



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID BAKALAR, :

Plaintiff, :

-against- :

MILOS VAVRA and LEON FISCHER, :

Defendants. :

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05 Civ. 3037 (WHP)

OPINION AND ORDER

WILLIAM H. PAULEY III, District Judge:

Plaintiff David Bakalar (“Bakalar”) brings this action seeking a declaratory judgment that he is the rightful owner of an Egon Schiele (“Schiele”) drawing known as “Seated Woman with Bent Left Leg (Torso)” (the “Drawing”). Defendants Milos Vavra and Leon Fischer seek a declaratory judgment that they own the Drawing, and bring counterclaims for conversion and replevin. Having conducted a bench trial, this Court makes the following findings of fact and conclusions of law, and awards judgment to Bakalar.

FINDINGS OF FACT

I. The Parties

Bakalar, a Massachusetts citizen, has been collecting works of art for more than forty years. (Amended Complaint dated June 5, 2008 (“Compl.”) ¶ 16; Fifth Amended Answer dated Jun. 24, 2008 (“Ans.”) ¶ 16; Trial Transcript (“Tr.”) at 43-44.) Vavra, a Czech citizen, and Fischer, a New York citizen, are heirs to the estate of Fritz Grunbaum (“Grunbaum”). (Compl.

¶¶ 20, 21; Ans. ¶¶ 20, 21; Dx. H4: Estate assignment certificate dated Oct. 31, 2003.)

II. The Drawing

The Drawing, which Schiele dated 1917, is one of more than 2,700 drawings he created. (Joint Pretrial Order dated Apr. 22, 2008 (“JPTO”) ¶¶ VI.A.1, VI.A.2.) Because Schiele never titled the Drawing, it has been given a number of titles as it has passed to different owners and exhibitions, including “Woman Sitting, With Left Leg Drawn Up;” “Seated Woman (Without Head);” “Woman crouching, watercolor 1917,” and currently “Seated Woman with Bent Left Leg (Torso).” (Tr. at 438; Ex. 2: Galerie St. Etienne receipt dated Nov. 12, 1963 at P0080; Ex. 111: Galerie St. Etienne receipt dated Nov. 12, 1963 at KAL0341; Ex. 84: Excerpt from Galerie Gutekunst inventory book listing works purchased on February 7 and May 22, 1956 at P0048-49.) The medium for the Drawing is black crayon and gouache, a water-based paint that is difficult to distinguish from watercolor or tempera. (Tr. at 435; Ex. 2 at P0080; JPTO ¶ VI.A.2.)

A. Documented Provenance

The earliest known documentation of the Drawing’s provenance dates to 1956, when the Drawing appeared in a catalog published by the Galerie Gutekunst & Klipstein in Bern, Switzerland (“Galerie Gutekunst”) in connection with a Schiele exhibition. (Ex. 2 at P0080.) In September 1956, Galerie Gutekunst sold the Drawing and nineteen other Schiele works to Galerie St. Etienne, a New York gallery specializing in German and Austrian art. (Tr. at 254; Ex. 109: Galerie Gutekunst bill of sale dated Sept. 18, 1956 at KAL0112.) Galerie St. Etienne was founded by Otto Kallir, the former director of the Neuc Gallery in Vienna, after he fled Austria in

the late 1930s. (Tr. at 286-87, 292.)

On November 12, 1963, Galerie St. Etienne sold the Drawing to Bakalar. (JPTO ¶ VI.A.57.) In August 2004, Bakalar consigned the Drawing to Sotheby's to sell at its November 2004 auction of Impressionist and Modern Art in New York. (Ex. 6: Consignment agreement dated Aug. 23, 2004 signed by Bakalar and Stephane Cosman Connery; Tr. at 52, 448.) After withholding the Drawing from the 2004 auction to conduct further research into its provenance, Sotheby's proceeded to auction it in London in February 2005. (Tr. at 448, 450-51; 463-65.)

