SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 9, 2010

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. SALVATORE R. MARTOCHE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SAMUEL L. GREEN

HON. ELIZABETH W. PINE

HON. JEROME C. GORSKI, ASSOCIATE JUSTICES

PATRICIA L. MORGAN, CLERK

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

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CA 09-02160

PRESENT: SMITH, J.P., FAHEY, CARNI, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF ANTHONY J. MACULA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION, GENESEO CENTRAL SCHOOL
DISTRICT, AND TIMOTHY HAYES, SUPERINTENDENT,
GENESEO CENTRAL SCHOOL DISTRICT,
RESPONDENTS-RESPONDENTS.

ANTHONY J. MACULA, PETITIONER-APPELLANT PRO SE.

WAYNE A. VANDER BYL, WILLIAMSON, FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered July 29, 2009 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination denying his request to set up a "truth-in" table at Geneseo High School (School) on "college days," when representatives of colleges, universities and the military are allowed into the School for recruitment purposes. The primary purpose of petitioner's proposed "truth-in" table was to provide students with negative information about military service that petitioner believed they should consider before deciding whether to enlist. Petitioner also sought to present materials about peace-orientated organizations, such as AmeriCorps and the Peace Corps, and to observe military recruiters while in the School. Although respondents denied petitioner's request for access to the School, they agreed to post in the guidance office a two-page document provided by petitioner entitled "Ten Points to Consider Before You Sign a Military Enlistment Agreement," a copy of which is also given by the School to every student who requests information about military service. Petitioner thereafter commenced this proceeding alleging, inter alia, that respondents violated his right of free speech under the state and federal constitutions by refusing to allow him to participate in college days. Supreme Court dismissed the petition, finding that respondents appropriately limited School access to "groups or schools with specific programs," which did not include petitioner, and that

petitioner had no right to observe military recruiters. On a prior appeal, we reversed the judgment and remitted the matter for further development of the record, which we concluded "lack[ed] sufficient information to enable a court to determine whether the determination was arbitrary and capricious or whether petitioner's constitutional rights were violated" (*Matter of Macula v Board of Educ., Geneseo Cent. School Dist.*, 61 AD3d 1338). Upon remittal, the record was supplemented primarily by petitioner, who submitted to the court copies of materials he intended to present to students, and the court again dismissed the petition. We affirm.

We note at the outset that, although petitioner advances numerous contentions on appeal, he asserted only two causes of action. The first cause of action alleges that the denial of petitioner's request to set up a "truth-in" table violated petitioner's constitutional right of free speech. According to petitioner, respondents engaged in viewpoint discrimination by allowing military recruiters into the School but prohibiting him from setting up a "truth-in" table. The second cause of action alleges that the denial of petitioner's request to observe the military recruiters in the School is arbitrary and capricious. We conclude that neither cause of action has merit.

With respect to the first cause of action, petitioner concedes that the School is a nonpublic forum in the context of its college days. Respondents may therefore control access to the School "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral" (*Cornelius v NAACP Legal Defense & Educ. Fund, Inc.*, 473 US 788, 806; *see Perry Educ. Assn. v Perry Local Educators' Assn.*, 460 US 37, 49; *Peck v Baldwinsville Cent. School Dist.*, 426 F3d 617, 633, *cert denied* 547 US 1097). In our view, the reasons offered by respondents for denying petitioner's request to set up a "truth-in" table at the School on college days are reasonable. When respondents denied his request, they explained to petitioner that access to the School on college days is limited to representatives of post-secondary academic institutions and the military, and petitioner is not a representative of any college or university or affiliated with the military. In addition, it is apparent that petitioner's primary purpose in appearing on college days is to provide students with negative information about military service, and respondents reasonably seek to avoid the potential for disruption that may arise from granting access to those who seek to discourage students from pursuing a particular post-secondary option. To the extent that petitioner also seeks to provide students with information about AmeriCorps and other similar organizations, respondents have asserted that he is free to do so during career day, when students are presented with information about particular occupations and careers.

Contrary to the contention of petitioner, respondents' determination to allow military recruiters but not him into the School on college days was viewpoint neutral. Respondents allege without contradiction that the reason they allow military recruiters into the School on college days is that they are compelled to do so by the federal No Child Left Behind Act of 2001 ([NCLB] 20 USC § 6301 *et*

seq., as added by Pub L 107-100, 115 US Stat 1425). Pursuant to that statute, a school district may lose all federal funding if it fails to afford to the military access to its schools similar to that which is granted to colleges and universities, and federal funding is a significant portion of respondents' budget. Thus, it cannot be said that respondents invited the military to participate in college days because they agreed with the mission or philosophy of the military and denied access to those espousing contrary views. We note that, pursuant to the NCLB, a school district is also required to provide student contact information to military recruiters. If the school district were to deny a request for such information from a nonmilitary employer or organization, it cannot be said that the school district would be engaging in viewpoint discrimination.

Petitioner relies heavily on *Searcey v Crim* (815 F2d 1389, 1393-1395), in which the United States Court of Appeals for the Eleventh Circuit held that the defendant school district, which allowed military recruiters in its high school on career day, could not deny similar access to the Atlanta Peace Alliance (APA). *Searcey* is factually distinguishable from this case for several reasons. First, the forum at issue in *Searcey* was career day, which is different from the college days at issue here (*id.* at 1390 n 3). Second, there was compelling, if not overwhelming, evidence in *Searcey* that the school district's decision to deny access to the APA was based on a desire to suppress its views, which members of the school board deemed unduly controversial (*id.* at 1390 n 3, 1394-1395). Here, in contrast, there is no evidence that respondents seek to suppress petitioner's views. Indeed, respondents have no objection to petitioner appearing on career day to present information about AmeriCorps and other similar organizations, and they have made ample use of the document entitled "Ten Points to Consider Before You Sign a Military Enlistment Agreement" provided by petitioner. Those actions belie an intent to discriminate against petitioner based upon his viewpoint. Finally, unlike in *Searcey*, respondents have a legitimate reason for allowing access to military recruiters but not to peace activists or organizations, i.e., the reluctance to lose all federal funding under the NCLB, which was enacted after the school board in *Searcey* denied access to the APA.

Although not directly on point, *Rumsfeld v Forum for Academic & Inst. Rights, Inc.* (547 US 47) is instructive. That case involved a challenge by various law schools to the Solomon Amendment (10 USC § 983), which requires institutions of higher education to provide military recruiters the same access afforded to nonmilitary recruiters. The law school plaintiffs opposed the military's policy concerning homosexuals and contended that such policy conflicted with the schools' own policies prohibiting discrimination based on sexual orientation. The United States Supreme Court rejected the law schools' challenge, concluding that the law schools were "not speaking when they host[ed] interviews and recruiting receptions" (*Rumsfeld*, 547 US at 64). The Court further concluded that "[n]othing about recruiting suggests that law schools agree with any speech by recruiters[] and [that] nothing in the Solomon Amendment restricts

what the law schools may say about the military's policies" (*id.* at 65). The Court stated that it had previously "held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy" (*id.*). Here, as in *Rumsfeld*, respondents are not endorsing the military's message or creating a forum for military speech by complying with the statutory mandate of the NCLB, nor are respondents necessarily expressing disagreement with the views of petitioner by denying his request to set up a "truth-in" table during college days.

With respect to the second cause of action, we reject the contention of petitioner that respondents' denial of his request to observe military recruiters in the School is arbitrary and capricious. Petitioner acknowledged during a hearing on the petition that he wanted to observe the military recruiters so that he could "mirror" their actions. We thus conclude that the request of petitioner is related to his other request to present information during college days that, for the reasons stated above, was properly denied. In any event, respondents do not permit unrestricted and unlimited access to the School to nonstudents, and their refusal to allow petitioner to observe military recruiters in the School so that he could perfect his counter-recruitment efforts is rational.

All concur except FAHEY, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent. The determination of respondents violated petitioner's constitutional right to free speech and was arbitrary and capricious.

This case had its genesis in petitioner's request, inter alia, to set up a table at Geneseo High School (School) that proposed alternatives to and discussed the drawbacks of a military career. According to respondents, the "tabling" done by military recruiters is essentially the same as that done by college recruiters at the School. Recruiters sit at tables near the School cafeteria with literature on display, and the recruiters are available to speak with students who inquire about the college or branch of the military that each recruiter represents.

In the petition by which this proceeding was commenced, petitioner, who is apparently a professor at the State University of New York College at Geneseo, stated that he had children attending the School and described himself as an "active participant in support of school activities," as well as an active member of the Geneseo Central PTSA. Petitioner's purpose in seeking tabling access was threefold. As set out in his November 26, 2007 letter to the Superintendent of the Geneseo Central School District (School District), respondent Timothy Hayes, requesting tabling access, petitioner explained that he sought to provide students with "[i]nformation critical for making informed decisions about military enlistment"; "[p]eace[-oriented] educational and career opportunities and alternatives to military service"; and "[i]nformation about conscientious objection, ethics and utility of war, [and] draft registration."

In that letter, petitioner also recognized the "responsibility [of respondents] to provide a safe, healthy learning environment for the students confided to its care," and he noted that he did not seek permission to engage in activity "that would disrupt or interfere with the vital education of [the] children." Rather, petitioner sought to "broaden and deepen students' critical thinking about their career options," and he posited that those "students do not need to be protected from the respectful and factual presentation of career options and alternatives." Petitioner further noted that it was "not [his] intent to denigrate or to criticize the military as a career choice" and, instead, he sought "to provide students with information and tools to allow them to compare alternatives and options and to make fully-informed decisions about their futures." Interestingly, petitioner also indicated that the access he sought was provided to others locally in the Rochester City School District and Hilton Central School District.

Hayes denied petitioner's request by a letter in which Hayes stated that petitioner would not be permitted the same type of access afforded to higher educational agencies and civilian employers, as well as to military recruiters under the provisions of the No Child Left Behind Act of 2001 ([NCLB] 20 USC § 6301 *et seq.*, as added by Pub L 107-100, 115 US Stat 1425), because the School District "does not intend to provide access to individuals or groups wishing to promote a specific point of view in opposition to any of the institutions of higher education or employers [that it] invite[s] onto [its] campus, whether civilian or military." That letter did not explain that a local educational agency accepting assistance under the NCLB "shall provide military recruiters the same access to secondary school students as is provided generally to post[-]secondary educational institutions or to prospective employers of those students" (20 USC § 7908 [a] [3]). In addition, petitioner's request was summarily denied by respondent Board of Education of the School District (Board of Education). The correspondence from the Board of Education denying petitioner's request for tabling accommodations also indicates that petitioner's request to observe military tabling at the school was denied.

Petitioner subsequently commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination denying his tabling request. Supreme Court dismissed the petition and, on a prior appeal, we concluded that the record "lack[ed] sufficient information to enable a court to determine whether the determination was arbitrary and capricious or whether petitioner's constitutional rights were violated," and we therefore remitted the matter for further development of the record (*Matter of Macula v Board of Educ., Geneseo Cent. School Dist.*, 61 AD3d 1338). "We note[d] in particular that the record lack[ed] evidence concerning what, if any, criteria respondents employ[ed] in determining who may present information at career days held at the School, as well as a specific description of the information that petitioner sought to present at the School with respect to career alternatives to military service" (*id.*).

Upon remittal, petitioner supplemented the record by submitting

evidence indicating that he was designated by the Genesee Valley Citizens for Peace to be the "truth-in military recruitment tabling representative for [the] School" and that the "Peace Action and Education" group had set up displays in the Rochester City School District, as well as in other school districts, including the Rush-Henrietta Central School District and Hilton Central School District. Petitioner also submitted several examples of literature for tabling, including a pamphlet providing background information on AmeriCorps; a document entitled, "Ten Points to Consider Before You Sign a Military Enlistment Agreement" (hereafter, Ten Points document) prepared by the American Friends Service Committee; information directed to "youth facing draft registration," which considered the absence of economic benefit in military service; information on the military's Delayed Entry Program; a list of "truth[s] about what recruiters promise" prepared by Iraq Veterans Against the War; and a list of examples of careers in peacemaking and social change. Petitioner also submitted a picture prototype of his tabling setup, which revealed that petitioner intended to present pamphlets regarding careers in social change, as well as information regarding "facts about military life."

Respondents, in turn, supplemented the record by submitting the affidavit of Hayes indicating that the School District does not have a written policy expressly addressing access to the School by college or military recruiters. In addition, he asserted that the only criteria for participation in a "career day" at the School are that the parent volunteer be willing to talk to students about his or her job or career and that the parent volunteer be approved by the guidance office. According to Hayes, however, petitioner did not ask to participate in a career day at the School but, rather, he sought access to the School during a time of college and military recruiting. Hayes indicated that the School District conducts a career day for fifth through seventh grade students and participates in a BOCES-sponsored career day for tenth grade students that is organized by BOCES and is held at a location other than the School.

Hayes further stated in his affidavit that the criteria employed in determining who may present information to "students about post[-]secondary education and career opportunities have been (1) whether the party will present information that is consistent with the . . . School's guidance curriculum and (2) with respect to the military, the requirements of [the] NCLB." The record does not contain any "guidance curriculum," and Hayes only hinted at what that curriculum might entail in averring that the School District "allows college recruiters access to students in the . . . School to carry out its guidance curriculum, specifically by allowing students direct access to college representatives so that they may learn about what participating colleges have to offer them."

Hayes also averred that petitioner did "not qualify for access to [the School's] students under [the School District's] guidance curriculum to conduct the activities he wants to conduct" because petitioner does not represent an employer or an institution of post-secondary education. Likewise, because petitioner was not a

representative of a branch of the military, Hayes stated that he did not qualify under the NCLB or any other statute for tabling access at the School. Of the printed materials petitioner sought to have disseminated at the School, only the two-page Ten Points document was approved for distribution by the School.

In my view, the court erred in again dismissing the petition. It is undisputed that, while constitutional rights of freedom of expression apply with equal force within schools (*see Tinker v Des Moines Ind. Community School Dist.*, 393 US 503, 506), it cannot be said "that students, teachers[] or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes" (*Grayned v City of Rockford*, 408 US 104, 117-118). Thus, any free speech analysis with regard to the existence of a right to access a school for expressive purposes depends on the character of the school property. In *Perry Educ. Assn. v Perry Local Educators' Assn.* (460 US 37), the United States Supreme Court recognized three categories for purposes of free speech analysis: (1) public forums, such as streets and parks, where limitations on expressive activity must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end" (*id.* at 45); (2) limited public forums, which have been opened by the state "for use by the public as a place for expressive activity" (*id.*) and are subject to the same standard as public forums (*see id.* at 46); and (3) nonpublic forums, which are "not by tradition or designation a forum for public communication" and are governed by different standards than the first two categories (*id.*).

Nonpublic forums are usually not held open to the general public, and "the state may reserve [a nonpublic] forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and [does] not [constitute] an effort to suppress expression merely because public officials oppose the speaker's view" (*id.*; *see Cornelius v NAACP Legal Defense & Educ. Fund, Inc.*, 473 US 788, 806; *United States Postal Serv. v Council of Greenburg Civic Assn.*, 453 US 114, 131 n 7, *appeal dismissed and cert denied* 453 US 917). With specific regard to schools, the Supreme Court has determined school internal mail facilities to be nonpublic forums (*see Perry Educ. Assn.*, 460 US at 46-47), as well as student newspapers (*see Hazelwood School Dist. v Kuhlmeier*, 484 US 260, 267-270). In addition, federal courts have determined that bulletin boards constitute nonpublic forums (*see Downs v Los Angeles Unified School Dist.*, 228 F3d 1003, 1016-1017 [9th Cir], *cert denied* 532 US 994), as well as sports activities (*see Hone v Cortland City School Dist.*, 985 F Supp 262, 271 [ND NY]) and school "career days" (*see Searcey v Harris*, 888 F2d 1314, 1318-1319 [11th Cir]).

The parties appear to agree that the School is a nonpublic forum and, in such a forum, the government may impose content-based restrictions that are premised upon "subject matter and speaker identity so long as the distinctions are reasonable in light of the purpose served by the forum and are viewpoint neutral" (*Cornelius*, 473

US at 806; *see generally Peck v Baldwinsville Cent. School Dist.*, 426 F3d 617, 632 n 9 [2d Cir], *cert denied* 547 US 1097). Here, Hayes limited access to the School for tabling purposes by denying "access to individuals or groups wishing to promote a specific point of view in opposition to any of the institutions of higher education or employers [that the School District] invite[s] onto [its] campus, whether civilian or military." Hayes further stated that the recruitment activities at the School are "limited to communication with students to answer their questions about the colleges and/or military services" and that the School "does not permit any outside parties access to the . . . School to engage in political speech related to college or military service recruitment activities."

The facts underlying the decisions of the United States Court of Appeals for the Eleventh Circuit in *Searcey v Crim* (*[Searcey I]* 815 F2d 1389) and *Searcey v Harris* (*[Searcey II]* 888 F2d 1314) are similar to those of this case. In those cases, the defendant school district promulgated a series of regulations applicable to the groups participating in the high school's career day forum, including the plaintiff peace organization (*Searcey II*, 888 F2d at 1320). Among the regulations were "no criticism" and "no discouragement" requirements, which stated that " '[p]articipants shall not be allowed to criticize or denigrate the career opportunities provided by other participants' " and that " '[n]o presenter whose primary focus or emphasis is to discourage a student's participation in a particular career field' may participate" (*id.* at 1322). In *Searcey II*, the Eleventh Circuit determined that the latter requirement was reasonable inasmuch as discouragement detracted from the "motivational purpose" of the career day forum, but it found the result of the former requirement, i.e., the "the total banning of a group from the forum[,]rather than limiting what a group can say . . .[,] to be unreasonable" (*id.*). After noting the "special force" that applied to weighing the pros and cons of embarking upon a military career, the court further stated that, "while avoiding controversial issues justifies prohibiting speakers from discussing the morality of war or defense spending, it does not justify excluding bona fide negative facts [that] are relevant to the requirements or benefits of a specific job, including one in the military" (*id.* at 1323; *cf. Student Coalition for Peace v Lower Merion School Dist. Bd. of School Directors*, 776 F2d 431, 437 [3d Cir]). The Court thus concluded that it was unreasonable for the school district to prohibit a group from presenting negative factual information about the disadvantages of specific job opportunities because the information would be useful in helping students make career choices and, further, the school district could not permit "speakers to point out the advantages of a particular career but ban any speaker from pointing out the disadvantages of the same career. That amounts to viewpoint-based discrimination" (*id.* at 1324).

In my view, the logic employed in the *Searcey* cases is equally applicable here. One of the grounds on which the majority distinguishes *Searcey I* is that it was decided before the enactment of the NCLB. I conclude, however, that the reluctance to lose federal

funding under that statute serves to *encourage* secondary schools to provide access to military recruiters but not to *discourage* access to peace activists or organizations. Moreover, as in the *Searcey* cases, respondents' justifications for limiting access to the school, e.g., avoiding debate about a controversial matter, are facially neutral but capable of concealing bias toward the approach advocated by petitioner. The fact that respondents approved for distribution a single piece of literature, i.e., the Ten Points document, that petitioner sought to present at the school does not support the conclusion that respondents' restriction on access to the school was viewpoint neutral. Indeed, that document was relatively benign. It lacked the detail and honesty inherent in the literature that respondents rejected. The rejected literature included several articles printed in the New York Times that considered the retraining of and pressure imposed upon Army recruiters, the "psychic toll" of the Iraq War, incidents of posttraumatic stress disorder in returning soldiers, the high suicide rate among soldiers and homelessness among veterans. By excluding negative information, respondents acted in a manner that was not viewpoint neutral (*see generally Cornelius*, 473 US at 806).

The majority also attempts to draw a distinction between the career day at issue in the *Searcey* cases and what respondents suggest upon remittal was a "college day." That is a distinction without a difference. The career day at issue in the *Searcey* cases was a forum intended "to provide information to high school students on post-high school career and educational opportunities" (*Searcey I*, 815 F2d at 1394 n 13). The forum at issue here considered almost the exact same topics. Freedom of speech should never be stifled upon such an arbitrary difference.

I further reject the majority's view with respect to the instructive nature of *Rumsfeld v Forum for Academic & Inst. Rights, Inc.* (547 US 47) on the facts of this case. I agree with the majority that there is no basis in the record on which to conclude that respondents' compliance with the NCLB amounts to an endorsement of the military's message or creates a forum for military speech. Although the Supreme Court in *Rumsfeld* concluded that various law schools were "not speaking when they host[ed] interviews and recruiting receptions" (*id.* at 64), and it reiterated its view that "high school students can appreciate the difference between speech a school sponsors and speech the school permits . . . pursuant to an equal access policy" (*id.* at 65), that conclusion is of no moment here inasmuch as it is not responsive to the question whether respondents' refusal to permit petitioner access to the School for the reasons set forth in the record is viewpoint neutral. The reasons offered by respondents for denying petitioner's tabling request were unreasonable. Petitioner plainly recognized the "responsibility [of the School District] to provide a safe, healthy learning environment for the students confined to its care," and was just as lucid in noting that he did not seek to engage in activity "that would disrupt or interfere with the vital education of [the] children." Indeed, petitioner expressed his intent to provide students with what amounted to a balanced view of

alternatives to military service, such as AmeriCorps, Peace Corps and International Development. While it is appropriate for the Board of Education "to prohibit political or idealogical debate" (*Searcey II*, 888 F2d at 1321), as well as "criticism . . . denigrating the opportunities offered by a specific group" (*id.* at 1324), the strictly factual presentation that petitioner sought to make corresponds with respondents' goal of providing information to students about potential post-secondary education options. In other words, while the proposed presentation of petitioner within the forum was not unlimited in scope, it was consistent with the information that the School's recruiting forum was intended to consider—specifically, students' options after high school graduation.

Finally, I agree with petitioner that respondents acted in an arbitrary and capricious manner. Whether the contention of petitioner with respect to the cause of action alleging arbitrary and capricious action concerns the denial of his tabling request or the denial of what appears to have been his request to observe the military recruiters, I disagree with the majority that respondents' refusal to allow petitioner access to the School under those circumstances is rational (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231).

Thus, I would reverse the judgment, grant the petition, annul the determination, and direct respondents to grant petitioner's tabling request and request to observe military recruiters.

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

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CA 09-00830

PRESENT: SCUDDER, P.J., SCONIERS, GREEN, AND GORSKI, JJ.

KARL S. SIENKIEWICZ, PLAINTIFF-APPELLANT,

V ORDER

FLEMING CO., INC., DOING BUSINESS AS JUBILEE FOODS, DEFENDANT-RESPONDENT.

ANDREWS, BERNSTEIN & MARANTO, LLP, BUFFALO (RICHARD A. NICOTRA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (PAUL G. JOYCE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered July 8, 2008 in a personal injury action. The order, insofar as appealed from, upon reargument granted defendant's motion for a new trial unless plaintiff stipulated to reduce the award of damages to a certain amount.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on June 14, 2010,

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

Entered: July 9, 2010

Patricia L. Morgan
Clerk of the Court

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

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CA 09-00375

PRESENT: MARTOCHE, J.P., CENTRA, FAHEY, PERADOTTO, AND PINE, JJ.

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

V OPINION AND ORDER

STANLEY L. CAMPANY, AN INMATE IN THE CUSTODY
OF NEW YORK STATE DEPARTMENT OF CORRECTIONAL
SERVICES, RESPONDENT-APPELLANT.

SHIRLEY A. GORMAN, BROCKPORT, FOR RESPONDENT-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (JULIE S. MERESON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Lewis County (Charles C. Merrell, A.J.), entered November 21, 2008 in a proceeding pursuant to Mental Hygiene Law article 10. The order determined that respondent is a dangerous sex offender requiring confinement and committed respondent to a secure treatment facility.

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

Opinion by FAHEY, J.:

I

In this appeal from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10, respondent raises what is, in the context of this proceeding, the unique issue whether the order should be reversed because he was denied effective assistance of counsel. For the reasons that follow, we agree with respondent that he was entitled to effective assistance of counsel, but we reject his contention that he was denied meaningful representation. We therefore conclude that the order should be affirmed.

II

Respondent is a repeat sex offender with a lengthy and active history of sexual crimes. In 1990, respondent was convicted upon his plea of guilty of sodomy in the first degree (Penal Law former § 130.50) for placing his mouth on the penis of a six-year-old boy. The presentence investigation with respect to that conviction included interviews of multiple children that had been in the company of

respondent and revealed that respondent may have engaged in other inappropriate behaviors. Respondent suggested as much in a statement that he gave to the police in which he intimated that the sexual abuse to which he was subjected as a child was responsible for his sexual contact with the victim of the sodomy and what respondent characterized as "several either inappropriate or misunderstood situations with several other [boys]." Respondent was released to parole supervision in November 1993.

In August 1994, respondent's parole was revoked. The revocation concerned respondent's alleged acts of a sexual nature with clients of a nursing home at which respondent was employed. The violation release report indicated that respondent had been having anal intercourse each night with a male resident of the nursing home and that the subject resident lived at the home because he was incapable of caring for himself in the community. Respondent was again released to parole supervision in May 1995, and he was discharged therefrom upon his maximum expiration date in November 1995.

In April 1996, respondent was arrested and subsequently charged with 15 counts of sexual abuse in the first degree (Penal Law § 130.65 [3]), five counts of endangering the welfare of a child (§ 260.10 [1]) and one count of resisting arrest (§ 205.30). The indictment alleged that, in November and December 1995, respondent used his hand to rub and/or grab the penis of an eight-year-old boy; that, in March 1996, respondent rubbed his hand on the vagina of a four-year-old girl; and that, on two occasions in January 1996, respondent touched the penis of a 10-year-old boy. Respondent was subsequently convicted of five counts each of sexual abuse in the first degree and endangering the welfare of a child, and he was sentenced to a total of 12 years in prison. This time, respondent was not released to parole supervision.

In April 2008, as respondent neared the end of his sentence, petitioner filed a civil management petition pursuant to Mental Hygiene Law article 10. The petition was supported by the report of a licensed psychologist with the New York State Office of Mental Health, who determined that respondent suffered from nonexclusive pedophilia, i.e., respondent was sexually attracted to both males and females, as well as antisocial personality disorder. That psychologist also used two actuarial assessment tools to determine respondent's risk of reoffending: the "Static-99" tool, under which respondent scored in the high risk range that predicted a 44% rate of violent recidivism over five years and a 51% rate of recidivism over 10 years, and the "MnSOST-R" tool, which stated that respondent had a 57% risk of reoffending within a six-year period. The psychologist also noted that respondent had never completed a sex offender treatment program despite being offered such a program eight times. Respondent's rationale for not completing a sex offender treatment program was that respondent would have to admit the past allegations against him, which he adamantly denied.

A probable cause order with respect to respondent was issued on April 16, 2008, and he was committed to a secure treatment facility

during the pendency of this proceeding. The attorneys for the parties later stipulated that neither would observe any examination conducted by the other party's psychiatric examiner. On June 20, 2008 and at respondent's request, Supreme Court issued an order for an "independent evaluation" of respondent, appointing respective psychiatric examiners for petitioner and respondent (*see* Mental Hygiene Law § 10.06 [d], [e]).

The matter proceeded to a trial on the issue whether respondent suffers from a mental abnormality (*see* Mental Hygiene Law § 10.03 [i]; § 10.07 [d]). The jury returned a verdict finding that respondent has a mental abnormality that predisposes him to commit further sex offenses and that respondent has serious difficulty in controlling such conduct. The court subsequently conducted a bench trial on the issue of respondent's dangerousness to determine whether to confine respondent or to place him on a regimen of strict and intensive supervision and treatment (*see* § 10.07 [f]; § 10.11). By order entered November 21, 2008, the court found that respondent has a mental abnormality with a strong predisposition to commit sex offenses, along with an inability to control his behavior, and that he is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility. The court thus concluded that respondent is a dangerous sex offender requiring confinement, and this appeal ensued.

III

Respondent contends that he had a right to effective assistance of counsel and was denied that right based on the alleged shortcomings of his attorney under the federal and state standards for ineffective assistance of counsel in a criminal action (*see Strickland v Washington*, 466 US 668, 694, *reh denied* 467 US 1267; *People v Baldi*, 54 NY2d 137, 147). Our consideration of that contention necessarily requires that we determine the character of this proceeding, i.e., whether it is of a criminal or civil nature.

We start with the decisions of the United States Supreme Court in *Kansas v Hendricks* (521 US 346) and *United States v Ward* (448 US 242, *reh denied* 448 US 916). In *Hendricks*, the Court upheld a statute specifically designed to accomplish the purposes of the civil confinement of sex offenders at the conclusion of their prison terms and concluded that such civil confinement was a civil rather than punitive restriction (521 US at 357-369). By that time, *Ward* had already established a two-part test to distinguish whether actions by the state are civil or criminal in nature:

> "First, we have set out to determine whether [the legislature], in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other . . . Second, where [the legislature] has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was

> so punitive either in purpose or effect as to negate that intention . . . In regard to this latter inquiry, we have noted that 'only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground' " (448 US at 248-249).

The result in *Hendricks* was consistent with the Court's trend of upholding "involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards" (521 US at 357; *see Foucha v Louisiana*, 504 US 71, 80; *Addington v Texas*, 441 US 418, 426-427). Nevertheless, the plain language of the decisions in *Hendricks*, *Foucha* and *Addington*, read either individually or collectively, does not alone compel the conclusion that our decision in this case is to be premised on civil authority. Rather, those cases provide a framework by which to analyze the character of Mental Hygiene Law article 10. The following passage from *Hendricks*, which considers the nature of a Kansas civil commitment statute, is instructive:

> "The categorization of a particular proceeding as civil or criminal 'is first of all a question of statutory construction' . . . We must initially ascertain whether the legislature meant the statute to establish 'civil' proceedings. If so, we ordinarily defer to the legislature's stated intent. Here, Kansas' objective to create a civil proceeding is evidenced by its placement of the [Sexually Violent Predator] Act within the Kansas probate code, instead of the criminal code . . ., as well as its description of the Act as creating a '*civil commitment procedure*[]' . . . Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm.
>
> Although we recognize that a 'civil label is not always dispositive,' . . . we will reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil[]' . . . In those limited circumstances, we will consider the statute to have established criminal proceedings for constitutional purposes" (521 US at 361).

Here, the legislative findings with respect to Mental Hygiene Law article 10 are embodied in section 10.01. Briefly, the Legislature found that, inter alia,

- "[c]ivil and criminal processes have distinct but overlapping goals, and both should be part of an

integrated approach" to the problem of sex offender recidivism (§ 10.01 [a]);

- sex offenders with mental abnormalities predisposing them to engage in repeated sex offenses should receive treatment during incarceration "as a result of the criminal process, and [they] should continue to receive treatment when that incarceration comes to an end" (§ 10.01 [b]);

- outpatient care is an appropriate means of treating some sex offenders, and "civil commitment should be only one element in a range of responses to the need for treatment" of those offenders (§ 10.01 [c]);

- "some of the goals of civil commitment . . . are appropriate goals of the criminal process as well[and, f]or some recidivistic sex offenders, appropriate criminal sentences . . . may be the most appropriate way to achieve those goals" (§ 10.01 [d]);

- "the system for responding to recidivistic sex offenders with civil measures must be designed for treatment and protection" (§ 10.01 [e]);

- "the system should offer meaningful forms of treatment to sex offenders in all criminal and civil phases" (§ 10.01 [f]); and

- the "civil commitment of sex offenders should be implemented in ways that do not endanger, stigmatize[] or divert needed treatment resources away from . . . traditional mental health patients" (§ 10.01 [g]).

