## ARBITRATOR'S AWARD OF $63,000 UNDER THE LEMON LAW BASED UPON NOISES FROM THE VEHICLE WAS NOT SUPPORTED BY ADEQUATE EVIDENCE (FIRST DEPT).

The First Department, reversing Supreme Court, determined the arbitration award in this Lemon Law case was not supported by adequate evidence. Respondent Leonidou leased a BMW and brought an action under the Lemon Law (General Obligations Law 198-a) alleging noises impaired the value of the vehicle. The arbitrator awarded Leonidou nearly $63,000:

> The Lemon Law applies to defects in car parts and workmanship that are expressly warrantied from defect by the manufacturer/dealer (see General Business Law § 198-a[b][1]). Under the statute, when a manufacturer is unable to correct a defect or condition that "substantially impairs" the value of the motor vehicle after a reasonable number of attempts, the manufacturer, at the option of the consumer, is required either to (1) replace the motor vehicle with a comparable motor vehicle or (2) accept return of the vehicle and refund the full purchase price to the consumer (General Business Law § 198-a[c][1]). It is undisputed that Leonidou was offered a replacement vehicle by BMW and the dealership in accordance with General Business Law § 198-a (c)(1). Leonidou exercised his option not to replace his vehicle.
>
> Leonidou failed to present any evidence to show a defect in materials or workmanship that was covered by an express warranty … . Leonidou acknowledged that the noise issues did not affect the car's safety or operation. He admitted that other drivers he knew, driving the same vehicle type, experienced similar noises, and BMW's witnesses, who testified to their technical experience in repairing such vehicles, attested that the noises at issue were inherent in the SUV design due to its, inter alia, stiffer suspension for off-road conditions. There was no basis in this record to find that the noises otherwise substantially impaired the value of the vehicle to Leonidou … . Matter of BMW of N. Am., LLC v Leonidou, 2020 NY Slip Op 02858, First Dept 5-14-20

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## THE PARTIES DID NOT AGREE THAT THE INITIAL 'PARTIAL' ARBITRATION AWARD WAS A FINAL AWARD; THEREFORE THE ARBITRATORS HAD THE AUTHORITY TO REVISIT THE MATTER AND ISSUE A VALID FINAL AWARD (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, reversing the Appellate Division, determined the arbitrators had the power to revisit a "partial final award" and issue a valid final award. The Appellate Division had held the doctrine of functus officio prohibited the arbitrators from revisiting the initial award:

> … [T]he Appellate Division held, that the arbitration panel exceeded its authority because it violated the common law doctrine of functus officio … . Functus officio, Latin for "having performed [one's] office" … , has operated historically as a restriction on the authority of arbitrators, precluding them from taking additional actions after issuing a final award. As this Court stated well over one hundred years ago, "[a]s soon as [the arbitrators] have made and delivered their award, they become functus officio, and their power is at an end. After having once fully exercised their judgment upon the facts submitted to them and reached a conclusion which they have incorporated into their award, they are not at liberty at another and subsequent time to exercise a fresh judgment on the case and alter their award" … . * * *
>
> This Court has not had occasion to determine whether or under what circumstances parties may agree to the issuance of a final award that disposes of some, but not all, of the issues submitted to the arbitrators; nor must we resolve that question in this case. Even assuming that parties to an arbitration may agree to the issuance of a partial determination that constitutes a final award, the parties here, as the arbitration panel below concluded, did not reach any such agreement. American Intl. Specialty Lines Ins. Co. v Corporation, 2020 NY Slip Op 02529, Second Dept 4-30-20

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## NONSIGNATORY NOT BOUND BY ARBITRATION CLAUSE IN ENGAGEMENT LETTER (FIRST DEPT).

The First Department, noting that Supreme Court should have decided whether a nonsignatory was bound by an arbitration clause and deciding the issue in the interest of judicial economy, determined the nonsignatory was not bound:

> Millennium Lab Holdings, Inc. and Millennium Lab Holdings II, LLC (Millennium Holdings, LLC), pursuant to an engagement letter, retained petitioner KPMG LLP to audit their financial statements for certain time periods. The engagement letter contained a clause requiring arbitration of "[a]ny dispute or claim arising out of or relating to this Engagement Letter or the services provided hereunder." * * *

The parties agree that the only theory under which respondent, as a nonsignatory to the engagement letter containing the arbitration clause, can be required to arbitrate is on the equitable estoppel/direct benefits grounds. We find that petitioner has not met its "heavy burden" … under that theory.

The benefits that the investors whose interests respondent represents derived from the engagement letters between petitioner and nonparty Millennium were "merely indirect" … . Here … respondent pleaded solely common-law claims and did not invoke the engagement letter … . …

Millennium and petitioner did not contemplate that the investors represented by respondent would benefit from the engagement letter. …

… [T]here is no indication in the record that the investors whom respondent represents had actual knowledge of the engagement letters between petitioner and Millennium … . Matter of KPMG LLP v Kirschner, 2020 NY Slip Op 02286, First Dept 4-16-20

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## RESPONDENT WAIVED HIS RIGHT TO ARBITRATE HIS TERMINATION PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT BY BRINGING A BREACH OF CONTRACT ACTION SEEKING THE SAME RELIEF ON THE SAME GROUNDS, AS WELL AS DAMAGES (THIRD DEPT).

The Third Department, reversing Supreme Court, determined respondent (Ferreira) had waived his right to arbitrate his discharge from employment as a teacher pursuant to the collective bargaining agreement (CBA) because he sought an action at law seeking the same relief on the same grounds, as well as damages:

> "Generally, when addressing waiver, courts should consider the amount of litigation that has occurred, the length of time between the start of the litigation and the arbitration request, and whether prejudice has been established" … . Moreover, the Court of Appeals has found no waiver where the ultimate objective of multiple procedures is the same, but the grounds urged for relief are discrete … .
>
> Here, Ferreira waived his right to arbitrate because he chose to pursue an action at law asserting virtually the same grounds for relief and remedies sought in the arbitration. His notice of claim, alleging breach of contract, was filed approximately three months prior to his request for arbitration. An action was thereafter commenced, which was still pending at the time of oral argument, and, "[b]y commencing an action at law involving arbitrable issues, [Ferreira] waived whatever right [he] had to arbitration" … . Although use of litigation to preserve the status quo while awaiting arbitration does not effectuate waiver, Ferreira did not merely seek an equitable relief; rather, he sought monetary damages and other affirmative relief as a result of the termination of his employment and petitioner's alleged violation of the CBA … . Matter of New Roots Charter Sch. (Ferreira), 2020 NY Slip Op 02223, Third Dept 4-9-20

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## RESPONDENT'S FAILURE TO ATTEND INDEPENDENT MEDICAL EXAMS RENDERED THE NO-FAULT INSURANCE POLICY VOID AB INITIO (FIRST DEPT).

The First Department, vacating the arbitrator's award, determined the no-fault policy was void because respondent failed to attend independent medical examinations:

> The master arbitrator's award was arbitrary in that it irrationally ignored well-established precedent that "the no-fault policy issued by petitioner was void ab initio due to respondent's assignor's failure to attend duly scheduled independent medical exams" … . Matter of Global Liberty Ins. Co. of N.Y. v Capital Chiropractic, P.C., 2020 NY Slip Op 01466, First Dept 3-3-20

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## THE COLLECTIVE BARGAINING AGREEMENT DID NOT ALLOW THE AWARD OF BACK PAY TO AN EMPLOYEE WHO FACED DISCIPLINARY ACTION RELATING TO A

## CRIMINAL OFFENSE BUT WAS ULTIMATELY ACQUITTED AFTER TRIAL; THEREFORE THE ARBITRATOR EXCEEDED HIS AUTHORITY (THIRD DEPT).

The Third Department determined the arbitrator exceeded his authority in awarding back pay to a corrections officer (Spratley) who was terminated by the Department of Corrections and Community Services (DOCCS) after shooting someone while off-duty. The officer was found not guilty of the criminal offense but was subject to disciplinary action based upon the incident:

> … Section 8.4 of the CBA [collective bargaining agreement] sets forth the procedures under which DOCCS may suspend an employee without pay prior to the service of a notice of discipline and the limited circumstances under which back pay is owed following that act. Spratley was suspended without pay pursuant to section 8.4 (a) (2), which, in relevant part, authorizes that step for "an employee charged with the commission of a crime." The same section provides that, where DOCCS fails to serve a notice of discipline within 30 days of the suspension or seven days after learning of a disposition of the criminal charges, "whichever occurs first," an award of back pay is called for. There is nothing to suggest, and the arbitrator did not find, that either of those conditions were satisfied. … Section 8.4 (a) (5) provides another path for an award of back pay where the suspended employee does not face related disciplinary action and is "not found guilty" of the pending criminal charges, but Spratley did face related disciplinary action. The CBA accordingly contains no provision for the "retroactive" invalidation of the interim suspension and award of back pay under the circumstances presented, and the arbitrator, who was expressly barred by a term of the CBA from adding to, subtracting from or otherwise modifying its provisions, was powerless to add one … . Thus, the arbitrator exceeded his authority in making an award of back pay, and Supreme Court should have granted respondents' cross motion to the extent of vacating that award. Matter of Spratley (New York State Dept. of Corr. & Community Supervision), 2020 NY Slip Op 01424, Third Dept 2-27-20

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## RESPONDENT WAS A CUSTOMER OF PETITIONER SECURITIES CORPORATION WITHIN THE MEANING OF FINANCIAL INDUSTRY REGULATORY AUTHORITY (FIRA) RULES AND THEREFORE COULD COMPEL ARBITRATION (FIRST DEPT).

The First Department, reversing Supreme Court, over an extensive dissent, determined respondent was a customer of petitioner (LekUS) and therefore could compel FINRA (Financial Industry Regulatory Authority) arbitration. Petitioner had been sued by FINRA in connection with shares of Cannibis Science, Inc. (CBIS) purchased by respondent and held by petitioner for trading:

> The record establishes that respondent was a customer of nonparty Lek Securities UK, Ltd. (LekUK), where he had his account, and was also a client of petitioner Lek Securities Corp. (LekUS), with which he had a series of direct agreements. Under those agreements, LekUS conditioned its provision of depository and execution services for certain trades on respondent's providing certain representations and an indemnity … .
>
> Specifically, respondent purchased shares of Cannabis Science, Inc. (CBIS) in a series of transactions in 2015 and 2016 that required that the shares be held and sold in the United States. For each transaction, respondent executed an agreement (Deposit Agreement) directly with LekUS pursuant to which LekUS deposited the shares in its account at the Depository Trust & Clearing Corporation (DTCC). In each Deposit Agreement, (1) respondent represented that his answers to certain questions were true and acknowledged that LekUS would rely on those representations; (2) LekUS agreed to act as the "Processing Broker" to provide the services of depositing and reselling the shares; and (3) LekUS accepted respondent's "Deposit Securities Request" on certain conditions, including that any claims by respondent or disputes arising from respondent's representations in the Deposit Agreement "shall be governed by New York law and subject to the exclusive venue and jurisdiction of the courts and arbitration forums in the City and State of New York," and that respondent would indemnify LekUS in connection with claims arising from respondent's representations in the Deposit Agreement or from "the deposit process or the subsequent sale of the securities."
>
> When respondent sought to trade the CBIS shares deposited with LekUS, he communicated with Michael Mainwald, who was located at the office of LekUS, had a LekUS phone number and email address, and was registered with FINRA as the "principal operating officer" of LekUS.
>
> … LekUS notified respondent that it had been sued by FINRA in connection with CBIS transactions and that LekUS sought indemnification by defendant pursuant to the Deposit Agreements. …
>
> … [R]espondent was a "customer" of LekUS within the meaning of FINRA Rule 12200, and was therefore entitled to demand arbitration. Matter of LEK Sec. Corp. v Elek, 2020 NY Slip Op 01134, First Dept 2-18-20

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## ARBITRATOR'S AWARD IN FAVOR OF DONALD J TRUMP FOR PRESIDENT INC VACATED AS VIOLATING PUBLIC POLICY AND EXCEEDING THE ARBITRATOR'S AUTHORITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined the arbitrator's award in this action based upon a non-disclosure, non-disparagement agreement (NDA) was against public policy and exceeded the arbitrator's authority. Plaintiff was employed by defendant, Donald J. Trump For President, Inc. She signed the NDA as a condition of her employment. Plaintiff brought an employment discrimination action in Supreme Court alleging a hostile work environment, sexual discrimination, defamation and intentional and negligent infliction of emotional distress. Pursuant to the NDA defendant demanded arbitration. Plaintiff then started a federal lawsuit seeking a declaration that the NDA was void and unenforceable and defendant, pursuant to the NDA again demanded arbitration. The arbitrator found plaintiff had breached the NDA by disclosing confidential information in the federal action and making disparaging comments on her GoFundMe pages and on her Twitter account. The First Department held the information disclosed in the federal action was protected by privilege and the comments posted on the Internet were not part of the defendant's demand for arbitration:

> Plaintiff's negative statements about defendant, for which the arbitrator made an award, were made in the context of the federal action in which she sought a declaration that the NDA was unenforceable … . By concluding that the allegations in the federal action are tantamount to disclosure of confidential information violative of the NDA, the arbitrator improperly punished plaintiff for availing herself of a judicial forum. Defendant is hard-pressed to explain how plaintiff could have pursued her rights without setting forth necessary factual statements for the federal court to consider.
>
> The remainder of the award was based upon certain Twitter "Tweets" and statements on a GoFundMe page. The nature of the Demand to Arbitrate, however, was limited to statements made "in connection" with this state action. * * * Defendant relies on plaintiff's actions subsequent to the date of its Demand to Arbitrate in an effort to have the arbitration award confirmed. Since the award takes into account events occurring after the demand, which could not have been legitimately considered at arbitration, the award was made in excess of the arbitrator's enumerated authority. Denson v Donald J. Trump for President, Inc., 2020 NY Slip Op 00923, First Dept 2-6-20

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## QUESTION OF FACT WHETHER AGREEMENT TO ARBITRATE WAS VOID PURSUANT TO REAL PROPERTY LAW 265-b; NOT CLEAR WHETHER DEFENDANT LAW FIRM WAS ACTING AS A CONSULTANT IN A MATTER CONCERNING A DISTRESSED HOME LOAN; IF SO, THE DEFENDANT CAN VOID THE AGREEMENT TO ARBITRATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant law firm was acting as a consultant in matters related to distressed home loans such that any related agreement to arbitrate was void pursuant to Real Properly Law 265-b. Supreme Court had granted the law firm's motion to compel arbitration:

> Real Property Law § 265-b governs the conduct of distressed property consultants. "Distressed property consultant" or "consultant" is defined as "an individual or a corporation, partnership, limited liability company or other business entity that, directly or indirectly, solicits or undertakes employment to provide consulting services to a homeowner for compensation or promise of compensation with respect to a distressed home loan or a potential loss of the home for nonpayment of taxes" … . A consultant does not include, inter alia, "an attorney admitted to practice in the state of New York when the attorney is directly providing consulting services to a homeowner in the course of his or her regular legal practice" … . Real Property Law § 265-b further provides, in part, that "[a]ny provision in a contract which attempts or purports to require arbitration of any dispute arising under this section shall be void at the option of the homeowner" … .
>
> Here, the plaintiff raised a question of fact as to whether the Donado defendants directly provided consulting services to the plaintiff in the course of the Donado defendants' regular legal practice … . The plaintiff asserted in his affidavit, among other things, that he never met with an attorney from Donado Law Firm, P.C. … . Inasmuch as the plaintiff raised a question of fact as to whether the Donado defendants were consultants within the meaning of former Real Property Law § 265-b[1][e][i], there is a question of fact as to whether the plaintiff would be allowed to void the arbitration provision … , and a hearing is required. Ventura v Donado Law Firm, P.C., 2020 NY Slip Op 00888, Second Dept 2-5-20

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## THE PORTION OF THE ARBITRATOR'S AWARD WHICH CONFLICTED WITH THE COLLECTIVE BARGAINING AGREEMENT AND THE PORTION OF THE AWARD WHICH WAS NONFINAL SHOULD NOT HAVE BEEN CONFIRMED BY SUPREME COURT (FOURTH DEPT).

The Fourth Department determined certain findings made by the arbitrator shouldn't have been confirmed by Supreme Court. The matter concerned the elimination of teaching positions to accommodate the hiring of teachers' aides. In one instance the arbitrator's ruling conflicted with the terms of the collective bargaining agreement (CBA). And in the other instance the arbitrator's ruling was nonfinal:

> An award may be vacated where an arbitrator, "in effect, made a new contract for the parties in contravention of [an] explicit provision of [the] arbitration agreement which denied [the] arbitrator power to alter, add to or detract from" the collective bargaining agreement (CBA) ... . ...
>
> An award is nonfinal and indefinite if, inter alia, "it leaves the parties unable to determine their rights and obligations" ... . Matter of Arbitration Between Buffalo Teachers Fedn., Inc. (Board of Educ. of the Buffalo Pub. Schs.), 2020 NY Slip Op 00794, Fourth Dept 1-31-20