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FIRST DEPARTMENT

APPEALS, CIVIL PROCEDURE, FAMILY LAW.

NO APPEAL LIES FROM AN ORDER ISSUED ON DEFAULT, A MOTION TO VACATE IS THE ONLY REMEDY; NO APPEAL LIES FROM AN ORDER ISSUED ON CONSENT.

The First Department, dismissing the appeal in this custody case, determined (1) no appeal lies from an order issued on mother's default, and (2) no appeal lies from an order entered with mother's consent: "Because the fact-finding order was issued on the mother's default, it is not appealable as of right and her remedy was to move to vacate (CPLR 5511 ...). Although the mother appeared on the final date of the inquest after petitioner's witnesses had testified, she was not present during the majority of the fact-finding hearing, and her counsel was not authorized to proceed in her absence ... . The mother also did not offer any evidence or seek to testify. Furthermore, no appeal lies from the dispositional order, as it was entered on the mother's consent and she is therefore not an aggrieved party under CPLR 5511 ...". ***Matter of P. A. (Joseph M.)*, 2023 N.Y. Slip Op. 03432, First Dept 6-27-23**

CIVIL PROCEDURE, ATTORNEYS. JUDGES, PERSONAL INJURY, EVIDENCE.

PLAINTIFFS' ATTORNEY FAILED TO SUBMIT MEDICAL RECORDS REQUESTED BY THE JUDGE FOR MORE THAN A YEAR AFTER THE INQUEST; THE APPLICATION FOR DAMAGES SHOULD NOT HAVE BEEN DENIED ON THAT GROUND; PLAINTIFFS SHOULD NOT BE PENALIZED FOR THE NEGLECT OF THEIR ATTORNEY.

The First Department, reversing Supreme Court, determined the application for damages in this personal injury action should not have been denied due to plaintiffs' counsel's failure to submit medical records for more than a year after the inquest. Plaintiffs should not be prejudiced by their counsel's inaction: "Although plaintiffs' counsel had timely subpoenaed the relevant medical records and those records were apparently delivered to the subpoenaed records room in the courthouse, they were not available at the inquest. Supreme Court therefore reserved decision to give plaintiffs time to submit evidence supporting their damages claim. After a period of more than one year in which plaintiffs' counsel failed to provide the requested information, Supreme Court issued an order ... denying the application for damages on the ground of failure of proof. Supreme Court improvidently exercised its discretion in denying plaintiffs' motion to vacate the underlying default. Although we share the court's concern regarding the extended delay and the inattentiveness of plaintiffs' former counsel, counsel's neglect in pursuing his clients' action should not be permitted to redound to the clients' detriment ... . Counsel did not deny that he failed to respond to communications from the court, but explained that the delays were due to a problem in his firm's case management system, which did not provide reminders ... . These circumstances present a type of law office failure for which the clients should not be penalized , particularly in light of the strong public policy preference for deciding cases on the merits ... . In addition, defendants defaulted and therefore will not be prejudiced ...". ***Rosario v. General Behr Corp.*, 2023 N.Y. Slip Op. 03560, Second Dept 6-28-23**

CIVIL PROCEDURE, CONTRACT LAW, CORPORATION LAW.

HERE, THE CLOSE RELATIONSHIP BETWEEN THE NON-SIGNATORY AND THE PARTY TO THE AGREEMENT WARRANTED FINDING THAT THE NON-SIGNATORY WAS BOUND BY THE FORUM SELECTION CLAUSE IN THE AGREEMENT.

The First Department, after reinstating the tortious interference with contract cause of action, determined a non-signatory can be bound by a forum selection clause under the "closely related" doctrine. where the non-signatory and the party to the agreement have such a close relationship that it is foreseeable the forum selection clause will be enforced against the non-signatory: "We find that plaintiff alleged a sufficiently close relationship between Vivendi and the Editis Defendants to justify subjecting it to personal jurisdiction in New York ... . Plaintiff alleged that Editis ... was a wholly-owned subsidiary of Vivendi, that Vivendi's CEO was also the Chairman of Editis, and that Vivendi managed the Editis Defendants' performance of the subject agreement …". ***EPAC Tech. Ltd. v. Interforum S.A.*, 2023 N.Y. Slip Op. 03543, First Dept 6-29-23**

CIVIL PROCEDURE, PERSONAL INJURY.

DEFENDANT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN ALLOWED TO AMEND HIS ANSWER TO ASSERT A GRAVES AMENDMENT AFFIRMATIVE DEFENSE (AVAILABLE TO THE LESSOR OF A VEHICLE); PLAINTIFF WAS NOT PREJUDICED BY THE LATENESS OF THE MOTION.

The Second Department, reversing Supreme Court, determined the defendant's (Lubman's) motion to amend his answer in this traffic accident case should have been granted. The lateness of the motion to amend did not cause sufficient prejudice to plaintiff to justify denial: "[T]he court ... improperly determined that the Graves Amendment is inapplicable here. Although Lubman did not clearly establish that he was a commercial lessor of motor vehicles ... , he proffered sufficient evidence to create a question of fact as to the Graves Amendment's applicability. He submitted evidence that he owned between four and seven cars that he rented fifty-nine times over a nine-month period through Turo, a peer-to-peer car sharing service. This volume of rental activity, which involved several vehicles, demonstrated more than a casual or occasional endeavor. The fact that Lubman operated under his own name rather than a corporate entity was not determinative. The Graves Amendment defines 'owner' as 'a person,' which it defines, in part, as 'any individual' as well as a 'corporation, company . . . or any other entity' ... . Thus, by its own terms, the Graves Amendment is intended to cover both individuals and corporate entities. Supreme Court should have granted Lubman's motion for leave to amend his answer to assert a Graves Amendment affirmative defense. Lubman demonstrated that his proposed amended answer was not palpably insufficient or clearly devoid of merit ... Although plaintiff ... claimed that they would be prejudiced by the amendment because Lubman waited ten months after his deposition before seeking leave to amend his answer, such delay was not significant prejudice that hindered their case preparation or prevented them from acting in support of their position ... , as the note of issue had not yet been filed and Lubman could have been deposed further on the limited issue of the Graves Amendment affirmative defense." ***Ventura v. Lubman*, 2023 N.Y. Slip Op. 03444, First Dept 6-27-23**

SECOND DEPARTMENT

CIVIL PROCEDURE, JUDGES.

