ANALYSIS

Who May Raise Arguments Deemed Permissible for First Time on Appeal?

The essence of this article is who may raise such sanctioned arguments first time on appeal, the appellant, the respondent, or both? We digress from t answer to this question to examine several sanctioned categories.

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Civil Appeals

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Preservation is the foundation of appellate review. Generally, an argument not presented to the court below may not be raised on appeal. "[I]t is settled that a ruling on an application must be reviewed in respect of the arguments made before the motion court and not on the basis of some novel contention." *Wald v. Marine Midland Bus. Loans*, 270 A.D.2d 73, 75 (1st Dept. 2000). "[T]he requirement of preservation is not simply a meaningless technical barrier to review." *Wilson v. Galicia Contr. & Restoration*, 10 N.Y.3d 827, 829 (2008). "The very theory and constitution of a court of appellate jurisdiction only is the correction of errors which a court below may have committed; and a court below cannot be said to have committed an error when their judgment was never called into exercise, and the points of law were never taken into consideration but was abandoned by the acquiescence or default of the party who raised it." *Flake v. Van Wagenen*, 54 N.Y. 25, 27 (1873). "It is, indeed, a rule, that questions not raised at the trial court, which might have been obviated by the action of the court then, or by that of the other party, will not be heard on appeal as ground of error." *Telaro v. Telaro*, 25 N.Y.2d 433, 438 (1969). However, there are exceptions to this this rule which permit appellate courts to hear specific categories of arguments first time on appeal, a random sampling of which follows. See E. Scheinberg, The New York Civil Appellate Citator, NYSBA, 2d ed, 2022.

The essence of this article is who may raise such sanctioned arguments first time on appeal, the appellant, the respondent, or both? We digress from the answer to this question to examine several sanctioned categories.

Sample of sanctioned categories of arguments that may be raised first time on appeal. Legal arguments, legal questions, issues of law "that appear on the face of the record and could not have been avoided had it been brought to the attention of the Supreme Court." *Byrne v. Nicosia*, 104 A.D.3d 717, 719 (2d Dept. 2013); *Velasquez v. 795 Columbus LLC*, 103 A.D.3d 541 (1st Dept. 2013). "Since it is a legal argument [CPLR 3404] that appears on the face of the record and could not have been avoided if brought to defendant's attention at the proper juncture, we will review it. *Thompkins v. Ortiz*, 84 N.Y.S.3d 453, 454 (1st Dept. 2018). *Feldshteyn v. Brighton Beach 2012*, 153 A.D.3d 670 (2d Dept. 2017) (statutory intent). *Mizugami v. Sharin W. Overseas*, 183 A.D.2d 962, 962-63 (3d Dept. 1992), aff'd, 81 N.Y.2d 363 (1993) (statutory construction).

"The preservation of an issue for appellate review is completely distinct from the question whether [a party] has sustained his [or her] burden of proof." *In re Estate of Lewis*, 114 A.D.3d 203, 207-08 (4th Dept. 2014), affirmed as mod, 25 N.Y.3d 456 (2015).

Decisions where sanctioned categories were declined first time on appeal. Exceptions also have exceptions, often unexplained. Accordingly, case law has also precluded consideration of issues of law, statutory applicability and legislative intent first time on appeal. *Tulino v. Tulino*, 148 A.D.3d 755, 757 (2d Dept. 2017) ("The executor's contention that indemnification should have been awarded based upon Business Corporation Law §724(c) is improperly raised for the first time on appeal and has not been considered by this Court."); *Kohilakis v. Town of Smithtown*, 167 A.D.2d 513, 514 (2d Dept. 1990) ("Having failed to raise the applicability of Civil Rights Law §50-a before the Supreme Court, the appellants may not now raise their present argument for the first time on appeal."); *Salahuddin v. Craver*, 163 A.D.3d 1508 (4th Dept. 2018) ("[P]laintiffs' contention that defendants have no private right of action to enforce [Labor Law] §191(3) is improperly raised for the first time on appeal."); *Cohan v. Bd. of Directors of 700 Shore Roderick. Waters Edge*, 108 A.D.3d 697, 700 (2d Dept. 2013) ("The board's contention regarding the application of Real Property Law §234 to the instant proceeding is raised for the first time on appeal and, therefore, is not properly before this Court."); *McGrawHill v. State Tax Com'n*, 146

A.D.2d 371, 376 (3d Dept. 1989), affirmed, 75 N.Y.2d 852 (1990) ("[P]etitioner asserts that the Legislature, by its amendment in 1981 [] of Tax Law §210(3)(a)(2)(B) has indicated its intent to include advertising as a "service" and thus make it taxable where rendered. As this last argument is interposed for the first time on appeal, it is not properly before us.")

Decisions that have considered and that have declined to consider the same specific arguments raised first time on appeal. Preservation has another layer of unpredictability, issues that have been both considered and precluded first time on appeal, a sampling follows: (1) the contention that a complaint fails to state a cause of action may not be raised for the first time on appeal, *Miterko v. Peaslee*, 80 A.D.3d 736, 737-38 (2d Dept. 2011); (2) a party may assert the failure to state a cause of action first time on appeal, *Konig v. WordPress.com*, 112 A.D.3d 936, 936-37 (2d Dept. 2013), *JF Corp. v. Cargill Fin. Services*, 45 A.D.3d 370 (1st Dept. 2007); (3) entitlement and challenges to summary judgment considered first time on appeal, *26th LS Series Ltd. v. Brooks*, 156 A.D.3d 427 (1st Dept. 2017), *Rivera v. Rochester Gen. Health Sys.*, 173 A.D.3d 1758, 1758-59 (4th Dept. 2019); (4) entitlement to summary judgment precluded first time on appeal, *Gorenstein v. Debralaurie Realty Co.*, 280 A.D.2d 642 (2d Dept. 2001), *Oneida Indian Nation v. Hunt Const. Group*, 88 A.D.3d 1264 (4th Dept. 2011); (5) statute of limitations raised first time on appeal held reviewable as an issue of law, *Beach v. Touradji Capital Mgt., LP*, 142 A.D.3d 442, 444 (1st Dept. 2016), *Nuevo El Barrio Rehabilitacion De Vivienda y Economia v. Moreight Realty*, 87 A.D.3d 465, 466 (1st Dept. 2011); (6) statute of limitations defense barred first time on appeal, *In re Candlewood Holdings*, 124 A.D.3d 775, 776 (2d Dept. 2015), *Schwartz v. Chan*, 75 N.Y.S3d 31 (1st Dept. 2018); (7) statute of frauds defense precluded first time on appeal, *Arthur Cab Leasing Corp. v. Loup Hacking Corp.*, 137 A.D.3d 826, 828 (2d Dept. 2016); (8) statute of frauds defense may be raised first time on appeal *Chapman, Spira & Carson v. Helix BioPharma*, 115 A.D.3d 526, 527-28 (1st Dept. 2014). (For additional instances see, Scheinberg, op. cit., Chapter 32.)

Arguments raised for the first time in reply papers in Supreme Court may be considered on appeal if they are determinative. "While, normally, arguments set forth for the first time in reply should not be considered … this Court will consider this argument as it is determinative, does not allege new facts, and is a legal argument on the face of the record that would not have been avoidable if raised in defendants' moving brief below, and because the record is sufficient to resolve the issue." *Newport E. v. Sviba Floral Decorators*, 202 A.D.3d 482, 484 (1st Dept. 2022).

Who may raise an argument from a sanctioned category first time on appeal, appellant, respondent, both? Back to our original query. Buried in a footnote, in *Sega v. State*, 60 N.Y.2d 183, 190 n.2 (1983), the Court of Appeals, citing *Scott v. Morgan*, 94 N.Y. 508 (1884), stated, "On appeal, *a respondent* may proffer in support of affirmance any legal argument that may be resolved on the record, regardless of whether it has been argued previously, if the matter is one which could not have been countered by the appellant had it been raised in the trial court."

In *Scott*, the complaint had been dismissed upon the defendant's motion upon a specified ground. On appeal, the respondent sought to assert an additional ground in support of affirmance of the judgment. As pertinent here, the Court of Appeals stated, "So far [] *as the respondent is concerned*, it is immaterial whether the ground stated in the minutes be regarded as having been taken upon the trial or not, since he has now the right in support of the judgment appealed from to do so upon any sufficient ground appearing in the record which he might have raised in the court below, provided it is such an objection as could not have been obviated upon the trial by the plaintiffs." *Sega* placed a "cf." after *Scott* and cited four cases: *Maloney v. Hearst Hotels Corp.*, 274 N.Y. 106, 111 (1937), *Persky v. Bank of Am. Nat. Ass'n*, 261 N.Y. 212, 217-18 (1933), *Nicholson v. Greeley Sq. Hotel Co.*, 227 N.Y. 345, 349 (1919), and *People v. Bresler*, 218 N.Y. 567, 570 (1916), which, in general terms, did no more than echo the established rule against new arguments first time on appeal. *Sega* offers no rationale as to why the high court saw the need to create the "FN2" rule.

In another Third-Department decision, *Olden v. Bolton*, 137 A.D.2d 878 n. (3d Dept. 1988), lies another footnote aggressively construing *Sega*: "Case law authorizing the raising of an issue for the first time on appeal is *generally* applicable only *to respondents, not appellants*." The word "generally" is not expounded upon. The gnawing question is why such an important pronouncement is unworthy of main text only relegated to footnotes. However, lest anyone minimize the value of a Court-of-Appeals pronouncement in a footnote, subject of contest, a robust, vibrant exception to the rule against direct appeals from a default, derives from a footnote, *James v. Powell*, 19 N.Y.2d 249, 256 n.3 (1967).

In *Interboro Ins. Co. v. Fatmir*, 89 A.D.3d 993, 994 (2d Dept. 2011), the Second Department, citing "FN2" in *Sega*, held, "While the plaintiff did not argue in the Supreme Court that a disclaimer was not required, '[o]n appeal, a *respondent* [the insurance company] may [as here] proffer in support of affirmance any legal argument that may be resolved on the record, regardless of whether it has been argued previously, if the matter is one which could not have been countered by the appellant had it been raised in the trial court." *Interboro* has never been cited in support of the "FN2" rule.

Cited in *Interboro* is *Stephan B. Gleich & Assoc. v. Gritsipis*, 87 A.D.3d 216 (2d Dept. 2011), wherein the defendant [the respondent] argued, first time on appeal, that the clerk of the court lacked authority to enter a judgment, "However, where [] *an argument presents* an issue of law appearing on the face of the record which could not have been avoided if raised at the proper juncture, it may be considered by an appellate court." "*Presents*" speaks in broad terms without conferring the right upon only one party.

In *Cont. Cas. Co. v. Stradford*, 11 N.Y.3d 443, 449 (2008), the Court of Appeals, citing *Scott* and "FN2" in *Sega*, stated, "Continental *[appellant]* argue[d] that Insurance Law §3420(d)'s timeliness standard is inapplicable. Because that argument *was not presented* to the courts below, we decline to consider it." The Appellate Division did not reject the argument based on Continental's procedural posture as appellant, which would have been expected due to its reference to "FN2" in *Sega*.

In *County of Saratoga v. Delaware Eng'g, D.P.C.*, 189 A.D.3d 1926, 1929 (3d Dept. 2020), the Third Department swerved from the "FN2" rule, "Delaware asserts that Jett's *[appellant's]* current arguments regarding the contractual indemnification provision are unpreserved. However, *a party [any party, no limitation]* 'may present *any legal argument* that may be resolved on the record, regardless of whether it has been argued previously, if the matter is one which could not have been countered by [the other party] had it been raised in the trial court.'"

In *Munoz v. Annucci*, 195 A.D.3d 1257, 1262 (3d Dept. 2021), respondent raised an argument first time on appeal. The Third Department, again veered away from *Olden* endorsing the argument because "*a party [broad terms]* may present any legal argument that may be resolved on the record, regardless of whether it has been argued previously, if the matter is one which could not have been countered by the other party had it been raised in the trial court." *Munoz* cited *County of Saratoga*, and "FN2" in *Sega*, notably adding "*cf.*" ahead of *Sega*.

Other decisions, of which a random sampling follows, have not limited the right to raise issues first time on appeal to respondents:

Telaro v. Telaro, 25 N.Y.2d 433, 439 (1969):

It should be noted that the general rule concerning questions raised neither at the trial nor at previous stages of appeal *is far less restrictive than some case language would indicate*. Thus, it has been said: 'if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. *No party should prevail on appeal*, given an unimpeachable showing that he had no case in the trial court.' (Cohen v. Karger, op. cit., pp. 627—628.) Of course, where new contentions could have been obviated or cured by factual showings or legal countersteps, they may not be raised on appeal. *But contentions which could not have been so obviated or cured below may be raised on appeal for the first time*.

["*No party*" speaks in general terms that any party, irrespective of procedural posture, may raise such an argument.]

Narvaez v. Vornado Realty Tr., 204 A.D.3d 519, 519-20 (1st Dept. 2022):

Plaintiff *[appellant]* argues for the first time on appeal that MSG failed to make a prima facie showing of entitlement to summary judgment. Generally, this Court does not review issues raised for the first time on appeal … Here, however, the question of whether MSG sustained its prima facie burden of demonstrating entitlement to summary judgment, is a determinative legal issue and the record on appeal is sufficient to permit this Court's review.;

Kramarenko v. New York Community Hosp., 195 A.D.3d 608, 609-10 (2d Dept. 2021):

Although the defendants *[respondents]* are correct that the plaintiffs *[appellants]* raise for the first time on appeal the contention that the J.H.O./Referee lacked authority under CPLR 3104 to issue the order [], this contention may be reached since it involves a question of law that is apparent on the face of the record and could not have been avoided by the Supreme Court if it had been brought to its attention.;

Salamone v. EIP Glob. Fund, 193 A.D.3d 558 (1st Dept. 2021):

Because the record is sufficient to permit a determination of plaintiff's *[appellant's]* estoppel argument, it may be considered for the first time on appeal.

Paolicelli v. Fieldbridge Assoc., 120 A.D.3d 643, 645-46 (2d Dept. 2014):

The defendant's *[appellant's]* contention that Administrative Code §27-2029 cannot serve as a predicate for liability pursuant to General Municipal Law §205-a because it is preempted by Multiple Dwelling Law §79 is raised for the first time on appeal, but that contention may be reached since it involves a pure question of law that appears on the face of the record which could not have been avoided if brought to the court's attention at the appropriate juncture.;

Hassan v. Woodhull Hosp. and Med. Ctr., 282 A.D.2d 709, 710 (2d Dept. 2001):

[T]he plaintiffs *[appellants]* contend that the Supreme Court erred in concluding that they were required to serve a notice of claim upon the HHC because Dr. Terry is a statutory employee within the meaning of General Municipal Law §50-d. We agree. General Municipal Law §50-d provides that every municipal corporation shall assume the liability for malpractice of any physician who renders medical services without receiving compensation at public institutions maintained by that municipal corporation. "Where section 50-d is applicable, ultimate financial responsibility rests not with the treating physician but with the appropriate municipal corporation and, under subdivision 2 of that section, no action will lie unless a notice of claim is served in compliance with section 50-e of the General Municipal Law" (Bender v. Jamaica Hosp., 40 N.Y.2d 560 ...). However, since the HHC is a public benefit corporation rather than a municipal corporation within the meaning of General Municipal Law §50-d, this provision does not apply here (Bender, supra). Although the plaintiffs *[appellants]* did not raise this issue before the Supreme Court, it may be considered on appeal because it presents an issue of law which appears on the face of the record and which could not have been avoided if raised at the proper juncture.;

Matter of Ins. Co. of N. Am. v. Kaplun, 274 A.D.2d 293, 297 (2d Dept. 2000):

Kaplun *[appellant]* does not dispute, for purposes of this appeal, the Supreme Court's determination that he and Aldochkina concealed the true facts regarding the ownership of the BMW from INA. He contends, however, that it was error to declare the policy void ab initio because INA failed to offer any proof that the policy was cancelled in compliance with Vehicle and Traffic Law §313 prior to the accident. The policy could not be cancelled retroactively, despite any misrepresentations that were made in procuring the policy, and therefore the court erred in granting a stay of arbitration of his uninsured motorist claim.

[T]his argument may be raised first time on appeal because it presents an issue of law which appears on the face of the record and which could not have been avoided if raised at the proper juncture.

Conclusion

No appellate court, including the Third Department, has since cited *Sega* or *Olden* in support of FN2; FN2 has also not been mentioned in secondary sources.

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