UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JULIUS H. SCHOEPS, EDELGARD VON LAVERGNE-PEGUILHEN, and FLORENCE KESSELSTATT,,

Plaintiffs,

v. 07 Civ. 11074 (JSR)

THE MUSEUM OF MODERN ART and THE SOLOMON R. GUGGENHEIM FOUNDATION,

Defendants.

Settlement Conference

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New York, N.Y.
February 2, 2009
9:35 a.m.

Before:

HON. JED S. RAKOFF

District Judge

APPEARANCES

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(Case called)

THE CLERK: Counsel, please state your names for the record.

MR. BYRNE: John Byrne for the plaintiffs, with Thomas Hamilton, David Pikus, and David Smitham.

THE COURT: Good morning.

MR. JOSEPH: Good morning, your Honor. Gregory Joseph for the museums. With me are Mr. Evan Davis and Mr. Lawrence Friedman from the Cleary Gottlieb firm and Pamela Jarvis, my partner.

THE COURT: This case was set for trial to begin today. Late on Friday, in fact on Friday evening, my law clerk received a telephone message from counsel saying they had settled the case. There was some correspondence, and then I received on Saturday a letter, signed by Mr. Byrne and Mr. Joseph, stating, "This is to advise the Court pursuant to your Honor's individual rule 10 that the above case has been finally settled and that the Court may dismiss the case with prejudice."

This in form is not, I think, quite what Rule 41 contemplates. I think it's close enough to constitute a stipulation of the parties under Rule 41 of the Federal Rules of Civil Procedure, but I want to be absolutely sure.

First, Mr. Byrne, with full authority from your clients, have you and they entered into an unconditional

dismissal of this case with prejudice?

MR. BYRNE: Your Honor --

THE COURT: Is the answer yes or no, Mr. Byrne?

MR. BYRNE: Yes.

THE COURT: Thank you. You may be seated.

Mr. Joseph, same question.

MR. JOSEPH: Yes, your Honor.

THE COURT: What are the terms of the settlement?

MR. JOSEPH: If I may, your Honor?

THE COURT: Yes.

MR. JOSEPH: The terms of the settlement are that for a sum certain, which confidentiality is part of the settlement, there will be complete peace between the museums and the Mendelssohn-Bartholdy and Lavergne-Peguilhen heirs. The settlement is not documented because we don't have signatures from all of the heirs. We are assured that we have full authority from the plaintiffs, so that all claims between these parties, so we don't have other heirs coming out of the woodwork, are involved.

THE COURT: And the paintings remain in the --

MR. JOSEPH: The paintings remain in the museums.

THE COURT: I'm interested that portions of this are confidential. I'm looking at the letter I received from Mr. Davis on January 15, 2009, just a couple of weeks ago. "The museums welcome to fact that this trial is open to the public,

including to members of the press. The museums are and remain committed to transparency in their actions, and these proceedings are no exception."

It's hard for me to see how keeping any aspect of the settlement confidential is in accordance with the public interest.

MR. JOSEPH: We are, of course, in the Court's hands. Let me suggest, your Honor, that the museums were fully prepared to begin trial today and wanted all of the facts to come out. The facts will not come out, because we have agreed on a settlement. A settlement can give rise to an inference which is unwarranted on the part of the public.

The fact of settlement is not being hidden. The fact that there is complete accord is not being hidden. We are not trying to hide anything. But the dollar amount is something which we think is commonly and appropriately a matter that remains in confidence.

THE COURT: I don't know that this is the ordinary case. The museums brought this case with very loud assertions that the plaintiffs' claims were without merit, that their ownership of these paintings was good and solid, and that they were in effect being extorted, and they were prepared to call the bluff of plaintiffs' counsel.

Plaintiffs' counsel with equal fervor asserted that these two very distinguished New York institutions had acquired

these paintings or had been bequeathed these paintings under circumstances that should have made them aware that their ownership was suspect and that the evil of Nazi duress had played a material part in the transfer of these paintings from the original owner.