B. Galerie Gutekunst's Purchase of the Drawing

On February 7, 1956, Eberhard Kornfeld ("Kornfeld"), a partner at Galerie Gutekunst, purchased twenty Schiele works from Mathilde Lukacs ("Lukacs"), a woman living in Belgium, and on May 22, 1956, he purchased another twenty-six Schiele works from her. (Ex. 84: Excerpt from Galerie Gutekunst inventory book listing works purchased on February 7 and May 22, 1956 at P0048-49; Deposition of Eberhard Kornfeld dated May 25, 2007 ("Kornfeld Dep.") at 45-46, 99.) Kornfeld testified that Lukacs sent some of the works by mail and brought others personally to him in Bern, though he cannot recall the specific works Lukacs delivered personally. (Kornfeld Dep. at 128.)

Kornfeld vaguely recalls paying for the works by check, though he has no copies of cancelled checks on file. (Kornfeld Dep. at 60.) Lukacs signed one receipt in pencil acknowledging that Galerie Gutekunst paid a combined 15,100 Swiss francs for the February and May 1956 purchases. (Ex. 84: Receipt dated Apr. 24, 1956 at EK00017; Kornfeld Dep. at 34-35.) Lukacs signed the receipt at Galerie Gutekunst in Bern. (Ex. 84 at EK00017; Kornfeld Dep. at 35.) Lukacs's name does not appear anywhere else on the receipt. (Ex. 84 at EK00017.) The

back of the receipt bears a Swiss tax stamp, which was required at the time to render a receipt legally valid in Switzerland. (Kornfeld Dep. at 39-40.) The Drawing, to which Galerie Gutekunst ascribed the inventory number 36777 and the description “Woman crouching, watercolor 1917,” was among the works Galerie Gutekunst acquired from Lukacs in the May 1956 tranche. (Ex. 84 at P0049; Kornfeld Dep. at 36.) Based on this documentation, the Court credits Kornfeld’s testimony that he purchased the Drawing from Lukacs.

Kornfeld first became acquainted with Lukacs five years earlier, when she contacted Galerie Gutekunst about its interest in auctioning original French and Dutch pieces that she owned. (Ex. 42 at P0002.) Galerie Gutekunst auctioned those works for Lukacs in 1953. (Ex. 61: Galerie Gutekunst auction sales invoice dated Nov. 24, 1953 at P0021.) Kornfeld and Lukacs exchanged several letters between 1952 and 1957; the letters discuss potential meetings and Galerie Gutekunst’s interest in purchasing Lukacs’s art. (Exs. 47, 54, 55, 56, 58, 63, 65, 69, 73, 75, 78, 79, 80: Letters from Lukacs to Gutekunst and to Kornfeld; Exs. 62, 64, 67, 71, 81: letters from Kornfeld to Lukacs.) Lukacs met with Kornfeld in Bern several times during those years, and Kornfeld visited Lukacs in her apartment in Brussels once. (Kornfeld Dep. at 81, 129.) According to Kornfeld, Lukacs appeared to live comfortably and had expressed a desire to retire in Switzerland. (Kornfeld Dep. at 81-82, 129.) In September 1955, Lukacs delivered eight Schiele works to Kornfeld which, along with the forty-six Schieles she sold to him in 1956, comprised the entirety of Galerie Gutekunst’s 1956 Schiele exhibition. (Ex. 67: Letter from Kornfeld to Lukacs dated Sept. 21, 1955 at P0033, D&M01667; Kornfeld Dep. at 38, 42.)

Kornfeld did not ask Lukacs for any documentation confirming that she owned the Schieles. (Kornfeld Dep. at 127.) Kornfeld testified that he did not know anything about the

location or ownership of the Drawing prior to purchasing it. (Kornfeld Dep. at 111.) Kornfeld knew that Lukacs had emigrated to Belgium from Vienna. (Kornfeld Dep. at 82.) When he asked Lukacs where she acquired the Schieles, she told him they were “an old Viennese family possession,” and he did not inquire further. (Kornfeld Dep. at 112.) Kornfeld testified that at that time, he did not know who Grunbaum was, let alone that Lukacs was related to him. (Kornfeld Dep. at 110.)

