SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 1, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

4374 The People of the State of New York, Respondent, Ind. 5159/07

-against-

Ramon Jimenez,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered June 26, 2008, convicting defendant, after a jury trial, of burglary in the second degree, and sentencing him, as a second felony offender, to a term of 6 years, unanimously affirmed.

The court properly declined to submit second-degree trespass to the jury as a lesser included offense. A surveillance videotape makes clear that there was no reasonable view of the evidence, viewed most favorably to defendant, that he entered the victim's apartment without criminal intent and formed an intent

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 Kisoon* (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

CLERK

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

4375 In re Travelers Property & Casualty Co. of America,
Petitioner-Appellant,

-against-

Luis Mayen,
Respondent-Respondent.

Index 260083/08

_____

Law Offices of Karen C. Dodson, New York (Andre Del Re of counsel), for appellant.

Law Offices of Jeffrey B. Manca, New York (Jeffrey B. Manca of counsel), for respondent.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered June 11, 2009, which, insofar as appealed from as limited by the briefs, after a framed-issue hearing, denied petitioner's application brought pursuant to CPLR article 75 seeking, inter alia, a permanent stay of arbitration of an uninsured motorist claim, unanimously affirmed, without costs.

Supreme Court properly denied the request for a permanent stay of arbitration, since petitioner failed to meet its burden of proof that a hit-and-run accident did not occur (*Matter of Empire Mut. Ins. Co. [Greaney-National Union Fire Ins. Co. of Pittsburgh],* 156 AD2d 154, 155 [1989]). The evidence adduced at the hearing, including the testimony of respondent's co-worker who witnessed another vehicle hit respondent's car, showed that

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

CLERK

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.

_____

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

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

4378 1091 River Avenue LLC, et al., Index 601228/09
Petitioners-Appellants,

-against-

Platinum Capital Partners, Inc.,
Respondent-Respondent.

_____

Shapiro & Shapiro, LLP, Brooklyn (Jeanne M. Weisneck of counsel), for appellants.

Tarter Krinsky & Drogin LLP, New York (Edward R. Finkelstein of counsel), for respondent.

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Order, Supreme Court, New York County (Walter B. Tolub, J.), entered October 27, 2009, which, inter alia, dismissed the petition to vacate two confessions of judgment and vacated the temporary stay of enforcement of the judgments, unanimously affirmed, with costs.

In this CPLR article 4 special proceeding, petitioners failed to present evidence in the petition and supporting affidavits sufficient to raise an issue of fact whether the judgments were improperly entered or whether the underlying loan agreements were illegally procured or whether they were otherwise defective. The court therefore was required to make a summary determination (CPLR 409[b]; *Karr v Black*, 55 AD3d 82, 86 [2008], *lv denied* 11 NY3d 712 [2008]; *see also Matter of 10 W. 66th St. Corp. v New York State Div. of Hous. & Community Renewal*, 184

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

CLERK

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

4379 Yann Geron, etc., Index 101116/10
Plaintiff-Appellant,

-against-

Vijay Amritraj,
Defendant-Respondent.

_____

Donald Pearce, for appellant.

Kestenbaum, Dannenberg & Klein, LLP, New York (Jeffrey C. Dannenberg of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered August 19, 2010, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its account stated cause of action, unanimously reversed, on the law, with costs and the motion granted. The Clerk is directed to enter judgment accordingly.

The court erred to the extent it found that issues of fact remain as to whether defendant was personally liable for obligations incurred pursuant to the agreement for legal services he entered into with the now dissolved law firm. As a promoter executing a contract on behalf of nonexistent corporate entities, defendant's personal liability under the agreement is presumed, and the plain language of the agreement here cannot be read to have absolved defendant of such personal liability (*see Grutman v*

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

CLERK

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

CLERK

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.

_____

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 hand-written 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

CLERK

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

4383 The People of the State of New York, Ind. 2733/09
Respondent,

-against-

Kennedy Howe,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered July 17, 2009, convicting defendant, upon his plea of guilty, of four counts of assault in the first degree, and sentencing him, as a second violent felony offender, to concurrent terms of 10 years, unanimously affirmed.

The record establishes that defendant's plea was knowing, intelligent and voluntary, and nothing in the plea allocution minutes casts doubt on his guilt (*see People v Toxey*, 86 NY2d 725 [1995]; *People v Lopez*, 71 NY2d 662 [1988]). Defendant explicitly admitted his guilt of all requisite elements including intent.

At sentencing, defendant made a statement about his psychiatric history that appeared to be a request for leniency or for better psychiatric treatment in prison. However, he did not

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

CLERK

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

4384 Ambrosia De Los Santos, Index 15971/06
Plaintiff-Appellant,

-against-

Amsterdam Apartments Manager, LLC, etc., et al.,
Defendants-Respondents.

[And A Third-Party Action]

_____

Fitzgerald & Fitzgerald, P.C., Yonkers (Mitchell Gittin of counsel), for appellant.

Gannon, Lawrence & Rosenfarb, New York (Peter J. Gannon of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered July 23, 2009, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie that they were not responsible for the injuries plaintiff suffered in a fire that started in a mattress that had been discarded in the second-floor hallway of the building. A fire investigation determined that the mattress was deliberately set afire with an incendiary. Deposition testimony established that the mattress presented no inherently dangerous fire hazard and that no smoking material had been negligently discarded in the hallway (*see e.g. Delgado v New York City Hous. Auth.*, 51 AD3d 570 [2008], *lv denied* 11 NY3d 706

[2008]).