VACATING A NOTE OF ISSUE IS NOT THE SAME AS MARKING A CASE OFF PURSUANT TO CPLR 3404; WHEN A NOTE OF ISSUE IS VACATED, THE ACTION REVERTS TO A PRE-NOTE OF ISSUE STATUS AND CAN BE RESTORED TO THE ACTIVE CALENDAR WITHOUT MEETING THE STRINGENT CPLR 3404 REQUIREMENTS.

The Second Department, reversing Supreme Court, determined plaintiff's motion to restore the action to the active calendar should have been granted. The note of issue had been vacated but the action had not been marked off pursuant to CPLR 3404. Therefore, the criteria for restoring an action that had been marked off for more than a year did not apply: "Pursuant to CPLR 3404, '[a] case . . . marked 'off' or struck from the calendar . . . and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute.' 'A plaintiff seeking to restore a case to the trial calendar more than one year after it has been marked 'off,' and after the case has been dismissed pursuant to CPLR 3404, must demonstrate a [potentially] meritorious cause of action, a reasonable excuse for the delay in prosecuting the action, a lack of intent to abandon the action, and a lack of prejudice to the defendant' ... . Here, the order ... vacating the note of issue was not equivalent to an order marking 'off' or striking the case from the calendar pursuant to CPLR 3404 ... . Thus, CPLR 3404 did not apply 'because the case reverted to its pre-note of issue status once the note of issue was vacated' ... As it is undisputed that there was neither a 90-day demand served upon the plaintiff pursuant to CPLR 3216 nor an order directing dismissal of the complaint pursuant to 22 NYCRR 202.27, and that discovery is complete, the Supreme Court should have granted the plaintiff's motion to restore the action to the active calendar ...". ***Carrero v. Pena*, 2023 N.Y. Slip Op. 03448, Second Dept 6-28-23**

CIVIL PROCEDURE, PERSONAL INJURY, EVIDENCE, JUDGES.

SURGERY, EVEN AFTER A DEFENSE REQUEST FOR A PRE-SURGERY PHYSICAL EXAM, IS NOT SPOLIATION OF EVIDENCE AND DOES NOT WARRANT SANCTIONS.

The Second Department, in a full-fledged opinion by Justice LaSalle, determined plaintiff's surgery, even after a defense request for a pre-surgical physical exam, is not spoliation of evidence and does not trigger sanctions. In this traffic accident case, plaintiff underwent surgery before the action was commenced and again after a defense demand for a pre-surgery medical exam: "[T]he First Department has recently rejected the proposition that a spoliation analysis can apply in such a situation. In ***Gilliam v Uni Holdings, LLC* (201 AD3d 83)**, the First Department held 'that the condition of one's body is not the type of evidence that is subject to a spoliation analysis' ... . After noting that '[s]poliation analysis has long been applied to a party's destruction of inanimate evidence,' the First Department concluded that the 'state of one's body is fundamentally different from inanimate evidence, and medical treatment, including surgery, is entirely distinct from the destruction of documents or tangible evidence which spoliation sanctions attempt to ameliorate. To find that a person has an 'obligation,' to preserve his or her body in an injured state so that a defendant may conduct [a medical examination], is antithetical to our belief in personal liberty and control over our own bodies' ... . * * * We agree with the First Department's conclusion in this regard, for the reasons stated in its opinion. It is not reasonable to require a plaintiff to delay medical treatment, and potentially prolong his or her suffering, solely to allow a defendant to examine the plaintiff's body in a presurgical state. Under these circumstances, the plaintiff has not 'refuse[d] to obey an order for disclosure or wilfully fail[ed] to disclose information which . . . ought to have been disclosed' (CPLR 3126)." ***Fadeau v. Corona Indus. Corp.*, 2023 N.Y. Slip Op. 03453, Second Dept 6-28-23**

CIVIL PROCEDURE, PERSONAL INJURY, TRUSTS AND ESTATES, FORECLOSURE.

IN THIS SIDEWALK SLIP AND FALL CASE, THE DEFENDANT PROPERTY OWNERS HAD DIED AT THE TIME THE ACTION AGAINST THEM WAS COMMENCED; THAT ACTION WAS A NULLITY; THEREFORE, THE MOTION TO AMEND THE COMPLAINT TO SUBSTITUTE THE EXECUTOR SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined the sidewalk slip and fall action brought against defendant property owners was a nullity because the property owners had died before the suit was commenced. Because the action was a nullity, the motion to amend the complaint to substitute the executor as a party should not have been granted: " 'A party may not commence a legal action or proceeding against a dead person' ... . The deaths of Leon Chain and Hanka Chain (hereinafter together the decedents) prior to the commencement of this action rendered the action, insofar as asserted against them, a legal nullity from its inception. The plaintiff was instead required to commence an action against the personal representative of the decedents' estates ... . Moreover, even assuming that Ziv was the duly appointed executor of each of the decedents' estates, the decedents were never a party to the action since they died before the commencement of the action, and the decedents' estates could not be brought into the action by substitution or by amendment of the caption (see CPLR 1015[a]; 1021 ...). The plaintiff's attempt to amend the complaint to designate the purported executor of the decedents' estates as a defendant in the place of the decedents was invalid and ineffective to retroactively render the action properly commenced against the decedents' estates ... " ***Hussain v. Chain*, 2023 N.Y. Slip Op. 03455, Second Dept 6-28-23**

Similar issues and result in a foreclosure action: ***Waterfall Victoria Master Fund, Ltd. v. Estate of Dennis F. Creese*, 2023 N.Y. Slip Op. 03497, Second Dept 6-28-23**

COURT OF CLAIMS, CIVIL PROCEDURE, PERSONAL INJURY.

THE NOTICE OF CLAIM IN THIS CHILD VICTIMS ACT CASE SUFFICIENTLY ALLEGED CLAIMANT'S INJURY, DEFENDANT'S FAILURE TO PROTECT CLAIMANT WHILE IN FOSTER CARE AND THE TIME THE CLAIM AROSE.

