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Foreign Affairs—Private Claims

Fight Over Paintings Looted by Nazis May Finally Get Trial Thanks to 9th Cir.

A woman who claims to own a 16th century diptych of Adam and Eve, taken by the Nazis in World War II and currently hanging in the Norton Simon Museum of Art in Pasadena, Calif., may get the chance to prove her case after the U.S. Court of Appeals for the Ninth Circuit June 6 reversed a lower court's dismissal of her claims (*Von Saher v. Norton Simon Museum of Art,* 2014 BL 158464, 9th Cir., No. 12-55733, 6/6/14).

Marei von Saher—the only living descendant of Jacques Goudstikker, a Dutch art gallery owner who fled the Netherlands with his family after the 1940 Nazi invasion—filed suit under California law and within a statute of limitations relating specifically to the recovery of fine art. The museum asserted that this extended limitations period conflicted with the foreign policy of the U.S., and was thus preempted.

The court disagreed. ''This matter is, instead, a dispute between private parties,'' Judge Dorothy W. Nelson wrote for the court.

Nicholas O'Donnell, a partner at Sullivan & Worcester, Boston, with expertise in the areas of museum and fine arts law, and who edits of the Art Law Report, called the decision ''very significant.'' The opinion is part of a ''pendulum swing'' since the start of 2013 in favor of claimants seeking restitution of art taken by the Nazis, he said in a June 11 phone call with BNA.

Larry Kaye, an attorney with the Art Law Group at Herrick, Feinstein, New York, and the lead attorney representing Von Saher in this matter, told BNA June 10 that they were ''gratified'' that the court had agreed with their arguments.

Ascertaining Policy. The central question the court needed to resolve was what U.S. foreign policy regarding art looted by the Nazis actually is. Because the foreign affairs power is vested solely in the federal government, state laws, like the statute of limitations here, can have no more than an incidental effect on U.S. international relations, the court said.

The court looked to two ''legally non-binding'' international agreements to which the U.S. is a party—the 1998 Washington Conference Principles on Nazi Confiscated Art and the 2009 Terezin Declaration on Holocaust Era Assets and Related Issues—to inform its analysis of U.S. foreign policy in the field. The court summarized U.S. policy in six principles:

- respect for the finality of ''appropriate actions'' taken by foreign nations to restitute plundered art;
- a pledge to identify and publicize Nazi-looted art that has not yet been returned, in order to facilitate pre-war owners;
- encouragement of pre-war owners and their heirs to step forward and claim art that hasn't yet been returned;
- efforts to achieve expeditious, just and fair outcomes for such claims;
- general encouragement for everyone, including public and private institutions, to follow the Washington Principles; and
- a recommendation that every effort be made to remedy consequences of forced art sales.

Based on these principles, the court held that not only was there ''an absence of conflict between Von Saher's claims and federal policy, but we believe her claims are in concert with that policy.''

O'Donnell said this is the ''first case to determine that the Washington Conference Principles on Nazi stolen art are themselves the foreign policy of the United States and that private claims for restitution are consistent with that policy.''

The determination has obvious implications for statutes of limitations in other states, but O'Donnell believes that it could also have broader implications.

''Many of these kinds of cases have fallen on prudential defenses. Courts may now allow these claims to go to the merits, rather than applying prudential defenses, in order to apply U.S. foreign policy,'' he said.

Peculiar Path to Pasadena. The paintings at issue here were created in 1530 by Lucas Cranach the Elder. They hung in a church in Kiev until their confiscation by Soviet authorities in 1927, and in 1931 were sold at a Berlin auction, where Goudstikker bought them.

After Goudstikker and his family fled the Netherlands in 1940, the paintings were ''bought'' by Hermann Göring in an illegal sale, the court said. After the war, the paintings were recovered by the U.S. and returned

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to the Netherlands to be restituted according to their own internal procedures.

The Dutch government, however, characterized the sale of the Goudstikker assets as ''voluntary,'' and Goudstikker's wife (Goudstikker had died on the ship escaping the Netherlands in 1940) determined that requesting restitution of the confiscated art would be fruitless, the court said.

