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Case Two Schiele Paintings – Grunbaum Heirs v. Richard Nagy

Fritz and Elisabeth Grunbaum – Richard Nagy – Artwork/oeuvre d’art – Nazi-looted art/spoliations nazies – Judicial claim/action en justice – Judicial decision/décision judiciaire – Due diligence – Ownership/propriété – Procedural issue/limites procédurals – Statute of limitation/prescription – Unconditional restitution/restitution sans condition

In 1938, the Nazis expropriated the art collection of Fritz Grunbaum while he was detained in Dachau concentration camp. In 2016, the Grunbaum heirs filed suit against Richard Nagy, the art dealer in possession of two of the paintings by Schiele that formed part of Fritz Grunbaum’s collection (“Woman in a Black Pinafore” and “Woman Hiding Her Face”). Eventually, the New York’s Supreme Court directed Nagy to return the artworks to the Grunbaum heirs.

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

- **1938-1939:** Fritz and Elisabeth Grunbaum, a Jewish couple from Vienna, were arrested by the Nazis while attempting to flee to Czechoslovakia. Imprisoned in Dachau, Fritz Grunbaum was forced to sign a power of attorney¹ that authorized his wife “to file for [him] the legally required statement of assets and to provide on [his] behalf all declarations and signatures required for their legal effect according to the statutory provisions, and to represent [him] in general in all [his] affairs”.² Subsequently, Franz Kieslinger, a Nazi agent, inventoried and appraised the collection of the Grunbaums. The inventory comprised over 400 artworks, including 81 by Schiele, among which figured the paintings “Woman in a Black Pinafore” and “Woman Hiding Her Face”.
- **1941:** Fritz Grunbaum was murdered at Dachau and Elisabeth was forced to sign his death certificate, stating that “there is no estate [...] [and] in the absence of an estate, there are no estate-related proceedings”.
- **1942:** Elisabeth Grunbaum died following detention in Maly Trostinec concentration camp.
- **24 February 2005:** Richard Nagy, an art dealer based in London, paid £91,140 for half a share of the Schiele painting “Woman in a Black Pinafore”.
- **October 2011:** Nagy returned his share of “Woman in a Black Pinafore”.
- **December 2013:** Nagy purchased the Schiele painting “Woman Hiding Her Face” and reacquired half a share on the painting “Woman in a Black Pinafore”.
- **November 2015:** The Grunbaum heirs discovered that Nagy held two of the Schiele paintings of their family and asked the dealer to return them. Nagy refused.
- **18 March 2016:** The Grunbaum heirs filed suit against Nagy in New York.³
- **4 May 2018:** The Supreme Court of the State of New York granted the plaintiff’s motion for summary judgment on replevin and conversion claims, thereby ordering that the contested artworks be turned over to the relatives of Fritz and Elisabeth Grunbaum.⁴
- **9 July 2019:** The Appellate Division affirmed the judgment of the New York’s Supreme Court directing the defendant to return the artworks to the plaintiffs.⁵

¹ A power of attorney is the act with which one party gives to another the authority to represent him or her in one or more legal affairs.

² This was required by the “Decree regarding the reporting of Jewish Property” of 26 April 1938, which required all Jews to declare property valued at or over 5,000 DM. See Lorraine Boissoneault, “A 1938 Nazi Law Forced Jews to Register Their Wealth – Making it Easier to Steal”.

³ *Reif v. Nagy*, 106 N.Y. 3d 5, 12 (N.Y. App. Div. 9 July 2019).

⁴ *Reif v. Nagy*, 2018 WL 1638805, Index No. 161799/2015 (Sup. Ct. N.Y. County 5 April 2018).

⁵ *Reif v. Nagy*, 106 N.Y. 3d 5, 12 (N.Y. App. Div. 9 July 2019).

II. Dispute Resolution Process

Judicial claim – Judicial decision

- Immediately after the discovery of the paintings at a show in New York, the Grunbaum heirs (namely Timothy Reif and David Fraenkel as co-executors of the estate of Leon Fischer and Milos Vavra, declared to be heirs of Fritz Grunbaum) requested Richard Nagy to return them. The request was not followed up. As a consequence, the heirs filed an action for replevin and conversion against Nagy in New York.⁶

III. Legal Issues

Due diligence – Ownership – Procedural issue – Statute of limitation

- The Supreme Court of the State of New York stated that the equity principle of laches could not be applied to this case (and hence it could not bar the plaintiff's claim) for two reasons. First, because the US Congress had enacted the Holocaust Expropriated Art Recovery Act (HEAR Act)⁷ on 16 December 2016. This Act applies to artworks looted between 1 January 1933 and 31 December 1945 and aims to facilitate the return of Nazi-looted art by extending the statute of limitation to six years from “the actual discovery by the claimant”. Second, because the plaintiffs sent a letter to the defendant right after the discovery of the paintings, thereby respecting the delay set out in the HEAR Act.⁸ Therefore, the Supreme Court did not hold that the HEAR Act defeated the laches defense but only used the HEAR Act to confirm its reasoning (in its conclusion) and to remind New York's “strong public policy to ensure that the state does not become a haven for trafficking in stolen cultural property, or permitting thieves to obtain and pass along legal title”.⁹
- It was not contested that the paintings “Woman in a Black Pinafore” and “Woman Hiding Her Face” were the property of Fritz Grunbaum and that they were stolen by the Nazis during the Second World War. Therefore, the Grunbaum heirs had an arguable claim of a superior right of possession, while Nagy had an unauthorized possession of the artworks. This led to a *prima facie* case of replevin and conversion which shifted the burden of the proof to the defendant, who then had to establish a superior claim or to raise a triable issue of fact in order to show that Grunbaum transferred the paintings voluntarily during his lifetime. The defendant failed to do so.

⁶ Ibid.

⁷ The HEAR Act was approved to enforce the Washington Conference Principles on Nazi-Confiscated Art of 3 December 1998, the Holocaust Victims Redress Act, and the Terezin Declaration on Holocaust Era Assets and Related Issues endorsed at the Holocaust Era Assets Conference, Prague, 30 June 2009.

⁸ *Reif v. Nagy*, 2018 WL 1638805, Index No. 161799/2015 (Sup. Ct. N.Y. County 5 April 2018).

⁹ *Reif v. Nagy*, 106 N.Y. 3d 5, 12 (N.Y. App. Div. 9 July 2019).

- Whether or not the purchaser was in good faith was not relevant to the situation since under New York legislation “a thief cannot convey good title”.¹⁰ Furthermore, Nagy was a Schiele expert and provenance issues with Schiele artworks had already occurred in the past.¹¹ Many indicators showed that the defendant was aware of these provenance issues. First, the price he had paid for half a share of “Woman in a Black Pinafore” (£91,140) was far below the estimation made by Sotheby’s (£350,000-450,000). In addition, the Art Loss Register and the Grunbaum heirs’ attorney wrote to Nagy in 2004 and in 2005 informing him that the heirs were looking for this painting. It was probably for this reason that he returned his share. He then reacquired his half share because the case between the Grunbaum heirs and Bakalar was resolved in favour of the defendant.¹² Moreover, when he acquired “Woman Hiding Her Face”, Nagy was aware that the painting was claimed by the Grunbaums. In fact, the Art Sale and Transfer Agreement admitted potential ownership claims by the Grunbaum heirs, and Nagy agreed he would have no claim against the seller if his title were to be challenged. He also obtained a title insurance policy on 16 January 2014 which specifically recognized that the artwork was registered as “Lost Art” and that previous claims by Grunbaum heirs had occurred.¹³ It also has to be noted that the price paid by Nagy for the painting “Woman Hiding Her Face” was far below its true market value as he had acquired it for \$1.5 million and sold it the same day for \$2.5 million.¹⁴

IV. Adopted Solution

Unconditional restitution

- The Supreme Court of New York vested title on the paintings “Woman in a Black Pinafore” and “Woman Hiding Her Face” to the Grunbaum’s estate. Subsequently, the Appellate Division of the New York’s Supreme Court affirmed the previous judgment and directed the defendant to return the paintings to the Grunbaum heirs.

¹⁰ Ibid.

¹¹ Apart from the decision in the case *Bakalar v. Vavra* (No 11-4042-ev, 2012 WL 4820801, 2nd Cir. Oct. 11, 2012), which also involved the Grunbaum heirs (on this case, which concerned the drawing “Seated Woman with Bent Left Leg (Torso)”, see Andrea Wallace, Shelly Janevicius, Marc-André Renold, “Case Schiele Drawing – Grunbaum Heirs v. David Bakalar”), see also the case concerning the painting “Portrait of Wally” (for a comment see Raphael Contel, Giulia Soldan, Alessandro Chechi, “Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum”).

¹² *Bakalar v. Vavra*, *ibid.*

¹³ *Reif v. Nagy*, 106 N.Y. 3d 5, 12 (N.Y App. Div. 9 July 2019).

¹⁴ *Reif v. Nagy*, 2018 WL 1638805, Index No. 161799/2015 (Sup. Ct. N.Y. County 5 April 2018).

V. Comment

- Although it was described as a “surprising decision”,¹⁵ the judgments of the courts of New York in the case under consideration were not so startling. First, the circumstances were not the same as in the *Bakalar* decision (which also involved the Grunbaum heirs). Second, the outcome was somehow predictable in light of the adoption of the HEAR Act. This provided “the victims of Holocaust-era persecution and their heirs [with] a fair opportunity to recover works of art confiscated or misappropriated by the Nazis” by extending the statute of limitation to six years from “the actual discovery by the claimant”.¹⁶
- It is important to emphasize that the HEAR Act was enacted to implement the Washington Principles of 1998 and the Terezin Declaration of 2009. This demonstrates the power of the “soft-law” as a source that can have an impact on the activity of both the legislature and the judiciary. Nonetheless, the HEAR Act is limited in that it will cease its effect on 1 January 2027.¹⁷ Hence, we cannot help but wonder what will happen next for Nazi-looted art claims in the United States.
- The Supreme Court of the State of New York, referring to *Bakalar v. Vavra*,¹⁸ emphasized that “in New York a thief cannot pass good title”, and that “New York’s overwhelming interest in preserving the integrity of its market warrants the application of New York law”.¹⁹ Therefore, with this decision the Court confirmed that New York is one of the most prominent location for the art market and that it should not be exploited to facilitate the transfer of looted art. Consequently, by protecting the title of the original owner, New York law appears to be favorable to Nazi-looted art restitution.

¹⁵ Webster D. McBride, “Surprise Decision in *Reif v. Nagy* Raises As Many Questions As It Answers”.

¹⁶ HEAR Act preamble. See also - Timothy Chung, “Two for the Price of One: Recent US Legal Developments in Nazi-Looted Art”.

¹⁷ HEAR Act §5(g).

¹⁸ *Supra* n. 11.

¹⁹ *Reif v. Nagy*, 2018 WL 1638805, Index No. 161799/2015 (Sup. Ct. N.Y. County 5 April 2018).

VI. Sources

a. Court decisions

- *Reif v. Nagy*, 106 N.Y.Y.3d 5, 12 (N.Y App. Div. 2019).
- *Reif. v Nagy*, 2018 WL 1638805, Index No. 161799/2015 (Sup. Ct. N.Y. County 5 April 2018).
- *Bakalar v. Vavra*, No 11-4042-ev, 2012 WL 4820801 (2nd Cir. Oct. 11, 2012).

b. Legislation

- Holocaust Expropriated Art Recovery (HEAR) Act of 16 December 2016, Pub. L. No. 114-308, 130 Stat. 1528.

c. Documents

- Andrea Wallace, Shelly Janevicius, Marc-André Renold, “Case Schiele Drawing – Grunbaum Heirs v. David Bakalar,” Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.
- Raphael Contel, Giulia Soldan, Alessandro Chechi, “Case Portrait of Wally – United States and Estate of Lea Bondi and Leopold Museum”, Platform ArThemis (<http://unige.ch/art-adr>), Art-Law Centre, University of Geneva.
- Terezin Declaration on Holocaust Era Assets and Related Issues endorsed at the Holocaust Era Assets Conference, Prague, 30 June 2009.
- Washington Conference Principles on Nazi-Confiscated Art, 3 December 1998.

d. Media

- Lorraine Boissoneault, “A 1938 Nazi Law Forced Jews to Register Their Wealth – Making it Easier to Steal”, Smithsonian, 26 April 2018, <https://www.smithsonianmag.com/history/1938-nazi-law-forced-jews-register-their-wealthmaking-it-easier-steal-180968894/> (last visited 30 October 2019).
- Webster D. McBride, “Surprise Decision in Reif v. Nagy Raises As Many Questions As It Answers”, Hughes Hubbard & Reed Art Law, 23 April 2018, <https://www.hhrartlaw.com/2018/04/surprise-decision-in-reif-v-nagy-raises-as-many-questions-as-it-answers/> (last visited 30 October 2019).
- Timothy Chung, “Two for the Price of One: Recent US Legal Developments in Nazi-Looted Art”, Center for Art Law, 8 October 2019, <https://itsartlaw.org/2019/10/08/two-for-the-price-of-one/#post-37973-footnote-ref-6> (last visited 13 November 2019).