

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TIMOTHY REIF and DAVID FRAENKEL,
as Co-Executors of the
ESTATE OF LEON FISCHER,
and MILOS VAVRA

Plaintiffs,

- against -

RICHARD NAGY, RICHARD NAGY LTD.,
Artworks by the Artist Egon Schiele known as
WOMAN IN A BLACK PINAFORE, and *WOMAN
HIDING HER FACE*,

Defendants.

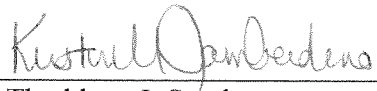
Index No.: 161799/2015

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the document attached hereto is a true and correct copy of the Order of the Honorable Charles E. Ramos, J.S.C., signed on September 7, 2016, and duly filed in the above-captioned matter in the Office of the Clerk of the Supreme Court of the State of New York, County of New York, on September 13, 2016.

Dated: New York, New York
October 24, 2016

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By: 
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CHARLES E. RAMOS
Justice

PART 53

Index Number : 161799/2015
REIF, TIMOTHY
vs.
NAGY, RICHARD
SEQUENCE NUMBER : 004
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s)
Answering Affidavits — Exhibits No(s)
Replying Affidavits No(s)

Upon the foregoing papers, it is ordered that this motion is

Motion denied as reflected in the Court's transcript. Any party to this matter may request that this Court "So Order" the transcript by submitting a copy of the Court Stenographer's record, together with an errata sheet correcting all errors in the record (counsel's as well as the Court's), to the Clerk of Part 53. If all parties consent to the proposed corrections or agree that no corrections are required, a stipulation to that effect shall accompany said errata sheet or transcript. In the absence of consent, the requesting party shall notice the record for settlement pursuant to CPLR Rule 5525(c).

No proposed order will be accepted unless specifically authorized at the oral argument. In the event the ruling authorizes the entry of a judgment or other action by the clerks, the submission of a proposed order or judgment shall be made to the Judgment Clerk or other appropriate clerk.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/7/16

[Signature] J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 53

----- X
TIMOTHY REIF and DAVID FRAENKEL,
as Co-Executors of the ESTATE OF
LEON FISCHER and MILOS VAVRA,

The Heirs,

- against -

RICHARD NAGY, RICHARD NAGY LTD.,
Artworks by the Artist Egon Schiele
known as WOMAN IN A BLACK PINAFORE
and WOMAN HIDING HER FACE,

Defendants.

----- X
Index No. 161799/2015

August 4, 2016
60 Centre Street
New York, New York 10007

B E F O R E: THE HONORABLE CHARLES E. RAMOS, Justice.

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Terry-Ann Volberg, CSR, CRR
Official Court Reporter.

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1 Proceedings

2 THE COURT: Good morning.

3 This is defendant's motion to dismiss and
4 there is a cross-motion by the plaintiff?

5 MR. DOWD: No, your Honor.

6 THE COURT: There isn't. Good.

7 Defendant, use the lectern, please.

8 There is a cross-motion to amend.

9 MR. DOWD: No, no, that was mooted because
10 we did amend on consent.

11 THE COURT: You didn't tell me that. Okay.

12 MR. DOWD: I apologize, your Honor.

13 THE COURT: That makes my life a little
14 easier.15 Hang on a second. Let me get my notes up to
16 speed here.17 In most of these art cases I get to hold on
18 to the works of art. No? That's a reasonable thing to
19 do.

20 MR. STAUBER: That's totally fair.

21 THE COURT: They would look great in my
22 chambers.

23 MR. STAUBER: No doubt they would.

24 THE COURT: We have to fill the walls up
25 with something.

26 Your motion to dismiss, please.

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Proceedings

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MR. STAUBER: Thank you, your Honor.

Attorney Thaddeus Stauber, Nixon Peabody, on behalf of Richard Nagy, the owner and art dealer in this particular case, along with my colleague Kristin Jamberdino. It is a pleasure to be before this court on this particular matter.

I think it behooves us --

THE COURT: My recollection is that you folks had agreed to keep the artwork in New York until this is all decided.