The Second Department, reversing the Court of Claims, determined the Notice of Claim in this Child Victims Act proceeding sufficiently described claimant's injury, the state's failure to protect claimant while in foster care, and the time when the claim arose: "[T]he claim sufficiently provided the defendant with a description of the manner in which the claimant was injured, and how the defendant was negligent in allegedly failing to protect the claimant from sexual abuse while a resident in a state-certified foster care facility. The claimant is not required to set forth the evidentiary facts underlying the allegations of negligence in order to satisfy the section 11(b) 'nature of the claim' requirement ... . As the claim is sufficiently detailed to allow the defendant to investigate and ascertain its liability, it satisfies the nature of the claim requirement of Court of Claims Act § 11(b)... . ... The claim alleges that the claimant was sexually abused repeatedly in 1992 and 1993, on numerous and regular occasions, including conduct taking place in his room three to four times a week. This Court has stated recently in the context of the CVA, that '[w]e recognize that in matters of sexual abuse involving minors, as recounted by survivors years after the fact, dates and times are sometimes approximate and incapable of calendrical exactitude' ... . Thus a claimant commencing a claim pursuant to the CVA is not required to allege the exact date on which the sexual abuse occurred ... . As the claim here sufficiently alleges the time when the abuse occurred, the Court of Claims properly declined to dismiss the claim on that ground ...". ***Davila v. State of New York*, 2023 N.Y. Slip Op. 03451, Second Dept 6-28-23**

CRIMINAL LAW. APPEALS.

THE WASHINGTON DC ATTEMPT TO COMMIT ROBBERY CONVICTION COULD NOT BE THE BASIS OF A SECOND FELONY OFFENDER ADJUDICATION IN NEW YORK.

The Second Department, reversing (modifying) Supreme Court, determined a Washington DC offense could not be the basis of a second felony offender adjudication. Although the issue was not preserved, the court exercised its interest of justice jurisdiction: "[T]he defendant's conviction of attempt to commit robbery in Washington, D.C., cannot be used as a predicate felony in New York (**see *People v Jurgins*, 26 NY3d 607**, 614-615; see also Penal Law §§ 70.06[1][b][i]; 160.00, 110.00; DC Code §§ 22-2801, 22-2802). Accordingly, we modify the judgment by vacating the defendant's adjudication as a second felony offender and the sentence imposed thereon, and we remit the matter ... for resentencing." ***People v. Blaker*, 2023 N.Y. Slip Op. 03472, Second Dept 6-28-23**

CRIMINAL LAW, JUDGES. APPEALS.

THE TRIAL JUDGE TOOK ON THE APPEARANCE OF AN ADVOCATE FOR THE PROSECUTION IN QUESTIONING WITNESSES; ROBBERY CONVICTION REVERSED.

The Second Department, reversing defendant's robbery conviction and ordering a new trial, determined the trial judge acted as an advocate for the prosecution when questioning witnesses. The issue was not preserved but the Second Department exercised its interest of justice jurisdiction: " '[A] trial judge is permitted to question witnesses to clarify testimony and to facilitate the progress of the trial, and, if necessary, to develop factual information,' so long as the judge does not take on the function or appearance of an advocate ... . Here, the Supreme Court engaged in its own lines of inquiry, which detailed the nature of the surveillance equipment tracking the defendant, elicited a detailed description of the perpetrator and the bags he was carrying, and what the perpetrator was observed doing on the video surveillance camera, asked leading questions as to what the guard saw and heard as the perpetrator left the store and triggered the store alarm, and noted that when the guard approached the perpetrator and asked for the merchandise back, the guard even said, 'please,' but the perpetrator still refused to return the items. The Supreme Court also repeated the perpetrator's allegedly threatening language, '[K]eep going or watch what's going to happen

to you,' and noted that it looked like the perpetrator was reaching for something and the guard did not want to find out what it was. During the direct examination of the arresting officer, the court elicited the fact that the officer observed a duffel bag containing the stolen property on the subway platform next to the defendant. Viewing the record as a whole, the Supreme Court took on the function and appearance of an advocate, at times even engaging in a running commentary on the testimony against the defendant. The court's conduct left the impression that its opinion favored the credibility of the People's witnesses and the merits of the People's case ...". ***People v. Pulliam*, 2023 N.Y. Slip Op. 03482, Second Dept 6-28-23**

DEFAMATION, ATTORNEYS, FAMILY LAW, PRIVILEGE.

AN ATTORNEY'S REFERENCE IN AN EMAIL TO A NONPARTY AS A "WIFE BEATER" WAS ABSOLUTELY PRIVILEGED AS PERTINENT TO THE DIVORCE ACTION.

The Second Department, reversing Supreme Court, determined a statement in an email written by an attorney in a divorce action, referring to plaintiff as a wife beater, was pertinent to the divorce action and was absolutely privileged: "The defendant Dina S. Kaplan is an attorney who represented the defendant Eric Dorfman in a divorce action (hereinafter the divorce action). Kaplan allegedly represented to the court in the divorce action, including court personnel, that the plaintiff, an attorney and a nonparty to the divorce action, was the boyfriend of Dorfman's wife. In an email exchange between Kaplan and Herbert Adler, an attorney representing Dorfman's wife in the divorce action, Kaplan allegedly made a defamatory statement about the plaintiff, referring to him as a 'wife beater . . . who is in criminal prosecution.' In addition to Adler, the email was sent to court personnel and other attorneys. * * * ... [U]nder the extremely liberal test of pertinency, Kaplan's statement allegedly referring to the plaintiff as a 'wife beater . . . who is in criminal prosecution' was pertinent to the divorce action and, thus, is absolutely privileged. The email exchange between Kaplan and Adler was initially focused on a dispute over Dorfman's financial ability to pay his wife maintenance and child support. The conversation turned, however, to the behavior of the parties to the divorce action while caring for their children, and Kaplan's statement that the plaintiff is a 'wife beater . . . who is in criminal prosecution' was responsive and therefore relevant to the issue of the parties' behavior ... . Under the circumstances, it cannot be said that the statement was 'so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame' the plaintiff, who was not among the participants in the conversation, was not otherwise mentioned in the email exchange, and was not even directly identified in the statement ...". ***Davidoff v. Kaplan*, 2023 N.Y. Slip Op. 03450, Second Dept 6-28-23**

FORECLOSURE, CIVIL PROCEDURE.

UNDER THE 2022 FORECLOSURE ABUSE PREVENTION ACT BANKS CAN NO LONGER STOP THE RUNNING OF THE STATUTE OF LIMITATIONS BY VOLUNTARILY DISCONTINUING A FORECLOSURE ACTION.

