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Tristan Weber, Alessandro Chechi, Marc-André Renold

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## Case The Actor – Leffmann Heir v. Metropolitan Museum of Art

*Paul and Alice Leffmann – Metropolitan Museum of Art – Artwork/oeuvre d'art – Nazi-looted art/spoliations nazies – Judicial claim/action en justice – Judicial decision/decision judiciaire – Due diligence – Ownership/propriété – Statute of limitation/prescription – Procedural issue/limites procédurales – Request denied/rejet de la demande*

*Before the Second World War, Paul and Alice Leffmann, a couple of German Jews, fled Germany to Italy and then to Brazil. To be able to leave Europe, they sold the painting “The Actor” by Picasso to three art dealers for a fraction of its market value. In 1939, one of the dealers sold the painting to Thelma Foy. Several years later, Thelma Foy donated the painting to the Metropolitan Museum of Art (MET) of New York. In the 2010s, Laurel Zuckerman, the great-grandniece of Paul and Alice Leffmanns, sued the MET to retrieve the painting.*

*I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comments; VI. Sources.*

ART-LAW CENTER – UNIVERSITY OF GENEVA

PLATFORM ARTHEMIS

[art-adr@unige.ch](mailto:art-adr@unige.ch) – <https://unige.ch/art-adr>

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## I. Chronology

### Nazi looted art

- **1936-1937:** Paul and Alice Leffmann, a couple of German Jews based in Cologne, Germany, decided to move to Italy through Switzerland as a result of the increasing distress caused by Nazi discriminatory policies. They brought to Switzerland the painting “The Actor” by Pablo Picasso.<sup>1</sup>
- **1938:** The Nazi Government’s influence kept growing and Italy became as threatening as Germany for the Leffmanns. This is why they decided to flee to Brazil. Because of the high fees required to leave, the Leffmanns had no choice but to sell “The Actor” for \$13,200 to three art dealers: Käte Perls, Hugo Perls and Paul Rosenberg.<sup>2</sup>
- **1940:** Rosenberg consigned the painting to Knoedler & Co. Gallery in New York, which was bought by Thelma Foy in **1941** for \$22,500.
- **1952:** Foy donated the painting “The Actor” to the Metropolitan Museum of Art (MET).<sup>3</sup>
- **1967:** The MET published a catalogue with the painting’s ownership history. However, it incorrectly listed Paul Leffmann as the owner only until 1912 and a German private collector from 1912 to 1938.<sup>4</sup>
- **September 2010:** Laurel Zuckerman, the great-grandniece of the Leffmanns, requested the MET to return the painting. The MET rebuffed the claim.
- **September 2016-2019:** Laurel Zuckerman filed a lawsuit in the Southern District of New York. Her claim was dismissed by the District Court and then by the Court of Appeals.<sup>5</sup>

## II. Dispute Resolution Process

### Judicial claim – Judicial decision

- Laurel Zuckerman filed legal action against the MET given that the museum refused to consider the restitution claim.
- Laurel Zuckerman filed legal action in the Southern District of New York to obtain the restitution of the painting “The Actor” on the grounds that Paul and Alice Leffmanns had been obliged to sold it in order to escape Nazi persecution. The MET rejected the restitution claim maintaining that it was barred by the doctrine of laches.
- Whereas the District Court concluded that Laurel Zuckerman failed to allege duress under New York law, the Court of Appeals ruled that the Laurel Zuckerman’s claim was barred by the doctrine of laches.

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<sup>1</sup> *Zuckerman v. The Metropolitan Museum of Art*, No 18-634 (2d Cir. 2019), 4-5, 7; Grossman LLP Press Release, “Citing Delay”.

<sup>2</sup> Drawdy “Claims for the Return of Holocaust Art” 286.

<sup>3</sup> *Zuckerman v. The Metropolitan Museum of Art*, No 18-634 (2d Cir. 2019), 10-11.

<sup>4</sup> Drawdy, “Claims for the Return of Holocaust Art” 286.

<sup>5</sup> *Zuckerman v. The Metropolitan Museum of Art*, No 18-634 (2d Cir. 2019), 11-12.

