Guggenheim v Lubell

Patty Gerstenblith*

In 1967, Mr and Mrs Lubell purchased a Chagall gouache from a well-known Madison Avenue gallery and displayed the painting in their home for nearly twenty years. In 1986, the Solomon R. Guggenheim Foundation filed suit alleging that the painting had been stolen sometime in the late 1960s and demanding its return.[1] The results of this case have established an important precedent for the jurisdiction which is the home of the most active art market in the United States and, at the same time, have shed some light on the complex interaction between the state and federal court systems within the United States.

The Anglo-American legal system, most often through the mechanism of statutes of limitation, provides that a law suit must be filed within a certain time period from the accrual of the cause of action. Such statutes of limitation apply to suits for the recovery of both real and personal property and, as such, are interwoven with the common law doctrine of adverse possession. This doctrine, more familiar in the context of the recovery of real property, defines the accrual of the cause of action for purposes of the running of the statute of limitation as the time when the claimant's possession becomes open, notorious, hostile and continuous. The underlying policy purpose of these requirements for the accrual of the cause of action is to give notice to the true owner that he or she is in danger of losing title to the property.[2]

In the context of personal property, courts have struggled with the applicability of these same requirements. While these requirements may be well suited to giving the diligent true owner of real property actual or constructive notice of the adverse claim, they do not as clearly accomplish the same objective when personal property is at issue.[3] A series of cases which consider the applicability of the statute of limitation to the recovery of stolen art works has now shaped the contours of this doctrine as it applies to all categories of personal property.

The first such 'modern' case addressing the accrual of a cause of action for replevin of stolen art works was *Menzel v List*.[4] In this decision, the New York Court of Appeals restated the New York rule that the cause of action does not accrue, at least against a good faith purchaser of stolen personal property, until the true owner

* Associate Professor of Law, De Paul University College of Law.

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has made a demand for its return and the possessor has refused the demand. The genesis of this rule is several nineteenth century cases in which it was applied to protect the good faith purchaser from other forms of liability, as for loss or injury to the property, while it is in the possession of a good faith possessor.[5] In *Menzel v List*, however, the New York Court of Appeals applied the 'demand and refusal' rule to a replevin action where the plaintiff, Mrs Menzel, presented a particularly sympathetic scenario because the painting which was the subject of the suit had been stolen by the Nazis during World War II.

The 'demand and refusal' rule has been criticized because, when applied to a replevin action, it may result in less protection for the good faith possessor than for the bad faith possessor. The statute of limitation does not run in favour of the good faith possessor until after the demand and refusal have occurred, while the statute will run in favour of the bad faith possessor from the time of the theft.[6] Nonetheless, the decision in *Menzel v List* clearly engrained the 'demand and refusal' rule in the New York approach to the definition of the accrual of the cause of action for the recovery of stolen property.[7]

In 1980, the New Jersey Supreme Court, wrestling with the same issue in the *O'Keeffe v Snyder* decision, fashioned a new approach.[8] It held that the cause of action would not accrue until the true owner had notice of the location of the stolen property or reasonably should have attained such notice through due diligence. This rule put the burden on the true owner to establish that he or she had used due diligence in searching for the property. This approach was very attractive because it appealed to a sense of equity and the need to balance the rights of the original owner and the adverse claimant. Ironically, however, it put the burden on the true owner, who did not know the location of the property, to show due diligence in searching for the property rather than on the purchaser, who had the property in hand, to demonstrate good faith in the acquisition of the property.

Following the *Menzel* decision, several cases involving disputed title to art works arose in New York but were decided in federal rather than in state court. When federal jurisdiction is based on diversity of citizenship, the federal court is constrained to apply the law of the state in which the federal court sits.[9] The District Court for the Southern District of New York and the Second Circuit Court of Appeals, most notably in *Elicofon*[10] and more explicitly in *DeWeerth v Baldinger*,[11] gradually adopted the New Jersey discovery rule as the rule which the New York state courts would adopt if they were deciding the cases. Although the federal courts could have certified the question to the New York Court of Appeals, they chose not to do so.

It was thus not until the *Guggenheim v Lubell* decision[12] that the issue was returned to its proper forum, the New York state courts,

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for definition of the accrual of a cause of action for replevin of stolen property. The Chagall painting had been in the Museum's collection since its donation by Solomon R. Guggenheim in 1937.[13] Sometime after 1965, the Museum discovered the painting was missing, although this was not certain until approximately 1970 when a complete inventory of the collection was conducted. While the painting was formally 'deaccessioned' in the Museum's records in 1974, the Museum made a tactical decision not to notify any authorities or organizations of the theft on the theory that publicity would drive 'the gouache further underground' and thereby decrease the likelihood of its recovery.[14]

In the interim, Mr and Mrs Lubell had purchased the painting from the Robert Elkon Gallery for $17,000 in 1967. Although they exhibited the painting subsequently at the Gallery, the Guggenheim did not learn of the painting's location until 1985 when a dealer showed a transparency of the painting to a Sotheby's employee who had previously worked at the Guggenheim and thus recognized the painting. In 1986, the Guggenheim made a demand of Mrs Lubell for return of the painting; after her refusal, the museum filed suit in 1987 for its recovery or, in the alternative, for $200,000.

Mrs Lubell's defense at trial relied primarily on the affirmative defense of the statute of limitation which, in New York, bars a claim for replevin of personal property three years after accrual of the cause of action. The trial court granted Mrs Lubell's motion for summary judgment. Relying on *DeWeerth*, the court held that the claim was barred because the Museum's failure to undertake a diligent search to locate the missing painting was unreasonable and that therefore it had delayed unreasonably in making its demand for the painting's return.[15]

The Appellate Division, however, modified, dismissing the statute of limitation defense and concluding that defendant's reliance on a lack of due diligence argument in fact formed the defense of laches. The court distinguished a statute of limitation defense, based on an 'unreasonable delay in making a demand upon a known possessor,' from a laches defense, based on 'lack of diligence in searching for stolen property'.[16] While a claim could not be barred, in the court's opinion, merely by delay in making a demand, the essential ingredient in a laches defense – that of prejudice caused by the delay – could cause such a result. Findings of fact on the questions of prejudice to the defendant caused by the Museum's delay and the reasonableness of the Museum's response to the theft were therefore necessary.[17]. The Appellate Division then certified the question to the Court of Appeals.[18]

The Court of Appeals clearly rejected the *O'Keeffe* 'due diligence' requirement and its adoption by the Second Circuit in *DeWeerth* and reaffirmed New York's own 'demand and refusal' rule. The court clearly placed its imprimatur on the policy of protecting the original owner of stolen art works. Imposition of an 'additional

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duty of diligence before the true owner has reason to know where its missing chattel is to be found' was considered too great a burden.[19] The court expressed its concern that New York not become a haven for stolen art works through the operation of a statute of limitation which might impose an unreasonable burden on the original owner, thus protecting those who traffic in stolen art.[20] The court also cited to the veto of state legislation which would have provided a definitive statute of limitation bar to the recovery of stolen art works once notice of the location of the art works was given through their display in public museums.[21] The court concluded that the burden is more appropriately placed on the potential purchaser of art works to discover the provenance of the art than on the original owner to locate, or even to demonstrate due diligence in attempting to locate, the stolen art.[22]

Nonetheless, the Court of Appeals approved the Appellate Division's reliance on the equitable defense of laches. In this context, the reasonableness of the conduct of both the defendant and the Museum becomes relevant, particularly in determining whether the defendant was prejudiced by the Museum's failure to notify various governmental and private art agencies of the theft. Finally, the Court of Appeals agreed with the Appellate Division that the burden remains on the defendant to prove that the painting was not in fact stolen property.[23]

Even in the short time since the *Lubell* decision, similar issues have arisen in subsequent cases.[24] In *Republic of Turkey v Metropolitan Museum of Art*,[25] the District Court denied defendant's motion for summary judgment in a suit filed by the Turkish government to recover a hoard of objects held by the Metropolitan. Relying on the *Lubell* analysis, the court characterized the appropriate defense as one based on laches and concluded that there were genuine issues of material fact as to the essential element of prejudice caused to the defendant by plaintiff's alleged delay in seeking recovery of the artifacts.[26]

The next case, *Golden Budha Corporation v Canadian Land Company of America*,[27] involved a dispute concerning the ownership of the 'Yamashita Treasure' allegedly buried in the Philippines by the Japanese at the end of World War II, unearthed in 1971 by a treasure hunter and subsequently stolen by various companies associated with Ferdinand and Imelda Marcos.[28] While the plaintiff's complaint was based on several related claims of fraud,[29] the Second Circuit addressed an interesting aspect of the defendants' reliance on a statute of limitation bar. If the defendants acted in bad faith in taking the treasure, then the 'demand and refusal' rule would not operate so as to protect them from suit until a demand had been made and refused. The plaintiff's cause of action thus accrued at the time of the theft and the suit would be barred three years later. To avoid this anomalous result, the Second Circuit was constrained to construe the complaint as alleging that some of the defendants

