UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 08-10097-RWZ

THE MUSEUM OF FINE ARTS, BOSTON

v.

DR. CLAUDIA SEGER-THOMSCHITZ

MEMORANDUM OF DECISION AND ORDER

May 28, 2009

ZOBEL, D.J.

I. Introduction

In 1973, plaintiff, The Museum of Fine Arts, Boston (the "MFA") received by bequest a painting by Oskar Kokoschka ("Kokoschka") known as Two Nudes (Lovers) (the "Painting"), which has been in its possession ever since. In 2007, defendant Claudia Seger-Thomschitz ("Seger-Thomschitz") made demand for the Painting, and the MFA has brought this action for declaratory judgment to establish that it has valid title to the Painting, to remove the cloud on its title by defendant's claim and to enjoin her from threatening and/or instituting legal or other action against the MFA regarding the Painting. In her First Amended Answer and Counterclaim (Docket # 20 ("Am. Answer")), defendant seeks a declaration that she is the rightful owner and asserts claims for replevin, conversion, constructive trust, disgorgement, restitution, unjust enrichment and estoppel.[1] Plaintiff has moved for summary judgment on the ground

[1] The counterclaim also includes multiple gratuitous paragraphs denouncing the MFA for assorted wrongs from violations of federal and state criminal and civil statutes,

that defendant's claims are time barred. (Docket # 25.) Resolution of this motion requires consideration of the Painting's provenance[2] starting in 1939, when its undisputed owner, Oskar Reichel ("Reichel"), a Jewish doctor living in Vienna, transferred it to an art dealer in Paris for sale.

II. Factual and Procedural Background[3]

The Austrian expressionist painter Kokoschka painted Two Nudes (Lovers), a self-portrait of the artist with his lover Alma Mahler, in approximately 1913. Reichel purchased the Painting from Kokoschka sometime in 1914 or 1915. Reichel was an art collector and acquired several other works by Kokoschka during this period. One, a portrait of Reichel's son Hans was painted during the period 1908-10 when Kokoschka spent time at the Reichel home in Vienna.

Reichel lent the Painting to the Neue Galeria art gallery in 1924 and again in 1933 for exhibition and possible sale. The Neue Galeria, owned by a Jewish art dealer, Otto Kallir-Nirenstein ("Kallir"), was located in Vienna. Another of Reichel's sons, Raimund, arranged for the transfer of the Painting to Kallir in 1924, and Reichel's wife Malvine signed the receipt when the painting was returned to the Reichel home in

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of organizational codes of ethics and of federal tax regulations, to the "Reckless Breach of Its Fiduciary Duties as a Public Trustee" (Am. Answer ¶ 107) and engaging in a "Long History of Acquiring Stolen and other Illicit Artworks." (Id. ¶ 108.)

[2] Provenance refers to the authenticated history of ownership of a work of art.

[3] The following facts concerning the case are taken primarily from plaintiff's Rule 56.1 Statement of Undisputed Facts (Docket # 26) where not controverted by defendant's amended Rule 56.1 statement of contested facts (Docket # 49). See Local Rules of the United States District Court for the District of Massachusetts, Rule 56.1.

November 1924 and, again, when the Painting was returned after the second exhibition in November 1933. In 1937, Reichel and Hans arranged a loan of the Painting and other works by Kokoschka to a museum in Vienna. The catalog for this exhibition listed Reichel as having lent the Painting.

In March 1938, Nazi Germany annexed Austria, the Anschluss. Shortly thereafter, Kallir transferred control of his gallery in Vienna to his secretary, who was not Jewish, and moved to Paris where he opened the Galerie St. Etienne. In Austria, the Nazi government issued regulations requiring Jews with property exceeding a certain value to file declarations listing all of their assets. Reichel submitted such a property declaration in June 1938. It included the Painting and four other works by Kokoschka. On February 1, 1939, Reichel transferred the five Kokoschka paintings to Kallir in Paris for their sale.

Kallir left France in August 1939, emigrated to the United States with the Painting and other works, and opened the Galerie St. Etienne in New York the following month. The gallery sold the Painting to the Nierendorf Gallery in September 1945, which sold it later that year to E. and A. Silberman Galleries of New York. Ownership of the Painting passed to Sarah Reed Blodgett ("Blodgett") sometime between December 1947 and April 1948. When Blodgett died in 1972, she bequeathed the Painting to the MFA, which formally acquired the work in 1973. Kallir died in 1978, but his art gallery continues to operate in New York City. Jane Kallir, Kallir's granddaughter, has worked at the gallery since 1977 and is currently its co-director. The gallery maintains an inventory card for the Painting, that shows it as having been

purchased from Reichel on February 1, 1939, and lists both Blodgett and the MFA as owners of the work.

During the time Blodgett owned the Painting, it was included in many exhibitions across the United States. The catalog for a traveling exhibition in 1948-49 specified that it had been owned by "Dr. Reichel, Vienna," and was "lent by Mrs. John W. Blodgett, Jr., Portland Oregon." (Docket # 26 ¶ 51.) Except for periods when it has been on loan for exhibitions elsewhere, the MFA has had the Painting on public display almost continuously since it acquired the work. The Painting has been included in all three catalogues raisonnés of Kokoschka's works published since 1939.[4] A catalogue raisonné published in 1947 listed Reichel as a prior owner. A 1995 catalogue raisonné listed the MFA as the current owner and traced the work's provenance back to Reichel. Since 1972, numerous other publications have referenced the Painting as owned by the MFA and listed Reichel as a prior owner. The MFA has publicized its acquisition and ownership of the work in its annual report and in several books on its collection. It published the provenance of the Painting on its web site in December 2000, and that information has been continuously available through the Internet since then. In addition, the Painting's provenance has been included in the Getty Provenance Index since the late 1980s.[5]

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[4] A catalogue raisonné is a comprehensive catalog of artworks by an artist. See DeWeerth v. Baldinger, 836 F.2d 103, 112 (2d Cir. 1987).

[5] See The Getty Provenance Index Databases, Public Collection record 10823. This database may be accessed at http://piprod.getty.edu/starweb/pi/servlet.starweb?path=pi/pi.web. Record 10823 shows the Painting in the public collection of the MFA and additionally notes that "[t]his record

Reichel died in Vienna in 1943. A third son, Max, was killed during the war. Hans settled in Illinois in 1939, where he was joined by his mother after the war. She died in Illinois in 1951. Hans died in 1979. Raimund moved to Paraguay in 1939, then lived in Argentina until 1982, at which time he returned to Vienna. He remained in Vienna until his death in 1997. While living in Vienna, Raimund corresponded with and was interviewed by numerous art historians concerning his father's collection of Kokoschka paintings. In this correspondence, he explained that his father maintained a

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was last modified 4 March 1987." Clicking on the "Provenance" link displays the following information (errors in original):

Provenance of Paintings Record 10823

KOKOSCHKA, OSKAR
Two Nudes (Lovers)
Boston, MA, Museum of Fine Arts
1973.196
canvas

- 1939
Reichal, Oskar. Wien, Österreich

1939 - 1945
Saint Etienne, Galerie. New York, NY, USA (from Reichal)

1945 - 1945/47
Nierendorf, (Karl), Gallery (from Kallir; d.1947)

1945/47 - 1973
Platt, Sarah Reed Blodgett, Mrs.. Portland, OR, USA; Santa Barbara, CA, USA (from Nierendorf between 1945 and 1947)

1973 -
Boston, MA, USA. Museum of Fine Arts (bequest of Platt)

(database last accessed April 27, 2009).

"Kokoschka room" in the house in Vienna to display the artist's work. In a 1982 letter sent to a Munich art historian, he recalled that "in 1938 my father transferred the entire collection of O[skar] K[okoschka] paintings to the art dealer Dr. Kailer [sic], which he sold in the USA." (Docket # 28, Ex. 65.) In another letter, sent in 1985 to a researcher working on a new catalogue raisonné of Kokoschka's works, Raimund specifically recalled his father bringing Alma [by then][6] Werfel to the house one Sunday and showing her the Painting hanging in the dining room. He further recalled:

> In 1938 he transferred his OK paintings (I think there were about ten) to Kallier when the latter was emigrating to the USA; exporting them was easy, since they were "degenerate", and my father made an arrangement with Kallier to provide the proceeds to my brother who was already over there – Around 1940 or 41 Kallier sent two-hundred-and-fifty dollars (sic), and so my brother sent me half, $125 ..... Some years later I spoke with Kallier in N.Y. in his Galerie St. Etienne; he told me that he lost his shirt for it!

(Docket # 31, Ex. A ("(sic)" and spelling as "Kallier" in original).) The Painting was displayed in Vienna in 1991 as part of a Kokoschka exposition while Raimund was living there.

