10-257-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARTIN GROSZ, LILIAN GROSZ,

Plaintiffs-Appellants,

—against—

THE MUSEUM OF MODERN ART, Herrmann-Neisse with Cognac, Painting by Grosz, Self-Portrait with Model, Painting by Grosz, Republican Automatons, Painting by Grosz,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND/OR REHEARING *EN BANC*

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Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants (the "Grosz Heirs") petition for rehearing and hearing *en banc* and request an order vacating the December 16, 2010 decision of this Court (Cabranes, Parker and Korman (sitting by designation), JJ.), *Grosz v. Museum of Modern Art, et al.*, 2010 U.S. App. LEXIS 25659 (2d Cir. N.Y.) ("Decision") (Slip op. attached) ("Op."), affirming a decision of the Hon. Colleen McMahon (II, A-290) dismissing this action on a motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I.
RULE 35 STATEMENT OF REASONS
FOR PANEL REHEARING AND HEARING *EN BANC*

Pursuant to Fed.R.App.P. 35, the Grosz Heirs are entitled to a rehearing or a hearing *en banc* because the Panel decision is in conflict with decisions of the United States Supreme Court and this Court and involves a question of exceptional importance, to wit:

1. The Panel violated the *Erie* Doctrine by failing to follow New York state law requiring an unequivocally authorized refusal before the limitations periods for replevin and conversion are triggered. *McCarthy v. Olin Corp.*, 119 F.3d 148, 153 (2d Cir. 1997) (federal court sitting in a diversity case must apply the substantive law of the forum state on outcome determinative issues); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938);

Guggenheim v. Lubell, 77 N.Y.2d 311, 569 N.E.2d 426 (1991)(articulating New York's "demand and refusal" rule); *Ball v. Liney*, 48 N.Y. 6, 12 (1871) (only an unqualified refusal to return Plaintiffs' property would constitute a conversion).

2. The Panel affirmed a decision that improperly decided disputed issues of fact on a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) (*Chambers v. Time Warner, Inc.* 282 F.3d 147, 152 (2d Cir.2002)) and improperly relied on materials extrinsic to the complaint (*Chambers*, 282 F.3d at 152).

3. In dismissing equitable estoppel claims, the Panel ignored material misrepresentations made by a Museum to the heirs of victims of Nazi persecution to bar return of stolen artwork to the rightful owners. *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010); *Zumpano v. Quinn*, 6 N.Y.3d 666 (2006)(deceptive defendant estopped to plead statute of limitations).

II.
PRELIMINARY STATEMENT

This action seeking the return of stolen art was dismissed as untimely based on New York's three-year statute of limitations which is triggered by the "demand and refusal" rule. The Panel affirmed dismissal pursuant to Fed.R.Civ.P. 12(b)(6) notwithstanding the plain allegations of the Complaint that Defendant-Respondent Museum of Modern Art ("MoMA") refused on April 12, 2006 the Grosz Heirs' demand for the return of stolen artworks. Instead of the refusal date alleged in the Complaint, the Panel and District Court erroneously looked to disputed materials

outside the Complaint to find an earlier refusal date. The District Court and the Panel also overlooked evidence of MoMA's dishonesty warranting the application of equitable estoppel to estop MoMA from pleading the statute of limitations. Specifically, the Panel ignored MoMA's numerous representations to the Grosz Heirs that (1) the refusal occurred April 12, 2006 and (2) that no communication prior to April 12, 2006 was a "refusal" authorized by MoMA's Board of Trustees. Under New York law, MoMA's misrepresentations equitably estop MoMA from alleging an earlier refusal date. In short, the Panel turned New York's "demand and refusal" doctrine on its head, permitting misleading behavior by a possessor of stolen property to cause a forfeiture of the true owners' rights.

Given the exceptional damage this decision does to federal policy promoting settlement discussions, to New York's case law, to the Federal Rules of Civil Procedure and to the U.S. treaty obligations and efforts to persuade other countries to return stolen artworks — a rehearing and a careful consideration is warranted to prevent the District Court and the Panel's decisions from thwarting New York's law and public policy against encouraging New York as a haven for stolen art.

III.
STATEMENT OF THE CASE

This is the first stolen art case in New York history dismissed pursuant to Rule 12(b)(6) based on a finding that an action for replevin to a work of art lost due to Nazi persecution accrued not on the date alleged by Plaintiffs in the

Complaint — and supported by evidence attached to the Complaint — but upon the District Court making a factually disputed finding that accrual occurred based on extrinsic settlement communications.