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acted in good faith so that the cause of action would not accrue until a demand for return of the property had been refused.[30] This illustrates the difficulty which the New York court's formulation of the 'demand and refusal' rule has created. The bad faith possessor is insulated from suit sooner because the cause of action is deemed to have accrued at the time of the theft. The good faith purchaser remains open to suit at any time because the cause of action does not accrue until the demand has been refused. The New York Court of Appeals thus needs at some point to address the apparent resulting inequity.[31]

Finally, *Hoelzer v City of Stamford*[32] involved the ownership of a mural painted as part of the Works Progress Administration on the walls of a Stamford high school in 1934.[33] The mural was removed during renovation of the school in 1970 and inadvertently discarded. A former student found the mural and, through a series of intermediaries, it was given in 1971 on behalf of the United States government, which was not in fact the owner, to Mr Hoelzer, a professional art restorer, to care for and restore. The Board of Education apparently knew of the mural's location by 1980 but made no formal demand for its return until 1986.[34] Hoelzer then claimed ownership and in 1989 filed suit seeking a declaratory judgment to quiet title to the mural on the theory that the City's claim would be barred by the statute of limitation.

The District Court, after first rejecting Hoelzer's claim that the school had abandoned the mural, held that the proper law to apply was that of the state (New York) in which the personal property was located and in which the injury occurred.[35] The District Court, writing before the Appellate Division decision in *Lubell*, applied the due diligence requirement formulated in *DeWeerth*. However, the court noted that while Hoelzer's possession was rightful, he was not a good faith purchaser because he had not given value for the mural. He was not therefore entitled to the protection of the due diligence rule and the City's conduct in allegedly delaying its demand for the mural's return was not unreasonable under the circumstances. The court thus held the City was the proper owner of the mural and dismissed Hoelzer's claim to ownership.[36] On appeal, the Second Circuit, with the benefit of the New York Court of Appeals' decision in *Lubell*, held that there was no due diligence requirement for the City and that Hoelzer could not demonstrate the prejudice necessary to a defense of laches because he had not purchased the mural.[37]

Perhaps the most interesting facet of this case, however, is that its theory, premised on the rules applicable to stolen art works, was not correctly characterized. The legal theory should have been one of bailment, in which the possessor's possession is rightful in its origin and only subsequently is the adverse claim made.[38] In such cases, where the original owner is entitled to assume that the possessor acts on his or her behalf, the need for the possessor to communicate clearly an adverse claim to the owner is particularly empha-

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sized.[39] Although there was some conflicting evidence on this point, Hoelzer's assertion that he owned the mural does not seem to have been clearly communicated to the City until 1986.[40] The fact that Hoelzer brought suit to quiet title within three years of the communication of the adverse nature of his possession seems to have doomed his claim. Not only was the City's claim not barred by the defense of laches, because Hoelzer was not prejudiced by any alleged delay, but it was also not barred by the statute of limitation because three years had not passed from the time the injury had occurred.

Conclusion

The legal issues involved in the recovery of stolen personal property have necessitated vexing policy determinations in the attempt to balance the rights of an injured and innocent owner against the interests of the good faith purchaser. The property rights of an owner deserve legal protection and any trafficking in stolen property should be discouraged. On the other hand, the legitimate expectations of one dealing in good faith should be protected and this may be essential to the viability of commercial transactions. These policy issues become more pronounced when the property at stake is art, unique and valuable from a monetary perspective, but even more so from a cultural and historical perspective. No reliable method for tracing title to art works yet exists and, at the same time, a market for stolen art thrives.

In confronting these questions, courts have at times been swayed by the particularly sympathetic nature of one of the parties or, as Judge Newman noted in his *Hoelzer* concurrence,[41] by the role, whether of owner or possessor, played by a museum in a specific case. Application of either the due diligence requirement or the demand and refusal rule seemed to tilt the balance too far in favour of the original owner because the good faith purchaser, even after a diligent search, could not protect itself from a potential law suit which would effectively never be time-barred. Strict application of the statute of limitation to bar the owner's claim, however, would encourage theft and bad faith dealings.

