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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

ADMINISTRATIVE LAW, EVIDENCE.

FINDING THAT LIQUOR LICENSEE WAS AWARE OF THE PRESENCE OF DRUGS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE; RARE DISCUSSION OF THAT ADMINISTRATIVE PROCEEDING STANDARD OF PROOF.
The First Department, over an extensive two-justice dissent, determined the evidence did not support the finding, by the New York State Liquor Authority, that licensee was aware of the presence of illegal drugs on the licensed premises. The decision is instructive about the "substantial evidence" standard of proof in administrative proceedings. The majority held the "substantial evidence" standard was not met: "The dissent points to the testimony of petitioner's head of security that when security guards were on patrol they would sometimes have a staff member, who was not trained to pat people down, watch the door, as allowing an inference to be drawn that lax security measures led to the presence of drugs at the scene. This however, is purely speculative and not based on the record. The quantity of drugs recovered was very small. The uncontroverted police testimony was that the drugs could easily been have secreted on an individual. There was no evidence that the patrons entering the premises were not subjected to a patdown or that given the packaging, a patdown would have detected drugs. Substantial evidence, which has been characterized as a 'minimal standard' or as comprising a 'low threshold,' must consist of such relevant proof, within the whole record, 'as a reasonable mind may accept as adequate to support a conclusion or ultimate fact' ... , it does not, however, 'rise from bare surmise, conjecture, speculation or rumor' ...". ***Matter of Home Run KTV Inc. v. New York State Liq. Auth.*, 2016 N.Y. Slip Op. 05834, 1st Dept 8-18-16**

CIVIL PROCEDURE.

LAW OFFICE FAILURE DEEMED A REASONABLE EXCUSE, DEFAULT JUDGMENT VACATED.
The First Department determined law office failure was a proper basis for vacating a default judgment (the underlying case was deemed meritorious): "Under certain circumstances, law office failure may provide a reasonable excuse for a default ... . At oral argument, respondents essentially conceded that, in this e-filed case, their office failed to regularly check its email and, as a result, was unaware of the motion court's order that gave rise to the default. Respondents' excuse was sufficiently particularized and there is no evidence of wilful or contumacious conduct on their part ...". ***Matter of Rivera v. New York City Dept. of Sanitation*, 2016 N.Y. Slip Op. 05837, 1st Dept 8-18-16**

CONTRACT LAW, DEFAMATION.

PUBLICITY AGENT FOR A BROADWAY SHOW BREACHED THE COVENANT OF GOOD FAITH AND FAIR DEALING BY SENDING EMAILS TO AN INVESTOR DESIGNED TO SINK THE PRODUCTION.
The First Department, in a full-fledged opinion by Justice Friedman, determined a publicity agent for a Broadway show breached the covenant of good faith and fair dealing implicit in the agent's contract with the show's producer. The agent, Thibodeau, sent emails to an investor which were intended to sink the project, and the investor pulled out. The defamation and tortious interference causes of action will go to trial. But the breach of contract cause of action was demonstrated as a matter of law. The plaintiff is a limited partnership formed to put on the show, RBLP: "The record establishes that Thibodeau, without RBLP's authorization, and using confidential information he had obtained as a result of his employment as RBLP's press representative, sent an email directly to Runsdorf, a key potential investor who had desired to remain anonymous, causing Runsdorf to withdraw his financial commitment, all of which resulted in the cancellation of rehearsals and the play's failure to open. Even assuming that his conduct did not violate the express terms of his agreement to act as the play's press representative, Thibodeau breached the implied duty of good faith and fair dealing by essentially defeating the purpose of the agreement by his actions ... . Thibodeau was hired by RBLP to use his public relations skills to facilitate the production of a play; his actions, in which he made use of confidential information that RBLP had entrusted to him in the course of his employment, made it impossible for RBLP to produce the play as planned. It is difficult to imagine a plainer case of a party to a contract utterly defeating the purpose for which the other party had entered into that contract, or a more blatant example of an agent's disloyalty to his principal ..". ***Rebecca Broadway L.P. v. Hotton*, 2016 N.Y. Slip Op. 05839, 1st Dept 8-18-16**

SECOND DEPARTMENT

ANIMAL LAW.

EVEN IF ANIMAL SHELTER FAILED TO INFORM PLAINTIFF OF THE DOG'S VICIOUS PROPENSITIES, THAT FAILURE WAS NOT THE PROXIMATE CAUSE OF THE DOG BITE; PLAINTIFF HAD AMPLE OPPORTUNITY TO OBSERVE THE VICIOUS PROPENSITIES PRIOR TO THE BITE.