All of those findings preceded the titling of Mental Hygiene Law article 10 as "Sex Offenders Requiring Civil Commitment or Supervision," and they are consistent with an intent to *treat* rather than *punish* offenders (*see Matter of State of New York v Farnsworth*, ___ AD3d ___ [Apr. 30, 2010]). A jury trial under article 10 does have some criminal characteristics—for example, the jury is to consist of 12 jurors (*see* § 10.07 [a]-[b]; CPL 270.05 [1]), and the verdict must be unanimous (*see* Mental Hygiene Law § 10.07 [d]). Nonetheless, the legislative intent embodied in Mental Hygiene Law § 10.01, coupled with the placement of the provisions of article 10 in the Mental Hygiene Law rather than the Penal Law, compel the conclusion that this statute is indeed of a civil nature (*see Hendricks*, 521 US at 361).

For those reasons, we conclude that this proceeding is of a civil rather than criminal nature and, in the context of civil litigation, a contention concerning ineffective assistance of counsel will not be considered absent "extraordinary circumstances" (*Lewis v Lewis*, 70 AD3d 1432, 1434; *see Matter of Hares v Walker*, 8 AD3d 1019). "Civil" as respondent's commitment may be, however, we are mindful of the fact that it is *indefinite* (*see* Mental Hygiene Law § 10.09 [b], [f]) and

involuntary. Such confinement constitutes an "extraordinary circumstance."

Our conclusion is not without support by analogy. By way of example, a respondent in a proceeding concerning child custody, the termination of parental rights or the violation of a child support order is entitled to the effective assistance of counsel, and the applicable standard is the same as in a criminal proceeding (*see e.g. Matter of Kathleen K.*, 66 AD3d 683, *lv denied* 13 NY3d 713; *Matter of Jenna KK.*, 50 AD3d 1216, 1217, *lv denied* 11 NY3d 703; *Matter of Moore v Blank*, 8 AD3d 1090, *lv denied* 3 NY3d 606; *Matter of Matthew C.*, 227 AD2d 679, 682). That result is logical—the consequences of such proceedings are drastic, and a respondent in any such proceeding has the right to assistance of counsel that would be hollow unless that assistance is meaningful (*see Matthew C.*, 227 AD2d at 682). Likewise, the consequences of an unfavorable determination at a Mental Hygiene Law article 10 proceeding are severe. Respondent's right to counsel would be eviscerated if counsel was ineffective (*see* § 10.06 [c]; § 10.08 [g]).

We now turn to the merits of respondent's instant contention. Inasmuch as respondent contends that he received ineffective assistance of counsel under both the state and federal standards, we use the state standard for ineffective assistance of counsel (*see People v Stultz*, 2 NY3d 277, 282, *rearg denied* 3 NY3d 702; *People v Henry*, 95 NY2d 563, 565-566; *cf. People v McDonald*, 1 NY3d 109, 114-115; *see generally Baldi*, 54 NY2d at 147). Applying that standard, we conclude that there is no merit to the contention of respondent that he received ineffective assistance of counsel.

We reject the contention of respondent that his attorney was ineffective in stipulating with petitioner that neither he nor petitioner's attorney would observe an examination conducted by the psychiatric examiner for the other party. Respondent essentially contends that, because petitioner does not have the right to attend the examination by respondent's psychiatric examiner, respondent's attorney bargained away an opportunity to protect respondent for no return. Even assuming, arguendo, that a respondent's attorney has the right to attend a psychiatric examination conducted at petitioner's request in a proceeding pursuant to Mental Hygiene Law article 10 (*see* § 10.06 [d]; *Matter of State of New York v Carmelo M.*, 72 AD3d 1102; *see also* CPL 250.10 [3]; *Matter of Lee v County Ct. of Erie County*, 27 NY2d 432, 444, *cert denied* 404 US 823; *Ughetto v Acrish*, 130 AD2d 12, 21-25, *appeal dismissed* 70 NY2d 871, 990), respondent's contention lacks merit. The issue whether petitioner is permitted to attend the psychiatric examination of a respondent conducted on respondent's behalf in a proceeding of this nature (*see* Mental Hygiene Law § 10.06 [e]) was not resolved until after the subject stipulation was entered (*see generally Matter of State of New York v Bernard D.*, 61 AD3d 567; *Matter of Charles S.*, 60 AD3d 954, 955), and respondent's attorney was not required to anticipate a change in the law (*see generally People v Brisson*, 68 AD3d 1544, 1547, *lv denied* 14 NY3d 798; *People v Lane*, 93 AD2d 92, 99, *lv denied* 59 NY2d 974).

We also conclude that the contention of respondent that his attorney failed to investigate his case is based on matters outside the record on appeal and thus is not properly before us (*see e.g. Matter of Gray v Kirkpatrick*, 59 AD3d 1092, 1093-1094; *Matter of Prudential Prop. & Cas. Ins. Co. v Ambeau*, 19 AD3d 999; *see also People v Boyde*, 71 AD3d 1442). Moreover, "[t]here can be no denial of effective assistance of . . . counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702), and the contention of respondent that his attorney was ineffective for failing to argue that the report of the psychiatric examiner appointed on his behalf should have remained private is thus without merit (*see* Mental Hygiene Law § 10.06 [e]). Contrary to the further contention of respondent, his attorney was not ineffective in using a peremptory challenge to exclude a prospective juror who had known respondent since childhood, rather than challenging him for cause. That prospective juror did not "cast serious doubt on [his] ability to render a fair verdict" (*People v Bludson*, 97 NY2d 644, 646; *see* § 10.07 [b]; CPL 270.20 [1] [b]), and this is not a case in which the strategy of respondent's attorney "during jury selection fell below the requisite level of effective assistance" (*People v Turner*, 37 AD3d 874, 877, *lv denied* 8 NY3d 991; *see generally People v Benevento*, 91 NY2d 708, 712-713). Viewing the evidence, the law and the circumstances of this case as a whole and as of the time of the representation, we conclude that respondent received effective assistance of counsel (*see generally Baldi*, 54 NY2d at 147).

IV

We next address respondent's remaining contentions. Respondent contends that the order should be reversed because of alleged evidentiary errors. Most of those errors are not preserved for our review (*see generally* CPLR 4017; CPLR 5501 [a] [3]), and we do not reach respondent's contention concerning them in the interest of justice (*see generally Huff v Rodriguez*, 64 AD3d 1221, 1223). With respect to the contention of respondent that there was improper testimony that he threw knives at his father and that he was treated at the St. Lawrence Psychiatric Center, we note that, after his attorney objected to the questions eliciting that testimony, the attorney for petitioner either agreed to limit the scope of his questioning or to withdraw the question, and respondent's attorney did not seek further relief. Consequently, we conclude that the alleged error was corrected to respondent's satisfaction, and any further contentions with respect to that issue are not preserved for our review (*see generally* CPLR 4017; CPLR 5501 [a] [3]). Respondent further contends that the court erred in permitting the psychiatric examiner for petitioner to testify concerning the use of a psychopathy checklist by the psychiatric examiner for respondent. Even assuming, arguendo, that the court so erred, we conclude that the error was harmless inasmuch as the psychiatric examiner for petitioner further testified that his informal scoring of the same test indicated that respondent had an increased risk of reoffending (*see generally* CPLR

2002; *Francis v Francis*, 262 AD2d 1065).

Respondent's contention that neither of the subject psychiatric examiners should have been permitted to testify because neither established the reliability of the information contained in the records upon which they relied is not preserved for our review (*see generally Carr v Burnwell Gas of Newark, Inc.*, 23 AD3d 998; *Balsz v A & T Bus Co.*, 252 AD2d 458). In any event, that contention is based on matters outside the record on appeal and thus is not properly before us (*see generally Gray*, 59 AD3d at 1093-1094; *Prudential Prop. & Cas. Ins. Co.*, 19 AD3d at 1000). The further contention of respondent that he was denied due process with respect to securing a psychiatric examiner is also unpreserved for our review (*see Melahn v Hearn*, 60 NY2d 944, 945), and we decline to review it in the interest of justice (*see generally Huff*, 64 AD3d at 1223).

We conclude that respondent failed to preserve for our review his contention that the court erred in admitting certain records of Central New York Psychiatric Center and the transcript of the trial that resulted in his 1996 conviction (*see generally* CPLR 4017; CPLR 5501 [a] [3]), as well as his further contention that the court erred in instructing the jury that the court would determine whether respondent required strict and intensive supervision and treatment or confinement if the jury found respondent to have a mental abnormality (*see* CPLR 4110-b; *De Long v County of Erie*, 60 NY2d 296, 306; *Fitzpatrick & Weller, Inc. v Miller*, 21 AD3d 1374). Respondent's contention that Mental Hygiene Law article 10 deprives a sex offender of equal protection is also not preserved for our review (*see generally Melahn*, 60 NY2d at 945), and we decline to review those contentions in the interest of justice (*see generally Huff*, 64 AD3d at 1223).

Accordingly, we conclude that the order should be affirmed.

Entered: July 9, 2010

Patricia L. Morgan
Clerk of the Court

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

700

CA 10-00125

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

SCOTT F. DEAN, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF UTICA, DEFENDANT-RESPONDENT.

CITY OF UTICA, THIRD-PARTY
PLAINTIFF-APPELLANT-RESPONDENT,

V

BEATON INDUSTRIES, INC., THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.

ANEY & MADIA, HERKIMER, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LINDA SULLIVAN FATATA, CORPORATION COUNSEL, UTICA (JOHN P. ORILIO OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

Appeals and cross appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered April 28, 2009 in a personal injury action. The order, inter alia, denied the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motions of defendant-third-party plaintiff and third-party defendant for summary judgment dismissing the Labor Law § 240 (1) claim and reinstating that claim, and by granting that part of the motion of third-party defendant for summary judgment dismissing the common-law indemnification claim and dismissing that claim and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while working on a scissor lift. Plaintiff was replacing bearing brackets on a large garage door and was injured when the garage door opened and struck the scissor lift, causing it to fall over. Plaintiff thereafter moved for partial summary judgment on liability under Labor

Law § 240 (1), and defendant-third-party plaintiff (hereafter, City) moved, inter alia, for summary judgment dismissing the Labor Law claims and for summary judgment on its claim for indemnification from third-party defendant, Beaton Industries, Inc. (Beaton). Beaton moved for summary judgment dismissing plaintiff's Labor Law claims and the City's third-party complaint. Supreme Court, inter alia, denied plaintiff's motion and granted those parts of the motions of the City and Beaton for summary judgment dismissing the Labor Law claims. Plaintiff raises no issues on appeal with respect to Labor Law § 241 (6) and thus is deemed to have abandoned any issues with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984). The court also denied that part of the motion of Beaton for summary judgment dismissing the third-party complaint.

We conclude that the court erred in granting those parts of the motions of the City and Beaton for summary judgment dismissing the Labor Law § 240 (1) claim. We therefore modify the order accordingly. The contention of the City that it established as a matter of law that the scissor lift provided to plaintiff was an adequate safety device lacks merit. The mere fact that the scissor lift tipped over upon being struck by the garage door is sufficient to establish as a matter of law that the scissor lift was not so "placed . . . as to give proper protection" to plaintiff (*id.*; *see Ward v Cedar Key Assoc., L.P.*, 13 AD3d 1098). We reject the contention of the City and Beaton that the actions of plaintiff were the sole proximate cause of the accident (*see Ward*, 13 AD3d 1098). Even assuming, arguendo, that plaintiff should have ensured that the garage door was properly locked out or tagged out prior to beginning work, we conclude that his failure to do so raises, at most, an issue of comparative negligence, which is not "a defense available under" section 240 (1) (*Gizowski v State of New York*, 66 AD3d 1348, 1349). Thus, we conclude that the City and Beaton failed to meet their initial burden of establishing their entitlement to judgment as a matter of law with respect to Labor Law § 240 (1) and that the court therefore erred in granting their motions insofar as they sought dismissal of that claim. We do not address the propriety of the court's denial of the motion by plaintiff for partial summary judgment under section 240 (1) inasmuch as plaintiff did not take an appeal from that part of the order denying his motion.

We reject the further contention of the City and Beaton that Labor Law § 240 (1) is inapplicable because plaintiff was performing only "routine maintenance" rather than "repair" work on the garage doors. The doors had been installed only weeks before, and the new bearing brackets were required because the previously installed bearing brackets were wearing down prematurely. Such premature deterioration of the brackets cannot be deemed "normal wear and tear" such that replacing the brackets would constitute routine maintenance (*Buckmann v State of New York*, 64 AD3d 1137, 1139).

With respect to that part of the motion of Beaton for summary judgment dismissing the third-party complaint to the extent that it seeks common-law indemnification, we conclude that the court erred in

denying that part of the motion. We therefore further modify the order accordingly. It is undisputed that plaintiff's injuries were not "grave" and thus the City's claim for common-law indemnification is barred by Workers' Compensation Law § 11. We agree with the court, however, that there are issues of fact concerning the City's claim for contractual indemnification, and the court therefore properly denied that part of Beaton's motion for summary judgment dismissing that claim.

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

702

CA 10-00120

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, GREEN, AND GORSKI, JJ.

VANESSA K. SHANAHAN AND JAMES SHANAHAN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JANET H. SUNG, ET AL., DEFENDANTS,
PAUL J. WOPPERER, M.D. AND PAUL J.
WOPPERER, M.D., P.C., DEFENDANTS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered August 4, 2009 in a medical malpractice action. The order denied the motion of defendants Paul J. Wopperer, M.D. and Paul J. Wopperer, M.D., P.C. for summary judgment and granted the cross motion of plaintiffs for leave to amend the complaint.

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

Memorandum: Plaintiffs commenced this medical malpractice action alleging, inter alia, that defendant Paul J. Wopperer, M.D. negligently "caused and/or allowed" a metallic fragment to break off from a needle that had been placed in the right breast of Vanessa K. Shanahan (plaintiff) to enable Dr. Wopperer to locate a nonpalpable mass during a biopsy procedure in June 2005. Contrary to the contention of the Wopperer defendants (collectively, defendants), Supreme Court properly denied their motion for summary judgment dismissing the complaint against them inasmuch as defendants failed to establish as a matter of law that the metallic fragment detected in plaintiff's right breast in December 2005 and removed in March 2006 did not result from the June 2005 biopsy. In support of the motion, defendants submitted an affidavit of Dr. Wopperer in which he asserted that the metallic fragment entered plaintiff's right breast prior to the June 2005 procedure. At his deposition, however, Dr. Wopperer testified that he had "no opinion whatsoever" whether the metallic fragment was present in plaintiff's breast before the June 2005 biopsy, and he testified that he was not aware from plaintiff's prior medical history of any manner in which a metal fragment could have

become embedded in plaintiff's breast. Defendants also submitted the deposition testimony of a physician who opined that plaintiff "got a metallic density in her breast from the previous surgery," but was unable to identify *which* surgery. Notably, Dr. Wopperer also performed a biopsy procedure on plaintiff in May 2004. Although the above-referenced physician testified at her deposition that, based upon her review of plaintiff's MRI films from 2004 and 2005, a "white artifact" that she identified as the metallic fragment was present in plaintiff's breast before the June 2005 biopsy, it should be noted that the physician did not set forth that observation in her December 2005 MRI report despite reviewing the same films at that time. Rather, she stated in her report only that she identified a metallic artifact at the "12:00 position" of the right breast, which was the same position of the mass removed in June 2005. We thus conclude that the burden never shifted to plaintiffs to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Suib v Keller*, 6 AD3d 805, 806).

