

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARTIN GROSZ and LILIAN GROSZ,
Plaintiffs,

09 Civ. 3706 (CM) (THK)

-against-

THE MUSEUM OF MODERN ART,
Defendant,

HERRMANN-NEISSE WITH COGNAC,
SELF-PORTRAIT WITH MODEL
and REPUBLICAN AUTOMATONS,
Three Paintings by Grosz,
Defendants-in-rem.

_____ x

DECISION AND ORDER DENYING PLAINTIFFS' MOTION FOR
RECONSIDERATION

McMahon, J.:

INTRODUCTION

On January 6, 2010, this Court granted defendant's motion to dismiss, on the ground that the statute of limitations barred Plaintiffs from maintaining an action in conversion to recover three paintings held by the museum (the defendants-in-rem). See Grosz v. Museum of Modern Art, No. 09 Civ. 3706, 2010 WL 88003 (S.D.N.Y. Jan. 6, 2010).

On January 19, 2010, Plaintiffs filed a motion to amend their now-dismissed complaint and to supplement the record (docket no. 61).

On January 20, 2010, Plaintiffs filed a motion for reconsideration or reargument (docket no. 64), which they amended on January 21, 2010 (docket no. 66).

By this decision, the Court denies both of Plaintiffs' motions.

FACTS

Plaintiffs Martin and Lilian Grosz (“Plaintiffs” or “Grosz Heirs”) are the son and daughter-in-law of the late German artist George Grosz. They sued the Museum of Modern Art (“MoMA”) seeking the return of three artworks currently in MoMA’s collection: *Republican Automatons*, *Portrait of the Poet Max Herrman-Neisse mit Cognakflasche* (“*Poet*”), and *Self-Portrait with Model* (“*Self-Portrait*”) (collectively, the “Paintings”). On November 24, 2003, Plaintiffs first “demanded return” of the Paintings, via a letter from their authorized agent, Ralph Jentsch, to MoMA. (First Am. Compl., May 29, 2009 (“Compl.”), ¶ 117 & Ex. 26.) The record reflects that Jentsch and MoMA exchanged a series of letters—some of them quite heated—and had several meetings between July 20, 2005, and April 12, 2006. (See Decl. of L. Solomon, June 4, 2009 (“06/04/2009 Solomon Decl.”), Ex. A.) At no time during this process did MoMA acknowledge Plaintiffs’ ownership of the Paintings or relinquish custody of them to Plaintiffs.

Plaintiffs waited until April 10, 2009, to commence this action. The statute of limitations in a conversion case is three years. In a case where the defendant did not come into possession of the converted article in bad faith, the three year period begins to run “not upon the stealing or the taking, but upon the defendant’s refusal to convey the chattel upon demand.” Menzel v. List, 49 Misc. 2d 300, 304-05 (N.Y. Sup. Ct. 1966) (citing Cohen v. M. Keizer, Inc., 246 App. Div. 277 (1st Dep’t 1936)).

Plaintiffs alleged that their action was commenced before the statute of limitations ran because MoMA rejected their demand for return of the Paintings by a letter from MoMA’s director, Glenn Lowry, to their agent, Ralph Jentsch, dated April 12, 2006.

(Compl. ¶ 31.) Plaintiffs attached to their pleadings their November 24, 2003 demand letter and a portion of MoMA's alleged refusal letter dated April 12, 2006. (Id. Exs. 26-27.)

In their Complaint,¹ Plaintiffs acknowledged that there was intervening communication between the parties, and acknowledged that this communication included, *inter alia*, "MoMA's absolute refusal to toll the statute of limitations." (See, e.g., id. ¶ 23). Plaintiffs did not append any of that communication to their Complaint.

On June 4, 2009, MoMA moved to dismiss the amended complaint as barred by the statute of limitations. In support of its motion, MoMA appended portions of that intervening correspondence. The museum argued that this correspondence was "integral" to Plaintiffs' Complaint because it bore on Plaintiffs' allegation that the Museum had not refused its demand until April 12, 2006. (Mem. of Law in Supp. of Mot. to Dismiss, June 4, 2009 ("MTD"), at 18-19.)