MR. STAUBER: Absolutely. This case came to your attention through a TRO which you granted. Once that was granted, I worked with Mr. Nagy, who is of London, and brought the works here for the Art and Design Fair, and we worked with counsel to agree that the works would stay in storage here in the New York jurisdiction until we resolved this dispute.

Mr. Nagy comes into this case with his eyes wide open. This is a case that we have tried to make very clean, very direct and very simple for you, your Honor. What we are asking to you do here today is something that you have done before, that which is apply collateral estoppel on a motion to dismiss based on --

THE COURT: I have gotten reversed before

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1 Proceedings

2 too. Take it slow.

3 MR. STAUBER: I have had the fortune of
4 working with Mr. Dowd and working on many of these art
5 cases, and I think what's important to point out in
6 this particular one is the word stolen does not apply
7 here. More importantly --

8 THE COURT: Hang on. There seems to be some
9 confusion perhaps on my part.

10 The original -- the other case, the case that
11 was prosecuted in the District Court, went to the
12 Second Circuit Court of Appeals, am I correct that that
13 was -- that one was not a stolen work of art?

14 MR. STAUBER: Right. Judge Pauley in the
15 Southern District --

16 THE COURT: Isn't there an allegation in
17 this case that this was stolen by the Nazis?

18 MR. DOWD: Yes, your Honor.

19 MR. STAUBER: There is an allegation that
20 this was stolen by the Nazis, your Honor, but what I
21 want to point out is, this exact case was litigated
22 already for eight years in front of Judge Pauley and up
23 in front of the Second Circuit Court of Appeals.

24 THE COURT: Wait a minute. That case, that
25 case involved a different painting.

26 MR. STAUBER: That case involved a different

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Proceedings

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2 artwork.

3 THE COURT: And a different -- well, it
4 wasn't a dealer, it was an owner.

5 MR. STAUBER: That case involved Mr. David
6 Bakalar who brought the case after acquiring the work,
7 he brought a declaratory action in the Southern
8 District. At that point in time Mr. Dowd, on behalf of
9 the exact same plaintiffs as we have here today,
10 brought a cross-complaint for a declaratory action.

11 What's important to note is that case
12 involved the Grünbaum Collection. The Grünbaum
13 Collection goes back to Austria, and goes to Fritz
14 Grünbaum, the Viennese cabaret singer.

15 THE COURT: The Second Circuit decision was
16 always talking about this painting, this painting, this
17 work of art, and made it very clear that they weren't
18 applying this across the board to any claim being made
19 with regard to this art collection.

20 I know you are trying to extrapolate what the
21 holding was there, but I have to look at the facts in
22 that case. The facts in this case was, it was not a
23 stolen work, that the supposed owner was not an art
24 dealer, but rather a good faith purchaser for value,
25 and a whole host of other issues have arisen, for
26 example, the plaintiffs here are raising the issue that

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2 your client did not acquire this work of art in good
3 faith, and that is a requirement to apply the laches
4 defense if it's applicable here at all. I don't know
5 that it is.

6 MR. STAUBER: Let me take those apart one by
7 one, if I could.

8 What we are actually asking you to do is
9 apply collateral estoppel, and if you look very closely
10 at Judge Pauley's well-reasoned decision endorsed by,
11 affirmed by the Second Circuit, when he was looking at
12 the question of laches, he was very careful to point
13 out that what he was applying the laches to was the
14 Grünbaum Collection because it would not be fair to
15 Mr. Dowd's clients that they had to identify each and
16 every work within that collection because the Grünbaum
17 Collection did not specifically identify Mr. Bakalar's
18 artwork.

19 THE COURT: But the Second Circuit in
20 affirming didn't speak in those terms. They said they
21 were referring to this work of art. And I believe
22 Judge Pauley and/or the Second Circuit made it very
23 clear that this was not a blanket determination.

24 MR. STAUBER: This was a determination with
25 respect to laches as it relates to the collection.

26 This particular artwork -- now let's step

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2 back, take a look at this particular artwork, if you
3 like, because it is --

4 THE COURT: As I understand it, the
5 plaintiffs in this case are alleging that there was an
6 attempt at some point, either an attempt or an attempt
7 that was frustrated because people were behind the Iron
8 Curtain, to obtain relief with regard to this work of
9 art.

