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ANALYSIS

Are Multiple Preservations Necessary Redux?

Must an objection be raised during trial if it had been previously raised during the litigation? Although the Court of Appeals has held that one pretrial objection preserves the issue, this issue has recurred—but rulings have not always been consistent.

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Litigation

By Elliott Scheinberg | September 11, 2023 at 10:35 AM

This article is in honor and in memory of Angela Susan Scheinberg. I was extraordinarily blessed that she was my wife. On 9/11, her life was savagely wrenched from me and from all who knew and loved her. Angela was a paradigm of kindness and integrity, and a beacon of virtue. I also honor every patriotic American murdered that day.

Three years ago, in CPLR 4404(a), Interests of Justice; Multiple Presentations, NYLJ, July 31, 2020, we discussed whether an objection must be raised during trial if it had been previously raised during the litigation, such as in a motion. Although the Court of Appeals has held that one pretrial objection preserves the issue for appeal, this issue has recurred—but the rulings have not always been consistent.

Review

In *Matter of New York City Asbestos Litig.*, 27 NY3d 1172 [2016] ("NYC Asbestos"), plaintiff's decedent, Dave Konstantin, had worked at two construction sites where defendant Tishman Liquidating Corp. (TLC) was the general contractor. Konstantin was exposed to asbestos dust and was subsequently diagnosed with mesothelioma, which required multiple surgeries, radiation and chemotherapy until his death soon thereafter.

Ten plaintiffs, all represented by the same firm, requested a joint trial pursuant to CPLR 602(a). All the defendants jointly opposed that motion. The U.S. Supreme Court ordered that 7 of the 10 cases, in which the plaintiffs had developed mesothelioma, be tried together and the remaining three cases, in which the plaintiffs had developed lung cancer, be tried together. Konstantin and Dummitt were among the seven cases.

Before trial five of the seven mesothelioma cases settled, leaving only Konstantin and Dummitt to be tried together. The jury found TLC 76% liable for Konstantin's injuries and awarded damages. TLC contended that the Supreme Court abused its discretion in conducting a joint trial. The Appellate Division disagreed and affirmed the judgment.

Two justices dissented in *Dummitt* but concurred in the result in *Konstantin.* Those justices would have declined to address TLC's challenge to the joint trial on the ground that TLC failed to assemble a proper appellate record and therefore meaningful review of the court's order was "impossible". The First Department granted TLC's motion for leave to appeal to the Court of Appeals, certifying the question whether its order was properly made. The Court of Appeals agreed with the dissenting justices.

Court of Appeals Noted That TLC Failed to Preserve Argument—But Did TLC Fail?

The Court of Appeals further noted that TLC had failed to preserve that challenge for appellate review in that "TLC *did not specifically challenge the joint trial of the Dummitt and Konstantin actions until its posttrial motion,* which is insufficient to preserve its contention for appellate review." [at 1176]. The court rejected TLC's argument that having previously joined all defendants in opposing the plaintiffs' pretrial motion, it was unnecessary for TLC to renew its objection after the five other cases settled:

In its pretrial order, Supreme Court considered the plaintiffs' motion to try all 10 cases jointly and concluded that seven of those cases, in which the plaintiffs had developed mesothelioma, should be tried together. The court therefore considered whether seven of those cases shared common questions of law or fact (CPLR 602[a]), and whether the defendants would be prejudiced by a joint trial of all seven.

If, after five of those seven cases settled, TLC believed that Supreme Court should consider the propriety of a joint trial anew by conducting a particularized assessment of whether *Dummitt* and *Konstantin* shared common issues of law or fact and of whether defendants would be prejudiced by the two-case joint trial, it was incumbent upon TLC to object, raise the specific arguments it now asserts with respect to these two cases, and ask the court to conduct that analysis in order to preserve its challenge for appellate review.

No authority is cited nor is any reason given as to why it was "incumbent" upon TLC to renew its previously raised objection.