The Second Department, reversing Supreme Court, determined defendant animal shelter could not be held liable for a dog bite, even if the shelter breached its duty to inform plaintiff, who adopted the dog, of the dog's vicious propensities. The plaintiff observed the dog's vicious propensities after bringing the dog home. Therefore, the animal shelter's breach was not the proximate cause of the bite: "Here, even if the defendant breached its duty to disclose the dog's vicious propensities known to it, or 'ascertainable by the exercise of reasonable care' at the time of the plaintiff's adoption ... , by failing to inform the plaintiff that the dog had previously bitten someone in the face, any such breach was not a proximate cause of the plaintiff's injuries. The dog's displays of aggressive behavior during the three and a half months the plaintiff owned it, and the fact that it first bit the plaintiff on July 13, 2012, gave the plaintiff sufficient knowledge of the dog's vicious propensities before she was bitten again on September 3, 2012 ...". ***Tighe v. North Shore Animal League Am.*, 2016 N.Y. Slip Op. 05807, 2nd Dept 8-17-16**

CIVIL PROCEDURE.

PREJUDGMENT INTEREST NEED NOT BE PAID INTO THE COURT PURSUANT TO CPLR 2601 WHEN SUCH A PAYMENT IS MADE TO STOP THE ACCRUAL OF INTEREST.

The Second Department, reversing Supreme Court, determined defendant need not pay prejudgment interest when it paid the policy limits into the court pursuant to CPLR 2601 to stop the accrual of interest on that amount: "In this action to recover damages for medical malpractice, after a jury trial, a judgment was entered in favor of the plaintiffs and against, among others, the defendant New York Methodist Hospital (hereinafter NYMH) in the total present value sum of $13,815,290. In an order dated September 24, 2014, the Supreme Court granted NYMH's motion pursuant to CPLR 2601, inter alia, for leave to pay the limits of its insurance policy, $7,500,000, into court in order to stop the accrual of interest on that amount. * * * … CPLR 2601 does not mandate that any specific amount of money be paid into court or require that interest on the amount to be paid into court from the date of the verdict to the date of deposit be paid at or around the time of deposit. Therefore, NYMH was not required to pay into court an additional $619,520.55, which represented the accrued interest from the date of the verdict to the date of deposit. Accordingly, the order must be reversed." ***Sence v. Atoynatan*, 2016 N.Y. Slip Op. 05804, 2nd Dept 8-17-16**

CRIMINAL LAW, ATTORNEYS.

FAILURE TO PROHIBIT T-SHIRTS MEMORIALIZING THE VICTIM AND THREE UNPRESERVED INSTANCES OF PROSECUTORIAL MISCONDUCT WERE HARMLESS ERRORS INDIVIDUALLY, BUT THE CUMULATIVE EFFECT REQUIRED A NEW TRIAL.

The Second Department, after finding the court's allowing the wearing of T-shirts memorializing the murder victim and three (unpreserved) instances of prosecutorial misconduct harmless individually, the cumulative effect of the "harmless" errors was deemed sufficient to reversed defendant's conviction: "After asking the members of the audience to stand up for a moment so as to view the T-shirts, the court stated that there was no basis to limit their right to wear items or make a statement since they had a First Amendment right to do so. * * * The prosecutor improperly appealed to the jury's sympathy by eliciting testimony from the victim's mother that the victim's wife was expecting a child and expressing sympathy for her loss ... . * * * The prosecutor committed misconduct of a different sort during summation when, while playing a surveillance video introduced into evidence at trial, she identified certain barely visible figures on the screen as the victim and the defendant." ***People v. Holiday*, 2016 N.Y. Slip Op. 05816, 2nd Dept 8-17-16**

EDUCATION-SCHOOL LAW, CIVIL PROCEDURE.

TEACHER'S PETITION TO REVIEW DEPARTMENT OF EDUCATION'S JOB PERFORMANCE RATING SHOULD NOT HAVE BEEN DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION, CRITERIA EXPLAINED.

The Second Department determined Supreme Court should not have dismissed the teacher's Article 78 petition seeking review of the NYC Department of Education's (DOE's) job performance rating. The court explained the review criteria in the context of a motion to dismiss the petition for failure to state a cause of action: "… [T]he petition and the documents annexed to it establish a cognizable claim that the respondents' determination was made in violation of lawful procedure, or was arbitrary and capricious or an abuse of discretion. Contrary to the respondents' contention, the petitioner's claim is not a mere disagreement as to whether the rating of "unsatisfactory" was deserved. Rather, as set forth in the petition, the

petitioner alleges that the process used by the respondents in arriving at the rating was based on a failure to observe her entire class lesson, faulty background knowledge, and unlawful procedure." ***Matter of Kunik v. New York City Dept. of Educ.*, 2016 N.Y. Slip Op. 05812, 2nd Dept 8-17-16**

EMPLOYMENT LAW.

