

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

MARTIN GROSZ and LILIAN GROSZ,

Plaintiffs,

against

THE MUSEUM OF MODERN ART,

Defendant,

PORTRAIT OF THE POET MAX
HERRMANN-NEISSE,
SELF-PORTRAIT WITH MODEL and
REPUBLICAN AUTOMATONS,
Three Paintings by Grosz

Defendants-in-rem.

----- X

Case No.: 09 Civ. 3706 (CM) (THK)

ECF CASE

**DEFENDANT’S REPLY MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS THE “FIRST AMENDED COMPLAINT”**

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PRELIMINARY STATEMENT

MoMA's motion focuses on a single ground: Plaintiffs' claims are time-barred. Dismissal is appropriate because (1) Plaintiffs' *remedies* have been cut off by New York's three-year statute of limitations; and (2) their *rights*, if any, to the Paintings extinguished long ago by operation of foreign statutes of repose. These threshold issues of law are ripe for decision.

MoMA's motion strictly adhered to Fed. R. Civ. P. 12(b)(6). The Rule 44.1 declarations of foreign law are essential and proper on a motion to dismiss. MoMA's motion also accepted as true the Complaint's well-pleaded allegations. Plaintiffs *say* MoMA argued outside the pleadings, but that is wrong. MoMA does rely on correspondence integral to the Complaint, which the cases permit (MoMA Mem. 8, 19). In any event Plaintiffs do not object to those references but say that we mischaracterize the letters (we don't, but the Court will determine that for itself) and that additional correspondence should also be considered (we do not object).

MoMA's motion ("MoMA Mem.") adhered to the Federal Rules. Plaintiffs' opposition ("Opp.") does not. They first attempt to rewrite the Complaint. For example:

- The Complaint alleged MoMA had knowledge of stolen art and acted deceitfully (¶¶ 20, 70-71, 87-88, 129, 165-166). Now Plaintiffs deny any claim of bad faith (Opp. 8, 15-16).
- Having alleged that German law governs (¶ 24), Plaintiffs now argue that New York law governs (Opp. 1, 7) – but also three more times assert German law (Opp. 5, 7, 21-22).
- Plaintiffs argue (Opp. 2) that Rule 9(b) does not apply, yet they ignore the Complaint's explicit allegations of "sham", falsity, and deceit (¶¶ 14, 16, 18, 57, 155).

They then attempt to argue the "merits", including through the Petropolous Decl., and assert a variety of irrelevant, incoherent arguments. Irrespective of what law governs or how they are pleaded, Plaintiffs' claims are time-barred and should be dismissed with prejudice.

ARGUMENT

I. The Federal Rules Govern Procedures in this Court

Plaintiffs' Opposition identifies as a main argument (Opp. Point IV) that New York's CPLR § 3018 requires MoMA to answer the Complaint, not move to dismiss, and plead statute of limitations as an affirmative defense (Opp. 12; *accord id.* 18). Of course, the Federal Rules govern pleading and procedure in this action. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). And a motion to dismiss based on statute of limitation is permissible, indeed standard, under Fed. R. Civ. P. 12(b)(6) (*see cases cited in MoMA Mem. 8; accord cases, p. 5*).

Plaintiffs' Opposition wrongly invokes Rule 64 (Opp. 5-6), which governs *provisional* remedies (which are not at issue), and confuses the *claims* Plaintiffs are asserting and the *relief* available (for example, constructive trust is a remedy, not a claim, *see* Opp. 20). And CPLR § 209 (Opp. 6) (tolling actions that “accrued in a foreign country” *during wartime or enemy occupation*) expired over 53 years ago.

II. Plaintiffs' Claims, If Any, for *Poet* Long Ago Expired

MoMA's opening brief treated *Poet* separately for two reasons, both based exclusively on the pleading: *First*, the Complaint alleged that MoMA's acquisition of *Poet* was in bad faith; and, *second*, the Complaint alleged that Grosz had actual knowledge that *Poet* was at MoMA and that, according to Grosz, *Poet* had been “stolen” from him (¶ 105). On these allegations alone it is absolutely clear that the statute of limitations expired with respect to *Poet*.

First, accrual for a conversion claim occurs at the time of possession if the defendant acquires the property in bad faith (MoMA Mem. 15-16). Plaintiffs do not even try to distinguish this law. Instead, to avoid dismissal, they back-pedal and foreswear alleging bad faith. Opp. 8 (“Since MoMA was a good faith purchaser of the Paintings”); Opp. 15-16 (same).

Plaintiffs cannot abandon their judicial admissions. The Complaint alleges that MoMA

took possession of *Poet* in bad faith. See ¶ 129 (“[A]t the time MoMA acquired [*Poet*] in 1952, MoMA had actual notice of its suspect provenance”); ¶ 166 (“At all relevant times, MoMA knew or should have known that Valentin and Weidler were thieves trafficking in stolen artworks.”); ¶ 20 (“Grosz never voluntarily parted with title to the Paintings. MoMA knew or should have known this, but chose to either actively conceal the evidence or look the other way and deal under suspicious circumstances with disreputable dealers who provided doctored or missing provenances”); ¶¶ 70-71 (“Barr further praised Valentin’s patriotism By 1942, Barr certainly knew that his statement on Valentin’s behalf was completely false. Clearly, Barr was protecting MoMA’s source of Nazi-looted artwork.”); ¶ 88 (“Barr clearly knew Weidler was trying to sell a stolen Grosz to him.”); ¶ 165. Given MoMA’s alleged bad faith, Plaintiffs’ claims to *Poet* accrued in 1952 and were barred in 1955. *Close-Barzin v. Christie’s, Inc.*, 51 A.D.3d 444, 444, 857 N.Y.S.2d 545, 546 (1st Dep’t 2008); MoMA Mem. 15-16.

Second, even were Plaintiffs permitted to change course (which the Court should permit only if Plaintiffs are precluded from ever arguing or seeking to prove MoMA’s bad faith), their claims for the “return” of *Poet* still fail because of the explicit admissions that Grosz had full knowledge in 1953 that MoMA had *Poet*, which Grosz believed had been stolen (¶ 105). Waiting over 55 years unquestionably bars Plaintiffs’ claims to *Poet* (MoMA Mem. 16-17).

Plaintiffs confuse this defect with laches (Opp. 14-15). The principles are different. Plaintiffs make no attempt to discuss or distinguish *Solomon R. Guggenheim Foundation v. Lubell*, which is directly on point (MoMA Mem. 16). Both the First Department and the New York Court of Appeals made clear that the demand-and-refusal rule does not help a claimant who had **actual knowledge** of the location of the painting. In the face of actual knowledge, the limitations period begins to run, and does not await the later date of demand-refusal, lest a

claimant adopt a wait-and-see hedge to see whether the value of the chattel exceeds the costs and time being spent by the institution with possession. 153 A.D.2d 143, 147, 550 N.Y.S.2d 618, 620 (1st Dep’t 1990) (recognizing the “unreasonable delay rule” pursuant to which “the time limited to interpose a cause of action that accrues upon the making of a demand cannot be indefinitely extended by unreasonably postponing the demand”), *aff’d*, 77 N.Y.2d 311, 567 N.Y.S.2d 623 (1991) (“Our case law already recognizes that the true owner, having discovered the location of its lost property, cannot unreasonably delay making demand upon the person in possession of that property (*see, e.g., Heide v. Glidden Buick Corp.*, 188 Misc. 198, 67 N.Y.S.2d 905).”). Plaintiffs try to distinguish *Songbyrd, Inc. v. Estate of Grossman*, 206 F.3d 172 (2d Cir. 2000), which confirms the independent, non-laches basis for dismissal when the claimant knows the whereabouts of the chattel, by the irrelevant observation that it involved music rather than a painting (Opp. 15). *See also Greek Orthodox Patriarchate v. Christie’s, Inc.*, 98 Civ. 7664, 1999 U.S. Dist. LEXIS 13257, at *17 (S.D.N.Y. Aug. 18, 1999) (addressing the “undisputed duty to make a demand for return within a reasonable time after the current possessor is identified”).

It is in this context that Plaintiffs misread Judge Rakoff’s decision in *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009) (Opp. 15). Plaintiffs incorrectly accuse us of hiding *Schoeps*. In fact we did cite it to the Court, in the Ernst Declaration (¶ 5) – but in fact it has no relevance to this motion. *Schoeps* addressed an equitable laches argument, which MoMA explicitly has not made (MoMA Mem. 17). Nor did Judge Rakoff reject Professor Dr. iur. Wolfgang Ernst’s declaration in *Schoeps* (*see* Opp. 2). Judge Rakoff relies on his declaration throughout the opinion. 594 F. Supp. 2d at 464 n.3, 466, 467.

III. If New York Law Governs, Plaintiffs’ Claims for All Paintings Are Time Barred

CPLR § 214(3) broadly applies a three-year period to *any* “action to recover a chattel or damages for the taking or detaining of a chattel”. Whatever *relief* Plaintiffs seek – whether

declaratory, the imposition of a constructive trust, or “equitable servitude” (*see* Opp. Points V & VI) – the **claims** for that relief must be brought within three years of accrual. *See, e.g., Norris v. Grosvenor Mktg., Ltd.*, 803 F.2d 1281, 1287-1288 (2d Cir. 1986) (3-year period barred equitable claims); *Mindel v. Phoenix Owners Corp.*, 17 A.D.3d 227, 228, 793 N.Y.S.2d 390, 391 (1st Dep’t 2005) (3-year; barring declaratory relief); *Gold Sun Shipping Ltd v. Ionian Transp. Inc.*, 245 A.D.2d 420, 421, 666 N.Y.S.2d 677, 678 (2d Dep’t 1997) (3-year; barring constructive trust remedy); *Schreibman v. Chase Manhattan Bank*, 15 A.D.2d 769, 770, 224 N.Y.S.2d 977, 979 (1st Dep’t 1962) (3-year; barring equitable remedy – “same statutory bar as” legal remedy).

A. Plaintiffs’ Claims to All Three Paintings Are Barred by 2008 at the Latest Because MoMA Refused Plaintiffs’ Demand in 2005 at the Latest

The pre-suit letters submitted by both sides go only to whether, by their language, they evidenced an intent by MoMA “to interfere with the demander’s possession or use of his property” (MoMA Mem. 17, *quoting Feld v. Feld*, 279 A.D.2d 393, 395, 720 N.Y.S.2d 35, 37 (1st Dep’t 2001)). Plaintiffs do not object to this Court’s consideration of the letters. *See Bilello v. JPMorgan Chase Ret. Plan*, 607 F. Supp. 2d 586, 594-595 (S.D.N.Y. 2009) (granting in part defendant’s Rule 12(b)(6) motion on limitations grounds; considering extrinsic documentary evidence to determine when “clear repudiation” of claim occurred). Nor do Plaintiffs seek conversion of the motion under Rule 12(d), though the Court may (but need not) convert only this aspect of the motion (*see* MoMA Mem. 19). We consent to the Court’s review of their additional letter – that letter, like the others, supports MoMA’s position fully.

The allegations of the Complaint, together with the letters, demonstrate that Plaintiffs had made an unconditional demand for the transfer of the Paintings in 2003, that Plaintiffs unilaterally established deadlines for “return” of the Paintings (which MoMA did not adhere to), and that discussions occurred in 2003-05 (Solomon Exs. A-D). Plaintiffs’ authorized

representative describes these as Plaintiffs' "**initial** restitution claim" (Solomon Ex. D at 1).

The letters confirm that MoMA would not return the Paintings from the date Plaintiffs first demanded their transfer in 2003. MoMA thus made its position quite clear by its conduct. Then, on July 20, 2005, as Plaintiffs authorized representative later admitted, MoMA in writing "**outright declined restitution**" and "**stated that there [was] no available evidence that would challenge the Museum's ownership**" (Solomon Ex. D at 2). MoMA unqualifiedly rejected Plaintiffs' "initial restitution claim" by July 2005.

Thereafter, Plaintiffs sought another meeting with MoMA, which occurred on December 16, 2005 (*id.*). At this meeting, as Plaintiffs' authorized representative describes, Plaintiffs were "deeply disappointed" (*id.*). After another meeting, in which Plaintiffs' authorized representative said there was more information that MoMA should be considering, he wrote **another** letter, dated January 5, 2006, making another "request [for] the unconditional return" of the Grosz paintings (Reply Solomon Ex. F). Plaintiffs' authorized representative describes this second set of demands as Plaintiffs' "**repeated** claim of unconditional return" (Solomon Ex. D at 1). It was this **repeated** claim of unconditional return that led to the January 18, 2006 letter that Plaintiffs now submit (Dowd Ex. 1).