This action is for replevin of three paintings ("Paintings") currently located at the Museum of Modern Art ("MoMA") in New York and claimed by Plaintiffs, the heirs of George Grosz ("Grosz"). Grosz was a world-renowned German artist who, fearing for his life, fled Nazi persecution in 1933 (Joint Appendix Vol. I "I", A-32). Grosz left his artworks in the care of his Jewish art dealer, Alfred Flechtheim, who also fled Nazi Germany shortly thereafter (I, A-47). The three paintings were lost during this flight due to Nazi persecution (I, A-49). Grosz and his family made claims for the works against Germany after World War II (I, A-43; 413; Joint Appendix Vol. II "II", A-30).

In 2003, art historian Ralph Jentsch discovered documents showing for the first time how the Paintings were stolen from Grosz and Flechtheim (I, A-44). Jentsch promptly wrote to MoMA demanding the Paintings' return (I, A-44; 183-184). Following the demand, the Grosz Heirs and MoMA agreed that MoMA would hold the Paintings and work with Jentsch to investigate the Paintings' title (II, A-469). MoMA assured Jentsch repeatedly that it would not refuse the demand until its Board of Trustees had made a decision (I, A-323; II: A-537-538). On April

11, 2006, MoMA's Board of Trustees voted to refuse to return the Paintings. On April 12, 2006, MoMA sent a notice of the refusal to the Grosz Heirs. (I, A-186).

On June 26, 2008, MoMA's Associate General Counsel Henry Lanman wrote to Plaintiffs' counsel David Rowland asserting that MoMA had refused Plaintiffs' demand on April 12, 2006 (I, A-540). On April 10, 2009, within three years of MoMA's refusal, the Grosz Heirs timely filed this action within New York's three-year statute of limitations for replevin of stolen property.

MoMA moved to dismiss the action as time-barred pursuant to Rule 12(b)(6). In support of its motion, MoMA improperly attached settlement communications. The Grosz Heirs objected to consideration of any material outside the Complaint on a Rule 12(b)(6) motion [Docket No. 23 at 3]. Relying on these extraneous and inadmissible materials, the District Court found that one of the settlement letters (I, A-187), read in conjunction with the fact that MoMA still held the Paintings, could imply a "refusal" of the Grosz Heirs claims. Stating that "actions, as we all know, sometimes speak louder than words," (II, A-307) the District Court dismissed Plaintiffs' complaint, holding that MoMA had refused the return of the Paintings prior to April 12, 2006 and that MoMA's retention of the Paintings for a year and a half was a refusal as a matter of law (II, A-308).

On appeal to this Court, the main issues were whether the District Court erred by misconstruing the "refusal" requirement of New York's "demand and

refusal" rule by resolving disputed issues of fact and by failing to convert the motion to dismiss to a summary judgment motion pursuant to Fed.R.Civ.P. 12(d) and 56. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152.

The Panel overlooked controlling law presented by Plaintiffs and instead affirmed the District Court's decision holding that "the record indicates that refusal took place, at the latest, in a letter from the Director of MoMA to the Grosz Heirs' agent on July 20, 2005," (Op. at 3) and that the record showed no basis for equitable estoppel was established by Plaintiffs. (Op. at 3).

IV.
ARGUMENTS AND AUTHORITIES

A. The Decision Conflicts With Decisions Of The United States Supreme Court And This Court And Involves An Issue Of Exceptional Importance Because The Panel Failed To Follow New York Law Which Requires An Unequivocal Refusal Before The Limitations Periods For Replevin And Conversion Are Triggered.

The District Court and Panel overlooked New York law and imposed new standards in place of New York's demand and refusal rule. This case is of exceptional importance because the New York Court of Appeals has expressly rejected the burden-shifting due diligence approach now espoused by the District Court and Panel. In *DeWeerth v. Baldinger*, this Court grafted a requirement of reasonable diligence onto New York's "demand and refusal" rule on the owners of stolen art (*DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir. 1987) *cert. denied* 486 U.S. 1056 (1998). The New York Court of Appeals rejected *DeWeerth* and this

due diligence requirement in what is now black-letter law in New York. *Guggenheim v. Lubell* (77 N.Y.2d 311, 317-318, 569 N.E.2d 426 (1991). Specifically, the New York Court of Appeals held that "the demand and refusal rule is not the only possible method of measuring the accrual of replevin claims, it does appear to be the rule that affords the most protection to the true owners of stolen property," and that "there is no reason to obscure the rule's straightforward protection of true owners by creating a duty of reasonable diligence to recover the stolen property for purposes of the Statute of Limitations." *Guggenheim,* 77 N.Y.2d at 318-319. The Panel repeated the *DeWeerth* court's legal error by endorsing the trial court's reasoning that holding an artwork for a year and a half is a refusal as a matter of law and overlooked the New York Court of Appeal's clear instructions in *Guggenheim* by construing a "refusal" which, at its core, is a restatement of the due diligence standard expressly rejected by the *Guggenheim* court since it requires the true owner to diligently guess at what behavior might constitute a "refusal" rather than measuring a "refusal" from receipt of an unequivocal refusal.

In parsing through ambiguous and hotly disputed settlement negotiations that the District Court conceded were "temporizing," the Panel: (i) overlooked that under the New York demand and refusal rule, an action for replevin only accrues when the possessor unequivocally and unqualifiedly refuses the return of the stolen

property; and (ii) overlooked the legal principle established by New York case law that there is no conversion unless the refusal is authorized by the possessor. Accordingly, because the Panel has inserted a new due diligence standard contrary to New York law, it has acted contrary to the *Erie* Doctrine that constrains the federal courts to apply state law while sitting in diversity and, therefore, is of exceptional importance requiring rehearing.

1. The Panel Overlooked That Under New York's Demand And Refusal Rule, An Action For Replevin Or Conversion Accrues Only When The Possessor Unequivocally Refuses The Return Of The Stolen Property.

The Panel affirmed the District Court's finding that MoMA's refusal occurred at the latest when MoMA's Executive Director sent a letter to Plaintiffs on July 20, 2005. In doing so, the Panel overruled case law holding that a refusal must be unqualified and unequivocal in order to constitute a refusal under the New York demand and refusal rule. *Ball v. Liney*, 48 N.Y. 6, 12 (1871) (only an unqualified refusal to return Plaintiffs' property would constitute a conversion); *McEntee v. New Jersey Steamboat Co.*, 45 N.Y. 34 (1871) (refusal to deliver goods to a person entitled to receive them constitutes a conversion unless the refusal is qualified).

The July 20, 2005 letter did not refuse Plaintiffs' demand but instead stated that investigations were still ongoing, that MoMA did not think the return was appropriate at "*that time*" (emphasis supplied), and that MoMA requested further meetings to determine "*an appropriate course of action*." (I, A-188)(emphasis

supplied). Thus, the Panel blurs the lines of the demand and refusal rule, which, hitherto, gave the owner of lost or stolen property a "clear and predictable" (*Guggenheim*, 77 N.Y.2d at 315) deadline to pursue ownership rights against the good faith purchaser . This result is contrary to New York law which requires an *absolute* refusal. *McEntee,* 45 N.Y. 34.

By overlooking New York's requirement of an unequivocal refusal, the Panel has adopted a new federal rule penalizing an owner who engages in good faith settlement negotiations and a provenance investigation instead of suing first and asking questions later, undermining New York's public policy goal of preventing unnecessary litigation and encouraging the amicable resolution of disputes.

2. The Panel Overlooked The Legal Principle Established By New York Law That There Is No Conversion Unless The Refusal Is Authorized By The Possessor.

The District Court decided that MoMA refused Plaintiffs' demand on July 20, 2005 by a letter written by MoMA's Executive Director Glenn Lowry to Plaintiffs' representative Ralph Jentsch (II, A-308). As Plaintiffs alleged (including in Jentsch's deposition testimony) and as Lowry represented to Plaintiffs repeatedly, Lowry was not authorized to refuse Plaintiffs' demand to return the Paintings and only MoMA's Board of Trustees could make such a final decision (I, A-323; II: A-537-538). Since Lowry was a mere "servant" not entitled

to possession, a refusal by Lowry alone without a decision of the corporation's Board of Trustees cannot constitute a conversion.

On January 18, 2006, Lowry wrote to Ralph Jentsch: "As I have told you many times, including at our meeting in early January, any decision on a matter like this [concerning the restitution of the Paintings] *must be considered by the Museum's Trustees."* (emphasis supplied) (I, A-323). The record shows that Lowry represented to Jentsch that he was powerless to refuse Plaintiffs' claims without MoMA's board having first decided to refuse the demand. Finally, on April 12, 2006, Glenn Lowry wrote to Jentsch: "The Museum's Board of Trustees unanimously decided to accept Mr. Katzenbach's report and to abide by its findings. Accordingly, *the Museum of Modern Art rejects your demand for Portrait of the Poet Max Hermann-Neisse and Self-Portrait with Model.*" (II, A-186)(emphasis supplied).

Prior to April 12, 2006, no representative of MoMA told Jentsch or any of the Plaintiffs that the museum's trustees had decided to reject Plaintiffs' claims. By a letter dated June 26, 2008, Defendant's Associate General Counsel Henry Lanman *reiterated* the April 12, 2006 rejection: "At the conclusion of his investigation, Mr. Katzenbach recommended to the Museum's Board of Trustees that it reject your clients' claims, *a decision that was communicated to your clients on April 12, 2006*." (II: A-540)(emphasis supplied).

Thus, it is clearly established that prior to April 12, 2006, MoMA at no time rejected Plaintiffs' claims because the museum's trustees — whose authorization was required according to Defendant's representations— had not decided to refuse Plaintiffs' demand.

B. The Decision Conflicts With Decisions Of The United States Supreme Court And This Court Because The Panel Affirmed A Decision That Decided Disputed Issues Of Fact On A Motion To Dismiss.

A court is required to accept all allegations in the complaint as true. *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) citing *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). It is sufficient that the actual allegations raise the right to relief above the speculative level. *Arista Records, LLC v. Doe 3*, 604 F.3d 110 (2d Cir. 2010).

1. The Panel Acknowledged That The Refusal Date Was Disputed But Overlooked This Circuit's Case Law Prohibiting Resolution Of Disputed Factual Issues On A Motion To Dismiss.

The District Court and the Panel did not accept as true Plaintiffs' allegations of an April 12, 2006 refusal but, instead, went on an impermissible fact-finding mission and construed another date of refusal. The Panel held that "all parties agree that refusal by MoMA has taken place, *they only disagree on when*" (Op. at 3). The Panel overlooked that when an issue of fact is disputed, the court cannot grant the motion because a motion to dismiss may only be granted when it appears *beyond doubt* that Plaintiff cannot prove any set of facts entitling him to relief. *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co., Inc.*, 32 F.3d 697, 699-700 (2d

Cir. 1994). Here, Plaintiffs asserted a specific date of refusal supported by a MoMA letter dated April 12, 2006 stating that "*the museum rejects your demand*" (I, A-186). Therefore, the Panel overlooked this Circuit's precedents by permitting the District Court to determine a disputed issue of fact rather than assuming the April 12, 2006 date to be the true refusal date.

2. The Panel Overlooked Rule 12(d) And This Circuit's Case Law By Considering Disputed Extrinsic Materials On A Motion To Dismiss.

This Circuit limits consideration of the affirmative defense of statutes of limitations on a Rule 12(b)(6) motion to dismiss for failure to state a claim to cases where the dates alleged in the complaint show that the action is barred by the statute of limitations. *Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 162 (2d Cir. 1989). To prevail on a Rule 12(b)(6) limitations defense, the defendant must prove that plaintiff can prove no set of facts warranting relief. *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004). Further, the Panel's resolution of disputed facts and consideration of extrinsic materials is in direct violation of Fed.R.Civ.P. 12(d), which requires converting to a motion for summary judgment under Fed.R.Civ.P. 56. *Chambers v. Time Warner*, 282 F.3d 147, 152 (2d Cir.2002).

Since the Complaint alleged dates showing the action to be timely, the District Court and Panel overlooked controlling law of this Circuit by considering extrinsic materials.

C. The Decision Conflicts With Decisions Of The United States Supreme Court And This Court And Involves An Issue Of Exceptional Importance Because In Dismissing Equitable Estoppel Claims The Panel Ignored Material Misrepresentations And Promises Made By A Museum To The Heirs Of Victims Of Nazi Persecution In Order To Bar Return Of Nazi Looted Art.

The Panel's legal errors were compounded by the refusal to permit amendment of the Complaint to allege equitable estoppel based on MoMA's repeated representations that no refusal occurred prior to April 12, 2006 (I, A-323; Vol. I, A-191; Vol. II, A-540).