Plaintiffs did not object to MoMA's submission of this correspondence. Nor did they dispute MoMA's assertion (later adopted by this Court) that the correspondence between the parties was integral to the Complaint. Instead, Plaintiffs attached yet another letter from the correspondence that, in their view, bore on the issue of demand-and-refusal. (See Decl. of R. Dowd, June 25, 2009 ("06/25/2009 Dowd Decl."), Ex. 1 (attaching January 18, 2006 letter).) At no time did Plaintiffs argue that the Court would have to convert the motion to dismiss into one for summary judgment in order to consider any of these documents.

¹ Plaintiffs amended their complaint as of right by filing an amended pleading on May 29, 2009. References in this opinion to the "Complaint" are in fact to the Amended Complaint.

While the motion to dismiss was *sub judice*, the parties engaged in discovery. On October 26, 2009, Plaintiffs sought production of the minutes of certain meetings of MoMA's Board of Trustees. Defendant turned over those minutes within a matter of weeks.

On November 20, 2009, Plaintiffs wrote a letter to this Court, asking permission to "supplement" their opposition to the motion to dismiss with selected minutes from meetings of MoMA's Board of Trustees and Executive Committee that were held between July 26, 2005 and April 11, 2006. (the "Meeting Minutes"). (See Decl. of R. Dowd, Nov. 17, 2009 ("11/17/2009 Dowd Decl."), Exs. 1&2.) Plaintiffs argued that these Meeting Minutes supported their position that MoMA did not refuse Plaintiffs' demand until April 12, 2006.

MoMA opposed Plaintiffs' request. In a letter dated November 24, 2009, the Museum argued that minutes were not material to the disposition of its motion to dismiss, because (unlike the parties' correspondence) they had not been sent to Plaintiffs during Lowry's negotiations with Jentsch, and so could not have affected Plaintiffs' perception about whether and when MoMA rejected their demand for the Paintings.

However, in case the Court agreed to consider Plaintiffs' November 20 submission, MoMA asked that the Court also take into account certain testimony from Ralph Jentsch's deposition, which they attached. The tenor of that testimony (which the Court did not read at the time) will be discussed later in this opinion.

There followed the usual flurry of correspondence back and forth. Plaintiffs sent two letters, one dated November 25, 2009, and one dated December 1, 2009; and MoMA responded in a letter dated December 2. Plaintiffs appended additional questions and

answers from Jentsch's deposition testimony to their November 25 letter. And in the December 1 letter, Plaintiffs mentioned the possibility of amending their Complaint yet again. Since Plaintiffs had already used their one amendment as of right, further amendment would have required leave of Court (see Fed. R. Civ. P. 15(a)(2)), but Plaintiffs did not make a motion for leave to amend.

At the time these letters were flying back and forth, the Court had already done considerable work on the motion to dismiss, based solely on the record submitted in June 2009. The Court had reached tentative conclusions and was in the process of drafting an opinion. I had no inclination to start the process over. Furthermore, I recognized that consideration of deposition testimony (which could not possibly have been relied on in drafting the Complaint)—and most likely consideration of the Meeting Minutes—would require me to convert the motion to dismiss into a motion for summary judgment. It was inevitable that the parties would greet any such announcement with the submission of yet more material in support of their respective arguments. So the Court declined to consider any of the parties' submissions—not the Meeting Minutes, not Jentsch's deposition testimony—and directed the parties to end the battle of correspondence. See Grosz v. Museum of Modern Art, No. 09 Civ. 3706, Mem. Endorsement, Dec. 2, 2009 (docket no. 47).

The decision that was already in the works in December 2009 issued on January 6, 2010. See Grosz v. Museum of Modern Art, No. 09 Civ. 3706, 2010 WL 88003 (S.D.N.Y. Jan. 6, 2010) (the "January 6 Decision"). The Court granted MoMA's motion to dismiss, holding principally that the statute of limitations had begun to run no later than July 20, 2005, when MoMA refused Plaintiffs' demand for purposes of the demand-

and-refusal rule. The Court also concluded that the action was barred using various other possible refusal dates, and even allowing for a brief tolling of statute early in 2006.

Familiarity with the January 6 Decision is presumed.

DISCUSSION

I. Legal Standard

To prevail on a motion for reconsideration, the movant must demonstrate “an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” See Doe v. New York City Dept. of Soc. Servs., 709 F.2d 782, 789 (2d Cir. 1983) (citations omitted). The Court’s review “is narrow and applies only to already-considered issues; new arguments and issues are not to be considered.” See Morales v. Quintiles Transnational Corp., 25 F. Supp. 2d 369, 372 (S.D.N.Y. 1998). A motion for reconsideration “is not a substitute for appeal and ‘may be granted only where the Court has overlooked matters or controlling decisions which might have materially influenced the earlier decision.’” See id. (citations omitted).

