

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 161799/2015

TIMOTHY REIF, DAVID FRAENKEL, MILOS VAVRA,

MOTION DATE 10/30/2020

Plaintiff,

MOTION SEQ. NO. 015

- v -

RICHARD NAGY, RICHARD NAGY, LTD., WOMAN IN A
BLACK PINAFORE, WOMAN HIDING HER FACE,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 015) 463, 464, 465, 468 were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents, the parties’ joint motion for entry of a final judgment on the remaining issues of prejudgment interest and costs is granted, and the Heirs (hereinafter defined) are entitled to judgment as set forth below, together with costs in the stipulated amount of \$7,500, plus prejudgment interest from November 13, 2015, the date of the adjudged conversion, to June 5, 2018, date of the court’s decision awarding the Heirs possession of the Artworks (hereinafter defined), per CPLR § 5001, and with interest thereafter, per CPLR § 5002, until the date of entry of judgment. Prejudgment interest under both §§ 5001 and 5002 of the CPLR is a matter of statute. Interest under CPLR § 5001 is intended to compensate the party whose property is wrongly converted for the fact that during relevant the time period the wrongdoer deprived the owner from use and enjoyment of the property. Interest under § 5002, in turn, “encourages defendants to be prudent and realistic in evaluating whether to take their concededly lawful appeals from interlocutory judgments of liability,” while postponing payment of damages

that have been adjudged pending decision of such appeals” (*Gunnarson v State of New York*, 70 NY2d 923 [1987]).

The sole remaining issues in this action are (i) whether the Timothy Reif and David Fraenkel (as Co-Executors of the Estate of Leon Fischer) and Milos Vavra as heirs of Franz Friedrich Grunbaum (collectively, the **Heirs**), are entitled to prejudgment interest, following the defendants’ November 13, 2015 conversion of two artworks (the **Artworks**) by the artist Egon Schiele and (ii) if so, how much.

THE FACTS RELEVANT TO THE MOTION

The parties have stipulated to entry of a judgment that includes costs in the amount of \$7,500.

The parties have also stipulated to the following facts and procedural history:

1. The Heirs commenced this action on November 16, 2015 (NYSCEF Doc. No. 1) and amended their Complaint on March 18, 2016 (NYSCEF Doc. No. 73).
2. The Heirs alleged four causes of action: (1) replevin under CPLR Article 71 of two artworks by Egon Schiele: *Woman in Black Pinafore* (1911), and *Woman Hiding Her Face* (1912) (i.e., the Artworks); (2) conversion under CPLR Article 71; (3) deceptive trade practices under New York General Business Law (**GBL**) § 349; and (4) declaratory judgment that the Artworks are the property of the Heirs (NYSCEF Doc. No. 73 at ¶¶ 67-107).
3. The Heirs sought judgment: (1) on their first cause of action for the return of the Artworks or, in the alternative, damages; (2) on their second cause of action for the return of the Artworks, or in the alternative, damages; (3) on their third cause

of action the return of the Artworks and damages and attorneys' fees; (4) on their fourth cause of action, a declaratory judgment that the Heirs own the Artworks; along with an award of costs, fees and attorneys' fees as well as any such other and further relief the Court deems just, proper and equitable (NYSCEF Doc. No. 73 at 13).

4. Defendants moved to dismiss the Heirs' claims. The court (Ramos, J.) denied that motion on September 7, 2016 (NYSCEF Doc. No. 140.)
5. The Appellate Division, First Department, affirmed the denial of the defendants' motion to dismiss except it dismissed the Heirs' GBL § 349 claim with prejudice (*Reif v Nagy*, 149 AD3d 532, 533 [1st Dept 2017]).
6. The Heirs moved for summary judgment on May 9, 2017 (and defendants cross-moved for summary judgment seeking dismissal) (NYSCEF Doc. No. 190). In their Notice of Motion, the Heirs asked for an order "granting summary judgment to Plaintiffs on their claims for replevin and conversion ... and ordering the return of [the Artworks]," along with "such other and further relief as this Court deems just and equitable including the costs and reasonable attorneys' fees incurred in this action" (*id.*). The Heirs subsequently requested prejudgment interest, reasonable attorneys' fees and costs (NYSCEF Doc. No. 232 at 26).
7. On April 6, 2018, the court (Ramos, J.) awarded summary judgment on the Heirs' replevin and conversion claims to the Artworks and directed the parties "to settle an order on notice vesting title" to the Artworks with the Heirs (*Reif v Nagy*, 61 Misc 3d 319, 330 (Sup Ct NY Cty 2018) (NYSCEF Doc. No. 295).

8. On June 5, 2018, the court (Ramos, J.) ordered the defendants to return the Artworks to the Heirs, finding that “Richard Nagy and Richard Nagy Ltd., a commercial art dealer and art expert, knowingly and in bad faith interfered with Plaintiffs’ property rights by refusing to return the Artworks,” and determined that the Heirs “are entitled to damages, costs and reasonable attorneys’ fees together with prejudgment interest running from November 13, 2015 , the date of conversion, in an amount to be determined at inquest” (NYSCEF Doc. No. 308).
9. On June 26, 2018, defendants moved the Appellate Division, First Department, to stay all further proceedings in this court pending a decision from the Appellate Division on this court’s summary judgment order (Appellate NYSCEF Doc. No. 3). The Heirs opposed the defendants’ stay motion (*id.*)
10. On June 27, 2018, the Appellate Division granted an interim stay “only as to the actual sale of the [Artworks]” (NYSCEF Doc. No. 317).
11. On July 13, 2018, defendants delivered the Artworks to the Heirs, care of Christie’s auction house in New York, as the Heirs had directed (Appellate NYSCEF Doc. No. 16 at ¶ 3).
12. Therefore, from November 13, 2015 through July 13, 2018, defendants retained possession of the Artworks.
13. From July 13, 2018 through the present, the Heirs (or Christie’s as their chosen agent) have had possession of the Artworks.
14. Prior to November 4, 2018, defendants had proposed that Christie’s auction the Artworks and hold the proceeds in escrow while the case continued on appeal.
15. The Heirs declined this proposal.

16. On August 2, 2018, the Appellate Division continued its stay prohibiting the sale of the Artworks on the condition that defendants “post a bond in the amount of \$4 million.” (NYSCEF Doc. No. 338).
17. Defendants did not post the directed conditional bond.
18. On October 30, 2018, upon motion by the Heirs seeking to compel defendants to post the \$4 million bond pending appeal, the Appellate Division issued the following Order: “It is ordered that the motion [by the Heirs] is deemed one to include a request to vacate the stay of the sale of the artwork in question pending appeal granted by the Court’s order entered August 2, 2018, and, as such, is granted unless [Defendants] post a \$4 million bond within five (5) days of the date hereof” (NYSCEF Doc. No. 353; Appellate NYSCEF Doc. No. 15.)
19. Defendants again did not post the directed conditional bond by the Appellate Division’s deadline of November 4, 2018.
20. On December 4, 2018, this court directed that any damages inquest would be “held in abeyance pending appeal” of the summary judgment order (NYSCEF Doc. Nos. 355, 356).
21. On July 9, 2019, the Appellate Division held that: “the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about June 11, 2018, which, inter alia, granted the Heirs’ motion for summary judgment on their claims of replevin and conversion and directing defendants to return the Artworks to the Heirs, and for an award of damages, costs and attorneys’ fees, should be modified, on the law, to deny the motion as to attorneys’ fees, and otherwise