Reichel and Malvine were persecuted by the Nazis after the Anschluss. Reichel's business was ordered closed, and he was forced to sell his ownership in property at Börsegasse 12. Malvine did not receive any monies from the sale of the family house, which she owned and sold in early 1939 to acquaintances. After the war,

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[6] Alma Mahler-Gropius-Werfel (1879-1964) was the wife, successively, of composer Gustav Mahler, architect Walter Gropius and novelist Franz Werfel. She was also the lover of several other prominent men of her era, one of which was Kokoschka. See, e.g., Tom Lehrer, Alma, on That Was the Year That Was (Reprise Records 1965) (lyrics available at http://www.casualhacker.net/tom.lehrer/the_year-commented.html).

the Reichel family was awarded compensation for the forced sale of the Börsegasse 12 property. Malvine, however, did not apply for compensation on the family house, and in 1949 she signed a statement relinquishing any claim to the property. In 1957, Raimund engaged a lawyer in Vienna to submit applications for himself and his brother Hans for compensation for paintings that had been owned by their father. In the statement attached to the application, he averred that "[a] large art collection was forcibly sold: 47 paintings of the painter Anton Romako ["Romako"], which are today to be found in Austrian Museums and private collections," the proceeds from which were placed in a blocked account controlled by the Nazis. (Docket # 28, Ex. 60.) The paintings were identified by number from a catalogue raisonné of Romako's works. Raimund received 5000 Schillings on the basis of this application and received an additional 1400 Schillings in 1969 in compensation for professional losses. However, neither Malvine, Raimund nor Hans ever sought restitution for any of the works by Kokoschka, nor did they seek to challenge the transfer of the Painting by Reichel to Kallir. Reichel's 1938 asset declaration listing the Painting was declassified by the Austrian government in 1993 for academic use and made available to the general public in 1998.

Although she has no consanguinity with the Reichel family,[7] Raimund designated Seger-Thomschitz, a nurse, as his "universal successor" in his will. She asserts that she is Reichel's sole remaining heir. In the fall of 2003, she first learned

[7] See Answer and Counterclaim ¶ 3, Dunbar v. Seger-Thomschitz, No. 08-711 (E.D. La. filed June 27, 2008) (Docket # 36, Ex. A). The court takes judicial notice of this filing by defendant in a related action seeking recovery of another one of the five Kokoschka paintings transferred to Kallir in February 1939. See E.I. du Pont de Nemours & Co., Inc. v. Cullen, 791 F.2d 5, 7 (1st Cir. 1986).

that she might have a claim to artworks formerly owned by Reichel when the Museums of Vienna contacted her in order to return four works by Romako to her. After receiving the paintings in early 2004, she retained a Viennese attorney for "all purposes relating to the restitution of artworks lost by Oskar Reichel due to Nazi persecution." (Am. Answer ¶ 105.)[8] She had worked with this attorney previously in qualifying as the sole heir of Raimund, and he had dealt with the Museums of Vienna concerning the restitution of the Romako artworks.

In the fall of 2006, Seger-Thomschitz retained a law firm in Washington, D.C., to investigate artwork in the United States formerly owned by Reichel. On March 12, 2007, that firm made a demand on the MFA for return of the Painting to her. The MFA asked for additional time to investigate her claim and agreed to toll the statute of limitations from July 23, 2007, until December 2007. After its investigation, the MFA met with defendant's attorneys in January 2008 to inform them that it would not return the Painting. The MFA explained that its investigation had concluded that Reichel's sale of the Painting to Kallir was a voluntary, uncoerced transaction and, therefore, it had clear legal title to the work.

On January 22, 2008, the MFA commenced the instant lawsuit seeking: an order quieting title to the Painting pursuant to 28 U.S.C. § 1655 (Count I); a declaratory order that the MFA has valid title to the Painting and that Seger-Thomschitz has no claim to it (Count II); and an injunction to enjoin Seger-Thomschitz or her agents from initiating or

[8] Paragraph numbers cited in defendant's Amended Answer (Docket # 20) refer to the numbered paragraphs of her counterclaim unless otherwise noted.

threatening legal action regarding Painting (Count III). (See Docket # 1 (the "Complaint").) The Complaint also asserts that defendant is in any event barred by the applicable statute of limitations from pursuing the Painting because its provenance and whereabouts have been public knowledge for decades.

In her initial answer (Docket # 11), filed on May 29, 2008, Seger-Thomschitz asserted counterclaims for replevin to recover the Painting, for conversion and for a declaration that she is the rightful owner of the Painting, and that the MFA has no valid title or interest in it. In an amended and corrected answer (Docket # 20), she added counts for a constructive trust, disgorgement, restitution and unjust enrichment, estoppel and injunctive relief. Her claims are premised on her assertion that the Painting was effectively confiscated by the Nazi government once Reichel listed it on his property declaration in 1938, and that the transfer to Kallir's gallery in Paris was but the last step in the confiscation. Alternatively, she construes the transfer as a forced, and therefore, invalid sale that could not create valid title in any subsequent owner. In response to the MFA's limitations argument in the Complaint, she asserts that no member of the Reichel family knew of Kallir's wrongful acquisition and the subsequent owners' wrongful retention of the Painting.

The MFA moves for summary judgment (Docket # 25) because it says that defendant's claims are barred by the Massachusetts three-year statute of limitations. Defendant does not, in general, dispute the MFA's statement of uncontested facts; rather, she asserts that Kallir "likely connived with Nazi authorities to obtain artworks from many Jewish collectors" and accuses Kallir of "exploit[ing] – for his own personal

gain – the fact that the Nazis persecuted Jews in Vienna." (Docket # 49 ¶¶ 6, 9.) She also contends that Reichel's property declaration "constituted the only means of identifying the specific artworks and other assets Oskar Reichel owned as of the date of the Property Declaration," and that investigating artworks and other property confiscated by the Nazis requires expertise not available to a person without specialized training. (Id. ¶¶ 18, 22, 23.) Finally, she alleges that "in acquiring the Painting from Oskar Reichel, Otto Kallir [w]as acting as a de facto Nazi agent and under color of Nazi authority, and that Kallir, in breach of his confidential relationship with Hans and Raimund Reichel, fraudulently concealed from them the true status he occupied when he acquired the Painting from Oskar Reichel, and so their claim to recover the Painting." (Id. ¶ 25.)

Based on this last contention, she moves to amend her answer and counterclaim to add counts of fraudulent concealment. (Docket # 45.) The MFA opposes the motion on the grounds that it is futile. (Docket # 52.) Seger-Thomschitz seeks leave to file a reply brief to plaintiff's opposition (Docket # 54), which the MFA opposes as "a disguised sur-reply in opposition to the Museum's motion for summary judgment." (Docket # 55.)

III. Legal Standard

Summary judgment is appropriate if, viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in her favor, no genuine issue of material fact remains. See Fed. R. Civ. P. 56(c); Casas Office Machs., Inc. v. Mita Copystar Am., Inc., 42 F.3d 668, 684 (1st Cir. 1994). The question

of whether a suit is time-barred is a question of law suited for disposition on summary judgment as long as there are no genuine issues of material fact about whether the suit was timely brought. See Morris v. Gov't Dev. Bank of Puerto Rico, 27 F.3d 746, 748 (1st Cir. 1994); Hallgren v. U.S. Dep't of Energy, 331 F.3d 588, 589 (8th Cir. 2003). Where, as here, the plaintiff has raised a plausible claim that the defendant's claim to the Painting is time-barred, she must identify a trialworthy issue to avoid summary judgment. See McIntosh v. Antonino, 71 F.3d 29, 33 (1st Cir. 1995). "Although we give the nonmoving party the benefit of all reasonable inferences, a party cannot rest on conclusory allegations, improbable inferences, on unsupported speculation to defeat a motion for summary judgment." Welch v. Ciampa, 542 F.3d 927, 935 (1st Cir. 2008) (internal quotation marks omitted).

IV. Discussion

A. The Applicable Statute of Limitations Period

Federal courts adjudicating state claims under diversity jurisdiction borrow the statute of limitations applicable to the action under the forum state's law.[9] See Molinar

[9] Defendant claims federal subject matter jurisdiction under 28 U.S.C. § 1331, relying on the Supreme Court's decision in Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005), to argue that a federal, not state, limitations period should apply. (See Docket # 41, 2.) Grable held that "in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." Id. at 312. This allows "claims recognized under state law that nonetheless turn on substantial questions of federal law" to be heard in federal court, even where there is no diversity of citizenship between the parties. Id. Here, reliance on Grable is unnecessary because subject matter jurisdiction is established by the complete diversity between the MFA and Seger-Thomschitz. (See Compl. ¶ 9; Am. Answer ¶ 18.) In addition, even if Grable had some applicability, its holding does not implicate the rule, stated supra, that federal courts adjudicating state claims apply the state limitations period to the action. Thus, defendant's counterclaims seeking recovery of

v. W. Elec. Co., 525 F.2d 521, 531 (1st Cir. 1975) (citing Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99 (1945)). Plaintiff contends that under Massachusetts law, defendant's counterclaims asserting actions of tort, actions of replevin and conversion, as well as the remaining causes of action that seek restitution or disgorgement based on the same underlying claim of conversion, are all subject to a three-year limitations period. See Mass. Gen. Laws ch. 260, § 2A ("[A]ctions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.").