### III. Legal Issues

#### Due diligence – Ownership – Statue of limitation – Procedural issue

- The main issue discussed by the Court of Appeals was whether Zuckerman’s legal action was timely pursuant to the doctrine of laches.
- The doctrine of laches protects a defendant against unreasonable and untimely legal actions.<sup>6</sup> Common in Anglo-American legal systems, this doctrine requires a careful analysis of the respective positions of the parties. In particular, the doctrine of laches applies if two conditions are fulfilled: (i) there was negligence on the part of the plaintiff that led to a delay in the prosecution; and (ii) the delay prejudiced the defendant.<sup>7</sup> The Court of Appeals found that both conditions were met in the present case. On the one hand, the Court decided that, given their position, knowledge and wealth, it was not plausible that the Leffmanns or their heirs had not been able to file an action earlier than 2010, especially taking into account that the location of the painting “The Actor” was well-known. On the other, the Court also stated that the time interval of almost seventy years between the 1938’s sale and the Zuckerman’s claim in 2010 prejudiced the MET. In the Court’s view, such delay was unreasonable and damaged the MET’s ability to defend itself given the passing away of witnesses, fading memories and loss of documentary evidence.<sup>8</sup>
- Alternatively, the plaintiff argued that a laches defense was unavailable because she had filed the legal action within the applicable statute of limitations as codified by the Holocaust Expropriated Art Recovery Act (“HEAR Act”). Passed in 2016, the HEAR Act establishes that a civil claim or cause of action against a defendant to recover any artwork that was lost during the Nazi regime may be commenced not later than 6 years after the actual discovery by the claimant (or the agent of the claimant) of: (i) the identity and location of the artwork; and (ii) a possessory interest of the claimant in the artwork.<sup>9</sup> Therefore, the HEAR Act encouraged the return of Nazi-looted art to Holocaust victims or their heirs by pre-empting existing statutes of limitations. Laurel Zuckerman claimed to have acted within the 6-year limitations set forth in the HEAR Act. Generally, this argument would be sufficient to set aside a laches defense. However, in the present case, the Court of Appeals excluded the application of the HEAR Act. On the one hand, the Court recognised that one of the purposes of the HEAR Act is to ensure that claims to recover Holocaust-related art are resolved in a just and fair manner. On the other, it affirmed that the Act does not eliminate equitable defenses that innocent defendants may assert. In other words, the Court concluded that it would be unfair and unjust if the HEAR Act would allow potential claimants to wait indefinitely to bring a claim.<sup>10</sup>

<sup>6</sup> *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, No 15-927 (Supreme Court of the United States 2017), 3.

<sup>7</sup> *Merrill Lynch Investment Managers v. OPTIBASE LTD.*, No 02-9195 (2d Cir. 2003), 132.

<sup>8</sup> *Zuckerman v. The Metropolitan Museum of Art*, No 18-634 (2d Cir. 2019), 15-18.

<sup>9</sup> HEAR Act, Section 5(a).

<sup>10</sup> *Zuckerman v. The Metropolitan Museum of Art*, No 18-634 (2d Cir. 2019), 20-22.

## IV. Adopted Solution

### Request denied

- The Court of Appeals barred Laurel Zuckerman's claim pursuant to the laches defence and eventually confirmed that the MET was the rightful owner of the painting "The Actor".

## V. Comments

- This case is a perfect illustration of the contradiction between justice and ethics. On the one hand, one can have empathy for the Leffmanns (and their heir) because of what they went through. In this sense, one could argue that the painting "The Actor" should be returned to them. On the other hand, the law does not protect unconditionally (and timelessly) each of our rights and we can understand the final decision of the Court of Appeals.
- With respect to the last issue, it is interesting to make a comparison with Swiss law. The Swiss Civil Code establishes that the buyer in bad faith of an object can never acquire its property. Inversely, a good faith buyer can acquire the property of an object as soon as that person obtains its possession.<sup>11</sup> Therefore, had the present case been decided on the basis of Swiss law, the MET could have retained the possession of the painting only by providing evidence that it was acquired in good faith, ie that MET representatives neither knew nor ought reasonably have known at the time of the donation by Thelma Foy that the painting had been sold under distress by the Leffmanns.
- Finally, regarding the finding that the HEAR Act does not systematically obstruct a laches defense, it is interesting to note that the Court of Appeals admitted that a laches defense would fail against a claim based on the HEAR Act under other circumstances.<sup>12</sup> For example, in a case concerning two Schiele paintings, the Supreme Court of the State of New York agreed to maintain a claim based on the HEAR Act despite the defendant invoked the equity principle of laches.<sup>13</sup>

## VI. Sources

### a. Bibliography

- Drawdy, Stephanie. "Claims for the Return of Holocaust Art: Scope of the US HEAR Act – Zuckerman v. The Metropolitan Museum of Art, New York." *Art Antiquity and Law* Vol. XXIV No 3 October 2019, 285-290.

<sup>11</sup> Swiss Civil Code of 2019 (RO 24 245), art. 714(2), 933 CC.

<sup>12</sup> *Zuckerman v. The Metropolitan Museum of Art*, No 18-634 (2d Cir. 2019), 25.

<sup>13</sup> *Reif v. Nagy* 05504 (New York Slip Op. 2019). On this case see Anaïs Bayrou, Alessandro Chechi, Marc-André Renold, "Case Two Schiele Paintings – Grunbaum Heirs v. Richard Nagy", Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

b. Court decisions

- *Reif v. Nagy* 05504 (New York Slip Op. 2019), July 2019.
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c. Legislation

- Swiss Civil Code of 2019 (RO 24 245).
- Holocaust Expropriated Art Recovery (HEAR) Act of 2016, 22 Public Law 114-308, 130 Stat. 1525 (2016).

d. Documents

- Anaïs Bayrou, Alessandro Chechi, Marc-André Renold, “Case Two Schiele Paintings – Grunbaum Heirs v. Richard Nagy”, Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.

e. Media

- Grossman LLP Press Release, “Citing Delay, Second Circuit Affirms That Met Can Keep Picasso Purportedly Sold Under Duress During World War II; Meanwhile, New York Appellate Court Affirms That Two Schiele Works Should Go Back To Holocaust Victim’s Family.” Published 15 July 2019, accessed 26 November 2019.  
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