C. Bakalar’s Purchase of the Drawing

Bakalar paid Galerie St. Etienne \$3,300 for the Drawing, which he purchased along with another Schiele for a combined sum of \$7,100. (Ex. 111 at KAL0341; Ex: 108: Undated Galerie St. Etienne inventory card at KAL0103.) He paid for the drawings in part by returning two lithographs by Kaethe Kollwitz (“Kollwitz”) that he had previously purchased from Galerie St. Etienne and in part by tendering \$4,300 in cash. (Ex. 111 at KAL0341; Tr. at 258-59.) Galerie St. Etienne valued the Kollwitz lithographs at \$2,500 and \$300; Galerie St. Etienne’s records indicate that it had sold the \$2,500 lithograph to Bakalar in 1961 for the same price. (Tr. at 323.) On November 20, 1963, Galerie St. Etienne sent Bakalar written confirmation that it had received two checks from him covering the \$4,300 balance in full. (Ex 163: Letter from Otto Kallir to Bakalar dated Nov. 20, 1963 at KAL0342.)

In 1963, Bakalar was a novice art collector who was unfamiliar with Schiele and had never heard of Grunbaum or Kornfeld. (Tr. at 46, 49-50.) Galerie St. Etienne did not include a certificate of provenance or authenticity with the Drawing, but according to its current director, Jane Kallir, it was not the practice to provide such documentation at the time. (Tr. at 50-51, 259.)

III. Fritz Grunbaum and the Drawing

A. The Grunbaums

Grunbaum was a well-known Jewish cabaret performer living in Vienna in the late 1930s, who maintained a large art collection that included a number of works by Schiele. (JPTO ¶¶ VI.A.3, VI.A.4.) Grunbaum was arrested on March 20, 1938, eight days after the Nazis annexed Austria (the “Anschluss”), and was held in concentration camps until his death on January 14, 1941 at Dachau. (JPTO ¶¶ VI.A.8, VI.A.9.) Grunbaum was survived by his wife, Elisabeth Grunbaum, who was arrested by the Nazis on October 5, 1942 and died shortly thereafter at a concentration camp in Minsk. (JPTO ¶¶ VI.A.10, VI.A.30, VI.A.32.) Elisabeth Grunbaum and Lukacs were sisters. (JPTO ¶ VI.A.20; Tr. at 642-43.) In addition to Lukacs, Elisabeth Grunbaum was survived by three other siblings. (JPTO ¶ VI.A.33.)

B. Grunbaum’s Schiele Collection After the Anschluss

On April 26, 1938, the Nazis began forcing Jews living in the Nazi Reich who owned more than 5,000 Reichsmarks (“RM”) in personal property to declare their assets to the government. (JPTO ¶ VI.A.11.) The Nazis specifically required that art collections be inventoried and assessed. (Ex. N6 at DBM4527.) On July 20, 1938, Franz Kieslinger, an appraiser for the Nazis, appraised Grunbaum’s art collection (“the Kieslinger Inventory”). (JPTO ¶ VI.A.12; Ex. 20: Kieslinger Inventory dated July 20, 1938 at D&M0017-18.) According to the Kieslinger Inventory, Grunbaum owned eighty-one Schiele works at the time, including fifty-five large, colored drawings, twenty pencil drawings, five oil paintings and one print. (JPTO ¶¶ VI.A.14-16; Ex. 20 at D&M0017-18.) Only the oil paintings are identified by title. (JPTO ¶¶

VI.A.15-16; Ex. 20 at D&M0017-18.) The Kieslinger Inventory valued Grunbaum's total art collection, which consisted of 449 works, at 5,791 RM. (JPTO ¶ VI.A.17.) On August 1, 1938, Elisabeth Grunbaum, who had received a power of attorney from Grunbaum after his arrest, signed a property declaration for Grunbaum that included artwork valued at 5,791 RM. (JPTO ¶ VI.A.18.)

On September 8, 1938, a request prepared for an export permit bearing the name Schenker & Co., A.G. ("Schenker"), a shipping and storage company in Vienna, identified Elisabeth Grunbaum as a sender of 417 untitled works of art. (JPTO ¶ VI.A.19; Ex. 25: Export permit application by Schenker dated Sept. 8, 1938 at DBM6081, P823.) The export permit does not include any custom stamp indicating the date and exact place in which Grunbaum's property crossed the Austrian border. (Ex. 25 at DBM6080, P822; Tr. at 766, 775.)

On June 9, 1941, Elisabeth Grunbaum signed Grunbaum's death certificate, identifying herself as his heiress and stating that "there is no estate . . . [and] in the absence of an estate, there are no estate-related proceedings." (JPTO ¶¶ VI.A.28-29.)

C. Lukacs and Other Grunbaum Family Members After the Anschluss

On August 12, 1938, Lukacs and her husband Sigmund Lukacs fled Vienna and moved to Belgium. (JPTO ¶¶ VI.A.22, VI.A.23.) Prior to emigrating, Sigmund Lukacs prepared an export permit application through Schenker. (Ex. 158: Export permit application for Sigmund Lukacs dated June 27, 1938.) The permit identifies three drawings, three watercolor paintings and eight graphic art pieces, as well as sixteen other works of art. (Ex. 158 at 2, 7.¹) Unlike Grunbaum's export permit, Sigmund Lukacs's export permit includes a page with custom

¹ Because Exhibits 158 and 160 do not include Bates-stamped pages, citations refer to the page numbers in those documents' sequential page order.

stamps, which indicates that the objects were shipped by rail on August 12, 1938 and passed through Austrian customs on August 14, 1938. (Ex. 158 at 4, 11; Tr. at 755-56.)

Berthold Reiss, a Vienna resident and husband of another of Elisabeth Grunbaum's sisters, also prepared an export permit prior to leaving Austria in 1939, with Schenker designated as the shipper. (Ex. 160: Export permit application of Berthold Reiss dated Sept. 16, 1938 at 2, 6.) Berthold Reiss and his wife fled Austria, and their declared property, which included three watercolor paintings and sixteen graphic art pieces, passed successfully through Austrian customs on January 27, 1939. (Ex. 160 at 4; Tr. at 756.)

IV. Evidence Establishing Grunbaum's Prior Ownership of the Drawing

Among the Schieles that Kornfeld sold to Galerie St. Etienne in September 1956 was an oil painting titled "Dead City." (Kornfeld Dep. at 131; Ex. 84 at P0048-49; Ex. 109 at KAL0112.) Of the fifty-four works in Galerie Gutekunst's 1956 Schiele catalogue, "Dead City" was the only one that listed previous owners, one of whom was Grunbaum. (Ex. 2.) Kornfeld included a provenance for "Dead City" because he found one in a 1930 catalogue raisonne² of Schiele oil paintings produced by Otto Kallir. (Kornfeld Dep. at 121-22.) Kornfeld never spoke with Otto Kallir about the provenance of "Dead City" or any of the other works in the Kornfeld catalog. (Kornfeld Dep. at 122-23.)

In early 1998, the New York County district attorney seized "Dead City" from an exhibition at the Museum of Modern Art after Rita Reif, a New York resident claiming to be Grunbaum's heir, asserted in a lawsuit that the painting had been looted by the Nazis.³ (Tr. at

² A "catalogue raisonne" is a comprehensive catalog of artworks by one artist.

³ The New York State Court of Appeals subsequently quashed the district attorney's seizure. See

272, 494.) Upon hearing of the seizure, Galerie St. Etienne contacted Kornfeld and asked him for the source of Galerie Gutekunst's 1956 Schiele exhibition. (Tr. at 272-73.) Kornfeld informed Galerie St. Etienne that he purchased the works from Lukacs. (Tr. at 273, 337.) Shortly thereafter, Austrian newspapers investigating the story of the "Dead City" seizure in New York reported the discovery of Lukacs's relation to Grunbaum by a Viennese municipal archivist. (Tr. at 272-76.)

Once Jane Kallir learned that Kornfeld had purchased the Schiele works from Lukacs and that Lukacs was Grunbaum's sister-in-law, Kallir compared the descriptions in Galerie Gutekunst's 1956 catalog to the descriptions in a 1925 unillustrated Schiele catalog published by a gallery in Vienna which included Grunbaum in the provenance of several works (the "1925 Catalog"). (Tr. 333-37; N4). Jane Kallir testified that some of the other Schiele works that Lukacs had sold appeared to match descriptions of Schiele works in the 1925 Catalog that listed Grunbaum as a previous owner. (Tr. at 336-337.) She concluded from this research and from her conversations with Kornfeld that Grunbaum was a previous owner of the Schieles in Galerie Gutekunst's 1956 catalog. (Tr. at 337.)