The Second Department, reversing Supreme Court, determined the foreclosure action was time-barred noting that the 2022 Foreclosure Abuse Prevention Act prohibited banks from stopping the running of the statute of limitations by voluntarily discontinuing the action: "[T]he voluntary discontinuance of the 2010 foreclosure action did not serve to reset the statute of limitations. Under the Foreclosure Abuse Prevention Act (L 2022, ch 821, § 8 [eff Dec. 30, 2022]), the voluntary discontinuance of the 2010 foreclosure action did not 'in form or effect, waive, postpone, cancel, toll, extend, revive or reset the limitations period to commence an action and to interpose a claim, unless expressly prescribed by statute' (CPLR 3217[e] ...)." ***ARCPE 1, LLC v. DeBrosse*, 2023 N.Y. Slip Op. 03498, Second Dept 6-28-23**

FORECLOSURE, CIVIL PROCEDURE, UNIFORM COMMERCIAL CODE (UCC).

THE BANK DID NOT DEMONSTRATE IT HAD STANDING TO FORECLOSE; THERE WAS INSUFFICIENT PROOF THE ALLONGE WAS FIRMLY AFFIXED TO THE NOTE AS REQUIRED BY UCC 3-202.

The Second Department, reversing Supreme Court, determined the bank in this foreclosure action did not prove it had standing to bring the action: "A plaintiff has standing to commence a mortgage foreclosure action when it is the holder or assignee of the underlying note at the time the action is commenced ... . The plaintiff can establish standing by attaching a properly endorsed note to the complaint when commencing the action ... . However, where an endorsement is on an allonge to the note, the plaintiff must establish that the allonge was 'so firmly affixed to the note so as to become a part thereof' pursuant to UCC 3-202(2) at the time the action was commenced ... . 'Where there is no allonge or note that is either endorsed in blank or specially endorsed to the plaintiff, mere physical possession of a note at the commencement of a foreclosure action is insufficient to confer standing or to make a plaintiff the lawful holder of a negotiable instrument for the purposes of enforcing the note' ... . Here, the plaintiff's submissions failed to eliminate triable issues of fact as to whether the allonges were so firmly affixed to the note as to become a part thereof ... . [The bank vice president's] affidavit did not clarify whether the allonges were firmly affixed to the note ...". ***U.S. Bank N.A. v. Duvivier*, 2023 N.Y. Slip Op. 03496, Second Dept 6-28-23**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

THE PROOF THE FORECLOSURE NOTICE WAS MAILED IN ACCORDANCE WITH RPAPL 1304 WAS INSUFFICIENT.

The Second Department, reversing Supreme Court, determined the mortgage company in this foreclosure action did not demonstrate compliance the notice requirements of RPAPL 1304: "[T]he copy of the notice contains no indication that it was sent by registered or certified mail, or by first-class mail ... . Nor is there '[a] copy of any United States Post Office document indicating that the notice was sent by registered or certified mail as required by the statute' ... . [The affiant] did not attest to having any personal knowledge of, or familiarity with, [the company's] actual standard mailing procedures during the relevant time period, which were designed to ensure that items are properly

addressed and mailed ... . Accordingly, [the affiant's] assertion in his affidavit that the RPAPL 1304 notice was sent to the defendant on March 14, 2013, at the address of the mortgaged premises, 'by registered or certified and first-class mail,' was unsubstantiated and conclusory ...". ***Ditech Servicing, LLC v. McFadden*, 2023 N.Y. Slip Op. 03452, Second Dept 6-28-23**

INSURANCE LAW, CIVIL PROCEDURE, PERSONAL INJURY.

BEFORE SUING A TORTFEASOR'S INSURER, PLAINTIFF MUST OBTAIN A JUDGMENT AGAINST THE TORTFEASOR.

The Second Department, reversing Supreme Court, determined defendant insurer's motion to dismiss the complaint in this personal injury action should have been granted. The injured plaintiff sued the tortfeasor's insurer before obtaining a judgment against the tortfeasor (the insured): "Insurance Law § 3420 'grants an injured party a right to sue the tortfeasor's insurer, but only under limited circumstances—the injured party must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days' ... . Here, the defendants established, prima facie, that the plaintiff lacked standing to commence this action by submitting the complaint, which alleged that the underlying action against [the tortfeasor] 'is currently pending.' The complaint is evidence that the plaintiff has not established the condition precedent to maintain a direct action against the defendants (see Insurance Law § 3420[a][2] ...)." ***Sizova v. Union Mut. Fire Ins. Co.*, 2023 N.Y. Slip Op. 03502, Second Dept 6-28-23**

INSURANCE LAW, PERSONAL INJURY.

A PARTY INJURED IN A HIT AND RUN TRAFFIC ACCIDENT CANNOT SUE THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) IF THE PARTY WAS OPERATING AN UNINSURED MOTOR VEHICLE AT THE TIME OF THE ACCIDENT; HERE THE ELECTRIC BIKE PETITIONER WAS OPERATING WAS DEEMED AN UNINSURED MOTOR VEHICLE.

The Second Department, reversing Supreme Court, determined petitioner was not entitled to sue the Motor Vehicle Accident Indemnification Corporation (MVAIC) for injuries suffered in a hit and run accident because the electric bike petitioner was operating was deemed to be an uninsured motor vehicle: "[T]he petitioner testified, among other things, that the 'electric bike' he was operating at the time of the accident was not equipped with pedals, was powered by an electric battery that must be charged in order for the vehicle to operate, and was 'probably' capable of reaching a speed of approximately 30 miles per hour. ... A court may make an order permitting a person injured in a hit-and-run collision to commence an action against MVAIC to recover damages if the court is satisfied that, among other things, 'the injured . . . person was not at the time of the accident operating an uninsured motor vehicle' (Insurance Law § 5218[b][3] ...). 'Uninsured motor vehicle' for purposes of the MVAIC Act is defined by reference to the definition of 'motor vehicle' set forth in Vehicle and Traffic Law § 125 (see Insurance Law § 5202[a], [c], [d]). 'Motor vehicle' is defined by Vehicle and Traffic Law § 125 as '[e]very vehicle operated or driven upon a public highway which is propelled by any power other than muscular power,' with certain enumerated exceptions. ... MVAIC established as a matter of law that the electric-powered vehicle operated by the petitioner at the time of the accident was an uninsured motor vehicle ...". ***Matter of Jackson v. Motor Veh. Acc. Indem. Corp.*, 2023 N.Y. Slip Op. 03464, Second Dept 6-28-23**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

REMOVING SCAFFOLDS, LADDERS, ETC. FROM THE WORKSITE WAS "ANCILLARY" TO THE RENOVATION WORK AND THEREFORE PROTECTED BY LABOR LAW § 240(1); THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF'S FALLING OFF THE TOP OF THE VAN WHERE HE WAS LOADING THE EQUIPMENT WAS COVERED BY LABOR LAW § 240(1).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff's task of removing equipment (scaffolds, ladders, poles, etc.) from the worksite and loading them onto the top of a van was ancillary to the renovation work and therefore encompassed by Labor Law § 240(1). Plaintiff fell from the roof of the van: "[T]he defendants' submissions failed to demonstrate, as a matter of law, that the plaintiff's activity in removing equipment from the worksite and loading it onto the van was not performed as part of the larger renovation project that CDI had been hired to complete on the premises, including roofing and shingling work. The plaintiff's role in removing the equipment after it had been used by the plaintiff and his CDI colleagues was an act 'ancillary' to the alteration of the structure at the property, and protected under Labor Law § 240(1) ... . The defendants also failed to adduce any evidence demonstrating that climbing on the roof of the van was not necessary to the task of securing the equipment on the roof, nor did they demonstrate that no safety device enumerated in Labor Law § 240(1) would have prevented the plaintiff's fall." ***Ramones v. 425 County Rd., LLC*, 2023 N.Y. Slip Op. 03489, Second Dept 6-28-23**

LEGAL MALPRACTICE, ATTORNEYS, CIVIL PROCEDURE.

PLAINTIFF STATED A CLAIM FOR LEGAL MALPRACTICE BASED UPON THE ATTORNEYS' ALLEGEDLY UNREASONABLE DELAYS IN PROSECUTING AN ACTION AGAINST A CONTRACTOR, RESULTING IN THE INABILITY TO COLLECT THE JUDGMENT.

The Second Department, reversing Supreme Court, determined the complaint alleging legal malpractice should not have been dismissed. Plaintiff alleged the attorneys' delays in prosecuting the action against a contractor resulted in plaintiff's inability to collect a judgment against the contractor. By the time the judgment was acquired, the contractor had sold its assets and moved out of the country: "[A]ccepting the facts alleged in the amended complaint as true, and according the plaintiff the benefit of every possible favorable inference, the amended complaint sufficiently states a cause of action to recover damages for legal malpractice. The amended complaint alleges that the defendants failed to exer-

cise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession by engaging in a pattern of undue delay in their prosecution of the underlying action, including by allowing the underlying action to be marked off the active calendar on two occasions and by failing to comply with certain court-ordered deadlines. The amended complaint further alleges that the defendants' negligence proximately caused the plaintiff to sustain actual and ascertainable damages in that their delays in prosecuting the underlying action prevented him from being able to collect on the judgment that was eventually entered against the contractor ... . Contrary to the defendants' contention, the plaintiff's allegations relating to proximate cause, including the nature and value of the contractor's alleged assets and when they were disposed of, were not impermissibly speculative or conclusory ...". ***Ofman v. Tenenbaum Berger & Shivers, LLP*, 2023 N.Y. Slip Op. 03471, Second Dept 6-28-23**

THIRD DEPARTMENT

ELECTION LAW, CIVIL PROCEDURE.

THE VOTERS WHOSE ABSENTEE BALLOTS WERE CHALLENGED ON RESIDENCY GROUNDS ARE NECESSARY PARTIES WHO WERE NOT INCLUDED IN THIS PROCEEDING; THE ELECTION LAW PROCEDURES FOR CHALLENGING THE ABSENTEE BALLOTS WERE NOT FOLLOWED; MATTER REMITTED.

The Third Department, reversing Supreme Court, over a dissent, determined the voters whose absentee ballots were unsuccessfully challenged on the ground the voters did not meet the village-residency-requirements were necessary parties in this proceeding and the matter had to be remitted to add them and consider whether their absentee ballots are valid: "Viewing Election Law § 5-220 (2) together with Election Law § 9-209, there is no statutory authority, under the circumstances here, permitting a challenge by petitioners to the absentee ballots submitted by the challenged voters. In view of the statutory scheme, the only opportunity for an objection to be lodged during the post-election review of an absentee ballot is after such ballot has been deemed invalid following a review under Election Law § 9-209 (8) (e), which presupposes an initial review under Election Law § 9-209 (2). ... [T]he improper registration of a voter is not one of the explicit grounds used to deem an absentee ballot invalid upon the initial review. Even assuming it was a ground, there is still no indication in the record that any review under Election Law § 9-209 (2) has occurred or, more importantly, that any determination under Election Law § 9-209 (8) (e) has been made here by the canvassing authority as to the invalidity of any absentee ballots and that such determination has been objected to — i.e., the statutory predicate for judicial review (see Election Law § 9-209 [8] [e]). There is likewise no explicit authority within Election Law § 9-209 permitting a court to either conduct that review or make that determination in the first instance." ***Matter of Hughes v. Delaware County Bd. of Elections*, 2023 N.Y. Slip Op. 03431, Third Dept 6-26-23**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF, AN EXPERIENCED MOTOCROSS RIDER, ASSUMED THE RISK OF LOSING CONTROL OF HIS BIKE UPON LANDING AFTER A JUMP; PLAINTIFF WAS AWARE THAT SOME ASPECT OF THE LANDING AREA CAUSED HIM TO LOSE CONTROL OF THE BIKE ON A PRIOR PRACTICE RUN BUT DID NOT INVESTIGATE.

The Third Department, reversing Supreme Court, over a dissent, determined plaintiff, an experienced motocross rider, assumed the risk of injury when using defendant's motocross track. Plaintiff alleged a pothole where riders landed after a jump was filled with a talcum powder–like substance which caused him to lose control of the bike. The majority concluded plaintiff was aware of the risk associated with the material used to fill the pothole: "Considering that Fritz [plaintiff] testified that on both jump landings the back end of his bike 'kicked up,' that he hit the same pothole and that he had to work to recover the bike, we are satisfied that he was aware of the potential for injury on that jump's landing ...". ***Fritz v. Walden Playboys M.C. Inc.*, 2023 N.Y. Slip Op. 03524, Third Dept 6-29-23**

FOURTH DEPARTMENT

COURT OF CLAIMS, PERSONAL INJURY.

