

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**FEBRUARY 7, 2013**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8727- Index 150136/10  
8728 Allianz Global Risks US Insurance  
Company, as subrogee of  
Yeshiva University,  
Plaintiff-Respondent,

-against-

Tishman Construction Corporation  
of New York, et al.,  
Defendants-Appellants.

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Bennett Giuliano McDonnell & Perrone, New York (William R. Bennett, III of counsel), for Tishman Construction Corporation of New York, appellant.

Rich Intelisano & Katz, LLP, New York (Steven Cramer of counsel), for Sirina Fire Protection Corp., appellant.

Sheps Law Group, P.C., Melville (Robert C. Sheps of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered May 14, 2012, which granted defendants' motion to reargue their CPLR 3211 motion to dismiss the complaint and, upon reargument, modified the order, same court and Justice, entered August 10, 2011, denying their motion to dismiss the complaint, solely to state that defendants are named insureds under the

subject insurance policy, and otherwise adhered to the original determination, unanimously affirmed, without costs. Appeal from August 10, 2011 order, unanimously dismissed, without costs, as superseded by the appeal from the May 14, 2012 order.

Defendant Tishman Construction Corporation of New York entered into a contract to serve as the general contractor for construction of a building owned by Yeshiva University. Tishman subcontracted with defendant Sirina Fire Protection Corp. to install the building's fire suppression system. It is alleged that one of the sprinkler pipe couplings failed, causing water damage to several floors in the building. Plaintiff Allianz Global Risks US Insurance Company, Yeshiva's property insurer, paid Yeshiva more than \$550,000 to cover the loss.

Allianz commenced this subrogation action against defendants to recover the insurance payment it made to Yeshiva. The complaint alleges that the damages were caused as a result of Sirina's negligent installation of the fire suppression system, and Tishman's approval of the improperly installed system. Defendants moved to dismiss the action as barred by the antesubrogation rule. Defendants assert that they are covered by a liability insurance policy issued by AIG under an Owner Controlled Insurance Program, and that Yeshiva is obligated to

cover the first one million dollars of damages. Defendants argue that, if successful, plaintiff will essentially recover from Yeshiva, its own insured, because the damages alleged are less than one million dollars.

At this preanswer stage of the proceedings, we cannot say, as a matter of law, that the action is barred by the antissubrogation rule. In the absence of discovery, there are issues of fact as to whether the AIG policy provides coverage to defendants for the loss. The complaint lacks sufficient details about the scope and location of the damages to the building, precluding a determination as to whether certain exclusions in the policy apply (see *George A. Fuller Co. v United States Fid. and Guar. Co.*, 200 AD2d 255, 259-261 [1st Dept 1994], *lv denied* 84 NY2d 806 [1994]).

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: FEBRUARY 7, 2013

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third degree, criminal sale of a controlled substance on or near school grounds, and resisting arrest. After the presentation, the grand jury failed to muster a vote for indictment or dismissal for any of the charges, but took "no affirmative action" on them. After the prosecutor recalled witnesses for additional testimony, the grand jury voted to indict defendant for resisting arrest, but again took no action on the drug sale charges.

At defendant's arraignment later that month, the prosecutor stated that she intended to re-present the drug sale charges to another grand jury, but did not seek the court's authorization for the re-presentation. In February 2010, the prosecutor submitted the drug sale charges to a second grand jury, along with additional counts for defendants' possession of bags containing cocaine residue and crack pipes. The second grand jury voted to indict defendant for both drug sale charges and the possession charges, and thereafter the two indictments were consolidated.

In April 2010, defendant moved pursuant to CPL 210.20 for an order dismissing the drug sale charges on the ground that, after the first grand jury had failed to vote to indict on those charges, the prosecutor violated CPL 190.75(3) by re-presenting

them to the second grand jury without authorization. The court denied the motion on the ground that its permission was unnecessary where, as here, the first grand jury took no action on the drug charges and the prosecutor did not "withdraw" them before re-presenting.

In January 2011, defendant pleaded guilty to a reduced charge of criminal sale of a controlled substance in the fourth degree, in full satisfaction of the consolidated indictment.

It was error to deny defendant's motion to dismiss the drug sale counts. Under CPL 190.75(3), the People cannot re-present a charge that a grand jury has dismissed unless the court in its discretion authorizes or directs resubmission. Even without a formal grand jury vote, a charge can be deemed "dismissed" within the meaning of CPL 190.75(3) if the prosecutor "prematurely takes the charge away from the grand jury" (*People v Credle*, 17 NY3d 556, 558 [2011]). In *Credle*, after the People presented drug charges against the defendant to a grand jury, they unsuccessfully tried to muster sufficient votes to indict or dismiss, and then offered the grand jury the option of voting "no affirmative action" on the charges (*id.*). After the grand jury accepted that option, the People, without seeking the court's permission, terminated the proceedings and resubmitted the

charges to a second grand jury, which indicted the defendant (*id.*). The Court of Appeals dismissed the drug charges, explaining that when a prosecutor terminates a grand jury's deliberations before it has disposed of the matter in one of the five ways permitted by CPL 190.60, the critical question as to whether a dismissal was effected was "the extent to which the [g]rand [j]ury considered the evidence and the charge" (17 NY3d at 560, quoting *People v Wilkins*, 68 NY2d 269, 274 [1986]). In *Credle*, the prosecutor terminated the first grand jury proceedings after it had made a complete presentation and directed the jury to deliberate over the charges, and accordingly the proceedings were deemed to amount to a dismissal (17 NY3d at 560).

The People's attempt to distinguish this case from *Credle* on the ground that here the prosecutor did not formally "withdraw" the drug charges against defendant from the first grand jury, but instead allowed its term to expire, is unpersuasive. The distinction has no bearing on whether the charges were effectively dismissed by the grand jury's failure to indict after a full presentation of the case.

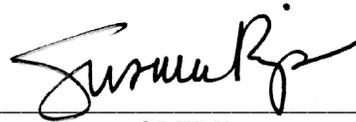
Defendant's guilty plea does not preclude his claim, because the prosecution's noncompliance with CPL 190.75(3) was a

jurisdictional defect (see *People v Hansen*, 95 NY2d 227, 230-232 [2000] [holding a defendant's "right to be prosecuted on a jurisdictionally valid indictment survive[s] [a] guilty plea"]). The prosecution's failure to adhere to the statutory procedure "affect[ed] the jurisdiction of the court, and as such appellate review thereof was neither waived nor forfeited by the defendant" (*People v Jackson*, 212 AD2d 732, 732 [2d Dept 1995], *affd* 87 NY2d 782 [1996] [where the prosecutor, without first obtaining the court's authorization pursuant to CPL 210.20(6)(b), resubmitted charges that were the subject of a reduction order more than 30

days after the order's entry, the defendant's guilty plea did not preclude his challenge on appeal]).<sup>1</sup>

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<sup>1</sup>In *People v Jackson* (212 AD2d 732), the People raised an argument similar to the argument that they raise here, namely, that the defendant's guilty plea forfeited his claim that an unauthorized re-presentation of charges to a second grand jury, because the error was non-jurisdictional. In affirming the reversal of the conviction on the merits without discussing that issue (87 NY2d 782), the Court of Appeals necessarily rejected the People's forfeiture argument. Accordingly, in view of *Jackson*, we decline to follow our decision in *People v McCoy* (91 AD3d 537 [1st Dept 2012]). We note that the appellate briefs for *McCoy* did not bring *Jackson* to the attention of the panel that decided *McCoy*.



but might have been left in the cell by someone else. Over objection, the court admitted evidence on the People's direct case that shanks were recovered from defendant's cell in both a past incident and a subsequent incident.

Defendant argues that the evidence of these uncharged crimes should not have been admitted under *People v Molineaux* (168 NY 264 [1901]). This evidence, however, was not received as proof that defendant had a propensity to keep shanks in his cell. Instead, it was probative of defendant's knowledge and intent in that "knowing possession" was an element of at least one of the charges on which he was convicted (Penal Law § 205.25.2; see e.g. *People v Giles*, 11 NY3d 495 [2008], *People v Webb*, 5 AD3d 115 [1st Dept 2004], *lv denied* 2 NY3d 809 [2004]). Although defendant argues that he did not "possess" the shank (see *People v Blair*, 90 NY2d 1003 [1997]), there was no testimony refuting the fact that the shank was discovered in a cell occupied only by him (see *People v Hurd*, 161 AD2d 841 [1990]). The contested issue at trial was whether defendant actually knew the shank was in his cell, directly implicating his state of mind (see *People v Alvino*, 71 NY2d 233 [1987]). The trial court correctly held that the probative value of this evidence outweighed its prejudicial effect, which the court minimized by way of thorough and repeated limiting instructions.

Defendant's related argument concerning the prosecutor's summation is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal of the judgment.

The court, however, finds that as a matter of discretion and in the interest of justice, the sentence should be reduced to a term of 2 to 4 years.

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Greenwich's cross motion for summary judgment dismissing the common-law negligence and Labor Law §§ 200, 240(1), and 241(6) claims as against it, granted defendant/third-party plaintiff Magnetic Construction Group Corp.'s (Magnetic) cross motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims against it, and denied 377 Greenwich's cross motion for summary judgment on its common-law and contractual indemnification and breach of contract claims against Magnetic, unanimously affirmed, without costs.

Plaintiffs made a prima facie showing that 377 Greenwich failed to provide the injured plaintiff with an adequate scaffold, which is a safety device under Labor Law § 240(1), and that as a consequence, he fell and injured himself. It is unrefuted that during an ongoing construction project, plywood sheeting was placed over the planks on the scaffold and that, in one area, there were two planks missing beneath the plywood. The scaffolding law mandates that owners and contractors provide safety devices which shall be so constructed, placed and operated as to give proper protection to persons performing work covered by the statute (Labor Law § 240[1]). 377 Greenwich had a nondelegable, statutory duty to ensure that the scaffold in use by plaintiff during the course of this construction project was

an effective and stable safety device (*Schultze v 585 W. 214th St. Owners Corp.*, 228 AD2d 381, 381 [1st Dept 1996], citing *Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560-562 [1993]). Since preventing a worker from falling is a core objective of the statute, plaintiff established a violation of section 240(1) as a matter of law (*Montalvo v J. Petrocelli Constr., Inc*, 8 AD3d 173, 175 [1st Dept 2004]).

Although 377 Greenwich argues that the planks were improperly removed, or possibly even stolen, by the employees of another contractor, no facts are presented from which to conclude that this was an extraordinary and/or unanticipated intervening act that constituted a superceding cause for plaintiff's injuries (*cf. Montgomery v Federal Express Corp.*, 4 NY3d 805 [2005]). 377 Greenwich's principal testified that he was aware that other subcontractors on the site were moving and removing construction tools and materials. 377 Greenwich's characterization of the removal of the planks as a "theft" is entirely speculative and, even if true, does not convert this foreseeable event into a superceding intervening cause (*Steinberg v New York City Tr. Auth.*, 88 AD3d 582 [1st Dept. 2011]).

The motion court also correctly determined that the medical records did not create an issue of fact about whether plaintiff actually fell from a scaffold. There is overwhelming evidence,

physical as well as testimonial, from both interested and non-interested witnesses, that plaintiff fell from the scaffold. Assuming the physician's assistant at St. Vincent's hospital (who admitted she was unfamiliar with the term "scaffolding") correctly transcribed plaintiff's statement as, "I twisted my ankle coming off the truck," this lone, uncorroborated statement is not sufficient to raise an issue of fact. Indeed, even if the statement is true, it is well established law that "[t]here may be more than one proximate cause of a workplace accident" (*Pardo v Bialystoker Ctr. & Bikur Cholim*, 308 AD2d 384 [1st Dept 2003]).