In response, defendant urges this court to "invoke its federal common law authority to displace the provincial Massachusetts limitations period with the equitable doctrines of laches and unclean hands," arguing that the MFA "wrongfully acquired and detains the Painting" in violation of its duties as a tax exempt organization. (Def.'s Opp'n to Summ. J. (Docket # 41), 1.) She further contends that, should the court choose to apply Massachusetts law, her counterclaims "sound in contract not tort," and thus are subject to a six-year limitations period, because they "are premised upon MFA's violation of its implied promise under [26 U.S.C.] § 501(c)(3) and breach of express contract with the public." (Id.)

Defendant's suggestion that this court ignore the state limitations period on equitable grounds is premised on the proposition that, upon being notified of her claim to the Painting, her ownership was so apparent and clear that the refusal by the MFA to

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the Painting would still be governed by the Massachusetts limitations period for tort and replevin claims, even if jurisdiction were established under Grable.

immediately hand over the Painting could only be attributed to a continued pattern of "aiding, abetting, encouraging and facilitating the illegal and criminal intentional trafficking in stolen art and illicit cultural property." (Am. Answer ¶ 7.) Here, however, the alleged illegitimacy of the transfer of the Painting to Kallir in 1939 is not clear-cut, and all of the witnesses with first-hand knowledge of the transfer are now deceased. Upon being notified of defendant's claim to the Painting, the MFA embarked upon an investigation into its provenance, with particular attention to its transfer to Kallir, before asserting its ownership. (See, Compl. ¶¶ 4-6, 36; Decl. of Victoria Reed in Supp. of MFA's Mot. for Summ. J. (Docket # 28).) Other museums faced with similar claims in which the circumstances of a wartime transfer made the legitimacy of the transfer debatable have also refused to summarily return the artworks and, instead, sought declaratory judgments of ownership. See, e.g., Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 804-05 (N.D. Ohio 2006); The Detroit Institute of Arts v. Ullin, No. 06-10333, 2007 WL 1016996, at *1-2 (E.D. Mich. Mar. 31, 2007); see also Orkin v. Taylor, 487 F.3d 734, 737 (9th Cir. 2007) (contesting a claim of ownership based on a similar theory of economic coercion and that the painting at issue had been sold "under duress"). Therefore, I find no evidence of bad faith, laches or unclean hands by the MFA that would justify setting aside the Massachusetts three-year limitations period.

Seger-Thomschitz's asserts that her counterclaims sound in contract, not tort, because the MFA has violated an "express contract with the public" as well as a contract with the federal government created by its tax-exempt status. This argument, while creative, is without merit. "Under Massachusetts law, the determination of

whether the contract or tort statute of limitations applies is controlled by the essential nature of a party's claim." Oliveira v. Pereira, 605 N.E.2d 287, 290 (Mass. 1992). Defendant does not allege the existence of any agreement between herself and plaintiff; rather, her contract claim purports to enforce the rights of the public and the United States government as parties to separate contracts with plaintiff.[10] Moreover, a plain reading of her counterclaim alleges that the MFA wrongfully obtained property properly belonging to her and that she now seeks its return. (See, e.g., Am. Answer ¶ 7 (contending that the MFA "wrongfully detained the Painting from Dr. Seger-Thomschitz after the MFA learned, dispositively, that the Nazis confiscated the painting") (emphasis, both boldface and italics, in original).) Such a claim sounds clearly in tort, not contract, and thus is subject to the three-year limitations period. See Oliveira, 605 N.E.2d at 290-91; cf. Aimtek, Inc. v. Norton Co., 870 N.E.2d 1114, 1119-20 (Mass. App. Ct. 2007) (holding that a dispute resulting from a consensual arrangement between the parties was contractual in nature and thus subject to the six-year limitations period).

[10] Defendant asserts that the MFA has formed an express contract with the public "by soliciting charitable contributions based on its status as an 'Accredited Museum' of the American Association of Museums (AAM)." (Docket # 14, 14.) Even assuming such a contract exists, Seger-Thomschitz, an Austrian citizen residing in Vienna, has not pled facts that would establish her standing to enforce the rights of members of the public who have been solicited for charitable contributions by the museum. As to her tax exempt contract theory, not only has "the Supreme Court [] long denied attempts to characterize a tax exemption as a contract" Amato v. UPMC, 371 F. Supp. 2d 752, 756 (W.D. Pa. 2005), but the federal courts have consistently held that tax-exempt status does not confer private rights of action on American citizens. See, e.g., Harrison v. Christus St. Patrick Hosp., 430 F. Supp. 2d 591, 595 (W.D. La. 2006); Amato, 371 F. Supp. 2d at 756; Ferguson v. Centura Health Corp., 358 F. Supp. 2d 1014, 1016 (D. Colo. 2004). As an Austrian citizen, defendant has no more standing than an American citizen to interject herself in such disputes.