In August 2004, Sotheby's contacted Jane Kallir and Kornfeld's gallery in Switzerland as part of its provenance research in preparation for its November 2004 auction of the Drawing. (Tr. at 445-449.) Both Jane Kallir and Kornfeld's gallery informed Sotheby's that they believed Grunbaum owned the Drawing before Lukacs did. (Tr. at 447-48.) Sotheby's then consulted with two independent art researchers, who both verified that Kornfeld had purchased the Drawings from Lukacs. (Tr. at 455-461.) Sotheby's also spoke with two representatives of

In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art, 719 N.E.2d 897 (N.Y. 1999).

Ruth Rozniak, another potential Grunbaum heir, who both told Sotheby's that they also believed Lukacs sold the Drawing to Kornfeld, and that they did not intend to challenge title. (Tr. at 463-64, 472-75.) Sotheby's was satisfied that the Drawing had remained in the Grunbaum family without having been looted by the Nazis, and proceeded to auction it in February 2005. (Tr. at 463-65; Ex. 90: description of the Drawing in Sotheby's auction catalog dated Feb. 8, 2005 at STHBY000102.)

CONCLUSIONS OF LAW

I. Bakalar's Claim to Title

"The [Uniform Commercial Code] is applicable to art as to other chattels." Interested Lloyd's Underwriters v. Ross, No. 04 Civ. 4381 (RWS), 2005 WL 2840330, at *4 n.1 (S.D.N.Y. Oct. 28, 2005). "A purchaser of goods acquires all title which his transferor had or had power to transfer . . . A person with voidable title has power to transfer a good title to a good faith purchaser for value." N.Y.U.C.C. § 2-403(1). See Tavoulaareas v. Steven Kessler Motor Cars, Inc., 259 A.D.2d 262, 263 (N.Y. App. Div. 1999) (good-faith purchaser of automobile receives voidable title and has right to convey it); Atlas Auto Rental Corp. v. Weisberg, 281 N.Y.S. 2d 400, 404-405 (N.Y. Civ. Ct. 1967) ("[D]efendant's claim to good title must founder on considerations of his own status. If he acquired the property from one who had a voidable title, he must show that he was a good faith purchaser for value.") (internal quotation marks omitted). A purchaser acts in good faith if he acts with "honesty in fact in the conduct or transaction concerned." N.Y.U.C.C. § 1-201(19). "A person gives 'value' for rights if he acquires them . . . generally, in return for any consideration sufficient to support a simple contract." N.Y.U.C.C. §

1-201(44)(d).

Bakalar purchased the Drawing and another Schiele work from Galerie St. Etienne in exchange for \$4,300 in cash and the return of two Kollwitz works. (Ex. 111 at KAL0341.) Galerie St. Etienne's records confirm it received two checks from Bakalar totaling \$4,300, and there is no evidence that Galerie St. Etienne undervalued the Kollwitz works in accepting them as partial consideration. (Ex. 163 at KAL0342; Tr. at 323.) Bakalar had just started to collect art when he purchased the Drawing, and had never heard of Schiele, Grunbaum or Kornfeld; there is no evidence contradicting those assertions. (Tr. at 46, 49-50, 63, 72.) Although Galerie St. Etienne did not include a certificate of provenance or authenticity with the Drawing, there was no evidence that Bakalar should have expected to receive one at that time. (Tr. at 50-51, 259.) Galerie St. Etienne was a seller with voidable title to the Drawing, having acquired it from Galerie Gutekunst in 1956. (Tr. at 254; Ex. 109 at KAI.0112.) Accordingly, Bakalar validly acquired title to the Drawing if Defendants cannot show that the property was unlawfully taken from their predecessors.

