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June 2018

Case Ka Nefer Nefer Mask – United States v. Mask of Ka Nefer Nefer

United States/Etats Unis – St. Louis Art Museum – Egypt/Egypte – Archaeological Object/Objet archéologique – Post 1970 Restitution Claims/Demandes de restitution post 1970 – Judicial claim/action en justice – Judicial decision/décision judiciaire – Negotiation/négociation – Illicit Importation/importation illicite – Ownership/propriété – Criminal offence/infraction pénale – Procedural Issue/limites procédurales – Request Denied/Rejet de la demande

On July 28, 2014, the Eighth Circuit Court of Appeals denied the request of the United States Government to take further legal action regarding the St. Louis Art Museum's ownership of the 3200 year old Egyptian Ka Nefer Nefer funerary mask. The U.S. Government wanted to seize and repatriate the mask to Egypt, but the Court held that the museum could keep the mask because the U.S. Government's amended complaint was not submitted on time, nor did it show that the mask was ever stolen.

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I. Chronology

Post 1970 restitution claims

- **1952:** The funerary mask of Ka Nefer Nefer an Egyptian noblewoman (the Mask) was excavated by Egyptian archaeologist Mohamed Yakaria and catalogued in Egypt.¹
- **1953:** The Mask was registered as Egyptian property and placed in a storage facility at Saqqara.²
- **1966:** The Mask was sent to Cairo Museum³ in box number fifty-four.⁴
- **1973:** The Mask was discovered missing during inventory.⁵
- **1983:** Egypt passed patrimony law, Egyptian Law on the Protection of Antiquities, Law 117, which asserts Egyptian public ownership of antiquities and restricts private possession or ownership of cultural property.⁶
- **1998:** St. Louis Art Museum (SLAM) purchased the Mask from Phoenix Ancient Art, a New York international art dealer based in Switzerland⁷ for \$499,000, after the museum's due diligence turned up nothing suspicious.⁸
- **2006:** Egypt requested that SLAM return the Mask to them.⁹
- **2011:** United States (U.S.) government filed a complaint for the forfeiture of all rights, title, and interest,¹⁰ relying exclusively on 19 U.S.C. § 1595a., stating that the Mask was "stolen, smuggled, or clandestinely imported into the United States 'contrary to law'".¹¹ The government also claimed that the Mask was stolen before it was brought into the country, contrary to the Tariff Act of 1930,¹² and filed a motion based on the National Stolen Property Act,¹³ which allows the US government to prosecute on behalf of a foreign government and defend their national ownership law.¹⁴
- **2012:** The United States District Court for the Eastern District of Missouri (District Court) found that there was not enough evidence to support the U.S. government's claim that the Mask had been stolen. The U.S. government filed a motion for the court to reconsider this dismissal of the case, and revealed new information that it claimed would support an

¹ Ann-Margaret Gidley and Sharon Flescher, "SLAM Mummy Mask Can Rest in Peace in the Museum – For Now," *International Foundation for Art Research (IFAR) Journal*, 15.2 (2014): 13.

² Selleck, "Case Review : US v. Mask of Ka-Nefer-Nefer (8th Cir.)," Center for Art Law, August 10, 2014, accessed June 2, 2015, <http://itsartlaw.com/2014/08/10/case-review-us-v-mask-of-ka-nefer-nefer-8th-cir/>.

³ Ibid.

⁴ *United States v. Mask of Ka-Nefer-Nefer*, No. 4:11CV504 HEA, 2012 WL 1094658, at *1 (E.D. Mo. Mar. 31, 2012) aff'd, 752 F.3d 737 (8th Cir. 2014) and aff'd, 752 F.3d 737 (8th Cir. 2014).

⁵ Ibid. Gidley and Flescher, "SLAM Mummy Mask Can Rest in Peace in the Museum – For Now."

⁶ Sharon Flescher and Mary Morabito Rosewater, "Mummy Mask Must Go Says ICE," *International Foundation for Art Research (IFAR) Journal*, 12.4 (2011): 16.

⁷ Ibid.

⁸ Gidley and Flescher, "SLAM Mummy Mask Can Rest in Peace in the Museum – For Now."

⁹ Flescher and Rosewater, "Mummy Mask Must Go Says ICE," 15.

¹⁰ *United States v. Mask of Ka-Nefer-Nefer*, at *1.

¹¹ Flescher and Rosewater, "Mummy Mask Must Go Says ICE," 16.

¹² See 19 U.S. Code Chapter 4.

¹³ See 18 U.S. Code Sections 2314 and 2315.

¹⁴ Selleck, "Case Review: US v. Mask of Ka-Nefer-Nefer (8th Cir.)."

amended complaint.¹⁵ The motion was denied. The U.S. government appealed to the Eighth Circuit Court of Appeals (Court of Appeals), which has appellate jurisdiction over district courts in the state of Missouri, among others.

- **2013:** Parties attempted negotiations, but they ultimately failed.
- **2014:** Court of Appeals affirms the District Court's procedural ruling, and the SLAM keeps the Mask.

