

# *State of New York Court of Appeals*

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at (518) 455-7711 or [gspencer@nycourts.gov](mailto:gspencer@nycourts.gov).

To be argued Wednesday, January 10, 2018

## **No. 16 Paramount Pictures Corporation v Allianz Risk Transfer AG**

In 2004, Allianz Risk Transfer AG and three other defendants (collectively, "investors") began investing in the production and distribution of motion pictures by Paramount Pictures Corporation. They made their investments through Melrose Investors LLC and all of the investors were bound by a subscription agreement in which, under one provision, they waived any and all claims against Paramount and, under a second provision, agreed not to sue Paramount. In 2008, the investors sued Paramount in Federal District Court to recoup losses on their investments, alleging that Paramount acted fraudulently in its foreign distribution of the films. Paramount raised an affirmative defense that the claims were barred by the waiver provision of the subscription agreement. Paramount did not raise an affirmative defense based on the covenant not to sue, nor did it assert a counterclaim that the investors breached this covenant. U.S. District Court ruled in favor of Paramount, holding the investors had expressly waived their claims in the subscription agreement. The court also found that Paramount did not act fraudulently or intend to mislead the investors.

Paramount then brought this state court action against the investors based on their alleged breach of the covenant not to sue, seeking to recover \$8 million in attorneys' fees and expenses it incurred in the federal litigation. The investors moved to dismiss the suit as barred by the doctrine of res judicata. They contended that, because rule 13(a) of the Federal Rules of Civil Procedure (FRCP) imposes a compulsory counterclaim requirement on parties in federal court, Paramount was required to raise the breach of the covenant not to sue as a counterclaim in the federal action. Since Paramount did not, they say, it is barred from raising the claim in this state court action. Paramount argued FRCP 13(a) does not apply to state court cases in New York.

Supreme Court denied the motion to dismiss, refusing to apply the compulsory counterclaim requirement of FRCP 13(a). "This State has a permissive counterclaim rule that was enacted by the legislature...", it said. "There's been no case, no State case at all that I have seen that indicates that this Court ... should apply 13A. That would require me to ignore CPLR 3011 in terms of the permissive counterclaims and that would not be proper."

The Appellate Division, First Department reversed and dismissed the suit, holding that FRCP 13(a) applies here and bars Paramount's claim that the investors breached their covenant not to sue. It acknowledged that "New York's permissive counterclaim rule would save it from the traditional bar of res judicata" and that "there is no binding precedent which holds that state courts must apply" the federal compulsory counterclaim rule. However, relying on a federal District Court decision and "dicta" from the Court of Appeals, it concluded "that the later assertion in a state court action of a contention that constituted a compulsory counterclaim [under FRCP 13(a)] in a prior federal action between the same parties is barred under the doctrine of res judicata...."

For appellant Paramount: Richard B. Kendall, Los Angeles, CA (310) 556-2700  
For respondents Allianz et al: James A. Janowitz, Manhattan (212) 421-4100

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To be argued Wednesday, January 10, 2018

## **No. 17 People v Dennis O'Kane**

Dennis O'Kane was charged with 14 misdemeanors for allegedly stalking and harassing his former landlord in Albany for nearly two years after she evicted him in May 2011. The charges included four counts of aggravated harassment in the second degree, two counts of stalking in the fourth degree, and eight counts of criminal contempt in the second degree based on alleged violations of three orders of protection.

To help the jury distinguish between the various charges, Albany City Court added to the verdict sheet a summary of the factual allegations and the dates relating to each count. Under one count the court wrote, "calling approximately 36 times and sending approximately 13 emails;" under a second count it wrote, "calling, emails, and leaving package of personal items;" and under a third it wrote, "calling approximately 90 times, emailing approximately 15 times, and sending a sympathy card." Defense counsel and the prosecutor consented to use of the annotated verdict sheet at the charge conference. O'Kane was convicted of 12 charges and acquitted of two counts of contempt. He was sentenced to two years in jail. On appeal, O'Kane argued that he was deprived of effective assistance of counsel on various grounds, but he raised no issues relating to the annotated verdict sheet.

County Court raised the issue on its own and reversed the conviction, saying, "The verdict sheet is replete with extraneous, and highly inflammatory information.... [I]t is manifest that the cited annotations on the verdict sheet were not authorized by CPL 310.20, and constitutes reversible error." The court said it was "mindful of the fact that defense counsel consented" to the verdict sheet and that "consent can be deemed a waiver of the CPL 310.20(2) violation," but it concluded the annotations were "a fundamental defect impairing defendant's right to a fair trial, akin to a mode of proceedings error requiring reversal...." It also found that defense counsel's consent "evidences ineffective assistance of counsel at its worst," since "the extensive annotations on the verdict sheet effectively marshalled and bolstered the People's proof."