10 Why should I foreclose at this early stage on
11 the basis of an action involving another party in
12 different circumstances, not even give them an
13 opportunity to show that they have a basis to assert
14 the claim that's being set forth here? And how do I
15 understand your defense of laches without knowing all
16 of the facts and circumstances surrounding this
17 particular case?

18 MR. STAUBER: I am very sensitive of that,
19 your Honor. I want to say that we also agree that
20 cases of this sensitive nature should not be barred
21 offhand by this court or any court, but at the same
22 time, at the same time, cases in which the very facts
23 which are, and issues which are identical here, that
24 is, the question of laches, involving the collection --

25 THE COURT: Legal issues -- excuse me --
26 legal issues are one thing, but there's always a

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2 factual predicate for these arguments. I don't know
3 any of the facts in this case other than what is
4 alleged in the complaint, and the complaint does allege
5 a valid cause of action.

6 MR. STAUBER: Let me take that for you, if
7 your Honor would allow me.

8 In the complaint, in the complaint, they cite
9 to the Grünbaum Inventory which was filed in 1936 or
10 1938. That inventory is the exact same inventory that
11 was submitted in the Bakalar case. The artwork at
12 issue here, the two artworks at issue here, like the
13 Bakalar case, do not appear on that inventory anywhere.
14 This particular artwork, this particular artwork does
15 not appear on any post-war inventories, exactly like
16 the Bakalar case. These particular artworks, in fact,
17 were never pursued, and the facts relating --

18 THE COURT: What you are arguing --

19 MR. STAUBER: -- are exactly the same.

20 THE COURT: Are you arguing that this
21 artwork was not stolen?

22 MR. STAUBER: This artwork was not stolen,
23 neither were stolen.

24 THE COURT: Plaintiff does not agree.
25 Plaintiff says they were stolen.

26 How can I make a determination on that issue?

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1 Proceedings

2 MR. STAUBER: But when they submit their own
3 documentation which shows that there is no evidence
4 that these particular artworks were not stolen, when
5 they submit to this court and refer you to the Looted
6 Art website which at one time had the works up, but now
7 don't have the works up, that is direct evidence that
8 the works were not stolen, your Honor.

9 THE COURT: I am having troubling following
10 your logic.

11 Are you telling me that on a motion to
12 dismiss that plaintiffs have to come forward and prove
13 that his artwork was stolen? They have to allege it.

14 MR. STAUBER: No, your Honor. It's at the
15 allegation stage. What I am saying --

16 THE COURT: You are conflating summary
17 judgment with a motion to dismiss.

18 MR. STAUBER: I don't want to do that
19 because we don't need to do that in this particular
20 case.

21 THE COURT: That's what you are doing.

22 MR. STAUBER: I am going to step away and
23 try to take you back to the original motion to dismiss
24 because this record that you have before you is the
25 exact same record that appeared in the Bakalar case.
26 All the plaintiff has done is taken the record which

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2 was fully and fairly litigated in the Bakalar case on
3 the issues of laches with respect to an artwork that
4 has the exact same provenance as this particular, as
5 these two particular artworks have. They have said to
6 this court, we don't agree with the Bakalar decision.
7 We want you to reexamine what happened during the
8 post-war era.

9 THE COURT: Excuse me. This is not a
10 situation where someone litigates in the Southern
11 District, they don't like the decision, and they come
12 here and re-litigate. This is a different work of art.
13 This is a different purported owner.

14 I would like to at least give the plaintiff a
15 chance to prove their case. I don't see why I should
16 throw it out willy-nilly.

17 MR. STAUBER: I don't think you are throwing
18 it out willy-nilly, your Honor. This is a case which
19 on a motion to dismiss there is more before this court
20 than there normally is. That's perfectly appropriate
21 here because much of this is already in the court files
22 and was referred to by the plaintiff. We have not
23 added anything into the record other than what proves
24 the case for ourselves because it was already there,
25 put there by the plaintiff.