II. Dispute Resolution Process

Judicial claim – Judicial decision – Negotiation

- Egypt, contacted SLAM to ask for the Mask back in accordance with its patrimonial law, but was unsuccessful.
- The U.S. government judicially intervened on Egypt's behalf, since an initial negotiation process had failed.¹⁶ Negotiation is usually the first step in these cases in an effort to avoid litigation, which is very costly. The U.S. government intervened by filing a forfeiture motion with the District Court in Missouri on behalf of the Egyptian government to defend Egypt's national patrimony laws.
- When the case was dismissed by the District Court in 2012, the parties tried to settle the dispute out of court, but the negotiations failed again.¹⁷ Despite the good faith attempts to reach an amicable resolution, the U.S. no longer felt that a non-judicial resolution would be likely.¹⁸ At the negotiations, the U.S., the SLAM, and Egypt were represented.¹⁹
- Finally, the question of the Mask's return and the SLAM's legal ownership was settled by a judicial decision of the Court of Appeals.

III. Legal Issues

Ownership – Criminal offence (theft) – Illicit importation – Procedural Issue

- Egypt believed that the Mask was stolen and illegally removed from Egypt, because the Mask was missing from its storage box in Cairo.²⁰

¹⁵ Ricardo A. St. Hilaire, "Ka Nefer Nefer Forfeiture Case: SLAM Appellate Brief Strongly Criticizes Government," *Cultural Heritage Lawyer Rick St. Hilaire*, August 6, 2013, accessed June 3, 2015, <http://culturalheritagelawyer.blogspot.ch/2013/08/ka-nefer-nefer-forfeiture-case-slam.html>.

¹⁶ Ricardo A. St. Hilaire, "Failed Negotiations Put Ka Nefer Nefer Forfeiture Case Back on the Docket," *Cultural Heritage Lawyer Rick St. Hilaire*, April 17, 2013, accessed June 4, 2015, <http://www.museum-security.org/2013/04/cultural-heritage-lawyer-rick-st-hilaire-failed-negotiations-put-ka-nefer-nefer-forfeiture-case-back-on-the-docket/>.

¹⁷ Selleck, "Case Review: US v. Mask of Ka-Nefer-Nefer (8th Cir.)."

¹⁸ Ricardo A. St. Hilaire, "Failed Negotiations Put Ka Nefer Nefer Forfeiture Case Back on the Docket."

¹⁹ Ricardo A. St. Hilaire, "Ka Nefer Nefer Settlement Terms to be Discussed," *Cultural Heritage Lawyer Rick St. Hilaire*, February 13, 2013, accessed June 4, 2015, <http://culturalheritagelawyer.blogspot.ch/2013/02/ka-nefer-nefer-settlement-terms-to-be.html>.

²⁰ Selleck, "Case Review: US v. Mask of Ka-Nefer-Nefer (8th Cir.)."

- SLAM believed that it had rightful ownership to the Mask, since it had done adequate research. SLAM's research showed that the Mask was part of the Kaloterna private collection during the 1960s, until it was purchased in Switzerland by Croatian collector Zuzi Jelinek, before it was sold to Phoenix Ancient Art in 1995.²¹ The museum saw no link between the 'illicit antiquities market' and the Mask. SLAM also claimed that the statute of limitations for seizure had passed:²² the statute of limitations is five years in the United States.²³
- Concerning the claim on stolen property, SLAM responded to the 2011 complaint with a motion to dismiss, asserting that the Mask had entered the U.S. prior to the passage of Egypt's patrimony law and thus was not stolen from the Egyptian government and that the facts alleged in the complaint were too vague to support a conclusion that it had been 'stolen' in the traditional sense. Despite the existence of inventory records, the District Court found that the U.S. government's complaint failed "to state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial."²⁴ Indeed, the complaint did not provide a factual statement of theft, smuggling, or clandestine importation, but only that the Mask was found to be "missing" from Egypt.²⁵ Essentially, correlation does not equal causation. SLAM also reasoned that the case was untimely filed under 19 U.S.C. § 162, and that the U.S. government's action should be barred by laches.²⁶
- The District Court in 2012 found that the U.S. government's complaint did not provide a "factual statement of theft, smuggling, or clandestine importation," but only stated that the Mask was missing as of 1973.²⁷ The U.S. government failed to provide evidence that the Mask was missing because it was stolen and then smuggled out of the country, and thus was making an unfounded legal conclusion.²⁸ The District Court relied upon Supplemental Rule E (2)(a), which requires that the Government set forth its claims in the complaint "with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading." Supplemental Rule G (2)(f) requires that the Government "state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial."²⁹
- Following the initial 2012 decision, SLAM remained steadfast by repeating in its briefs that the case had been dismissed, against the U.S. government's continual attempts to reopen the case with new evidence.³⁰ Rather than contravening the procedural question of the dismissal, the U.S. government addressed only the meritorious aspects of the case. The SLAM urged the District Court to consider only the procedural question in issuing its decision.
- Following this decision, the U.S. government applied to the Court of Appeals to review the dismissal of the case by the District Court. The Court of Appeals found that the proposed

²¹ Jennifer Mann, "Government Sues to Seize St. Louis Museum's Mummy Mask," *St. Louis Today*, March 17, 2011, accessed June 4, 2014, http://www.stltoday.com/news/local/metro/government-sues-to-seize-st-louis-museum-s-mummy-mask/article_98d72244-9976-5b8a-a73d-5c211c6a771b.html.

