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In Nazi-Looted Art Case, Judge Rules Prejudgment Interest Owed by Wrongful Possessor Who Continued to Litigate

"This is a monumental sea change," said Raymond Dowd, the lawyer for Jewish heirs, of the Manhattan Supreme Court-issued decision on prejudgment interest. "An art dealer or a museum refusing to stop now has a meaningful financial downside," he said, when they continue to litigate cases in which a trial court has already awarded possession of Nazi-looted art back to the family or heirs of a Jewish person who'd rightfully owned the artwork before Nazis took it away.

By Jason Grant | July 15, 2021

From left to right: “Woman in a Black Pinafore” (1911) and “Woman Hiding Her Face” (1912) by Egon Schiele

In a case (https://www.law.com/newyorklawjournal/2018/12/26/jewish-heirs-worldwide-fight-to-reclaim-nazi-stolen-art-plays-out-in-manhattan-courts/) closely watched worldwide over the ownership of two early 20th-century paintings looted by the Nazis, a Manhattan Supreme Court justice has ruled that years’ worth of prejudgment interest on the artworks, which in 2018 were ruled to rightfully belong to the heirs of a 1930s Jewish art collector, must be paid by the London-based art dealer who had previously possessed the paintings.

The amount of interest owed on the paintings (https://www.law.com/newyorklawjournal/2020/12/09/in-case-over-nazi-looted-art-dispute-over-1-4m-in-prejudgment-interest-heats-up/), according to Raymond Dowd, the lawyer for plaintiff heirs in the long-running art title case, is $1,432,267, which he said represents more than a third of the paintings’ last-estimated total value in 2018 of $3.4 million. The court, though, has yet to rule on the exact amount of prejudgment interest owed.

Dowd, a Manhattan-based partner at Dunnington Bartholow & Miller and a longtime art law practitioner, says he believes that the prejudgment interest ruling handed down this week by Justice Andrew Borrok will trigger a “sea change” in the increasingly prevalent and heated litigations in the U.S. and Europe over possession of allegedly Nazi-looted art. Before Borrok’s ruling, he said, there had been little-to-no ”financial downside” when art dealers and museums that had wrongfully possessed looted art chose to keep fighting their cases in court, via appeals and sometimes regarding lesser issues, such as interest owed, even after they’d lost the possession cases on the merits.

Now, he said, the Manhattan-based trial court in New York State, which he noted is regularly watched worldwide in art possession and provenance cases, has for the first time, he believes, issued a weighty ruling against a past wrongful art possessor stating that, under New York State statutes, prejudgment interest money is owed.

“This is a monumental sea change,” Dowd said of Borrok’s lengthy decision issued June 12 on the prejudgment-interest issue. “An art dealer or a museum refusing to stop [appealing or litigating] now has a meaningful financial downside” when they continue to fight cases in which a trial court has already awarded possession of Nazi-looted art back to the family or heirs of a Jewish person who’d rightfully owned the artwork before Nazis took it away.

“People who have been claimants [to Nazi-looted art, which under laws passed in recent decades have the right to reclaim the art into their families,] have had the clock running against them” when art-conversion cases have been litigated, Dowd said. Borrok’s ruling, he said, is applying old common law wrongful -conversion “principles but in this new context in a way that museums may have never contemplated.”

William Charron, a Pryor Cashman partner and attorney for Richard Nagy, the London-based art dealer defendant in the possession action first brought by the heirs in 2015, said in an email Wednesday, “We think this decision [on prejudgment interest] is wrong and makes for troubling precedent.”

Charron did not say whether he and Nagy will seek to appeal Borrok’s prejudgment interest ruling.

Borrok, in his decision, said that two statutes made it clear that interest was owed on the two Egon Schiele paintings at issue, “Woman in a Black Pinafore” (1911) and “Woman Hiding Her Face” (1912), which in 2018 then-Manhattan Supreme Court Justice Charles Ramos had ruled must be returned to the Jewish heirs. Dowd said that because the prejudgment interest decision, which relied on state statutes CPLR §5001 and §5002 on property conversion cases, may be viewed as a “ministerial” decision and, therefore, there may not be an automatic appeal of Borrok’s opinion as of right to the Appellate Division.

“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,” he wrote in part.

“In addition, an award of interest from the date of the conversion is required here by the law of the case doctrine,” Borrok further wrote, adding that “as discussed above, on June 5, 2018, the [Manhattan Supreme] 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,” to the date of Ramos’ 2018 decision.

The total amount owed of more than $1.4 million, said Dowd, includes $575,753 in interest from the time the artworks were discovered to be possessed by Nagy until Ramos' ruling, plus another $856,514 in interest from 2018 to the current time, as appeals and the interest dispute has continued and no final judgment in the action has been issued.

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 Schiele paintings, after detailed court assessment on their disputed provenance, appears to be largely settled, although New York's highest court, the Court of Appeals, has not ruled yet on whether it will grant leave to hear an appeal of the case on the merits.

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 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 Schieles, passed through the art world. Then in 2015, an art-focused journalist spotted the two Schieles in dispute during a Manhattan art show at a sales booth run by Nagy. Days later, Dowd and his clients, the Grünbaum heirs, sued for their possession, eventually winning them from Nagy.

Charron has said once the prejudgment interest issue was resolved, he and Nagy intend to go to the Court of Appeals and again seek permission to have their appeal on the merits of the ownership dispute heard. "The Appellate Division [ruling on the merits] … fundamentally upset and changed the laws of res judicata and laches in New York," he said in December 2020.

On Wednesday, he said by email, that while he disagrees with Borrok's prejudgment decision, the ruling does bring the case to the doorstep of a final judgment being entered and, therefore, the ruling "does move our clients closer to having their motion for leave to appeal considered on the merits by the Court of Appeals. Our clients very much look forward to having that opportunity."