26 For example, in 2004 referenced in the

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2 complaint is the --

3 THE COURT: Let's assume that I accept your
4 argument. What about the plaintiff's argument that
5 laches does not apply because there was no good faith
6 on the part of your client?

7 MR. STAUBER: The fundamental premise of
8 laches is that whatever my plaintiff did or didn't do
9 has to prejudice the plaintiff for the application of
10 laches. In this particular case, as is alleged in the
11 complaint and as is alleged in the briefing, Mr. Nagy
12 didn't acquire the works until well after the Bakalar
13 decision. There is plenty of case law that says
14 someone acting in furtherance or respecting a court
15 decision is by definition not acting in bad faith.
16 But, most importantly, nothing he's done in any way has
17 prejudiced or prevented them from pursuing their work
18 of art.

19 They have loaded the file with accusations
20 about what somebody unrelated to these two plaintiffs
21 did in the Communist Era, but that has nothing to do
22 with what the two particular plaintiffs here have.
23 Most importantly, all of that was put before Judge
24 Pauley. All of that was put before the court. He
25 already examined that issue. All we are asking is was
26 that issue fully and fairly litigated.

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2 THE COURT: It's easy for you to say that,
3 but you have to understand that we are dealing with a
4 different owner and a different category of consumer,
5 who is a consumer rather than a dealer, involving a
6 different artwork. The only thing that's the same is
7 that it apparently came out of the same estate. You
8 say that's enough to foreclose any claim by heir. I am
9 not buying it. I'm sorry, I can't.

10 MR. STAUBER: I understand you are not
11 buying it, but that is not the only thing that's the
12 same. What is the same is that it comes allegedly from
13 the same collection, the Grünbaum Collection. It's
14 part of that collection. It, just like the Bakalar
15 situation, it was sold in 1956. Eberhard Kornfeld --

16 THE COURT: Back up one second. This is one
17 of the reasons for my confusion.

18 How can you say it comes out of the same
19 category of these paintings if the painting in the
20 District case was not a stolen work of art, and this is
21 alleged to be a stolen work of art? Doesn't that
22 immediately put it into separate categories; yes or no?

23 MR. STAUBER: Yes or no? It does not. For
24 purposes of this motion, it does not because --

25 THE COURT: That's easy to say, but I don't
26 see the justification.

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2 MR. STAUBER: It's not easy to say because
3 what I am asking the court as a matter of law, as a
4 matter of law on the collateral estoppel question, the
5 question is: Did these two heirs, are they estopped
6 from later pursuing claims of artworks coming out of
7 this collection be them stolen or not stolen?

8 In this particular case you can't simply make
9 a bare allegation that an artwork was stolen, and then
10 put before the court the very evidence that shows that
11 it was not stolen. We don't have to assume all of the
12 facts they alleged in the complaint to be true.

13 THE COURT: What is there in the record now,
14 we are talking here about the summons and complaint or
15 a document that establishes a defense as a matter of
16 law, that this was not stolen?

17 MR. STAUBER: The evidence in the record
18 from 2004, which is the letter from the Art Loss
19 Register that the plaintiffs submitted to this court to
20 try to demonstrate that Mr. Nagy did not conduct due
21 diligence, in fact says that he conducted extreme due
22 diligence, and it is more likely than not there is no
23 relevant claim to this particular artwork.

24 THE COURT: Wait a minute. I thought you
25 said that there was evidence being submitted by the
26 plaintiff that established that this was not a stolen

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2 work of art.

3 MR. STAUBER: No. The plaintiff -- the
4 plaintiff --

5 THE COURT: We are having a failure to
6 communicate here. That's what I heard.

7 Plaintiff -- excuse me, this is my courtroom.
8 Let me hear what you have to say, plaintiff,
9 please.

10 MR. DOWD: Yes, your Honor.

11 THE COURT: Good morning.

12 MR. DOWD: Good morning, your Honor.

13 Raymond Dowd for Timothy Reif and Milos
14 Vavra, for the plaintiffs.

15 I think your Honor has pretty much
16 understood, has pretty much understood the issues and
17 the allegations. I think the issue to look at really,
18 and an easy way of deciding it is looking at Judge
19 Pauley's decision that denies certification of the
20 class. Judge Pauley there specifically said that I'm
21 not going to let the plaintiffs litigate all of these
22 items because laches is an individualized determination
23 dependent on factual circumstances. So if we are
24 looking at collateral estoppel, the judge himself
25 narrowly circumscribed and used restraint in that
26 decision itself.

