

11-4042-cv
Bakalar v. Vavra

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.

1 At a stated term of the United States Court of Appeals
2 for the Second Circuit, held at the Daniel Patrick Moynihan
3 United States Courthouse, 500 Pearl Street, in the City of
4 New York, on the 11th day of October, two thousand twelve.

5
6 PRESENT: DENNIS JACOBS,
7 Chief Judge,
8 ROBERT D. SACK,
9 Circuit Judge,
10 JOHN GLEESON,
11 District Judge.*
12

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14 DAVID BAKALAR,
15 Plaintiff-Counter-Defendant-
16 Third-Party-Defendant-
17 Appellee,
18

19 -v.- 11-4042-cv

20
21 MILOS VAVRA, LEON FISCHER,
22 Defendants-Counter-
23 Claimants-Appellants.
24

- - - - -X

* The Honorable John Gleeson, United States District Judge for the Eastern District of New York, sitting by designation.

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FOR APPELLANT: Raymond J. Dowd, Luke McGrath,
Thomas V. Marino, Dunnington,
Bartholow & Miller LLP, New
York, NY.

FOR APPELLEES: William L. Charron, Pryor
Cashman LLP, New York, NY.

Appeal from a judgment of the United States District
Court for the Southern District of New York (Pauley III,
J.).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED
AND DECREED** that the judgment of the district court be
AFFIRMED.

This is an ownership dispute concerning a 1917 drawing
by Egon Schiele (the "Drawing"), between David Bakalar, who
seeks a declaration that he owns it by purchase from a
dealer, and Milos Vavra and Leon Fischer, who are heirs of
Austrian cabaret performer, Fritz Grunbaum, who owned it
before he was murdered by the Nazis in 1941. The United
States District Court for the Southern District of New York
(Pauley III, J.) awarded judgment to Bakalar on the basis of
laches. Bakalar v. Vavra, 819 F. Supp.2d 293, 307 (S.D.N.Y.
2011). "Following a bench trial, we set aside findings of
fact only when they are clearly erroneous However,
we review de novo the district court's conclusions of law
and its resolution of mixed questions of law and fact."
Phansalkar v. Andersen Weinroth & Co., L.P., 344 F.3d 184,
199 (2d Cir. 2003) (citations omitted). We assume the
parties' familiarity with the underlying facts, the
procedural history, and the issues presented for review.

[1] In a title action under New York law, a good faith
purchaser of an artwork has the burden of proving that the
work was not stolen. Bakalar v. Vavra, 619 F.3d 136, 147
(2d Cir. 2010) (citing Solomon R. Guggenheim Found. v.
Lubell, 77 N.Y.2d 311, 321 (1991)). Here, the district
court found that the Drawing was not looted by the Nazis.
Bakalar, 819 F. Supp. 2d at 298-99. Vavra and Fischer argue
that the district court's finding is clearly erroneous and
that the Nazis stole the Drawing. However, Bakalar traced

1 the provenance back to Mathilde Lukacs, Grunbaum's sister-
2 in-law, who sold it to a gallery in 1956. Vavra and
3 Fischer's hypothesis--that the Nazis stole the Drawing from
4 Grunbaum only to subsequently return or sell it to his
5 Jewish sister-in-law--does not come close to showing that
6 the district court's finding was clearly erroneous.
7

8 After finding that the Drawing was not stolen by the
9 Nazis, the district court extended its Lubell analysis by
10 requiring Bakalar to show that Lukacs acquired proper title
11 in the Drawing, and found that he could not. Bakalar, 819
12 F. Supp. 2d at 299-302. We do not decide whether Bakalar
13 discharged his burden under Lubell by tracing the provenance
14 back to Lukacs, who was a close relative of Grunbaum (she
15 was sister to Mrs. Grunbaum, who survived Grunbaum before
16 herself being murdered by the Nazis). The point was not
17 pressed by Bakalar, and we affirm instead on the district
18 court's ruling that the claim against Bakalar is defeated by
19 laches.
20

21 This Court previously recognized that Bakalar could
22 assert a laches defense under New York law. See Bakalar,
23 619 F.3d at 147. In order to prevail on laches, Bakalar had
24 to show that "(1) [Vavra and Fischer] were aware of their
25 claim [to the Drawing], (2) they inexcusably delayed in
26 taking action, and (3) Bakalar was prejudiced as a result."
27 Bakalar, 819 F. Supp. 2d at 303 (citing Ikelionwu v. United
28 States, 150 F.3d 233, 237 (2d Cir. 1998)). The district
29 court found that Vavra and Fischer's "ancestors were aware
30 of--or should have been aware of--their potential intestate
31 rights to Grunbaum property," and that the ancestors "were
32 not diligent in pursuing their claims to the Drawing." Id.
33 at 305-06.
34

35 Vavra and Fischer contend that the district court
36 committed two errors of law bearing on the laches defense.
37 First, they argue that the court erroneously "imputed
38 knowledge of 'potential intestate rights' to [Vavra and
39 Fischer] based upon previous actions or inactions of other
40 family members." But it was obviously necessary for the
41 court to do just that; the alternative was to reset the
42 clock for each successive generation. See Bakalar, 819 F.
43 Supp. 2d at 303 ("This inquiry focuses not only on efforts
44 by the party to the action, but also on efforts by the

1 party's family.") (internal quotation omitted). Second,
2 Vavra and Fischer argue that their families had no legal
3 duty of diligence until they knew of the actual *location* of
4 the Drawing. They rely on language in Lubell declining to
5 "impose the additional duty of diligence before the true
6 owner has reason to know where its missing chattel is to be
7 found." 77 N.Y.2d at 320. However, though "[l]ack of
8 diligence in locating the property" is not a consideration
9 for a statute of limitations analysis, it is absolutely
10 relevant "with respect to a laches defense." SongByrd, Inc.
11 v. Estate of Grossman, 206 F.3d 172, 182 (2d Cir. 2000)
12 (citing Lubell, 77 N.Y.2d at 321).

13
14 Vavra and Fischer's factual arguments are no more
15 persuasive. Their theories about what their ancestors knew
16 (or didn't know) are speculative, and we do not have a
17 "definite and firm conviction that a mistake has been
18 committed.'" Mobil Shipping & Transp. Co. v. Wonsild Liquid
19 Carriers Ltd., 190 F.3d 64, 67-68 (2d Cir. 1999) (quoting
20 Anderson v. Bessemer City, 470 U.S. 564, 574 (1985)).

21
22 Next, Vavra and Fischer contest whether Bakalar was
23 prejudiced by their ancestors' delay in pursuing the
24 Drawing. There can be no serious dispute that the deaths of
25 family members--Lukacs and others of her generation, and the
26 next--have deprived Bakalar of key witnesses. See Sanchez
27 v. Trustees of the Univ. of Pa., 2005 WL 94847, *3 (S.D.N.Y.
28 Jan. 18, 2004) (noting that the death of potential witnesses
29 is prejudicial) (citing Solomon R. Guggenheim Found. V.
30 Lubell, 153 A.D.2d 143, 149 (1st Dep't 1990)). And while a
31 "defendant's vigilance is as much in issue as [a]
32 plaintiff's diligence," Lubell, 153 A.D.2d at 152, Vavra and
33 Fischer's speculation has not established clear error in the
34 district court's finding that Bakalar, a good faith
35 purchaser, was prejudiced by the delay. See Bakalar, 819 F.
36 Supp. 2d at 306-07.

37
38 In sum, there is no clear error in the findings that
39 Vavra and Fischer's ancestors knew or should have known of a
40 potential claim to the Drawing, that they took no action in
41 pursuing it, and that Bakalar was prejudiced in this
42 litigation as a result of that delay. It was therefore
43 sound to recognize Bakalar's title on the basis of his
44 laches defense.

1 [2] Citing little authority, Vavra and Fischer argue
2 that the district court should have permitted them to
3 supplement the record with additional expert testimony on
4 remand. They misconstrue this Court's remand instruction
5 that the district court *could* reopen discovery to mean that
6 it was required to do so. See Bakalar, 619 F.3d at 147
7 ("[W]e vacate the judgment of the district court and remand
8 the case for further proceedings, including, *if necessary*, a
9 new trial.") (emphasis added). See also Int'l Star Class
10 Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc., 146 F.3d
11 66, 73 (2d Cir. 1998) ("The decision whether to hear
12 additional evidence on remand is within the sound discretion
13 of the trial court judge."). The district court granted a
14 six month extension for expert discovery before trial, but
15 Vavra and Fischer failed to meet the revised deadline. See
16 Bakalar v. Vavra, 851 F. Supp. 2d 489, at 491-92 (S.D.N.Y.
17 2011). The district court did not abuse its discretion in
18 abiding by its discovery calendar, especially in light of
19 its generous extension.

20
21 Finding no merit in Vavra and Fischer's remaining
22 arguments, we hereby **AFFIRM** the judgment of the district
23 court.

24
25
26 FOR THE COURT:
27 CATHERINE O'HAGAN WOLFE, CLERK
28

The signature of Catherine O'Hagan Wolfe is written in cursive over a circular official seal. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS".

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DENNIS JACOBS
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: October 11, 2012
Docket #: 11-4042cv
Short Title: David Bakalar v. Sotheby's Inc.

DC Docket #: 05-cv-3037
DC Court: SDNY (NEW YORK CITY)
DC Judge: Pauley

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- * be filed within 14 days after the entry of judgment;
- * be verified;
- * be served on all adversaries;
- * not include charges for postage, delivery, service, overtime and the filers edits;
- * identify the number of copies which comprise the printer's unit;
- * include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- * state only the number of necessary copies inserted in enclosed form;
- * state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- * be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007**

DENNIS JACOBS
CHIEF JUDGE

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DC Judge: Pauley

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

and in favor of

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature