



to steal only once he was inside (see *People v Zokari*, 68 AD3d 578 [2009], *lv denied* 15 NY3d 758 [2010]).

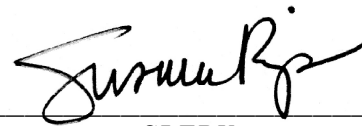
Assuming, without deciding, that the court was required to comply with the procedural requirements set forth in *People v O'Rama* (78 NY2d 270, 277-278 [1991]) when the jury sent a note stating it had reached a partial verdict, we find that the court fulfilled its "core responsibility" under *People v Kisoan* (8 NY3d 129, 135 [2007]). The court disclosed the note to counsel, announced its intention to take the partial verdict, and did nothing to prevent counsel from suggesting any other course of action. Accordingly, there was no mode of proceedings error exempt from preservation requirements (see *People v Starling*, 85 NY2d 509, 516 [1995]). We decline to review defendant's unpreserved claim in the interest of justice. As an alternative holding, we find no basis for reversal. Defense counsel was evidently satisfied when the court accepted the partial verdict and immediately dismissed the remaining count, upon which the jury had failed to agree. Accordingly, counsel had no reason to provide any additional input.

Defendant also raises claims regarding the court's acceptance and the jury's rendition of the partial verdict. These claims do not fall into the "very narrow category" of "mode of proceedings" errors exempt from the preservation requirement

(see *People v Kelly*, 5 NY3d 116, 119 [2005]). We decline to review these unpreserved arguments in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: MARCH 1, 2011

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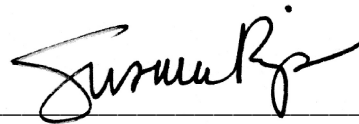
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respondent was indeed involved in a hit-and-run accident (see *Matter of Allstate Ins. Co. v Killakey*, 78 NY2d 325 [1991]). Although the police accident report indicated that respondent told the responding officer that the crash was the result of a blown out tire, the court reasonably attributed this statement to the fact that respondent was falling in and out of consciousness at the accident scene.

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

ENTERED: MARCH 1, 2011

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Gonzalez, P.J., Tom, Andrias, Renwick, Abdus-Salaam, JJ.

4377 AGFA Photo USA Corporation, etc., Index 118102/06  
Plaintiff-Respondent,

-against-

Chromazone, Inc., et al.,  
Defendants-Appellants.

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Hirschel Law Firm, P.C., Garden City (Daniel Hirschel of  
counsel), for appellants.

Traflet & Fabian, New York (Stephen G. Traflet of counsel), for  
respondent.

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Judgment, Supreme Court, New York County (Michael D.  
Stallman, J.), entered March 1, 2010, insofar as appealed from as  
limited by the briefs, granting plaintiff's motion for summary  
judgment on its claims for breach of contract and conversion and  
awarding plaintiff the total amount of \$125,587.31 jointly and  
severally against defendants, unanimously affirmed, with costs.

Defendants' argument that plaintiff's second motion for  
summary judgment should have been treated as a motion to renew,  
is improperly raised for the first time on appeal (see *Callisto  
Pharm., Inc. v Picker*, 74 AD3d 545 [2010]). Were we to review  
this argument, we would find that the court's treatment of the  
motion was entirely appropriate. When the court denied  
plaintiff's initial motion for summary judgment, it did so  
"without prejudice to another motion for summary judgment" with

the submission of additional evidence (see CPLR 3212[f]).

Plaintiff established its prima facie entitlement to judgment as a matter of law on its claims for breach of the equipment lease agreement and service maintenance agreement by submitting the subject agreements, the agreement assigning AFGA Corporation's rights to plaintiff and evidence of nonpayment in the form of the demand notices (see *Advanta Leasing Servs. v Laurel Way Spur Petroleum Corp.*, 11 AD3d 571 [2004]). In opposition, defendants failed to raise a triable issue of fact. Contrary to defendants' argument that plaintiff failed to meet its obligations under the service maintenance agreement, any alleged failure by plaintiff to provide parts and services had no bearing on defendants' breach under the lease agreement. Moreover, the record establishes that plaintiff indeed continued servicing the equipment during the relevant time period.

Plaintiff also established its entitlement to summary judgment on its conversion cause of action. Plaintiff submitted evidence demonstrating that the individual defendant exercised unauthorized dominion and control over the equipment by making unapproved alterations to it, by removing the equipment from the installation site without notice or consent and by relocating the equipment to his new business (see *Meese v Miller*, 79 AD2d 237, 242 [1981] ["(c)onversion is any unauthorized exercise of

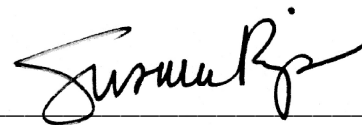
dominion or control over property by one who is not the owner of the property which interferes with and is in defiance of a superior possessory right of another in the property”]).

Defendants’ opposition failed to raise a triable issue of fact. The affidavit from the individual defendant conflicted with his deposition testimony and appears tailored to avoid the consequences of his earlier testimony (see e.g. *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]).

We have considered the defendants’ remaining arguments, including that the imposition of liability against the individual defendant constituted an improper piercing of the corporate veil, and find them unavailing.

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

ENTERED: MARCH 1, 2011



CLERK





AD2d 143, 148 [1992])). Accordingly, petitioners' claim that they were deprived of due process by the court's dismissal of the petition following a hearing on their motion for a preliminary injunction is without merit. Indeed, the hearing on the preliminary injunction afforded petitioners an opportunity to be heard to which they were not otherwise entitled.

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

ENTERED: MARCH 1, 2011

  
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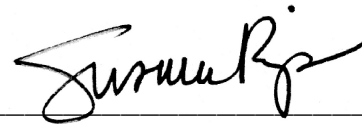


*Katz*, 202 AD2d 293 [1994]; *Clinton Invs. Co., II v Watkins*, 146 AD2d 861 [1989]).

In view of defendant's receipt and retention of plaintiff's final invoice dated December 18, 2008 without reasonably timely objection, defendant had no viable defense to plaintiff's claim to recover on an account stated (see *Fleming v Vassallo*, 43 AD3d 278 [2007]; *Bartning v Bartning*, 16 AD3d 249 [2005]).

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

ENTERED: MARCH 1, 2011

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Gonzalez, P.J., Tom, Andrias, Renwick, Abdus-Salaam, JJ.

4380 Dayong Liu, etc., et al., Index 116214/08  
Plaintiffs-Respondents,

-against-

Peng Cheng,  
Defendant-Respondent,

Robert W. O'Reilly,  
Defendant-Appellant.

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Martin, Fallon & Mullé, Huntington (Stephen P. Burke of counsel),  
for appellant.

Johnson Liebman, LLP, New York (Charles D. Liebman of counsel),  
for Dayong Liu and Tao Wong, respondents.

Cerussi & Spring, White Plains (Lam D. Le of counsel), for Peng  
Cheng, respondent.

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Order, Supreme Court, New York County (George J. Silver,  
J.), entered April 23, 2010, which, in an action for personal  
injuries, wrongful death and negligent infliction of emotional  
distress arising out of an automobile accident, denied defendant-  
appellant O'Reilly's motion for summary judgment dismissing the  
complaint as against him, unanimously affirmed, without costs.

The record demonstrates that the vehicle driven by co-  
defendant Peng Cheng was traveling in the westbound lane of a  
two-lane highway, which is divided by a double yellow line.  
O'Reilly was traveling in the eastbound lane when Cheng lost  
control of his vehicle, which spun around and crossed into the

lane of traffic where O'Reilly was traveling. The rear of the Cheng vehicle was then struck by the front of O'Reilly's vehicle in the eastbound lane.

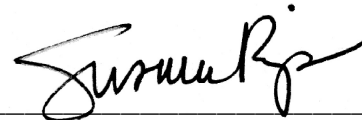
O'Reilly contends that Cheng is solely liable for the accident as his vehicle crossed over a double yellow line in violation of New York Vehicle and Traffic Law § 1126(a), and that O'Reilly was not required to anticipate that a vehicle traveling in the opposite direction would cross over into oncoming traffic. O'Reilly, however, failed to establish his entitlement to judgment as a matter of law, because, although demonstrating the existence of an emergency situation, there is no evidence with respect to what, if any, reasonable action O'Reilly took to avoid the accident (see *Caristo v Sanzone*, 96 NY2d 172, 175 [2001]).

Furthermore, even assuming O'Reilly did meet his initial burden, plaintiffs and Cheng raised triable issues of fact as to whether there was a sufficient time interval between the crossover of Cheng's vehicle and the collision for O'Reilly to have taken reasonable steps to avoid the collision. They both averred that Cheng's vehicle came to a complete stop after spinning into the eastbound lane and was stopped for more than ten seconds before being struck by the O'Reilly vehicle and that other vehicles were able to pass the Cheng vehicle without incident (see *Quiles v Greene*, 291 AD2d 345 [2002]; *Trevino v*

*Castro*, 256 AD2d 6 [1998]; *Raposo v Raposo*, 250 AD2d 420 [1998]).  
The affidavits of plaintiffs and Cheng consisted of more than  
mere speculation that O'Reilly could have done something to avoid  
hitting Cheng's car.

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

ENTERED: MARCH 1, 2011

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Gonzalez, P.J., Tom, Andrias, Renwick, Abdus-Salaam, JJ.

4381 Deloris Browne, et al., Index 302400/07  
Plaintiffs,

Lavern Browne,  
Plaintiff-Respondent,

-against-

Joseph A. Covington,  
Defendant-Appellant.

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Richard T. Lau & Associates, Jericho (Keith E. Ford of counsel),  
for appellant.

Seth D. Zukoff, New York (John Evans Bos of counsel), for  
respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-  
Hughes, J.), entered on or about July 15, 2010, which, insofar as  
appealed from, denied defendant's cross motion for summary  
judgment dismissing the third cause of action on the ground that  
plaintiff Lavern Browne did not suffer a serious injury within  
the meaning of Insurance Law § 5102(d), unanimously modified, on  
the law, to grant the cross motion as to plaintiff Lavern  
Browne's 90/180-day claim, and otherwise affirmed, without costs.

Supreme Court properly determined that Lavern Browne raised  
an issue of fact with respect to whether she suffered a serious  
injury insofar as the claims are premised upon her "permanent  
consequential limitation of use" and "significant limitation of



use" of her spine, right shoulder, and left ankle (Insurance Law § 5102[d]).

That portion of defendant's argument premised upon the alleged gap in Lavern Browne's treatment with Dr. Opam is unpreserved and, additionally, unavailing (see *Byong Yol Yi v Canela*, 70 AD3d 584, 585 [2010]). The fact that the same physician also examined her in January 2010 does not, as defendant contends, constitute an unexplained gap in treatment which somehow vitiates the probative value of the physician's affirmation. The record demonstrates that "the so-called gap in treatment was, in reality, a cessation" of that doctor's treatment, not all treatment (*Pommells v Perez*, 4 NY3d 566, 574 [2005]). Even a "cessation of all treatment" would not necessarily be dispositive, and, in any event, Browne offered a sufficient explanation in her affidavit in opposition to defendant's cross motion - her no-fault benefits were denied (*id.*; see *Peluso v Janice Taxi Co., Inc.*, 77 AD3d 491, 492 [2010]; *Delorbe v Perez*, 59 AD3d 491, 492 [2009]).

Defendant's argument that the treating physician's handwritten reports have no probative value because they did not "compare the reported degrees of loss of range of motion to normal values" has been raised for the first time on appeal and, therefore, is unpreserved for review (see *Alicea v Troy Trans*,


*Inc.*, 60 AD3d 521, 521-522 [2009]). Regardless, it is unpersuasive because the physician's affirmation, which Browne submitted in opposition to defendant's cross motion, clearly sets forth the normal ranges of motion for each and every allegedly injured body part and "ascribe[s] a specific percentage to the loss of range of motion" in each of those parts (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]). This comparison is sufficient to raise a question of fact regarding Browne's loss of range of motion for the purposes of her "permanent consequential limitation of use" and "significant limitation of use" claims (Insurance Law § 5102[d]).

However, defendant made a prima facie showing that Lavern Browne was not prevented from performing substantially all of her customary and daily activities for 90 of the 180 days immediately following the accident by submitting the affirmed report of an examination conducted approximately two months after the accident. Lavern Browne's subjective complaints fail to raise a material issue of fact and, to the extent that her doctor's affirmation purports to address the 90/180-day claim, it merely offers an unavailing conclusory recitation of the statutory

language (see *Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 463 [2010]; *Ortiz v Ash Leasing, Inc.*, 63 AD3d 556, 557 [2009]).