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THE COURT: Which exhibit is his decision?

MR. DOWD: It is cited in our opposition. I have a copy.

THE COURT: Is there a copy of it?

MR. DOWD: I have a copy for your Honor, yes, I do.

So, you know, when the federal judge himself says I'm not going to let you litigate this (handing), this issue, and I'm not going to let you take one laches situation and apply it to another, we didn't like that decision, but we were sliced and diced, and we were told very clearly in that decision, you may only litigate this one work. So that circumscribed our discovery. It circumscribed the issues that we could litigate. It circumscribed the length and breadth of our questioning of the Swiss art dealer where we were only permitted to ask about that one work.

And Mr. Stauber used the word the Grünbaum Collection as if that were something that that were established. If your Honor looks at the 2006 decision of Judge Pauley --

THE COURT: I am looking now.

MR. DOWD: -- he specifically --

THE COURT: It says the third counterclaim defendants -- the counterclaim defendants, that's you

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Proceedings

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2 folks -- sorry -- that's these defendants here, I
3 suppose.

4 MR. DOWD: No, no.

5 THE COURT: Counterclaim defendants.

6 "Counterclaim defendants raise a laches defense" --

7 MR. DOWD: It was the proposed class.

8 THE COURT: -- "raise a laches defense
9 requiring an individual demonstration on fair prejudice
10 as a result of the heirs'," your clients, "unreasonable
11 delay." Judge Pauley said, "Such a defense is not
12 susceptible to uniform applications as prejudice may be
13 suffered -- suffered, may vary by class member."

14 MR. DOWD: That's it, game over.

15 THE COURT: Are you are you saying that this
16 class member, the estate -- is it the estate of two
17 people or one person?

18 MR. DOWD: It's the estate of Fritz
19 Grünbaum. So it's two heirs involved, co-heirs.

20 What we tried to do was certify a defendants
21 class.

22 THE COURT: The argument that they are
23 making is that Pauley basically made the finding as
24 against your client, not against other members of the
25 class.

26 MR. DOWD: No, no.

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2 THE COURT: Or is he talking about the
3 estate?

4 MR. DOWD: That's a misstatement. I think
5 we have to be very clear in the laches determination.

6 The laches determination was made with
7 respect to Mr. David Bakalar. Bakalar was a wealthy
8 Massachusetts collector who in 1964 went to a gallery
9 on 57th Street and bought a Schiele, and told the judge
10 I had absolutely no idea where it came from. I didn't
11 know it came from Switzerland. I didn't know anything.
12 And the judge, Judge Pauley, believed him.

13 So he was able to assert an ignorance and
14 prove that to the judge's satisfaction. That is the
15 basis for Judge Pauley's laches determination vis-a-vis
16 David Bakalar who purchased in 1964 and tried to sell
17 at Sotheby's in 2005. So '64 to 2005 was the inaction,
18 the alleged inaction of the heirs that was the factual
19 determination at issue with David Bakalar. And the
20 judge concluded that deceased Jewish people should have
21 done something, an unnamed something, to assert rights
22 to property that they didn't know even survived World
23 War II.

24 So I don't expect this court, in view of the
25 doctrine of judicial restraint, to decide whether or
26 not Judge Pauley made a good decision, but I would say

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1 Proceedings

2 that this court is well-positioned to take a look at
3 the law of decedent estates and say, well, does an heir
4 have to actually do something to get their property?
5 And the way it works is not like that. The probate
6 court sends out a notice, says you're an heir, you have
7 the opportunity to get your stuff. That's how a
8 probate proceeding works.

