

**ANDREW ORKIN, Plaintiff, -against- THE SWISS CONFEDERATION, et al.,  
Defendants.**

**09 Civ. 10013 (LAK)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK**

**2011 U.S. Dist. LEXIS 4357**

**January 13, 2011, Decided  
January 13, 2011, Filed**

**COUNSEL:** [\*1] For Andrew Orkin, Plaintiff: Richard Allen Altman, LEAD ATTORNEY, Richard A. Altman, New York, NY.

For The Swiss Confederation, Defendant: Laurie E. Foster, LEAD ATTORNEY, Morgan, Lewis and Bockius LLP (NY), New York, NY; Mark N. Bravin, PRO HAC VICE, Morgan, Lewis & Bockius LLP, Washington, DC.

For Museum Oskar Reinhart AM Stadtgarten, Defendant: Laurie E. Foster, Morgan, Lewis and Bockius LLP (NY), New York, NY; Mark N. Bravin, Lewis & Bockius LLP, Washington, DC.

**JUDGES:** Lewis A. Kaplan, United States District Judge.

**OPINION BY:** Lewis A. Kaplan

**OPINION**

**MEMORANDUM AND ORDER**

LEWIS A. KAPLAN, *District Judge*.

Plaintiff Andrew Orkin, a Canadian citizen, sues to recover possession of a Vincent van Gogh drawing that his great-grandmother sold to a Swiss art collector in 1933, allegedly under duress and at an artificially low price, in order to finance her family's escape from Nazi Germany. Defendants are the Swiss Confederation, the Stiftung Oskar Reinhart (the "Foundation," erroneously sued here as the Museum Oskar Reinhart Am Stadtgarten (the "Museum")), <sup>1</sup> and Sammlung Oskar Reinhart "Am Römerholz." Plaintiff alleges that defendants are in possession of the drawing, having acquired it from the collector. The matter is [\*2] before the Court on the Foundation's motion to dismiss the claims against it for lack of subject matter jurisdiction pursuant to FED. R. Civ. P. 12(b)(1). <sup>2</sup>

<sup>1</sup> The Foundation contends that the Museum, which it owns and operates, is simply a collection

of artwork and not a legal entity capable of being sued. The Foundation nevertheless argues that dismissal would be necessary even if plaintiff were to amend the amended complaint to sue the Foundation in the Museum's place. For the sake of simplicity, the Court treats the amended complaint as if the claims nominally asserted against the Museum were asserted against the Foundation and henceforth refers only to the Foundation unless otherwise indicated.

<sup>2</sup> The Foundation moves also to dismiss the claims against it on several other grounds including lack of personal jurisdiction, untimeliness and failure to state a claim upon which relief can be granted. The Court does not address those arguments here.

*Discussion*

*1. Subject Matter Jurisdiction*

The claims against the Foundation must be dismissed for lack of subject matter jurisdiction if the Court "lacks the statutory or constitutional power to adjudicate" them. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) [\*3] (citing FED. R. CIV. P. 12(b)(1)). Plaintiff bears the burden of establishing that the Court has subject matter jurisdiction. *See Makarova*, 201 F.3d at 113. He asserts that the Foundation is an agency or instrumentality of a foreign state within the meaning of the Foreign Sovereign Immunities Act of 1976 (the "FSIA"). Am. Cpt. [DI 7] ("Am. Cpt.") ¶ 11. He purports to premise subject matter jurisdiction over his claims against it on the FSIA and the Alien Tort Statute ("ATS"). <sup>3</sup>

<sup>3</sup> Plaintiff asserts also that the Court has supplemental jurisdiction over his various state law claims against the Foundation under 28 U.S.C. § 1367. The Court need not now reach this issue, as it first must satisfy itself that it has jurisdiction under the FSIA or some other federal statute.

### A. Foreign Sovereign Immunities Act

The Court begins by assuming *arguendo* that the Foundation, as plaintiff claims, is an agency or instrumentality of the Swiss Confederation. On that assumption, the only source of subject matter jurisdiction over the claims against the Foundation is the FSIA, "which codifies several exceptions to the long-established doctrine of foreign sovereign immunity." *Garb v. Republic of Poland*, 440 F.3d 579, 581 (2d Cir. 2006). [\*4] Plaintiff contends that there is subject matter jurisdiction over his claims because they come within the "takings" exception to foreign sovereign immunity articulated in 28 U.S.C. § 1605(a)(3).

"To establish subject matter jurisdiction pursuant to the 'takings' exception of the FSIA, a plaintiff must demonstrate each of four elements:

"(1) that rights in property are at issue;

"(2) that the property was 'taken';

"(3) that the taking was in violation of international law; and *either*

"(4)(a) 'that property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state,' or

"(4)(b) 'that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]'" *Garb v. Republic of Poland*, 440 F.3d at 588 (quoting 28 U.S.C. § 1605(a)(3)).

Plaintiff's theory of the Foundation's liability appears to be that the Swiss collector unlawfully "took" the Van Gogh drawing from plaintiff's great-grandmother and that the Foundation, years later, acquired the drawing from the collector by donation or bequest. *See* Am. Cpt. ¶¶ 55-73.