²² *United States v. Mask of Ka-Nefer-Nefer*, at *1.

²³ Flescher, and Rosewater, "Mummy Mask Must Go Says ICE."

²⁴ *United States v. Mask of Ka-Nefer-Nefer* at *2.

²⁵ *Ibid.* at *3.

²⁶ *Ibid.* at *1.

²⁷ *United States v. Mask of Ka-Nefer-Nefer*, at *3.

²⁸ *Ibid.*

²⁹ *Ibid.* at *1.

³⁰ *Ibid.*

amended complaint was not only “too late, it was also too little, because it *still* did not show that the mask was ever stolen.”³¹ The Court of Appeals held that the District Court was not obliged to invite the U.S. government to amend its complaint before granting complainant’s motion to dismiss, and the District Court was within its discretion in denying the U.S. government’s post-dismissal motion for leave to file an amended complaint.³²

IV. Adopted Solution

Request denied

- Ultimately, by allowing the District Court’s dismissal of the U.S. government’s forfeiture request, the Court of Appeals prevented the U.S. government from seizing the Mask and repatriating it to Egypt, instead allowing the SLAM to retain the Mask.
- Egypt has said that it will not abandon its efforts to repatriate the mask.³³ In a press release, Minister of Antiquities Mohamed Ibrahim said that he will “resort to the private sector in the United States to put pressure on the St. Louis Art Museum according to the agreements signed in this regard.”³⁴ Given the long legal battle that it has just gone through, it is unlikely that SLAM will simply heed calls for it to return the Mask to Egypt.

V. Comment

- There is broadly publicized pillaging throughout the Middle East, as will often occur during and as a result of political uprisings and regional wars. When the Mask was stolen, fighting was occurring between Israel and Egypt, Jordan, Palestine Liberation Organization and their allies, in what is now called the War of Attrition, lasting from 1967-1970.³⁵
- To avoid the potential purchase of black market items such as the Mask, museums should consider publicizing new purchases. Failure to publicize will result in the object being hidden from those who could identify them and possibly call for their restitution.³⁶ In 2008, the American Association of Art Museum Directors, of which the SLAM is a member, adopted for the first time guidelines for the acquisition of archaeological and ancient art, which requires museums to publish their acquisitions in print or electronic form, to make “this information readily available to all interested parties.”³⁷
- It is noteworthy that in December 2005, the Museum Security Network had notified the FBI’s Art Theft Program that they believed SLAM to be in possession of “an Egyptian mask stolen

³¹ Gidley and Flescher, “SLAM Mummy Mask Can Rest in Peace in the Museum – For Now,” 13.

³² *United States v. Mask of Ka Nefer Nefer*, 752 F.3d 737, (8th Cir. 2014).

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Leila Amineddoleh, “Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions,” *Fordham Intellectual Property, Media and Entertainment Law Journal*, 24 (2014) : 775.

³⁶ *Ibid.*, 776.

³⁷ “New Report on Acquisition of Archaeological Materials and Ancient Art Issued by Association of Art Museum Directors,” *Association of Art Museum Directors*, June 4, 2008

circa 15 years ago from depositories of a museum in Saqqara, Egypt.”³⁸ However, no branch of the U.S. government made an attempt to investigate or seize the antiquity until 2011, more than 10 years later.

- The National Stolen Property Act (NSPA) allows the U.S. government to prosecute on behalf of a foreign government and defend their national ownership law.³⁹ The NSPA was previously considered in the landmark case of *U.S. v. Schultz* (2003), where art dealer Frederick Schultz was convicted of importing and selling looted Egyptian antiquities.⁴⁰ In the Schultz case, the U.S. court upheld Egypt’s patrimony law, which would have been the most efficient move for the court to take here, but which it chose not to. The Court in Schultz found that an object was considered “stolen” within the meaning of NSPA if it was taken in violation of patrimony law.⁴¹ In the case of the Mask, the Court did not even consider Egypt’s patrimony law, but looked only at the pleading requirements stated in the Federal Supplemental Rules.
- The Court of Appeals characterized the government’s efforts at forfeiture as “an attempt to expand the government’s forfeiture powers at the likely expense of museums and other good faith purchasers in the international marketplace for ancient artifacts.” Indeed, the Court’s pro-museum characterization of the appeal is troubling, because it whitewashes over the responsibilities that good-faith purchasers have to research their acquisitions prior to purchase and to ensure beyond a doubt that their acquisitions were not looted.

VI. Sources

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³⁸ Flescher and Rosewater, “Mummy Mask Must Go Says ICE,” 16.

³⁹ Selleck, “Case Review: *US v. Mask of Ka-Nefer-Nefer* (8th Cir.).” ; 18 U.S.C.A. § 2314.

⁴⁰ Selleck, “Case Review: *US v. Mask of Ka-Nefer-Nefer* (8th Cir.).”

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c. Documents

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