9 So I don't think that Judge Pauley's
10 determination or the determination of the Second
11 Circuit has any reflection on how New York law would
12 apply this. And, in fact, I successfully argued before
13 New York Court of Appeals in the matter of Flamenbaum
14 the application of the laches doctrine and defeated it
15 in sort of similar circumstances representing the
16 Pergamon Museum.

17 To circle back to all of that, we are in
18 state court. Your Honor has a specific expertise in
19 applying the New York laches doctrine, and in your
20 Honor's earlier comments I think you got it right in
21 terms of, and Judge Pauley agreed with this, it's
22 consistent with Judge Pauley's determination, that each
23 artwork must be individually analyzed, and here there
24 is no way that, for example, Nagy can show any of the
25 elements of laches.

26 THE COURT: He says something in his

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2 decision that confuses me. He says "An individual
3 investigation is required to identify each untitled
4 work. Second, good faith defenses would vary for each
5 class member based on applicable law and the facts
6 specific to each transfer." I would think that the
7 transfer issue is really aimed at the good faith
8 requirement, that is, was it a purchaser in good faith.
9 I don't see how that --

10 MR. DOWD: He is at this point making a
11 general observation that people who are in Nagy's
12 position should have the possibility of asserting
13 whatever defenses they may have. So this decision in
14 2006 is very protective of unnamed potential class
15 members. Judge Pauley's language simply preserves the
16 ability of a Mr. Nagy to come in and assert defenses.
17 So he is denying class certification to let them prove
18 their individual prejudice, for example.

19 If we look at the laches, New York's
20 requirement of establishing the affirmative defense of
21 laches, Mr. Nagy must demonstrate that he didn't know
22 of these claims, A, and it was some -- B, it was some
23 inaction on the part of the plaintiffs that caused this
24 prejudice.

25 THE COURT: Let me ask the defendant a
26 question.

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2 Getting back to the statement I read from
3 Judge Pauley's decision, he says, first, an individual
4 investigation is required to identify each untitled
5 work. Sounds to me like he is telling me, Judge Ramos,
6 conduct an investigation with regard to this artwork.
7 Let's find out what happened to this painting, first.
8 Then we will determine whether or not the transfer of
9 this work of art violates the rules, was there a theft,
10 was there a good faith purchaser, what have you.

11 I think -- I don't like to criticize other
12 judges, but I feel there is some inconsistency in Judge
13 Pauley's decision, but, again, I don't know what the
14 facts were in that case. I didn't try it, he did.

15 MR. STAUBER: First of all, I think what we
16 are doing is conflating an early class action
17 certification determination with a later decision on
18 the merits that goes to the point of laches. And in
19 this particular case Mr. Nagy, unlike Bakalar, has not
20 come to the court and asked this court to issue a
21 declaratory decision finding him to be the punitive
22 owner of the particular artwork. In fact, he was
23 brought in. He is simply asserting the affirmative
24 defense of laches and saying these two plaintiffs have
25 already been down this road, and just like in
26 Poindexter v. Cash Money where you had a collection of

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2 songs, a particular song that was involved and laches
3 was applied, now you have to different song. We simply
4 bar, we simply stop the plaintiff from relitigating the
5 very same issue which is, did the heirs and those who
6 preceded them exercise the appropriate due diligence to
7 protect and preserve their rights?

8 Nothing is different here today with respect
9 to their actions than was in Bakalar. Mathilde Lukacs
10 is dead, she decide in 1979, just like the court found.
11 In fact, we are at a greater disadvantage because one
12 of the plaintiffs who is in there has now since passed
13 away. So the court, when they got to the point of
14 issuing this particular decision on the issue of
15 laches, has already made findings of law that laches
16 applies because of their inaction over the years.

17 What am I going to do in discovery your
18 Honor? Whose deposition will I take? It's already
19 been worked through which is why the plaintiff presents
20 to you the entire Bakalar record and asks you to look
21 at it anew.

22 THE COURT: Isn't this a problem we see in
23 every one of these Nazi art cases, most of the people
24 are dead? The original owner died in the concentration
25 camp, and the heirs have died of old age, if they ever
26 got by World War II.