In *NYC Asbestos Litig,* the Court of Appeals contradicted its own precedent decided only two years earlier and its 1989 ruling that objections raised in a pretrial motion but not raised thereafter during trial are preserved for appeal

The high court's ruling, in *NYC Asbestos Litig*, is unclear and contradictory as, almost exactly two years earlier, in *People v. Finch*, 23 N.Y.3d 408, 413 (2014), the Court held:

As a general matter, a lawyer is not required, in order to preserve a point, to repeat an argument that the court has definitively rejected (*People v. Jean–Baptiste*, 11 N.Y.3d 539, 544 (2008) [having made a specific motion to dismiss for legal insufficiency, defendant was not required to make the same point as an exception to the charge]; *People v. Payne*, 3 N.Y.3d 266, 273 (2004) ["We decline to . . . elevate preservation to a formality that would bar an appeal even though the trial court . . . had a full opportunity to review the issue in question"]). When a court rules, a litigant is entitled to take the court at its word.

* * *

We hold only that *People v. Hines*, 97 N.Y.2d 56 (2001) does not establish a general rule that every argument once made and rejected must be repeated at every possible opportunity.

In *People v. Mahboubian*, 74 NY2d 174, 188 [1989], the Court of Appeals held that certain contentions "were preserved by defendants' pretrial motions to dismiss on that precise ground, even though defendants did not specifically seek dismissal on that basis at the close of the People's evidence."

While the phrase "definitively rejected" appears in other decisions, below, it is unclear how a "definitively" rejected argument differs with respect to preservation, or, with respect to anything else, for that matter, from a simple denial of an argument.

The First Department: 'Finch,' An Ongoing Objection, Inconsistency

Two decisions in the First Department, decided less than three months apart, had different outcomes. In *People v. Woody*, 214 AD3d 157, 166-67 [1st Dept 2023], decided March 14, 2023, the First Department, citing *Finch,* held that "defendant was not required to object each time defendant's prior conviction was mentioned or to both of the court's limiting instructions because defendant made a clear objection during the pretrial motion in limine":

"[A] lawyer is not required, in order to preserve a point, to repeat an argument that the court has definitively rejected" … During the pretrial motions in limine, defense counsel presented a comprehensive argument in opposition to the prosecutor's motion to admit defendant's gun conviction."

Does an ongoing objection preserve an argument? It should if a court directs that it is not receptive to repeated objections. In *Parlux Fragrances v. S. Carter Enterprises,* 190 NYS3d 337, 340 [1st Dept 2023], decided June 1, 2023, the First Department held that "specific objections to the jury instructions and verdict sheet were not required because the court was aware of plaintiffs' ongoing objection (CPLR 4017)."

Parlux's other ruling is, however, surprising: "[A party's] appeal and argument before trial of an earlier motion in the case did not excuse plaintiffs from their obligation to preserve trial objections." Notably absent in *Parlux* is any reference to *Finch.* Equally notable is that the *Woody* panel included two justices from the earlier *Parlux* panel.

Logic might suggest that if an argument was not to be deemed to have been preserved as between *Woody* and *Parlux* it should have been the argument in *Woody* because it was made in the context of an arguably "weaker" procedural motion in that no appeal may be had by right or by permission from the denial of a motion in limine.

The Second Department—An Objection Once Made Need Not Be Repeated

People v. Kennedy, 177 AD3d 628, 629-30 [2d Dept 2019]:

The defendant contends that his conviction of assault in the first degree was based on legally insufficient evidence and against the weight of the evidence, because a conviction of assault in the first degree under Penal Law § 120.10(4) (felony assault) cannot be predicated on a conviction of assault in the second degree under Penal Law § 120.05(3), which provides that a person is guilty of that crime when, "[w]ith intent to prevent … a police officer … from performing a lawful duty, … he or she causes physical injury to such … police officer."

Although defense counsel failed to move for a trial order of dismissal making an argument "specifically directed" at the alleged error (People v. Gray, 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 652 N.E.2d 919; see CPL 470.05[2]), the defendant's legal sufficiency argument is preserved for appellate review, as the defendant moved, in his pretrial omnibus motion, to dismiss the count of the indictment charging assault in the first degree on the basis that there was no underlying felony that could serve as a predicate to that charge (*People v. Finch,* 23 N.Y.3d 408, 410, 991 N.Y.S.2d 552, 15 N.E.3d 307; People v. Mahboubian, 74 N.Y.2d 174, 188, 544 N.Y.S.2d 769, 543 N.E.2d 34).

The Third Department

The Third Department, relying on *Finch* has held:

People v. Wakefield, 175 AD3d 158, 166 [3d Dept 2019], affd, 38 NY3d 367 [2022], like *Woody,* involved a motion in limine:

Defendant raised his Confrontation Clause argument in his motion in limine before Supreme Court, the People had an opportunity to, and did, respond and "[the court] ruled definitively on the legal argument that defendant makes on this appeal."

People v. Maisonette, 192 AD3d 1325, 1330 [3d Dept 2021], lv to appeal denied, 37 NY3d 966 [2021], also addresses motions in limine:

Defendant's primary allegations of ineffective assistance rely upon counsel's failure at trial to renew objections to the admissibility of evidence and to move to strike testimony. Because Supreme Court had decided these issues prior to the testimony in question, in response to pretrial motions or motions in limine, counsel was not required to renew his objections upon the elicitation of the testimony nor move to strike it in order to preserve the objections for appellate review.

People v. Smith, 174 AD3d 1039, 1043 [3d Dept 2019]:

[O]ver defendant's objections, County Court granted the People's pretrial motion to introduce the challenged hearsay testimony under the co-conspirator exception to the hearsay doctrine. The friend's trial testimony was consistent with the testimony contemplated by the People's motion and subsequently ruled upon by County Court prior to trial. Under these circumstances, defense counsel was "not required, in order to preserve a point, to repeat an argument that the court ha[d] definitively rejected."

The Fourth Department

The Fourth Department decisions all cite *Finch. People v. Parilla*, 211 AD3d 1609, 1611 [4th Dept 2022], lv to appeal denied, 39 NY3d 1112 [2023], the Fourth Department held: "…defendant's legal sufficiency contention made on appeal is not otherwise preserved for our review because, contrary to defendant's assertion, that contention is not based on a pretrial legal argument that was definitively rejected by the court." A pretrial motion was sufficient to preserve the argument.

People v. Johnson, 203 AD3d 1649 [4th Dept 2022], lv to appeal denied, 38 NY3d 1071 [2022]:

Defendant contends in both appeals that County Court erred in permitting two fingerprint examiners to testify to their opinions within "a reasonable degree of scientific certainty." Contrary to the People's assertion, defendant preserved his contention for our review by specifically objecting to testimony from the first fingerprint examiner that her opinion was made to a reasonable degree of scientific certainty … The court overruled that objection, definitively rejecting defendant's challenge to the form of the opinion questions posed to the witness, and thus defendant was not required to repeat the objection in order to preserve for review his contention with respect to the second fingerprint examiner.

Matter of Carmela H., 185 AD3d 1460, 1461 [4th Dept 2020]:

Respondents objected to the notes of the first caseworker on the grounds that they now raise on appeal, thereby preserving their contentions with respect to that set of notes … The court overruled respondents' objections, *definitively rejecting* their challenges to the admission of the first caseworker's notes, and thus respondents were not required to repeat the same arguments in order to preserve their contentions with respect to the second caseworker's notes.

In *People v. Wallace*, 147 A.D.3d 1494 (4th Dept 2017), the Fourth Department held:

Although defendant's motion for a trial order of dismissal was not specifically directed at the legal sufficiency of the evidence [] inasmuch as he unsuccessfully argued that issue before trial, defendant need not "repeat the argument in a trial motion to dismiss in order to preserve the point for appeal" (quoting People v. Finch, 23 N.Y.3d 408 …).

Also see: *State v. Nervina*, 120 A.D.3d 941 (4th Dept 2014), aff'd., 27 N.Y.3d 718 [2016].

Conclusion

The lesson is to err on the side of overcaution and to re-dot the i's and re-cross the t's during trial by remaking every pretrial objection, even those raised in motions.

Elliott Scheinberg *is a member of the New York State Bar Association Committee on Courts of Appellate Jurisdiction. He is the author of "The New York Civil Appellate Citator" (NYSBA, 2d ed., 2 vols 2022) and "Contract Doctrine and Marital Agreements in New York" (NYSBA, 5th ed., 2 vols 2023). He is also a fellow of the American Academy of Matrimonial.*

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