SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 16, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Oing, Singh, Moulton, JJ.

11383 In re Jomar M., Dkt. D-33529/18

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Dawne A. Mitchell, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Ashley R. Garman of counsel), for presentment agency.

_____

Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about February 5, 2019, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second and third degrees, grand larceny in the fourth degree, petit larceny, criminal possession of stolen property in the fifth degree and attempted assault in the third degree, and also committed the act of unlawful possession of a weapon by a person under 16, and placed him with the Administration for Children's Services for a period of 18 months, unanimously modified, on the law, to the extent of

vacating the findings of third-degree robbery and petit larceny and dismissing those counts, and otherwise affirmed, without costs.

The court's finding was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). There is no basis for disturbing the court's determinations concerning identification and credibility.

As the presentment agency concedes, the findings of third-degree robbery and petit larceny should be dismissed as lesser included offenses.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11384 In re Robert Stewart, Index 153130/18
Petitioner-Appellant,

-against-

New York City Department of Education,
Respondent-Respondent.

_____

Levine & Blit, PLLC, New York (Justin S. Clark of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Ashley R. Garman of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Nancy M. Bannon, J.), entered May 16, 2019, which denied the petition to annul the determination of respondent New York City Department of Education (DOE), dated February 2, 2018, denying petitioner the position of cleaner, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The DOE rationally concluded that petitioner's past misappropriation of funds in a kickback and bid-rigging scheme when he worked as a DOE custodial engineer, leading to his guilty plea for conspiracy to misapply property (*see* 18 USC § 371), justified the denial of his application for employment for the subordinate position of cleaner. His past behavior had a direct bearing on his fitness or ability to perform the cleaner job

duties and posed an unreasonable risk to DOE property and the welfare of taxpayers (*see* Correction Law §§ 750[3], 752; *Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 364 [1999]).

It is apparent from the denial letter that the DOE considered the requisite factors (*see* Correction Law § 753[1][a]-[h]). The DOE was "not required" to "state with specificity its detailed analysis with respect to each of the eight factors in its denial letter" or to "point to any contemporaneously created record" to show that it considered all eight factors (*Matter of Acosta v New York City Dept. of Educ.*, 16 NY3d 309, 318-319 [2011]). Nor has petitioner adduced evidence showing that the DOE failed to consider the information he provided in support of his application, which were specifically referenced in the letter or already a part of the entire file that was reviewed (*see Matter of Dempsey v New York City Dept. of Educ.*, 25 NY3d 291, 300 [2015]). Furthermore, any presumption of rehabilitation did not entitle petitioner to the position, as rehabilitation is only

one of the factors to be considered (*see Matter of Arrocha*, 93 NY2d at 366; *Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624, 625 [1st Dept 2015]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11385 Judy Craig, as adoptive mother of M.C., Plaintiff-Appellant, Index 302768/11

-against-

TC Ambulance Corporation, Defendant-Respondent,

New York City Health and Hospitals Corporation (Jacobi Medical Center), Defendant.

_____

The Fitzgerald Law Firm, P.C., Yonkers (Mitchell Gittin of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Roland T. Koke of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Lewis J. Lubell, J.), entered October 11, 2018, dismissing the complaint as against defendant TC Ambulance Corporation, unanimously affirmed, without costs.

Defendant established its prima facie entitlement to judgment as a matter of law in this action where plaintiff alleges that errors made by defendant's emergency medical technicians led to delays in treating the infant plaintiff's biological mother, and the infant's resulting injuries. Defendant submitted the affidavit of an expert, who opined that the treatment defendant's technicians rendered was in accordance

with accepted standards of emergency medical care, and was not a proximate cause of the infant's claimed injuries (*see Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015].

In opposition, plaintiff failed to raise a triable issue of fact. The expert evidence submitted by plaintiff was speculative, conclusory, and insufficient to raise an issue of fact as to whether any alleged departure from accepted practice was a proximate cause of the infant's injuries (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544-545 [2002]; *Foster-Sturrup v Long*, 95 AD3d 726, 728 [1st Dept 2012]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11386 The People of the State of New York, Ind. 3525N/18
Respondent,

-against-

Alberto Lopez,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jody Ratner of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Felicia A. Mennin, J.), rendered February 19, 2019,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Renwick, J.P., Oing, Singh, Moulton, JJ.