We agree with the further contention of defendants, however, that the court abused its discretion in granting plaintiffs' cross motion for leave to amend the complaint to include a cause of action asserting that the metallic fragment was left in plaintiff's right breast during the May 2004 biopsy performed by Dr. Wopperer, inasmuch as that cause of action is time-barred. We therefore modify the order accordingly. The May 2004 biopsy was performed more than 2½ years before plaintiffs commenced this action, and we conclude that the continuous treatment doctrine does not apply to toll the statute of limitations (*see* CPLR 214-a; *see generally Nykorchuck v Henriques*, 78 NY2d 255, 258-259). CPLR 214-a provides that "[a]n action for medical . . . malpractice must be commenced within two years and six months of the act, omission or failure complained of *or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission or failure*" (emphasis added). Here, the act, omission or failure complained of is leaving a metallic fragment in plaintiff's right breast. Even assuming, arguendo, that the act took place in May 2004, we conclude that the "illness, injury or condition" giving rise to that act was the palpable nodule detected in plaintiff's right breast in March 2004, and it is undisputed that plaintiff sought no further treatment for that condition after the nodule was removed. Thus, the course of treatment related to the condition prompting the May 2004 biopsy—the palpable nodule found in the "11 o'clock area" of plaintiff's right breast—ended in May 2004 with the removal of that nodule (*see Shister v City of New York*, 63 AD3d 1032, 1034). The detection of a new nodule in a different position of plaintiff's right breast in April 2005 prompted a second course of treatment that continued until January 2006, when Dr. Wopperer last treated plaintiff. We thus conclude that the two biopsies were "discrete and complete" events that cannot be linked by way of the continuous treatment doctrine (*Davis v City of New York*, 38 NY2d 257, 260). Although Dr. Wopperer continued to monitor plaintiff for fibrocystic changes in her breasts after the May 2004 biopsy, it is well established that "neither the mere 'continuing relation between physician and patient' nor 'the continuing nature of a diagnosis' is sufficient to satisfy the

requirements of the doctrine" (*Nykorchuck*, 78 NY2d at 259).

All concur except GREEN and GORSKI, JJ., who dissent in part and vote to affirm in the following Memorandum: We respectfully dissent in part, and would affirm. We agree with the majority that Supreme Court properly denied the motion of the Wopperer defendants (collectively, defendants) for summary judgment dismissing the complaint against them. As the majority concludes, defendants failed to meet their initial burden of establishing that the metallic fragment detected in the right breast of Vanessa K. Shanahan (plaintiff) in December 2005 and removed in March 2006 did not result from the June 2005 biopsy performed by defendant Paul J. Wopperer, M.D. We further note that defendants failed to submit any evidence that the distortion identified by a physician on a December 2005 MRI film of the right breast no longer appeared on any image or film following the subsequent removal of the metal fragment from that breast in March 2006. We thus conclude that defendants, by their own submissions and lack thereof, raised a triable issue of fact when the metallic fragment was placed in plaintiff's breast. Indeed, Dr. Wopperer testified at his deposition that he was unsure whether the distortion seen on the December 2005 MRI film was indicative of metal, and the deposition testimony of the aforementioned physician indicated that the distortion detected on the June 2005 preoperative film could have been calcification rather than a metallic "spot."

In light of the above, we cannot agree with the majority that the court abused its discretion in granting plaintiffs' cross motion for leave to amend the complaint to include an additional cause of action. In that proposed cause of action, plaintiffs sought to assert that the metallic fragment was negligently left in plaintiff's right breast during a biopsy performed by Dr. Wopperer in May 2004, 13 months before the June 2005 biopsy from which this action arises (*see generally Aurora Med. Group, P.C. v Genewick*, 68 AD3d 1769). In light of both our conclusion and that of the majority that defendants failed to establish as a matter of law when the metallic fragment entered plaintiff's body, we are compelled to conclude that the majority is inconsistent in determining that there is no issue of fact concerning the applicability of the continuous treatment doctrine.

"[U]nder the continuous treatment doctrine, 'when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint,' the limitations period does not begin to run until the end of treatment" (*Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1, 8; *see Shister v City of New York*, 63 AD3d 1032, 1033-1034). "Included within the scope of 'continuous treatment' is a timely return visit instigated by the patient to complain about and seek treatment for a matter related to the initial treatment" (*McDermott v Torre*, 56 NY2d 399, 406; *see Couch v County of Suffolk*, 296 AD2d 194, 196). Although the May 2004 biopsy was a separate procedure performed more than 2½ years before plaintiffs commenced this action, plaintiffs submitted evidence that plaintiff returned to Dr. Wopperer as late as August 2005 complaining of pain in her right breast and that the pain was related to the existence of the metallic fragment in her breast,

inasmuch as the pain resolved following the removal of the metallic fragment from plaintiff's body. Thus, if we assume the truth of plaintiffs' allegation that the metallic fragment was left in plaintiff's breast in May 2004, as we must in the context of determining whether the continuous treatment doctrine applies (*see Scribner v Harvey*, 245 AD2d 1120, 1121), we may also conclude that in August 2005 plaintiff sought treatment related to the initial procedure in May 2004 (*see generally McDermott*, 56 NY2d at 405-406; *Couch*, 296 AD2d at 196). The court therefore properly granted plaintiffs' cross motion (*see Aurora Med. Group, P.C.*, 68 AD3d 1769; *see generally Couch*, 296 AD2d at 196). "Generally, [l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where[, as here,] the amendment is not patently lacking in merit" (*Anderson v Nottingham Vil. Homeowner's Assn., Inc.*, 37 AD3d 1195, 1198, *amended on rearg* 41 AD3d 1324 [internal quotation marks omitted]).

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

732

KA 07-01939

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CIJNTJE J. COX, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (STEPHEN X. O'BRIEN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered April 18, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of assault in the first degree (Penal Law § 120.10 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]). Defendant failed to preserve for our review his contention that the count of the indictment charging him with criminal possession of a weapon was duplicitous (*see People v Sponburgh*, 61 AD3d 1415, *lv denied* 12 NY3d 929), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Viewing the evidence in light of the elements of assault in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to that count is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject the further contention of defendant that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). Although defendant contends that he was denied effective assistance of counsel because defense counsel did not seek youthful offender status for him, it is well established that "[t]he failure to make motions with little or no chance of success does not constitute ineffective assistance of counsel" (*People v Nuffer*, 70 AD3d 1299, 1300). Here, there were no "mitigating circumstances . . . bear[ing] directly upon the manner in which the crime[s were] committed," nor could defendant be considered a "relatively minor" participant in the

crimes (CPL 720.10 [3]). Finally, the sentence is not unduly harsh or severe.

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

735

KA 06-03475

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAMAR J. ROUNDTREE, DEFENDANT-APPELLANT.

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

MICHAEL C. GREEN, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered July 19, 2006. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree, and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentences imposed for criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree shall run concurrently with the sentence imposed for murder in the second degree and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), criminal possession of a weapon in the second degree (§ 265.03 [former (2)]), and criminal possession of a weapon in the third degree (§ 265.02 [former (4)]). Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Pearson*, 26 AD3d 783, *lv denied* 6 NY3d 851). In any event, we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "Defendant's further contention concerning the legal sufficiency of the evidence before the grand jury 'is not reviewable on an appeal from an ensuing judgment based upon legally sufficient trial evidence' " (*People v Lee*, 56 AD3d 1250, 1251, *lv denied* 12 NY3d 818; *see* CPL 210.30 [6]).

Contrary to the contention of defendant, he was not denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). In view of our determination that the evidence is legally sufficient to support the conviction, defendant was not denied effective assistance of counsel based on defense counsel's failure to renew the motion for a trial order of dismissal inasmuch as he failed to show that the motion, "if made, would have been successful" (*People v Marcial*, 41 AD3d 1308, 1308, *lv denied* 9 NY3d 878; *see People v Bassett*, 55 AD3d 1434, 1437-1438, *lv denied* 11 NY3d 922). With respect to the remaining alleged shortcomings of defense counsel, we conclude that defendant has failed " 'to demonstrate the absence of strategic or other legitimate explanations' for [those] alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712).

We agree with defendant, however, that the sentences imposed for criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree must run concurrently with the sentence imposed for murder in the second degree, and we therefore modify the judgment accordingly. Pursuant to Penal Law § 70.25 (2), "[w]hen more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other," the sentences, with an exception not relevant here, must run concurrently. Based on the evidence presented at trial, and as correctly conceded by the People, "the court has no discretion; concurrent sentences are mandated" (*People v Hamilton*, 4 NY3d 654, 658).

The sentence imposed for murder in the second degree is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are lacking in merit.

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

738.1

CA 10-00108

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

BERNARD GARRASI, II, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANNE MARIE DEAN, AS EXECUTRIX OF THE ESTATE OF SANDY ROTUNDA, DECEASED, AND ROTUNDA PROPERTIES, LLC, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

SHANE AND REISNER, LLP, ALLEGANY (JEFFREY P. REISNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered January 11, 2010. The order granted the motion of plaintiff for, inter alia, leave to amend 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 vacating the third and fourth ordering paragraphs and as modified the order is affirmed without costs.

Same Memorandum as in *Garrasi v Dean* ([appeal No. 1] ___ AD3d ___ [July 9, 2010]).

Entered: July 9, 2010

Patricia L. Morgan
Clerk of the Court

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

738

CA 09-01793

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

BERNARD GARRASI, II, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANNE MARIE DEAN, AS EXECUTRIX OF THE ESTATE OF SANDY ROTUNDA, DECEASED, AND ROTUNDA PROPERTIES, LLC, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

SHANE AND REISNER, LLP, ALLEGANY (JEFFREY P. REISNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 29, 2009. The order denied the motion of defendants to dismiss the complaint in part and for a change of venue.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the complaint against defendant Anne Marie Dean, as executrix of the estate of Sandy Rotunda, deceased, is dismissed, and venue is placed in Chautauqua County.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he slipped and fell in the parking area of property allegedly owned by defendants. In appeal No. 1, defendants moved, inter alia, to dismiss the complaint against defendant Anne Marie Dean, as executrix of the estate of Sandy Rotunda (decedent), on the ground that at the time of the accident decedent had no ownership interest in the property. They also moved to transfer the venue of the action from Erie County to Chautauqua County pursuant to CPLR 511 or, alternatively, CPLR 510, contending that Erie County is not a proper venue. According to defendants, all proper parties to the action reside or have their principal place of business in Chautauqua County, the incident occurred there, and the convenience of material witnesses will be promoted by the change of venue. Supreme Court denied that part of the motion with respect to decedent without prejudice to be renewed upon the completion of discovery, and the court denied that part of the motion seeking a change of venue. In appeal No. 2, plaintiff moved for leave to amend the complaint pursuant to CPLR 2001 and 3025 (b) to reflect that plaintiff in fact resided in Erie County, and he sought leave to "renew and/or reargue"

his opposition to that part of defendants' motion for a change of venue, seeking to allow venue to remain in Erie County pursuant to CPLR 503 (a). The court granted plaintiff's motion.

We conclude with respect to appeal No. 1 that the court erred in denying that part of defendants' motion to dismiss the complaint against Dean, as executrix of decedent's estate. In support of their motion, defendants submitted evidence establishing as a matter of law that decedent's estate had transferred title to the subject property to defendant Rotunda Properties, LLC one year and seven months prior to plaintiff's accident and thus was not a record owner of the property at the time of the accident (*see Adamkiewicz v Lansing*, 288 AD2d 531, 532). Plaintiff failed to raise an issue of fact to defeat that part of the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The court also erred in denying that part of defendants' motion for a change of venue inasmuch as the evidence before the court at the time of the motion, including the original complaint, established that no legitimate party to the action had sufficient ties with Erie County to sustain plaintiff's choice of that venue (*see* CPLR 503 [a]; *Seefeldt v Incledon* [appeal No. 2], 261 AD2d 925, 926).

We conclude with respect to appeal No. 2 that the court properly granted that part of plaintiff's motion for leave to amend the complaint, inasmuch as plaintiff established that he maintained his residence in Erie County. We further conclude, however, that plaintiff in fact moved for leave to renew with respect to venue, despite his characterization of that part of his motion as one to "renew and/or reargue," and we modify the order by denying that part of plaintiff's motion. Plaintiff failed to establish in support of that part of his motion that he had a "reasonable justification for the failure to present [the fact concerning his correct residence in opposition to] the prior motion" (CPLR 2221 [e] [3]; *see Custom Topsoil, Inc. v City of Buffalo*, 12 AD3d 1162, 1164). We note in any event that a "change of venue is warranted [because] . . . the action bears no relation to Erie County apart from plaintiff's asserted residence there" (*Seefeldt*, 261 AD2d at 926).

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

744

CA 09-00009

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

WILLIAM BUCKLAEW,
PLAINTIFF-RESPONDENT-APPELLANT,
AND JOHN HIGGINS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT L. WALTERS AND LORI MILLER,
DEFENDANTS-APPELLANTS-RESPONDENTS.

JAECKLE FLEISCHMANN & MUGEL, LLP, BUFFALO (BRADLEY A. HOPPE OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

LAW OFFICES OF MARK D. GROSSMAN, NIAGARA FALLS (MARK D. GROSSMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered November 17, 2008 in a personal injury action. The order granted in part and denied in part the motion of defendants to dismiss the complaints.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing the complaints in their entirety against defendant Lori Miller and by denying that part of the motion for summary judgment dismissing the Labor Law § 200 cause of action asserted by plaintiff William Bucklaew against defendant Scott L. Walters and reinstating that cause of action against that defendant and as modified the order is affirmed without costs.

Memorandum: Plaintiffs each commenced Labor Law and common-law negligence actions that were thereafter consolidated, seeking damages for injuries they allegedly sustained when, only minutes apart, each fell from a ladder and "pick" assembly while installing siding at a two-family residence jointly owned by defendants, where defendants reside. We note at the outset that the cross appeal taken by plaintiff John Higgins has been deemed abandoned and dismissed by his failure to perfect it in a timely fashion (*see* 22 NYCRR 1000.12 [b]; *Hayek v Hayek*, 63 AD3d 1598, 1599). We therefore do not address his cross appeal. We further note that counsel for plaintiffs stated at oral argument they do not wish to pursue their claims against defendant Lori Miller. We thus dismiss the complaints in their entirety against her, and we modify the order accordingly.

Contrary to the initial contention of defendants, Supreme Court did not err in considering the papers submitted by William Bucklaew (plaintiff) in opposition to defendants' motion because they were not timely served. Courts have "discretion to overlook late service where the nonmoving party sustains no prejudice" (*Jordan v City of New York*, 38 AD3d 336, 338). Here, plaintiff's opposing papers contained no evidentiary material and instead contained only legal arguments, and we conclude that Scott L. Walters (defendant) was not prejudiced by the late service.

Addressing first the merits of plaintiff's cross appeal, we conclude that the court properly granted those parts of the motion of defendants for summary judgment dismissing plaintiff's causes of action under Labor Law § 240 (1) and § 241 (6) against defendant. Contrary to plaintiff's contention, the exemption from liability afforded to owners of one- and two-family dwellings under those sections applies to defendant and the unrefuted evidence demonstrates that he did not direct or control the " 'method and manner in which the work [was] performed' " (*Gambee v Dunford*, 270 AD2d 809, 810). Defendant did not instruct plaintiff how to perform the work, and defendant did not provide the necessary equipment, tools and materials to perform the work. The mere fact that defendant occasionally pointed out areas where the work was not completed properly does not subject him to liability under those sections of the Labor Law. Such interest in the quality of the work "does not constitute the kind of direction or control necessary to overcome the homeowner's exemption from liability" (*Chowdhury v Rodriguez*, 57 AD3d 121, 127; *see Warsaw v Eastern Rock Prods.*, 210 AD2d 883, *lv dismissed* 85 NY2d 967). Moreover, the fact that defendant performed some work unrelated to that performed by plaintiffs does not deprive him of the benefits of the homeowner's exemption (*see Lang v Havlicek*, 272 AD2d 298; *see also Luthringer v Luthringer*, 59 AD3d 1028).

