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## Case Three Grosz Paintings – Grosz Heirs v. Museum of Modern Art

*George Grosz – United States/Etats-Unis – Artwork/œuvre d'art – Nazi looted art/spoliations nazies – Negotiation/négociation – Judicial claim/action en justice – Judicial decision/décision judiciaire – Ownership/propriété – Procedural issue/limites procédurales – Statute of limitation/prescription – Tort/acte illicite – Request denied/rejet de la demande*

*In April of 2009, after a decade-long search for artworks lost during Nazi persecution, George Grosz's legal heirs brought action against the Museum of Modern Art, seeking declaration of title and replevin as to three of the artist's paintings in the Museum's possession, and requesting damages for their unlawful conversion. Holding that the action was time-barred by the statute of limitations, the District Court granted the museum's motion to dismiss. The Court of Appeals for the Second Circuit in New York affirmed the order on appeal, and the United States Supreme Court denied the Heirs' writ of certiorari.*

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

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## I. Chronology

### Nazi looted art

- **1933:** Expressionist artist and Nazi-opponent George **Grosz** was forced to flee **Nazi Germany**, leaving behind two important oil paintings and a watercolor with his Berlin dealer, **Alfred Flechtheim**. The three works included the portrait “**Poet Max Hermann-Neisse**” (1927), “**Self-Portrait With Model**” (1928) and the watercolor “**Republican Automatons**” (1920) (collectively, the **Paintings**). Flechtheim, who was Jewish, also fled Germany within months of Grosz’s departure.<sup>1</sup>
- **1937:** Flechtheim died and the **Paintings were lost in the course of Nazi persecution**.<sup>2</sup>
- **1940s-50s:** The **Museum of Modern Art (MoMA)** obtained “**Poet Max Hermann-Neisse**” and “**Republican Automatons**” by private purchase, and “**Self-Portrait With Model**” by donation.<sup>3</sup>
- **1953:** Grosz visited the Museum and saw “**Poet Max Hermann-Neisse**” hanging on its walls. He wrote to his brother-in-law that the MoMA exhibited a painting that had been stolen from him, but died six years later without ever contacting the museum to regain possession.<sup>4</sup>
- **1994:** Grosz’s son, Martin Grosz, and Martin’s sister-in-law, Lilian (hereafter Heirs), retained **Ralph Jentsch**, an art historian and author of the artist’s catalogue raisonné, to trace the artist’s stolen artworks.
- **24 November 2003:** After a decade-long search, Jentsch discovered the **Paintings were in the possession of the MoMA and made a first formal request for the Paintings’ return**.<sup>5</sup> Following receipt of the letter, MoMA engaged researchers from Yale to undertake provenance research with respect to the **Paintings**, met periodically with the Heirs’ representatives, and engaged in correspondence with Jentsch.<sup>6</sup>
- **20 July 2005:** The Museum’s director, Glenn D. Lowry, wrote to the Heirs’ representative that **evidence challenging the museum’s ownership was unpersuasive** “at this time,” and that the **Paintings’ prior transfers had not been forced**.<sup>7</sup>
- **January 2006:** The Museum’s board retained former U.S. Attorney General Nicholas deB. Katzenbach to review the work that had been done and to prepare a report and recommendation for the MoMA board.<sup>8</sup>

<sup>1</sup> *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 472, 476 (2010).

<sup>2</sup> *Ibid* at 478.

<sup>3</sup> *Ibid* at 480-81.

<sup>4</sup> Grosz wrote, “Modern Museum exhibits a painting stolen from me (I am powerless against that) they bought it from someone, who stole it.” See Patricia Cohen, “Family’s Claim Against MoMA Hinges on Dates,” *The New York Times* (August 23, 2011), accessed August 6, 2013, [http://www.nytimes.com/2011/08/24/arts/suit-against-moma-highlights-time-limit-rule-in-nazi-looting-claims.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/08/24/arts/suit-against-moma-highlights-time-limit-rule-in-nazi-looting-claims.html?pagewanted=all&_r=0).

<sup>5</sup> *Ibid*.

<sup>6</sup> *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d at 484.

<sup>7</sup> *Ibid*; See Patricia Cohen, “Family’s Claim Against MoMA Hinges on Dates.”

<sup>8</sup> *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d at 484.

- **12 April 2006:** MoMA sent a letter notifying the Heirs that its Board of Trustees had voted to accept Katzenbach’s conclusion that **the museum had no obligation to return, and should not return**, the three paintings.
- **10 April 2009:** The Heirs **filed suit in the United States District Court for the Southern District of New York**, seeking declaration of title and replevin as to the three paintings, and damages for their unlawful conversion. The Museum **moved to dismiss** on the grounds that the three-year limitations period had expired.<sup>9</sup>
- **6 January 2010:** The court **granted Museum’s motion to dismiss**, holding the action was time-barred by the applicable statute of limitations.<sup>10</sup> The Heirs appealed this decision.
- **16 December 2010:** The Court of Appeals upheld the District Court’s decision.<sup>11</sup>
- **2011:** The Heirs filed a petition for writ of certiorari to the Supreme Court of the United States. The Supreme Court denied certiorari, thereby finalizing the decision of the Second Circuit.<sup>12</sup>

## II. Dispute Resolution Process

### Negotiation – Judicial claim – Judicial decision

- Before filing suit, the Heirs approached the MoMA and attempted to negotiate the return of the paintings. The Heirs alleged that Grosz consigned each of the Paintings to Flechtheim, and each was then either stolen or subject to some other form of malfeasance after the dealer’s death. The MoMA considered the Heirs’ demand, but maintained it had diligently researched the artworks’ provenance and found no evidence that the Nazis looted them or any other basis for disputing their legitimate ownership.<sup>13</sup> Multiple exchanges containing temporal and conditional language occurred between the two parties. The Heirs claimed this language, such as when Glenn Lowry specified “at this time,” led them to believe the ownership question remained open, and argued that the 2005 letter had indicated that there were circumstances under which the property might be returned at some unspecified moment in the future. Further, Lowry, a representative of the museum, and not the museum’s board, had written the 2005 letter. Any decision regarding restitution could not have been made by Lowry, but only by the museum’s trustees, with whom the Groszes were still negotiating until April 2006. These communications, they asserted, did not constitute outright refusal. Instead, the 2006 letter containing the board’s vote constituted the MoMA’s official refusal.
- In the alternative, the Heirs claimed the MoMA should be equitably estopped from using the statute of limitations as a defense because the plaintiffs had reasonably relied upon the continuing negotiations from July 2005 to April 2006 with the MoMA in choosing not to

<sup>9</sup> See Patricia Cohen, “Family’s Claim Against MoMA Hinges on Dates.”

<sup>10</sup> Federal Rules of Civil Procedure, Rule 8(c)(1); New York Civil Practice Law and Rules, Sections 203(a) and 214(3).

<sup>11</sup> See *Grosz v. Museum of Modern Art*, 403 Fed. Appx. 575 (2010).

<sup>12</sup> See “Grosz v. Museum of Modern Art: Petition for certiorari denied on October 3, 2011,” *Scotusblog: The Supreme Court of the United States Blog*, accessed August 7, 2013, <http://www.scotusblog.com/case-files/cases/grosz-v-museum-of-modern-art/>.

<sup>13</sup> See Patricia Cohen, “Family’s Claim Against MoMA Hinges on Dates.”

file suit, even if the court determined the 2005 letter as the date of accrual. The MoMA responded by arguing the 2005 letter, coupled with its act in retaining possession of the paintings, clearly constituted a definite rejection of the Heirs' demand.<sup>14</sup> Since New York Law requires that an action to recover property must be commenced within three years of the plaintiff's demand and the innocent possessor's refusal,<sup>15</sup> the Heirs finally filed suit in April 2009, which was almost three years to the date after receiving the April 2006 letter containing the board's decision.

- At trial, the District Court analyzed whether the suit was barred by the statute of limitations.<sup>16</sup> On appeal, the Second Circuit affirmed all the District Court's findings.<sup>17</sup>

### III. Legal Issues

#### Statute of limitation – Ownership – Tort

- George Grosz's heirs primarily based their legal action on three claims: declaration of title and replevin, and unlawful conversion. In addition, they argued the Museum's actions after sending the 2005 letter had equitably estopped the action's date of accrual. Essentially, the Heirs asked the court to find that: (i) they – as George Grosz's heirs – were the rightful owners of the Paintings; (ii) the Paintings had been lost as a result of Nazi persecution; and (iii) the MoMA had unlawfully converted the artworks, not by stealing or taking the Paintings, but by refusing to convey the Paintings to the Heirs upon their demand.
- The MoMA filed a motion to dismiss the suit on the grounds that the limitation period had expired. Both parties agreed that Jentsch's 2003 letter constituted the demand, but they disagreed as to whether the 2005 or 2006 letter sent by the MoMA constituted the refusal.
- New York's "demand and refusal" rule only applies to good faith purchasers. The court justifies this, in part, because the good faith possessor is not liable to the original owner for loss or injury to the property until *after* demand and refusal, whereas a bad faith possessor is liable throughout the time of the possession.<sup>18</sup> The rule's purpose is to allow an innocent purchaser the opportunity to turn over chattel in his possession after learning it had been stolen.<sup>19</sup> Set out in *Menzel v. List*<sup>20</sup>, the rule requires that a lawsuit to recover stolen property be filed within three years of the original owner discovering its whereabouts, demanding its return, and being refused.<sup>21</sup> This is because the law believes that an innocent purchaser of

<sup>14</sup> *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d at 488-89.

<sup>15</sup> New York Civil Practice Law and Rules, Section 214(3).

<sup>16</sup> Patty Gerstenblith, *Art, Cultural Heritage and the Law*, 3rd edition, Durham, North Carolina: Carolina Academic Press (2012), 444-45.

<sup>17</sup> See *Grosz v. Museum of Modern Art*, 403 Fed. Appx. 575 (2010).

<sup>18</sup> Gerstenblith, *Art, Cultural Heritage and the Law*, 438-39.

<sup>19</sup> *Ibid.*

<sup>20</sup> 253, N.Y.S. 2d 43 (1st Dept. 1964); 267 N.Y.S. 2d 804 (Sup. Ct. N.Y. 1966).

<sup>21</sup> See "Grosz Heirs v. Museum of Modern Art," *Commission for Art Recovery*, accessed August 6, 2013, <http://www.commartrecovery.org/cases/grosz-heirs-v-museum-modern-art>; *Menzel v. List*, 253, N.Y.S. 2d 43 (1st Dept. 1964), 267 N.Y.S. 2d 804 (Sup. Ct. N.Y. 1966).

- stolen goods becomes a wrongdoer, for purpose of a conversion or replevin claim, only after refusing the owner's demand for their return.<sup>22</sup>
- The Heirs did not assert that the MoMA had acted in bad faith, nor did they allege any fraud or misrepresentations on the MoMA's part. Instead, they claimed that the MoMA had been on notice of facts warranting investigation because it knew that the Paintings had been held on consignment by Flechtheim, a Jew persecuted by the Nazis.<sup>23</sup> However, such facts do not constitute bad faith *per se*. Accordingly, the court focused only on whether the Heirs' claim was time-barred.
  - As previously mentioned, the limitations analysis hinged on whether the 2005 letter or the 2006 letter constituted the MoMA's refusal. The court began by defining "refusal" as words or actions that are inconsistent with the claimant's possession or use of the property, regardless of whether the possessor explicitly refuses the demand. Because the rule's purpose is to give the good faith possessor an opportunity to relinquish the property once informed of the claimant's rights, a failure in *any* form to turn over the property constitutes a "refusal." This refusal, which triggers legal action, need not use the specific word "refuse" so long as it clearly conveys an intent to interfere with the demander's possession or use of his property.<sup>24</sup> If these actions amount to "an overt and positive act of conversion," they may be sufficient to constitute a refusal.
  - According to the court, the 2005 letter clearly rejected plaintiffs' assertion that they had an immediate right to possession to any of the Paintings and further stated the Museum's intent to keep all three Paintings "at this time." Thus, "no reasonable person" could have concluded after reading the 2005 letter that the MoMA agreed with the Heirs' assertion that they were the rightful owners of the Paintings, and as such were entitled to their immediate restitution. The court found that the first letter, along with the museum's continued retention of the paintings after sending the letter, indicated its continuing intent to interfere with the Heirs' ownership rights, and that taken together, this constituted "all the 'refusal' the law could possibly require" to cause the accrual of the plaintiffs' claim.<sup>25</sup>
  - To circumvent the statute of limitations issue, the Heirs argued the Museum's temporal and conditional language coupled with the board's continued efforts to negotiate equitably tolled the statute of limitations until reception of the board's express refusal in April 2006. The doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense, specifically where the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action and had reasonably relied on the defendant's misrepresentations.<sup>26</sup> However, the court held the "mere existence" of negotiations insufficient to grant the Heirs' equitable tolling claim without an indication of fraud or misrepresentation on the part of the MoMA. Thus, the doctrine of equitable

<sup>22</sup> *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d at 482 (2010).

<sup>23</sup> *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d at 480, 403 Fed. Appx. at 577.

<sup>24</sup> See "Grosz Heirs v. Museum of Modern Art."

<sup>25</sup> Ralph E. Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers, & Artists*, New York City: Practising Law Institute, 4th edition, Volume 1, 262.

<sup>26</sup> *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d at 480, 403 Fed. Appx. at 577.

estoppel was not available to the Heirs' claim and, as a result, the claim was time-barred by the statute of limitations.

#### IV. Adopted Solution

##### Request denied

- The District Court held, and the Court of Appeals affirmed, that the museum had, in effect, refused the plaintiff's demand for the works' return for at least 18 months before the 2006 letter containing the board's decision. In the decision, the court held: (i) the 2005 letter clearly communicated its intent to keep all three works despite the Heirs' demand; (ii) that the Museum had acted inconsistently with the Grosz family's claim of right by failing to return the Paintings for more than a year and a half after the 2003 demand; and (iii) negotiations with the Museum had not equitably tolled the action's date of accrual.<sup>27</sup> Accordingly, the District Court dismissed the Heirs' suit.
- The earlier letters and Museum's retaining the paintings were equivalent to a "no" even though it had not used the word "refuse." Therefore, the MoMA's acts constituted a refusal as a matter of law. Since the Heirs' did not file suit until April 10, 2010, the action was dismissed as falling outside the statute of limitations.<sup>28</sup>

#### V. Comment

- Under U.S. law, the standard of review for a motion to dismiss requires the court to liberally construe all claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff.<sup>29</sup> To the Heirs, the letter Grosz wrote to his brother-in-law was proof that the painting was stolen. To the Museum, it was evidence that Grosz himself passed up opportunities to ask for his art within a reasonable time.<sup>30</sup> The Heirs also presented evidence that could have cast doubt upon the Paintings' provenance, such as forced sales under the Nazi regime and laundering. Even so, the court determined the statute of limitations prevented access to court, thus it did not proceed to address the merits of the claim.
- With regard to a museum's duty to return work expropriated during wartime, contract law pertaining to forced transactions or transactions carried out under duress is not settled as to when such transactions should be voided.<sup>31</sup> Courts have held that the Guidelines of the American Alliance of Museums "were not intended to create legal obligations or mandatory rules but rather were intended to 'facilitate the ability of museums to act ethically and

<sup>27</sup> See *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 472 (2010).

<sup>28</sup> *Ibid.*

<sup>29</sup> Federal Rules of Civil Procedure, Rule 12(b)(6); *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d at 476.

<sup>30</sup> See Patricia Cohen, "Family's Claim Against MoMA Hinges on Dates."

<sup>31</sup> See *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300 (2007).

legally as stewards' through 'serious efforts' on a 'case by case basis' . . . [and] should not be interpreted to place an undue burden on the museums."<sup>32</sup>

- To address some of the issues Nazi looting has raised, the United States and more than forty other nations adopted the 1998 Washington Conference Principles on Nazi-Confiscated Art, and the 2009 Terezin Declaration, which urge nations to decide claims "on the facts and merits" and to take historical circumstances into account when legal hurdles arise.<sup>33</sup> These international agreements beseech nations to decide Holocaust-recovery claims based on their substance, and not on legal technicalities like the statute of limitations. Regardless, the agreements do not have the force of law, and U.S. courts taking these agreements into consideration have noted that the language of the Terezin Declaration disfavoring statute of limitations as being "too general and too hedged."<sup>34</sup>
- Some lawyers argue that laws regarding time limits are not merely technical, but also speak to the question of whether it is possible to reconstruct an accurate historical record after a long lapse, such as in the present case.<sup>35</sup> The three Paintings at issue had disappeared during the 1930s, but retained extensive legal records of exchanging hands. These lawyers argue that giving claimants the benefit of the doubt could penalize honest and rightful owners who obtain artwork legally. Other lawyers argue the opposite, saying, "the statute of limitations was never intended to cover something like wartime mass pillaging of property."<sup>36</sup>
- Because New York is at the heart of the art and antiquities market in the United States, the common-law rules developed by New York courts affecting the art market are particularly significant, and often the courts seem conscious of their role.<sup>37</sup> The policies influencing courts represent a balancing between the general commercial benefit of securing title through statutes of limitation that prevent the bringing of stale claims after relevant evidence and memories may have faded, and the desire to reduce incentives to steal and trade in stolen art works.<sup>38</sup>

## VI. Sources

### a. Bibliography

- Gerstenblith, Patty. *Art, Cultural Heritage, and the Law*, 3rd edition. Durham, North Carolina: Carolina Academic Press, 2012.

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<sup>32</sup> See *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (2006); Gerstenblith, *Art, Cultural Heritage and the Law* 615.

<sup>33</sup> See Washington Conference Principles on Nazi-Confiscated Art, Released in connection with the Washington Conference on Holocaust-Era Assets, Washington D.C. (December 3, 1998); Terezin Declaration on Holocaust Era Assets and Related Issues, Terezin (June 30, 2009); Gerstenblith, *Art, Cultural Heritage and the Law*, 615.

<sup>34</sup> *Ibid*; See Patricia Cohen, "Family's Claim Against MoMA Hinges on Dates."

<sup>35</sup> Gerstenblith, *Art, Cultural Heritage and the Law*, 438.

<sup>36</sup> Statement by Mr. Charles A. Goldstein, counsel to the Commission for Art Recovery; See Patricia Cohen, "Family's Claim Against MoMA Hinges on Dates."

<sup>37</sup> Gerstenblith, *Art, Cultural Heritage and the Law*, 444.

<sup>38</sup> *Ibid* at 472.

- Lerner Ralph E. and Judith Bresler. *Art Law: The Guide for Collectors, Investors, Dealers, & Artists*, 4th edition. New York City: Practising Law Institute, 2012.

b. Court decisions

- *Menzel v. List*, 253 N.Y.S. 2d 43 (1st Dept. 1964); 267 N.Y.S. 2d 804 (Sup. Ct. N.Y. 1966).
- *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300 (D. R.I. 2007).
- *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006).
- *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 472 (S.D.N.Y. 2010); 403 Fed. Appx. 575 (2d Cir. 2010).

c. Legislation

- Federal Rules of Civil Procedure, Rules 8(c)(1) and 12(b)(6).
- New York Civil Practice Law and Rules, Sections 203(a) and 214(3).

d. Documents

- Washington Conference Principles on Nazi-Confiscated Art, Released in connection with the Washington Conference on Holocaust-Era Assets, Washington D.C. (December 3, 1998).
- Terezin Declaration on Holocaust Era Assets and Related Issues, Terezin (June 30, 2009). Released in connection with the Washington Conference on Holocaust Era Assets, Prague and Terezin, June 26-30, 2009.
- Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era 1933-1945 (June, 1998).

e. Media

- Cohen, Patricia. "Family's Claim Against MoMA Hinges on Dates." *The New York Times*, August 23, 2011. Accessed August 6, 2013. [http://www.nytimes.com/2011/08/24/arts/suit-against-moma-highlights-time-limit-rule-in-nazi-looting-claims.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/08/24/arts/suit-against-moma-highlights-time-limit-rule-in-nazi-looting-claims.html?pagewanted=all&_r=0).
- "Grosz Heirs v. Museum of Modern Art," *Commission for Art Recovery*. Accessed August 6, 2013. <http://www.commartrecovery.org/cases/grosz-heirs-v-museum-modern-art>