MondayMonday

Never The Twain Shall Meet

August 12, 2013

America abhors cheaters. We speak not of marital indiscretions, for those are viewed as personal to the person who is cheated, *e.g.,* Bill Clinton, and are oftimes excused. No, we mean cheating against all of us, as in sport. To cheat in sport; to defame the American standard of "fair play," is not forgiven. Think Lance Armstrong. Better yet, think Alex Rodriguez.

The question goes something like this: If Pete Rose bet on games, but had no effect on their outcome, and is banned from baseball for life, then what punishment befits an Alex Rodriquez, who cheated; who affected the play of the game; who played his teammates, his fans and the gods of baseball for fools? Death? Banishment to Elba? A 211 game suspension?

Huh? How is that fair? Rose didn't cheat. Rodriquez cheated. He had marked cards; he had loaded dice; he had extra weights stashed in the nose of his soap box derby racer. We don't forgive that sort of conduct; we punish it. Severely. Americans don't cheat or tolerate those who do. Not at sports, anyway.

What of those who benefitted from that cheating, either innocently or otherwise? Shouldn't the 1996, 1998-2000 and 2009 World Series titles of the Yankees be held forfeit? In the end, the answer is that these judgments are not ours. As the great Grantland Rice wrote in "Alumni Football": "For when the one great scorer comes to write against your name; he writes not whether you won or lost, but how you played the game." Thanks Mr. Rice for setting us straight.

The First Department reminds us again this week that the East River, though just a tidal straight, is sometimes as broad as the Hudson, separating not two departments, but two different jurisdictions entirely. In *Rodriquez v. DRLD Dev. Corp.*, 2013 NY Slip Op 05548 (1st Dep't, 8/6/13), it takes a moment to, once again, as it did in *Carillo v. 3440 LLC*, 46 A.D.3d 382 (1st Dep't 2007), state that a violation of 12 NYCRR 23-2.1(a)(1), which prohibits stacking of materials in an unsafe manner at a job site, need not occur in a passageway, stairway, walkway or thoroughfare. As we are all too familiar, the Second Department vehemently disagrees, insisting instead that 23-21.1(a)(1) is inapplicable unless the accident occurs in such a "'passageway, walkway, stairway or other thoroughfare'." *Grygo v. 1116 Kings Highway Realty, LLC*, 96 A.D.3d 1002 (2d Dep't 2012). The Court of Appeals? Apparently, it couldn't care less, having denied leave in the *Grygo* case in February. 20 N.Y.3d 859 (2013). So much for a "unified" court system.

No Inherent Power to Dismiss for Sloth

We had thought it rather clear that courts have no authority to dismiss for failure to prosecute in the absence of a 90-day notice under CPLR 3216(b). This is true for all purposes.

In case you ever doubted this proposition, doubt no more. The Second Department has foreclosed the issue thrice and for all this week. *Gatehouse v. NYCHA*, 2013 NY Slip Op 05556 (2d Dep't, 8/7/12); *Armouth–Levy v. NYCTA*, 2013 NY Slio Op 0555` (2d Dep't, 8/7/13); *Campbell v. NYCTA*, 2013 NY Slip Op 05553 (2d Dep't, 8/7/13). Got it? Message clear to all trial courts in the department?

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