The motion court correctly refused to dismiss the Labor Law § 241(6) claim against 377 Greenwich. Although Industrial Code (12 NYCRR) § 23-5.1(c) is insufficiently specific to support a Labor Law § 241(6) claim, 377 Greenwich failed to establish that the scaffolding planks complied with Industrial Code (12 NYCRR) § 23-5.1(e), which is a proper predicate for a Labor Law § 241(6) claim (see generally *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). The latter code provision requires, among other things, that scaffolding planks be of a specified width (§ 23-5.1[e][5]) and "laid tight" (§ 23-5.1[e][1]).

377 Greenwich cross moved to dismiss plaintiff's Labor Law § 200 and common-law negligence claims on the sole ground of lack of notice. Any references in the cross motion to supervision

were raised only in connection with relief requested by and against codefendant Magnetic. Plaintiff restricted his arguments only to those raised in 377 Greenwich's limited cross motion. Consequently, to the extent this accident involves the methods or materials used by plaintiff at the work place, 377 Greenwich never made out a prima facie case entitling it to summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action (see generally *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]; see also *Raffa v City of New York*, 100 AD3d 558 [1st Dept 2012]).

The construction agreement relied on by both 377 Greenwich and Magnetic is unsigned and replete with editorial markings. It does not clearly and unambiguously obligate Magnetic to indemnify the owner, 377 Greenwich (see *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). Therefore, the motion court properly denied 377 Greenwich's cross motion against Magnetic for contractual indemnification.

The motion court also properly denied 377 Greenwich's cross motion for common-law indemnification against Magnetic, since 377 Greenwich failed to show that plaintiff's accident was caused by Magnetic's negligence (see *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]). Similarly the motion court properly dismissed the Labor Law § 200 and common-law negligence

claims against Magnetic as there is no evidence that Magnetic, assumed authority over plaintiff's work or exercised the requisite degree of supervision and control over the work to hold it liable (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]).

As to its breach of contract claim against Magnetic, 377 Greenwich failed to identify in its original motion papers the precise contractual provision requiring Magnetic to name it as an additional insured (*see Bryde v CVS Pharmacy*, 61 AD3d 907, 909 [2d Dept 2009]). The issue, therefore, remains for trial.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 7, 2013

  
CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clarke, JJ.

9102-		Index	602355/08
9103	Sherle Wagner International, L.L.C., Plaintiff,		602851/07 591094/07 590117/09

-against-

450 Park LLC, et al.,  
Defendants-Appellants,

Taconic Investment Partners, LLC,  
Defendant.

- - - - -

Sherle Wagner International, L.L.C.,  
Plaintiff,

-against-

Consolidated Edison Company  
of New York, Inc.,  
Defendant/Third-Party  
Plaintiff-Respondent,

-against-

450 Park LLC, et al.,  
Third-Party Defendants-Appellants,

Taconic Investment Partners, LLC, et al.,  
Third-Party Defendants.

[And Another Third-Party Action]

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Carol R. Finocchio, New York, for appellants.

Richard W. Babinecz, New York (Stephen T. Brewi of counsel), for  
respondent.

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Orders, Supreme Court, New York County (Milton A. Tingling,  
J.), entered June 22, 2012, which, to the extent appealed from,

denied defendants/third-party defendants 450 Park LLC and Taconic Management Company, LLC's motion for summary judgment dismissing the complaint, the third-party complaint and all cross claims asserted against them, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this and related actions, Sherle Wagner International, L.L.C. (SWI) or its subrogee, seeks recovery for losses sustained when SWI's Manhattan showroom, located in the sub-basement of 60 East 57<sup>th</sup> Street, became flooded after the sump pump in an adjacent Con Edison vault failed to work. The vault, which was located outside of the premises, housed an electrical transformer and supplied power to the premises through electrical wires. The wires were run through conduits between the vault and a "network compartment" room, which shared a wall with the vault, but was located within 450 Park LLC's premises.

450 Park LLC and Taconic Management Company, LLC, the owner and property manager of the premises, respectively, made a prima facie showing of entitlement to dismissal of the claims asserted against them. The motion papers established that 450 Park LLC and Taconic Management Company, LLC lacked control or responsibility for the space within the conduits, through which their two experts maintained that the water entered the premises,

and lack of prior notice of an insufficient waterproofing condition. Although the network compartment was located on the premises, it housed Con Edison's equipment and Con Edison had exclusive access to the locked room, via use of a standardized key used for other network compartments throughout Manhattan. Further, a long-time Con Edison employee testified that, in order to prevent water from traveling through the conduits between the vault and the network compartment, the ducts were packed with a fibrous substance and then sealed with a sealant, which materials he carried on his truck and applied when necessary.

In opposition, SWI and Con Edison failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Con Edison did not dispute that the water entered the premises through the conduits which carried its wires from the vault to Con Edison's equipment in the network compartment. As such, responsibility for sealing the space between the conduits and the exterior wall of the premises, on which point the opposition papers were focused, is not at issue. Given Con Edison's

admitted responsibility for the "electrified components" in the network compartment (see 16 NYCRR 98.4), there is no logical basis upon which to exclude its responsibility for the sealing of the subject conduits.