B. The Massachusetts Discovery Rule

Under Massachusetts law, the general rule is that causes of action in tort accrue when the plaintiff is injured. E.g., Joseph A. Fortin Const., Inc. v. Massachusetts Hous. Fin. Agency, 466 N.E.2d 514, 516 (Mass. 1984). However, under the discovery rule exception, the limitations period does not begin to run in circumstances where "the plaintiff did not know or could not reasonably have known that he or she may have been harmed by the conduct of another." Koe v. Mercer, 876 N.E.2d 831, 836 (Mass. 2007) (citing Bowen v. Eli Lilly & Co., 557 N.E.2d 739 (1990)). "A plaintiff is considered to be on 'inquiry notice' when the first event occurs that would prompt a reasonable person to inquire into a possible injury . . . ." Epstein v. C.R. Bard, Inc., 460 F.3d 183, 187 (1st Cir. 2006) (emphasis added) (applying Massachusetts law).

Seger-Thomschitz asserts that her counterclaim is timely because no member of the Reichel family could have known that the Nazis stole the Painting, and she was unaware the Nazis stole the Painting until her attorneys so advised her in 2006. (See Am. Answer ¶¶ 86-106.) A party asserting the discovery rule "bears the burden of proving both an actual lack of causal knowledge and the objective reasonableness of that lack of knowledge." Koe, 876 N.E.2d at 836 (internal quotation marks and citation omitted).

1. Knowledge of the Reichel Family

Here, the evidence is undisputed that the members of the Reichel family had sufficient knowledge of Reichel's ownership and transfer of the Painting to put them on notice of a possible injury long before defendant contacted the MFA. As discussed

supra, Part II, Malvine, Raimund and Hans all knew of Reichel's ownership of the Painting before the war, and Raimund was aware that his father transferred the Painting, along with other paintings by Kokoschka, to Kallir for their sale. At some point in 1940 or 1941, Kallir sent the proceeds in the amount of $250 to Hans, who forwarded half to Raimund. Raimund recalled visiting Kallir at his New York gallery after WWII and discussing the Painting and its sale with him.

In addition, although the Reichel family never claimed compensation for any of the Kokoschka works that had been transferred to Kallir for sale, it did claim restitution for artwork and property that had been stolen by the Nazis. It received compensation for the forced sale of the Börsegasse 12 property, and both Raimund and Hans submitted applications for compensation for their father's Romako collection, which he was admittedly forced to sell.

Finally, the location of the Painting has been readily ascertainable since at least 1945. Kallir's New York gallery, which has moved only once since its founding, maintained a record of the several owners of the work. Raimund visited Kallir at the gallery and he knew that Kallir had sold the Painting after he came to the United States. Since the Painting was given to the MFA, it has been on display almost continually and its provenance, including Reichel's ownership, was widely recorded in several catalogues raisonnés of Kokoschka's works. Indeed, the Painting was exhibited in Vienna while Raimund lived there.

Given this evidence, Hans, Raimund and Malvine all had ample notice of any

possible claim to the Painting decades before the filing of this lawsuit.[11] Although Seger-Thomschitz accuses Kallir of dealing in stolen Nazi art (Am. Answer ¶ 53) and alleges that all Jewish property in Austria was "effectively seized by the Nazis no later than November 1938" (id. ¶ 44), these allegations only emphasize that an objective person would have been on notice to investigate the circumstances surrounding the transfer of the Painting to Kallir. Indeed, according to defendant, the MFA "has known since 1983 that the Nazis likely stole the Painting" based solely on the fact that "Oskar Reichel, a persecuted Jew, 'sold' it in February 1939 in Vienna Austria to art dealer Otto Kallir." (Id. ¶ 107.) The Reichel family had this same information.

The Reichel family's post-war conduct is in stark contrast to actions by the original artwork owner in Vineberg v. Bissonnette, 548 F.3d 50 (1st Cir. 2008), supplemental authority submitted by defendant.[12] (See Docket # 56.) In Vineberg, Dr. Stern ("Stern"), a Jewish art dealer, was forced by the Nazis to liquidate his gallery and inventory. However, unlike the Reichels, he actively sought recovery of his paintings "[i]n the immediate aftermath of World War II." He placed advertisements in 1948 and 1952 to track down his missing art, "visited Europe in 1949 to hunt for his missing

[11] In addition, the fact that the Reichel family sought compensation for some wartime assets while disclaiming other assets is evidence that its failure to challenge the transfer of the Painting to Kallir was not due to mere inadvertence or ignorance of its right to restitution.