IN THIS INTERSECTION TRAFFIC ACCIDENT CASE, ALTHOUGH THE STATE DEMONSTRATED THE INTERSECTION WAS SAFE WHEN CONSTRUCTED, CLAIMANT RAISED A QUESTION OF FACT WHETHER INCREASED TRAFFIC RENDERED THE INTERSECTION UNSAFE AND WHETHER THE STATE WAS AWARE OF THE DANGER.

The Fourth Department, reversing (modifying) Supreme Court, determined claimant's cause of action, alleging the intersection where claimant was injured in a traffic accident was dangerous, should not have been dismissed. Although the state demonstrated the intersection was not dangerous when constructed, claimant raised a question of fact whether increased traffic rendered the intersection dangerous and whether the state was aware of the danger: "Under the ordinary rules of negligence, the State 'has a nondelegable duty to keep its roads reasonably safe . . . , and the State breaches that duty 'when [it] is made aware of a dangerous highway condition and does not take action to remedy it' ... . The duty includes the 'continuing duty to review [a planned intersection] in light of its actual operation' ... . Although the State established that its design of the intersection in 1974 was reasonably safe, claimant raised an issue of fact whether the intersection was reasonably safe at the time of the accident in light of the significant increase in traffic at that intersection over the years for drivers turning left onto the I-690 West ramp ... . Claimant submitted the affidavit of her expert, who averred that the significant increase in traffic volume warranted the installation of a left-turn-only lane for eastbound drivers turning left onto Collingwood. Indeed, the expert averred that there was insufficient sight distance

for eastbound left-turning vehicles because of the continuous line of oncoming traffic." ***Lilian C. v. State of New York*, 2023 N.Y. Slip Op. 03618, Fourth Dept 6-30-23**

CRIMINAL LAW, ATTORNEYS, JUDGES, MUNICIPAL LAW.

THE JUDGE SHOULD HAVE INQUIRED INTO DEFENDANT'S ALLEGATION HIS ASSIGNED COUNSEL WAS BEING PAID BY HIS FAMILY; NEW TRIAL ORDERED.

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined the judge should have, but did not, conduct an inquiry into defendant's allegation his assigned counsel was being paid by his family: "... Supreme Court violated his right to counsel when it failed to conduct a sufficient inquiry into defendant's complaint that his assigned counsel accepted payment from his family. ... [T]rial courts have the 'ongoing duty' to 'carefully evaluate serious complaints about counsel' ... . * * * Here, defendant sent a letter to the court alleging ... that his assigned counsel was being paid by his family, which is a serious complaint involving unethical and illegal conduct (see generally County Law § 722-b [4]). Although the court began to engage defense counsel in a discussion concerning defendant's letter, before defense counsel was able to address the concerns raised by defendant in the letter, the court interjected and said, 'You are going to represent [defendant] at trial.' The court then addressed defendant directly and concluded its comments to him by stating ... 'You are not going to get another attorney.' At no time did the court make any inquiry into defendant's allegation that his family had paid defense counsel to represent him. ... [W]e conclude that the court violated defendant's right to counsel by failing to make a minimal inquiry concerning his serious complaint ... " ***People v. Jackson*, 2023 N.Y. Slip Op. 03609, Fourth Dept 6-30-23**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH DEFENDANT'S GRABBING AT HIS WAISTBAND AND RUNNING DID NOT PROVIDE REASONABLE SUSPICION, THE MAJORITY HELD DEFENDANT'S STOPPING HIS CAR IN THE STREET AND AGGRESSIVELY APPROACHING A WOMAN IN ANOTHER CAR PROVIDED REASONABLE SUSPICION; THE DISSENT DISAGREED.

The Fourth Department, over a dissent, determined the police had reasonable suspicion defendant was about to commit a crime when he grabbed at his waistband and ran. The police saw the defendant stop his car in the street and aggressively approach another car on foot. When the police told him to stop, he ran. The majority agreed with the dissent that defendant's grabbing at his waistband did not provide reasonable suspicion he had a weapon. Rather the police saw enough to have reasonable suspicion the defendant was about to commit a crime when he aggressively approached the other car: "We agree with defendant that his arm movements directed at his waistband and his flight would not, without more, justify police pursuit. As the court determined, however, it was reasonable for the officers to suspect that defendant was about to commit a crime because he approached the woman in an aggressive manner with clenched fists while yelling at her. The officers thus properly ordered defendant to stop and could have lawfully frisked him had he not run away. Because the stop was supported by reasonable suspicion, we conclude that the subsequent pursuit was also supported by reasonable suspicion, especially considering that, immediately following the stop, defendant turned his back to the officers, grabbed at his waistband, and then fled on foot, leaving his vehicle in the middle of the street with its driver's door open. **From the dissent:** ... [D[efendant's digging at his waistband, flight, and leaving his car in the street 'do not provide additional specific circumstances indicating that defendant was engaged in criminal activity' ... . While defendant's actions, 'viewed as a whole, [may have been] suspicious, . . . there is nothing in this record to establish that the officers had a reasonable suspicion' that defendant had committed, was committing, or was about to commit a crime ...". ***People v. Cleveland*, 2023 N.Y. Slip Op. 03597, Fourth Dept 6-30-23**

CRIMINAL LAW, EVIDENCE, APPEALS, VEHICLE AND TRAFFIC LAW.