Plaintiffs’ motion for reconsideration is denied because they have demonstrated none of the three required factors.

A. There Has Been No Intervening Change of Controlling Law

Plaintiffs point to no intervening change of controlling law on the subject of the statute of limitations for conversion claims, or the demand-and-refusal rule. They do cite a case that was not included in the opposition to the motion to dismiss—Ball v. Liney, 3 Sickels 6 (N.Y. Ct. App. 1871). But a case decided more than 125 years ago can hardly be considered new law.

In any event, Ball supports the Court's conclusion that Plaintiffs' claims are time barred. In Ball, the New York Court of Appeals held that a person who had acquired property in good faith would be afforded only a "brief period" to investigate a claim that the property had been stolen before his continuing possession of the property would ripen into conversion under the demand-and-refusal rule and the three year statute of limitations would begin to run. 3 Sickels at 12-13. The Ball court concluded that even three months was too long to qualify as a "brief period," and specifically stated that it could "*hardly conceive* of a case where the bailee would be justified in detaining property from the real owner, from May 15 to August 6, nearly three months, to inquire into the title." Id. at 13 (emphasis added).

This case involves claims to works of art that are alleged to have fallen prey to Nazi looting in the years leading up to World War II. It would hardly be appropriate to measure the "brief period" for looking into the Paintings' ownership in days, or weeks, or even the few months that were not brief enough for the Ball court. Matters of provenance are notoriously complicated, and the circumstances under which the Paintings made their way to MoMA (as alleged by Plaintiffs) made the museum's investigation difficult.

But nothing in Ball suggests that the period for investigation allowed by the Court in this case—*twenty months from the date Plaintiffs made their demand*—would qualify as "brief" for the purposes of New York's demand and refusal rule. Moreover, as discussed in the January 6 Decision, the date on which the Court concluded that Plaintiffs' conversion accrued was three months *after* the date by which MoMA agreed to respond, one way or the other, to Plaintiffs' demand. Grosz v. Museum of Modern Art, No. 09 Civ. 3706, 2010 WL 88003, at *12-13 & n.7 (S.D.N.Y. Jan. 6, 2010).

B. There Is No New Evidence That Would Affect the Disposition of the Case

Plaintiffs have not submitted any “new evidence” that would alter the Court’s original determination.

The purported “new evidence” consists principally of the Meeting Minutes from MoMA’s Executive Committee dated April 4, 2006, and MoMA’s Board of Trustees dated April 11, 2006. (Mem. of Law in Supp. of Mot. for Recons., Jan. 20, 2010 (“Pls. Br.”), at 16.)

Plaintiffs allege that the Meeting Minutes demonstrate that the Museum did not reject their demand until the Board’s April 11, 2006 meeting, at which the Board voted to adopt the Report of Nicholas deB. Katzenbach. Katzenbach had concluded that the museum did nothing wrong by refusing to turn the Paintings over to Plaintiffs.²

However, the Meeting Minutes add nothing substantive to the record that was already before the court in connection with the motion to dismiss. It has *always* been Plaintiffs’ position in this lawsuit that “rejection” did not occur until Katzenbach completed his work and the Board affirmed it. Plaintiffs attached to their Complaint the April 12, 2006 letter in which Katzenbach’s conclusions, and the Board’s decision to adopt his recommendations, were conveyed to Plaintiffs (via Jentsch). So the “new evidence” that Plaintiffs want the Court to consider—the minutes of the meeting at which the decisions memorialized in the April 12 letter were taken—is not “new” at all. The Court has already considered Plaintiffs’ argument that the Board’s April 11 action

² The Court sees no need to rehash everything that is contained in the original decision, but I take this opportunity to remind the reader that, in January 2006, MoMA’s Board commissioned former Attorney General Katzenbach to re-examine the work done on the provenance of two of the Paintings (*Self-Portrait* and *Poet*) and to provide his “opinion and recommendations with respect to two paintings in the Museum’s Collection by the artist George Grosz.” (06/04/2009 Solomon Decl. Ex. E (Katzenbach Report (cover letter), at 1).) Katzenbach did as asked and submitted a report to the Board on March 22, 2006. The Board voted to adopt the Report on April 11, 2006.

triggered the statute of limitations, and that nothing that happened earlier constituted “refusal” as a matter of law. For the reasons discussed exhaustively in the January 6 Decision, I rejected plaintiffs’ contention.