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

CLERK

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

4385 Dalia Krinsky, Index 107184/08
Plaintiff-Appellant,

-against-

Richard D. Fortunato, et al.,
Defendants-Respondents.

_____

Mallilo & Grossman, Flushing (Francesco Pomara, Jr., of counsel), for appellant.

Gannon, Lawrence & Rosenfarb, New York (Jason B. Rosenfarb of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 12, 2010, which, in action for personal injuries allegedly sustained when plaintiff slipped and fell on an accumulation of snow and ice on a cracked and uneven portion of the sidewalk in front of defendants' building, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was warranted where plaintiff's fall occurred while a storm was in progress (*see Solazzo v New York City Tr. Auth.*, 21 AD3d 735 [2005], *affd* 6 NY3d 734 [2005]). The climatological records of the day of plaintiff's accident showed a snowfall that resulted in a total accumulation of 2.8 inches (see *Abaya v City of New York*, 257 AD2d 446 [1999]). Even crediting plaintiff's testimony that the snow had completely

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

CLERK

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.

_____

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

CLERK

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

4387 The People of the State of New York, Ind. 116/03
Respondent,

-against-

Stephan Pitts,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

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Judgment, Supreme Court, New York County (John Cataldo, J. at plea; Michael R. Ambrecht, J. at sentence), rendered October 14, 2008, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony offender, to a term of 4½ to 9 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 3 to 6 years, and otherwise affirmed. The record does not establish a valid waiver of the right to appeal.

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

CLERK

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

4388-4389 Stella Lewis, et al., Plaintiffs-Appellants

-against-

The City of New York, Defendant-Respondent.

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

Index 115066-06

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

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

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 34th 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

CLERK

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.

_____

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

CLERK

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

4391 In re Lorretta Gibbs, Index 400153/09
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

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

CLERK

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

4392 The People of the State of New York, Ind. 2962/06
Respondent,

-against-

Elvin Munoz,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about April 7, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: MARCH 1, 2011

CLERK

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

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.

_____

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 smailing, 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

CLERK

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.

_____

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]).

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

ENTERED: MARCH 1, 2011

CLERK

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

4219 The People of the State of New York, Respondent,

-against-

Keith Johnson, Defendant-Appellant.

Ind. 3920/04

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

Cyrus R. Vance, Jr., District Attorney, New York (John B. F. Martin of counsel), for respondent.

Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about May 18, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

Defendant is ineligible for resentencing under the 2009 Drug Law Reform Act because of his prior violent felony conviction. It is immaterial that that conviction did not serve as the basis for his adjudication as a second felony offender on the drug conviction upon which he seeks resentencing (*see People v Wright*, 78 AD3d 474 [2010]). Defendant's estoppel arguments are without merit.

The court properly applied the tolling provisions of CPL 440.46(5)(a) with regard to defendant's many periods of incarceration. The court did not take on a prosecutorial function or deprive defendant of due process when it requested the parties to submit additional records and information bearing on the tolling issue following the initial resentencing submissions (*compare*

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
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 1, 2011

CLERK

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

4223 Janmarie Spangler Stein-Sapir, Index 35438/71
Plaintiff-Appellant,

-against-

Leonard R. Stein-Sapir,
Defendant-Respondent.

_____

Robert A. Katz, New York, for appellant.

Fox Horan & Camerini LLP, New York (John R. Horan of counsel), for respondent.

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Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered August 31, 2009, which granted defendant's motion to confirm the report of a Special Referee recommending denial of plaintiff's application for upward modification of alimony and denied plaintiff's cross motion to reject the report, unanimously affirmed, without costs.

Plaintiff failed to make "a clear and convincing showing of a substantial change in circumstances" since the 1996 denial of her previous application for an upward modification of alimony (*see Matter of Hermans v Hermans*, 74 NY2d 876, 878 [1989]). Inflation is not such a change. In the 1996 decision, the court noted, "That there was inflation was well known to all, long ago at the time of the original judgment." Moreover, inflation is not peculiar to plaintiff's personal circumstances; it is a broader social factor (*see Hermans*, 74 NY2d at 878).

Upon our independent review of the transcript of the hearing

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

CLERK

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

4224 In re Quincy B.,

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

CLERK

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

4226 The People of the State of New York, Ind. 2207/07
Respondent,

-against-

Mohan Kowlessar,
Defendant-Appellant.

_____

Sullivan & Brill, LLP, New York (Steven Brill of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (John Carter, J.), rendered March 19, 2009, convicting defendant, after a jury trial, of four counts of sexual abuse in the first degree, and sentencing him to an aggregate term of 12 years, unanimously affirmed.

Defendant's arguments concerning the People's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The prosecutor had a sufficient basis on which to comment on defendant's failure to call his brother to corroborate his own testimony, and this comment did not improperly shift the burden of proof. Defendant's brother was an available and presumably favorable witness who could have provided material, noncumulative testimony (*see People v Cochran*, 29 AD3d 365 [2006], *lv denied* 7 NY3d 787 [2006]). The remaining summation remarks challenged on appeal were permissible comments on the evidence and responses to

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]).

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

ENTERED: MARCH 1, 2011

CLERK