The prosecution argues that defense counsel's consent to the annotated verdict sheet constituted a waiver of the appellate issue which deprived County Court of interest of justice jurisdiction to review it. "That consent constituted a waiver because it was an affirmative abandonment of a legal right by the defendant.... Here, there was discussion between the trial court and the parties regarding the verdict sheet, and the defendant agreed to its use.... That established full consent.... The verdict sheet annotations ... do not constitute a mode of proceedings error and may be waived by the defendant through consent, as every court that has considered the issue has found -- including this one...." It argues the defendant failed to preserve the issue by objection at trial and abandoned the issue by failing to raise it on appeal. It also contends the annotations were neither inflammatory nor bolstering, and defense counsel was not ineffective in consenting to them.

For appellant: Albany County Assistant District Attorney Christopher D. Horn (518) 487-5460  
For respondent O'Kane: Paul R. Edwards, Albany (518) 462-2200

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To be argued Wednesday, January 10, 2018

**No. 18 People v Joseph Sposito**

*(papers sealed)*

Joseph Sposito was charged with rape and criminal sexual act in the first degree for allegedly having vaginal and anal intercourse with a woman who was physically helpless due to alcohol consumption and, thus, incapable of consent. The incident occurred in October 2010 when, after a night of heavy drinking in Albany, Sposito and the complainant went with several others to sleep at a friend's house in the Town of Colonie. The complainant told the police that she had no memory of what happened after they left the last bar until she woke up in a bathroom, naked and covered in blood, with Sposito trying to make her wash off in the shower. She ran into the street screaming for help. During a videotaped interrogation at the Colonie police station, Sposito repeatedly told officers that the complainant was conscious and walking on her own after they left the bar, that she consented to sex, and that they were talking to each other while having sex. However, near the end of the tape, he agreed with them that she did not respond when he knocked on her bedroom door and that he heard only a "murmur" or "noise" when he asked if he could get into her bed.

Prior to trial, Sposito's attorney moved for a Huntley hearing to seek suppression of the videotape on the ground it was obtained in violation of his Miranda rights. County Court granted the hearing, but defense counsel withdrew his motion before it was held, waiving his right to challenge the tape. The prosecutor played the tape for the jury at trial. Sposito was convicted of the charges and sentenced to 20 years in prison. The court denied, without a hearing, his CPL 440.30(1-a) motion for post-verdict DNA testing and his CPL 440.10 motion to vacate the conviction due to ineffective assistance of counsel.

The Appellate Division, Third Department affirmed the conviction, saying Sposito failed to establish on his direct appeal that he received ineffective assistance of counsel because he did not "demonstrate the absence of a legitimate strategy for counsel's decision not to seek suppression" of the videotape. It said, "[H]aving reviewed the video, in which defendant repeatedly professed his innocence and gave a narrative for the events in question largely consistent with what he eventually testified to at trial, we cannot say that defendant established that it was objectively unreasonable for counsel to have watched the video and concluded that it was more favorable than unfavorable to defendant." The court also affirmed the denial of post-verdict DNA testing, saying that even if a test showed the complainant had intercourse with someone else hours before Sposito, this "would not have shown the victim to be any less physically helpless during the sexual encounter." It reversed the denial of Sposito's post-verdict motion on his ineffective assistance of counsel claim and remitted the matter for a hearing.

Sposito argues he was denied effective assistance of counsel "by his attorney's waiver of the suppression hearing he had been granted." He says the motion "was clearly meritorious" and, "in view of the devastating impact of the video" of his statements that the complainant did not respond to his request for consent, "there could be no strategic or other legitimate explanation for counsel's decision to waive the Huntley hearing. He also argues he was entitled to post-verdict DNA testing because proof that another man had intercourse with the complainant before he did "would have provided an alternative explanation for her anal injuries, which furnished the only proof of the anal sex needed to sustain defendant's Criminal Sexual Act conviction. And it would have stripped the People of their argument that the nature of [her] injuries was inconsistent with conscious consent."

For appellant Sposito: Donna Aldea, Garden City (516) 745-1500

For respondent: Albany County Assistant District Attorney Michael C. Wetmore (518) 487-5460