In 2004, Von Saher—Goudstikker's granddaughter and the sole heir—finally won restitution of all of the Goudstikker art still in the possession of the Netherlands. By this time, however, the Cranach paintings were no longer in Dutch possession. They had been sold in 1966 to George Stroganoff, who claimed that the paintings had been illegally confiscated from his family by the Soviets. The Museum bought the paintings in 1971.

Acts of State. Although the court reversed the dismissal of Von Saher's claim, it instructed the lower court to examine whether her claim implicates the act of state doctrine, which requires U.S. courts to respect the acts of a foreign sovereign within its own borders.

Because Von Saher seeks to quiet title in the paintings that the Museum claims through a chain leading back to the Dutch sale to Stroganoff in 1966, ''it becomes important to determine whether the conveyance to Stroganoff constituted an official act of a sovereign.'' The court indicated several ways in which the doctrine might apply, but also listed several potential exceptions, including the commercial exception.

Kaye expressed confidence that Von Saher would be able to overcome the doctrine. He called the doctrine ''discretionary'' and highlighted the list of exceptions that the court provided.

O'Donnell was less sure, and said that the doctrine was ''potentially strong for the defendants.'' There were many potential acts of state in this case, both Dutch and Soviet, and there are a lot of factual questions up in the air, he said. He also called it ''interesting'' and ''unusual'' that the court would tee up a potential issue in this manner.

Dissent Favors Finality. Dissenting, Judge Kim McLane Wardlaw focused on the aspects of U.S. foreign policy that favor finality.

''In my view, Von Saher's attempt to recover the Cranachs in U.S. courts directly thwarts the central objective of U.S. policy in this area: to avoid entanglement in ownership disputes over externally restituted property if the victim had an adequate opportunity to recover it in the country of origin,'' she wrote.

This view of U.S. foreign policy was informed by a brief filed by the U.S. Solicitor General with the U.S. Supreme Court, urging it to deny a petition for certiorari in a earlier iteration of this case. In that brief, the Solicitor General expressed the view that the Dutch restitution procedures were ''bona fide,'' and that Von Saher had several opportunities to recover the paintings.

''[W]e lack the authority to resurrect Von Saher's claims given the expressed view of the United States,'' Wardlaw wrote.

The court discounted the value of the brief, however. The brief was filed in relation to a different underlying statute of limitations, and made several assertions that conflicted with ''the complaint, the record before us and the parties' positions,'' the court said. ''It demonstrates that the SG goes beyond explaining federal foreign policy and appears to make factual determinations,'' it said.

The court also said that the status of the paintings was never actually adjudicated, and there was therefore no ''finality'' to respect. Goudstikker's wife never sought their return in a post-war proceeding, fearing futility. Later restitution proceedings only sought return of the art in possession of the Dutch government, but by that time it had already sold the paintings, the court said.

On to Merits? O'Donnell said that the case was likely to go back to the trial court, rather than up on appeal to the Supreme Court. ''The court mostly gets it right,'' he said. He also said that even if the Museum were to appeal, he would be ''surprised'' if the Supreme Court granted certiorari because ''the equities run in the other direction—there's interest in hearing the merits of the case sooner rather than later.''

Kaye indicated that he was eager to get to the merits, as well. ''The case is finally beginning, after seven years,'' he said. He also said that other museums, even those outside of the U.S., have already returned pieces claimed by Von Saher. So far she has recovered more than 40 pieces, although more than 1,000 are still missing, he said.

In a June 6 statement, the Museum said that it ''remains confident that it holds complete and proper title'' to the paintings, and ''will continue to pursue, consistent with its fiduciary duties, all appropriate legal actions'' to defend its rights to them.

Judge Harry Pregerson joined the court's opinion.

Kaye argued for Von Saher.

Fred A. Rowley Jr., Munger, Tolles & Olson LLP, Los Angeles, argued for the museum.

BY NICHOLAS DATLOWE

*Full text at http://www.bloomberglaw.com/public/document/Von_Saher_v_Norton_Simon_Museum_of_Art_No_1255733_2014_BL_158464_*

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