The New York Court of Appeals in *Lubell* seems to have struck a balance through its characterization of the appropriate defense as one of laches. The need for a full inquiry into the circumstances of each case necessitated by the laches defenses may reduce certainty and increase costs of litigation. Nonetheless, the equitable defense will force a full consideration of the reasonableness of the conduct of *both* parties. Even more significantly, the requirement of showing prejudice caused by any alleged delay will result in a clear distinction between the purchaser who acts in a commercially reasonable manner and in good faith and the purchaser who does not. The laches defense will thus focus a considerable amount of attention on the possessor's conduct which is where it should be. It is the possessor

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who knows the location of the property and who makes the decision whether to deal with the property.

If the reason for protecting the possessor is to protect legitimate commercial expectations, then the possessor must act in a commercially reasonable manner. One who acts in bad faith or with notice of unclear title or without undertaking a search which would be reasonably diligent in light of the character, uniqueness and value of the property involved cannot be said to have relied on good title or to have been prejudiced by any alleged delay on the part of the original owner. The *Lubell* decision underscores this point and, as it is elucidated in subsequent court opinions, this approach should allow the proper balance between these conflicting policy goals to be attained, even in the particularly troublesome art market.

Notes

1 Solomon R. Guggenheim Foundation v Lubell, 153 A.D.2d 143, 550 N.Y.S. 2d 618 (1990), *aff'd* 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S.2d 623 (1991).

2 For general discussion of adverse possession of real property, *see, e.g.*, 3 American Law of Property, section 15.2 (A. Casner, ed. 1952), and, more recently, Helmholz, *Adverse Possession and Subjective Intent*, 61 Wash. U.L.Q. 331 (1983); Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 Wash. U.L.Q. 1 (1986); Merrill, *Property Rules, Liability Rules and Adverse Possession*, 79 Nw. U.L. Rev. 1122 (1985); Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 Wash. U.L.Q. 667 (1986).

3 On the subject of adverse possession of personal property, *see* Gerstenblith, *The Adverse Possession of Personal Property*, 37 Buffalo L. Rev. 119 (1989).

4 22 A.D.2d 647, 253 N.Y.S. 2d 43 (1964), and 49 Misc. 2d 300, 267 N.Y.S. 2d 804 (Sup. Ct. 1966), *modified on other grounds*, 28 A.D.2d 516, 279 N.Y.S. 2d 608 (1967), *modification rev'd*, 24 N.Y.2d 91, 246 N.E.2d 742, 298 N.Y.S. 2d 979 (1969).

5 *See, e.g.*, Gillet v Roberts, 57 N.Y. 28 (1874); Hovey v Bromley, 33 N.Y.S. 400 (S. Ct. 1895).

6 *See, e.g.*, Kunstsammlungen zu Weimar v Elicofon, 678 F.2d 1150 (2d Cir. 1982); Ward, *The Georgia Grind – Can the Common Law Accommodate the Problems of Title in the Art World, Observations on a Recent Case*, 8 J.C. & U.L. 533, 554 (1981–82); Comment, *The Recovery of Stolen Art: Of Paintings, Statues, and Statutes of Limitations*, 27 U.C.L.A. L. Rev. 1122, 1138–40 (1980).

7 The 'demand and refusal' rule is appropriately applied to define the accrual of a cause of action when the possession was rightful in its origin, as in the case of a bailment, and the refusal is necessary to inform the original owner that the possession has become adverse. Until that time the original owner is entitled to assume that the possession is permissive and there is no need to initiate an action for return of the property. *See* Gerstenblith, *supra* note 3, at 148–54.

8 170 N.J. Super. 75, 405 A.2d 840 (1979), *rev'd and remanded*, 83 N.J. 478, 416 A.2d 862 (1980).