We further conclude with respect to plaintiff's cross appeal that the court erred in granting that part of defendants' motion for summary judgment dismissing the Labor Law § 200 cause of action asserted by plaintiff against defendant. We therefore further modify the order accordingly. With respect to the appeal taken by defendants, however, we conclude that the court properly denied that part of defendants' motion for summary judgment dismissing the common-law negligence causes of action against defendant, asserted by both plaintiffs. By their own submissions in support of their motion both with respect to Labor Law § 200 and common-law negligence, defendants raised an issue of fact whether defendant created a dangerous condition on the property by digging a trench in the area where one of the ladders on which plaintiffs were working had to be placed. Based on the deposition testimony of plaintiff, there is an issue of fact whether the accident occurred as a result of that ladder kicking out, and there is a further issue of fact whether the act of defendant in digging the hole was a proximate cause of the ladder kicking out. Furthermore, there is an issue of fact whether any negligence by plaintiff contributed to the accident, or was a superseding cause thereof. "As a general rule, issues of proximate cause are for the

trier of fact" (*Standard Fire Ins. Co. v New Horizons Yacht Harbor, Inc.*, 63 AD3d 1542, 1543; *see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784, 829; *Gerfin v North Colonie Cent. School Dist.*, 41 AD3d 1085, 1086-1087).

Entered: July 9, 2010

Patricia L. Morgan
Clerk of the Court

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

745

CA 10-00242

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND SCONIERS, JJ.

PAUL KENT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

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

BROWN & KELLY, LLP, BUFFALO (CAROLYN M. HENRY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF CRAIG Z. SMALL, BUFFALO (CRAIG Z. SMALL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered April 3, 2009. The order, insofar as appealed from, granted that part of plaintiff's motion for summary judgment on the complaint against defendant New York Central Mutual Fire Insurance Company and directed that defendant to pay a certain sum to plaintiff under an automobile insurance policy.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part and the fourth ordering paragraph is vacated.

Memorandum: Plaintiff commenced this action seeking, inter alia, supplementary uninsured/underinsured motorist (SUM) coverage under an automobile insurance policy issued by New York Central Mutual Fire Insurance Company (defendant) to plaintiff's father. Plaintiff was a passenger on a moped that was operated by Stephen Spaziale, and he sustained injuries when the moped was rear-ended by a vehicle driven by Donald Boss. Sixteen months after the accident, plaintiff notified defendant of the potential SUM claim, and defendant disclaimed coverage based, inter alia, on the alleged lack of timely notice of the potential SUM claim. Plaintiff subsequently obtained a judgment in excess of $800,000 against the Spaziales and settled his claims against Boss for $10,000. Plaintiff then commenced this action against defendant and Allstate Insurance Company, which insured the Spaziales, seeking SUM coverage under both policies. Supreme Court granted plaintiff's motion for summary judgment on the complaint and, inter alia, ordered defendant to pay plaintiff SUM coverage in the amount of $25,000. We reverse the order insofar as appealed from because plaintiff did not meet his burden of establishing his entitlement to judgment as a matter of law from defendant (*see*

generally Zuckerman v City of New York, 49 NY2d 557, 562).

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

788

CA 09-02319

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND PINE, JJ.

PETER G. DAVIDSON AND MARY J. DAVIDSON,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

STRAIGHT LINE CONTRACTORS, INC.,
DEFENDANT-RESPONDENT,
KARLA GERRIE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT S. ATTARDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (KYLE C. REEB OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

THE LAW FIRM OF JANICE M. IATI, P.C., ROCHESTER (JANICE M. IATI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (David Michael Barry, J.), entered February 19, 2009. The judgment, inter alia, granted plaintiffs' motion for a default judgment against defendant Karla Gerrie.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the cross motion is granted and plaintiffs are directed to accept service of the answer of defendant Karla Gerrie dated October 21, 2008.

Memorandum: In appeal No. 1, Karla Gerrie (defendant) appeals from a judgment that, inter alia, granted plaintiffs' motion for a default judgment and denied defendant's cross motion to compel plaintiffs to accept service of defendant's untimely answer. In appeal No. 2, defendant appeals from an amended order that denied her motion seeking leave to reargue and vacatur of the default judgment entered against her in appeal No. 1.

With respect to appeal No. 1, we conclude that Supreme Court abused its discretion in granting plaintiffs' motion and denying defendant's cross motion upon determining that defendant failed to establish a reasonable excuse for her default in answering the complaint. " 'Public policy favors the resolution of a case on the

merits, and a court has broad discretion to grant relief from a pleading default if[, inter alia,] there is a showing of . . . a reasonable excuse for the delay and it appears that the delay did not prejudice the other party' " (*Case v Cayuga County*, 60 AD3d 1426, 1427, *lv dismissed* 13 NY3d 770). Here, the excuse offered by defendant was that she mistakenly assumed that the attorneys representing her in two other actions related to the same construction project had received a copy of the summons and complaint in this action and were acting to protect her interests. Indeed, the record establishes that she contacted her attorneys and acted to protect her interests upon being served with plaintiffs' motion. Under the circumstances of this case, we conclude that defendant's excuse was reasonable and that the delay did not prejudice plaintiffs (*see e.g. Evolution Impressions, Inc. v Lewandowski*, 59 AD3d 1039, 1040; *Crandall v Wright Wisner Distrib. Corp.*, 59 AD3d 1059, 1060; *Cavagnaro v Frontier Cent. School Dist.*, 17 AD3d 1099; *cf. Smolinski v Smolinski*, 13 AD3d 1188, 1189).

Although the court did not reach the further requisite issue whether defendant established that she has a meritorious defense inasmuch as it determined that she failed to offer a reasonable excuse for her pleading default (*see Smolinski*, 13 AD3d at 1189), we conclude on the record before us that defendant met her burden in that respect by demonstrating "that there is support in fact for [her] . . . defenses" (*Bilodeau-Redeye v Preferred Mut. Ins. Co.*, 38 AD3d 1277, 1277 [internal quotation marks omitted]; *see Evolution Impressions, Inc.*, 59 AD3d at 1040).

In sum, "given the brief overall delay, the promptness with which defendant [responded to plaintiffs' motion], the lack of any intention on defendant's part to abandon the action, plaintiff[s'] failure to demonstrate any prejudice attributable to the delay, and the preference for resolving disputes on the merits," we conclude that the order in appeal No. 1 must be reversed, plaintiffs' motion denied and defendant's cross motion granted (*Mayville v Wal-Mart Stores*, 273 AD2d 944, 945).

With respect to appeal No. 2, we conclude that the appeal from the order in that appeal must be dismissed. First, it is well established that no appeal lies from an order denying a motion for leave to reargue (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984), and thus the appeal from the order in appeal No. 2 must be dismissed to that extent. Second, in view of our determination in appeal No. 1 granting defendant's cross motion to vacate the default judgment, the appeal from the order in appeal No. 2 must be dismissed as moot to the extent that defendant seeks vacatur of the default judgment in appeal No. 1.

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

789

CA 09-01683

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND PINE, JJ.

PETER G. DAVIDSON AND MARY J. DAVIDSON,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

STRAIGHT LINE CONTRACTORS, INC.,
DEFENDANT-RESPONDENT,
KARLA GERRIE, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

WOODS OVIATT GILMAN LLP, ROCHESTER (ROBERT S. ATTARDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (KYLE C. REEB OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

THE LAW FIRM OF JANICE M. IATI, P.C., ROCHESTER (JANICE M. IATI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (David Michael Barry, J.), entered July 17, 2009. The amended order denied the motion of defendant Karla Gerrie for leave to reargue and vacatur of the default judgment entered against her.

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

Same Memorandum as in *Davidson v Straight Line Contrs., Inc.* ([appeal No. 1] ___ AD3d ___ [July 9, 2010]).

Entered: July 9, 2010

Patricia L. Morgan
Clerk of the Court

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

793

CA 09-01696

PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND PINE, JJ.

FRANKLIN CREDIT MANAGEMENT CORPORATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL WIK, DEFENDANT-APPELLANT.

DANIEL WIK, DEFENDANT-APPELLANT PRO SE.

ROSICKI, ROSICKI & ASSOCIATES, P.C., PLAINVIEW (EDWARD RUGINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered May 12, 2009. The order, inter alia, granted plaintiff a default judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part granting a default judgment, granting defendant 10 days after service of the order of this Court with notice of entry to serve an answer, and denying plaintiff's motion and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action by serving a summons and complaint alleging that defendant breached his obligations under a promissory note, and defendant, a pro se litigant, made a pre-answer motion to dismiss the complaint for failure to state a cause of action. Defendant also sent a letter to plaintiff disputing the claims set forth in the complaint. Both the motion and letter were served upon plaintiff within two weeks of service of the summons and complaint, but the motion was not brought before Supreme Court because defendant failed to obtain the required request for judicial intervention (RJI) from the Monroe County Clerk's Office. Plaintiff did not respond to defendant's motion. Approximately eight months later, plaintiff moved for summary judgment in lieu of complaint pursuant to CPLR 3213, despite the fact that it had served a complaint. Plaintiff contended therein that it was entitled to judgment based on documentary evidence, i.e., defendant's failure to remit payment on the promissory note. On the return date of plaintiff's motion, the court heard argument on plaintiff's motion as well as defendant's motion to dismiss the complaint. In an ensuing written decision, the court denied defendant's motion and granted what it characterized as plaintiff's motion for "a default judgment." In addition, the court determined that, because defendant failed to

purchase an RJI, his motion to dismiss came before the court only in response to plaintiff's motion "for a default judgment, long after the time to respond to the complaint had expired." The court thus determined that defendant's motion to dismiss "could no longer serve to extend [defendant's] time to answer the complaint," in accordance with CPLR 3211 (f), and that defendant therefore was not entitled to 10 additional days in which to serve an answer.

We conclude that, although the court properly denied defendant's motion to dismiss the complaint, it erred in granting a default judgment inasmuch as plaintiff did not move for such relief, and we therefore modify the order accordingly. We further conclude that defendant was entitled to the benefit of the 10 additional days set forth in CPLR 3211 (f) in which to serve an answer to the complaint, and we therefore further modify the order accordingly. First, by serving plaintiff with the motion to dismiss and the letter disputing the claim, defendant demonstrated an attempt to participate in the action pro se and "clearly negated any intent to default in this action" (*Townsend v Torres*, 182 AD2d 1140, 1141; *see Thomas v Callahan*, 222 AD2d 1070; *Meyer v A & B Am.*, 160 AD2d 688, 689). Second, although defendant did not file his motion properly because he failed to obtain an RJI, it is undisputed that he served the motion upon plaintiff in a timely manner, and it is *service* of an unsuccessful pre-answer motion to dismiss, rather than *filing*, that extends a defendant's time in which to answer the complaint under CPLR 3211 (f). Finally, we must deny plaintiff's motion for summary judgment in lieu of complaint inasmuch as it is undisputed that a complaint previously was served, and we therefore further modify the order accordingly.

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

807

CAF 09-00047

PRESENT: SCUDDER, P.J., MARTOCHE, SCONIERS, GREEN, AND GORSKI, JJ.

IN THE MATTER OF TERRANCE M., DWAYNE M. AND SHAWN M.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TERRANCE M., SR., RESPONDENT-APPELLANT, ET AL., RESPONDENT.

IN THE MATTER OF CHARLOTTE S., PETITIONER,

V

TERRANCE M., SR., RESPONDENT-APPELLANT, ET AL., RESPONDENT.

THOMAS N. MARTIN, ROCHESTER, FOR RESPONDENT-APPELLANT.

WILLIAM K. TAYLOR, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Family Court, Monroe County (Gail A. Donofrio, J.), entered December 22, 2008 in proceedings pursuant to Family Court Act article 6. The amended order, insofar as appealed from, terminated the parental rights of respondent Terrance M., Sr. and dismissed the petition of petitioner Charlotte S. for custody.

It is hereby ORDERED that said appeal from the amended order insofar as it dismissed the petition of petitioner Charlotte S. is unanimously dismissed and the amended order is otherwise affirmed without costs.

Memorandum: Respondent father appeals from an amended order that, inter alia, terminated his parental rights with respect to three of his children on the ground of permanent neglect. The father contends that Family Court erred in dismissing the petition in which Charlotte S., one of his relatives, sought custody of the children. The father, however, is not aggrieved by that part of the amended order, and his appeal from the amended order insofar as it dismissed that petition must be dismissed (*see Matter of Carol YY. v James OO.*, 68 AD3d 1463). We note that Charlotte S. did not take an appeal from the amended order.

The court properly rejected the father's request either to continue the period of the suspended judgment pursuant to Family Court Act § 633 (e) or to extend the period of the suspended judgment pursuant to Family Court Act § 633 (f). "If [petitioner Monroe County Department of Human Services (DHS)] establishes 'by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights' " (*Matter of Shad S.*, 67 AD3d 1359, 1360; *see Matter of Ronald O.*, 43 AD3d 1351). Although the suspended judgment had not expired at the time DHS alleged that the father had violated its terms and conditions, DHS established the father's noncompliance with the terms and conditions of the suspended judgment by a preponderance of the evidence. The record of the violation hearing establishes that the father attended only 5 out of 34 possible visits with the children, and it is well settled that maintaining frequent contact with the children by participating in regularly scheduled visitation is essential to developing and maintaining a meaningful parental relationship (*see Matter of Christian Lee R.*, 38 AD3d 235, *lv denied* 8 NY3d 813; *see also Matter of Joshua Justin T.*, 208 AD2d 469). Furthermore, the record of the dispositional hearing establishes that the father attended only 9 out of 65 possible visits with the children, had not completed a mental health evaluation, was denied public assistance, and could not verify that he was employed. "The court's assessment that [the father] was not likely to change his behavior is entitled to great deference" (*Matter of Philip D.*, 266 AD2d 909; *see Matter of Nathaniel T.*, 67 NY2d 838, 842). The record also supports the court's finding that the children have a strong attachment to their foster parents, considered them to be their parents and wished to stay with them (*see generally Eschbach v Eschbach*, 56 NY2d 167, 173). Moreover, the foster parents welcomed the children into their home and planned to adopt them. We thus conclude that the court properly terminated the father's parental rights and freed the children for adoption.

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

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KA 09-00931

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND PINE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARIN L. BULLOCK, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (LYNN S. SCHAFFER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered February 23, 2009. The judgment convicted defendant, upon his plea of guilty, of aggravated assault upon a police officer or a peace officer.

It is hereby ORDERED that the judgment so appealed from is modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Chautauqua County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of aggravated assault upon a police officer or a peace officer (Penal Law § 120.11). We agree with defendant that County Court erred in sentencing him in the absence of counsel and thus that vacatur of the sentence is required. The record establishes that defendant was initially assigned counsel, but then retained counsel to represent him. At the time of the plea proceeding, the court indicated that it would sentence defendant to a 15-year determinate term of incarceration but would consider a lesser sentence if defense counsel provided the court with "compelling reasons" to do so. Prior to sentencing, the court granted the motion of defense counsel to be relieved as counsel for defendant, after defendant indicated that he no longer wanted that attorney to represent him. Defendant informed the court that he intended to retain new counsel, whereupon the court granted his request for a 90-day adjournment of sentencing to enable him to do so. On the adjourned date of the sentencing, however, defendant appeared pro se and explained that his family had the money to retain counsel but that the attorney he was attempting to retain could not meet with him for another month or so. The court denied defendant's request for a second adjournment. When the court asked defendant at sentencing whether he wished to speak on his own behalf, defendant informed the court that he was having difficulty in obtaining documents that would establish that there were mitigating

factors entitling him to a lesser sentence. The court determined that defendant waived his right to counsel and proceeded to sentence defendant. The court then provided defendant with a copy of the presentence report, which defendant indicated that he had never received.

The People agree with defendant that the court erred in concluding that defendant waived his right to counsel, but they instead contend that he forfeited his right to counsel. We reject that contention. "While egregious conduct by defendants can lead to a deemed forfeiture of the fundamental right to counsel" (*People v Smith*, 92 NY2d 516, 521), there was no such conduct by defendant here to warrant "an extreme, last-resort forfeiture analysis" (*id.*; *cf. People v Wilkerson*, 294 AD2d 298, *lv denied* 98 NY2d 772; *People v Sloane*, 262 AD2d 431, *lv denied* 93 NY2d 1027; *People v Gilchrist*, 239 AD2d 306, *lv denied* 91 NY2d 834). In addition, the court never warned defendant that sentencing would proceed if he did not have new retained counsel by that time, nor did the court offer to assign new counsel to defendant if he could not afford to retain counsel (*cf. People v Taylor*, 164 AD2d 953, 954-956, *lv denied* 76 NY2d 991). It thus cannot be said that defendant's conduct in requesting the second sentencing adjournment was "calculated to undermine, upset or unreasonably delay" sentencing (*People v McIntyre*, 36 NY2d 10, 18; *see People v James*, 13 AD3d 649, 650, *lv denied* 5 NY3d 764). The absence of counsel to assist defendant at sentencing was particularly troublesome in this case, inasmuch as defendant informed the court that he was unable to present any mitigating circumstances for the court to consider when sentencing him and, indeed, defendant indicated that he had not previously received a copy of the presentence report.

Although we recognize that a court has the discretion to determine whether to grant an adjournment, the complicating factor here was that the court granted the motion of defendant's retained counsel for permission to withdraw, which left defendant without counsel at sentencing (*cf. People v Loewke*, 15 AD3d 859, *lv denied* 4 NY3d 888; *People v Merejildo*, 308 AD2d 378, *lv denied* 1 NY3d 540). Nevertheless, that complicating factor is not pivotal inasmuch as the issue on appeal is not whether the court abused its discretion in denying the request for an additional adjournment. Rather, the issue is whether the court erred in sentencing defendant without counsel, and thus there is no need to analyze what the dissent characterizes as the "important issue" of whether an adjournment should have been granted.

The dissent has not identified any egregious conduct by defendant to warrant the conclusion that he forfeited his right to counsel. The fact that defendant appeared without counsel on the adjourned sentencing date was not egregious under the circumstances of this case, in which defendant had not made multiple requests for an adjournment of sentencing but, instead, had made only one previous request. We disagree with the dissent's statement that we have "fail[ed] to recognize the fundamental distinction between the waiver of a right and the forfeiture of a right." The cases cited herein,

including *Wilkerson*, *Sloane*, and *Gilchrist*, each involve egregious conduct, e.g., abusive and threatening acts by the defendants toward their attorneys, and thus those cases warrant the conclusion that the defendants therein forfeited their right to counsel. The fact that the court here never warned defendant that sentencing would proceed in the absence of counsel supports our conclusion that defendant did not engage in egregious conduct when he appeared pro se on the adjourned date of sentencing.

We further conclude that the dissent mischaracterizes our holding by stating that we have "de facto conclud[ed] that dilatory conduct [by a defendant] may not result in the forfeiture of the right to counsel at sentencing." Indeed, if the court had simply warned defendant when it granted his initial request for an adjournment that sentencing would proceed on the adjourned date even if he did not have new retained counsel by then, or if the court had granted an additional two-week adjournment with a similar warning, we may well have concluded that defendant forfeited his right to counsel. The court issued no such warnings in this case, however, and in the absence of any egregious conduct by defendant we cannot conclude that defendant forfeited his right to counsel. We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing, at which time, if defendant seeks to retain counsel, he must be afforded the opportunity to do so and shall be advised that sentencing shall proceed on the scheduled date if he appears without counsel or, if defendant is unable to afford to retain counsel, counsel shall be assigned.

All concur except CARNI, J., who dissents in part and votes to affirm in the following Memorandum: I respectfully disagree with the conclusion of my colleagues that defendant did not forfeit his right to counsel at sentencing. I therefore dissent in part and would affirm the judgment.

On October 9, 2007, while incarcerated in the Chautauqua County Jail, defendant and other inmates concocted an escape plan that included the use of a ceramic tile or brick as a weapon to subdue a correction officer. Defendant and other inmates summoned a correction officer to their cell under the pretense that their toilet was clogged, and therefore they needed to use a bathroom outside of their cell. Defendant had placed the ceramic tile or brick inside a sock in order to facilitate its use as a weapon. While being escorted to a bathroom, defendant used the homemade weapon to strike the correction officer repeatedly on the head, causing serious injuries.

On the morning scheduled for trial, while represented by his retained counsel, defendant pleaded guilty to one count of aggravated assault on a police officer or peace officer (Penal Law § 120.11), and County Court made a sentencing commitment of a 15-year determinate term of incarceration. In the absence of the plea agreement, upon conviction defendant faced a maximum term of 25 years of incarceration. Sentencing was scheduled for October 14, 2008. By letter dated October 7, 2008, defendant discharged his retained counsel. By notice of motion dated November 10, 2008, defendant's

retained counsel moved for an order permitting him to withdraw as attorney of record. By letter dated November 12, 2008, defendant advised the court that he had "dismissed" his retained counsel. Defendant requested that the court grant him "an adjournment to allow [him] ample time[] to retain new private counsel." On November 17, 2008, the court granted the motion of defendant's retained counsel for permission to withdraw and adjourned the sentencing until a later date to be determined by the court.

On November 24, 2008, defendant appeared in court without counsel. In light of the circumstances, the court specifically asked defendant whether he was "planning on hiring counsel or whether [he could] afford to hire counsel." Defendant replied, "I have every intention of retaining new counsel. I am asking for an adjournment to do so." The court inquired as to how much time defendant needed and granted defendant's request for an adjournment of 90 days.

On February 23, 2009, defendant appeared for sentencing and was again not represented by counsel. Defendant represented to the court that he had sufficient funds to retain counsel but that his attorney of choice could not meet with him until "April 3rd." Defendant did not identify the attorney to whom he was referring, and the record does not contain any prior communication to the court from defendant, or from any attorney on defendant's behalf, to that effect. The court determined that it would proceed with sentencing and stated, "I have given you ample time to retain counsel for the purpose of sentencing, Mr. Bullock. I believe that you're just stretching this thing out unnecessarily. I'm prepared to proceed to sentence today." The court concluded that defendant had "waived" his right to counsel and sentenced defendant to the agreed-upon 15-year determinate term of incarceration. As the majority correctly points out, however, the court erred in characterizing defendant's conduct as resulting in a "waiver" of the right to counsel instead of applying the appropriate characterization as one of forfeiture.

Initially, I disagree with the majority's conclusion that the court erred because it did not "offer to assign new counsel to defendant if he could not afford to retain counsel." On November 24, 2008, the court specifically asked defendant whether he could afford to retain counsel, and defendant represented that he was capable of retaining counsel. On February 23, 2009, defendant specifically advised the court that he had marshaled the funds necessary to retain counsel and had every intention of doing so.

Under these circumstances, I cannot agree with the majority that the court failed to ascertain defendant's need for assigned counsel. The majority's determination essentially imposes the burden of offering assigned counsel to a defendant who, in response to the court's inquiry whether defendant can "afford to hire counsel," has represented in court that he or she has the financial means and intention of retaining counsel. *People v Taylor* (164 AD2d 953, *lv denied* 76 NY2d 991), the only authority cited by the majority for that proposition, does not compel the additional offer of assigned counsel required by the majority. Rather, *Taylor* involves a unique factual

situation where the refusal of assigned counsel by the defendants was part of a calculated strategy with their retained attorneys to create reversible error or a mistrial. Indeed, the Second Department in *Taylor* held that defendants forfeited their right to counsel by failing to "discharge their retained counsel and hire new counsel or accept appointed counsel" (*id.* at 956). Here, defendant also failed to hire new counsel and refused the court's offer to appoint counsel. Thus, in my view, *Taylor* does not support the majority's conclusion that defendant did not forfeit his right to counsel.

However, in concluding that defendant did not forfeit his right to counsel, the majority states that "the court never warned defendant that sentencing would proceed if he did not have new retained counsel by that time . . . ." In my view, that analysis fails to recognize the fundamental distinction between the waiver of a right and the forfeiture of a right. Forfeiture is often confused with the closely related - but distinct - concept of waiver (*see e.g. United States v Mitchell*, 777 F2d 248, 258, *cert denied* 476 US 1184 [concluding that the defendants "waive[d]" the right to counsel while resting the decision on the notion of forfeiture]), and the majority has done so in this case. "[T]he forfeiture of a right may occur even though a defendant never made an informed, deliberate decision to relinquish that right. While waiver requires a knowing, voluntary and intelligent decision, which may be either express or implied, forfeiture occurs by operation of law without regard to defendant's state of mind" (*People v Parker*, 57 NY2d 136, 140). Thus, in determining whether a defendant has forfeited his or her right to counsel, a determination whether the defendant has been warned of the consequences of his or her conduct is irrelevant to the analysis (*see People v Sanchez*, 65 NY2d 436, 443-444; *Gilchrist v O'Keefe*, 260 F3d 87, 95, *cert denied* 535 US 1064 [no warning need precede the deprivation of a Sixth Amendment right upon a forfeiture]). In *Sanchez*, the Court of Appeals determined that a defendant forfeits the right to be present during trial by deliberately leaving the courtroom after trial has begun "regardless of whether [the defendant] knows that the trial will continue in his [or her] absence" (*id.* at 443-444). Thus, in my view, the majority incorrectly relies upon the absence of a "warning" in a case in which the People correctly concede that the appropriate analysis is one of forfeiture.

Although not addressed by the majority, it is also important to recognize that the " 'forfeiture of counsel at sentencing does not deal as serious a blow to a defendant as would the forfeiture of counsel at the trial itself' " (*Gilchrist*, 260 F3d at 99, quoting *United States v Leggett*, 162 F3d 237, 251 n 4, *cert denied* 528 US 868).

While the majority also concludes that defendant's conduct was not so "egregious" as to warrant a forfeiture of the right to counsel, it also ignores one of the critical public policy reasons giving rise to the forfeiture doctrine, to wit, that "[t]he right to assistance of counsel, cherished and fundamental though it be, may not be put to service as a means of delaying or trifling with the court" (*United*

States v Fowler, 605 F2d 181, 183, *reh denied* 608 F2d 1373; *see also Sanchez*, 65 NY2d at 443). "As has been stated, '[t]he right to counsel does not include the right to delay' " (*People v Arroyave*, 49 NY2d 264, 273, quoting *People v Reynolds*, 39 AD2d 812, 813).

Here, as previously noted, defendant discharged his retained counsel by letter dated October 7, 2008. The sentencing scheduled for October 14, 2008 was therefore adjourned. Although more than six weeks transpired from his discharge of retained counsel, defendant appeared on November 24, 2008 without retained counsel. Defendant requested, and was granted, a further 90-day additional adjournment of sentencing. On February 23, 2009, 18 weeks after defendant's discharge of retained counsel, defendant again appeared without retained counsel and offered only a nebulous and unsubstantiated claim that an unidentified attorney could not appear on his behalf for another five or six weeks. "At this point, public policy considerations against delay become even stronger, and it is incumbent upon the defendant to demonstrate that the requested adjournment has been necessitated by forces beyond his [or her] control and is not simply a dilatory tactic" (*id.* at 271-272). Whether an adjournment should be granted lies within the discretion of the sentencing court (*see id.* at 271). The majority neither recognizes nor analyzes that important issue. In my view, the court was in the best position to evaluate the bona fides of defendant's need for an adjournment, and I see no reason to conclude that the court abused or improvidently exercised its discretion in denying defendant's request for yet another adjournment of sentencing.

Here, defendant had ample opportunity to retain counsel of his own choosing before his request for an adjournment, and he failed to "demonstrate that the requested adjournment [was] necessitated by forces beyond his control and [was] not simply a dilatory tactic" (*id.* at 272; *see also People v Allison*, 69 AD3d 740, 741). Thus, in my view, defendant forfeited his right to counsel at sentencing by his 18-week delay in retaining counsel.

By failing to recognize the public policy issue at stake and in de facto concluding that dilatory conduct may not result in the forfeiture of the right to counsel at sentencing, the majority's determination is tantamount to transferring the control of the court's sentencing calendar to criminal defendants. Sentencing courts in this Department will now be subject to repeated unsubstantiated requests for adjournments in order to retain counsel, and the courts will be deprived of the critical discretionary authority to deny adjournment requests advanced as dilatory tactics. As a result of the majority's determination, courts will be foreclosed from proceeding to sentencing even after determining that a defendant has forfeited his right to counsel by such dilatory conduct. I cannot agree with the result reached by the majority.

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

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CA 10-00089

PRESENT: MARTOCHE, J.P., FAHEY, CARNI, SCONIERS, AND GREEN, JJ.

JAMES P. SHELDON AND CAROL SHELDON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

HENDERSON & JOHNSON CO., INC. AND POMCO, INC.,
DEFENDANTS-RESPONDENTS.

RUSSELL, RUSSELL & GRASSO, PLLC, CENTRAL SQUARE (DAVID S. GRASSO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (SANDRA J. SABOURIN OF COUNSEL), FOR DEFENDANT-RESPONDENT HENDERSON & JOHNSON CO., INC.

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (JOHN F. PFEIFER OF COUNSEL), FOR DEFENDANT-RESPONDENT POMCO, INC.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered April 30, 2009 in a personal injury action. The order granted defendants' motions 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 of defendant POMCO, Inc. in part and reinstating the common-law negligence claim and the derivative cause of action against that defendant and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by James P. Sheldon (plaintiff) when he allegedly slipped and fell on snow and ice in the parking lot of premises exclusively maintained by defendant POMCO, Inc. (POMCO) as a tenant in possession. We agree with plaintiffs that Supreme Court erred in granting that part of the motion of POMCO seeking summary judgment dismissing the common-law negligence claim against it. We therefore modify the order accordingly. POMCO met its initial burden with respect to the common-law negligence claim by submitting evidence establishing that there was a storm in progress at the time of the accident (*see Brierley v Great Lakes Motor Corp.*, 41 AD3d 1159, 1160). In opposition to the motion, however, plaintiffs raised a triable issue of fact with respect to whether the hard-packed snow and ice that caused the accident existed prior to the storm (*see Martin v Wagner*, 30 AD3d 733, 735). In addition, plaintiffs raised a triable issue of fact by

submitting the affidavit of a meteorologist stating that there was no storm on the day in question and that any ice on the ground did not form on that day (*see generally Bullard v Pfohl's Tavern, Inc.*, 11 AD3d 1026).

We reject plaintiffs' further contention that the court erred in granting that part of the motion seeking summary judgment dismissing the Labor Law § 241 (6) cause of action against POMCO. It is well settled "that a [work site] within the meaning of Labor Law [§] 241 (6) is not limited to the actual area where the construction work is to be performed and includes adjacent areas that are part of the construction site, such as passageways or walkways to and from the work area" (*Zito v Occidental Chem. Corp.*, 259 AD2d 1015, 1016, *lv dismissed* 93 NY2d 999). Here, the parking lot in which plaintiff fell was not a "passageway[] or walkway[]" and thus did not constitute part of the work site (*id.*).

Contrary to plaintiffs' contention, we conclude that the court properly granted the motion of defendant Henderson & Johnson Co., Inc. (Henderson) for summary judgment dismissing the complaint against it. In support of its motion, Henderson submitted evidence establishing that, as a contractor performing work on the interior of an existing building, it had no duty to maintain the parking lot in a safe condition (*see Barends v Louis P. Ciminelli Constr. Co., Inc.*, 46 AD3d 1412, 1413). Plaintiffs failed to raise a triable issue of fact in opposition to the motion.

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

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KA 09-00714

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BARAK CORNELL, DEFENDANT-APPELLANT.

TIMOTHY PATRICK MURPHY, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (LYNN S. SCHAFFER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered December 15, 2008. The judgment convicted defendant, upon his plea of guilty, of arson in the second degree.

It is hereby ORDERED that the judgment so appealed from is reversed on the law, the plea is vacated, and the matter is remitted to Chautauqua County Court for further proceedings on the indictment.