The public surely would want to know now and forever which of those diametrically different views was true, and the great crucible of a trial would have made that known. Instead, what we are left with is a settlement that each side will undoubtedly spin in favor of their positions and the public will remain uncertain as to what the truth is in this important case.

The museums surely, as quasi-public institutions, have a responsibility, one that I think was well captured in Mr. Davis's letter that I just read from. Plaintiffs' counsel for their part, in making an accusation so serious and invoking the weight of history on their behalf, have a responsibility to the public as well, maybe not in law but in simple justice.

I find it extraordinarily unfortunate that the public will be left without knowing what the truth is. However, rule 41 of the Federal Rules of Civil Procedure and the case law thereunder makes it crystal clear that when the parties to a civil lawsuit, a private civil action, enter into a binding settlement and stipulation that the case is to be dismissed with prejudice and without any conditions, this Court is

obligated to accept that dismissal.

With respect to keeping the terms of the settlement confidential, I will think about that. I would urge the parties to think about their public obligations in this lawsuit.

We have one other matter, which is costs under local rule 47.1. That rule, as I advised counsel in a letter over the weekend, indicates that where, as here, a case is settled and the Court is advised of the settlement after noon on the prior business day, which was Friday, then the Court in its discretion may assess the parties or counsel with the cost of one day's attendance of the jury, a modest sum but still one that serves an educative purpose if nothing else.

Let me hear from counsel if they oppose the assessment of those costs.

MR. JOSEPH: If I may, your Honor?

THE COURT: Yes.

MR. JOSEPH: There were initial settlement discussions before my firm was involved in the case in August. After your Honor entered the summary judgment order, there was a discussion between Mr. Davis and Mr. Byrne. The museums had made an offer back in August which hadn't been responded to, and an invitation was invited at that time, which had been perhaps the first few days of January, shortly after the order entered.

As your Honor knows from the proposed jury instructions, however, prior to the summary judgment opinion there was a substantial disagreement between the parties as to the governing law and what presumptions might apply. That was entirely clarified in the Court's summary judgment opinion. Settlement discussions resumed very promptly, and the case was settled within I believe about 80 hours of that opinion, with discussions every day from the moment we had that opinion.

I would urge your Honor that the parties have in good faith, from the positions that they understood they were entitled to take prior to the summary judgment opinion, not acted other than in good faith and it was a reasonable effort to get the matter resolved. Thank you, your Honor.

THE COURT: Let me hear from plaintiffs' counsel.

MR. BYRNE: Your Honor, I would concur with that. Let me clarify one point. With regard to Mr. Davis's offer, it said it expired within 10 days and we let it expire. It's not a question of whether it was responded to or not.

I would concur with Mr. Joseph, we have been engaged in active settlement discussions, and this was the final conclusion of it.

THE COURT: I have the highest respect for the counsel in this case. However, I think in their representation of their respective clients and in their clients' actions the parties have lost sight of the public interests that attend

this case, and that notwithstanding the parties' repeated invocations of the public's interest throughout this case. Nevertheless, I have no doubt about the credibility of counsel in this case, so on the representations just made, I will not impose costs.

I think on the issue of whether the settlement should remain private, it probably makes sense, unless counsel disagree, for the parties to, as soon as it is signed, send me a copy of it, and I will keep it under seal until I have had a chance to look at it. It doesn't have to be filed publicly. If I determine that it is appropriate and within my power to make it public, I will convene a conference with counsel so that they may be heard on that further, if that's the Court's inclination.

Any problems with that?

MR. JOSEPH: No, your Honor. Thank you.

MR. BYRNE: No, your Honor. In fact, that is related to an item that I wanted to raise. Does that mean that the Court will retain jurisdiction until the documentation is completed in the case?

THE COURT: How long is it going to take you to get the signatures?

MR. BYRNE: We are going to try to go as promptly and expeditiously as possible.

THE COURT: That's right. Now give me a time frame.

MR. BYRNE: May I confer with counsel?

THE COURT: Yes.

MR. BYRNE: Your Honor, 30 days.

THE COURT: 30 days?

MR. BYRNE: Yes. There are a number of heirs.

THE COURT: Let me make clear that I am, on the representations made both in your letter that you and your adversary signed and on the representations made by counsel, dismissing this case with prejudice today finally, unequivocally, no ifs, ands, and buts, no reopenings. I will retain jurisdiction for the limited purpose of saying whether the settlement document should be public or not, and I will give you 30 days to submit that in its final signed and unequivocally final version. But only in that respect am I retaining jurisdiction. All right?

MR. BYRNE: Yes, your Honor.

THE COURT: Anything else counsel need to raise with the Court?

MR. JOSEPH: No. Thank you very much, your Honor.

THE COURT: The court stands adjourned.

(Adjourned)

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FROM: Charlotte Taylor
Law Clerk to Hon. Jed S. Rakoff

DATE: January 27, 2009

RE: *Museum of Modern Art v. Schoeps*, 07 Civ. 11074

MESSAGE: Please see attached.

PAGES: 14 (including cover)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIUS H. SCHOEPS, EDELGARD VON LAVERGNE-PEGUILHEN, and FLORENCE KESSELSTATT, Plaintiff, -v- THE MUSEUM OF MODERN ART, and THE SOLOMON R. GUGGENHEIM FOUNDATION, Defendant.	07 Civ. 11074 (JSR) OPINION

JED S. RAKOFF, U.S.D.J.

This case essentially involves claims by Julius Schoeps, Edelgard von Lavergne-Peguilhen, and Florence Kesselstatt ("Claimants"), heirs of Paul von Mendelssohn-Bartholdy ("Paul") and/or of his second wife, Elsa, that two Picasso paintings -- Boy Leading a Horse (1905-1906) ("Boy") and Le Moulin de la Galette (1900) (collectively, "the Paintings") -- once owned by Paul and now held by, respectively, the Museum of Modern Art and the Solomon R. Foundation ("the Museums"), were transferred from Paul and/or Elsa as a result of Nazi duress and rightfully belong to one or more of the Claimants.[1] The case began as a declaratory judgment action by the Museums seeking, in effect, to "quiet title" as to the Paintings, but has now been reconfigured to more accurately reflect the parties'

[1] The Claimants have entered into a side-agreement waiving any conflicts and agreeing to divide any recovery that any one or more of them may obtain in this lawsuit. See Waiver of All Potential and Real Conflicts of Interest and Addendum to Retainer Agreement, Ex. 46 to Declaration of Evan A. Davis in Support of Plaintiffs' Motion for Summary Judgment ("Davis Decl.").

positions.[2] Prior to the repositioning, the Museums moved for summary judgment granting their request for declaratory relief and dismissing all counterclaims brought by the Claimants; but the Court, by Order dated December 30, 2008, denied the Museums' motion. See Order, 12/30/08. The Order also informed the parties that the Court had determined that German law governs the issue of duress relating to the sale or transfer of the Paintings and that New York law governs the issue of whether the Claimants' claims are barred by laches. By Order dated January 20, 2009, the Court further ruled that New York law, rather than Swiss law, applies to the issues raised by the parties concerning the validity and legal effect of the transfer of Boy to William Paley ("Paley") by art dealer Justin Thannhauser ("Thannhauser") in 1936. This Opinion briefly sets forth the reasons for these various rulings.

In an action for declaratory judgment, the burden of proof rests on the party who would bear it if the action were brought in due course as a claim for non-declaratory relief. Preferred Acc. Ins. Co. of N.Y. v. Grasso, 186 F.2d 987, 991 (2d Cir. 1951). See Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2770. This, indeed, is one of the reasons the Court subsequently repositioned the parties. Accordingly, on this summary judgment

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[2] Specifically, by Order dated January 20, 2009 the Court repositioned the parties and amended the caption in this case so that Schoeps -- originally defendant and counterclaim-plaintiff -- and von Lavergne-Peguilhen and Kesselstatt -- originally counterclaim-plaintiffs -- now stand as plaintiffs, and the Museums stand as defendants.