Given the foregoing, MoMA's willingness to have a third party review the materials does not alter the prior unequivocal rejection of Plaintiffs' self-described "initial" demands, as Plaintiffs themselves admit in the subsequent January 20, 2006, letter (Solomon Ex. D). The January 18 letter itself reiterated "[MoMA's] belief that it has good title to these pictures", that "[Plaintiffs'] assertion of title . . . is unsubstantiated" and that "there is not a shred of evidence that the painting was 'stolen'" (Dowd Ex. 1). "Notwithstanding" that, said MoMA – even though "[n]o such compelling facts exist in this instance" – MoMA was willing to "take another

important step” “to engage in serious, scholarly provenance research on works in its collection” (*id.*). MoMA made clear, however: “We take this extraordinary step not out of any sense of uncertainty about our conclusions, or any wavering in our resolve, but rather to obtain an intelligent, candid, independent assessment of the situation” (*id.*). This is the letter Plaintiffs rely on. (The Katzenbach report itself is irrelevant to MoMA’s motion; it was referenced because the Complaint (Ex. 27) attached the letter but not the report.)

The January 18 letter does not undo the earlier unequivocal rejection; in fact it is fully in keeping with it. A “refusal” sufficient to trigger the 3-year statute does not require a talismanic incantation. If it did, putative defendants could avoid conversion claims from ever accruing by dodging explicit terms of refusal. *Ingersoll v. Barnes*, 47 Mich. 104, 107, 10 N.W. 127, 128-129 (1881) (neither admitting/denying plaintiff’s claim amounted to refusal; “[i]f a demand for property can thus be answered and not constitute a conversion, it will be easy hereafter to avoid the responsibility which a refusal entails”). Nor can a claimant prevent the statute from running by making “*initial restitution claims*” and then a “*repeated claim of unconditional return*”. “Refusal” sufficient to trigger the 3-year period requires only that the defendant “clearly conveys an intent to interfere with the demander’s possession or use of his property.” *Feld*, 279 A.D.2d at 395, 720 N.Y.S.2d at 37. Here, that intent was conveyed by MoMA’s holding the Paintings and, in July 2005, when it “*outright declined restitution*” and “*stated that there [was] no available evidence that would challenge the Museum’s ownership*” (Solomon Ex. D at 2).

Plaintiffs fail to distinguish *Feld* and cite no case that a conversion claim revives by “re-demanding”. Even indications from MoMA that it was still exploring avenues of investigation regarding the provenance of the Paintings would not undo its clear refusal by word and deed. *Borumand v. Assar*, 01-CV-6258P, 2005 U.S. Dist. LEXIS 5496, *43 (W.D.N.Y. Mar. 31, 2005)

(plaintiff's conversion claim barred; defendant "continually maintained that he would [turn over the chattel in question] at some future time" but did not do so). Any reasonable person would have concluded MoMA's actions and letters amounted to a refusal. *Id.* Because of MoMA's public commitment, it would consider new information even today. That changes nothing.

B. Plaintiffs Cannot Claim the Benefit of Unpleaded Equitable Tolling

Both of Plaintiffs' cases (Opp. 12) *reject* claims for equitable tolling. *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Lord, Day & Lord v. Socialist Republic of Vietnam*, 134 F. Supp. 2d 549, 567 (S.D.N.Y. 2001). *Smith* recognizes that equitable tolling requires more than reasonable diligence; the law requires a specific showing that "extraordinary circumstances prevented" compliance with the statute of limitations. 208 F.3d at 17-18. Plaintiffs wholly ignore that requirement. "Negotiations", even assuming they occurred (Opp. 12), are hardly "extraordinary circumstances". And nothing MoMA did "prevented" Plaintiffs from timely filing – even if MoMA's January 18, 2006 letter confused them (and of course it didn't, as their response two days later confirms), Plaintiffs still had years after their claimed confusion disappeared (in April 2006) to file before July 2008. They didn't. Their claims are barred now.

IV. Plaintiffs' Claims Have Long Been Extinguished by Operation of Foreign Law

A. New York Law Will Import Foreign Accrual and Statutes of Repose

Describing MoMA's position as "frivolous", Plaintiffs seriously misstate the holding of *Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150, 1160 (2d Cir. 1982) ("*Elicofon*"), by announcing that "New York's case law has rejected all attempts to apply foreign statutes of repose to personal property sitting in New York for decades" (Opp. 18). In *Elicofon*, the Court found that German law did not apply and therefore the statutes of repose did not apply. The Court did not even consider whether New York would borrow Germany's statute of repose.

