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UPDATE—New York Court Awards Statutory Prejudgment Interest to Grünbaum Estate's Heirs

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

By Clara Cassan on August 13, 2021

For those who believe that one today is worth two tomorrows, prejudgment interest offers a significant judicial remedy. In an unprecedented holding on July 12, 2021, the Commercial Division of the New York State Supreme Court, County of New York, applied the prejudgment rule in favor of the rightful owners of two Egon Schiele paintings. In a case involving family property, monetary interest can hardly compensate for time spent apart from a cherished heirloom. Still, the court's decision could bring heirs at least somewhat closer to recovering for the loss suffered.

Under New York's statutory prejudgment interest rules, an aggrieved party may recover prejudgment interest on a sum awarded because of a breach of contract or wrongful interference with title to, or possession or enjoyment of, property.[1] These rules are intended to (i) "compensate the party whose property is wrongly converted for the fact that during the relevant time period the wrongdoer wrongfully deprived the owner from use and enjoyment of the property," and (ii) "encourage 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."[2]

On July 12, 2021, Justice Andrew Borrok ruled that the rightful owners of two artworks by the Viennese Expressionist Egon Schiele (the "Artworks") are entitled to prejudgment interest following an art dealer's refusal to turn over the Artworks in 2015.[3] In doing so, Justice Borrok reviewed the purpose of New York's statutory prejudgment rules and found that interest awarded under those rules is "mandatory," and "not dependent on the court's discretion or specific demand."[4] Justice Borrok's decision is the first to apply these rules in a case involving artworks whose fate was subject to Nazi criminality.

As previously reported on this blog, the *Reif v. Nagy* dispute turned to the issue of prejudgment interest after the Appellate Division affirmed[5] the New York State Supreme Court's decision[6] ordering that Defendants, art dealer Richard Nagy and his private company Richard Nagy Limited (together, "Nagy") turn over the Artworks—which were transferred under duress, if not stolen, following the Nazi takeover of Austria—to the heirs of their original Jewish owner, Fritz Grünbaum.[7] Plaintiffs Milos Vavra, Timothy Reif and David Frankel, remote relatives and statutory heirs to the Grünbaum estate (the "Heirs") argued that: (i) they are entitled to prejudgment interest at New York's statutory interest rate of 9% per annum on $2.5 million (the value of the Artworks as of the conversion date) for the period running from November 13, 2015 (the conversion date) until the Artworks' return to the heirs on July 13, 2018, and (ii) 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 that date.[8] Nagy argued that awarding the claimed prejudgment interest would be a windfall to the Heirs because the appreciation in value of the Artworks during the course of the case—which the parties stipulated were worth $3.4 million as of November 4, 2018—more than made up for the statutory prejudgment interest sum that the Heirs would have been entitled to receive had they elected to receive conversion damages rather than taking possession of the Artworks through the remedy of "replevin."[9] Thus, Nagy argued, the Heirs' replevin of the Artworks "made them whole."[10]

Justice Borrok rejected Nagy's arguments and ruled in favor of the Heirs, finding them entitled to the following prejudgment interest: (i) pre-decision interest at the statutory rate of 9% per annum from the date of accrual (*i.e.*, the refusal of the Heirs' demand) until the court's decision establishing liability and (ii) interest at a rate to be determined on the decision until judgment is entered.[11] Justice Borrok reasoned that New York's prejudgment interest statute is intended "to compensate the victim for the loss of potential use for the converted goods, not to approximate the actual appreciation of value":

> "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."[12]

Justice Borrok further found Nagy's replevin argument to be "fatally flawed":

> "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 and the Heirs were deprived of their rights of ownership."[13]

The exact amount of prejudgment interest Nagy owes to the Heirs remains to be determined, but the ***New York Law Journal* reported** that the Heirs expect it to exceed $1.4 million.

Nagy appeared to press ahead with his claims of ownership to the Artworks[14] when he filed an appeal from Justice Borrok's July 12, 2021 decision on August 5, 2021.[15] In a letter to Justice Borrok dated July 26, 2021, Nagy had requested that the court "award interest separately with respect to each artwork."[16] The defendants' proposed prejudgment interest calculations total $592,798.22[17]—less than half the amount of the Heirs' calculation. We are closely watching the case for further developments.

[1] NY CPLR §§ 5001 and 5002.

[2] Decision and Order on Motion, at 1-2 *Reif v. Nagy*, No. 161799/2015 (N.Y. Sup. Ct. 2020) (No. 469) (quoting *Gunnarson v. State of New York*, 70 N.Y.2d 923 (1987) (internal quotation marks omitted)).

[3] Although the Artworks were taken from the rightful owner decades ago, under New York's demand-and-refusal rule, "conversion" by a good-faith purchaser of a chattel occurs only when the rightful owner makes a demand for turnover 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).

[4] Decision and Order on Motion, at 10, *Reif v. Nagy*, No. 161799/2015 (2020) (quoting *In re Doman*, 150 A.D.3d 994, 996 (2d Dep't 2017)).

[5] *See, Reif v. Nagy*, 175 A.D.3d 107, 109 (1st Dep't 2019).

[6] *See, Reif v. Nagy*, 2018 N.Y. Slip Op. 31781 (N.Y. Sup. Ct. 2018).

[7] **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, Grünbaum was arrested and imprisoned in a Nazi concentration camp. Following the German absorption of Austria that year, Nazi authorities 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 art dealer Richard Nagy purchased *Woman Hiding Her Face* and a half-interest in *Woman in a Black Pinafore*.

[8] Joint Motion for Judgment as a Matter of Law on the Issues of Prejudgment Interest and Costs Pursuant to CPLR 4401, *Reif v. Nagy*, No. 161799/2015 (N.Y. Sup. Ct. 2020)(No. 465).

[9] A plaintiff may bring an action in replevin to recover personal property that was wrongfully taken from him or her. Replevin leads to the return of a specific piece of property rather than to money damages (*See* **NY CPLR § 7101-7112 (2012)**).

[10] *Id.* at 31.

[11] Decision and Order on Motion, at 11, *Reif v. Nagy*, No. 161799/2015 (2020).

[12] *Id.* at 9.

[13] *Id.* at 11 (citing *Debobes v. Butterly*, 210 A.D. 50, 54-55 (1st Dep't 1924); *Vigilent Ins. Co. v. Am. V Housing Auth. Of City of El Paso, Tex.*, 87 N.Y.2d 36, 44 (1995)).

[14] **As we previously reported**, the parties' efforts to resolve the dispute over prejudgment interest came about after New York's highest court, the Court of Appeals, declined to hear Nagy's appeal on the merits until the prejudgment interest issue is resolved. 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 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." *Reif v. Nagy*, 35 N.Y.3d 986 (2020) (citing *Burke v. Crosson*, 85 N.Y.2d 10, 18 n.5 (1995)). The Court of Appeals has not ruled yet on whether it will grant leave to hear an appeal of the case on the merits.

[15] Notice of Appeal, *Reif v. Nagy*, No. 161799/2015 (N.Y. Sup. Ct. 2020)(No. 474).

[16] Supplemental Letter Re: Plaintiffs' Proposed Judgment, *Reif v. Nagy*, No. 161799/2015 (N.Y. Sup. Ct. 2020)(No. 472).

[17] *Id.*

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