Memorandum: On appeal from a judgment convicting him upon his guilty plea of arson in the second degree (Penal Law § 150.15), defendant contends that the judgment of conviction must be reversed because County Court failed to advise him at the time of his plea that his sentence would include a period of postrelease supervision (PRS). We agree. It is well established that a "trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences" (*People v Ford*, 86 NY2d 397, 402-403; *see People v Louree*, 8 NY3d 541, 544). "Although the court is not required to engage in any particular litany when allocuting the defendant, 'due process requires that the record must be clear that the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant' " (*People v Catu*, 4 NY3d 242, 245, quoting *Ford*, 86 NY2d at 403).

Here, defendant was indicted on three felony offenses, including arson in the second degree. Defendant entered a plea of not guilty and the matter proceeded to trial where, at the outset of jury selection, the prosecutor placed the People's plea offer on the record. The offer required defendant to plead guilty to arson in the second degree in satisfaction of all charges, in return for a sentence promise from the court of 14 years' imprisonment plus a period of five years of PRS. Defendant rejected that offer, stating, inter alia, that he wanted a sentence promise of seven years. Following a

conference with defense counsel and the prosecutor in chambers, the court informed defendant that it would "cap the sentence at 14 years" and consider a lesser term based upon the submission of mitigating evidence at sentencing. The court did not mention a period of PRS. Defendant rejected that modified offer, and the court proceeded with jury selection. Later that day, after seven jurors had been seated, the court spoke to defendant and defense counsel off the record. Following that discussion, the court reiterated to defendant on the record that it would sentence him to no more than 14 years' imprisonment if he were to plead guilty to the top count of the indictment, i.e., arson in the second degree. No mention of any period of PRS was made by the court, the prosecutor or defense counsel. Although he had rejected the same modified offer from the court earlier that day, defendant stated that he understood the offer and wished to accept it, whereupon the court engaged him in a plea colloquy and accepted his guilty plea. At no time during the colloquy did the court mention a period of PRS. The court nevertheless sentenced defendant to a period of PRS of five years, along with a determinate term of imprisonment of 14 years.

It is undisputed that defendant was not advised at the time of the plea that his sentence would include a period of PRS. The People contend, however, that the plea need not be vacated because the prosecutor had stated earlier that day that the People's plea offer included a period of PRS. In our view, the record does not make clear that defendant was aware that the court's sentence promise, which as noted was slightly modified from that articulated by the prosecutor, included a period of PRS. The prosecutor did not state that a period of PRS was mandatory, and the court, when it modified the sentence promise to a cap of 14 years' imprisonment, did not state that all other conditions of the plea agreement as outlined by the prosecutor earlier that day would remain in effect. The court simply stated that its sentence promise was a cap of 14 years' imprisonment. Under the circumstances, it cannot be said that defendant necessarily was informed that his sentence would be a cap of 14 years' imprisonment *plus* a period of five years of PRS. Indeed, defendant may reasonably have believed that the court's repeated failure to mention a period of PRS indicated that it was no longer a part of the sentence promise. It is of course possible that defendant knew that his sentence would include a period of PRS, but to reach that conclusion on this record would entail engaging in impermissible speculation. As the Court of Appeals has explained, the " 'record must be clear' " with respect to the knowledge of defendant of the terms of his sentence (*Catu*, 4 NY3d at 245), and the record in this case does not meet that standard.

We cannot agree with the dissent that the proceedings on the day in question may be characterized as "an ongoing plea allocution." There was a pronounced break in the plea discussions after defendant rejected the People's plea offer that morning. Jury selection thereafter commenced, the court adjourned the proceeding for lunch, and seven jurors were seated. At some time later that day, the discussions concerning a plea were renewed and defendant eventually decided to plead guilty. At that time, the court had a constitutional duty to ensure that defendant was aware that his sentence would

include a period of PRS (*see Louree*, 8 NY3d at 544), and the fact that the prosecutor mentioned a period of PRS earlier that day does not excuse the court from fulfilling its constitutional duty (*see generally People v Garcia*, 61 AD3d 475, *lv denied* 12 NY3d 925; *see also People v Key*, 64 AD3d 793). The guilty plea must therefore be vacated even in the absence of a postallocution motion (*see People v Boyd*, 12 NY3d 390, 393; *People v Dillon*, 67 AD3d 1382, 1383).

All concur except SMITH, J.P., and SCONIERS, J., who dissent and vote to affirm in the following Memorandum: We respectfully dissent and would affirm the judgment. It is well established that a defendant " 'must be aware of the postrelease supervision [PRS] component of [his or her] sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action' " (*People v Louree*, 8 NY3d 541, 545, quoting *People v Catu*, 4 NY3d 242, 245). We cannot agree with the majority, however, that the plea entered by defendant was not voluntary, knowing and intelligent because County Court did not personally inform defendant at the time of the plea that his sentence would include a period of PRS.

The record establishes that, at the start of the proceedings on the day that this matter was scheduled for trial, the prosecutor stated on the record that the People would permit defendant to plead guilty to the charge of arson in the second degree in full satisfaction of the remaining counts of the indictment, and that County "Court has indicated that upon such a plea [it] would commit to a term of 14 years in state prison plus five years [of] postrelease supervision." The court then stated, "that's correct," and asked whether that was the defense's understanding of the terms of the plea agreement. After defense counsel answered in the affirmative, defendant attempted to bargain with the court regarding the length of the term of incarceration rather than accepting the plea at that time. After repeatedly indicating that the term of incarceration would remain as set forth in the plea agreement recited by the prosecutor, the court eventually stated that jury selection would proceed.

Later that same day, however, the court stated that it had personally spoken with defendant, in the presence of and with the permission of the prosecutor and defense counsel. The court further stated that it would cap the sentence at 14 years if defendant pleaded guilty, and would permit defense counsel to attempt to obtain a lesser sentence by presenting the court with records regarding defendant's psychological issues. The court did not repeat the other terms of the plea agreement. Defendant pleaded guilty and, at a later date, was sentenced to a term of incarceration of 14 years plus a five-year period of PRS.

Initially, we conclude that defendant failed to preserve his current contention for our review inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction based on that contention (*see generally People v Schwandner*, 67 AD3d 1481, *lv denied* 14 NY3d 805, 806). While we of course agree with the majority that, where the record fails to establish that the court, directly or through the prosecutor, "advise[d] a defendant of postrelease

supervision during the plea allocution, the defendant may challenge the plea as not knowing, voluntary and intelligent on direct appeal, notwithstanding the absence of a postallocution motion" (*Louree*, 8 NY3d at 546), here the record establishes that defendant was in fact advised of the sentence to be imposed, including its PRS component, during what may be characterized under the circumstances of this case as an ongoing plea allocution. "Because defendant could have sought relief from the sentencing court in advance of the sentence's imposition, *Louree*'s rationale for dispensing with the preservation requirement is not presently applicable" (*People v Murray*, ___ NY3d ___, ___ [June 24, 2010]).

Even assuming, arguendo, that preservation is not required, we would nevertheless reject the contention of defendant that his plea was not knowingly, voluntarily and intelligently entered because the court failed to apprise him that a period of PRS would be imposed as a component of the sentence. The majority is correct that the Court of Appeals has stated that, in order to ensure that a defendant is aware that a period of PRS will be imposed as part of a sentence, "the trial judge must advise a defendant of the direct consequences of a plea and the resulting waiver of rights" (*Louree*, 8 NY3d at 545; *see Catu*, 4 NY3d at 244-245). In that same case, however, the Court of Appeals also stated that " '[t]he court is not required to engage in any particular litany when allocuting the defendant, but due process requires that the record must be clear that the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant' " (*Louree*, 8 NY3d at 544-545). We have repeatedly concluded that a court need not personally state the conditions of a plea but, rather, the prosecutor may state the conditions provided that the record reflects that the defendant understood his or her choices and made a voluntary and intelligent choice among the alternatives (*see e.g. People v Williams*, 15 AD3d 863, *lv denied* 5 NY3d 771, 811; *People v Gress*, 4 AD3d 830, *lv denied* 2 NY3d 740). Here, the prosecutor unequivocally stated at the start of the proceedings on the day of the plea that a five-year period of PRS was a condition of the plea, the court and defense counsel indicated their agreement with that statement, and defendant did not request any alteration with respect to that term of the sentence promise. Thus, the record reflects defendant's understanding that PRS was a condition of the plea.

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

872

CA 09-00883

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF RICHARD J. SHERWOOD,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF LANCASTER, TOWN OF LANCASTER TOWN BOARD, ROBERT H. GIZA, SUPERVISOR, DONNA STEMPNIAK, COUNCILMEMBER, RONALD RUFFINO, COUNCILMEMBER, AND JOHN ABRAHAM, COUNCILMEMBER,
RESPONDENTS-RESPONDENTS.

RICHARD J. SHERWOOD, PETITIONER-APPELLANT PRO SE.

HODGSON RUSS LLP, BUFFALO (JEFFREY F. SWIATEK OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 29, 2009 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the claims under the collective bargaining agreement and Retirement and Social Security Law § 41 (j) with respect to accumulated sick leave from January 1, 1996 through January 7, 2008 and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking credit for unused vacation and sick leave accrued as of the date of his retirement from his position as attorney for respondent Town of Lancaster (Town). Petitioner was employed by the Town from January 1, 1976 to December 31, 1991, first as Deputy Town Attorney and then as Town Attorney. Although he was not reappointed in 1992, he subsequently was reappointed to the Town Attorney position on January 1, 1996. He was employed in that position until January 7, 2008, when he abruptly resigned therefrom in order to avoid his imminent termination. Supreme Court determined, inter alia, that petitioner was ineligible to receive a credit for unused vacation and sick leave that he had accrued. This appeal ensued.

At the outset, we reject petitioner's contention that the payment of the benefits at issue is not governed by the terms of the collective bargaining agreement between the Town and the White Collar Unit of the Town's Civil Service Employees Association (hereafter,

CBA). Petitioner is correct that at an earlier stage in his employment with the Town, his benefits were governed by the Town's "Personnel Rules for Employees" (Personnel Rules). The record establishes, however, that by a resolution adopted in 2005 the Town expressly made the CBA applicable to employees such as petitioner and, indeed, petitioner himself explicitly relies on various provisions of the CBA in support of his claims for the relief sought. Most notably, he relies on the provision in the CBA allowing him to accrue a maximum of 300 sick days while, under the Personnel Rules, he was entitled to accrue a maximum of only 220 sick days. We cannot agree with petitioner that he is entitled to the benefits of the CBA but is not otherwise bound by its terms.

Petitioner's alleged entitlement to a credit for accrued but unused vacation days is governed by Article 3 of the CBA. Pursuant to section 3.4.3, "[i]f an employee is separated from Town service for any reason except termination for cause or resignation on less than ten working days' notice, he/she shall be paid in full for any unused vacation to which he/she is entitled." It is undisputed that petitioner gave less than 10 working days' notice of his resignation, but he contends that he gave immediate notice of his resignation on January 7, 2008 when it became clear that same day that he would not be reappointed as Town Attorney at the Town Board meeting scheduled for that evening. Pursuant to the terms of the CBA, petitioner would have been entitled to a credit for unused vacation days that he accrued had he not resigned and simply awaited the Town Board's decision not to reappoint him. Because he instead chose to resign effective immediately, he is not entitled to that credit, in accordance with the unambiguous terms of the CBA.

Petitioner's alleged entitlement to a credit for accrued but unused sick leave is governed by Article 5 of the CBA. Section 5.4 of that article is entitled "Conversion at Retirement," and section 5.4.1 provides that, "[p]rior to the retirement, the employee may apply to the Town Board for a lump sum payment of sixty (60%) percent of the cash value of his or her accumulated sick leave as of the date of retirement." We conclude that the court erred in determining that "[s]ection 5.4 of the [CBA] renders eligible only those employees who have actually applied for retirement through the NYS Employee's Retirement System to receive a lump sum payment for accrued sick time." Nothing in the language of the CBA supports that interpretation, which was advanced by respondents. Because the CBA is a contract, the " 'unilateral expression of one party's postcontractual subjective understanding of the terms of the [contract] . . . [is] not probative as an aid to the interpretation of the contract' " nor, by logical extension, does it control the interpretation of the contract (*Di Giulio v City of Buffalo*, 237 AD2d 938, 939). It is undisputed that petitioner was just a week short of his 61st birthday when he resigned, his resignation letter states that he was "retiring from Town Service," and petitioner did not thereafter engage in any further employment covered by the New York State retirement system. We thus conclude that the CBA provisions concerning retirement unambiguously apply to petitioner, rendering him entitled to a credit for unused sick leave that he accrued.

We further conclude, however, that pursuant to the express terms of section 5.9.1 of the CBA, petitioner is entitled only to credit for unused sick leave that he accrued from January 1, 1996 through the date of his retirement on January 7, 2008. Pursuant to that section, an employee may receive credit for sick leave that accumulated prior to his or her separation from employment only in the event that the employee "is reinstated in Town service within one (1) year following separation," and here the gap between the reappointment of petitioner as Town Attorney in 1996 and his previous employment with the Town exceeded one year. Moreover, we agree with respondents that there is an issue of fact whether petitioner accurately accounted for his sick leave. The court did not make that determination, nor are we able to do so on the record before us. We therefore modify the judgment by reinstating petitioner's claims under the CBA as well as Retirement and Social Security Law § 41 (j) with respect to accumulated sick leave from the date of petitioner's reappointment as Town Attorney through the date of petitioner's retirement, and we remit the matter to Supreme Court to determine following a hearing, if necessary, the number of accumulated sick days or hours, if any, for which petitioner is entitled to credit.

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

873

CA 09-02622

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

JANICE STRUEBEL, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF MATTHEW JAMES STRUEBEL, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GLORIA FLADD AND GERALD H. WELSTED, DEFENDANTS-APPELLANTS.

COHEN & LOMBARDO, P.C., BUFFALO (NEIL R. SHERWOOD OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (DAVID H. ELIBOL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 2, 2009 in a wrongful death action. The order, insofar as appealed from, 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 for summary judgment dismissing the complaint in its entirety against defendant Gerald H. Welsted and dismissing the complaint in its entirety against that defendant, and by granting that part of the motion for summary judgment dismissing the first cause of action against defendant Gloria Fladd except insofar as that cause of action alleges negligent supervision and dismissing that cause of action to that extent against that defendant and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action, individually and as administrator of the estate of her son (decedent), seeking damages for his wrongful death and conscious pain and suffering. Decedent died as a result of a head injury he sustained after falling from a second story porch of a house owned by defendant Gerald H. Welsted, where Welsted's fiancée, defendant Gloria Fladd, resided with her 16-year-old son. Fladd's son, decedent, and several other teenagers were having a party at the house and beer was consumed. Fladd was at the house at various times during the evening in question but denied both that she supplied the alcohol and that she was aware that alcohol was being consumed. The record establishes that Welsted was not present at the house at any time that evening. Defendants moved for summary judgment dismissing the complaint, which asserts three causes of

action. The first two are against Fladd and Welsted, respectively, for negligence including negligent supervision, and the third is a derivative cause of action against both defendants. Supreme Court granted the motion only to the extent that it was "based on the dram shop law." We conclude that the court should have granted that part of the motion for summary judgment dismissing the complaint in its entirety against Welsted and that part of the motion for summary judgment dismissing the first cause of action against Fladd except insofar as that cause of action alleges negligent supervision. We therefore modify the order accordingly.

With respect to the claim against Fladd for negligent supervision, we note at the outset that "the duty to control the conduct of third persons for the protection of others on the premises extends not only to landowners, but also to those in control or possession of the premises" (*Dynas v Nagowski*, 307 AD2d 144, 147). We conclude on the record before us that there are issues of fact whether Fladd had the opportunity " 'to control the conduct of third persons on [the] premises and [was] reasonably aware of the need for such control' " (*id.* at 146, quoting *D'Amico v Christie*, 71 NY2d 76, 85), and thus may be held liable for negligent supervision. We further note, however, that "[s]uch 'liability may be imposed only for injuries that occurred . . . in an area under [Fladd's] control, where [she] had the opportunity to supervise the intoxicated guest' " (*Place v Cooper*, 35 AD3d 1260, 1261, quoting *D'Amico*, 71 NY2d at 85).

We turn next to those parts of defendants' motion seeking summary judgment dismissing the first and second causes of action to the extent that they allege that there was a dangerous or defective condition on the premises, and to the extent that they allege an agency theory with respect to Fladd's son as well as negligent supervision against Welsted. We conclude that the court erred in denying those parts of defendants' motion. With respect to the dangerous or defective premises claim, "[d]efendants met their initial burden by establishing their entitlement to judgment as a matter of law on this claim . . . [and p]laintiff failed to raise an issue of fact whether the premises were kept in a reasonably safe condition" (*Oehler v Diocese of Buffalo*, 277 AD2d 967, 968).

With respect to the agency theory, we note that " '[t]he existence of a parent-child relationship is insufficient to establish an agency relationship; the proof must establish that the child is in fact an agent of the parent' " (*Dynas*, 307 AD2d at 147; *see Hannold v First Baptist Church*, 254 AD2d 746, 747). " 'Under most circumstances, [mere] intrafamilial activity will not give rise to an agency relationship' " (*Dynas*, 307 AD2d at 148, quoting *Maurillo v Park Slope U-Haul*, 194 AD2d 142, 146). Here, there is no evidence that Fladd's son was acting as an agent of either defendant.

Finally, we conclude that the court erred in denying that part of defendants' motion with respect to the negligent supervision claim against Welsted. The record contains uncontroverted evidence that he was not present at the premises on the night of the accident and that he was unaware that friends of Fladd's son would be at the house or

that alcohol would be consumed (*see Ahlers v Wildermuth*, 70 AD3d 1154, 1155). Based on our determination that there is no basis upon which to hold Welsted liable, the derivative cause of action must be dismissed against him as well, while that cause of action remains viable with respect to Fladd, in view of her potential liability for negligent supervision.

Entered: July 9, 2010

Patricia L. Morgan
Clerk of the Court

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

875

CA 09-02386

PRESENT: SMITH, J.P., LINDLEY, SCONIERS, PINE, AND GORSKI, JJ.

IN THE MATTER OF DOUGLAS W. VANDINE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

GREECE CENTRAL SCHOOL DISTRICT, GREECE
CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION,
AND STEVEN ACHRAMOVITCH, AS SUPERINTENDENT
AND CHIEF EXECUTIVE OFFICER OF THE GREECE
CENTRAL SCHOOL DISTRICT,
RESPONDENTS-RESPONDENTS.

ARTHUR P. SCHEUERMANN, LATHAM (ROBERT T. FULLEM OF COUNSEL), FOR PETITIONER-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (DALE A. WORRALL OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (William P. Polito, J.), entered March 16, 2009 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking, inter alia, a judgment directing respondents to hold a name-clearing hearing with respect to allegations associated with the termination of petitioner from his probationary position with respondent school district (*see generally Board of Regents of State Colls. v Roth*, 408 US 564, 573). We agree with petitioner that Supreme Court erred in dismissing the petition.

Where, as here, "a government employee is dismissed for stigmatizing reasons that seriously imperil the opportunity to acquire future employment, the employee is entitled to 'an opportunity to refute the charge [or charges]' " (*Donato v Plainview-Old Bethpage Cent. School Dist.*, 96 F3d 623, 633, *cert denied* 519 US 1150, quoting *Board of Regents of State Colls.*, 408 US at 573). The discharged employee's entitlement to such a name-clearing hearing requires a showing that there "has been a public disclosure by the employer of stigmatizing reasons for the discharge" (*Ranus v Blum*, 132 AD2d 983,

984, *appeal dismissed* 70 NY2d 926, *lv denied* 71 NY2d 802 [internal quotation marks omitted]). We cannot conclude in this case that the submission of a complaint to the New York State Department of Education (SED) based upon the allegations underlying petitioner's termination does not constitute such a public disclosure. It may be that, under certain circumstances, a confidential communication with an authorized governmental agency does not constitute public disclosure, such that an employee's right to a name-clearing hearing is not invoked (*see Gentile v Wallen*, 562 F2d 193, 197-198). Here, however, the applicable regulations do not address the issue of the confidentiality of a complaint submitted to SED and the subsequent investigation thereof by SED (*see* 8 NYCRR part 83). Because a hearing officer or panel from SED may determine that, based on allegations in the complaint, there exists a substantial question concerning petitioner's moral character that ultimately could result in the revocation of petitioner's teaching certificate (*see* 8 NYCRR 83.6) and because, as noted, the applicable regulations do not address the issue of confidentiality, we conclude herein that there is a sufficient potential for public disclosure to establish petitioner's entitlement to a name-clearing hearing (*see Matter of Browne v City of New York*, 45 AD3d 590; *cf. Matter of Lentlie v Egan*, 61 NY2d 874, 876).

Contrary to the contention of respondents, petitioner in fact "challenge[d] the substantial truth of the [allegations] in question" (*Codd v Velger*, 429 US 624, 627-628). Indeed, petitioner need only "contest the truth of the allegedly stigmatizing statements because, as the Supreme Court has explained, the purpose of a name clearing hearing is to give the allegedly stigmatized employee an opportunity to refute the . . . stigmatizing charges. If the truth of the statements is not contested, there is nothing to have a hearing about" (*O'Neill v City of Auburn*, 23 F3d 685, 693, citing *Codd*, 429 US at 627). In order to comport with the requirements of due process, a discharged employee must be afforded an opportunity at any such hearing to refute the allegations and to clear his or her name (*see Codd*, 429 US at 627; *Board of Regents of State Colls.*, 408 US at 573 n 12; *see generally Goldberg v Kelly*, 397 US 254, 267-268). "The risk to be avoided is a risk that false charges would go unrefuted and that a falsely accused employee's name would go uncleared" (*Matter of Parr v Onondaga County Legislature*, 139 Misc 2d 975, 978, *affd for reasons stated in op of Lowery, J.*, 156 AD2d 985; *see Baden v Koch*, 799 F2d 825, 832). We note that, pursuant to the applicable regulations, petitioner is afforded a hearing on the complaint submitted to SED only if a determination is made that the allegations raise a substantial question concerning his moral character (*see* 8 NYCRR 83.3, 83.4). Because petitioner thus is not guaranteed a hearing on the complaint, he may be foreclosed from any opportunity to refute the allegations absent a name-clearing hearing with respondents (*cf. Parr*, 139 Misc 2d at 978). We therefore conclude that petitioner has established that the court erred in dismissing his petition seeking, inter alia, a name-clearing hearing. Furthermore, in the absence of any evidence or, indeed, any allegation by respondents that special circumstances would render an award of attorney's fees unjust, we further agree with petitioner that the court should have granted that

part of the petition seeking reasonable attorney's fees pursuant to 42 USC § 1988 (b) (*see generally Matter of Johnson v Blum*, 58 NY2d 454, 457-458). We therefore reverse the judgment, grant the petition, and remit the matter to Supreme Court to determine the amount of reasonable attorney's fees pursuant to 42 USC § 1988 (b) and to direct respondents to grant petitioner the remainder of the relief sought in the petition.

Entered: July 9, 2010

Patricia L. Morgan
Clerk of the Court

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

884

CA 09-02203

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF DARRELL CLINTON,
PETITIONER-APPELLANT,

V ORDER

HENRY LEMONS, JR., ACTING CHAIRMAN, NEW YORK
STATE DIVISION OF PAROLE, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered July 30, 2009 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: July 9, 2010

Patricia L. Morgan
Clerk of the Court

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

898

KA 09-01492

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND GREEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BURNIE E. DANIELS, DEFENDANT-APPELLANT.

FRANKLIN & GABRIEL, OVID (STEVEN J. GETMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered July 13, 2009. The judgment convicted defendant, upon a nonjury verdict, of criminal mischief in the fourth degree, petit larceny and possession of burglar's tools.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the amount of restitution ordered to $129.06 and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, following a nonjury trial, of criminal mischief in the fourth degree (Penal Law § 145.00 [1]), petit larceny (§ 155.25) and possession of burglar's tools (§ 140.35). We reject the contention of defendant that County Court erred in refusing to suppress his statement to the police on the ground that he was in custody when he made the statement and had not received *Miranda* warnings. "As the court properly determined, a reasonable person in defendant's position, innocent of any crime, would not have believed that he or she was in custody, and thus *Miranda* warnings were not required" (*People v Lunderman*, 19 AD3d 1067, 1068, *lv denied* 5 NY3d 830; *see People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). Based on the totality of the circumstances, we also reject the contention of defendant that his consent to the search of his vehicle was involuntary (*see People v Hyla*, 291 AD2d 928, *lv denied* 98 NY2d 652; *People v Caldwell*, 221 AD2d 972, *lv denied* 87 NY2d 920; *see generally People v Gonzalez*, 39 NY2d 122, 128). In addition, even assuming, arguendo, that the People failed to comply with Penal Law § 450.10 by erroneously informing defendant that the stolen coin boxes had been returned to their owner and thus were no longer in their possession to enable defendant to examine them, we cannot agree with defendant that the court should have refused to admit the coin boxes in evidence as a sanction based on that failure (*see generally People v Johnson*, 262 AD2d 1004, 1005, *lv denied* 93 NY2d 1020). There is no indication in the record that defendant

actually sought to inspect the coin boxes, despite the fact that the court provided defendant with an opportunity to do so.

Defendant waived his challenge to the legal sufficiency of the evidence supporting his conviction of criminal mischief in the fourth degree inasmuch as he asked the court to charge that crime as a lesser included offense of criminal mischief in the third degree (Penal Law § 145.05 [2]), and he ultimately was convicted of the lesser included offense (*see People v McDuffie*, 46 AD3d 1385, 1386, *lv denied* 10 NY3d 867). "Defendant ought not be allowed to take the benefit of the favorable charge and complain about it on appeal" (*id.* [internal quotation marks omitted]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction of petit larceny (*see People v Gray*, 86 NY2d 10, 19), and we reject the additional contention of defendant that the conviction of possession of burglar's tools is not supported by legally sufficient evidence. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Pichardo*, 34 AD3d 1223, 1224, quoting *People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678 [internal quotation marks omitted]). Here, the evidence presented at trial could lead a rational person to the conclusion reached by the court with respect to defendant's possession of burglar's tools, i.e., that defendant possessed the hammer and crowbar seized from his van under circumstances evincing an intent to use them in the commission of a forcible taking (*see People v Borrero*, 26 NY2d 430, 434; *see generally People v Bleakley*, 69 NY2d 490, 495). Also contrary to defendant's contention, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see generally People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that the court erred in ordering him to pay restitution in the amount of $258.12. That award was based on evidence that two coin machines sustained damage that required an equal amount of repair at a collective cost of $258.12. The crimes of which defendant was convicted involved damage to only one of those coin boxes, and we thus modify the judgment by reducing the amount of restitution ordered accordingly. Defendant failed to preserve for our review his further contentions that the court erred in ordering him to pay restitution to a person who was not a victim of the crimes (*see* Penal Law § 60.27 [4] [b]; *People v Horne*, 97 NY2d 404, 414 n 3), and that the court erred in considering uncharged crimes in sentencing him (*see* CPL 470.05 [2]; *People v Brown*, 38 AD3d 676, *lv denied* 9 NY3d 840), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of

justice (*see* CPL 470.15 [6] [a]).

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

904

KA 07-02565

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL A. GOOSSENS, DEFENDANT-APPELLANT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, INC., LIVINGSTON COUNTY CONFLICT DEFENDERS, WARSAW (NEAL J. MAHONEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS E. MORAN, DISTRICT ATTORNEY, GENESEO (ERIC R. SCHIENER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Robert B. Wiggins, J.), entered October 22, 2007. 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 modified in the exercise of discretion by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: We agree with defendant that County Court improvidently exercised its discretion in determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). We therefore "substitute [our] own discretion even in the absence of an abuse" by the court (*Matter of Von Bulow*, 63 NY2d 221, 224), and we modify the order by determining that defendant is a level two risk. Although defendant was presumptively classified as a level three risk pursuant to the risk assessment instrument, we conclude based on the record before us that there is "clear and convincing evidence of the existence of special circumstance[s] to warrant [a] . . . downward departure" from the presumptive risk level (*People v Guaman*, 8 AD3d 545). Defendant, who was 21 years old at the time of the underlying offense, engaged in sexual activity with a 15-year-old female. The court found that the victim was a willing participant in the sexual activity and that she had been supportive of defendant throughout the proceedings (*see People v Brewer*, 63 AD3d 1604; *People v Weatherley*, 41 AD3d 1238). Indeed, "[t]here was no allegation or evidence of forcible compulsion" (*Brewer*, 63 AD3d at 1605). Moreover, the underlying conviction was defendant's first felony conviction. Although defendant had previously been convicted of a misdemeanor sex offense, that offense

involved the same victim, who is defendant's girlfriend. We thus conclude under the circumstances of this case that defendant did not have a high risk of reoffending (*see* Correction Law § 168-*l* [6]; *Brewer*, 63 AD3d 1604; *cf. People v Heichel*, 20 AD3d 934, 935). In light of our determination, we do not address defendant's remaining contentions.

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court

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

908.1

CAF 09-02260

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, PINE, AND GORSKI, JJ.

IN THE MATTER OF RACHELLE A. SAUNDERS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TODD HAMILTON, RESPONDENT-RESPONDENT.

RACHELLE A. SAUNDERS, PETITIONER-APPELLANT PRO SE.

TODD HAMILTON, RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Livingston County (Dennis S. Cohen, J.), entered September 14, 2009 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Petitioner mother commenced this proceeding seeking, inter alia, to modify a September 2009 custody order that was entered in Indiana. The mother and the children had resided in Indiana from September 2008 until March 2009 but, at the time the proceeding was commenced, they resided in New York and respondent father resided in Indiana. We note at the outset that Family Court apparently treated the mother's order to show cause, pursuant to which the mother sought the instant relief, as a "petition" for modification of a prior order of custody, and dismissed the petition. We affirm.

Contrary to the contention of the mother, the court properly concluded that it lacked jurisdiction to determine the petition (*see* Domestic Relations Law § 76-b; *Matter of Calvo v Herring*, 51 AD3d 916; *Stocker v Sheehan*, 13 AD3d 1, 6-7). There is no indication in the record that the Indiana court determined that it no longer had exclusive, continuing jurisdiction under Domestic Relations Law § 76-a or that New York would be a more convenient forum under Domestic Relations Law § 76-f (*see* § 76-b [1]). Indeed, the Indiana court's order was entered less than one week before the mother commenced this proceeding in New York, and the order noted that the issue of child support was "deferred." Further, the father continued to reside in Indiana, and thus neither Family Court nor the Indiana court could determine that the children and their parents did not reside in Indiana (*see* § 76-b [2]; *Calvo*, 51 AD3d 916; *Stocker*, 13 AD3d at 6-7).

The mother's contentions concerning Family Court's December 2008 order are not properly before us inasmuch as the mother failed to take a timely appeal from that order (*see generally Matter of Jasper QQ.*, 64 AD3d 1017, 1019-1020, *lv denied* 13 NY3d 706; *Matter of Rogers v Bittner*, 181 AD2d 990). In any event, the mother was not aggrieved by the December 2008 order inasmuch as that order dismissed the father's petition seeking modification of a prior custody order (*see* CPLR 5511; *Matter of Brian JJ. v Heather KK.*, 61 AD3d 1285, 1287; *Matter of Green v Keough*, 32 AD3d 591). Although the mother contends that the December 2008 order "[gave] jurisdiction to . . . Indiana" and "result[ed in] custody of the children being given to the [father]," that contention is not supported by the record. The December 2008 order dismissed the father's modification petition for lack of jurisdiction because the parties and their children all resided in Indiana at that time (*see* Domestic Relations Law § 76-a [1] [b]).

Entered: July 9, 2010 Patricia L. Morgan
Clerk of the Court