Second, I agree with MoMA that internal Museum documents reflecting communications among MoMA’s Executive Committee and its Board of Trustees and Minutes of Board meetings—documents that were not shared with Plaintiffs until many months after this lawsuit commenced—have no bearing on when the statute of limitations began to run. In a case governed by the demand-and-refusal rule, the issue is when, by word or deed, MoMA conveyed to Plaintiffs its intent to continue interfering with their asserted right to possession of the disputed property. *That* is the meaning of “refusal.” See Feld v. Feld, 279 A.D.2d 393, 395 (N.Y. App. Div. 1st Dep’t 2001) (“A refusal need not use the specific word ‘refuse’ so long as it clearly conveys an intent to interfere with the demander’s possession or use of his property.”) (citation omitted). Documents that the Plaintiffs never saw could not have conveyed *anything* to them, and so are irrelevant.

The Court has held that Plaintiffs should have concluded that the Museum had refused their demand long before the Board voted to affirm the Katzenbach Report on April 11, 2006, based on the Museum’s words (Lowry’s July 20, 2005 letter to Jentsch) and its deeds (its continued refusal to turn over the Paintings). Grosz v. Museum of Modern Art, No. 09 Civ. 3706, 2010 WL 88003, at *9-10 (discussing Borumand v. Assar). In fact, as discussed in the January 6 Decision, the museum rejected Plaintiffs’ demand over and over again—by keeping the Paintings for years after the demand was made; by sending letters saying “the available evidence does not lead to any definitive conclusion that challenges the Museum’s ownership” and “we cannot reach the

conclusion that restitution . . . would be appropriate at this time”; by suggesting shared ownership or arbitration—even by delaying and temporizing (as the museum surely did). An aggrieved owner of property cannot delay the accrual of his cause of action for conversion indefinitely by eliciting multiple rejections from the person who is interfering with his right to possession. And once his claim accrues, the clock does not reset to zero every time the parties reopen the subject of who owns the disputed property.

But even if I were to consider the Meeting Minutes that plaintiff submits, they would not save the Complaint from dismissal. The Meeting Minutes tend to confirm, rather than undermine, MoMA’s contention that Plaintiffs’ claim accrued far earlier than April 12, 2006. For example, the minutes from MoMA’s April 11, 2006 Board of Trustees’ meeting—the meeting at which the Board adopted the Katzenbach Report—chronicle the history of the museum’s interactions with Plaintiffs. They recount that the museum had offered “to ‘share’ ownership [with Plaintiffs] pending further definitive research” on the Paintings (Letter from R. Dowd to the Court, Nov. 25, 2009 (“11/25/2009 Dowd Decl.”), Ex. A at 3), and to “arbitrate and/or mediate” the dispute (*id.*; *see also id.* Ex. D at 3 (July 26, 2005 minutes).) The January 6 Decision explains why both sharing and arbitrating are inconsistent with Plaintiffs’ claim of ownership in the disputed property, and in and of themselves, indicate rejection of the demand that the Paintings be conveyed to Plaintiffs. Additionally, minutes from MoMA’s April 4, 2006 Executive Committee meeting state that “the consensus” of the Trustees *on that date*—more than three years before Plaintiffs filed suit—“was that while the Museum would always remain open to studying any new facts that Mr. Jentsch might wish to bring before the Museum, without more, *the Museum would stand with its position rejecting his*

claims.” (*Id.* Ex. D at 2 (April 4, 2006 minutes) (emphasis added).) The only fair inference one can draw from that statement is that the Museum had already rejected Plaintiffs’ demand by April 4, 2006.

C. No Manifest Injustice Would Result From Denial of Plaintiffs’ Motion

Finally, Plaintiffs have not argued, and this Court cannot conclude, that manifest injustice would result from a denial of their motion for reconsideration.

Plaintiffs suggest in their motion papers that this Court could only have reached its conclusion on the limitations question by failing to “take judicial notice of the fact that Adolph Hitler came to power in March 1933,” and by underestimating the significance of the Holocaust. (Pls. Br. at 24.) It may be that Plaintiffs are suggesting that it would work a manifest injustice if the Court were not to reconsider its decision because the circumstances in which Grosz lost his Paintings were themselves unjust. If so, the Court cannot accept the argument.

