

UPDATE – Dispute over Ownership of Nazi Victim’s Art Turns to Pre-judgment Interest

By John Kilgard on January 15, 2021



Woman in a Black Pinafore (l) and *Woman Hiding Her Face* (r)

Following the New York Appellate Division’s affirmance of the New York State Supreme Court’s decision in *Reif v. Nagy* ordering the turnover of two works of art transferred under duress, if not stolen, following the Nazi takeover of Austria to the heirs of their original Jewish owner, Fritz Grünbaum,^[1] the dispute has turned to the increasingly significant issue of pre-judgment interest.

Background

As previously reported on this blog, the April 5, 2018 decision of Justice Charles Ramos of the Commercial Division of New York State Supreme Court (“Commercial Division”) in *Reif v. Nagy* came as a surprise, as it was directly contrary to the 2011 decision of the Southern District of New York in *Bakalar v. Vavra*, affirmed by the Second Circuit Court of Appeals in 2012, involving nearly identical facts and the same claimants.^[2] The key intervening factor between the district court’s 2011 decision and Justice Ramos’ decision in 2018

was passage of the Federal Holocaust Expropriated Art Recovery Act, or "HEAR" Act, in 2016. Justice Ramos relied on the broad language of the HEAR Act to discount any precedential value of the *Bakalar v. Vavra* decision. Controversially, Justice Ramos also found that the broad purpose of the HEAR Act operated to defeat the equitable defense of laches, despite the Act's express provision that only defenses "at law" related to the passage of time are precluded.^[3]

In a detailed opinion issued on July 9, 2019, a five-judge panel of the New York Appellate Division for the First Department ("Appellate Division") unanimously affirmed Justice Ramos' decision. The panel rejected the argument of defendants, art dealer Richard Nagy and his private company Richard Nagy Limited (together, "Nagy"), that, while the Third Reich inventoried and catalogued Grünbaum's art collection, they never actually seized it, and the collection passed at some point to Grünbaum's sister-in-law, Mathilde Lukacs.^[4] In doing so, the panel concluded that none of the contemporaneous documents evidenced Lukacs' ownership of the Grünbaum collection. The primary evidence that Nagy offered to support Lukacs' ownership was a 2007 deposition of Eberhard Kornfeld, the Swiss art dealer who later sold the work. Kornfeld testified that he had acquired the collection from Lukacs and produced documents purporting to support his claim.^[5] The Appellate Division took a dim view of Kornfeld's testimony and the legitimacy of the documents he provided, finding that Lukacs' signature appeared to be forged:

Kornfeld acknowledged in his deposition that the records he produced had Mathilde's signature and name added in pencil, while the rest of the page was written in ink. He also admitted that her name was not added contemporaneously with the purchase. Kornfeld confirmed that Mathilde's signature on key documents was misspelled and her signature did not appear in her handwriting. Kornfeld surmised that the signature could have been her secretary's.^[6]

Furthermore, the Appellate Division found that, even assuming that Kornfeld *had* acquired the Grünbaum works from Lukacs, they were still misappropriated—and lost—from Grünbaum and his legal heirs because any transfer made while Grünbaum was imprisoned at Dachau was involuntary: "We reject the notion that a person who signs a power of attorney in a death camp can be said to have executed the document voluntarily."^[7]

The Appellate Division also rejected Nagy's laches defense. Nagy argued that the failure of plaintiffs Milos Vavra, Timothy Reif and David Frankel, remote relatives and statutory heirs to the Grünbaum estate (the "Heirs"), to bring the action until after Lukacs' death prejudiced Nagy, because if Lukacs were alive, she could have provided testimony about whether she acquired the Grünbaum collection and, if so, the circumstances of that acquisition. But the panel found that such testimony would be irrelevant, because no transfer made by Grünbaum while he was imprisoned could have been voluntary.^[8] Because the panel disposed of Nagy's laches defense on the merits, it did not address Justice Ramos' conclusion that the HEAR Act eliminated the defense. The Appellate Division invoked the HEAR Act only to note that its intent and provisions highlight the tragic consequences of the Nazi takeover, and that this intent informed the court's decision.^[9]

Pre-judgment Interest Dispute

Following the Appellate Division's July 2019 decision, Nagy moved to sever the substantive issues from the pending issue of pre-judgment interest in order to appeal the Appellate Division's decision to New York's highest court, the Court of Appeals. The Court of Appeals denied the appeal in a one-sentence decision, stating that the decision appealed from was not final, citing precedent holding that attempts to sever unresolved fee claims from resolved substantive claims are "ineffectual."^[10]

In a joint motion submitted to the Commercial Division at the end of October 2020, the parties laid out their respective arguments on pre-judgment interest and requested judgment as a matter of law.^[11] At issue is whether and to what extent the Heirs, as the court-determined rightful owners of the two artworks at issue (the "Artworks"), are entitled to pre-judgment interest.

The Heirs argue that they are entitled to (i) pre-judgment interest at the statutory interest rate of 9% per annum on \$2.5 million (the value of the Artworks as of the date of conversion) for the period running from November 13, 2015 (the conversion date)^[12] until June 5, 2018 (the date Justice Ramos issued his decision fixing liability)^[13]; and (ii) post-decision interest at a rate to be determined on the total of \$2.5 million (the value of the Artworks as of the date of conversion) together with interest that accrued from June 5, 2018 (the

date of Justice Ramos' decision) until a final judgment is entered in the action. ^[14]

While Nagy does not dispute that pre-judgment interest began to accrue from the date of conversion, he argues that the pre-judgment interest period should end on November 4, 2018, the date that the Appellate Division lifted its stay pending appeal and allowed the Heirs to sell the Artworks. In addition, Nagy claims that the appreciation in value of the Artworks —which the parties stipulated were worth \$3.4 million as of November 4, 2018—exceeds the statutory pre-judgment interest sum that the Heirs would have been entitled to receive had they elected the remedy of conversion damages rather than the remedy of replevin. Thus, Nagy argues, the Heirs' replevin of the Artworks "made them whole":

Had Plaintiffs [*i.e.*, the 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* [*i.e.*, Nagy] would have maintained possession and use of the Artworks. Plaintiffs elected the remedy of replevin 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.^[15]

In response, the Heirs point to the Appellate Division's decision affirming Justice Ramos' award of replevin *and* pre-judgment interest, and argue that Nagy's argument would lead to the absurd conclusion that "persons wrongfully converting a chattel that appreciated in value during the detention period would *never* be liable for any prejudgment interest after recovering the chattel."^[16] In addition, the Heirs argue that they had no legal ability to sell the Artworks prior to November 4, 2018 because Nagy refused in bad faith to return them and obtained a stay of sale from the Appellate Division conditioned on a bond that Nagy failed to post on November 4, and that, while the Appellate Division's removal of the stay technically may have permitted the Heirs to sell the Artworks, Nagy's continued claim to them cast a cloud over title to the Artworks. In particular, the Heirs assert that Nagy's "continuing bad faith claims of ownership are such a substantial interference with the Heirs' ownership of the Artworks as to be a total deprivation of the

economic value of the Artworks,"^[17] and point to Nagy's statements to the media asserting claims of ownership to the Artworks and New York law requiring sellers of artwork to warrant good title to obtain a fair selling price.^[18]

The parties' joint motion on the issue of pre-judgment interest is now before Justice Andrew Borrok of the Commercial Division for decision. Regardless of how Justice Borrok rules, we expect Nagy to continue to assert his claims of ownership to the Artworks before the Appellate Division and the Court of Appeals, since the parties' current efforts to resolve the dispute over pre-judgment interest came about after the Court of Appeals declined to hear Nagy's appeal until this issue is settled.

^[1] See *Reif v. Nagy*, 175 A.D.3d 107 (1st Dep't 2019).

^[2] See *Bakalar v. Vavra*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012).

^[3] Following Justice Ramos' decision, the Second Circuit in an unrelated case found that the HEAR Act does not preclude a laches defense. See *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186, 195-97 (2d Cir. 2019).

^[4] As we previously reported, Fritz Grünbaum was a prominent cabaret performer in 1930s Vienna and an avid collector of art. His collection contained numerous works by Egon Schiele, including the two works at issue here, *Woman in a Black Pinafore* (1911) and *Woman Hiding Her Face* (1912). In 1938, after Grünbaum was arrested and imprisoned in a Nazi concentration camp following the German absorption of Austria, Nazi forces ordered Jewish citizens to turn over all assets worth over 5,000 Reichmarks. The Third Reich inventoried and catalogued Grünbaum's art collection, then forced Grünbaum to sign a power of attorney granting his wife, Elisabeth Grünbaum, control over his assets. Grünbaum died in 1941 at Dachau; Elisabeth also died at a concentration camp one or two years later. According to evidence offered by Nagy, Elisabeth's sister, Mathilde Lukacs, obtained possession of Grünbaum's collection – although the Appellate Division questioned this theory and held that, even if Lukacs did obtain possession, the transfer was involuntary – and in 1956, she sold the paintings to the Kornfeld Gallery in Bern, Switzerland, maintaining at that time that she owned them. Thereafter, the paintings changed hands several times through private sales. Ultimately, defendant and art dealer Richard Nagy purchased *Woman Hiding Her Face* and a half-interest in *Woman in a Black Pinafore*.

^[5] *Reif v. Nagy*, 175 A.D.3d 107, 122-24 (1st Dep't 2019).

^[6] *Id.* at 123.

^[7] *Id.* at 129.

^[8] *Id.*

^[9] *Id.* at 132.

^[10] *Reif v. Nagy*, 35 N.Y.3d 986 (2020) (citing *Burke v. Crosson*, 85 N.Y.2d 10, 18 n.5 (1995)).

^[11] Joint Motion for Judgment as Matter of Law on Prejudgment Interest and Costs, *Reif v. Nagy*, Index No. 161799/2015 (Sup. Ct. N.Y. Cnty.) (Dkt. No. 465) (Oct. 30, 2020) (the “Interest Motion”).

^[12] Although the Artworks were lost to the family of the Heirs decades ago, under New York’s demand-and-refusal rule, conversion only occurs when the true owner makes a demand for return of the chattel and the person in possession refuses to return it. See *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 317-18 (1991).

^[13] See C.P.L.R. § 5001.

^[14] See C.P.L.R. § 5002.

^[15] Interest Motion at 31.

^[16] *Id.* at 13-14 (emphasis supplied).

^[17] *Id.* at 14.

^[18] Interest Motion at 14-15 (citing New York Arts & Cultural Affairs Law § 13.01).