THE PEOPLE DID NOT DEMONSTRATE THE DEFENDANT VIOLATED THE VEHICLE AND TRAFFIC LAW BY WALKING IN THE MIDDLE OF THE STREET AT THE TIME OF THE STREET STOP; THEREFORE, THE PEOPLE DID NOT DEMONSTRATE THE LEGALITY OF THE POLICE CONDUCT AND THE SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, vacating defendant's guilty plea and dismissing the indictment, determined the People did not demonstrate the legality of the street stop at the suppression hearing. The police had a warrant to search defendant's apartment and anyone in it. Before the warrant was executed, the defendant left the apartment and the SWAT team stopped him. The People relied on the allegation that defendant was violating the Vehicle and Traffic Law at the time of the stop by walking in the middle of the street. The Fourth Department found the evidence of a Vehicle and Traffic Law violation was insufficient. Therefore, the People failed to demonstrate the legality of the police conduct: "[W]here the issue presented is whether the People have demonstrated 'the minimum showing necessary' to establish the legality of police conduct, 'a question of law is presented for [our] review' ... . Here, the court refused to suppress the physical evidence on the ground that the officers' observation of defendant walking in the roadway provided probable cause for them to believe that defendant had violated the Vehicle and Traffic Law, which justified the initial stop and the subsequent pursuit of defendant. Vehicle and Traffic Law § 1156 (a) requires that, '[w]here sidewalks are provided and they may be used with safety it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway.' Here, when asked at the suppression hearing if he had seen defendant 'doing anything illegal,' the testifying police officer responded, '[o]ther than walking down the center of the road, no.' Even assuming, arguendo, that we can infer the presence of a sidewalk based on the officer's response, we conclude that the People failed to establish that a sidewalk was available and that it could 'be used with safety' ..., especially when considering that defendant was stopped in January in central New York. Nor did the People establish that defendant, by walking 'down the center of the road,' violated section 1156 (b), which requires a pedestrian, where sidewalks are not provided, to 'walk only on the left side of the roadway or its shoulder facing traffic' inasmuch as a pedestrian is only required to do so 'when practicable.' Thus, we agree with

defendant that, under the circumstances of this case, the People failed to meet their burden of establishing the legality of the police conduct." ***People v. Montgomery*, 2023 N.Y. Slip Op. 03606, Fourth Dept 6-30-23**

CRIMINAL LAW, EVIDENCE, JUDGES.

PRECEDENT DID NOT REQUIRE THE TRIAL JUDGE TO ADMIT, UNDER SANDOVAL, EVIDENCE OF A PRIOR CONVICTION SIMILAR TO THE OFFENSE ON TRIAL; RATHER THAT PRECEDENT ONLY HELD EVIDENCE OF A PRIOR CONVICTION SHOULD NOT BE EXCLUDED SOLELY BASED ON SIMILARITY; THE PREJUDICE VERSUS PROBATIVE-VALUE ANALYSIS SHOULD STILL BE APPLIED.

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined the trial judge was not bound by Fourth Department precedent to admit, under Sandoval, evidence of a prior possession of a weapon conviction in this criminal possession of a weapon prosecution. The Fourth Department has held that evidence of a prior conviction should not be excluded solely based on similarity with the offense on trial. But here the Fourth Department made clear that the prejudice versus probative-value analysis should still be applied where the crimes are similar: "[T]he court cited this Court's decision in ***People v Stanley* (155 AD3d 1684** [4th Dept 2017] ...) and advised defense counsel that she 'may want to discuss [her arguments] with the Fourth Department,' explaining that Stanley was 'their ruling, not my ruling' and that it was 'bound by [the Fourth Department's] rulings.' ... Stanley, however, stands for the proposition that '[c]ross-examination of a defendant concerning a prior crime is not prohibited solely because of the similarity between that crime and the crime charged' ... . That means that a Sandoval application by the People should not be automatically denied merely because a prior conviction is similar in nature to the present offense, and certainly does not mean that a court must automatically grant the People's application. There was nothing in Stanley that 'bound' the court in this case and, to the contrary, the court was required to make its own discretionary balancing of the probative value of defendant's prior conviction against its potential for undue prejudice ...". ***People v. Colon*, 2023 N.Y. Slip Op. 03583, Fourth Dept 6-30-23**

CRIMINAL LAW, FAMILY LAW.

RESPONDENT JUVENILE WAS NOT INFORMED THE FACT-FINDING HEARING IN THIS JUVENILE DELINQUENCY PROCEEDING WOULD GO FORWARD IN HIS ABSENCE (THE PARKER WARNING); THEREFORE, RESPONDENT DID NOT WAIVE THE RIGHT TO BE PRESENT AND THE ADJUDICATION WAS REVERSED BECAUSE OF HIS ABSENCE.

The Fourth Department, reversing Family Court in this juvenile delinquency proceeding, determined that the respondent juvenile was not informed that the fact-finding hearing would proceed in his absence. Therefore, he did not waive his right to be present at the hearing: "Respondent contends that the court violated his constitutional and statutory right to be present at the fact-finding hearing. We agree, and we therefore reverse the order and remit the matter to Family Court for further proceedings on the petition. '[R]espondents in juvenile delinquency proceedings have a constitutional and statutory right to be present at all material stages of court proceedings, including fact-finding hearings ... . Respondents 'may, however, waive the right to be present at such proceedings' ... . 'In order to effect a voluntary, knowing and intelligent waiver, the [respondent] must, at a minimum, be informed in some manner of the nature of the right to be present at [the fact-finding hearing] and the consequences of failing to appear' for that hearing' ... . Here, the court did not advise respondent that he had a right to be present at the fact-finding hearing and that the consequence of his failure to appear would be that the fact-finding hearing would proceed in his absence (see generally *People v Parker*, 57 NY2d 136, 141 [1982]). We therefore conclude on this record that there is no voluntary, knowing, and intelligent waiver of respondent's right to be present at the hearing ...". ***Matter of Timar P. (James B.)*, 2023 N.Y. Slip Op. 03654, Fourth Dept 6-30-23**

CRIMINAL LAW, JUDGES.

THE FOR CAUSE CHALLENGES TO TWO JURORS WHO SAID THEY WOULD TEND TO BELIEVE THE TESTIMONY OF POLICE OFFICERS SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED.

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined that two jurors who stated they would tend to believe the testimony of police officers should have been excused for cause: "The first prospective juror stated in response to a question concerning police officers that she 'was raised to respect them' and that, because 'they're the people that are protecting you, you should trust them.' When further probed about weighing the credibility of a police officer's testimony against a defendant's testimony, she stated that she would 'most likely [believe] the police officer.' The second prospective juror stated that, because of his work as an emergency medical technician, he saw police 'in a very positive light.' When asked the same question about whose version of events he would believe, the prospective juror stated '[t]o be completely honest, probably the first responder police officer.' Further, both prospective jurors repeated that they would likely believe a police officer's account of an event over a defendant's version after the court attempted to rehabilitate them ... . Thus, their respective affirmative answers when the court asked them if they could be fair and impartial were 'insufficient to constitute . . . unequivocal declaration[s]' that they could set aside their stated bias in favor of police officers ... . After the court denied his challenges for cause, defendant used peremptory challenges to remove the two prospective jurors from the venire and, therefore, '[b]ecause defendant exhausted all of his peremptory challenges before the completion of jury selection, reversal is required' ...". ***People v. Smith*, 2023 N.Y. Slip Op. 03647, Fourth Dept 6-30-23**

CRIMINAL LAW, JUDGES, EVIDENCE.