PROVISIONS OF POLICY MANUAL DID NOT CONSTITUTE ENFORCEABLE OBLIGATIONS.

The Second Department, reversing Supreme Court, determined defendants' summary judgment motion should have been granted. Plaintiff employees argued they were entitled to severance pay in accordance a policy manual. Policy manuals which can be amended or withdrawn unilaterally do not obligate the employer unless there is a regular practice and reliance: "Provisions contained in company policy manuals which, like the one in this case, can be amended or withdrawn unilaterally, do not constitute enforceable obligations owing from an employer to its employees absent a showing of a regular practice by the employer to provide the benefits now claimed, the employee's knowledge of the practice, and his or her reliance upon such practice as evidenced by accepting or continuing employment as a result thereof ...". ***Cohen v. National Grid USA*, 2016 N.Y. Slip Op. 05786, 2nd Dept 8-17-16**

FAMILY LAW.

CHILD SUPPORT PROVISIONS OF A STIPULATION OF SETTLEMENT DID NOT COMPLY WITH THE CHILD SUPPORT STANDARDS ACT, PROVISIONS SHOULD HAVE BEEN VACATED.

The Second Department, reversing Supreme Court, determined the child support provisions of a stipulation of settlement (divorce) should have been vacated because the provisions did not comply with the Child Support Standards Act (CSSA): "Here, the child support provision in the parties' stipulation of settlement did not include a calculation of basic child support pursuant to the CSSA or a recital that such calculation would result in the presumptively correct amount of child support ... . In addition, that provision makes no distinction between the defendant's obligation to pay basic child support and his obligation to pay other support for the child not required by statute, such as the child's college tuition and other expenses incurred by the child after his 21st birthday." ***Young v. Young*, 2016 N.Y. Slip Op. 05809, 2nd Dept 8-17-16**

PERSONAL INJURY, MUNICIPAL LAW, IMMUNITY.

INVESTIGATION OF CHILD ABUSE IS A DISCRETIONARY ACT, CITY CAN NOT BE SUED FOR NEGLIGENT INVESTIGATION; NEW YORK DOES NOT RECOGNIZE A CAUSE OF ACTION FOR NEGLIGENT INVESTIGATION.

The Second Department determined the City of New York was immune from a suit alleging the negligent investigation of child abuse, leading to the child's death two years later. The court also noted that New York does not recognize a cause of action for negligent investigation or prosecution: "... [T]he defendants contended and established that they engaged in discretionary conduct in investigating the report of abuse in 2003, and thus cannot be held liable for the manner in which the investigation was performed under the doctrine of governmental immunity ... . A government's performance of a governmental function, when discretionary in nature, cannot result in liability .. . Discretionary acts 'involve the exercise of reasoned judgment which could typically produce different acceptable results' ... . The defendants demonstrated that the subject investigation consisted of a series of discretionary acts ... , and that this was not a situation in which no discretion or judgment was exercised. In any event, the defendants also demonstrated their prima facie entitlement to judgment as a matter of law by establishing that New York does not recognize a cause of action sounding in negligent investigation or negligent prosecution ...". ***Hines v. City of New York*, 2016 N.Y. Slip Op. 05794, 2nd Dept 8-17-16**

PERSONAL INJURY, MUNICIPAL LAW, LANDLORD-TENANT.

LESSEE AND CITY NOT LIABLE FOR HOLE IN SIDEWALK; DEFECT WAS NOT IN THE CURB CUT OR PEDESTRIAN RAMP FOR WHICH THE ABUTTING PROPERTY OWNER WOULD NOT BE RESPONSIBLE.

The Second Department determined the lessee of property abutting a sidewalk and the city (NYC) were entitled to summary judgment in this slip and fall case. The city argued it did not have prior written notice of the hole in the sidewalk. The lessee, El Fuerte, argued it did not create the dangerous condition, did not violate any statute or ordinance, and the lease imposed no duty to repair the sidewalk. With regard to the liability of the abutting property owner, the court noted that, although a curb cut and pedestrian ramp leading from a sidewalk to the street are not the responsibility of the abutting property owner, the defect here was not in the curb cut or ramp: "... [A] lessee of property which abuts a public sidewalk owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except where the abutting lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk which imposes liability upon the lessee for injuries caused by a violation of that duty ... . * * * ... [A] provision of a lease which obligates a tenant to repair a sidewalk does not impose on the tenant a duty to a third party, such as the plaintiff." ***Martin v. Rizzatti*, 2016 N.Y. Slip Op. 05797, 2nd Dept 8-17-16**

THIRD DEPARTMENT

CRIMINAL LAW, ATTORNEYS, APPEALS.

GRAND-JUROR BIAS ISSUE IS FORFEITED BY A GUILTY PLEA; ERRONEOUS ADVICE RE APPEALABILITY OF THE ISSUE REQUIRED REMITTAL TO GIVE DEFENDANT OPPORTUNITY TO MOVE TO WITHDRAW HIS PLEA.

The Third Department, over an extensive dissent, determined: (1) a claim of grand juror bias is forfeited by a guilty plea; and (2) erroneous advice from defense counsel indicating the issue was appealable the guilty plea provided defendant with a ground for moving to withdraw his plea: "Inasmuch as defendant's misunderstanding as to his ability to appeal the juror bias issue was brought to County Court's attention at sentencing, we find that defendant's challenge to the voluntariness of his plea has been sufficiently preserved for our review ... , notwithstanding the absence of an appropriate postallocution motion. Once County Court learned that defendant had been given erroneous advice by counsel, the court should have conducted a further inquiry to ascertain whether defendant wished to go forward with the plea ... . Absent such inquiry by County Court, and in light of the fact that the record otherwise presents 'a genuine issue of fact as to the knowing, intelligent and voluntary nature of defendant's guilty plea' ... , this matter must be remitted to County Court to afford defendant an opportunity to either accept the plea that was offered or move to withdraw his plea ...". ***People v. Clark*, 2016 N.Y. Slip Op. 05831, 3rd Dept 8-18-16**

ELECTION LAW.

DESPITE REGISTERING TO VOTE IN WASHINGTON DC, CANDIDATE FOR STATE SENATE MET NEW YORK'S RESIDENCY REQUIREMENTS.

The Third Department, over a two-justice dissent, reversing Supreme Court, determined that a candidate for State Senator (Glickman) met the five-year New York residency requirement, despite Glickman's having registered to vote in Washington D.C. in 2014: "Under the circumstances here, the evidence adduced regarding compliance with the five-year residency requirement demonstrates Glickman's 'legitimate, significant and continuing attachments' in order to establish New York as his residence for Election Law purposes ... . Even if Glickman had registered and voted in Washington, D.C., based on how New York courts have interpreted Election Law § 1-104 (22), that, in and of itself, does not demonstrate as a matter of law that he intended to abandon his New York residence at the precise point of registering ... . Because objectors failed to establish by clear and convincing evidence any 'aura of sham' in Glickman's electoral residency for the purpose of obtaining the candidacy ... , the petitions should not have been invalidated." ***Matter of Glickman v. Laffin*, 2016 N.Y. Slip Op. 05841, 3rd Dept 8-18-16**

FOURTH DEPARTMENT

CRIMINAL LAW, ATTORNEYS.

JUDGE'S FAILURE TO ADDRESS JURY NOTES BEFORE THE VERDICT NOT REVIEWED IN THE INTEREST OF JUSTICE, DEFENSE COUNEL MAY HAVE HAD A STRATEGIC REASON FOR NOT OBJECTING, CONVICTION AFFIRMED AFTER COURT OF APPEALS REVERSAL.

In a case reversed by the Court of Appeals and remitted, the Fourth Department, over a two-justice dissent, refused to exercise its interest of justice jurisdiction to address an unpreserved "jury note" error. The jury sent out to notes which the trial judge read into the record. But before the judge responded to the notes, the jury rendered a verdict. Defense counsel did not object to the failure to address the notes. The Fourth Department had reversed, finding the failure to respond to the notes a mode of proceedings error (not requiring preservation). The Court of Appeals reversed the Fourth Department, finding the error needed to be preserved: "... [T]he only remaining issue to be decided is whether we should exercise our power to review defendant's unpreserved contention regarding the unanswered jury notes as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]). We decline to do so. As the Court of Appeals noted, defense counsel 'may have made a strategic choice not to challenge the trial court's procedure,' and 'may have decided that the jurors were more likely to acquit defendant if they were not given the chance to deliberate further' ... . Such a strategic decision, if made, would have been entirely reasonable considering that the jury had asked for, among other things, a readback of testimony from the key prosecution witness. Because defense counsel may have had a legitimate, strategic reason for not objecting to the court's procedure, we respectfully disagree with the dissent that defendant was "seriously prejudiced" by the court's taking of the verdict." ***People v. Mack*, 2016 N.Y. Slip Op. 05825, 4th Dept 8-17-16**

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