First, it is obviously not the case that the Court was unaware of the circumstances that led to the loss of Grosz’s paintings. Hitler’s rise to power and its effect on Grosz’s career were documented in the January 6 Decision. *See, e.g., Grosz v. Museum of Modern Art*, No. 09 Civ. 3706, 2010 WL 88003, at *1 (noting that Hitler ascended to Chancellor in 1933); *id.* (“... the Third Reich branded him [Grosz] an ‘enemy of the state’”); *id.* at 2 (“[T]he three Paintings fell prey to a network of unscrupulous art professionals, who took advantage of the political climate of the time to divest Grosz of his ownership.”). However, the Court was confronted with a legal, not a historical, question: how soon after Plaintiffs demanded return of the Paintings in November 2003 did their cause of action for conversion accrue, and the statute of limitations begin to run?

The answer to that question is not a function of circumstances in Germany in the 1930s and 1940s, unspeakably vile though they were.

It may be that Plaintiffs are contending (albeit obliquely) that the statute of limitations ought to be waived because Grosz was a victim of the hideous regime known as the Third Reich. Plaintiffs append several treatises about the loss of art during the period of Nazi domination and the Holocaust to their proposed amended complaint. No such argument was made in opposition to the motion to dismiss—it was not, for example, the basis for Plaintiffs' claim of equitable tolling—so the Court cannot consider it on a motion for reconsideration. But any such suggestion would lack merit. Aside from equitable tolling, New York does not recognize case-by-case exceptions to its statutes of limitations. For the reasons discussed in the January 6 Decision, the record in this case does not support a finding that the statute should be equitably tolled. Furthermore, as discussed in that opinion, even if the equitable tolling argument made by Plaintiffs in opposition to MoMA's motion were accepted, it would not save Plaintiffs' claims from dismissal on limitations grounds. See id., 2010 WL 88003, at *14-16.

Accordingly, nothing in the record suggests that manifest injustice would result from a denial of Plaintiffs' motion.

II. Whether the Court Should Have Converted the Motion to Dismiss to a Motion for Summary Judgment Is Not Properly Considered On A Motion For Reconsideration

Plaintiffs argue that the Court should reconsider the January 6 Decision because it should not have considered the documents submitted by both sides in connection with the museum's motion to dismiss without converting the motion into one for summary judgment.

As noted above, Plaintiffs did not make this suggestion until after the motion was decided against them. That alone makes it improper for the Court to consider the issue on a motion for reconsideration. Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F. 3d 147, 159 (2d Cir. 2003) (argument waived if made for the first time on a motion for reconsideration). However, two things warrant brief discussion.

First, in this Circuit (though not in all circuits), affirmative defenses are routinely considered under Federal Rule Civil Procedure 12(b)(6). See, e.g., McKenna v. Wright, 386 F.3d 432, 436 (2d Cir. 2004) (citing cases); see also 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1226 (3d ed. 2004) (“[T]he current trend in the cases is to allow [the statute of limitations defense] to be raised by a motion to dismiss under Rule 12(b)(6) when the defect appears on the face of the complaint.”). Plaintiffs clearly understood this. They failed to object to MoMA’s submission of the portions of the parties’ correspondence that it deemed relevant to the limitations issue; and they submitted additional portions of that correspondence for the Court’s consideration as part of their response to defendant’s motion.

Second, although courts in this jurisdiction refer to the statute of limitations in the context of the demand-and-refusal rule as an “affirmative defense,” see, e.g., Lehman v. Lehman, 591 F. Supp. 1523, 1527 (S.D.N.Y 1984), in a cause of action for conversion against a good faith purchaser of chattels, “demand and refusal are substantive elements” of the claim, Deweerth v. Baldinger, 836 F.2d 103, 107 n.3 (2d Cir. 1987) (citing cases), rev’d on other grounds by Solomon R. Guggenheim Found. v. Lubell, 153 A.D.2d 143 (1st Dep’t 1990); accord Kunstsammlungen Zu Weimar v. Elicofon, 678 F.2d 1150, 1161

(2d Cir. 1982). Therefore, Plaintiffs were required to plead compliance with the statute of limitations in their complaint, which necessarily rendered the parties' correspondence "integral" to the complaint. This obviated any need to convert the motion to dismiss to a motion for summary judgment. Of course, when Plaintiffs affirmatively pleaded that they commenced this action within three years of the Museum's denial of Plaintiffs' demand for the Paintings, Plaintiffs attached to their complaint the lone letter that they contend supported this allegation. But Plaintiffs did not thereby restrict the Court to considering only the April 12, 2006 letter.

A court may consider matters outside the pleading for the purposes of adjudicating a motion to dismiss if those documents are "integral" to a plaintiff's claims—even if the plaintiff fails to append or allude to them to his complaint. As the Second Circuit explained in Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 44 (2d Cir. 1991), cert. denied, 503 U.S. 960 (1992), "Plaintiffs' failure to include matters of which as pleaders they had notice and which were integral to their claim—and that they apparently most wanted to avoid—may not serve as a means of forestalling the district court's decision on the motion." Otherwise, a plaintiff could "evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach the [document] to the complaint or to incorporate it by reference." I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991) (citations omitted).

Plaintiffs clearly relied on the entire course of correspondence between the parties when they framed their Complaint. By affirmatively pleading that the April 12, 2006 letter was MoMA's "refusal" of their demand, Plaintiffs necessarily represented that those earlier letters did not convey any "refusal." This made the correspondence between

the parties “integral” to Plaintiffs’ claim of conversion, specifically to the contention in their Complaint that they had complied with the statute of limitations. Plaintiffs could not evade MoMA’s statute of limitations argument by ignoring the earlier letter that was unfavorable to their point of view—including especially the July 20, 2005 letter from Lowry to Jentsch that MoMA (and eventually the Court) identified as the Museum’s *actual* refusal of Plaintiffs’ demand for purposes of the demand-and-refusal rule.³

As will be seen in connection with the Court’s discussion of Plaintiffs’ motion for leave to amend their amended complaint, the Court might have saved itself a lot of work if it had converted the motion last December. In light of the testimony of Plaintiffs’ agent, there is absolutely no way Plaintiffs could have raised a genuine issue of material fact that would have saved their claim from dismissal. (*See infra* Part III). But the Court was not required to convert the motion, and plaintiffs are not entitled to reconsideration on that basis.

III. The Motion To Amend The Complaint Is Denied Because Amendment Would Be Futile

In addition to moving for reconsideration of the prior decision, Plaintiffs have moved for leave to amend their Complaint and to supplement the record. Plaintiffs argue that amendment is required because the so-called “new evidence” discussed above—the Meeting Minutes, in addition to select excerpts from the deposition of Ralph Jentsch, which they first submitted to the Court last November—supports their claim that MoMA did not refuse Plaintiffs’ demand until April 12, 2006.

³ The July 20, 2005 letter was effectively brought to the Court’s attention in another way—and by Plaintiffs themselves—when Plaintiffs chose to call the Court’s attention to a letter dated January 18, 2006, as support for their argument that the statute of limitations should be equitably tolled. (*See* 06/25/2009 Dowd Decl. Ex. 1 (attaching the January 18 letter).) The January 18 letter refers to earlier correspondence between the parties, leading the Court inexorably back to the letter that proved fatal to Plaintiffs’ lawsuit.

MoMA responds that amendment would be futile, because none of the evidence proffered by Plaintiffs in support of the motion could possibly alter the Court's conclusion that their claims are barred as a matter of law.

MoMA is correct.

Although leave to amend is to be freely granted, courts have discretion to deny an application for leave where amendment would be futile. See Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469, 477-78 (2d Cir. 1999) (citation omitted). Here, there can be no question that amendment would be futile.

Plaintiffs' motion for leave to amend relies on the same argument that the court has already rejected in connection with their claim of "new evidence:" namely, that the April 11, 2006 Board Minutes and certain other minutes from MoMA's Executive Committee compel the conclusion that the Museum did not really reject their demand until April 12, 2006, when Lowry conveyed the results of the April 11 Board meeting to Jentsch. Both motions are predicated on the assumption that the Court would have denied defendants' motion to dismiss if only the Court had considered the evidence Plaintiffs proffered to it in November 2009. For the reasons discussed at length above, that assumption is simply wrong.

However, in order to decide the motion for reconsideration and the motion for leave to amend, I have had to become familiar with the submissions that I refused to consider last November. Among the evidence submitted to the Court at that time is certain deposition testimony of Ralph Jentsch, Plaintiffs' agent and the person who dealt with MoMA on their behalf. Jentsch's testimony dooms Plaintiffs' contention that their lawsuit was timely brought.

Both sides submitted excerpts from Jentsch's deposition to the court last November. To support their contention that MoMA did not reject Plaintiffs' demand until after the April 11, 2009 Board meeting, Plaintiffs offered the following:

Q: Now, is that true what Mr. Lowry wrote to you that any decision on a matter like this must be considered by the museum's trustees?

...

A: Yes, he said that many times to me.

Q: Okay, what did he say to you many times?

A: Well, that any decision about the restitution could not be made by him but only by the museum's trustees.

(11/25/09 Dowd Decl., Ex. B (Jentsch Tr. 295:10-296:3).)

Plaintiffs did *not* send the court the following additional excerpts from Jentsch's deposition—but MoMA did:

Q: Did any representative of MoMA ever agree to transfer any of the three works to you or to the Grosz Estate?

A: That would have – no.

Q: And did you – you said you were puzzled before the May meeting. Were you – were you puzzled after the meeting as well when Mr. Lowry kept saying, "We have a different opinion?"

A: I got suspicious.

Q: *When did you – when did you first reach the conclusion that MoMA was not returning these works of art to you?*

...

A: *After that letter of Glenn Lowry, which I think was July 20th, August.*

Q: *July 20th of 2005?*

A: *Yes.*

(Letter from L. Solomon to the Court, Nov. 24, 2009 (“11/24/2009 Solomon Decl.”), Ex.

A (Jentsch Tr. 132:8-133:2) (emphasis added).)

In a second excerpt, Jentsch testified as follows:

Q: What was your understanding of MoMA’s position when you got this letter [the July 20, 2005 letter from Glenn Lowry]?

A: My understanding was that MoMA never had the intention to return or accept our claim and that I was dragged along all of the time, that the time frame was extended twice; that, in spite of all the polite exchange, exchanging words, there was no serious intention to return any of the works, nor acknowledge any of the findings of the documentation which I provided being taken seriously.

Q: Did you communicate that to Mr. Lowry?

A: Yes.

Q: When did you do that?

A: In my letter of August 11th.

(Id. at Ex. B (Jentsch Tr. 143:11-144:7).)

MoMA argues that the portions of Jentsch’s testimony it submitted render any attempt at amendment futile. I agree. Jentsch’s own words confirm his understanding that the museum had rejected Plaintiffs’ demand for the return of the Paintings well before April 2006. Although Jentsch stated that he believed that MoMA’s Trustees would have to make any decision to “restitute” the Paintings, he clearly explained that it was his understanding that the demand had been refused in July 2005, *the very date found by the Court to be the date MoMA unmistakably communicated its refusal to Plaintiffs*. Jentsch’s testimony thus underscores the correctness of the Court’s original conclusion—as well as its subsidiary finding that Jentsch’s January 5, 2006 letter to Lowry

acknowledged the museum's rejection of Plaintiffs' demand. Grosz v. Museum of Modern Art, No. 09 Civ. 3706, 2010 WL 88003, at 14-15 (S.D.N.Y. Jan. 6, 2010).

Plaintiffs' argument is, and has always been, that the limitations clock "reset" and began to run all over again when MoMA's Board decided to re-examine the Museum's decision and retained Katzenbach. That, of course, is not the way statutes of limitations work. Once a cause of action accrues, the limitations period begins to run, and it continues to run—regardless of intervening events—unless something tolls it. *Plaintiff affirmatively pleaded that the museum refused to toll the statute of limitations* (Compl. ¶ 23), so once the limitations period started to run it kept on running.

Furthermore, even if the Board's decision to revisit the matter somehow equitably tolled the statute as of January 18—which was Plaintiffs' argument in opposition to the original motion—Plaintiffs still waited too long to bring suit. See Grosz, 2010 WL 88003, at 15. Nothing in the proposed amended Complaint cures that defect.

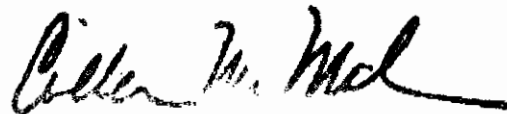
For these reasons, the motion for leave to amend is denied as futile.

CONCLUSION

Plaintiffs' motion for reconsideration (docket no. 66) is denied. Plaintiffs' motion for leave to amend (docket no. 61) is denied. The Clerk of the Court is instructed to remove these motions from the Court's outstanding motion list and to close the case.

This constitutes the decision and order of this Court.

Dated: March 3, 2010



U.S.D.J.

BY ECF TO ALL COUNSEL