motion, as at trial, it is the Claimants who bear the burden of establishing their rights, if any, to ownership of the Paintings. It is well-established, moreover, that summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Bay v. Times Mirror Magazines, Inc., 936 F.2d 112, 116 (2d Cir. 1991). The central question on this summary judgment motion, therefore, is whether the Claimants have adduced competent evidence sufficient to create triable issues of fact as to the essential elements of their claims, viewing the evidence in the light most favorable to them. As reflected in the Order of December 30, 2008, the Court concludes that they have.

It is undisputed that, prior to 1927, the Paintings were owned by Paul von Mendelssohn-Bartholdy, a German of Jewish descent. With regard to Schoeps, the Museums argue that two documents executed in 1935 establish that Paul gave the Paintings as a wedding gift in 1927 to his second wife Elsa, née von Lavergne-Peguilhen, and that Schoeps, who is descended from Paul's sister Marie Busch, therefore has no valid claim to them.[3] The Claimants' primary argument in

[3] Under German law, if no such gift had been made, Paul's sisters would have inherited the Paintings upon Elsa's death. Elsa was Paul's "first heir," while his sisters were Paul's "second heirs." This meant that Elsa would have the equivalent of a life estate in any property that Paul possessed at his death, and upon her death such property would pass immediately by operation of law to the second heirs or, if they were no longer living, to their heirs. Report of Wolfgang Ernst, Ex. 5 to Davis

response is that the alleged 1927 gift was in fact merely a pretext, conceived by Paul as he neared death in 1935 in response to anti-Semitic measures taken by the then-ascendent Nazi government, and was designed to protect the Paintings by putting them in the name of Elsa, who was considered "Aryan." The Claimants point, inter alia, to records from the Lucerne branch of Thannhauser's art gallery listing Paul as the owner of the paintings in 1934, Report of Laurie A. Stein ("Stein Report"), Ex. 8 to Declaration of Evan A. Davis in Support of Plaintiffs' Motion for Summary Judgment ("Davis Decl."), at 27-28, as well as to the stark fact that there is no pre-1935 document of any kind evidencing the alleged gift. Moreover, three of the Claimants' experts express the opinion that Paul only pretended that he had given the paintings to Elsa but actually intended to protect them and pass them on to his sisters, Rebuttal Report of Ulf Bischof, dated September 10, 2008, Ex. 14 to Davis Decl., at 3; Report of Christoph Kreutzmueller, dated July 30, 2008, Ex. 10 to Davis Decl., at 2; Report of Lucilee Roussin, dated July 30, 2008, Ex. 11 to Davis Decl., at 4. The Court finds this evidence more than sufficient to create a triable issue of fact on this point.

Moreover, even if the jury trying this case (beginning February 2, 2009) were to find that there was a bona fide gift of the Paintings to Elsa in 1927, this would not, of itself, eliminate the Claimants' claim to the Paintings, because the other two Claimants,

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Decl., at 13-14.

von Lavergne-Peguilhen and Kesselstatt, are heirs of Elsa[4], and the Claimants' ultimate position is that, regardless of whether the Paintings still belonged to Paul or were simply being held by him on behalf of Elsa, the transfer of the Paintings to the Museums' predecessors in interest was still voidable as the product of Nazi duress.

The Museums argue that von Lavergne-Peguilhen and Kesselstatt have waived any claim they might have as Elsa's heirs because, in their responses to the Museums' Requests for Admission, they both declined to admit that Paul gave the Paintings to Elsa in 1927 or at any point before his death, Responses of Counterclaim-Plaintiff Florence Kesselstatt to Plaintiffs and Counterclaim-Defendants' Requests for Admission ("Kesselstatt Responses"), Ex. 3 to Davis Decl., ¶¶ 58-72; Responses of Counterclaim-Plaintiff Edelgard von Lavergne-Peguilhen to Plaintiffs and Counterclaim-Defendants' Requests for Admission ("Lavergne-Peguilhen Responses"), Ex. 4 to Davis Decl., ¶¶ 58-72. But a refusal to admit is not the equivalent of an affirmative admission of the opposite. As for Kesselstatt's statement in her deposition that she interpreted one of the 1935 documents as merely containing a "hint" that Paul had given the Paintings to Elsa, Deposition of Florence Kesselstatt, dated July 18, 2008, Ex. 19 to Davis Decl., at 67-70, this is most likely not admissible evidence at all, and, even if it were, neither it nor the Claimants' experts' opinion that the gift was pretextual constitutes

