

**People v Kleyman**

2007 NY Slip Op 33829(U)

November 19, 2007

Supreme Court, Suffolk County

Docket Number: 0003614/2006

Judge: C. Randall Hinrichs

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COUNTY COURT, SUFFOLK COUNTY

TRIAL TERM PART 9

THE PEOPLE OF THE STATE OF NEW YORK,

BY: C. RANDALL HINRICHS, J.C.C.

vs

November 19, 2007

IGOR KLEYMAN,  
VYACHESLAV GRINBERG,  
ARIADNA SALACE,

CASE NOS: 3614A, B, and D-2006

Defendants

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The instant indictment charges five defendants, Igor Kleyman, Vyacheslav Grinberg, Christine Prandy, Ariadna Salace and Anatoly Osadchy (A through E, respectively), as follows:

**Count One: Conspiracy in the Fourth Degree** (all five defendants);

**Count Two: Grand Larceny in the Second Degree** (defendants Kleyman and Grinberg only);

**Count Three: Money Laundering in the Second Degree** (defendants Kleyman and Grinberg only);

**Count Four: Insurance Fraud in the Third Degree** (defendants Kleyman, Grinberg, Prandy and Osadchy);

**Count Five: Enterprise Corruption** (all five defendants); and

**Count Six: Criminal Facilitation in the Fourth Degree** (all five defendants.)

Defendants Kleyman and Grinberg have filed a written motion, pursuant to Criminal Procedure Law (CPL) §§ 210.30 and 21020(1) for inspection of the Grand Jury minutes and dismissal of various counts based upon insufficiency of the evidence presented to the Grand

Jury. Defendant Osadchy filed a separate written motion seeking dismissal of the indictment based upon lack of jurisdiction and also based upon insufficiency of the evidence presented to the Grand Jury. Osadchy also sought discovery, Bill of Particulars materials and severance. The People consent to have the Court review the Grand Jury minutes for legal sufficiency and oppose the motion in all other respects. Salace did not file a written motion but appeared at oral argument on September 20, 2007 and joined in the motion to dismiss the indictment for legal insufficiency. Prandy has not filed motions and entered a plea of guilty on October 19, 2007.

On November 8, 2007, prior to a decision by the Court on the instant motions, Osadchy entered a plea of guilty in satisfaction of the indictment and withdrew all pending motions. Accordingly, this decision will not rule on any issues applicable solely to Osadchy.

In arriving at the instant decision the Court has considered; 1) the written motions of Kleyman and Grinberg; 2) the oral arguments of the People and counsel for Kleyman and Grinberg presented on September 20, 2007; and 3) written submissions from counsel for Kleyman and from the People following the September 20, 2007 arguments.

The Court has examined the minutes of the Grand Jury presentation at the request of the defendants, and it is the determination of the Court that the evidence presented to the Grand Jury is legally sufficient to support counts One, Two, Three, Four and Six of the indictment. Moreover, the Grand Jury was adequately instructed on the law, and the proceeding otherwise conforms to the requirements of Article 190 of the CPL as to those counts.

“Legally sufficient evidence--defined as "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof" (CPL 70.10 [1])--means simply a prima facie case, not proof beyond a reasonable doubt ( *People v Mayo*, 36 NY2d 1002, 1004). The reviewing court must consider whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted--and deferring all questions as to the weight or quality of the evidence--would warrant conviction ( *People v Mikuszewski*, 73 NY2d 407, 411; *People v Jennings*, 69 NY2d, at 114-115).” *People v. Swamp*, 84 NY2d 725, 730 (1995.)

Applying this standard, the Court finds that the evidence presented to the Grand Jury is legally sufficient to sustain counts One, Two, Three, Four and Six, as to each defendant. The Grand Jury was presented, along with other evidence, with the testimony of a confidential informant as well as extensive testimony from an undercover detective. Audiotapes from conversations between the defendants and the undercover detective were also introduced.

Turning first to the argument by Kleyman and Grinberg that the element of knowledge is insufficient to support the larceny counts of the indictment (and the other counts derivatively), the Court finds this argument unavailing.

“The People may prove knowledge "circumstantially by conduct or directly by admission, or indirectly by contradictory statements from which guilt may be inferred" ( *People v Reisman*, 29 NY2d 278, 285, cert denied 405 U.S. 1041; see also, *People v Walker*, 166 AD2d 911, lv denied 77 NY2d 845). "Knowledge \* \* \* may be implied based on all of the surrounding circumstances (see, e.g., *People v Dordal*, 55 NY2d 954, 956, rearg dismissed 61 NY2d 759)" ( *People v Turner*, 141 AD2d 878, lv denied 72 NY2d 962.)” *People v. Cadbury Beverages*, 203 AD2d 918, 919, 614 NYS2d 82 (4<sup>th</sup> Dept, 1994.)

Viewing the evidence in the light most favorably to the People, based on all of the evidence presented to the Grand Jury, more than ample evidence was presented from which the

Grand Jury could find that the element of knowledge was established as to both Kleyman and Grinberg, as to each charged crime.

Next, Penal Law (PL) § 460.20 Enterprise Corruption, reads as follows:

*1. A person is guilty of enterprise corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he:*

*(a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity; or*

*(b) intentionally acquires or maintains any interest in or control of an enterprise by participating in a pattern of criminal activity; or*

*(c) participates in a pattern of criminal activity and knowingly invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise.*

*2. For purposes of this section, a person participates in a pattern of criminal activity when, with intent to participate in or advance the affairs of the criminal enterprise, he engages in conduct constituting, or, is criminally liable for pursuant to section 20.00 of this chapter, at least three of the criminal acts included in the pattern, provided that:*

*(a) Two of his acts are felonies other than conspiracy;*

*(b) Two of his acts, one of which is a felony, occurred within five years of the commencement of the criminal action; and*

*(c) Each of his acts occurred within three years of a prior act.*

*3. For purposes of this section, the enterprise corrupted in violation of subdivision one of this section need not be the criminal enterprise by which the person is employed or with which he is associated, and may be a legitimate enterprise.*

The instant indictment charges each defendant under two subdivisions of this statute, PL §§ 460.20(1)(a) (*conducts or participates in the affairs of an enterprise*) **and** 460.20(1)(b) (*acquires or maintains any interest in or control of an enterprise.*) Inasmuch as this count charges the defendants with two different subdivisions, the Court holds that this count as currently drafted is violative of CPL § 200.30 which requires that each count of an indictment charge only one count. This duplicitous count may be either: 1) dismissed without prejudice to re-presentation of the Enterprise Corruption count to another Grand Jury [see, for example *People v Seabrooke*, 152 AD2d 760, 544 NYS2d 379 (2<sup>nd</sup> Dept, 1989)]; or 2) the People may amend the indictment by deleting reference to either one of the two subdivisions [see, for example *People v Tolle*, 144 AD2d 963, 534 NYS2d 271 (4<sup>th</sup> Dept, 1988)], at the People's option. There is ample evidence before the Grand Jury to support both subdivisions. While the People may amend the indictment pursuant to CPL § 200.70, they may only do so subject to the limitations provided therein. Further, any application to amend may not convert count five into two separate counts. See *People v Perez*, 83 NY2d 269 (1994) which held that CPL § 200.70 "certainly does not extend the category so far as to allow the addition of an entirely new count."

Given the Court's decision that the Enterprise Corruption count as drafted is duplicitous, and the defendants' prior motion requesting a Bill of Particulars from the People, the Court, on reconsideration, agrees with the defendants that a Bill of Particulars would be necessary in order

to permit the defendants to properly prepare for trial as to this count. Accordingly, should the People elect to amend the indictment as to the Enterprise Corruption count, the Court directs that a Bill of Particulars be provided by the People which specifies precisely which pattern criminal acts the People contend support the charge as to each defendant. This is necessary because CPL § 310.50(4) requires a “a unanimous special verdict of guilty with regard to each of at least three criminal acts and/or lesser included offenses” before the jury can return a guilty verdict on the Enterprise Corruption count. Should the People elect to re-present the count to another Grand Jury, the issue of the need for a Bill of Particulars will be addressed, if necessary, if a true bill is returned.

The Court will defer on defendant Salace’s claim that the Enterprise Corruption count is insufficient as to her for the People’s failure to establish the requisite pattern criminal acts until after re-presentation or amendment. Salace points out that she is not charged under the Grand Larceny, Money Laundering or Insurance Fraud counts of the indictment. The court notes that the Court of Appeals has made clear that, although the People must *prove* at least three qualifying criminal acts, each such qualifying criminal act need not be separately charged as a count in the indictment. See, *People v Besser*, 96 NY2d 136 (2001.)

Accordingly, the Court sustains the indictment as to counts One, Two, Three, Four and Six, and directs the People make an election in accordance with this decision as to the Enterprise Corruption count under count Five.

This memorandum shall constitute the decision and Order of the Court.

  
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J.C.C.