



AiA Art News-service



WYWH: Knoedler Trial Uncut (Week 2)

By Center for Art Law Team



Source: The New York Times (Feb. 8, 2016).

Another exciting and riveting week has passed in Courtroom 318, where District Judge Paul Gardephe is presiding over the trial in the case brought by Domenico and Eleanor De Sole against Ann Freedman, Knoedler Gallery, and 8-31 Holdings and others. Over a course of about

15 years, Knoedler sold almost 40 works brought to the Gallery by Glafira Rosales. She admitted following a grand jury investigation and an indictment that all of the works she handled were forgeries. The Gallery earned about \$80 million on the transactions involving Rosales trove and transferred over \$20 million of that amount to its parent company, 8-31 Holdings, before closing to the public in November 2011. Both Knoedler Gallery LLC and 8-31 Holdings Inc. are incorporated in Delaware and were operating out of 19 E 70th Street, a stone’s throw away from the Frick Museum and other art institutions of the City.

As some art attorneys like to say, judges want to give opinions in art related cases. So who is presiding over the first Knoedler trial?

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHIEF JUDGE LORETTA A. PRESKA
RUBY J. KRAJICK, CLERK OF COURT

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<p>Hon. Paul G. Gardephe United States District Judge</p> <p>Thurgood Marshall United States Courthouse 40 Foley Square New York, NY 10007</p> <p>Courtroom: 705 Chambers Phone: (212) 805-0224 Deputy Phone: (212) 805-0102</p>	<p>Rulings of Special Interest</p> <p>February 9th, 2016 Benjamin Gross v. GH Group, Inc., et al.</p> <p>February 4th, 2016 United States of America, ex rel. Ilya Eric Kekelinsky v. Moody's Corporation et al.</p>
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1. Meet the Judge:

Judge Gardephe is a graduate of Columbia Law School who was nominated to the Southern District of New York in 2008 by George W. Bush. He has handled a number of fraud cases and high profile cases but the Knoedler cases appears to be the first arts related case on Judge Gardephe’s docket. Throughout the Knoedler trial, Judge Gardephe has been thoughtful in his consideration of objections and evidence admittance as well as diligent in his management of the trial. During the jury selection, Judge Gardephe underscored the civic duty that the members of the jury are called upon to perform and was very reluctant to accept mundane reasons presented by the would-be jurors in hopes of getting out of service.

Judge Gardephe has been making rulings in the Knoedler case for months leading to the public trial. Thus in his decision from September 2015 *De Sole v. Knoedler Gallery LLC*, No. 12 CIV. 2313 PGG, 2015 U.S. Dist. LEXIS 134146 (S.D.N.Y. September 30, 2015), he denied a summary judgement motion in part because he found that the movement of funds from Knoedler Gallery to its parent holding company 8-31 Holdings may be deemed siphoning of resources and thus ruled that 8-31 Holdings must remain a party to the dispute – on October 9, 2015 Judge Gardephe issued another opinion *De Sole v. Knoedler Gallery LLC*, No. 12 CIV. 2313 PGG, 2015 U.S. Dist. LEXIS 138729 (S.D.N.Y. October 9, 2015), explaining the reason for denying summary judgment. Specifically, he found that a reasonable jury could find an “overall element of injustice or unfairness,” in observing corporate distinction between Knoedler Gallery LLC and 8-31 Holdings LLC, the parent company of the Knoedler and Hammer Galleries.

In the October 9, 2015 opinion, Judge Gardephe also noted that Freedman enjoyed a significant financial fallout from the sale of the Rosales forgeries. Notably, between 1998 and 2007 Freedman profit sharing percentage increased three times to a total of 30% of the Knoedler Gallery's operating income. In 2007, Freedman was paid more than \$1.3 million in 2007.

2. *Questions to Answer:*

Before the trial and certainly as various art experts, accountants and researchers have been testifying at trial, the questions mount: Did Ann Freedman and the Knoedler Gallery know that they were selling forgeries? Or were they fooled along with the rest of the art world? These are the questions that everyone who is watching the trial as it unfolds both in courtroom and on the pages of the the newspapers is asking, and the jury may have a chance to answer them in the coming weeks, unless the parties settle before the verdict. On Sunday, February 7, 2016, two weeks into the trial, Ann Freedman settled with the De Soles. The terms of this settlement have not been disclosed; however, Freedman was expected to testify on Tuesday, February 9, 2016.* (Note: Freedman did not testify on February 9th).

3. What happened during the second week in *De Sole v. Knoedler et al.*,:

Monday, February 1, brought the conclusion of testimony from Eleanor De Sole as well as testimony from Christopher Rothko. Mrs. De Sole testified that she accepted the provenance that Ann Freedman and Knoedler provided because Freedman was the representative of one of the oldest and most reputable galleries around and "that should have said it all." Freedman provided the De Soles with a list of experts who had viewed the work. The list served as a clever marketing tool to imply that individuals including David Anfam, E.A. Carmean, Irving Sandler, and Christopher Rothko authenticated the work. Even though Mrs. De Sole was not personally familiar with any of these people (she stated that the only name she was familiar with was Christopher Rothko), she was impressed with the line up and trusted its representation. Due to his lineage, a celebrity witness, Christopher Rothko was next on the stand. Christopher, the son of Mark Rothko testified that he never authenticates his father's work, as this "requires specific expertise" that he does not believe he possesses. He viewed the De Soles' work, as well as other Rosales works, and may have described them as "beautiful" or "pristine" but he did not authenticate them or give permission for his name to be on any lists used in connection with the work. On cross, Rothko admitted to giving countless presentations about his father's works as well as writing articles and organizing exhibitions related to Rothko. The dichotomy in the art market created by the fear of giving a negative opinion about a work of art and being brought to court to answer for the opinion has discouraged not only individual scholars but also authentication foundations from giving categorical rulings about the attribution of art works ([See a previous article about the disbanding of the Keith Haring Foundation art authentication committee](#)). Rothko admitted that he directed Freedman to consult an art conservator for expertise regarding technique, paints and other physical qualities of the works attributed to his

father. Freedman consulted Dana Cranmer (who testified on January 29). A memorable quote from the day: “On the basis of . . . research, a strong case can be made for authenticity or lack of authenticity of any given work.” A picture of Christopher Rothko leaving the courthouse appeared in *The New York Times* the following day. The decision to publish a photograph of this witness was not based on his Rothko expertise but rather on him being a genuine Rothko. The second Rothko expert, David Anfam, was feeling less at ease on the stand and at times would proclaim certain statements or practices as “outrageous.” He is the author of the 1998 Rothko Catalogue Raisonné entitled *Mark Rothko: The Works on Canvas* and he, too, emphatically indicated that he does not provide authenticity for sale purposes. According to Anfam, the mysterious collector who was the source of the paintings was based in Switzerland and Jewish, and had considerable links to Mexico. Incidentally, the pedigree of Mr. X (or Secret Santa, a.k.a. a son of the collector, who was the purported source of the Rosales paintings) was unclear and changed multiple times. He was described as a sole heir to his father’s collection, and as one of two children—at one point, he supposedly had an estranged brother and at another he had a sister. Anfam had the honor of informing the jury about “art transparency” (photograph of a work of art) and “Park Avenue Armory” (an annual show in the NY armory until recently). At one point, Anfam admitted that Freedman did most of the talking but as to the substance of her statements he described them as “a lot of nothing.”