9 Erie Railroad v Tompkins, 304 U.S. 64 (1938).

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10 Kunstsammlungen zu Weimar v Elicofon, 536 F. Supp. 829 (1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).
11 658 F. Supp. 688, *rev'd*, 836 F.2d 103 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2823 (1988).
12 153 A.D.2d 143, 550 N.Y.S. 2d 618 (1990), *aff' d*, 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S. 2d 623 (1991).
13 For a summary of the facts, *see* 77 N.Y.2d at 315–16, 569 N.E.2d at 427–28, 567 N.Y.S. 2d at 625–26.
14 *Id.* at 316, 569 N.E.2d at 428, 567 N.Y.S. 2d at 625.
15 *Id.* at 316–17, 569 N.E.2d at 428–29, 567 N.Y.S. 2d at 625–26.
16 153 A.D.2d at 149, 550 N.Y.S. 2d at 622.
17 *Id.* at 149–50, 550 N.Y.S. 2d at 621–22.
18 159 A.D.2d 1032, 554 N.Y.S. 2d 992 (1990).
19 77 N.Y.2d at 320, 569 N.E.2d at 430, 567 N.Y.S.2d at 627. The Court of Appeals at this point perhaps misunderstood or misstated the due diligence requirement. This element only requires that the true owner continue to search for the stolen property and perhaps publicize the search, not that the true owner be diligent about instituting the law suit before knowing the location of the property. On the other hand, the Court of Appeals made a salient point in noting that the definition of 'due diligence' will vary considerably depending on the uniqueness and value of the stolen property, the position of the original owner and, particularly appropriate in this case, an assessment of what conduct is most likely to lead to recovery of the stolen art. *Id.* at 320, 569 N.E.2d at 430–31, 567 N.Y.S. 2d at 627–28.
20 *Id.* at 320, 569 N.E.2d at 431, 567 N.Y.S. 2d at 628.
21 *Id.* at 319, 569 N.E.2d at 430, 567 N.Y.S. 2d at 627.
22 *Id.* at 320, 569 N.E.2d at 430, 567 N.Y.S. 2d at 627.
23 *Id.* at 321, 569 N.E.2d at 431, 567 N.Y.S. 2d at 628.
24 *See* Autocephalous Greek-Orthodox Church v Goldberg, 771 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990). A more recent controversy has arisen between the Boston Museum of Fine Arts and Lafayette College in Pennsylvania concerning an Egyptian pectoral of the Second Intermediate Period which was originally owned by Lafayette and was purchased by the Museum of Fine Arts in 1981 from a dealer. The Museum of Fine Arts filed suit in a federal court to quiet title to the pectoral, relying primarily on its claimed status as a good faith purchaser and the equitable arguments of laches and lack of due diligence on the part of Lafayette. This case may demonstrate whether courts which are not subject to New York law will adopt the *Lubell* equitable defence approach. Museum of Fine Arts v Lafayette College, Civ. No. 91–10922 (D. Mass. 1991).
25 762 F. Supp. 44 (S.D.N.Y. 1990). This case was decided after the Appellate Division decision in *Lubell* but before the New York Court of Appeals decision. The application of the 'demand and refusal' rule and the formulation of the laches defense articulated by the Appellate Division was adopted in *Republic of Turkey*. *Id.* at 46–47.
26 *Id.*
27 931 F.2d 196 (2d Cir. 1991).
28 *Id.* at 198–99.
29 Among these claims was the assertion that if the plaintiff's delay in bringing a suit against the defendant was caused by defendant's fraudulent concealment of the facts necessary to institute the suit, then the statute of limitation would not run so as to bar the suit. *Id.* at 200–201.
30 *Id.* at 201.

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31 This inequity can be resolved through liberal application of the fraudulent concealment theory, discussed in *Golden Budha*, *supra* note 29. If the bad faith of the possessor is considered equivalent to fraudulent concealment, then the law suit will not be time-barred.
32 722 F. Supp. 1106 (S.D.N.Y. 1989), *aff'd*, 933 F.2d 1131 (2d Cir. 1991).
33 For summary of the facts, see 933 F.2d at 1133–35.
34 Hoelzer claimed that he first asserted ownership in 1981. 933 F.2d at 1135. However, neither the District Court nor the Second Circuit considered the potential ramifications of this point for the accrual of the City's cause of action.
35 722 F. Supp. at 1111–12.
36 *Id.* at 1112–14.
37 933 F.2d at 1136–38. Hoelzer would, however, have a claim for just compensation based on his efforts expended in caring for the mural for the many years during which it was in his possession. *Id.* at 1138.
38 This point was briefly mentioned by the District Court but not fully analysed. 722 F. Supp. at 1113.
39 See Gerstenblith, *supra* Note 3, at 148–54.
40 722 F. Supp. at 1109, 1113 and n.37.
41 933 F.2d at 1139. Judge Newman was also the author of the *DeWeerth* decision. 836 F.2d 103 (1987).

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