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proof. The indictment, the proof at trial, the prosecutor's summation and the court's instructions were all based on the theory that defendant Haggerty stole money from Mayor Bloomberg by making false representations that the money that the Mayor transferred to the Independence Party would be used for an extensive ballot security operation costing about \$1.1 million. Although the Mayor could not have controlled how the Independence Party used that money, the theft was committed when Haggerty used false representations to cause the Mayor to transfer the money to the Party. While Haggerty also deceived the Independence Party into believing that it was paying a vendor for ballot security services when it transferred the money to Haggerty's shell corporation, the Mayor remained the true victim of Haggerty's deception. Accordingly, the evidence established a theft from the Mayor, as charged in the indictment (*compare People v Grega*, 72 NY2d 489 [1988]). Haggerty's assertion that the jury convicted him on an improper theory is based on speculative inferences from jurors' notes.

Since the transfer of the money from the Mayor to the Independence Party was the larceny, the evidence also proved defendants' guilt of money laundering, based on the transfer of the proceeds of the larceny from the Independence Party to the shell corporation. The evidence supports the conclusion that the

transfer was designed in whole or in part to "conceal or disguise the nature, the location, the source, the ownership or the control of the proceeds" of the preexisting larceny (Penal Law § 470.15[1][b][ii][A]).

The court properly exercised its discretion in denying defendants' mistrial motion, made when the prosecutor addressed a remark to the court during a colloquy on a matter of law, but within the hearing of the jury, that impinged on Haggerty's right to refrain from testifying. The jury is presumed to have followed the court's prompt curative instruction, as well as its other instructions to draw no unfavorable inference from Haggerty's failure to testify (see *People v Davis*, 58 NY2d 1102, 1104 [1983]).

We have considered and rejected defendants' arguments concerning the best evidence rule (see generally *Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643-644 [1994]).

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Mazzarelli, J.P., Acosta, Saxe, Renwick, Clark, JJ.

9202            In re Angela P.,  
                  Petitioner-Respondent,

-against-

Floyd S.,  
Respondent-Appellant.

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Floyd Schofield, appellant pro se.

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Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about December 21, 2011, which denied respondent father's objections to an order, same court (Harold E. Bahr, Support Magistrate), entered on or about October 7, 2011, denying his motion to vacate an order of child support, same court (Cheryl Joseph-Cherry, Support Magistrate), entered on or about March 26, 2007, upon the father's purported default, unanimously affirmed, without costs.

The father's almost 4½-year delay in moving to vacate the order of child support, despite his awareness of all relevant facts surrounding the issue, was unreasonable (*see Bank of N.Y. v Stradford*, 55 AD3d 765, 765 [2d Dept 2008]). Moreover, the issues raised in the motion to vacate, including the assertion that the support order incorrectly stated that the father had defaulted, were raised in the father's objections to the support order and addressed by the Family Court in its order denying the

objections. The father abandoned his appeal from the Family Court's order. A motion to vacate an order pursuant to CPLR 5015 cannot serve as a substitute for an appeal, or remedy an error of law that could have been addressed on a prior appeal (*Pjetri v New York City Health & Hosps. Corp.*, 169 AD2d 100, 103-104 [1st Dept 1991], *lv dismissed* 79 NY2d 915 [1992]).

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reasonably permit or promote the stated purpose of the entity to be realized or achieved, or [that] continuing the entity is financially unfeasible" (see *Matter of 1545 Ocean Ave., LLC*, 72 AD3d 121, 131 [2d Dept 2010]; *Schindler v Niche Media Holdings*, 1 Misc 3d 713, 716 [Sup Ct, New York County 2003]). Indeed, the allegations show that the company has been able to carry on its business since the alleged expulsion of plaintiff in 2007; the allegation that defendants failed to pay plaintiff his share of the profits and award him distributions shows that the company is financially feasible.

In view of the foregoing, there is no occasion for the appointment of a receiver (see Limited Liability Company Law § 703). We note that plaintiff admits that he can seek appointment of a temporary receiver under CPLR 6401(a), given his remaining causes of action.

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In any event, the father was not entitled to court-appointed counsel on his petition to terminate the order of support (see Family Ct Act § 262[a]; *cf. Matter of Scott v Scott*, 62 AD3d 714, 715 [2d Dept 2009]).

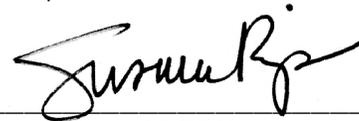
In addition, Support Magistrate Mulroy properly found that the father did not establish that the subject child resided with the paternal grandmother, and not petitioner-respondent mother, during the relevant time period (see generally *Matter of Jennifer H.S. v Damien P.C.*, 50 AD3d 588, 588 [1st Dept 2008], *lv denied* 12 NY3d 710 [2009]).

The father's argument, raised for the first time on appeal, that the Family Court should have retroactively reduced his support arrears, is not properly before this Court. Indeed, the father's argument should be made in an enforcement proceeding or in a petition to modify child support, not in a proceeding to terminate the support obligation completely, which is the only proceeding before this Court on appeal.

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

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challenge to the victim's later statement to another officer, and regardless of whether it was error to permit two witnesses to give essentially the same evidence, any error was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant was not deprived of a fair trial by the prosecutor's summation. The prosecutor did not shift the burden of proof by commenting on defendant's failure to call witnesses who were defendant's friends, and who would have been in a position to corroborate defendant's testimony (*see e.g. People v Kowlessar*, 82 AD3d 417 [1st Dept 2011]; *People v Cochran*, 29 AD3d 365, 366 [1st Dept 2006], *lv denied* 7 NY3d 787 [2006]).

We perceive no basis for reducing the sentence.

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Mazzarelli, J.P., Acosta, Saxe, Renwick, Clark, JJ.

9210 Yu Yun Dong, as mother and natural guardian of Danny Chen, etc.,  
Plaintiff-Respondent, Index 109135/09

-against-

Reginald Ruiz, M.D., et al.,  
Defendants,

Daniel Clement, M.D.,  
Defendant-Respondent,

St. Vincent's Catholic Medical Centers,  
Defendant-Appellant.

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

Morelli Ratner PC, New York (Adam Deutsch of counsel), for Yu Yun Dong, etc., respondent.