On Tuesday, February 2, Plaintiffs’ attorneys began by wrapping up David Anfam’s testimony, which focused on his opinions about the Rosales works and how his impressions evolved as he learned more and more about the collection Rosales brought to Knoedler Gallery. Anfam considers himself to be the foremost expert in abstract expressionism and has authenticated Rothkos in the past. He saw dozens of the Rosales works and did not raise doubts as to their authenticity. In 2008, he wrote to Knoedler that the works were “99.99% okay” and he just couldn’t “see how anyone but the artists could have produced such a cache.” However, in 2012, he told an FBI investigator that such a large collection “strains all credibility,” later saying that he possessed information in 2012 that he did not have in 2008, such as the number of the works, the IFAR investigation of Jack Levy’s Pollock, and the results of Jamie Martin’s forensic tests. Anfam emphatically denied giving Freedman permission to use his name in connection with any sales. By the same token, he probably never specifically asked her not to use his name in connection with the business transactions either.

Next on the plaintiffs’ witness list was Dr. Stephen Polcari a retired art historian whose expertise lies in abstract expressionism of the 1930s, 40s, and 50s. He has written books, received multiple fellowships, and taught courses in modern art and abstract expressionism at multiple universities. His testimony centered around his time working as an “independent contractor” at Knoedler Gallery, where he would curate exhibitions and write essays about works he saw at Knoedler. He would evaluate the style and meaning behind these works. Polcari testified that he thought the

works he was writing about were authentic, or else he would not have written about them. In terms of the provenance of the works, his information came from Freedman, and he found this convincing simply because the works were in the Knoedler Gallery. Notably, Polcari read an email from an upset Ann Freedman, who told him that she was “kicked out the door” of the Knoedler Gallery “without so much as a goodbye.”

A small amount of Dr. Polcari’s testimony concluded the morning of **Wednesday, February 3**, but the stars of the day were Frank Del Deo, Jack Flam, and Martha Parrish. Mr. Del Deo, an art dealer in New York, worked at Knoedler from 1999 until 2011, and was the President and Director from 2009 until 2011. While at Knoedler, he sold 100-200 works, none of them from the Rosales collection. He testified that the standard profit for the gallery was anywhere between 5 and 100 percent on works the gallery owned and 20 and 30 percent for works they did not own, but the profits were “considerably higher” for the Rosales collection. These profits would be over 100 percent on occasion. Mr. Del Deo’s testimony contained many references to attorney-client privilege, but he stated that he left the Gallery employment in 2011, before the gallery closed, after speaking with a lawyer and sought other employment.

Next witness, Dr. Jack Flam, is an art historian who concentrates on Motherwell and Matisse. A close friend of Motherwell’s, he spent summers in his studio and serves as the President of the Dedalus Foundation. He has never authenticated a Rothko and was never asked to. He could not recall seeing the De Soles’ painting and was “very surprised” to learn that his name was included on the list that accompanied the De Soles’ work. Dr. Flam spoke rapidly about David Herbert and said that Freedman kept coming back to the Herbert story, but upon seeing a reproduction of a purported Motherwell in the Rosales collection, he believed it was a fake. When he looked four images of purported Motherwells and later saw one at Dana Cranmer’s studio he “strongly” believed they were fake, and expressed his opinion to Ann Freedman and Knoedler Gallery on several occasions, though E.A. Carmean disagreed with him.

Martha Parrish, a retired art dealer in New York and Palm Beach who helped draft the Art Dealers Association of America (“ADAA”) code of ethics, also testified on Wednesday. Ms. Parrish stated that dealers “run like hell” when an individual comes to them with a large collection of unknown works to sell below market price. She also informed the jury that cash is not a customary way to pay for a work on consignment (plaintiffs stressed that Rosales was paid in part by check, with cash below \$10,000, and out of the country wire transfers). As to the usual range of profit on consigned works, Ms. Parrish testified that it ranges between 10% and 20%. In some instances, Knoedler’s profit was more than 700%. She stated that good provenance could be used as a selling tool and emphasized the importance of being transparent with prospective purchasers—presenting something as a fact that is not known to be fact is “not acceptable.” On cross examination and on its face, the practices actually followed by dealers may not be as

transparent or stringent as this witness indicated through her testimony, which is the reason why the art market is notoriously opaque and all experts agree to that fact if little else.