Plaintiff's [\*5] predecessor parted with the drawing at some point though the questions whether it was "taken" from her -- let alone "in violation of international law" -- even by the immediate transferee are considerably more troublesome. But there appears to be no need to consider those issues. For even if the claims against the Foundation satisfied those requirements, jurisdiction still would be lacking unless either (1) the

drawing is in the United States in connection with commercial activity carried on in the United States by the Swiss Confederation or its agency or instrumentality, or (2) the drawing is owned by an agency or instrumentality of the Swiss Confederation and that agency or instrumentality is engaged in commercial activity in the United States. 28 U.S.C. § 1605(a)(3). As plaintiff alleges that the drawing is in Switzerland, *see* Am. Cpt. ¶ 3, the first of these requirements is not satisfied. Hence, his jurisdictional contention, even on the assumptions previously articulated, would depend upon whether the drawing is owned by an agency or instrumentality of the Swiss Confederation that is engaged in commercial activity in the United States.

The Foundation contends that it does not possess [\*6] or own, and never possessed or owned, the drawing. The evidence, indeed, indicates that the Foundation has no connection to the drawing at all save that the Foundation was established by the same man (the Swiss collector) who, years later, separately bequeathed the drawing to the Swiss Confederation. *See* Wohlwend Decl. [DI 15-1] ("Wohlwend Decl.") ¶ 13; Staub Decl. [DI 15-2] ¶¶ 3-6, 13. Accordingly, even if the Foundation were an agency or instrumentality of the Swiss Confederation and even if it had engaged in commercial activity in the United States -- and the evidence submitted by it is plainly to the contrary, Wohlwend Decl. ¶¶ 3-12 -- Section 1605(a)(3) would not be satisfied because it does not own the drawing.<sup>4</sup>

4 The statutory language, read absolutely literally, might permit the conclusion that jurisdiction would lie over a claim against the Foundation despite its lack of ownership of the drawing, its entirely private status and its lack of commercial activity in the United States as long as the amended complaint alleged that *some* agency or instrumentality of the Swiss Confederation owned the drawing and otherwise satisfied Section 1605(a)(3). Such a reading, however, would be [\*7] contrary to common sense. Moreover, the Second Circuit has said that the "takings" exception of Section 1605(a)(3) "permits a plaintiff to bring suit against an 'agency or instrumentality of [a] foreign state,' provided that the agency or instrumentality 'own[s] or operate[s]' the property in question and 'is engaged in a commercial activity in the United States.'" *Garb*, 440 F.3d at 589 (emphasis added) (quoting 28 U.S.C. § 1605(a)(3)).

There remains for consideration only a procedural nicety. "[W]hen, as here, subject matter jurisdiction is challenged under Rule 12(b)(1), evidentiary matter may be presented by affidavit or otherwise." *Kamen v. AT&T Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986); *see also Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 170 (2d

Cir. 2008), *aff'd*, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010). Where the movant submits such evidence, the motion, though technically not converted into a FED. R. CIV. P. 56 motion for summary judgment, is treated as one in all respects material here. *See Kamen*, 791 F.2d at 1011. Accordingly, it is the obligation of the non-moving party to come forward with admissible evidence showing a genuine issue of material fact as to the existence of subject matter [\*8] jurisdiction, or to submit an affidavit under Rule 56(d) <sup>5</sup> showing "(1) what facts are sought . . . and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts." *Gurary v. Winehouse*, 190 F.3d 37, 43 (2d Cir. 1999) (quoting *Meloff v. N.Y. Life Ins. Co.*, 51 F.3d 372, 375 (2d Cir. 1995)).

##### 5 Formerly Rule 56(f).

The Foundation made this motion and submitted its supporting evidence months ago. In light of plaintiff's complete failure to respond to the Foundation's evidence with evidence of his own or an appropriate Rule 56(d) affidavit, dismissal for lack of subject matter jurisdiction is appropriate. Given that this is a Rule 12(b)(1) motion, however, it is conceivable that plaintiff was not fully aware of these obligations. The Court therefore will allow plaintiff to submit whatever evidence or affidavit he deems appropriate, and the Foundation to respond, in accordance with the schedule provided below.

##### B. Alien Tort Statute

The ATS, as plaintiff acknowledges, provides "a basis for federal jurisdiction against private non-governmental [\*9] actors." Pl. Mem. [DI 20] at 20; *see also Swarna v. Al-Awadi*, 622 F.3d 123, 144 n.11 (2d Cir. 2010). Hence, if plaintiff is correct that the FSIA provides subject matter jurisdiction over his claims against the Foundation -- a theory that requires, *inter alia*, that the Foundation be an agency or instrumentality

of the Swiss Confederation -- then the ATS is immaterial. Accordingly, the Court considers the ATS only against the possibility that plaintiff fails to establish that the Foundation is an agency or instrumentality of the Swiss Confederation.

The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a *tort only*, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (emphasis added). As plaintiff has alleged no cognizable tort against the Foundation, the ATS is inapposite. Accordingly, plaintiff's only possibly viable basis for subject matter jurisdiction over his claims against the Foundation is the FSIA.

##### Conclusion

The depredations and atrocities of the Nazi regime, which included the misappropriation of artifacts of great cultural and personal worth, cannot be overstated. But it appears [\*10] to this Court, both from the amended complaint and the Foundation's evidence, that plaintiff's decision to sue the Foundation was at best naïve -- most obviously because the Foundation does not appear to have the very object that plaintiff sues to recover. Nevertheless, plaintiff will be afforded a final opportunity to make out a claim against it. Plaintiff may submit whatever evidence or Rule 56(d) affidavit he deems necessary on or before January 24, 2011. Any submissions by the Foundation in response are to be made on or before February 3, 2011.

SO ORDERED.

Dated: January 13, 2011

/s/ Lewis A. Kaplan

Lewis A. Kaplan

United States District Judge