[12] Seger-Thomschitz also submits an order and opinion from a case in the Southern District of New York as relevant to this case. However, that opinion provides insufficient explanation for the court's conclusion that "disputed questions of material fact preclude its ruling finally on the issue of laches" to illuminate the present dispute. (Docket # 57, Ex. A, 3.)

artworks" and "pursued claims for monetary compensation in the German restitution courts." Id. at 53. During his lifetime, Stern was unable to recover the painting that was the subject of the lawsuit because, unbeknownst to him, it had been sold during the war and was being held in a private collection, with only a single brief public exhibition. After Stern's death, his estate listed the painting on Germany's Lost Art Internet database and contracted with an art recovery company to search for artworks still missing. It was not until 2003 that the painting-at-issue was put up for sale by the wartime buyer's step-daughter and its location came to the attention of the Stern estate.[13] Unlike the instant case, the ownership of the painting was not in question, nor did the step-daughter contest the estate's claim of ownership; rather, she relied on the affirmative defense of laches. In rejecting this defense, the court below held that Stern and his successors-in-interest were not barred from recovering the work because they "had pursued their claim to the Painting diligently," and the defendant had not shown that she was prejudiced by the delay in bringing suit. Id. at 57. The First Circuit affirmed on the latter ground. See id. at 57-59.

Here, the basic issue is whether the transfer to Kallir in 1939 was legitimate, and thus, who is the rightful owner of the painting. Unlike Stern and his successors, the Reichel family never attempted to recover the Painting after WWII, and there is no evidence that it believed the transfer was not legitimate. In addition, the delay in bringing suit will prejudice the MFA because all of the witnesses with actual knowledge

[13] Plaintiff Vineberg was an executor of Stern's estate and a trustee of the Dr. and Mrs. Stern Foundation.

of the transfer are now deceased. See Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 554 (1974) ("[S]tatutory limitation periods are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.") (internal quotation marks and citation omitted).

2. Knowledge of Seger-Thomschitz

Even if the limitations period was tolled during Raimund's lifetime for some reason, defendant is still barred because she waited more than three years to assert her claim after she was on inquiry notice of her possible right to the Painting. Seger-Thomschitz admits that she "first learned that the Nazis had confiscated artworks from Oskar Reichel in the Fall of 2003 when the Museums of Vienna contacted her concerning their intent to return to her as the sole heir of Oskar Reichel four artworks in their collection by the artist Anton Romako . . . ." (Am. Answer ¶ 103.) Although she disclaims any specialized knowledge or familiarity with the art world, she understood that she had a claim to paintings formerly belonging to Reichel and, in fact, retained counsel in 2004, well within the limitations period, "for all purposes relating to the restitution of artworks lost by Oskar Reichel due to Nazi persecution." (Id. ¶ 105.)

The information necessary to pursue her claim was readily available to both defendant and her counsel at that time. The Austrian government had made Property Declarations generally available in 1998; therefore, Reichel's declaration (showing his ownership of the Painting) was accessible in 2003. (Docket # 36, Ex. A ¶ 90.) In addition, not only was Reichel's prior ownership of the Painting listed on the MFA's web

site, in the Getty Provenance Index and in the several catalogues raisonnés of Kokoschka's works, but a book published in Vienna in 2003 included a picture of the Painting, traced its provenance from Reichel to the MFA, included a transcription of Reichel's April 1938 property declaration listing the Painting and described the sale of the work to Kallir and its subsequent exhibition in the United States at the Galerie St. Etienne. (Docket # 28 ¶¶ 45-46; id. Ex. 50.) The conclusion is inescapable that, in 2003, defendant knew or should have known of Reichel's previous ownership of the Painting, his transfer of the Painting to Kallir and the MFA's current ownership, all of which was public knowledge and easily discoverable. Because she did not make a demand on the MFA until 2007, Seger-Thomschitz's claims are time-barred, even if the cause of action were tolled until 2003.

V. Defendant's Motion to Amend Her Counterclaim

Seger-Thomschitz moves to amend her First Amended Counterclaim to add allegations of fraudulent concealment by Kallir. (Docket # 45). Because defendant's counterclaim would still be time-barred even if amended, amendment would be futile. See Adorno v. Crowley Towing and Transp. Co., 443 F.3d 122, 126 (1st Cir. 2006) ("Consent to file amended pleadings shall be freely given when justice so requires unless the amendment would be futile or reward undue delay.") (internal quotation marks and citation omitted).