Kaufman Borgeest & Ryan LLP, New York (Dennis J. Dozis of counsel), for Daniel Clement, M.D., respondent.

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Appeal from order, Supreme Court, New York County (Alice Schlesinger, J.), entered June 14, 2011, which denied the motion of defendant St. Vincent's Catholic Medical Centers (St. Vincent's) to dismiss the complaint pursuant to CPLR 3211(a) (5) and (7) on the ground that plaintiff's claims were discharged due to bankruptcy, unanimously dismissed, without costs.

At issue in this appeal is the interpretation and implementation of a February 16, 2011 stipulation and order so-

ordered by the United States Bankruptcy Court, Southern District of New York (Cecilia Morris, J.), which lifted the automatic stay on the underlying medical malpractice action pursuant to St. Vincent's second bankruptcy proceeding and allowed the action to proceed, provided that plaintiff waived all claims against all debtors, including St. Vincent's, all recovery is limited to the proceeds of St. Vincent's third-party insurance coverage, and the insurers are responsible for all costs in defending the action. The order is silent, however, as to the first bankruptcy plan.

The bankruptcy court has jurisdiction to interpret and enforce its own prior orders (*see St. Vincents Catholic Med. Ctrs. v Goodman [In re St. Vincents Catholic Med. Ctrs.]*, 417 BR 688, 694 [SD NY 2009], citing *Travelers Indem. Co. v Bailey*, 557 US 137, 151 [2009]). Moreover, in the instant matter, the bankruptcy court expressly provided that it "shall retain jurisdiction to resolve all matters relating to the implementation of this Stipulation and Order." There are numerous factual and legal issues that need to be settled with respect to this stipulation and order before this Court may pass on the effect it may have had on plaintiff's action, specifically whether and how the second bankruptcy plan modified or replaced the first failed bankruptcy plan, what ultimate effect this may

have had on plaintiff's underlying action, which St. Vincent's argues is barred under the first plan due to plaintiff's failure to timely file a proof of claim under that plan, and whether the first plan could have properly effectuated a non-debtor release for the insurers, thus barring plaintiff, as a non-approved claimant, from the recovery contemplated in the order. Hence, we dismiss this appeal to allow the Bankruptcy Court to expound upon this and other issues necessary to resolve the issue of whether plaintiff can maintain this action, even solely against the insurers, with St. Vincent's as a nominal defendant.

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Construction Corp.'s cross motion for summary judgment dismissing the third-party complaint and all cross claims against it, unanimously modified, on the law, to granting the City's motion as to the common-law negligence claim, and otherwise affirmed, without costs.

As plaintiff concedes, the "firefighter's rule" bars his common-law negligence claim against the City of New York, his municipal employer (see General Obligations Law § 11-106; *Williams v City of New York*, 2 NY3d 352, 363 [2004]).

The City failed to establish prima facie that it did not create the alleged defective condition that gave rise to plaintiff's accident (see *Oboler v City of New York*, 8 NY3d 888 [2007]). Vales, the City's contractor, failed to establish that its work was limited to the installation of a pedestrian ramp and did not include the area of the sidewalk surrounding the hydrant, where plaintiff tripped and fell. In any event, the record presents a triable issue of fact whether Vales's work resulted in

the immediate creation of the 2½-inch height differential in the sidewalk on which plaintiff tripped and fell.

We have considered appellants' remaining arguments for affirmative relief and find them unavailing.

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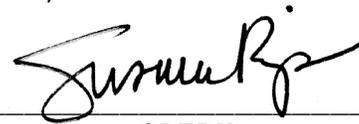
impound the car and conduct an inventory search (see *People v Walker*, 20 NY3d 122 [2012]). This search was conducted pursuant to standardized guidelines that were introduced into evidence, and that were designed to safeguard defendant's property, protect the police against claims of theft, and guard against dangerous instrumentalities (see *People v Galak*, 80 NY2d 715, 718-719 [1993]). Those guidelines require the police to check any area that may contain valuables. The officer testified that valuables might be stored in the spare tire compartment in the trunk of a car; accordingly, he did not exceed the permissible scope of the search in checking that compartment and seizing and vouchering the cocaine and other items found there. Furthermore, the property clerk's invoices, even if not ideal, sufficed as a meaningful inventory list (see *Walker*, 20 NY3d 122).

Defendant's challenges to sufficiency of the evidence and his related claims regarding the chemical analysis of the drugs are unpreserved and we decline to review in the interest of justice. As an alternative holding, we find these arguments to

be without merit. We also find that the verdict 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 jury's credibility determinations.

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

ENTERED: FEBRUARY 7, 2013



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doctrine did not apply to the malpractice claim, as the legal services relied upon were unrelated to the specific legal matter as to which malpractice was alleged (see *Shumsky v Eisenstein*, 96 NY2d 164, 168 [2001]), and was not pursuant to a retainer agreement in which the attorney and client anticipated continued representation (*id.* at 170).

Moreover, the fraud, breach of fiduciary duty and breach of contract causes of action all arose from the same facts as the malpractice claim and alleged similar damages, and were therefore properly dismissed as duplicative of the deficient malpractice claim (see e.g. *Sun Graphics Corp. v Levy, Davis & Maher, LLP*, 94 AD3d 669 [1st Dept 2012]; *Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 416 [1st Dept 2011]).

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: FEBRUARY 7, 2013



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informant pointed to the machine, followed the police outside the station, and pointed out defendant. However, the informant left the scene without identifying himself. The circumstances of the interaction warranted the inference that the informant had personally observed defendant engaging in criminal mischief, thereby enhancing the statement's reliability (see *People v Wallace*, 89 AD3d 559, 560 [1st Dept 2011], *lv denied* 18 NY3d 963 [2012]).