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

ENTERED: MARCH 1, 2011

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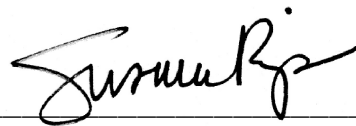
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move to withdraw his plea. In the absence of such a motion, there was nothing to require a sua sponte inquiry by the court into the plea's voluntariness (see e.g. *People v Riley*, 264 AD2d 689 [1999], *lv denied* 94 NY2d 906 [2000]). Furthermore, there is nothing to suggest that defendant was mentally incompetent at the time of his plea or had a viable psychiatric defense to the charges.

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

ENTERED: MARCH 1, 2011

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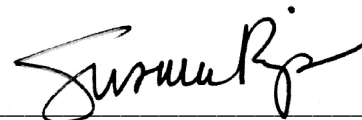
In opposition, plaintiff failed to support her theory that the fire was accidentally caused by discarded smoking material. She also testified that not long before the outbreak of the fire she passed by the second-floor hallway and did not smell smoke or see anyone smoking. Moreover, plaintiff failed to submit evidence of prior similar acts of vandalism in the building so as to raise an inference that the arson was a foreseeable consequence of defendants' alleged negligent failure to remove the mattress (*see generally Jacqueline S. v City of New York*, 81 NY2d 288 [1993]).

Plaintiff failed to sufficiently raise an inference that a defective rooftop door prevented her from exiting onto the roof to avoid the fire.

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: MARCH 1, 2011



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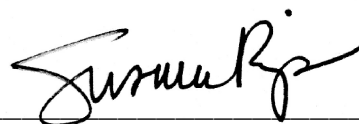


stopped 30 to 45 minutes before her fall, such a short lapse of time is insufficient to impart liability on defendants (see *Rodriguez v New York City Hous. Auth.*, 52 AD3d 299 [2008]; *Nayman v New York City Tr. Auth.*, 25 AD3d 376 [2006]), and plaintiff's contention that her fall was the result of improper snow removal is speculative (see *Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462, 464 [2007]).

Defendants also established, through the affidavit of their expert, that the cracked condition of the sidewalk was too trivial to be actionable (see *Trincere v County of Suffolk*, 90 NY2d 976 [1997]). Plaintiff's affidavit in opposition is insufficient to defeat the motion, as it contradicts her deposition testimony (see *Disla v City of New York*, 65 AD3d 949 [2009]).

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

ENTERED: MARCH 1, 2011

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Gonzalez, P.J., Tom, Andrias, Renwick, Abdus-Salaam, JJ.

4386 M.N. Dental Diagnostics, P.C., etc., Index 38893/06  
Plaintiff-Respondent,

-against-

New York City Transit Authority,  
Defendant-Respondent.

---

Jones Jones & O'Connell LLP, Brooklyn (Agnes Neiger of counsel),  
for appellant.

Baker, Sanders, Barshay, Grossman, Fass, Muhlstock & Neuwirth,  
Garden City (Steven J. Neuwirth of counsel), for respondent.

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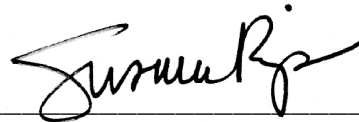
Order of the Appellate Term of the Supreme Court of the  
State of New York, First Department, entered on or about July 22,  
2009, which affirmed an order, Civil Court, Bronx County  
(Fernando Tapia, J.), entered on or about January 29, 2008,  
denying defendant's motion for summary judgment dismissing the  
complaint as time-barred, unanimously reversed, on the law,  
without costs, the motion granted and the complaint dismissed.  
The Clerk is directed to enter judgment accordingly.

It is well settled that "the No-Fault Law does not codify  
common-law principles; it creates new and independent statutory  
rights and obligations in order to provide a more efficient means  
for adjusting financial responsibilities arising out of  
automobile accidents" (*Aetna Life & Cas. Co. v Nelson*, 67 NY2d  
169, 175 [1986]). Since it is undisputed that there existed no

contract between plaintiff's assignor and the NYCTA, the common carrier's obligation to provide no-fault benefits arises out of the no-fault statute. Therefore, the three-year statute of limitations as set forth in CPLR 214(2) is applicable here.

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

ENTERED: MARCH 1, 2011

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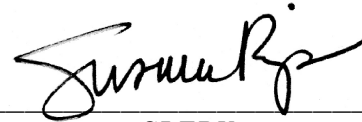
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We find the sentence excessive to the extent indicated.

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

ENTERED: MARCH 1, 2011

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Gonzalez P.J., Tom, Andrias, Renwick, Abdus-Salaam, JJ.