11387 Ala Ohadi, et al., Index 161586/14
Plaintiffs-Appellants-Respondents,

-against-

Magnetic Construction Group Corp., et al.,
Defendants-Respondents-Appellants,

Sydell Group, LLC, et al.,
Defendants,

Stonehill & Taylor Architects, P.C., et al.,
Defendants-Respondents.

- - - - -

Magnetic Construction Group Corp.,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Haren & Keller Painting Corp.,
Third-Party Defendant-Respondent-Appellant,

Cassway Construction Corp., et al.,
Third-Party Defendants-Respondents.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Michael H. Zhu of counsel), for appellants-respondents.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for Magnetic Construction Group Corp., respondent-appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for 1170 Broadway Associates, LLC, respondent-appellant.

Pillinger, Miller, Tarallo, LLP, Elmsford (Mary Ellen O'Brien of counsel), for Haren & Keller Painting Corp., respondent-appellant.

Law Office of Tromello & Fishman, Tarrytown (Daniel Folchetti of counsel), for Stonehill & Taylor Architechts, P.C., respondent.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Thomas Fogarty of counsel), for Cassway Contracting Corp., respondent.

Camacho Mauro Mulholland, LLP, New York (Kenneth G. Gerard of counsel), for A & G.V. Stucco Construction Corp., respondent.

Order, Supreme Court, New York County (Anthony Cannataro, J.), entered on or about July 9, 2018, which, insofar as appealed from, granted defendant Stonehill & Taylor Architect, P.C.'s motion for summary judgment dismissing the complaint and cross claims for common-law and contractual indemnification asserted against it by defendant 1170 Broadway Associates, LLC (1170 Broadway), denied plaintiff's motion for summary judgment as to liability on the Labor Law § 241(6) claim insofar as predicated on Industrial Code (12 NYCRR) § 23-1.7(e)(2), granted defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim insofar as predicated on Industrial Code § 23-1.7(d), denied defendant/third-party defendant Haren & Keller Painting Corp.'s (H&K) motion for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241(6) claims as against it, denied 1170 Broadway's motion for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241(6) claims as against it and on its cross claims for contractual indemnification against defendant/third-party defendant Cassway

Construction Corp. and for common-law and contractual indemnification against Stonehill & Taylor and defendant/third-party plaintiff Magnetic Construction Group Corp., and denied Magnetic's motion for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241(6) claims as against it and all cross claims against it arising therefrom and on its cross claims for common-law indemnification against defendant/third-party defendant A & G.V. Stucco Construction Corp. and for common-law and contractual indemnification against H&K and Cassway, unanimously modified, on the law, to deny defendants' motion as to the Labor Law § 241(6) claim insofar as predicated on Industrial Code § 23-1.7(d), to grant H&K's motion as to the common-law negligence and Labor Law §§ 200 and 241(6) claims, grant 1170 Broadway conditional summary judgment on its contractual indemnification claims against Magnetic and Cassway, and grant Magnetic conditional summary judgment on its contractual indemnification claims against Cassway, and otherwise affirmed, without costs.

Plaintiff Ala Ohadi seeks to recover damages for injuries he allegedly sustained when he slipped and fell down a staircase at a building undergoing renovation where he was working. He asserts claims for, inter alia, common-law negligence and violations of Labor Law §§ 200 and 241(6). Contrary to 1170

Broadway's, Magnetic's and H&K's contentions, plaintiff's identification of the cause of his slip and fall is not merely speculation. He testified that after he fell down the stairs, the steps he could see from the bottom of the staircase were dusty, his clothes were dusty, and his jacket was wet with paint. Further, there is testimony in the record that the walls of the stairway had been sanded and painted before plaintiff's accident. Giving plaintiff the benefit of every favorable inference in opposition to defendants' motions for summary judgment, we find that an issue of fact exists as to whether dust and paint from sanding and/or painting that had been done in the stairway caused him to slip and fall (*see Hecker v New York City Hous. Auth.*, 245 AD2d 131 [1st Dept 1997]; *cf. Zanki v Cahill*, 2 AD3d 197 [1st Dept 2003] [the plaintiff could only speculate that the slip and fall down stairs was attributable to spillage where she did not see anything on stairs before or after accident, and the wet sleeve she observed after fall could be attributed to other causes], *affd* 2 NY3d 783 [2004]).

Industrial Code § 23-1.7(e)(2) may serve as a predicate for plaintiff's Labor Law § 241(6) claim, as it applies to slipping as well as tripping hazards (*Serrano v Consolidated Edison Co. of N.Y., Inc.*, 146 AD3d 405, 406 [1st Dept 2017], *lv dismissed* 29 NY3d 1118 [2017]; *Lopez v City of N.Y. Tr. Auth.*, 21 AD3d 259,

259-260 [1st Dept 2005]). However, plaintiff is not entitled to partial summary judgment on the claim, because an issue of fact exists as to whether he slipped on dirt or debris that had accumulated on the stairs in violation of Industrial Code § 23-1.7(e)(2).

Industrial Code § 23-1.7(d) is applicable to plaintiff's accident. While a staircase used to provide access to a job site is not a passageway or other working surface within the meaning of the provision unless it is the sole means of access (*Wowk v Broadway 280 Park Fee, LLC*, 94 AD3d 669, 670 [1st Dept 2012]; *Blysma v County of Saratoga*, 296 AD2d 637, 638 [3d Dept 2002]), the provision is applicable if the staircase was a work area (*see Luciano v New York City Hous. Auth.*, 157 AD3d 617 [1st Dept 2018]; *Whalen v City of New York*, 270 AD2d 340, 342 [2d Dept 2000]). An issue of fact exists as to whether the staircase on which plaintiff fell was a work area, regardless of whether work was being performed there at the exact moment of his accident.

Insofar as Magnetic was delegated authority for the injury-producing work, retained subcontractors to perform the injury-producing work, and was responsible for clean-up at the site, it may be held liable under Labor Law § 241(6) as a statutory agent (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st

Dept 2011]). Further, the motion court correctly refused to dismiss the common-law negligence and Labor Law § 200 claims against 1170 Broadway and Magnetic. In the absence of evidence as to the last time the stairway was cleaned or inspected before the accident, 1170 Broadway and Magnetic failed to demonstrate that they lacked constructive notice of the dangerous condition that allegedly caused plaintiff's injury (*Pereira v New Sch.*, 148 AD3d 410, 412-413 [1st Dept 2017]).

However, the common-law negligence and Labor Law §§ 200 and 241(6) claims must be dismissed as against H&K. It is uncontested that H&K completed its work in the subject stairway more than two months before plaintiff's accident, and Magnetic never received any complaints about the condition of the stairs. Accordingly, H&K could not have been responsible for any work that caused plaintiff's accident, and it had no duty to inspect or otherwise keep the premises clean (*see Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 46-47 [1st Dept 2005]; *DeSimone v City of New York*, 121 AD3d 420, 421-422 [1st Dept 2014]).

The court correctly concluded that Stonehill & Taylor acted solely as a design professional and therefore dismissed the common-law negligence and Labor Law §§ 200 and 241(6) claims, as well as 1170 Broadway's cross claims, as against it (*see Lopez v Dagan*, 98 AD3d 436, 437 [1st Dept 2012], *lv denied* 21 NY3d 855

[2013]; *Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 341 [1st Dept 2004]; Labor Law § 241[9]).