Defendant bases her motion to amend on several of the letters written by Raimund to art historians that the MFA submitted in support of its motion for summary judgment. (See Docket # 28, Ex. 65; Docket # 31, Ex. A.) In one of these letters,

Raimund erroneously wrote that the transfer of the Painting took place "in 1938," not a month later on February 1, 1939, and equivocally recalled that there were ten Kokoschkas transferred, not five. She asserts, "upon information and belief," that this evidence shows that "Raimund had been totally misled by Otto Kallir," and that Kallir told Raimund "that the sale [of the Kokoschka paintings] was a volitional sale that occurred in 1938, rather than in 1939." (Docket # 46, 4.)

Seger-Thomschitz's assertion that Kallir misled Raimund as to the date of the transfer and the number of paintings is pure speculation. There is no evidence that any of the errors (including the several misspellings of Kallir's name) in the letters Raimund wrote forty-five years after the events he was recounting were the result of statements made to him by Kallir. Even if Kallir did mislead Raimund and his brother, fraudulent concealment by Kallir would not toll the limitations period of defendant's counterclaims against the MFA. See Mass. Gen. Laws ch. 260, § 12 ("If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action.") (emphasis added). Defendant cites no evidence that the MFA concealed any cause of action from the Reichel family or from her. Finally, even if fraudulent concealment by Kallir tolled the limitations period as to the Reichel family, defendant's counterclaims are time-barred because she knew of her claim in 2003. See discussion supra, Part IV.B.2.

In addition, although she describes the evidence on which she bases her motion

to amend as "previously unknown to Seger-Thomschitz" (Docket # 45, 1), these letters were obtained by the MFA from third parties unassociated with either the MFA or defendant in its investigation of her demand. (See Docket # 28 ¶ 57 (Declaration of the MFA's Asst. Curator for Provenance attesting that she "contacted Marie-Agnes von Puttkamer, an art historian and art dealer" in July 2008 to obtain the 1982 letter); Docket # 31 (Declaration of Johann Winkler, a Vienna based researcher of the life and work of Kokoschka, explaining his possession of the 1985 letter).) Seger-Thomschitz had the same opportunity to obtain this evidence as did the MFA, and it would be unfair to plaintiff and the public to delay resolution of this case because of her failure to investigate the circumstances of the transfer of the Painting. See Wolf v. Reliance Standard Life Ins. Co., 71 F.3d 444, 450 (1st Cir. 1995). The motion to amend is denied.

VI. Defendant's Motion to File a Reply Brief

Defendant's motion to file a reply to the MFA's opposition to her motion to amend (Docket # 54) is allowed, however, the arguments presented in that reply (id., Ex. A) do not change my decision as to her motion to amend. She first argues that the discovery rule is fact intensive and that the limitations period did not begin to run until she learned that Reichel had owned the Painting, that it had been transferred to Kallir and that the MFA now owned it. Seger-Thomschitz's thesis, however, that her retention of an attorney in Vienna in 2004 followed by her "commencing negotiations and hiring her present counsel" (id. at 7) is adequate to toll the statute of limitations, does not comport with Massachusetts law. See, e.g., Koe, 876 N.E.2d at 836; Epstein, 460 F.3d

at 187; see also Bernier v. Upjohn Co., 144 F.3d 178, 180 (1st Cir. 1998) (refusing to apply the Massachusetts discovery rule where plaintiff did not "offer any rationale for concluding that her attorney could not have discovered [a relevant document] in 1980 as readily as he did in 1994" and cautioning that "lawyers faced with deadlines in the future should treat this case as a warning"). Unlike the situations in the cases she cites in support of her motion, here Reichel's prior ownership of the Painting and its current location were easily discoverable.

Second, she rebuts the MFA's contention that even if Kallir had fraudulently concealed information from the Reichel brothers, it would not toll the limitations period against the MFA. However, the basis for her rebuttal is that the limitations period should be equitably tolled due to the MFA's unclean hands, an argument I have already rejected. See supra, Part IV. A.

VII. Conclusion

Accordingly, defendant's motion to file a reply brief (Docket # 54) is ALLOWED. Defendant's motion to amend her counterclaim (Docket # 45) is DENIED. Plaintiff's motion for summary judgment (Docket # 25) is ALLOWED.

Plaintiff shall submit an agreed form of judgment within 10 days.

May 28, 2009
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE