New York Law Journal

In Case Over Nazi-Looted Art, Dispute Over $1.4M in Prejudgment Interest Heats Up

"As long as they continue to assert title, we can't sell the artworks," said the lawyer for the Jewish heirs to an Austrian 1920s art collector who had owned the Egon Schiele paintings before the Nazis imprisoned him. The heirs are claiming that interest on the artworks they won possession of continues to grow as the interest amount is disputed and leave for appeal on the merits is sought.

By Jason Grant | Dezember 09, 2020

"Woman in a Black Pinafore" by Egon Schiele

In a closely watched case over the rightful ownership of two early 20th century paintings looted by the Nazis, a fierce legal battle has emerged over $1.4 million in pre-judgment interest that—in the view of the lawsuit's plaintiffs—continues to grow each day as legal arguments drag on.

The merits of the dispute (https://www.law.com/newyorklawjournal/2018/12/26/jewish-heirs-worldwide-fight-to-reclaim-nazi-stolen-art-plays-out-in-manhattan-courts/) over which party should own the artworks—"Woman in a Black Pinafore" (1911) and "Woman Hiding Her Face" (1912)—based on their disputed provenance, has been all but settled for more than a year. In July 2019, the Appellate Division, First Department (https://www.law.com/newyorklawjournal/2019/07/09/ny-appeals-court-

explains-why-nazi-stolen-paintings-belong-with-jewish-collectors-heirs/) issued a 46-page opinion that was filled with provenance history and examination of past rulings by New York courts. The appeals court affirmed Manhattan Supreme Court Justice Charles Ramos' 2018 decision stating that the Jewish heirs of 1930s Austrian Jewish entertainer Fritz Grünbaum held rightful title to the paintings.

The paintings, created by the celebrated Austrian artist Egon Schiele, were bought by Grünbaum in the 1920s and made part of his art collection, according to Ramos' decision. In 1938, the Nazis arrested Grünbaum, who was an entertainer and public critic of Adolf Hitler, stripped him of his art, and imprisoned him at Dachau concentration camp, where he later died. In the ensuing decades, his 449-piece art collection, 81 of them Egon Schieles, passed through the art world. Then in 2015, a lawyer for Grünbaum's heirs spotted the two Schieles in dispute during a Manhattan art show, displayed at the sales booth run by Richard Nagy, a London-based art dealer. He and his clients sued for their possession, eventually winning them from Nagy.

Nagy and his lawyer, William Charron, a Pryor Cashman partner, moved for leave to appeal the Appellate Division, First Department's affirmance on the merits of the dispute, but only after first convincing the trial court to sever the case into two parts: one on the merits, and one on the issue of prejudgment interest on the Schiele paintings to be transferred from Nagy to the Jewish heirs, according to court documents and Raymond Dowd, the lawyer for plaintiff heirs Milos Vavra, Timothy Reif and David Fraenkel.

Last February, the New York Court of Appeals, the state's high court, declined to grant leave to appeal to Nagy and Charron. It pointed out in a terse order that it didn't have jurisdiction to hear an appeal because no final judgment had been issued, since prejudgment interest hadn't been fully decided.

On the increasingly heated issue of prejudgment interest, Dowd and the Grünbaum heirs argue in court papers before Manhattan Justice Andrew Borrok that Ramos ruled in 2018 that defendant Nagy owed 9% per annum interest on the Schiele paintings and that, according to the ruling, interest from Nov. 13. 2015, the lawsuit's filing date, to June 5, 2018, when he issued his opinion. That amount, both sides agree, is $575,753.

But Nagy and his attorney, Charron, have contended that after the Grünbaum heirs gained title to the artworks, they were free to sell them by November 2018, and that by that time, the pieces had appreciated in value from about $2.5 million to $3.4 million. The $900,000 in appreciation more than covered the prejudgment interest ordered by Ramos, they argue in court papers, and that should have put the issue to rest.

But Dowd and the Grünbaum heirs have countered that they couldn't have sold the paintings in late 2018, or at any time, thus far, because Nagy went forward and sought leave to appeal Ramos' ruling, leaving a "cloud" over them and who may ultimately hold their title.

"As long as they [Nagy and his lawyer] continue to assert title, we can't sell the artworks," said Dowd, a partner at Dunnington Bartholow & Miller, in a phone interview Tuesday.

At the same time, the Grünbaum heirs and Dowd have argued in jointly filed Oct. 30 court papers submitted to Borrok that from June 5, 2018, to the present, interest on the paintings has continued to mount while contentions about the interest itself has plodded its way through the court, preventing a "final judgment" in the case.

The total of the interest amount owed from June 2018 to present, as claimed by Dowd and the heirs, is $869,579, said Dowd on Tuesday. It is more than the original $575,753 amount of interest in dispute, he pointed out.

"The decision of Justice Ramos that Nagy made bad faith title claims to the Schiele paintings, causing conversion of them to accrue on Nov. 13, 2015, the date the action was brought, together with an award of prejudgment interested was affirmed by the Appellate Division," Dowd said. "It is leaving the

trial court, Justice Borrok, with no choice but to award us the interest. It's law of the case."

But in the court papers filed Oct. 30. Charron wrote that "had plaintiffs [the Jewish heirs] elected the remedy of damages (meaning the value of the artworks as of the time of conversion on November 13, 2015), then they would have been entitled to prejudgment interest on that sum, but defendants would have maintained possession and use of the artworks."

Instead, wrote Charron, "Plaintiffs elected the remedy of replevin [or return of possession of the artworks] because they believed (correctly) that the value of the artworks was greater than the value of an award of damages plus statutory interest. Plaintiffs' election of remedy is binding and it controls their prejudgment interest demand."

In addition, Charron wrote that the heirs "do not contest that the artworks were worth $3.4 million as of November 4, 2018. ... Thus, there is no dispute that the artworks appreciated in value by $900,000 during the period of wrongful detention. That appreciation exceeds the prejudgment interest sum that plaintiffs would have been entitled to receive had they elected the remedy of conversion damages rather than the remedy of replevin. Plaintiffs' replevin of the artworks, therefore, made them whole."

In an email Wednesday, Charron added that, once the prejudgment interest issue is resolved, he and Nagy intend to go to the Court of Appeals and again seek leave—or permission—to have their appeal on the merits of the ownership dispute heard by the high court.

Prejudgment interest is "the last remaining issue in the case at the trial court level," Charron said. "The Court of Appeals said earlier this year that it wanted this issue decided before it considered the defendants' motion for leave to appeal on the merits. That motion asks the court to review rulings by the Appellate Division that fundamentally upset and changed the laws of res judicata and laches in New York. We are very eager to re-present that motion to the Court of Appeals."

Dowd has said that he and his clients will oppose leave to bring the appeal on the merits, in part by arguing that merits litigation ended and that there are no remaining legal issues for the high court to decide.