Finally, because issues of fact exist as to 1170 Broadway's and Magnetic's negligence, they are not entitled to summary judgment on their common-law negligence claims (*Maggio v 24 W. 57 AFP, LLC*, 134 AD3d 621, 627 [1st Dept 2015]). However, 1170 Broadway is entitled to conditional summary judgment on its contractual indemnification claims against Magnetic and Cassway, i.e., it will be entitled to contractual indemnification to the extent that plaintiff's injuries are found to have arisen from Magnetic's and Cassway's acts or omissions. Similarly, Magnetic is entitled to conditional summary judgment on its contractual indemnification claim against Cassway, i.e., it will be entitled to contractual indemnification to the extent that plaintiff's injuries are found to have arisen from Cassway's acts or omissions (*id.* at 627-628).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11388 & M-1242 Brian Patrick Donnelly, Plaintiff-Respondent, Index 155023/15

-against-

Stephen L. Christian, Defendant-Appellant.

_____

Wade Clark Mulcahy LLP, New York (George Parpas of counsel), for appellant.

Bisogno & Meyerson, LLP, Brooklyn (Elizabeth Mark Meyerson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Lucy Billings, J.), entered May 22, 2019, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing plaintiff's claim for assault, unanimously affirmed, without costs.

Plaintiff alleged that he was injured when, as he was attempting to sit down, defendant, his coworker, pulled his chair out from under him, causing him to fall to the ground. After plaintiff's accident, the Workers' Compensation Board determined that he was entitled to benefits for a work-related injury.

An employee's rights to Workers' Compensation benefits is the employee's exclusive remedy against his employer or coemployee for injuries sustained during his employment (*see* Workers' Compensation Law §§ 11, 29[6]); *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 357 [2007]). The Workers' Compensation

Law, however, does not prevent an employee from recovering for intentional torts, such as an assault (*see Hanford v Plaza Packaging Corp.*, 2 NY3d 348, 350 [2004]; *Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535, 543 [1980]).

Here, the motion court properly denied defendant's motion for summary judgment dismissing the claim for assault. There are issues of fact as to whether defendant's conduct placed plaintiff in "imminent apprehension of harmful contact" (*Fugazy v Corbetta*, 34 AD3d 728, 729 [2d Dept 2006] [internal quotation marks omitted]; *see Nicholson v Luce*, 55 AD3d 416 [1st Dept 2008]).

We have considered defendant's remaining contentions and find them unavailing.

M-1242 - *Donnelly v Christian*

Motion for stay denied as academic.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11390 The People of the State of New York, Respondent, Ind. 1878/16 5336/16

-against-

Dayvon Pinkney, Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Harold V. Ferguson Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ellen N. Biben, J.), rendered November 2, 2017,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Renwick, J.P., Oing, Singh, Moulton, JJ.

11391 In re Yu Chan Li, Index 100241/16
Petitioner-Appellant,

-against-

New York City Landmarks Preservation Commission,
Respondent-Respondent.

_____

Marc H. Gerstein, New York, for appellant.

James E. Johnson, Corporation Counsel, New York (Claudia Brodsky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered March 26, 2019, which denied petitioner's motion for reargument and renewal, unanimously affirmed, as to renewal, and appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

The article 78 court providently exercised its discretion in declining to grant leave to renew, as petitioner raised no new facts that would have changed the outcome of the prior order and judgment, and did not provide a reasonable excuse for failing to present those facts with the petition (CPLR 2221[e]; *see Wade v Giacobbe*, 176 AD3d 641 [1st Dept 2019]). Petitioner's decision to perform additional research about the area that was designated a historic district only after the court issued its order and judgment does not warrant renewal.

The denial of a motion for leave to reargue is not appealable (*Aldalali v Sungold Assoc. Ltd. Partnership*, 172 AD3d 555 [1st Dept 2019]).

We have considered petitioner's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11392-
11392A The People of the State of New York,
Respondent,

Ind. 1657/15
2070/15

-against-

Deroy Dale also known as Jamal Deroy
also known as Dale Delroy,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Mandy E. Jaramillo of counsel), for appellant.

_____

Judgments, Supreme Court, New York County (Laura A. Ward, J.), both rendered April 17, 2017, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11393 Duvars Ayers, et al., Index 23311/13E
Plaintiffs-Respondents,

-against-

Avinash Mohan, M.D., et al.,
Defendants,

Bruce Zablow, M.D.,
Defendant-Appellant.

