

# Olympic Skater Seeks 9th Circ. Rehearing Of NBC Royalty Suit

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By Cara Salvatore

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Law360 (May 14, 2018, 8:48 PM EDT) -- Olympic gold medal-winning ice skater Oksana Baiul asked the Ninth Circuit on Friday to revive her suit seeking royalties from the 1995 airing of "Nutcracker on Ice" on NBC, saying the appeal panel relied on a dead, discredited precedent.

In April, a Ninth Circuit panel refused to revive Baiul's suit, agreeing with a lower court that the claims are barred by the dismissal of another similar lawsuit and can't be relitigated. A California district court didn't err in dismissing the suit under res judicata due to a New York federal judge's decision to toss a similar lawsuit by Baiul, the panel said.

But Baiul believes the Ninth Circuit's approval of the federal standard for claim preclusion, rather than the California standard, was wrong. That approval was based on a precedent called Costantini, and Baiul believes Costantini, which the Ninth Circuit had called "the only citable precedent" here, was not valid.

The Ninth Circuit "chooses to pass over in silence how seriously discredited is this 'only citable precedent,'" Baiul said. "Not only has Costantini been explicitly and repeatedly rejected by the California Courts of Appeal, as a valid statement of California law, but this court itself concurred in the wholesale rejection of Costantini and refused to apply Costantini in an unreported decision, viewing the matter as sufficiently uncontroversial that it did not even publish the decision as 'citable precedent.'"

The test laid out in Costantini — "same nucleus of operative facts" — was the basis for finding that a New York federal court's decision barred the California claims from which this appeal stemmed, Baiul said.

But the test under California law is "same cause of action," and that's the test that should have been applied here, she said.

"Costanini is a dead letter under California law because it directly conflicts with two leading California Supreme Court cases," she said.

A rehearing is necessary to correct this error, which allowed the New York decision to shut down this California case, she said.

Additionally, Baiul argued that, although the New York court dismissed claims with prejudice as to NBC, it did not dismiss with prejudice as to another group of defendants, the Mendelson defendants, named after television producer Barry Mendelson. And yet the Ninth Circuit approved the dismissal of all claims, including ones against Mendelson, another error that a rehearing is needed to correct, Baiul argued.

"Such a dismissal without prejudice has no claim-preclusive effect because it is not final and not 'on the merits,'" Baiul said.

Mendelson's attorney Edward Pilot of Edward W. Pilot APC told Law360 Baiul's petition "is without merit. There is absolutely no inconsistency between the Ninth Circuit's April 27, 2018, decision and the decisions of any other circuit court in the United States, or the United States Supreme Court, which requires any further waste of judicial resources."

Baiul filed suit against NBC, the now-defunct On Ice Inc. and producer Mendelson in California state court in July 2015, claiming NBC denied her royalties from the show despite an alleged January 1995 agreement written by the network and now-defunct On Ice. After Baiul amended the pleadings eight times, NBC moved the California case to federal court.

In 2016, SDNY Judge Katherine Forrest granted NBC's motion to dismiss the New York federal court suit, finding Baiul's claims "frivolous and, frankly, bizarre," as well as repetitions of claims already attempted in New York state court.

Baiul had argued before the three-judge panel that the case should have been sent back to state court instead of being dismissed.

A representative for NBC was not immediately available for comment.

Baiul is represented by Raymond Markovich and Usman Shaikh of U.S. Law Group.

NBC is represented by Enoch Liang, Prashanth Chennakesavan and Kevin Kelly of LTL Attorneys LLP. Mendelson is represented by Edward Pilot of Edward W. Pilot APC.

The case is Oksana Baiul v. NBC Sports et al., case number 16-56658, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Daniel Siegal and Dorothy Atkins. Editing by Alanna Weissman.