[4] As noted, the Claimants have waived all conflicts between them, so as to allow their counsel to argue in the alternative.

a formal concession waiving a party's right to contest the alleged admission or opinion. See, e.g., Guadagno v. Wallack Ader Levithan Ass'n, 950 F. Supp. 1258, 1261 (S.D.N.Y. 1997).

The Museums next argue that even if one or all of the Claimants can bring a claim, the claim must fail because Paul's or Elsa's transfer of the Paintings was not the product of duress or other invalidity. As a preliminary matter, the Court agrees with the Museums that this is an issue governed, as a substantive matter, by German law. New York choice of law rules govern in diversity cases, see Finance One Public Co. Ltd. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 331 (2d Cir. 2005), and New York applies interest analysis to choice-of-law questions, Istim, Inc. v. Chemical Bank, 78 N.Y.2d 342, 346-47 (1991). The New York Court of Appeals has laid down five factors to be considered in determining which forum's law will govern a contract dispute, including the place of contracting, the place of negotiation, the place of performance, the location of the subject matter of the contract, and the domicile or place of business of the contracting parties. Maryland Cas. Co. v. Continental Cas. Co., 332 F.3d 145, 151-52 (2d Cir. 2003) (citing Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 317 (1994)). All five of these factors plainly support the application of German law to the issue of whether the transfer of these German-held Paintings in 1935 was a product of Nazi duress or the like.[5]

[5] Under one possible view of the facts, the Paintings were in Switzerland at the Lucerne branch of the Thannhauser gallery as early as 1932, see Stein Report at 29, before any transfer was made. Neither party, however, has argued that Swiss law applies

If German law applies, the next issue is whether one is talking about the ordinary German Civil Code, which dates back to 1900 and is still in place, or whether the standard that should be invoked is that contained in Military Government Law 59 ("MGL 59"), a law put in place by the Allies during the postwar occupation of Germany that establishes a presumption that property was confiscated if it was transferred between January 30, 1933 and May 8, 1945 by a person subject to Nazi persecution. But MGL 59 did not displace the German Civil Code. It simply established a limited regime under which claims brought in a particular tribunal, which no longer exists, and by a given deadline, which has passed, were entitled to a special presumption, which is no longer available. Cf. Dreyfus v. Von Finck, 534 F.2d 24, 29 (2d Cir. 1976) ("Military Law 59 created its own regulations and its own tribunals to interpret and enforce them. It was completely self-contained."). Thus MGL 59 neither applies to this case nor precludes the claim here asserted. Indeed, the only German court decision that has been provided to this Court in its entirety -- a 2008 judgment from the Berlin District Court -- allowed a claim similar to the one here asserted to go forward, without benefit of the MGL presumption and without the claim being barred by the expiration of MGL 59.

The relevant provisions of the German Civil Code, or Bürgerliches Gesetzbuch ("BGB"), that are relevant here to Claimants' claim of duress or other such invalidity are BGB § 138 and § 123.

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to the duress question; the choice, both sides agree, is between New York and German law.

Under BGB § 138, a contract may be declared void ab initio if it is entered into when one party is at a distinct disadvantage in bargaining -- for example, if that party is in "dire need" -- and its terms lopsidedly favor the other party. Report of Wolfgang Ernst ("Ernst Report"), Ex. 5 to Davis Decl., at 76. Under BGB § 123, a party may rescind a contract if he or she entered into it because of a threat. Id. at 104.

While the record regarding the transfers of these Paintings is meagre, it is informed by the historical circumstances of Nazi economic pressures brought to bear on "Jewish" persons and property, or so a jury might reasonably infer, and, in this context, the Court concludes that Claimants have adduced competent evidence sufficient to create triable issues of fact as to whether they have satisfied the elements of a claim under BGB § 138 and/or BGB § 123. For example, Claimants have adduced competent evidence that Paul never intended to transfer any of his paintings and that he was forced to transfer them only because of threats and economic pressures by the Nazi government. Summary judgment is therefore not appropriate.

Although German law governs the issue of duress, the Claimants frame their substantive claims (originally, counterclaims) in common law terms like "conversion" and "replevin." In that regard, the Museums argue that Claimants may not bring such claims without first having been appointed as representatives of the relevant estate by the New York Surrogate. The Museums rely on Schoeps v. The Andrew Lloyd Webber Art Foundation, 2007 NY Slip Op 52183U (N.Y. Sup. Ct. Nov. 19, 2007) ("Webber"), in which the New

York Supreme Court held that one of the Claimants in this case, Julius Schoeps, did not have standing to bring a similar restitution claim for a painting once owned by Paul because he had not been appointed representative of Paul's estate.

It is true that under New York law, a cause of action possessed by the decedent at the time of his or her death may be brought subsequently by a representative of the decedent only if the plaintiff has been appointed personal representative of the decedent's estate by the New York Surrogate. See, e.g., George v. Mt. Sinai Hospital, 47 N.Y.2d 170, 177 (1979). At the same time, however, when under the relevant foreign inheritance law there is no estate but rather property passes immediately by operation of law to the decedent's heirs, this requirement does not apply. Roques v. Grosjean, 66 N.Y.S.2d 348, 349 (N.Y. Sup. Ct. 1946); Bodner v. Bank Paribas, 114 F. Supp. 2d 117, 126 (E.D.N.Y. 2000); Pressman v. Estate of Steinworth, 860 F. Supp. 171, 177 (S.D.N.Y. 1994). As the Claimants point out, the Museums' own expert witness explains that under German law there is no estate as there is under American law; rather, the decedent's assets vest immediately in his or her heirs at death. Ernst Report at 11. The Webber court was not squarely presented with this issue as no similar authority had been introduced in that case. Webber at *4. In light of Roques, this Court is constrained to disagree with the dictum in Webber that Bodner is contrary to New York law.[6] The Claimants' failure to be appointed

[6] This is not to say that the authorities cited in Webber are not accurate statements of New York law; all stand for the

representatives of the relevant estates is not therefore a bar to bringing their conversion and replevin claims. It is, indeed, difficult to imagine how the Claimants could be appointed representatives of Paul's or Elsa's estates when, according to the Museums' witness, no such estates ever existed or would exist under German law.

Although German law governs the issue of whether the transfer of the Paintings from Paul or Elsa was a product of duress or the like, there is a separate issue of what law governs the validity and legal effect of the sale of Boy to Paley in 1936, since that sale, of which some record exists, might create a "good faith purchaser" defense for the Museum of Modern Art (to which Paley willed the painting) even if the transfer from Paul or Elsa were infected with duress. Claimants say that New York law governs this issue, while Museums say it is governed by the law of Switzerland, where the sale occurred.

The issue is indeed pertinent, as Swiss and New York law provide different applicable standards. See Finance One Public Co. Ltd. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 331 (2d Cir. 2005) (choice of law analysis is not necessary in the absence of an actual conflict between the laws of the two relevant jurisdictions). "New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in

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valid proposition that an action on behalf of a New York estate must be brought by a representative duly appointed by the New York Surrogate. See, e.g., Tajan v. Pavia & Harcourt, 257 A.D.2d 299, 302 (1st Dept. 1999).

the possession of a good-faith purchaser for value." Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 317 (1991). See also, e.g., Phelps v. McQuade, 158 A.D. 528, 530 (1st Dept. 1913) ("The possession of personal property obtained by common-law larceny confers no title which can protect an innocent purchaser from the thief."); Candela v. Port Motors, Inc., 208 A.D.2d 486, 487 (2d Dept. 1994) (holding that, under UCC 2-403(1), one who purchased a stolen car cannot convey good title to a subsequent purchaser for value). Under Swiss law, on the other hand, owners of stolen goods receive less protection. A party who acquires an object in good faith becomes the owner even if the seller was not authorized to transfer ownership, the purchaser's good faith is presumed, and the exception enabling the owner of lost or stolen property to reclaim it even from a good faith purchaser applies only for five years. See Bakalar v. Vavra, No. 05 Civ. 3037, 2008 WL 4067335, at *6 (S.D.N.Y. Sept. 2, 2008); Autocephalos Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 717 F. Supp. 1374, 1400 (D. Ind. 1989), aff'd 917 F.2d 278 (7th Cir. 1990).

As previously noted, New York applies interest analysis to choice of law questions. Istim, 78 N.Y.2d at 346-47. In disputes over transfers of personal property, interest analysis will often lead to the conclusion that the law of the forum where the transfer took place applies, the same result that would have been reached under the traditional lex loci delicti rule. See, e.g., Kunstammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 845-46 (E.D.N.Y. 1981). But such a result is not inevitable, and where

another forum has a more significant relationship to the parties and the property, that forum's law will apply. See Restatement 2d of Conflict of Laws § 245. In particular, when the parties did not intend that the property would remain in the jurisdiction where the transfer took place, that forum will have a lesser interest in having its law applied. Restatement 2d of Conflict of Laws § 244 cmt. f; Autocephalos, 717 F. Supp. at 1394.

Here, Boy was held at the time of its sale by the Galerie Rosengart in Lucerne, Switzerland, which was, according to the Museums' expert, a branch gallery run by Thannhauser but a legally independent entity. Stein Report at 33, 24-25. But Boy was immediately shipped to New York, where Paley lived, Stein Report at 34, and the painting was paid for by a check made out to a New York bank, see Letter from Albert Skira to William Paley dated August 27, 1936, Ex. 56 to Davis Decl. The owner of Boy, whether Paul, Elsa, or Thannhauser, was not a Swiss resident or citizen at the time. And Boy has been in New York for over 70 years and is now the property of a major New York cultural institution that is also a party to this action. Under these circumstances, interest analysis leads to the conclusion that New York law applies to the sale of Boy to Paley, and the Claimants' claims as to Boy are therefore not barred by Swiss law.

Finally, the Museums assert that the claims are barred by laches. The parties agree that New York law governs this issue. See transcript, December 18, 2008. As the Court indicated in its December 30, 2008 Order, the fact-intensive question of whether

laches bars Claimants' action will be the subject of an evidentiary hearing conducted by the Court simultaneously with the jury's trial of the merits of the case. Summary judgment is inappropriate at this stage because genuine questions of fact exist as to, inter alia, whether Elsa knew she had a potential claim to the Paintings during her lifetime and whether the Museums, as Claimants argue, had reason to know that the Paintings were misappropriated and so are barred from invoking laches by the doctrine of "unclean hands."

Although the Court has also considered, and rejected, various other arguments made by the Museums, the foregoing expresses the basic reasoning underlying the Court's Order of December 30, 2008 denying the Museums' motion for summary judgment, as well as the supplemental Order of January 20, 2009.

Dated: New York, NY
January 27, 2009

JED S. RAKOFF, U.S.D.J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE MUSEUM OF MODERN ART, and THE SOLOMON R. GUGGENHEIM FOUNDATION,

Plaintiffs,

BOY LEADING A HORSE, and LE MOULIN DE LA GALETTE, two paintings by Pablo Picasso,

Plaintiffs in rem,

-v-

JULIUS H. SCHOEPS,

Defendant.

JULIUS H. SCHOEPS, EDELGARD VON LAVERGNE-PEGUILHEN, and FLORENCE KESSELSTATT,

Counterclaim-Plaintiffs,

-v-

THE MUSEUM OF MODERN ART, and THE SOLOMON R. GUGGENHEIM FOUNDATION,

Counterclaim-Defendants.

07 Civ. 11074 (JSR)

ORDER

JED S. RAKOFF, U.S.D.J.

On October 7, 2008, plaintiffs in this action moved for summary judgment granting their request for declaratory relief and dismissing all counterclaims brought by counterclaim-plaintiffs Julius Schoeps, Edelgard von Lavergne-Peguilhen, and Florence

Kesselstatt. Following full briefing, the Court heard oral argument on December 18, 2008, followed by supplemental briefing.[1]

If the context of this case were an ordinary one, the failure of counterclaim-plaintiffs to come forward with more particularized evidence supporting their assertions might well have resulted in plaintiffs' obtaining summary judgment; but the combination of the unique historical circumstances that form the backdrop to this case and the absence of living witnesses to most of the events in question persuades the Court that, at least at the summary judgment stage, greater liberty must be accorded to the drawing of extended inferences than might more ordinarily be the case. Accordingly, the Court concludes that genuine issues of material fact remain that preclude granting plaintiffs' motion at this stage and the motion is therefore denied.

An opinion more fully detailing the reasons for this ruling will issue in due course. However, to help guide counsel in preparation for the upcoming trial of this case, which is firmly fixed to commence at 9:00 a.m. on February 2, 2009, the Court here apprises counsel that the Court has determined, inter alia, that German law governs the issue of duress relating to the sale or transfer of the paintings and that New York law governs the issue of whether counterclaim-plaintiffs' claims are barred by laches. The

[1] Counterclaim-plaintiffs' supplemental submissions did not adhere to the limits placed by the Court on the scope of these submissions and will be disregarded to the extent they exceeded those limitations.

Court also notes that, since disputed questions of material fact preclude its ruling finally at this time on the issue of laches, that issue will be tried by the Court simultaneously with the jury's trial of the merits; but if there is any evidence proffered that bears solely on the issue of laches, it will be taken outside the presence of the jury.[2]

To simplify matters at trial and in any further proceedings in this case, the Court is considering repositioning the parties and recasting the caption of the case so that Julius Schoeps, Edelgard von Lavergne-Peguilhen, and Florence Kesselstatt are treated as Plaintiffs and the Museum of Modern Art and the Solomon R. Guggenheim Foundation as Defendants. If any party objects to this, such party should fax the Court a letter, not to exceed three single-spaced pages, by January 9, 2009, explaining the grounds for the objection.

Finally, the Court received today a letter from an entity named Courtroom View Network seeking to record and provide audio-visual coverage of the trial in this case. Before determining

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[2] The Court recognizes that this raises the possibility that after the jury trial has been concluded, the Court may still find that the claims of counterclaim-plaintiffs are barred by laches. As the Second Circuit has advised, however, concerns of judicial efficiency dictate that in cases where the trial judge has doubts before trial as to whether a given fact-intensive issue will be dispositive of the matter at hand, it is preferable to conduct the trial and obtain a jury verdict and then rule on that issue. This allows the Court of Appeals, if it disagrees with a judge's ruling of law dismissing the case, to reinstate the jury's verdict without the need to order a new trial. See, e.g., Williams v. County of Westchester, 171 F.3d 98, 102 (2d Cir. 1999) (noting that such efficiency concerns make it preferable to grant judgment as a matter of law after the jury has rendered its verdict).

whether to grant or deny the application, the Court wishes to have the views of the parties, in the form of a letter from each party, not to exceed two single-spaced pages, which should be faxed to the Court and to counsel for Courtroom View Network, by January 15, 2009. Courtroom View Network may respond to any such letter by its own letter, not to exceed three single-spaced pages, which should be faxed to the Court and to counsel of record by January 21, 2009.

SO ORDERED.

Dated: New York, NY
December 30, 2008

JED S. RAKOFF, U.S.D.J.