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2 MR. STAUBER: That's why --

3 THE COURT: What you are telling me, what
4 you are telling me is that Judge Pauley's decision
5 involving this one work of art purchased by one
6 innocent purchaser forecloses all of the heirs from
7 pursuing any claim against those works of art, any
8 other works of art that may have been stolen. I am not
9 about to do that.10 MR. STAUBER: When that particular work of
11 art has the exact same provenance as the Bakalar
12 particular work of art, in that particular case it did
13 not appear in any of the inventories which were
14 presented --15 THE COURT: We don't know that. I have not
16 made a finding that this was or was not a stolen work
17 of art. There is a difference of opinion here. We
18 also have a very different category of plaintiff.19 In any event, fellows -- time out. Time out.
20 I don't want to beat a dead horse. Guys, the motion is
21 denied.22 MR. STAUBER: Can I ask the Court one thing
23 if the court will do that?24 Number one, ARIS Title Insurance, which is an
25 interested party in this particular case, has filed a
26 motion for intervention.

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2 THE COURT: Any opposition?

3 MR. DOWD: They are not interested. They
4 didn't file a proposed pleading, and, you know, we gave
5 them the opportunity to be here today, and they decided
6 they were too busy so they are coming next week.

7 Their motion shows exactly how outrageous the
8 arguments that were made before you today are. They
9 want to launder all of this through the instrumentality
10 of this court without letting us litigate any of these
11 issues. There has not even been one affidavit from
12 Mr. Nagy submitted in support of his own motion.

13 THE COURT: This is a motion addressed to
14 the pleadings. This is a 3211 motion, correct?

15 MR. DOWD: Your Honor, it is their
16 affirmative defense that is their burden to establish.
17 They must plead it in --

18 THE COURT: If the complaint doesn't set
19 forth a cognizable cause of action or if there are
20 documents like a general release or whatever that
21 dispense with the case, we don't have to have them
22 making any showings by way --

23 MR. DOWD: That I would concede, your Honor.

24 MR. STAUBER: All I would ask is to solve
25 this so we have some judicial efficiency here. We
26 understand what the court's decision is here today. I

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2 would ask you to hold that until the decision on the
3 intervention is decided, is made. That's set for
4 hearing on August 10th. At that point in time what I
5 would suggest you do is put them together, because I
6 know that with respect to ourselves we would like to
7 ask this court to approve the stopping of the discovery
8 so we can appeal this decision of law and take that up.

9 THE COURT: Who is seeking to intervene?

10 MR. DOWD: ARIS Title Insurance is seeking
11 to intervene.

12 THE COURT: Who was their insured?

13 MR. STAUBER: They provided title insurance
14 to one of the two works at issue here.

15 THE COURT: On your client's behalf?

16 MR. STAUBER: On my client's behalf. They
17 would like to exercise their standing, come into the
18 case and protect their interests as the insuring party.

19 THE COURT: Why should I delay the effect of
20 my ruling based upon that?

21 MR. STAUBER: So that we can tie things up
22 together so that we can, if we move, we will be moving
23 for appeal, we can put that all in one package, your
24 Honor.

25 THE COURT: You can anyway.

26 I take it that your client has put them on

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2 notice that this claim's been asserted.

3 MR. STAUBER: Yes.

4 THE COURT: But they are not representing
5 your client in this case?

6 MR. STAUBER: They are providing defense for
7 my client, but we have two works. One has no insurance
8 on it, one has insurance on it. We want to have one
9 counsel, handle both cases myself. However, ARIS Title
10 Insurance which is here in court today, and is prepared
11 to argue if you would like to take up the motion for
12 intervention, would like to step into the case as a
13 co-defendant to protect its interests which are
14 slightly different than my individual client's with
15 respect to one of the works since should there be a
16 valid claim, should they have to pay out --

17 THE COURT: With regard to the artwork that
18 is not insured, as far as they are concerned --

19 MR. STAUBER: They don't have an interest in
20 that particular artwork, but these are two works owned
21 by Mr. Nagy. One is insured, one is not.