- - - - -

[And Another Action]

_____

Heidell, Pittoni, Murphy & Bach, LLP, White Plains (Daniel S. Ratner of counsel), for appellant.

Wolf & Fuhrman LLP, Bronx (Carole R. Moskowitz of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered on or about October 4, 2019, which, to the extent appealed from as limited by the briefs, denied the motion of defendant Bruce Zablow M.D. for summary judgment dismissing the medical malpractice claim against him insofar as it is based on postsurgical treatment after an October 22, 2012 procedure, unanimously affirmed, without costs.

In August 2012, Dr. Zablow, Director of Neurointerventional Radiology at Westchester Medical Center (WMC), first treated then-32-year-old plaintiff Duvars Ayers, who was incarcerated at the time. In October 2012, Dr. Zablow performed surgery on

plaintiff in an attempt to readdress a giant aneurysm in an artery behind plaintiff's left eye by placing a replacement stent, which proved unsuccessful. Dr. Zablow then performed a balloon occlusion test, which showed that the artery where plaintiff's aneurysm was located could be permanently blocked through occlusion. Dr. Zablow's discharge summary instructed plaintiff to follow up with him in two weeks, but plaintiff was returned to prison, and did not return to Dr. Zablow's care.

Dr. Zablow established his prima facie entitlement to judgment as a matter of law by submitting evidence showing that there was no departure from good and accepted medical practice in the postsurgical treatment of plaintiff or that any departure was not the proximate cause of the injuries alleged (*see Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]). Dr. Zablow submitted the affirmation from a neurological surgeon, who opined that Dr. Zablow properly discharged plaintiff back to prison and that because Dr. Zablow treated plaintiff only as a consulting physician, it was the responsibility of plaintiff's primary medical team to arrange for further treatment of his aneurysm once plaintiff had decided how to proceed.

In opposition, plaintiff's expert opined that Dr. Zablow departed from the standard of care when he failed to arrange for plaintiff to have a neurological consult and failed to discuss

with plaintiff the results of the balloon occlusion test and the possibility of occluding the carotid artery to address the aneurysm. The conflicting expert opinions raised issues of fact and credibility that cannot be resolved on a motion for summary judgment (*see Cregan v Sachs*, 65 AD3d 101, 108-109 [1st Dept 2009]; *Bradley v Soundview Healthcenter*, 4 AD3d 194 [1st Dept 2004]).

Dr. Zablow's argument that the opinions of plaintiff's expert were contradicted by evidence showing that plaintiff was instructed to follow up with him in two weeks is not persuasive. Dr. Zablow's expert did not address that evidence and the opinions of plaintiff's expert are not facially inconsistent with Dr. Zablow having instructed plaintiff to follow up with him. Contrary to Dr. Zablow's contention, plaintiff's affidavit raised an issue of fact as to whether the doctor discussed the results of the balloon occlusion test and the possibility of carotid artery occlusion with plaintiff before he was discharged. Viewed in the light most favorable to plaintiff, plaintiff's deposition testimony was that he did not remember having any conversation with the doctor who performed the procedures at WMC or discussing the procedures he underwent at WMC with anyone at that facility.

That testimony did not contradict with his averments that he did not recall Dr. Zablow, and that at WMC he was never informed of the results of the balloon occlusion test or the possibility of treating his aneurysm by closing one of his arteries.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11394-
11394A Jeffrey T. Price,
Plaintiff-Appellant,

-against-

TuneCore, Inc.,
Defendant-Respondent.

Index 653194/13

_____

John Carlson, Merrick, for appellant.