Under New York law, equitable estoppel is warranted where the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action. *Zumpano v. Quinn*, 6 N.Y.3d 666, 673-74 (2006). Contrary to the Panel's findings, Plaintiffs showed that (1) MoMA misrepresented some important facts; (2) that Plaintiffs relied upon the misrepresentation; (3) that this reliance caused them to delay filing of the lawsuit within the applicable limitations period; and (4) that they thereafter commenced the action within a reasonable time after the facts giving rise to the estoppel have ceased to be operational, such that:

(1) MoMA's Executive Director represented repeatedly that he had no authority to refuse claims before MoMA's board decided (I, A-323; II: A-537-538). MoMA's in-house counsel advised Plaintiffs' counsel that the claims were rejected on April 12, 2006 (II, A-540). Thus, MoMA's later assertion in its motion to dismiss that a refusal occurred on July 20, 2005 is an outright falsification. Only

after this action was filed did MoMA fabricate the earlier "refusal" date to deprive the Grosz Heirs of their date in court.

(2) Plaintiffs clearly relied on Lowry's and the in-house counsel's false and misleading statements to their detriment in filing their complaint (I, A-323, II: A-537-538). Plaintiffs' reliance on MoMA's misrepresentation is shown by the fact that Plaintiffs filed suit on April 10, 1009, two days prior to the April 12, 2009 expiring of the statute of limitations.

(3) Plaintiffs were made to believe that MoMA was still investigating the matter until its refusal on April 12, 2006. Had MoMA not represented the refusal date to be April 12, 2006, Plaintiffs would not have relied upon the fact that they had until April 12, 2009 to investigate, attempt to settle and to commence legal action against MoMA and would have sued prior to July 20, 2008. Plaintiffs' reasonable reliance on these misrepresentations caused the delay.

(4) Plaintiffs commenced this action on April 10, 2009 within three years of MoMA's April 12, 2006 rejection letter. Thus, Plaintiffs commenced their legal action prior to the time the facts giving rise to the estoppel ceased to be operational. MoMA should therefore be equitably estopped from asserting an earlier date of refusal.

V.

CONCLUSION

For the foregoing reasons, the Petition for Rehearing and Hearing *En Banc* should be granted and the Decision of the Panel dated December 16, 2010 should be vacated.

Dated: New York, New York
December 29, 2010

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By: /s/ Raymond J. Dowd

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10-257-cv
Grosz v. Museum of Modern Art, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of December, two thousand and ten.

PRESENT:

JOSÉ A. CABRANES,
BARRINGTON D. PARKER,
Circuit Judges,
EDWARD R. KORMAN,*
District Judge.

----------x No. 10-257

MARTIN GROSZ AND LILIAN GROSZ,

Plaintiffs-Appellants,

v.

THE MUSEUM OF MODERN ART, HERMANN-NEISSE WITH COGNAC, PAINTING BY GROSZ, SELF-PORTRAIT WITH MODEL, PAINTING BY GROSZ, REPUBLICAN AUTOMATONS, PAINTING BY GROSZ,

Defendants-Appellees,

AMERICAN JEWISH CONGRESS, COMMISSION FOR ART RECOVERY, FILIPPA MARULLO ANZALONE, YEHUDA BAUER, MICHAEL J. BAZYLER, BERNARD DOV BELIAK, MICHAEL BERENBAUM, DONALD

* The Honorable Edward R. Korman, of the United States District Court for the Eastern District of New York, sitting by designation.

S. BURRIS, JUDY CHICAGO AND DONALD WOODMAN, TALBERT D'ALEMBERTE, MARION F. DESMUKH, HEDY EPSTEIN, HECTOR FELICIANO, IRVING GREENBERG, GRACE COHEN GROSSMAN, MARCIA SACHS LITTEL, HUBERT G. LOCKE, CARRIE MENKEL-MEADOW, ARTHUR R. MILLER, CAROL RITTNER, JOHN K. ROTH, LUCILLE A. ROUSSIN, WILLIAM L. SHULMAN, STEPHEN D. SMITH, FRITZ WEINSCHENK,

Amici Curiae.

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FOR DEFENDANTS-APPELLEES: CHARLES S. SIMS (Margaret A. Dale, Jennifer L. Jones, *on the brief*), Proskauer Rose LLP, New York, NY.

FOR AMICI CURIAE: Edward McGlynn Gaffney, Jr., Valparaiso University School of Law, Valparaiso, IN; Jennifer Kreder, Law Office of Jennifer Kreder, Florence, KY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Colleen McMahon, *Judge*).

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED**.

Plaintiffs Martin and Lilian Grosz ("plaintiffs" or "Grosz heirs") are the legal heirs to the estate of the late painter George Grosz ("Grosz"). Three of Grosz's works of art, *Hermann-Neisse with Cognac*, *Self-Portrait with Model*, and *Republican Automatons* are currently in the possession of the Museum of Modern Art in New York ("MoMA"). Plaintiffs filed suit against MoMA on April 10, 2009 in the Southern District of New York, alleging claims for, among other things, conversion, replevin, declaratory judgment, and constructive trust with respect to the works of art. On June 4, 2009, defendants moved under Federal Rule of Civil Procedure 12(b)(6) to dismiss the Complaint as time-barred. In its Decision and Order Granting Defendant's Motion to Dismiss the Complaint, *Grosz v. Museum of Modern Art, et al.*, No. 09-CIV-3706, 2010 WL 88003 (S.D.N.Y. Jan. 6, 2010), the District Court granted MoMA's motion. The District Court dismissed the case as barred by the three-year statute of limitations for conversion and replevin under New York law, N.Y. C.P.L.R. § 214(3). Plaintiffs appeal the judgment of the District Court, claiming that the three-year statute of limitations had not passed at the point at which suit was brought or, in the alternative, that the statute of limitations in this case should have been subject to equitable tolling. We assume the parties' familiarity with the facts and procedural history of this action.

I.

We review the dismissal of a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) *de novo*, construing the complaint liberally and accepting all factual allegations in the complaint as true. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002).

Under New York State Law, "[a]n innocent purchaser of stolen goods becomes a wrongdoer only after refusing the owner's demand for their return." *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1161 (2d Cir. 1982). This "demand-and-refusal" rule dates back to 1966, when the New York Supreme Court became the first court in the country to address the statute of limitations issue for innocent purchasers of chattel in art dealings. *See Menzel v. List*, 49 Misc. 2d 300 (N.Y. Sup. Ct. 1966). In *Menzel*, a case involving a good faith purchase of a painting by Marc Chagall, the court held that a cause of action for conversion or replevin accrues "against a person who lawfully comes by a chattel . . . not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand." *Id.* at 304.

The Grosz heirs do not affirmatively assert that MoMA was a bad faith purchaser. Accordingly, a judgment declaring the plaintiffs' claims as time-barred rests on whether suit was brought within three years of refusal by MoMA. All parties agree that refusal by MoMA has taken place, they only disagree on when. As the District Court explained in its thoughtful and comprehensive opinion, the record indicates that refusal took place, at the latest, in a letter from the Director of MoMA to the Grosz heirs' agent on July 20, 2005, and that the agent of the Grosz heirs' confirmed his understanding that refusal had taken place in at least two subsequent letters to MoMA. Because plaintiffs did not file suit until April 10, 2010, more than three years after refusal took place, the District Court correctly dismissed the action as falling outside the statute of limitations.

II.

Plaintiffs claim, in the alternative, that MoMA should be equitably estopped from using the statute of limitations as a defense because plaintiffs relied upon continuing negotiations with MoMA in choosing not to file suit. Under New York law, "[t]he doctrine of equitable estoppel applies where it would be unjust to allow a defendant to assert a statute of limitations defense"—specifically, "where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action," *Zumpano v. Quinn*, 6 N.Y.3d 666, 673-74 (N.Y. 2006) (internal quotation marks and citation omitted). "[T]he plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations." *Id.*

The mere existence of settlement negotiations is insufficient to justify an estoppel claim. *See Cranesville Block Co., Inc. v. Niagara Mohawk Power Corp*, 572 N.Y.S.2d 495, 296-97 (N.Y. App. Div. 3d Dep't 1991). Indeed, where "there was never any settlement agreement[;] continued difficulties in trying to settle the matter[;] no fraud or misrepresentation by defendants[; and] no agreement or promise by defendants upon which plaintiffs relied in failing to commence their lawsuit within the requirement period," equitable estoppel does not apply. *Marvel v. Capital Dist. Transp. Auth.*, 494 N.Y.S.2d 215 (N.Y. App. Div. 3d Dep't 1985).

The record indicates no fraud or misrepresentation on the part of MoMA, nor does it indicate evidence of reasonable reliance by plaintiffs on any alleged misrepresentations by MoMA. We therefore hold that the District Court correctly denied plaintiff's equitable tolling claim.

CONCLUSION

We have considered all of plaintiffs' claims on appeal and find them to be without merit. Accordingly, the judgment of the District Court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court