Upon information and belief, Thursday, **February 4**, began with Victoria Sears Goldman, provenance researcher and an art historian, followed by a brief and uncomfortable testimony by Edye Weissler, a former Knoedler employee, taking the stand. Ms. Weissler performed research at Knoedler along with Melissa De Medeiros and E.A. Carmean. She attempted to establish a connection between David Herbert and the works that were coming into Knoedler from Glafira Rosales. Forensic analyst James Martin next took the stand. Mr. Martin does art examination work for FBI, US Attorney, Christie's, Sotheby's, and conservators, among others, in a private studio using the same methods and technology as museums. He has analyzed about 5000-8000 art works and taught courses on paint analysis. He was first hired by Knoedler in 2008 to evaluate 2 Motherwells, which he determined were not created in the 1950s, as they were purported to have been. Martin testified that he told Freedman and Knoedler to exercise caution when dealing with these paintings. He later examined the De Soles' work and 15 other works sold through Knoedler. Martin concluded that all of the Rosales works were deliberate fakes. He described in great detail the process that he used to evaluate these works as well as the tools involved.

Martin's testimony concluded on the morning of **Friday, February 5**, with more description about the process that he used to evaluate the De Soles' work, a process that he said Knoedler's competitors have been coming to him with artworks for since 2004. Forensic accountant Roger Seifert was the next person to be questioned. Mr. Seifert's testimony concerned three topics: a profitability analysis of Knoedler from 1994 to 2011, the amount of profit sharing earned by Freedman from the Rosales sales, and whether or not 8-31 Holdings benefited from the Rosales sales. Mr. Seifert concluded that Knoedler would not have been profitable without the Rosales sales (the data showed that they would have lost about \$3.2 million from 1994-2011), Freedman earned \$10.4 million in profit sharing, and 8-31 Holdings benefited from these sales, as the income from Knoedler was included in their consolidated earnings. Between 1994 and 2008, works from Rosales were sold by Knoedler for about \$70 million, bringing the gallery \$32.7 million in net income.

The [Knoedler demise](#) and the subsequent lawsuits against it, its employees and shareholders highlight the power that experts wield in creating an aura of legitimacy. In the case of the Rosales forgeries, peppering correspondence with references to recognized authorities was enough, at least for a while, to compensate for an auspicious lack of documentation. The theme that emerged during the trial was that just because a work looks like a Pollock (Rothko, Motherwell, etc.), it is not necessarily a "Real McCoy."

4. Food for thought:

Is there an ethical, if not legal, responsibility in the academic or art market community to ask probing questions regardless of context (reputable gallery or museum, renowned seller, collector, family member, curator)? At the end of the week, it seems that only cold, hard facts in accounting and science are able to light fire under the cool demeanor of the crème de la crème of the art world.

Disclaimer: Reading WYWH articles is no substitute to attending art law trials, programs and exhibitions in person. After all, picture is worth a thousand words, even if it's a fake.

Select Sources and Suggested Readings:

- De Sole v. Knoedler Gallery, LLC, No. 12 CIV. 2313 PGG, 2015 U.S. Dist. LEXIS 138729 (S.D.N.Y. October 9, 2015).
- Colin Moynihan, Knoedler Gallery Director Settles Lawsuit Over Fake Rothko, N.Y. Times, Feb. 7, 2016, http://www.nytimes.com/2016/02/08/arts/design/knoedler-gallery-director-settles-lawsuit-over-fake-rothko.html?_r=0.
- Laura Gilbert, Knoedler Fakes Trial Could Be A Game-Changer for the Art Market, The Art Newspaper, Jan. 25, 2016, <http://theartnewspaper.com/comment/comment/knoedler-fakes-trial-could-be-a-game-changer-for-the-art-market>.
- Laura Gilbert, 'Red Flags Were Flying' Around Knoedler Fakes, Experts Testify, The Art Newspaper, Feb. 4, 2016, <http://theartnewspaper.com/news/news/red-flags-were-flying-around-knoedler-fakes-experts-testify>.