This information provided the officers with reasonable suspicion that justified stopping defendant. Furthermore, the limitation on defendant's freedom of movement was minimal. The officers simply informed defendant of the accusation and requested or directed him to follow them back into the subway station. Even assuming this to be a seizure (*but see People v Francois*, 61 AD3d 524, 525 [1st Dept 2009], *affd* 14 NY3d 732 [2010]), it was justified by the information available to the police, regardless of whether the same information might have justified a more intrusive action, such as a gunpoint seizure or an immediate frisk.

The police observed that the MetroCard machine had been disabled by jamming something into it, which corroborated the informant's accusation. The police now had probable cause to

arrest defendant for criminal mischief. Although defendant asserts that there were innocent explanations for the condition of the machine, probable cause does not require proof beyond a reasonable doubt (*see generally People v Bigelow*, 66 NY2d 417, 423 [1985]). Accordingly, the police conducted a lawful search incident to the arrest, which produced a credit card not belonging to defendant.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence established that the credit card at issue was not issued to defendant, and he was not authorized to possess or use it. There is no basis for disturbing the jury's finding that defendant knowingly possessed stolen or lost property without taking reasonable measures to return it to the owner. This finding was supported by the evidence that approximately one hour before the credit card was found in defendant's possession, someone had twice attempted to use the credit card at a MetroCard vending machine at the same station.

The card qualified as a credit card even though it was not fully activated, because "criminal liability with regard to credit cards can arise even with respect to non-activated,

expired or canceled cards" (*People v Thompson*, 287 AD2d 399, 400 [1st Dept 2001], *affd* 99 NY2d 38 [2002; see also *People v McCloud*, 50 AD3d 379, 380 [1st Dept 2008], *lv denied* 11 NY3d 738 [2008]]; *People v Radoncic*, 259 AD2d 428, 429 [1st Dept 1999], *lv denied* 93 NY2d 1005 [1999]). We have considered and rejected defendant's arguments to the contrary.

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

ENTERED: FEBRUARY 7, 2013

  
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Mazzarelli, J.P., Acosta, Saxe, Renwick, Clark, JJ.

9216 Christopher Carver, Index 103191/10  
Plaintiff-Respondent,

-against-

P.J. Carney's, et al.,  
Defendants-Appellants,

"John Doe," etc.,  
Defendant.

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Nowell Amoroso Klein Bierman, P.A., New York (Alexander J. Drago  
of counsel), for appellants.

Burns & Harris, New York (Blake G. Goldfarb of counsel), for  
respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.),  
entered April 23, 2012, which, in this action for personal  
injuries under the Dram Shop Act (General Obligations Law § 11-  
101) and in common-law negligence, denied the motion of  
defendants-appellants (collectively tavern) for summary judgment  
dismissing the complaint as against them, unanimously affirmed,  
without costs.

Summary judgment was properly denied in this action where  
plaintiff alleged that he was injured when he was struck in the  
face by a visibly intoxicated patron of the Tavern on the  
sidewalk outside the premises. The record presents triable  
issues as to whether there was "some reasonable or practical

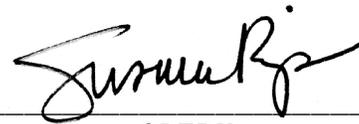
connection" between the sale of alcohol to a visibly intoxicated patron and the resulting injuries (*Adams v Ziriakus*, 231 AD2d 80, 88 [4th Dept 1997], *affd* 92 NY2d 396 [1998]). Although the tavern's bartender stated that the subject patron did not appear to be visibly intoxicated, plaintiff testified to the contrary, and two other witnesses submitted affidavits stating that prior to the assault the patron had been served alcohol by the tavern while visibly intoxicated inasmuch as he was unsteady, aggressive and boisterous (see General Obligations Law § 11-101[1]; Alcohol Beverage Control Law § 65[2]; *McGovern v 4299 Katonah*, 5 AD3d 239 [1st Dept 2004]). The record also raises issues as to whether appropriate security measures were taken after the tavern's bartender allegedly diffused an initial confrontation between the patron and plaintiff's group while inside the bar (see *Wilder v Nickbert Inc.*, 254 AD2d 819 [4th Dept 1998]; see also *Panzera v Johnny's II*, 253 AD2d 864 [2d Dept 1998]).

Contrary to the tavern's contention, the assault, if intentional, did not serve to sever potential liability under either the Dram Shop Act (see *Catania v 124 In-To-Go, Corp.*, 287 AD2d 476 [2d Dept 2001], *lv dismissed* 97 NY2d 699 [2002]), or

under a common-law negligence claim (see *Wilder*, 254 AD2d at 819; *Panzera*, 253 AD2d at 865). Furthermore, the fact that plaintiff, after the initial confrontation, later chose to walk over to where the patron and members of plaintiff's party were arguing outside the tavern's front door, did not negate, as a matter of law, the duty on the Tavern's part to keep the premises reasonably safe for its customers.

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

ENTERED: FEBRUARY 7, 2013

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where it is directly contrary to a settled public policy (see *United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 80 [2003]), imposing a one year suspension, rather than termination, does not violate the policy of protecting confidential information. Nor does the imposition of a penalty short of termination render the award irrational, because there is a possibility that the employee will reoffend, especially where there has been no criminal conviction and there is a clear, substantial penalty imposed to deter such future conduct (*cf. Matter of Social Servs. Empls. Union, Local 371 v City of N.Y., Dept. of Juvenile Justice*, 82 AD3d 644, 645 [1st Dept 2011]). Finally, the employee's lack of remorse, while relevant to the risk of recidivism, does not here rise to the level in the cases relied upon by the City (see *Matter of Binghamton City School Dist. [Peacock]*, 46 AD3d 1042, 1044 [3d Dept 2007] [school teacher's

lack of remorse or understanding of moral aspect of inappropriate relationship with teen student required termination until counseling or other remedial steps taken]).