22 THE COURT: Is it appropriate for the
23 carrier to intervene?

24 MR. DOWD: We fully briefed this. We said
25 to ARIS, you can come here and argue it today. They
26 said they were not available. This is the very first

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2 time we hear that ARIS is actually here in the
3 courtroom, ready to argue. I didn't bring my motion
4 papers, but I will argue it.

5 They didn't submit a proposed pleading. They
6 put in a me too motion to dismiss in which they ask
7 your Honor to launder undisclosed artworks on behalf of
8 an undisclosed insured showing just exactly how
9 ridiculous it is what Mr. Stauber has asked you to do
10 here today.

11 So I am ready, willing and able if Mr. Aris,
12 who is sitting back in the courtroom, to get up there
13 and argue this [sic].

14 THE COURT: Folks, I'm here. If you want to
15 get it done today --

16 MR. STAUBER: With respect to the decision
17 here that you've made today or are making today, what I
18 would ask the court is the following: The issues of
19 what these plaintiffs did or didn't do was fully and
20 fairly litigated already. The discovery has been
21 completely done. What I would submit, and it sounds to
22 me like where this court is wanting to hear more
23 evidence, is with respect to Mr. Nagy and Mr. Nagy's
24 good faith acquisition in this artwork.

25 THE COURT: I have no desires in this case
26 other than do the right thing. You folks will try your

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2 cases, put before me the evidence you want. I will not
3 dismiss the case at this juncture.

4 MR. STAUBER: I understand.

5 As Mr. Dowd artfully pointed out, if we are
6 going to move forward with discovery, I would submit it
7 needs to be narrowly tailored to this particular work,
8 and Mr. --

9 THE COURT: We will handle that at a
10 preliminary conference which we will do once you folks
11 have answered.

12 MR. STAUBER: What I would like to do at
13 this stage is, your Honor, make a motion to the court
14 or apprise the court of the fact that we will be
15 appealing this decision.

16 THE COURT: In the Commercial Division I
17 assume appeals go from every decision we make.

18 MR. STAUBER: Obviously no disrespect for
19 this court because clearly you've reviewed the
20 material, but given the history of this Grünbaum
21 Collection, and these claims, how long they go, we
22 think it's important to help shape the law accordingly.

23 I would submit --

24 THE COURT: If you want to make an
25 application to stay discovery pending an appeal to the
26 Appellate Division, I will so order the record. You go

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up to the Appellate Division tomorrow if you want to
and you can ask them for a stay.

MR. STAUBER: Thank you, your Honor. We
will do so.

With respect to the intervention --

MR. DOWD: We would oppose that.

THE COURT: That's Madison's Avenue's
problem, not mine.

(Continued on next page for certification.)

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2 MR. STAUBER: With respect to the request of
3 intervention, your Honor, again, we respect that the
4 court wants to hear everything. It's set for
5 August 10. I am trying to align dates and times and
6 judgment dates together so we have as clean a record as
7 possible. I don't think any of us are harmed here
8 today if the court puts in its pocket a decision today.
9 Here's the motion for intervention --

10 THE COURT: Excuse me. I don't want to put
11 anything in my pocket. Number two, what you are saying
12 makes absolutely no sense.

13 Okay, folks, we are done. Thank you.

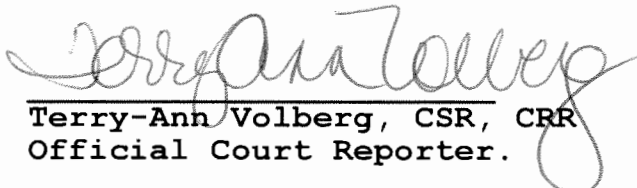
14 MR. DOWD: Thank you, your Honor.

15 MR. STAUBER: Thank you, your Honor.

16 * * *

C E R T I F I C A T E

17
18 I, Terry-Ann Volberg, C.S.R., an official court reporter of
19 the State of New York, do hereby certify that the foregoing
20 is a true and accurate transcript of my stenographic notes.

21
22 
23 Terry-Ann Volberg, CSR, CRR
24 Official Court Reporter.
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