]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

439

CAF 19-02374

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

IN THE MATTER OF TODD MICHALAK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MELISSA PEREZ, RESPONDENT-APPELLANT.

IN THE MATTER OF MELISSA PEREZ,
PETITIONER-APPELLANT,

V

TODD MICHALAK, RESPONDENT-RESPONDENT.

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

LAW OFFICE OF PETER P. VASILION, WILLIAMSVILLE (PETER P. VASILION OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered December 9, 2019 in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject child to petitioner-respondent.

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

Memorandum: Respondent-petitioner mother appeals from an order that, inter alia, granted a petition of petitioner-respondent father for modification of a prior order by awarding him sole custody of the subject child and denied the mother's violation petition against the father. We affirm for reasons stated in the decision at Family Court. We write only to note that, under the correct legal standard, the court did not abuse its discretion in refusing to find the father in civil contempt of court for disobeying the prior order inasmuch as the mother failed to establish by clear and convincing evidence the elements necessary to support such a finding (*see Matter of White v Stone*, 165 AD3d 1641, 1642 [4th Dept 2018], *lv denied* 32 NY3d 913

[2019]; *see generally El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

440

CAF 19-01865

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

IN THE MATTER OF JAYCE P., CATALEYA O.,
AND TYRELL O., JR.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

ASHLEY P., RESPONDENT-APPELLANT,
AND TYRELL O., RESPONDENT.

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

PETER M. RAYHILL, COUNTY ATTORNEY, UTICA (DENISE J. MORGAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

CATHERINE M. SULLIVAN, BALDWINSVILLE, ATTORNEY FOR THE CHILD.

STEPHANIE N. DAVIS, OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered September 5, 2019 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that the subject children are neglected.

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

442

CA 20-00396

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

ABLA MOHAMED, PLAINTIFF-RESPONDENT,

V ORDER

HANI ABUHAMRA, DEFENDANT.

FERRY EXPRESS MART 4, INC., AND DOLLAR CITY WHOLESALE, ALSO KNOWN AS D.C. WHOLESALE, ALSO KNOWN AS DCW, NONPARTY APPELLANTS.

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

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

Appeal from an order of the Supreme Court, Erie County (Lynn W. Keane, J.), entered February 25, 2020. The order denied the motion of nonparty appellants seeking to intervene in this action.

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

445

CA 20-00885

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

CRISTINA TANNER, INDIVIDUALLY AND AS LEGAL GUARDIAN OF JASON TANNER, AND AS ASSIGNEE OF RISEN FOODS, LLC, PLAINTIFF-RESPONDENT,

V ORDER

HEFFERNAN INSURANCE BROKERS, INC., DANA SCHILLER, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

LEWIS BRISBOIS BISGAARD & SMITH LLP, NEW YORK CITY (PETER T. SHAPIRO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BARTH SULLIVAN BEHR, LLP, BUFFALO (JOHN R. CONDREN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered January 24, 2020. The order denied the motion of defendants Heffernan Insurance Brokers, Inc., and Dana Schiller to dismiss the second amended complaint against them.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 26, 2021,

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

446

CA 20-00676

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

THOMAS A. CULVER, JR., PLAINTIFF-RESPONDENT,

V ORDER

ROCHESTER-GENESEE REGIONAL TRANSPORTATION AUTHORITY, DEFENDANT-APPELLANT.

MARK A. YOUNG, ROCHESTER, FOR DEFENDANT-APPELLANT.

THE BARNES FIRM, BUFFALO (MARTHA PIGOTT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Charles N. Zambito, A.J.), entered November 22, 2019. The order denied defendant's motion for summary judgment.

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

449

KA 19-00207

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TONDRE BOLDEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered December 19, 2018. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]), defendant contends that the permanent order of protection should be vacated or amended because its expiration date fails to account for his jail-time credit. Even assuming, arguendo, that defendant did not validly waive his right to appeal, we note that his challenge to the expiration date of the protective order is unpreserved for appellate review (*see People v Nieves*, 2 NY3d 310, 315-317 [2004]).

In any event, there is no merit to defendant's assertion that the expiration date of the subject protective order should have been set with reference to jail-time credit. The expiration date of a protective order issued upon a felony conviction "shall not exceed the greater of: (i) eight years from the date of . . . sentencing . . . , or (ii) eight years from the date of the expiration of the maximum term of an indeterminate or the term of a determinate sentence of imprisonment actually imposed" (CPL 530.13 [4] [A]). Here, because defendant did not receive either a determinate or an indeterminate sentence of imprisonment, the expiration date of the subject protective order was necessarily set under CPL 530.13 (4) (A) (i), not CPL 530.13 (4) (A) (ii). Thus, "since the duration of the order was not based on the expiration date of defendant's sentence [under CPL 530.13 (4) (A) (ii)], jail time credit was irrelevant" (*People v*

Bryant, 132 AD3d 502, 502 [1st Dept 2015], *lv denied* 26 NY3d 1086 [2015]; *see generally Nieves*, 2 NY3d at 313).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

450

KA 19-01902

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILIP CONGILARO, DEFENDANT-APPELLANT.

DANIEL M. GRIEBEL, TONAWANDA, FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (ELIZABETH S. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Herkimer County Court (John H. Crandall, J.), dated August 2, 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: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that County Court violated his due process rights by accepting his waiver of the right to appear at the SORA hearing (*see People v Poleun*, 26 NY3d 973, 974-975 [2015]; *People v Turner*, 188 AD3d 1746, 1746 [4th Dept 2020], *lv denied* 36 NY3d 910 [2021]). In any event, we conclude that "defendant's right to due process was not violated inasmuch as the record establishes that defendant 'was advised of the [SORA] hearing date, of the right to be present at the hearing, and that the hearing would be conducted in his . . . absence,' and defendant waived his right to be present by informing the court in writing that he did not wish to appear" (*People v Caleb*, 170 AD3d 1618, 1618 [4th Dept 2019], *lv denied* 33 NY3d 910 [2019]). Contrary to defendant's further contention, he has failed to establish that defense counsel was ineffective (*see generally People v Dean*, 169 AD3d 1414, 1415 [4th Dept 2019]).

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

451

KAH 20-01349

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ABDOOL AZEEZ, PETITIONER-APPELLANT,

V ORDER

SUPERINTENDENT J. NOETH, ATTICA CORRECTIONAL
FACILITY, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 18, 2020 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

466

CA 20-00853

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

IN THE MATTER OF NICHOLAS SMITH,
CLAIMANT-APPELLANT,

V ORDER

TOWN OF MANSFIELD, RESPONDENT-RESPONDENT.

DOLCE PANEPINTO, P.C., BUFFALO (AARON C. GORSKI OF COUNSEL), FOR CLAIMANT-APPELLANT.

CHELUS HERDZIK SPEYER & MONTE P.C., BUFFALO (MICHAEL J. CHMIEL OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Terrence M. Parker, A.J.), entered July 8, 2020. The order denied claimant's application seeking, inter alia, leave to serve a late notice of claim.

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

485

CA 20-01189

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

IN THE MATTER OF ARBITRATION BETWEEN
TOWN OF HUNTINGTON AND PMA MANAGEMENT,
PETITIONERS-APPELLANTS,

AND ORDER

ALLSTATE INSURANCE COMPANY AND ALLSTATE
INSURANCE GROUP, RESPONDENTS-RESPONDENTS.

HAMBERGER & WEISS LLP, BUFFALO (DAVID J. MARELLO OF COUNSEL), FOR PETITIONERS-APPELLANTS.

LAW OFFICES OF JOHN TROP, BUFFALO (JONATHAN H. DOMINIK OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Dennis Ward, J.), entered May 18, 2020. The order denied the motion to modify an arbitration decision.

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court

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

487

TP 20-01326

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

IN THE MATTER OF TRACI MERGENHAGEN, PETITIONER,

V ORDER

SHEILA J. POOLE, ACTING COMMISSIONER, NEW YORK STATE OFFICE OF CHILDREN, AND SHEILA MCBAIN, DIRECTOR, NEW YORK STATE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT, A DIVISION OF CHILD WELFARE AND COMMUNITY SERVICES, RESPONDENTS.

DIPASQUALE & CARNEY, LLP, BUFFALO (JASON R. DIPASQUALE OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Frank A. Sedita, III, J.], dated October 7, 2020) to review a determination of respondents. The determination denied petitioner's request that a report maintained in the New York State Central Register of Child Abuse and Maltreatment, indicating petitioner for maltreatment, be amended to unfounded.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 2 and 8, 2021,

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

Entered: April 30, 2021

Mark W. Bennett
Clerk of the Court