4388- Stella Lewis, et al., Index 115066-06  
4389 Plaintiffs-Appellants

-against-

The City of New York,  
Defendant-Respondent.

The New York City Transit Authority, et al.  
Defendants.

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Kelner & Kelner, New York (Gail S. Kelner of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai Newman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered March 26, 2010, dismissing the complaint and all cross claims as against defendant The City of New York (the City) pursuant to an order, same court and Justice, entered March 24, 2010, which granted the City's motion for summary judgment, unanimously affirmed, without costs. Appeal from the above order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

On February 7, 2006, the injured plaintiff was struck by a bus as she crossed the intersection of 34<sup>th</sup> Street and Broadway. She alleged that a proximate cause of the accident was the negligent acts of a traffic officer employed by the City of New

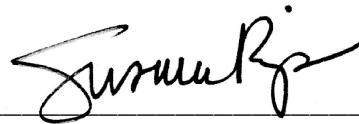
York in directing traffic at the intersection.

Supreme Court correctly held that the officer's action involved discretionary conduct, and, thus, the City was immune from liability (see *Devivo v Adeyemo*, 70 AD3d 587 [2010]; *Shands v Escalona*, 44 AD3d 524 [2007], *lv denied* 10 NY3d [2008]).

In light of the foregoing, we need not reach plaintiffs' remaining contentions.

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

ENTERED: MARCH 1, 2011

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Gonzalez, P.J., Tom, Andrias, Renwick, Abdus-Salaam, JJ.

4390 U.S. Underwriters Index 111375/08  
Insurance Company, etc.,  
Plaintiff-Respondent,

-against-

James Greenwald, et al.,  
Defendants-Appellants.

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Schlam Stone & Dolan LLP, New York (Michael C. Marcus of  
counsel), for James Greenwald, appellant.

Bellin & Associates, LLC, White Plains (Aytan Y. Bellin of  
counsel), for Theodora Corsell, appellant.

Cozen O'Connor, P.C., New York (Robert W. Phelan of counsel), for  
respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.),  
entered December 10, 2009, which denied defendant Greenwald's  
motion to dismiss the complaint as against him and defendant  
Corsell's cross motion to dismiss the breach of contract cause of  
action as against her, unanimously affirmed, without costs.

With respect to dismissing the breach of contract cause of  
action for lack of standing, we reject defendants' contention  
that Greenwald entered into the lease for the apartment with the  
wife of a principal of the insured apartment owner in her  
individual capacity and that therefore plaintiff, as subrogee of  
the insured apartment owner, lacks privity with Greenwald or  
Corsell. The deeds tracing the chain of ownership of the



apartment do not clearly establish that only Joseph Armato transferred his undivided interest in the property to the insured corporation (see CPLR 3211[a][1]). In any event, for purposes of Greenwald's lease, the insured and Josette Armato, who is Joseph Armato's spouse, would have been co-lessors (see generally *V.R.W., Inc. v Klein*, 68 NY2d 560, 563-566 [1986]; *Lawriw v City of Rochester*, 14 AD2d 13, 15 [1961], *affd* 11 NY2d 759 [1962]).

We also find no merit in Greenwald's contention that the breach of contract cause of action should have been dismissed because he was no longer a tenant at the time of the fire. The record shows that the landlord retained Greenwald's security deposit; that Greenwald continued to pay the rent for the apartment and the landlord accepted the payments; and that the loss of rent claim submitted by the insured to plaintiff states that Greenwald was the tenant of record at the time of the fire. These facts, particularly when corroborated by Joseph Armato's affidavit, counter the statements contained in the September 17, 2007 letter from Corsell to Josette Armato. Thus, issues of fact exist whether Greenwald was a guarantor of Corsell's tenancy or a holdover tenant subject to a month-to-month tenancy after September 15, 2007, with the same terms and conditions as are set forth in the original lease (see Real Property Law § 232-c; *City of New York v Pennsylvania R.R. Co.*, 37 NY2d 298, 300 [1975];

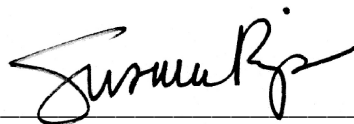
*Logan v Johnson*, 34 AD3d 758 [2006]).

