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FIRST DEPARTMENT

ARBITRATION, EMPLOYMENT LAW.

ARBITRATOR'S RULING THAT, UNDER THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT, AN EMPLOYEE COULD NOT BE DISCIPLINED CONSTITUTED A VIOLATION OF THE PUBLIC POLICY PROHIBITING SEXUAL HARASSMENT IN THE WORKPLACE.

The facts of the case presented a rare instance when the arbitrator's resolution of a matter covered by a collective bargaining agreement (CBA) violated public policy. A bus driver, Aiken, was accused of sexual harassment by a co-worker. Shortly thereafter the union requested of the Transit Authority that Aiken be placed on union-paid "release time" and the Transit Authority did so. The Equal Employment Opportunity Commission (EEOC) found the bus driver had violated the Transit Authority's sexual harassment policy and recommended corrective action. Aiken did not participate in the disciplinary proceedings (which resulted in Aiken's termination) on the ground that, under the terms of the CBA, the Transit Authority did not have the authority to impose discipline while he was on union-paid "release time." An arbitrator ultimately agreed with Aiken and reinstated him. The First Department noted that the arbitrator's award was supported by the terms of the CBA, but held the award violated the strong public policy prohibiting sexual harassment in the workplace. **Matter of Phillips v Manhattan & Bronx Surface Tr. Operating Auth., 2015 NY Slip Op 06564, 1st Dept 8-18-15**

PERSONAL INJURY.

PLAINTIFF ASSUMED RISK OF GOLF-CART ACCIDENT.

Defendant was entitled to summary judgment dismissing the complaint on the ground that plaintiff had assumed the risk of riding in a golf cart driven by defendant. Both plaintiff and defendant were participating in a golf program. Defendant, 17-year-old Andrew Jiminez, was driving a golf cart with plaintiff as a passenger when he allegedly made a "full speed" sharp turn, throwing plaintiff out of the cart. Reversing Supreme Court, the First Department held that plaintiff had assumed the risk of injury from defendant's operation of the golf cart. That plaintiff was not performing her golf-program duties at the time of the accident was deemed irrelevant: "The fact that plaintiff was not actively performing her duties of monitoring the hole at the time of her injury does not render the doctrine inapplicable. [T]he assumption [of risk] doctrine applies to any facet of the activity inherent in it ... . The salient point is that the accident involved a sporting or recreational activity that occurred in a designated athletic or recreational venue ...". [internal quotation marks omitted] **Valverde v Great Expectations, LLC, 2015 NY Slip Op 06561, 1st Dept 8-18-15**

SECOND DEPARTMENT

ARBITRATION, CONTRACT LAW.

ALLEGATIONS OF FRAUD IN THE INDUCEMENT DID NOT INVALIDATE THE ARBITRATION CLAUSE IN THE AGREEMENT.

The Second Department, over a dissent, determined that plaintiff's motion to stay arbitration was properly denied. Plaintiff alleged that an agreement to sell her business and related real property was induced by fraud and, therefore, the arbitration clause in the agreement was invalid and unenforceable. The court noted that the agreement was properly signed by plaintiff's attorney as her attorney-in-fact and plaintiff attended the closing where she signed the relevant documents. She was deemed, therefore, to have read and understood the documents. The court explained its limited role in determining whether a matter is arbitrable, and further explained that, absent fraud which permeated the entire agreement, the arbitration clause will still be enforced in the face of allegations of fraud in the inducement: "[T]he Court of Appeals ruled that an arbitration clause is generally separable from substantive provisions of a contract, so that an agreement to arbitrate is valid even if the substantive provisions of the contract are induced by fraud ... . However, if a party can demonstrate that the alleged fraud was part of a grand scheme that permeated the entire contract, including the arbitration provision, the arbitration provision should fall with the rest of the contract ... . To demonstrate that fraud permeated the entire contract, it must be established that the agreement was not the result of an arm's length negotiation or the arbitration clause was inserted into the contract

to accomplish a fraudulent scheme ... . Here, the plaintiff failed to make such a showing." [internal quotation marks omitted] **Ferrarella v Godt, 2015 NY Slip Op 06571, 2nd Dept 8-19-15**

CIVIL PROCEDURE, EVIDENCE.

DEFENDANTS ENTITLED TO DEPOSE NONPARTY PHYSICIAN WHOSE NOTES INDICATED SKEPTICISM ABOUT PLAINTIFF'S CLAIMS.

Defendants were entitled to depose a nonparty doctor whose notations in medical records expressed skepticism about the plaintiff's claims re: the cause of her injuries. The court explained the applicable law: "Pursuant to CPLR 3101(a)(4), a party may obtain discovery from a nonparty in possession of material and necessary evidence, so long as the nonparty is apprised of the circumstances or reasons requiring disclosure. The notice requirement of CPLR 3101(a)(4) obligates the subpoenaing party to state, either on the face of the subpoena or in a notice accompanying it, the circumstances or reasons such disclosure is sought or required ... . After the subpoenaing party has established compliance with the CPLR 3101(a)(4) notice requirement, disclosure from a nonparty requires no more than a showing that the requested information is relevant to the prosecution or defense of the action ... . However, the party or nonparty moving to vacate the subpoena has the initial burden of establishing either that the requested deposition testimony is utterly irrelevant to the action or that the futility of the process to uncover anything legitimate is inevitable or obvious ...". [internal quotation marks omitted] **Bianchi v Galster Mgt. Corp., 2015 NY Slip Op 06568, 2nd Dept 8-19-15**

CONTRACT LAW.

COUNTERCLAIMS FOR TORTIOUS INTERFERENCE WITH CONTRACT AND TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS PROPERLY DISMISSED — ELEMENTS EXPLAINED.

The Second Department, over a dissent, determined that the counterclaims alleging tortious interference with contract and tortious interference with prospective business relations were properly dismissed. The counterclaims alleged that the plaintiffs-attorneys, who represented defendant, Landmark, improperly sought payment of attorney fees for a negotiated stipulation of settlement directly from the party with whom Landmark settled, rather than from Landmark. In dismissing the counterclaims, the court explained the required elements of each: "A necessary element of [tortious interference with contract] is the intentional and improper procurement of a breach and damages ... . Here, Landmark failed to adequately plead facts that would establish that the plaintiffs, in communicating with the third party to secure their attorney's fees, intentionally procured that party's breach of the stipulation of settlement ... . A claim for tortious interference with prospective business relations does not require a breach of an existing contract, but the party asserting the claim must meet a more culpable conduct standard ... . This standard is met where the interference with prospective business relations was accomplished by wrongful means or where the offending party acted for the sole purpose of harming the other party ...". [internal quotation marks omitted] **Law Offs. of Ira H. Leibowitz v Landmark Ventures, Inc., 2015 NY Slip Op 06575, 2nd Dept 8-19-15**

ELECTION LAW.

CANDIDATE DESIGNATING PETITION DEEMED INVALID DUE TO FRAUD (UNWITNESSED SIGNATURES).

A candidate-designating petition was invalid because the subscribing witness did not in fact witness all of the signatures on the petition. The petition was invalid with respect to the candidate who was aware of the fraud, and the candidates who were not aware of the fraud (because there were not enough signatures after the invalid signatures were struck): "A candidate's designating petition will be invalidated on the ground of fraud where there is a showing that the entire designating petition is permeated with fraud ..., or where the candidate has participated in, or is chargeable with, knowledge of the fraud ..., even if there are a sufficient number of valid signatures on the remainder of the designating petition ...". **Matter of Sgammato v Perillo, 2015 NY Slip Op 06630, 2nd Dept 8-19-15**

LABOR LAW, PERSONAL INJURY.

HOMEOWNER'S EXEMPTION FROM LIABILITY DID NOT APPLY TO THREE-UNIT BUILDING WITH TWO APARTMENTS, ONE OF WHICH WAS OWNER-OCCUPIED.

Defendant was not entitled to the homeowner's exemption from liability under the Labor Law. The exemption is afforded owners of one and two-family residences who do not control the work on the premises. Here defendant's building had a retail store on the ground level and two apartments above. One of the two apartments was occupied by the sole member of the defendant limited liability company which owned the building. The city had classified the building as within the "J-3" occupancy group, which includes one and two-family residential buildings. In finding the three-unit building did not trigger the exemption, the court explained the purpose behind the exemption, and the irrelevance of the "J-3" classification. **Assevero v Hamilton & Church Props., LLC, 2015 NY Slip Op 06567, 2nd Dept 8-19-15**

LANDLORD-TENANT, CONTRACT LAW.

TERMS OF LEASE AND RELATED GUARANTY REQUIRED GUARANTOR TO PAY LIQUIDATED DAMAGES IN AN AMOUNT EQUAL TO THE RENT FOR THE UNFINISHED TERM EVEN AFTER THE TENANT HAD BEEN EVICTED AND THE LANDLORD REGAINED POSSESSION.

The Second Department, over a dissent, determined that the terms of appellant's guaranty of payment of amounts owed under a lease obligated the appellant even after the tenant had left the premises and the landlord took possession. Although the tenant's obligation to pay rent had ended when the plaintiff-landlord took possession, the terms of the lease allowed the plaintiff to seek the amount of the rent for the remaining term of the lease as liquidated damages and did not require the plaintiff to mitigate those damages by renting to another: "Although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please ... . Where a lease provides that a landlord is under no duty to mitigate damages after its reentry by virtue of its successful prosecution of a summary proceeding, and that the tenant remains liable for damages, 'the tenant] remain[s] liable for all monetary obligations arising under the lease ...'". [internal quotation marks omitted] **H.L. Realty, LLC v Edwards, 2015 NY Slip Op 06572, 2nd Dept 8-19-15**

MUNICIPAL LAW, PERSONAL INJURY.

IN THE CONTEXT OF A PETITION TO FILE A LATE NOTICE OF CLAIM, THE APPLICABILITY OF THE DOCTRINE OF EQUITABLE ESTOPPEL EXPLAINED.

In affirming the denial of the petition to file a late notice of claim against a public corporation, the Second Department explained the doctrine of equitable estoppel as it applies to public corporations: "Estoppel against a public corporation will lie only when the public corporation's conduct was calculated to, or negligently did, mislead or discourage a party from serving a timely notice of claim and when that conduct was justifiably relied upon by that party ... . Here, the petitioner failed to demonstrate that the respondents engaged in any misleading conduct that would support a finding of equitable estoppel ... . In addition, there was no evidence that the respondents made any settlement representations upon which the petitioner justifiably relied prior to the expiration of the statutory periods for serving a notice of claim or seeking leave to serve a late notice of claim and, therefore, the petitioner could not have relied on any conduct by the respondents in discouraging him from serving a notice of claim or seeking leave ...". **Attallah v Nassau Univ. Med. Ctr., 2015 NY Slip Op 06587, 2nd Dept 8-19-15**

PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT BASED UPON DEMONSTRATION DEFENDANT WAS NEGLIGENT AND PLAINTIFF WAS FREE FROM COMPARATIVE NEGLIGENCE.

Plaintiff-pedestrian, who was struck by defendant when in a crosswalk, was entitled to summary judgment. The court explained plaintiff had demonstrated both required elements: (1) defendant was negligent; and (2) plaintiff was free from comparative negligence. Defendant's opposing affidavit, which contradicted his deposition testimony, raised only "feigned" issues and did not, therefore, raise a question of fact. **Zhu v Natale, 2015 NY Slip Op 06586, 2nd Dept 8-19-15**

PERSONAL INJURY, CONTRACT LAW.

DEFENDANT, IN ITS SUCCESSFUL SUMMARY JUDGMENT MOTION, PROPERLY ADDRESSED ONLY THE THEORY OF "TORT LIABILITY ARISING FROM CONTRACT" WHICH WAS ALLEGED IN THE PLEADINGS.

Defendant was entitled to summary judgment in an action based upon the allegation defendant had "launched an instrument of harm," thereby imposing liability in tort arising from a contract. Defendant demonstrated it did not launch an instrument of harm and plaintiff failed to raise a question of fact in response. The court explained the applicable law, noting that defendant need only address the specific theory of contract-based liability which was raised in the pleadings: "Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party ... . The Court of Appeals has recognized three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely ... . Here, the only exception alleged in the pleadings with respect to the defendant Wiley Engineering, P.C. (hereinafter Wiley), was that Wiley launched a force or instrument of harm ... . Therefore, in moving for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, Wiley was only required to address this exception by demonstrating, prima facie, that it did not launch a force or instrument of harm creating or exacerbating any allegedly dangerous condition ... . Here, Wiley met its prima facie burden and, in opposition, the plaintiff failed to raise a triable issue of fact." [internal quotation marks omitted] **Reece v J.D. Posillico, Inc., 2015 NY Slip Op 06580, 2nd Dept 8-19-15**

IN THIS RELATED CASE, DEFENDANT, IN ITS SUCCESSFUL SUMMARY JUDGMENT MOTION, ADDRESSED ALL THREE THEORIES OF "TORT LIABILITY ARISING FROM CONTRACT" (TO BE SAFE, ADDRESS ALL THREE?).
In a case which was consolidated with the case summarized immediately above, the Second Department determined the defendant was entitled to summary judgment dismissing the complaint because it had demonstrated that none of the three theories of "tort liability arising from a contract" applied. It is not clear from the decision whether the defendant here, unlike the defendant in the companion case, was required, by the nature of the pleadings, to address all three theories in order to be entitled to summary judgment (to be safe, address all three?): "Here, the defendant J.D. Posillico, Inc …, met its initial burden of establishing its entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against it by demonstrating, prima facie, that none of the exceptions were applicable as against it in this case ...". **Reece v J.D. Posillico, Inc., 2015 NY Slip Op 06581, 2nd Dept 8-19-15**

REAL PROPERTY, MUNICIPAL LAW.

REQUIREMENTS FOR AN "EASEMENT IN FAVOR OF PUBLIC USE" NOT MET.
The city failed to demonstrate that an unmapped roadway used since the 1970s had become a public highway under the Highway Law, and the city failed to demonstrate an "easement in favor of public use" existed over the portion of the roadway which was on defendant's land. The "Highway Law" statute invoked by the city applied only to towns, not cities. And the requirements for an easement in favor of public use had not been demonstrated. The court explained the easement requirements: "The City argues ... that an easement in favor of the public was created over the defendant's property pursuant to the common-law doctrine of dedication. This doctrine requires evidence of the owner's intent to dedicate the property for public use and acceptance of the dedication by the public authorities ... . Here, however, the City's submissions in support of its motion for summary judgment failed to establish, prima facie, that the defendant's land had been dedicated to the use of public travel by any prior owner or the defendant." **City of New York v Gounden, 2015 NY Slip Op 06569, 2nd Dept 8-19-15**

THIRD DEPARTMENT

ELECTION LAW.

FACT THAT NOTARY PUBLIC DID NOT ADMINISTER OATH TO SIGNATORIES DID NOT INVALIDATE DESIGNATING PETITION.
The signatures on the candidate-designating petition were valid, despite the respondent's, Sira's, admission that no oath was administered to the signatories which Sira signed as a notary public. The court noted that, under the Election Law, Sira could have merely witnessed the signatures, without signing as a notary public. Because there was no evidence the signatures were fraudulent in any way, the petition was deemed valid. **Matter of Vincent v Sira, 2015 NY Slip Op 06636, 2nd Dept 8-20-15**

ELECTION LAW.

FRAUD DOES NOT REQUIRE PROOF OF A "NEFARIOUS MOTIVE" — FACT THAT RESPONDENT KNEW THREE SPOUSES SIGNED PETITION ON BEHALF OF THE SIGNATORIES INVALIDATED THE PETITION, DESPITE THE PRESENCE OF A SUFFICIENT NUMBER OF VALID SIGNATURES.
The Third Department invalidated the designating petition because the respondent, Hammond, admitted he witnessed the signatures of the three people who were the spouses of the person purportedly signing the petition. The petition included 38 signatures, 30 more than the eight required to receive the party designation. Hammond thought having the three spouses sign was proper. The court noted that the signatures were fraudulent, despite the absence of an intent to defraud, and Hammond's knowledge of the fraud required invalidation: "A court will invalidate a designating petition where the challenger establishes, by clear and convincing evidence, that the entire petition is permeated with fraud or that the candidate participated in, or can be charged with knowledge of, fraudulent activity ... . Where a candidate is involved in the fraud, the challenger need not show that the fraud permeated the entire petition ..., and the petition may be invalidated even if it contains a sufficient number of valid signatures independent of those fraudulently procured ... . * * * Fraud ... does not require proof of a nefarious motive ... . Inasmuch as Hammond participated in the fraud, and regardless of the fact that the designating petition contained a sufficient number of signatures independent of the three signatures that were fraudulently obtained, we invalidate respondents' designating petition and strike their names from the ballot ...". [internal quotation marks omitted] **Matter of Mattice v Hammond, 2015 NY Slip Op 06637, 3rd Dept 8-20-15**

ELECTION LAW.

ADDRESS ERRORS RENDERED DESIGNATING PETITION INVALID — PETITIONER NOT ENTITLED TO "OPPORTUNITY TO BALLOT."

The Third Department determined that errors in indicating the correct address of signatories invalidated the designating petition. Because such errors are not deemed merely "technical" errors under the Election Law, the petitioner's request for an "opportunity to ballot" was properly denied: "Pursuant to Election Law § 6-130, [t]he sheets of a designating petition must set forth in every instance the name of the signer, his or her residence address, town or city (except in the city of New York, the county), and the date when the signature is affixed. Strict compliance with Election Law § 6-130 is mandated, as its requirements constitute a matter of substance and not of form ... . * * * [T]he discretional remedy of an opportunity to ballot should be granted only where the defects which require invalidation of a designating petition are technical in nature and do not call into serious question the existence of adequate support among eligible voters ... . Here, we find that Supreme Court did not abuse its discretion in concluding that the opportunity to ballot remedy is not appropriate in light of the fact that the defects at issue have been held to be substantive and not technical in nature ...". [internal quotation marks omitted] **Matter of Canary v New York State Bd. of Elections, 2015 NY Slip Op 06638, 3rd Dept 8-20-15**

ELECTION LAW.

FAILURE TO ADMINISTER OATH TO TWO SIGNATORIES INVALIDATED PETITION. WHEN OATH IS REQUIRED UNDER ELECTION LAW EXPLAINED.

The Third Department determined that the failure to administer the oath required by the Election Law to two signatories invalidated the designating petition. The court explained when the oath is required under the Election Law, and when it is sufficient to merely witness a signature: "The Election Law provides a much simpler process for a local party member to obtain petition support for a potential candidate than for an individual of either another political party or from outside the relevant political subdivision. A local party member may obtain petition signatures and affirm with a simple statement that the signatories subscribed the same in my presence on the dates above indicated and identified himself or herself to be the individual who signed this sheet (Election Law § 6-132 [2]). Where the petition is obtained by an individual other than a statutorily authorized local party member, however, the petition may be approved by a notary public or commissioner of deeds, but it is further required that each individual signatory be duly sworn (Election Law § 6-132 [3])." [internal quotation marks omitted] **Matter of Mertz v Bradshaw, 2015 NY Slip Op 06639, 3rd Dept 8-20-15**

ELECTION LAW. MUNICIPAL LAW.

FAILURE TO MEET ONE-YEAR RESIDENCY REQUIREMENT IN COUNTY CHARTER INVALIDATED DESIGNATING PETITION.

The Third Department affirmed the invalidation of petitioner's designating petition because petitioner had not lived in the relevant district for one year, as required by the Albany County Charter. The court held the residency requirement did not violate due process: "[B]y conceding that the address listed on his designating petition is outside the 9th Legislative District and that he did not, in fact, live in that district, petitioner failed to demonstrate that he satisfied the residency requirements and, consequently, did not meet his burden of demonstrating the validity of his designating petition ... . [W]e find that the one-year durational residency requirement imposes a reasonable, nondiscriminatory restriction on prospective candidates and voters that is supported by a rational basis ...". **Matter of Scavo v Albany County Bd. of Elections, 2015 NY Slip Op 06640, 3rd Dept 8-20-15**

FOURTH DEPARTMENT

CRIMINAL LAW, EVIDENCE.

POLICE-MONITORED, RECORDED PHONE CONVERSATION BETWEEN MINOR VICTIM AND DEFENDANT WAS ADMISSIBLE.

In affirming defendant's conviction, the Fourth Department determined a police-monitored, recorded phone conversation between the minor victim and the defendant was admissible. "Vicarious consent" to the recording was given by the victim's mother. The court rejected arguments that the conversation was inadmissible because the victim was acting as a police agent and because the conversation constituted an impermissibly deceptive tactic on the part of the police. **People v Bradberry, 2015 NY Slip Op 06609, 4th Dept 8-19-15**

ELECTION LAW. CIVIL PROCEDURE.

"NAILING" OF PETITION ON LAST POSSIBLE DAY FOR SERVICE WAS SUFFICIENT. RESPONDENT, WHO INITIALLY DECLINED DESIGNATION AS A CANDIDATE, COULD NOT SUBEQUENTLY ACCEPT DESIGNATION AS A SUBSTITUTE CANDIDATE.

The Fourth Department, over a two-justice dissent, determined that the petition seeking invalidation of respondent's designating petition was timely served by "nail and mail" because the nailing occurred on the last possible date for service. The fact the petition could not have been "received" by mail by that date was not determinative. On the merits, the court determined respondent could not be the substitute candidate for a vacancy he himself had created by initially declining the designation. With respect to the service issue, the court wrote: "[T]he petitioner must effectuate actual delivery of the instrument of notice not later than the last day on which the proceeding may be commenced ... . In other words, the respondents must receive delivery of the order to show cause and the verified petition within the [statute of limitations] period ... . That requirement operates irrespective of the court's specific service directions under section 16-116 ... . Contrary to the view of our dissenting colleagues, we conclude that petitioner effectuated actual delivery of the commencement papers when they were affixed to respondent's front door. It is well established that because the [commencement] papers were timely affixed to the front door, the fact that the papers mailed were not received on [or before the statute of limitations date] was not a jurisdictional defect ...". [internal quotation marks omitted] **Matter of Angletti v Morreale, 2015 NY Slip Op 06616, 4th Dept 8-19-15**

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