II. Defendants' Counterclaims

Defendants' counterclaims require establishing that they have superior ownership rights in the Drawing to Bakalar. To do so, Defendants must show that the Drawing was unlawfully taken from Grunbaum or his estate, and that Kornfeld's acquisition of it was therefore the product of an illegitimate transfer.

A. Choice of Law

Plaintiff argues Swiss law applies to Defendants' counterclaims to the Drawing;

Defendants argue Austrian law applies. “New York’s choice of law dictates that questions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the alleged transfer.” Kunstsammlungen Zu Weimar v. Elicofon, 536 F. Supp. 829, 846 (E.D.N.Y. 1981); see also Greek Orthodox Patriarchate of Jerusalem v. Christie’s, Inc., No. 98 Civ. 7664 (KMW), 1999 WL 673347, at *4-5 (S.D.N.Y. Aug. 30, 1999) (applying the law of the country where “title passed, if at all” to plaintiff’s claim seeking return of tenth-century manuscript). Prior to trial, this Court determined that the substantive law of Switzerland applies to Defendants’ counterclaims, because their claims of title hinge on the propriety of Kornfeld’s initial acquisition of the Drawing in Bern, the first transfer of the Drawing that either party alleges or has evidence to support. See Bakalar v. Vavra, 550 F. Supp. 2d 548, 550-51 (S.D.N.Y. 2008); Bakalar v. Vavra, 05 Civ. 3037 (WHP), Order dated June 18, 2008 (Docket No. 195) (denying reconsideration). This Court based this determination on Kornfeld’s deposition testimony that Lukacs signed an invoice for the sale of the Drawings in Switzerland, but left open the possibility that if facts arising at trial indicated a potentially legitimate transfer may have occurred elsewhere, it would revisit the issue. Because no such evidence was introduced at trial, this Court adheres to its earlier holding that Swiss law applies.

B. Acquisition of Property Under Swiss Law

A district court interpreting foreign law may “consider any relevant material or source . . . whether or not submitted by a party or admissible under the Federal Rules of Evidence.” Fed. R. Civ. P. 44.1. Although this Court generally credits both parties’ experts on Swiss law, it has relied on Bakalar’s Swiss law expert to a greater extent, since his report

provided greater detail and because he testified during trial.⁴

Under Swiss law, a person who acquires and takes possession of an object in good faith becomes the owner, even if the seller was not entitled or authorized to transfer ownership. (Ex. 15: Expert opinion on Swiss law by Alexander Jolles dated Oct. 5, 2007 at P00658; Ex. P6: Expert opinion on Swiss law by Peter Mosimann and Markus Mueller-Chen dated Sept. 27, 2007 at DBM04631; Tr. at 184-85.) A purchaser acts in good faith if he sincerely believes that the seller was authorized to transfer ownership, and the purchaser may presume from the seller's possession of the object that the seller has the authority to sell it. (Ex. 15 at P00661; Tr. at 185.) The purchaser's good faith is presumed, and a claimant to the object bears the burden of establishing otherwise by proving either (1) the purchaser's actual knowledge that the seller lacked authority to sell the object, or (2) that the purchaser failed to exercise due diligence before purchasing the object. (Ex. 15 at P00661; Ex. P6 at DBM04631; Tr. at 194-195.) Even if the purchaser fails to exercise due diligence, the burden remains on the claimant to show that the required investigation would likely have revealed the seller's lack of authority to sell the object. (Ex. 15 at P00668.) The relevant exception to this rule is that if the object had been lost or stolen, the owner who previously lost the object retains the right to reclaim the object for five years. (Ex. 15 at P00659; Tr. at 199.)

Because Lukacs possessed the Drawing and the other Schiele works she sold to Kornfeld in 1956, Kornfeld was entitled to presume that she owned them. To the extent that the Drawing may have been lost or stolen at some point prior to Kornfeld's purchase, any absolute

⁴ Upon this Court's inquiry, Bakalar's Swiss law expert disclosed for the first time during trial that he represents Kornfeld in a tax proceeding in Switzerland. (Tr. at 237.) However, having read his expert reports and listened closely to his testimony, this Court finds that his potential conflict of interest does not undermine his credibility on issues of Swiss law.