Contrary to Greenwald's contention, the complaint sets forth all the elements of a negligence cause of action and apprises Greenwald of the acts intended to be proved (see CPLR 3013). Moreover, the evidence that Greenwald was dining at a restaurant outside the vicinity of the apartment building and was not observed near the apartment around the time of the fire does not conclusively establish that he played no part in causing the fire. Since Greenwald's whereabouts at the material time are likely to be predominantly within his and Corsell's knowledge, it would be premature to dismiss the negligence cause of action prior to discovery (see *Barrios v Boston Props. LLC*, 55 AD3d 339 [2008]).

We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: MARCH 1, 2011

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", is written over a horizontal line.

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Gonzalez, P.J., Tom, Andrias, Renwick, Abdus-Salaam, JJ.

4391 In re Lorretta Gibbs,  
Petitioner,

Index 400153/09

-against-

New York City Housing Authority,  
Respondent.

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Loretta Gibbs, petitioner pro se.

Sonya M. Kaloyanides, New York (Byron S. Menegakis of counsel),  
for respondent.

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Determination of respondent New York City Housing Authority,  
dated December 17, 2008, terminating petitioner's public housing  
tenancy, unanimously confirmed, the petition denied and the  
proceeding brought pursuant to CPLR article 78 (transferred to  
this Court by order of Supreme Court, New York County [Joan B.  
Lobis, J.], entered January 25, 2010), dismissed, without costs.

Respondent's finding that petitioner failed to comply with  
the terms of a stipulation in which she agreed to permanently  
exclude her son who had engaged in criminal activity from her  
apartment, is supported by substantial evidence, including  
petitioner's concession that the excluded individual was  
discovered in her apartment (*see Matter of Folks v New York City  
Hous. Auth.*, 27 AD3d 270 [2006], *lv denied* 7 NY3d 709 [2006];  
*Matter of Romero v Martinez*, 280 AD2d 58 [2001], *lv denied* 96

NY2d 721 [2001])). The penalty of termination does not shock our sense of fairness, particularly in view of the son's serious criminal activity and the stipulation's clear provision that his presence in the apartment would result in termination of petitioner's tenancy (see *Matter of Wooten v Finkle*, 285 AD2d 407 [2001])).

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

ENTERED: MARCH 1, 2011

  
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Gonzalez, P.J., Tom, Andrias, Renwick, Abdus-Salaam, JJ.

4393N Brill Physical Therapy, P.C., Index 600629/09  
Plaintiff-Respondent,

-against-

Stephanie Leaf, et al.,  
Defendants-Appellants.

Vertical Response,  
Defendant.

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Levy Davis & Maher, LLP, New York (Jonathan A. Bernstein of  
counsel), for appellants.

Law Office of M. Angelo Genova III, New York (M. Angelo Genova  
III of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.),  
entered December 21, 2009, which, to the extent appealed from,  
directed defendants to reimburse plaintiff Brill Physical  
Therapy, P.C. for all costs, including but not limited to  
attorney's fees, associated with preparing, serving and  
monitoring the court-ordered notification to certain non-party  
patients of plaintiff, advising them that their names, addresses,  
dates of birth and social security numbers had been improperly  
published by defendants, unanimously affirmed, with costs and  
disbursements.

We find that the court did not abuse its discretion in  
ordering payment of the subject attorney's fees. Contrary to

defendants' contentions, the fees were not awarded in contravention of the "American Rule," which precludes a prevailing party from recouping legal fees from the losing party except where authorized by statute, agreement or court rule (see *Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203 [2010]). Rather, such fees related solely to administrative costs incurred in connection with an urgent, court-ordered mass mailing, which was necessary to alert over 1000 patients of plaintiff that their personal information, including names addresses, dates of birth and social security numbers, had been improperly sent to a marketing company and that they were in danger of potential identity theft. Defendants agreed to pay the postage and processing costs for the mailing, the invoiced fees reflected that the tasks performed did not relate to any substantive legal work performed on behalf of plaintiff in connection with its claims asserted in this action, and the mass mailing was ancillary to the instant action (*compare Solow v Wellner*, 205 AD2d 339 [1994], *affd* 86 NY2d 582 [1995]).

Moreover, we note that, in connection with their appeal, defendants prepared a record which selectively failed to include many motion papers and supporting exhibits that had been submitted in Supreme Court and were an integral part of the record before that court. Accordingly, plaintiff was compelled

to submit a supplemental appendix on appeal, containing pertinent documents which were necessary for a determination of the issues on appeal (see *2001 Real Estate v Campeau Corp. [U.S.]*, 148 AD2d 315 [1989]).