O'Melveny & Myers LLP, New York (Daniel J. Franklin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Robert R. Reed J.), entered January 14, 2019, which, to the extent appealed from as limited by the briefs, granted judgment in favor of defendant TuneCore, Inc. and denied plaintiff's summary judgment motion, unanimously affirmed, with costs. Appeal from order (same court and Justice), entered March 30, 2018, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff Jeffrey T. Price is the former CEO of defendant TuneCore. With respect to plaintiff's claim that he did not receive his full base salary under the employment agreement with TuneCore, it is undisputed that he did not plead this cause of action and did not attempt to amend the complaint. It is well settled that a court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a

motion for summary judgment, that was not pleaded in the complaint (*721 Fruit & V. Mkt., Inc. v Stavia LLC*, 114 AD3d 481, 482 [1st Dept 2014], *lv denied* 24 NY3d 912 [2014]).

The IAS court also properly found that there was no disputed issue of fact regarding plaintiff's second cause of action to be the highest paid employee. The employment agreement did not give plaintiff the unfettered right to be the highest paid employee, this was only the case unless he "otherwise agreed". As CEO, plaintiff was responsible for hiring other employees, and he actively encouraged the Board to hire employees at salaries that he knew were higher than his own. By his admitted inaction, knowing these facts, plaintiff waived his right to insist that he be the highest-paid employee (*Jumax Assoc. v 350 Cabrini Owners Corp.*, 46 AD3d 407, 408 [1st Dept 2007]).

Plaintiff's seventh cause of action seeking compensation for accrued vacation time was also properly dismissed. Plaintiff does not contest that TuneCore remitted payment to him for the unused vacation days that had accrued during the year of his termination in 2012. Plaintiff's assertion that the check for the vacation time was sent to his late attorney's office after he had died, and that he never received it, is contrary to his deposition testimony, and was properly rejected (*Tse Chin Cheung v G & M Hardware & Elec.*, 249 AD2d 28, 29 [1st Dept 1998]). The

IAS court also properly dismissed the remainder of plaintiff's claim for unused vacation time, as the evidence reflects that TuneCore's vacation policy did not permit employees to carry over vacation days from one year to the next. While plaintiff submits affidavits in an effort to show that there was a special vacation policy applicable to TuneCore's founders, the assertions in those affidavits are belied by the fact that when one of the founders was terminated, plaintiff sent him a letter informing him that he would receive payment for the unused vacation days from that year only.

We have considered plaintiff's remaining contentions, and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11398 The People of the State of New York, Respondent, Ind. 3531/16

-against-

Blake Tannen, Defendant-Appellant.

_____

Barket Epstein Kearon Aldea & LoTurco, LLP, Garden City (Donna Aldea of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Susan Axelrod of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered March 9, 2018, convicting defendant, after a jury trial, of attempted sexual abuse in the first degree and assault in the second degree (two counts), and sentencing him to an aggregate term of 7 years, unanimously affirmed.

The court's *Sandoval* ruling balanced the proper factors and was a proper exercise of discretion. The court was not obligated to preclude questioning about prior sexual misconduct, notwithstanding that the present charges included sex crimes (*see People v Smith*, 18 NY3d 588, 593-594 [2012]; *People v Hayes*, 97 NY2d 203 [2002]; *People v Pavao*, 59 NY2d 282, 292 [1983]), and it properly allowed the People to cross-examine defendant about a conviction by guilty plea in a case where he was awaiting sentence (*see People v Brady*, 97 NY2d 233 [2002]).

In any event, we find that any error in the *Sandoval* ruling, the admission of cell site location records, or the admission of certain out-of-court statements by the victim was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]; *see also People v Grant*, 7 NY3d 421, 425 [2006]). Among other things, a videotape clearly depicted defendant interacting with the victim shortly before the crime, and the victim's DNA was found in defendant's car.

Defendant did not preserve his legal insufficiency claim relating to his assault conviction under a count with a dangerous instrument element (Penal Law § 120.05[2]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that this conviction was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The evidence established that when the victim refused defendant's request for sexual contact, defendant slammed her head into the dashboard of his car, fracturing her nose. This supports the conclusion that the dashboard was a dangerous instrument, because it was readily capable of causing serious physical injury under the circumstances in which it was used (*see People v Ortega*, 176 AD3d 479 [1st Dept 2019], *lv denied* 34 NY3d 1080 [2019]).

The court properly denied defendant's motion to suppress

the victim's lineup identification, because the lineup was not unduly suggestive (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). The participants were sufficiently similar, any differences in body type were minimized by having the participants with large number cards and blankets covering most of their bodies, and any differences in age or hair color were "not so noticeable as to single defendant out" (*People v Amuso*, 39 AD3d 425, 425 [1st Dept], *lv denied* 9 NY3d 862 [2007]). Defendant failed to preserve his argument that the victim's identification of defendant in the lineup was tainted by her viewing of herself and defendant in a surveillance video 11 days earlier, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, including matters of strategy and claims relating to scientific evidence (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, in the absence of a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we

find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11400N In re KPMG LLP, Index 655664/18
Petitioner-Respondent,

-against-

Marc S. Kirschner, in his capacity as Trustee of the Millennium Corporate Claim Trust and of the Millennium Lender Claim Trust,
Respondent-Appellant.

_____

Wollmuth Maher & Deutsch LLP, New York (Lyndon M. Tretter of counsel), for appellant.

Gibson, Dunn & Crutcher LLP, New York (Daniel J. Thomasch of counsel), for respondent.

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Order, Supreme Court, New York County (Barry R. Ostrager, J.), entered August 7, 2019, which granted the petition to the extent of compelling arbitration on the issue of arbitrability and staying a California action commenced by respondent for 30 days, unanimously reversed, on the law, with costs, the petition denied and this proceeding dismissed.

Millennium Lab Holdings, Inc. and Millennium Lab Holdings II, LLC (Millennium Holdings, LLC), pursuant to an engagement letter, retained petitioner KPMG LLP to audit their financial statements for certain time periods. The engagement letter contained a clause requiring arbitration of "[a]ny dispute or claim arising out of or relating to this Engagement Letter or the

services provided hereunder."

In 2014, Millennium Holdings, LLC and Millennium Laboratories, LLC (collectively, Millennium) entered into a $1,825,000 credit agreement with various banks. On November 10, 2015, Millennium Holdings, LLC and its affiliates filed for Chapter 11 relief under the Bankruptcy Code. The Bankruptcy Court confirmed Millennium's reorganization plan, which, inter alia, resulted in the creation of the Millennium Lender Claim Trust. Respondent, as the Claim Trust trustee, commenced an California action against petitioner asserting, inter alia, claims for negligent and intentional misrepsentation.

Petitioner brought this article 75 special proceeding to stay the California action and to compel arbitration. Supreme Court granted the petition "to the extent of compelling arbitration on the issue of arbitrability and staying the California action for 30 days." Respondent appeals.

The parties agree that "[t]he issue of whether a party is bound by an arbitration provision in an agreement it did not execute is a threshold issue for the court, not the arbitrator, to decide" (*Matter of 215-219 W. 28th St. Mazal Owner LLC v Citiscape Bldrs. Group Inc.*, 177 AD3d 482, 483 [1st Dept 2019]). Accordingly, Supreme Court should have decided this issue. The parties, however, ask us to decide the issue of arbitrability

instead of remanding. We do so in the interest of judicial economy (*see Hawkeye Funding, Ltd. Partnership v Duke/Fluor Daniel*, 307 AD2d 828 [1st Dept 2003], *lv denied* 1 NY3d 538 [2003]).

The parties agree that the only theory under which respondent, as a nonsignatory to the engagement letter containing the arbitration clause, can be required to arbitrate is on the equitable estoppel/direct benefits grounds. We find that petitioner has not met its "heavy burden" (*Matter of Rural Media Group, Inc. v Yraola*, 137 AD3d 489, 490 [1st Dept 2016]) under that theory.

The benefits that the investors whose interests respondent represents derived from the engagement letters between petitioner and nonparty Millennium were "merely indirect" (*Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626, 631 [2013] [internal quotation marks omitted]). Here, in the California action, respondent pleaded solely common-law claims and did not invoke the engagement letter (*see Jones v Singing River Health Servs. Found.*, 674 Fed Appx 382, 384 [5th Cir 2017]; *see also Oxbow Calcining USA Inc. v American Indus. Partners*, 96 AD3d 646, 649-650 [1st Dept 2012] ["the party seeking to compel arbitration must demonstrate that the party seeking to avoid arbitration relies on the terms of the agreement containing the arbitration

provision in pursuing its claim"]).

There is an additional reason why the benefits the investors received are indirect. "[B]enefits are direct when specifically contemplated by the ... parties [to the agreement containing the arbitration clause]; and benefits are indirect when the parties ... would not have originally contemplated the non-signatory's eventual benefit" (*Life Techs. Corp. v AB Sciex Pte. Ltd.*, 803 F Supp 2d 270, 276 [SD NY 2011]; *see also Katsoris v WME IMG, LLC*, 237 F Supp 3d 92, 108 [SD NY 2017]). Millennium and petitioner did not contemplate that the investors represented by respondent would benefit from the engagement letter. Indeed, the letter provided that "only the hard copy report is to be relied upon as [petitioner's] work product," and that if Millennium were to use the report petitioner "would consider [its] consent to the inclusion of [petitioner's] report and the terms thereof at that time."

Moreover, "a nonsignatory may be compelled to arbitrate where [it] '*knowingly* exploits' the benefits of an agreement containing an arbitration clause" (*Belzberg*, 21 NY3d at 631 [emphasis added]). "To satisfy the knowledge requirement, the case law requires that the non-signatory [] had actual knowledge of the contract containing the arbitration clause" (*Noble Drilling Servs., Inc. v Certex USA, Inc.*, 620 F3d 469, 473 [5th

Cir 2010]). To be sure, if an investor received a Millennium financial statement audited by petitioner, it would presumably have assumed that there was a contract between Millennium and petitioner. However, "[a] nonsignatory must have specific knowledge of the relevant agreement" (*Pershing, L.L.C. v Bevis*, 606 Fed Appx 754, 758 [5th Cir 2015]). Here, there is no indication in the record that the investors whom respondent represents had actual knowledge of the engagement letters between petitioner and Millennium (*see Arboleda v White Glove Enter. Corp.*, 179 AD3d 632, 633 [2d Depts 2020]).

Finally, we decline to consider petitioner's arguments regarding choice of law and the substantive law of accountant liability, because "the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute" (CPLR 7501; *see Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 142 [1999]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

CLERK

Renwick, J.P., Oing, Singh, Moulton, JJ.

11401N Abe Green, et al., Index 302355/15
Plaintiffs-Respondents,

-against-

Lauren N. Steinitz, et al.,
Defendants-Appellants.
- - - - -
[And A Third-Party Action]

Harris J. Zakarin, P.C., Melville (Harris J. Zakarin of counsel), for appellants.

Elefterakis, Elefterakis & Panek, New York (Michael S. Marron of counsel), for respondents.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about July 29, 2019, which denied defendants' motion to renew their motions to change venue from Bronx County to Putnam County, unanimously affirmed, without costs.

This consolidated personal injury action arises from a motor vehicle accident that occurred between the parties in Putnam County on September 6, 2014. In their summonses, dated May 20, 2015, and July 9, 2015, respectively, plaintiffs Abe Green and Melissa Hale Green designated Bronx County as the place of trial, on the basis that they resided there.

The October 19, 2015 lease agreement signed by plaintiffs for property located in Dutchess County and the deposition

testimony annexed to defendants' renewal motion shows only that plaintiffs resided in Dutchess County sometime after the actions were commenced, and does not challenge plaintiffs' prior showing that they were residents of Bronx County when they commenced their respective actions (*see* CPLR 503[a]; *Lilly v Ayoub*, 260 AD2d 302 [1st Dept 1999]; *Cardona v Aggressive Heating*, 180 AD2d 572, 573 [1st Dept 1992]). Plaintiffs' subsequent move to Dutchess County "does not invalidate the original designation based upon plaintiffs' residence at the time of the commencement of the action" (*Iassinski v Vassiliev*, 220 AD2d 372, 374 [1st Dept 1995]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: APRIL 16, 2020

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