MoMA's moving papers (MoMA Mem. 11-12) showed that, even since *Elicofon*, New

York's Highest Court has explicitly held, twice, that, where a cause of action accrues without the state, the foreign jurisdiction's substantive time limitations will apply to bar a plaintiff's claims. *See Tanges v. Heidelberg N. Am., Inc.*, 93 N.Y.2d 48, 56, 687 N.Y.S.2d 604, 607 (1999); *Yonkers Contracting Co. v. Port Auth. Trans-Hudson*, 93 N.Y.2d 375, 378, 690 N.Y.S.2d 512, 514-515 (1999). Plaintiffs do not cite or discuss *Yonkers*, and they appear to agree that the assertion in their brief is in "Contrast" to the holding of *Tanges* (Opp. 8).

Many other cases bar claims by reason of foreign statutes of repose. *See, e.g., Christie's*, 1999 U.S. Dist. LEXIS 13257, at *14, 23 (French law of prescription bars claims for the return of art); *Goldsmith v. Sotheby's*, 52 A.D.3d 230 (1st Dep't 2008) (affirming the decision below that English prescription law applied but reversing on the issue of accrual); *Warin v. Wildenstein & Co.*, 115143/99, 2001 N.Y. Misc. LEXIS 542, at *19-20 (N.Y. Sup. Ct. Sept. 4, 2001) (willing to apply French prescription law as a statute of repose and holding, based on New York's Borrowing Statute, that "if the proceeding is time-barred under French law, it must be dismissed irrespective of whether it is otherwise permitted to go forward under New York law").

Plaintiffs' related citation to Restatement (Second) of Conflicts § 246 is unavailing (Opp. 18). New York's interest analysis rejects the traditional *lex loci delicti* rule of the Restatement. *Schoeps*, 594 F. Supp. 2d at 468; *accord* cases cited *supra*.

B. German and Dutch Law Govern the Relevant Transfers

Plaintiffs blithely suggest that New York law governs because they are suing MoMA for paintings in New York (Opp. 18). Even assuming they were permitted to walk away from the explicit pleading in their Complaint that German law governs the issue of transfer – and similar assertions made in their brief (*e.g.*, Opp. 21) ("NEW YORK'S CHOICE OF LAW APPLIES GERMAN LAW TO QUESTIONS OF TITLE TO THE PAINTINGS") (all caps in original) – the law is settled that they cannot revive a barred claim by waiting for a new purchaser and then

suing. As Judge Wood explained in *Christie's*, the manuscript at issue there – the Archimedes Palimpsest – was acquired sometime in the 1920s by a French businessman and was consigned in the 1990s to defendant Christie's, who held a public auction in New York in 1998. The Court held that the French law of prescription applied to cut off the claim:

[Plaintiff] makes no argument that the transfer from Mme. Guersan to Christie's, or from Christie's to the Purchaser, was invalid except insofar as Mme. Guersan [in France] never obtained legitimate title to the Palimpsest. Because title passed, if at all, in France, French law should apply to this case. 1999 U.S. Dist. LEXIS 13257, at *14.

For the same reasons German and Dutch law, applicable when title passed, govern here.

Under both German and Dutch law, the period of Prescription, Adverse Possession, and the other absolute bars to Plaintiffs' claims have long since passed (MoMA Mem. 12-14, 20-22). Plaintiffs ignore Dutch law and misapprehend German law (*see* Reply Ernst Decl.). Plaintiffs' claim that German law doesn't apply flies in the face of their Complaint and the repeated assertions in their brief (Opp. 5, 7, 21-22). Professor Ernst shows that German Prescription law is no different from the law of the U.K. and France, which the cases have found to be substantive prescription laws and hence incorporated into the limitations analysis (MoMA Mem. 11; *supra*, pp. 8-9). That this law applies only to property located in Germany is wrong (Reply Ernst Decl. ¶¶ 6-7, discussing the very case that Plaintiffs brought, and lost, in Germany).

CONCLUSION

The Court should dismiss the Complaint with prejudice.

Dated: July 1, 2009
New York, New York

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