We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: MARCH 1, 2011

  
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Sweeny, J.P., Catterson, Moskowitz, Renwick, Richter, JJ.

3776 Maryann Imperato, et al., Index 110727/07  
Plaintiffs-Respondents,

-against-

The Mount Sinai Medical Center, et al.,  
Defendants-Appellants.

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Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard Ng of counsel), for appellants.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for respondents.

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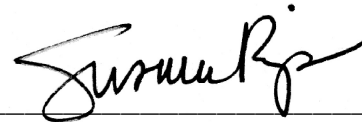
Order, Supreme Court, New York County (Joan B. Lobis, J.), entered May 5, 2010, which granted plaintiffs' motion to vacate an order precluding their expert witness from testifying at trial and denied defendants' motion to dismiss the case, unanimously affirmed, without costs.

Plaintiffs' counsel's debilitating illness, coupled with "law office failure," was a reasonable excuse warranting relief from the preclusion order entered on default (*see Frenchy's Bar & Grill v United Intl. Ins. Co.*, 251 AD2d 177, 177-718 [1998]). Plaintiffs' expert witness disclosure sufficiently delineated defendants' alleged departures from accepted medical practice and their causal connection to plaintiffs' injuries (*Ford v Empire Med. Group*, 123 AD2d 820, 821-822 [1986]; *see also Levy v New*

*York City Hous. Auth.*, 287 AD2d 281 [2001]). Moreover, there is no evidence that the failure to timely disclose was willful, contumacious or manifested bad faith (*Tsai v Hernandez*, 284 AD2d 116, 117 [2001]).

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ENTERED: MARCH 1, 2011

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

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*People v Arnold*, 98 NY2d 63 [2002]). We have frequently observed that, within its broad discretion under *People v Moulton* (43 NY2d 944 [1978]), a court may appropriately request or suggest that parties elicit additional proof (see e.g. *People v Rodriguez*, 22 AD3d 412 [2005], *lv denied* 6 NY3d 758 [2005]; *People v Davis*, 289 AD2d 134, 135 [2001], *lv denied* 97 NY2d 753 [2002]; *People v Medina*, 284 AD2d 122 [2001], *lv denied* 96 NY2d 922 [2001]).

We also conclude that the incarceration records produced by the People were sufficiently reliable to establish defendant's ineligibility for resentencing under the tolling provision. There is no merit to defendant's argument that the court improperly shifted the burden of proof to defendant in accepting these records.

In view of the foregoing, we find it unnecessary to reach any of the procedural or substantive issues presented by the People's alternative argument for affirmance.

THIS CONSTITUTES THE DECISION AND ORDER  
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before the Special Referee, we conclude, as did the motion court, that plaintiff was not deprived of a fair hearing.

Contrary to plaintiff's claim, Domestic Relations Law § 236(B)(5-a)(g) does not unconstitutionally discriminate against women who obtained divorces before the effective date of the statute by relieving women who obtained divorces after the effective date of the need to show a change of circumstances for a modification. As can be seen from its language, the statute applies in limited circumstances not present in this case.

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

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

ENTERED: MARCH 1, 2011

  
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Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, Román, JJ.

4224 In re Quincy B.,

A Person Alleged to be a  
Juvenile Delinquent,  
Appellant.

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Presentment Agency

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

Michael A. Cardozo, Corporation Counsel, New York (Elina Druker of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx (Robert R. Reed, J.), entered on or about December 21, 2009, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he had committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree and menacing in the third degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning identification and credibility. The victim testified that appellant personally seized his property, rather than appellant being merely present at the

scene. The victim also testified that he recognized appellant as a student at his school, and that he knew what grade appellant was in. The court properly considered this in crediting the victim's identification of appellant as one of the perpetrators of the theft of the ipod.

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

ENTERED: MARCH 1, 2011



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the defendant's summation (see *People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

Defendant did not preserve his challenge to the proficiency of the official court interpreter at trial who translated the victim's testimony, and we decline to review it in the interest of justice. As an alternative holding, we find the record establishes that the interpreter provided an adequate translation of the testimony. While there were occasional difficulties in translation, they were sufficiently rectified so that the victim's testimony was properly presented to the jury (see e.g. *People v Watkins*, 12 AD3d 165 [2004], *lv denied* 4 NY3d 836 [2005]; *People v Nedal*, 198 AD2d 42 [1993]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 1, 2011

  
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