

NEW YORK COURT OF APPEALS ROUNDUP

FORUM NON CONVENIENS MOTIONS REMAIN SUBJECT TO COURT DISCRETION

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We note with profound sadness the passing of one of the original authors of this column, our dear friend and retired partner Roy L. Reardon. Roy was a giant of the trial bar and a significant contributor to the administration of justice in New York in ways that are too numerous and varied to enumerate here. Writing this column was particularly important to Roy because of the deep respect he had for the Court of Appeals and the pleasure he derived from arguing before its members. Although words are the tools of our trade as trial lawyers, we lack the words to adequately describe what Roy meant to us, to our firm and to the bar.

The Court of Appeals recently addressed the availability of New York as a forum for obtaining justice in a case involving the theft of an Edgar Degas painting stolen by the Nazis during the Holocaust. In *Estate of Kainer, et al. v. UBS AG et al.*, the court affirmed the dismissal of a case on forum non conveniens grounds and, in doing so, reaffirmed that forum non conveniens motions are subject to the broad discretion of the trial court.

The plaintiffs in the case are the estate and 11 putative heirs of Margaret Kainer. Ms. Kainer was the owner of an extensive art collection that was stolen by the Nazi regime in the 1930s when Ms. Kainer lived in Germany. She lived as a refugee in Switzerland during World War II and then relocated to France, where she died in 1968. Among the artwork stolen by the Nazis was a Degas painting titled *Danseuses*.

The defendants include Norbert Stiftung (the Foundation), UBS AG and UBS Global Asset Management (Americas) (collectively, UBS), and the art auction house Christie's, Inc. The Foundation was allegedly provided for in the 1927 will of Ms. Kainer's father to be established if Ms. Kainer died without offspring. Plaintiffs allege that UBS's predecessor created the Foundation as a Swiss entity under UBS control and improperly obtained all of Ms. Kainer's assets. There has been substantial ongoing litigation in Switzerland and Germany among plaintiffs, UBS, the Foundation and other claimed heirs of Ms. Kainer as to their respective alleged entitlement to her assets—including claims concerning a 2012 French certificate of inheritance identifying plaintiffs as Ms. Kainer's lawful heirs and a 1972 German certificate of inheritance identifying the Foundation as the heir to three quarters of the estate of Ms. Kainer's father that was nullified by a German court in 2017.

The Foundation registered the Degas painting as stolen in lost and looted art databases in 2000. Nine years later, Christie's reached out to the Foundation on behalf of a Japanese art gallery that was in possession of the painting and was interested in selling it. The gallery and the Foundation worked out a deal in which they

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entered into a Restitution Settlement Agreement pursuant to which the Foundation renounced its rights to the painting in exchange for thirty percent of the sale proceeds. Christie's then arranged a private sale of the painting in Japan for \$6 million from which the Foundation received \$1.8 million in proceeds. The painting then sold a few days later at a public auction at Christie's in New York for \$10.7 million.

Plaintiffs commenced this action in Supreme Court, New York County in January 2013. They asserted claims against the Foundation, UBS and Christie's, among others, including claims for conversion, unjust enrichment and conspiracy arising out of the 2009 sale of the painting. Defendants moved to dismiss on forum non conveniens grounds, and the non-United States defendants moved to dismiss for lack of personal jurisdiction. While the motions to dismiss were pending, Congress enacted the Holocaust Expropriated Art Recovery Act of 2016 (the HEAR Act) which extended state statutes of limitations in civil cases seeking to recover artwork looted by the Nazis. The trial court did not address the merits of the personal jurisdiction argument but presumed personal jurisdiction and dismissed the claims against the Foundation and UBS on forum non conveniens grounds, dismissed certain claims against Christie's for failure to state a claim, and stayed the remaining claims against Christie's with leave to restore in the event plaintiffs obtained a favorable determination of their ownership rights from the European courts. No. 650026/13, 2017 WL 4922057, at*4,*16 (N.Y. Cty. Oct. 31, 2017).

The Appellate Division, First Department unanimously affirmed. The Court of Appeals granted leave to appeal with respect to the claims against the Foundation and UBS and denied leave with respect to the claims against Christie's on the grounds that the decision was non-final as to the Christie's claims.

In an opinion written by Judge Anthony Cannataro and joined by Chief Judge DiFiore and Judges Garcia, Wilson and Singas, the Court of Appeals affirmed the First Department. Judge Fahey issued a dissenting opinion and Judge Rivera did not take part in the decision. The majority first rejected plaintiffs' claims that the trial court was required to resolve and reject the non-United States defendants' personal jurisdiction arguments before it could consider the forum non conveniens issue.

The majority then addressed the forum non conveniens issue and noted that CPLR 327(a) provides that "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just." The majority explained that the decision to grant or deny a motion on that basis is subject to the trial court's discretion and will not be disturbed as an abuse of discretion if the courts below considered the various relevant factors—even if the appellate court itself would have weighed those factors differently.

The majority acknowledged that if there are special or unusual circumstances favoring acceptance of a suit between non-resident parties, it can be an error of law to exclude consideration of those circumstances. The majority continued on, however, to explain that even when there are special circumstances that impact a compelling state interest, retention of jurisdiction is not mandated when the case has only a tenuous connection to New York. While there are special circumstances present here—including the horrific circumstances of World War II as reflected in the Congressional findings accompanying the HEAR Act and New York's compelling interest in protecting the integrity of its art market and preventing the illicit trafficking of stolen art—the record reflects that the trial court and the First Department engaged in a thorough consideration of the relevant factors and the special circumstances in concluding that the case should be dismissed. The majority accordingly affirmed.

Judge Fahey began his dissenting opinion with two sentences that, whether you agree with the majority or with Judge Fahey's dissent, should be etched into the minds of every lawyer and jurist: "Justice is the only meaningful goal in the resolution of any lawsuit. The law may not always be just, but it does provide a path to justice."

Judge Fahey noted the massive scope of the Nazi's looting and destruction of artwork and the utter horror of the Holocaust. He explained that the focus of any analysis of a forum non conveniens motion should be on justice. He acknowledged that the lower courts did consider the relevant factors but he argued that the special circumstances present here require, in the interests of substantial justice, that New York retain jurisdiction and adjudicate plaintiffs' claims.

It is clear that forum non conveniens motions remain subject to the discretion of the trial court and that the decision to grant or deny a motion will only be disturbed upon a finding of abuse of discretion. While the dissent disagreed with the majority as to whether that standard had been met here, it remains equally clear that focus of the inquiry—and, indeed, any inquiry submitted to a court of law—should be on the interests of substantial justice.

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