DEFENDANT CHALLENGED THE VALIDITY OF THE PAROLE WARRANT WHICH WAS THE BASIS OF THE ENTRY INTO HIS HOME (THE PAYTON ISSUE); THE JUDGE SHOULD HAVE HELD A HEARING TO DETERMINE THE VALIDITY OF THE PAROLE WARRANT.

The Fourth Department, remitting the matter for a hearing, determined the judge should not have found the police entry into defendant's residence (the Payton issue) was justified by the parole warrant without a hearing to determine validity of the parole warrant: " ' ... A parole violation warrant by itself justifies the entry of the residence for the purposes of locating and arresting the defendant therein . . . provided that, as here, the officers 'reasonably believe[d] the defendant to be present' in the premises ...'. ... Inasmuch as defendant challenged the factual basis for and the continued validity of the parole violation warrant at the time of his arrest, which he alleged was executed solely by police officers unaccompanied by parole officers, that was error. Pursuant to 9 NYCRR 8004.2 (a), a parole violation warrant cannot be issued without 'probable cause to believe that [the parolee] has violated one or more of the conditions of their release." "Probable cause exists when evidence or information which appears reliable discloses facts or circumstances that would convince a person of ordinary intelligence, judgment and experience that it is more probable than not that the subject releasee has committed the acts in question' (9 NYCRR 8004.2 [b]). If a parole officer believes that there is probable cause that the parolee has violated a condition of release 'in an important respect,' that parole officer is required to report that to the parole board 'or a designated officer,' such as a senior parole officer (9 NYCRR 8004.2 [a]), at which time 'a notice of violation may be approved' (9 NYCRR 8004.2 [c]) and a warrant for 'retaking and temporary detention may [be] issue[d]' by, among others, a designated officer (9 NYCRR 8004.2 [d]). Notably, a parole violation warrant may be administratively canceled '[a]t any time' after it is issued (9 NYCRR 8004.11 [a]). Here, inasmuch as defendant sufficiently raised the Payton issue in his omnibus motion, and the People's opposition papers did not resolve the issue as a matter of law, the court should have afforded defendant the opportunity to put the People to their proof regarding the alleged probable cause for the warrant, i.e., absconding, and whether the warrant was still active at the time defendant was arrested ...". ***People v. McCracken*, 2023 N.Y. Slip Op. 03614, Fourth Dept 6-30-23**

DEFAMATION, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, PRIVILEGE.

DEFENDANT SCHOOL SUPERINTENDENT'S DISCUSSION OF PLAINTIFF CROSS-COUNTY COACH'S TERMINATION WITH STUDENTS WAS ABSOLUTELY PRIVILEGED.

The Fourth Department, reversing Supreme Court, determined the defendant school superintendent's (Brantner's) statements to students about plaintiff cross-country coach (who was terminated) were absolutely privileged: " 'The absolute privilege defense affords complete immunity from liability for defamation to an official [who] is a principal executive of State or local government . . . with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties' ... . Here, plaintiff does not dispute that Brantner, as superintendent, is a government official to whom the absolute privilege would apply ... . The question presented is whether Brantner was acting within the scope of her duties as superintendent when she met with members of the cross-country team in a classroom before school to discuss plaintiff's termination. We conclude that ... Brantner's statements were made during the course of the performance of her duties as a school superintendent and were about matters within the ambit of those responsibilities. Brantner testified at her deposition that the school board asked her to speak with the students, who had appeared at school board meetings demanding to know why plaintiff had been fired ... In any event, even assuming, arguendo, that Brantner decided on her own to meet with the students, we conclude that she was acting within the scope of her duties when making the statements. Although Education Law § 1711 ... does not specifically authorize superintendents to meet with students, the statute is not an exhaustive list delineating every action that a school superintendent is permitted to engage in, and the absence from the statute of a reference to a particular category of action does not mean that it is unauthorized. In our view, a school superintendent does not act ultra vires when speaking to students in a school setting about a matter related to their education or extracurricular activities." ***Panek v. Brantner*, 2023 N.Y. Slip Op. 03636, Fourth Dept 6-30-23**

LANDLORD-TENANT, MUNICIPAL LAW, HUMAN RIGHTS LAW, APPEALS.

THE COMPLAINT STATED A CAUSE OF ACTION FOR A VIOLATION OF THE EXECUTIVE LAW THAT PROHIBITS DISCRIMINATION BY LANDLORDS AGAINST POTENTIAL TENANTS BASED UPON SOURCE OF INCOME; ALTHOUGH THE ISSUE WAS NOT RAISED BELOW IT PRESENTED A QUESTION OF LAW REVIEWABLE ON APPEAL.

The Fourth Department, reversing Supreme Court, determined the complaint stated a cause of action for a violation of the Executive Law prohibiting discrimination in renting an apartment based upon source of income. Although the issue was raised for the first time on appeal, the issue presented a question of law which could not have been avoided had it been raised below: "Executive Law § 296 (5) (a) (2) provides in relevant part that it 'shall be an unlawful discriminatory practice for the owner, lessee, sub-lessee, assignee, or managing agent of, or other person having the right to sell, rent or lease a housing accommodation, constructed or to be constructed, or any agent or employee thereof . . . [t]o discriminate against any person because of . . . lawful source of income . . . in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.' Plaintiff alleged in its amended complaint that it sent two testers to defendants' properties seeking to rent the properties. The testers asked defendants if they accepted security agreements, which are issued by the Erie County Department of Social Services to landlords in the amount of one month's rent in lieu of a cash deposit. Defendants responded that they accepted those agreements, but that they also required tenants to put down a cash deposit of one-half of a month's rent for the security deposit. ... The allegations in the amended complaint support the inference that, for a person whose lawful source of income is public assistance ... , defendants imposed a different term or condition for the rental than for a person whose lawful source of income was not public assistance. In particular, for a person on public assistance, defendants required one-half's month rent,

in cash, as a security deposit in addition to the security agreements." ***Housing Opportunities Made Equal v. DASA Props. LLC*, 2023 N.Y. Slip Op. 03607, Fourth Dept 6-30-23**

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