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

ENTERED: FEBRUARY 7, 2013

  
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Gonzalez, P.J., Sweeny, Richter, Román, Clark, JJ.

8710-

Index 17396/06

8710A Denise James,  
Plaintiff-Respondent,

-against-

1620 Westchester Avenue, LLC, et al.,  
Defendants-Appellants.

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Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Joseph D'Ambrosio of counsel), for appellants.

Alexander J. Wulwick, New York, for respondent.

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Orders, Supreme Court, Bronx County (Robert E. Torres, J.),  
entered May 5, 2011 and March 8, 2012, affirmed, without costs.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.  
John W. Sweeny, Jr.  
Rosalyn H. Richter  
Nelson S. Román  
Darcel D. Clark, JJ.

8710-8710A  
Index 17396/06

x

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Denise James,  
Plaintiff-Respondent,

-against-

1620 Westchester Avenue, LLC, et al.,  
Defendants-Appellants.

x

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Defendants appeal from the order of the Supreme Court, Bronx County (Robert E. Torres, J.), entered May 5, 2011, which, to the extent appealed from as limited by the briefs, denied their motion for summary judgment dismissing the complaint and granted plaintiff's cross motion for leave to amend the complaint and from the order, same court and Justice, entered March 8, 2012, which, to the extent appealed from, denied defendants' motion for leave to renew.

Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Joseph D'Ambrosio and Andrew I. Mandelbaum of counsel), for appellants.

Alexander J. Wulwick, New York, for respondent.

RICHTER, J.

On or about September 18, 2005, plaintiff was walking home from the grocery store, pushing her shopping cart along the sidewalk on Morrison Avenue in the Bronx. As plaintiff walked, one of the wheels of the cart went into a hole in the sidewalk, causing the cart to flip over. Plaintiff fell to the ground and the cart fell on top of her. Plaintiff alleges that as a result of the accident she sustained a debilitating injury to her neck and a spiral fracture of her right leg.

Defendant 1620 Westchester Avenue, LLC, owns the premises known as 1620 Westchester Avenue, a triangular-shaped building. The building is managed by defendant ISJ Management Corp. The block on which the building sits is bounded to the north by Westchester Avenue, to the east by Harrod Avenue, to the south by Harrod Place, and to the west by Morrison Avenue. Because of the shape of defendants' building, there is a large triangular-shaped sidewalk area between the building and Morrison Avenue. As one travels south from the corner of Morrison and Westchester Avenues, the paved sidewalk splits in two. One part of the sidewalk runs at an angle directly alongside the building, and the other part runs parallel to Morrison Avenue. In between the two paved sections of the sidewalk lies a smaller unpaved triangular area containing grass and several trees.

According to plaintiff, the accident occurred on the portion of the paved sidewalk parallel to Morrison Avenue and adjacent to the unpaved grassy area.<sup>1</sup> This grassy area is not part of defendants' property but is owned by the City of New York.<sup>2</sup> Land surveys submitted by both plaintiff's and defendants' experts indicate that there is no separate tax lot assigned to this area. Thus, there is no intervening parcel between defendants' property and the curb line of Morrison Avenue.

Plaintiff brought this action against defendants seeking to recover for personal injuries sustained when she allegedly fell on the sidewalk. Defendants moved for summary judgment dismissing the complaint, arguing that they were not responsible for maintaining that part of the sidewalk where plaintiff allegedly fell. Plaintiff cross-moved for summary judgment in her favor and for permission to amend her bill of particulars to correct the location of the accident. In an order entered May 5, 2011, the court denied both motions for summary judgment and

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<sup>1</sup> Defendants point out that plaintiff provided inconsistent descriptions of the accident's location. That, however, merely raises an issue of fact and provides no basis to grant defendants summary judgment.

<sup>2</sup> The parties agree that the City owns this grassy area. This fact was confirmed by the deposition testimony of a representative of the building's management company submitted in support of defendants' summary judgment motion.

granted plaintiff's cross motion for leave to amend.<sup>3</sup> Defendants moved to renew, and in an order entered March 8, 2012, the court denied the motion. Defendants now appeal from both orders.

Historically, liability for injuries sustained as a result of negligent maintenance of a public sidewalks was placed on the municipality. In New York City, that changed with the enactment of Administrative Code of City of NY § 7-210 which, with certain exceptions, transferred tort liability for defective sidewalks from the City to abutting property owners. Subdivision (a) of the statute imposes a duty upon "the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition." Subdivision (b) further provides that "the owner of real property abutting any sidewalk . . . shall be liable for any . . . personal injury . . . proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition." Failure to maintain a sidewalk in a reasonably safe condition includes, but is not be limited to, "the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags . . ." (*id.*).

Although § 7-210 does not define the term "sidewalk," Administrative Code § 19-101(d) defines sidewalk as "that portion

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<sup>3</sup> Plaintiff has abandoned her appeal from the denial of her cross motion for summary judgment.

of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians.” This Court has held that, in the absence of a definition in section 7-210, the definition of sidewalk in section 19-101(d) should govern (*Fernandez v Highbridge Realty Assoc.*, 49 AD3d 318, 319 [1st Dept 2008]; see *Ascencio v New York City Hous. Auth.*, 77 AD3d 592, 593 [1st Dept 2010] [applying section 19-101(d) in determining scope of duty under section 7-210]; *Garris v City of New York*, 65 AD3d 953, 953 [1st Dept 2009] [same]).

The definition of the term “sidewalk” in section 19-101(d) requires denial of defendants’ motion for summary judgment. According to plaintiff, the accident took place between the curb line of Morrison Avenue and the adjacent property line of defendants’ building.<sup>4</sup> This location fits squarely within the definition of sidewalk contained in section 19-101(d), making section 7-210 applicable (see *Khaimova v City of New York*, 95 AD3d 1280, 1281 [2d Dept 2012] [brick walkway between curb and property line was part of the sidewalk for purposes of liability under section 7-210]; *Harakidas v City of New York*, 86 AD3d 624

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<sup>4</sup> Although not raised by defendants, there is no question that this paved section of the sidewalk was “intended for the use of pedestrians” (Administrative Code § 19-101[d]).

[2d Dept 2011], *lv dismissed* \_\_\_ NY3d \_\_\_, 2013 NY Slip Op 60606 [2013] [same with respect to asphalt surface between curb line and property line]).

In disclaiming liability under section 7-210, defendants argue that the part of the sidewalk where plaintiff allegedly fell does not abut their property, but rather abuts the unpaved grassy area, which defendants characterize as a separate "parcel of land" and a "park area." Defendants' use of these terms to describe the grassy area is unsupported by the record. The undisputed evidence establishes that, although under the ownership of the City, no separate tax lot is assigned to this area. Nor is there any evidence that the grassy area was ever designated as a park. We perceive no reason why liability under section 7-210 should not attach merely because there is an unpaved area of grass, not comprising a separate lot of property, between the location of the accident and defendants' abutting property.

This case is similar to *Pardi v Barone* (257 AD2d 42 [3d Dept 1999]). In *Pardi*, the plaintiff fell on a concrete public sidewalk in front of the defendants' property in the City of Schenectady. A strip of land owned by the City was situated between the sidewalk and the defendants' property. This strip was part of the larger municipal right-of-way within which the

street and sidewalk were located. A local zoning ordinance, similar to section 7-210, provided that “the owner of lands ‘abutting’ any street shall keep ‘the sidewalks adjoining [the owner’s] lands’ free and clear of snow and ice and shall be liable for any injury caused by the failure to do so” (*id.* at 43 [brackets in original]).

The defendants in *Pardi* moved to dismiss the complaint, arguing that because their property did not touch the sidewalk, but rather adjoined the strip of land, they had no liability under the ordinance. The Court rejected this argument, finding that the terms “abutting” and “adjoining” as used in the ordinance should be construed “to include property in close proximity to an improved sidewalk although separated from it by [the strip of land]” (*id.* at 46). In reaching this result, the Court recognized that the street, sidewalk and the strip of land all comprise a municipal right-of-way, “regardless of whether the sidewalk or the municipal strip of land actually touches the adjacent property” (*id.*).

The Court in *Pardi* concluded that the local ordinance applied to the concrete sidewalk running in front of the defendants’ property even though it did not touch the defendants’ property (*id.*). Defendants here attempt to distinguish *Pardi* by focusing on language in the opinion noting that the strips of

land at issue there commonly existed in the relevant city. Defendants ignore the more fundamental part of the *Pardi* analysis holding that the terms "abutting" and "adjoining" need not be limited to property directly touching the building. Although the part of the paved sidewalk where plaintiff allegedly fell does not actually touch defendants' property line, it is part of a larger sidewalk area that, when fairly viewed, runs in front of defendants' property and "abut[s]" the property for purposes of ascribing liability under section 7-210.

This result is not inconsistent with *Vucetovic v Epsom Downs, Inc.* (10 NY3d 517 [2008]). In *Vucetovic*, the plaintiff was injured when he stepped into a tree well and tripped on one of the cobblestones surrounding the dirt area. The Court of Appeals affirmed dismissal of the complaint, holding that a tree well is not part of the "sidewalk" for purposes of section 7-210 (*id.* at 518-519). Here, in contrast, plaintiff allegedly fell as a result of a defect in a paved section of a concrete sidewalk. There is no allegation that plaintiff fell in a tree well, or anything akin to one. Moreover, the Court of Appeals did not address whether the sidewalk could include a paved area adjacent to an unpaved patch of grass where trees are planted.

Defendants' view, if accepted, would lead to absurd, and unintended, results. If a plaintiff were to fall on one side of

a grassy area (or tree well, for that matter) in a public sidewalk, liability would attach to the adjacent property owner. On the other hand, if the plaintiff were to fall on the other side, the City would be liable. Such a result would be inconsistent with the purposes behind enactment of section 7-210. In *Vucetovic*, the Court noted that “[t]he City Council enacted section 7-210 in an effort to transfer tort liability from the City to adjoining property owners as a cost-saving measure, reasoning that it was appropriate to place liability with the party whose legal obligation it is to maintain and repair sidewalks that abut them – the property owners” (*Vucetovic* at 521 [internal quotation marks omitted]; see also *Pardi*, 257 AD2d at 44-45 [focusing on the “obvious” legislative intent of the ordinance – to shift responsibility for keeping sidewalks clear of snow and ice from municipalities to owners whose properties lie along the rights-of-way of municipal streets]). To interpret the term “abutting” as absolving defendants of liability here, and resulting in potential liability for the City, would “produce a result clearly not intended, and we decline to adopt such a construction” (*Pardi*, 257 AD2d at 46).

Defendants’ motion to renew was properly denied because they failed to offer a reasonable justification for not presenting the

new affidavit on the initial motion (see *Matter of Colletti v Schiff*, 98 AD3d 887, 888 [1st Dept 2012]). In any event, the affidavit submitted on renewal did not warrant a different result. Finally, the court properly granted plaintiff's motion to amend the bill of particulars. The amendment was sought prior to close of discovery, and did not prejudice defendants, who were on notice of the proper location of the accident early in the litigation (see *Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]).

Accordingly, the order of the Supreme Court, Bronx County (Robert E. Torres, J.), entered May 5, 2011, which, to the extent appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint, and granted plaintiff's cross motion for leave to amend the complaint, should be affirmed, without costs. The order of the same court and Justice, entered March 8, 2012, which, to the extent appealed

from, denied defendants' motion for leave to renew, should be affirmed, without costs.

All concur.

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

ENTERED: FEBRUARY 7, 2013

  
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