- unanimously affirmed, with costs” (*Reif v. Nagy*, 175 AD3d 107, 132 (1st Dept 2019).
22. On January 1, 2020, this court directed that “that portion of the Plaintiffs’ action that seeks recovery of damages, costs, and prejudgment interest is severed and said issue is referred to a Special Referee or JHO to hear and report” (NYSCEF Doc. No. 410).
23. On February 5, 2020, this court entered a partial judgment providing that the Heirs “shall have final judgment against Defendants as follows: possession of, and title to, the Artworks is hereby awarded to Plaintiffs and the Artwork are hereby declared the property of Plaintiffs” (NYSCEF Doc. No. 414).
24. In preparation for the inquest directed by this Court, the parties exchanged expert appraisal reports concerning the Artworks. The Heirs produced a “Fair Market Value Appraisal” of the Artworks by Christopher Gaillard of Gurr Johns on January 27, 2020, and defendants produced a rebuttal “Historic Fair Market Valuation” of the Artworks by Guy Jennings of The Fine Art Group on March 13, 2020 (NYSCEF Doc. Nos. 424, 425).
25. Upon the exchange of the aforementioned reports, the parties now stipulate that the fair market value for the Artworks was \$2,500,000 (USD) as of November 13, 2015: i.e., \$500,000 for *Woman in Black Pinafore*, and \$2,000,000 for *Woman Hiding Her Face*.
26. The Heirs do not contest, for the purposes of this motion, that the aggregate fair market value for the Artworks as of November 4, 2018 was \$3,400,000 (USD): i.e., \$600,000 for *Woman in Black Pinafore*, and \$2,800,000 for *Woman Hiding*

Her Face (per the uncontested opinion of defendants' valuation expert, Guy Jennings).

27. The parties, having now worked together to try to resolve and reduce remaining issues for the court to decide, stipulate to taxable costs in the full amount of \$7,500 and jointly request the court to enter judgment on taxable costs in this amount and no lesser or greater amount.

DISCUSSION

The Heirs maintain that CPLR § 5001 entitles them to prejudgment interest on the value of the Artworks from the date of conversion (November 13, 2015) to the date of its return on July 13, 2018 at 9% per annum based on the stipulated market value of the Artworks (i.e., \$2,500,000). The Heirs further argue that this period should be extended from July 13, 2018 to November 4, 2018 because the defendants "blocked the Heirs' sale of the Artworks by obtaining a stay from the Appellate Division until November 4, 2018" (NYSCEF Doc. No. 465 at 9).

The defendants assert that awarding such prejudgment interest would be a windfall to the Heirs. They argue that they should be afforded a credit in the amount of the increase in value from \$2,500,000 (i.e., the value at the date of the adjudged conversion) to \$3,400,000 (i.e., the value when the Artworks were returned). Additionally, the defendants argue that the calculations of prejudgment interest under CPLR §§ 5001 or 5002 should be reduced by the value of the Artworks as of November 4, 2018, because they offered to permit the Heirs to jointly auction the works and to respect the winning bidder's title subject to escrowing the proceeds of the sale. Simply put, the defendants are wrong.

The Heirs are Entitled to Prejudgment Interest from the Date of the Adjudged Conversion Under CPLR § 5001

It is long settled that the “usual measure of damages for conversion is the value of the property at the time and place of conversion, plus interest” (*Fantis Foods, Inc. v Standard Importing Co., Inc.*, 49 NY2d 317, 326 [1980]). Prejudgment interest is a matter of statute and an award of prejudgment interest in a conversion action is required by CPLR § 5001:

Interest to verdict, report or decision. (a) Actions in which recoverable. ***Interest shall be recovered upon a sum awarded*** because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion. (b) Date from which computed. ***Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred.*** Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date. (c) Specifying date; computing interest. The date from which interest is to be computed shall be specified in the verdict, report or decision. If a jury is discharged without specifying the date, the court upon motion shall fix the date, except that where the date is certain and not in dispute, the date may be fixed by the clerk of the court upon affidavit. The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

(CPLR § 5001 [emphasis supplied]).

The language of CPLR § 5001(a) is mandatory, providing that interest “shall” be awarded in cases affecting possession “or enjoyment” of property at the statutory rate of 9% per annum as part of the recovery on a conversion action (*Eighteen Holding Corp. v Drizin*, 268 AD2d 371, 372 [1st Dept 2000]); *Reichman v Warehouse One*, 173 AD2d 250, 252 (1st Dept 1991); *Scotti v Barrett*, 88 NYS3d 44 [2d Dept 2018]) [collecting cases]).

Such awards of prejudgment interest are necessary to make aggrieved parties whole in conversion actions (*Lawyers' Fund for Client Prot. of State of NY v Bank Leumi Tr. Co. of NY*, 94 NY2d 398, 408 [2000] [“Interest thus properly runs from the date of conversion or defalcation”]). Thus, under CPLR § 5001(b), the Heirs are entitled to prejudgment interest from November 13, 2015, the date of the conversion (*see* NYSCEF Doc. No. 308).

Nothing in the statute affords a credit to someone based on an increase in value of the property or, with respect to prejudgment interest, or further penalizes the wrongdoer by adding extra interest if the value goes down. The wrongdoer does not get the benefit from fluctuations in the market. Stated differently, it is not a windfall to award prejudgment interest per the statutory mandate because had the Artworks never been taken, the Artworks may have appreciated earlier, the Heirs may have sold it earlier, and/or the Heirs may have invested the profits of such sale elsewhere. The statutory prejudgment interest is to compensate the victim for the loss of potential use for the converted goods, not to approximate the actual appreciation of value. The defendants’ argument that this affords a double recovery suggests that the wrongdoer should get a benefit to which the defendants were never entitled, i.e., the appreciation of value. That is plainly wrong.

In addition, an award of interest from the date of the conversion is required here by the law of the case doctrine. As discussed above, on June 5, 2018, the court (Ramos, J.) awarded summary judgment to the Heirs and held that the Heirs were entitled to “pre-judgment interest from November 13, 2015, the date of conversion” and directed the Heirs to move for an inquest within 60 days (NYSCEF Doc. No. 308). On July 19, 2019, the Appellate Division affirmed the court’s

June 5, 2018 Order granting summary judgment, damages and costs, *and pre-judgment interest*, running from November 13, 2015 (*Reif v Nagy*, 175 AD3d 107 [1st Dept 2019] [modifying decision only as to attorneys' fees]). This is the law of the case.

The Heirs are Entitled to Prejudgment Interest Until Entry of Judgment Because it Continues to Accrue Until Entry of Judgment Under CPLR § 5002

CPLR § 5002 Interest from Verdict, Report or Decision to Judgment, provides:

Interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made *to the date of entry of final judgment*. The amount of interest shall be computed by the clerk of the court and included in the judgment.

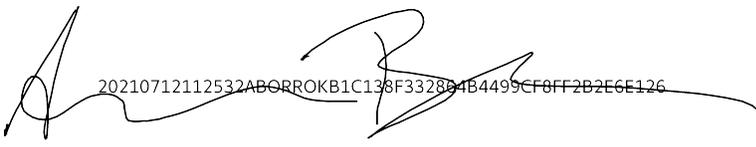
(CPLR § 5002 [emphasis added]).

Under CPLR § 5002, post-decision interest is mandatory (*Spathis v Spathis*, 137 AD3d 654 [1st Dept 2016]) and not “not dependent upon the court's discretion or a specific demand” (*In re Doman*, 150 AD3d 994, 996 [2d Dept 2017]).

Interest does not stop to run when converted property is returned in a replevin if the return is contingent upon the outcome of the lawsuit. The defendants' argument that calculations of prejudgment interest under CPLR §§ 5001 or 5002 should be reduced by the value of the Artworks as of November 4, 2018, because they offered to permit the Heirs to jointly auction the works and to respect the winning bidder's title subject to escrowing the proceeds of the sale is fatally flawed. There is no factual or legal basis for such a credit. The Heirs were under no obligation to auction the Artworks under a cloud of title while the defendants continued to litigate the Heirs' entitlement to their possession. Nor were the Heirs required to accept the offer

to sell the Artworks and to put the proceeds in escrow. This neither afforded the Heirs physical possession nor dominion and control over the Artworks (*Debobes v Butterly*, 210 AD 50, 54-55 [1st Dept 1924]), and the Heirs were deprived of their rights of ownership (*see Vigilant Ins. Co. of Am. V Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995] [conversion is unauthorized assumption and exercise of right of ownership of goods belonging to another *to the exclusion of owner's rights*]).

Thus, in short, the Heirs are entitled to (i) interest from the date of its accrual (i.e., the conversion) until a decision establishing liability per CPLR § 5001, and, separately, (ii) interest on the decision until judgment is entered per CPLR § 5002 (David D. Siegel, *McKinney's Practice Commentaries*, CPLR 5001). The Heirs are directed to e-mail a proposed judgment in accordance with the foregoing to the defendants and to the Part 53 email address by July 14, 2021 at 5 P.M.



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7/12/2021
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE