

Spencer's Art Law Journal

Edited by Ronald D. Spencer

Editor's Note

This is Volume 2, Issue No. 3 of Spencer's Art Law Journal. This issue contains a single essay, which will become available by posting on Artnet, January 2012. Volume 3, Issue No. 1 will appear in Spring, 2012.

As noted in earlier volumes of this Journal, art law is an amalgam of personal property law, contract, estate, tax and intellectual property law relating to the acquisition, retention and disposition of fine art.

The essay in this issue will tee-up the question of how bona fide purchasers and other owners (donees, heirs and the like) can lose possession and title to the "true" original owner. Answers to some of the questions posed by this essay may come from the New York Court of Appeals later in 2012.

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Judith Wallace

Three times a year issues of this Journal will address legal questions of practical significance to collectors, dealers, scholars and the general art-minded public..

--- RDS

IF THE EXPIRATION OF THE STATUTE OF LIMITATIONS BARS YOU FROM RECOVERING YOUR ART FROM THE CURRENT HOLDER, WHEN THE CURRENT HOLDER SELLS CAN YOU, NEVERTHELESS, RECOVER YOUR ART FROM THE BUYER? AND, ANYWAY, WHEN DID THE STATUTE OF LIMITATIONS BEGIN TO RUN AGAINST YOU?

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Judith Wallace

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This brief essay offers an introduction into the circumstances whereby, under New York law, a good faith purchaser for value or a donee of a gift of art might lose possession (and, effectively ownership) of that art based on an ownership claim of the true (original) owner. – RDS

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Many are aware that one can lose (or gain) ownership of real property by occupying and using land openly and under a claim of right for 10 years.¹ Where real property is concerned, there is a public policy that favors use of land, and under certain circumstances, the law rewards misappropriation if it is sufficiently blatant and persists long enough.

Personal property, however, is treated differently than real property. If personal property has not been transferred or abandoned by the true owner, can a misappropriation ever give rise to legal title after the passage of enough time, simply because the statute of limitations (three years in New York, far shorter than the decade required for adverse possession) has expired? If so, what is required? Just as there are special rules for real property, are there also public policy concerns relating to fine art that are reflected in the law? If so, what are they?

New York law is distinct in this regard. New York law has long been that the expiration of a statute of limitations does not convey good title to misappropriated personal property, and particularly not to artwork. This rule is illustrated by the landmark 1991 case of *Guggenheim v. Lubell*.² In *Guggenheim*, the Court of Appeals, New York's highest court, reaffirmed New York's longstanding rule that the time to raise a claim against a party that possesses property for its return only starts to run when the true owner makes a demand for the property and that demand is refused. The Court of Appeals rejected a statute of limitations defense by the Lubells, collectors who had purchased from a New York gallery a Chagall gouache that had been stolen from the Guggenheim Museum, and who had proudly displayed the Chagall in their home for decades, and lent it to exhibitions in their name. *Guggenheim* is of particular importance in claims relating to art because Court of Appeals explicitly and emphatically rejected a due diligence rule followed in many other states, which calculates the true owner's time to raise a claim to begin from when the true owner did, or could, or should have had knowledge that the art was missing or where it was located, and which often requires the true owner to have exercised due diligence in searching for the missing property. The Court of Appeals discussed at length the policy reasons that this rule applied with special force to claims for artwork, and found that the legislature and Governor had made the policy choice to ensure that New York, through its importance as a cultural center, did not become a haven for stolen artwork.

These issues are once again before the Court of Appeals in a case involving claims to artwork. In January 2012, the Court of Appeals heard oral argument in *Mirvish v. Mott*, a case that concerns the effect of New York's statute of limitations for a claim to misappropriated artwork under *Guggenheim v. Lubell*.³

In 1997, Yulla Lipchitz, the widow of sculptor Jacques Lipchitz (who died in 1973), gave an erotically-themed monumental bronze sculpture entitled *the Cry* to her companion of 20 years. Because the sculpture was 1,000 pounds, it was kept in storage with a New York gallery, rather than the Sutton Place apartment where the couple lived, and so Mrs. Lipchitz made her gift via a handwritten statement inscribed by her on the back of a photograph of the work.

The dispute arose when, after Mrs. Lipchitz's death in 2003, her companion sought to retrieve the sculpture from storage. To do so, he contacted Yulla's executor, Hanno Mott, her son by a prior marriage and a residuary beneficiary of his mother's estate. The executor did not respond to the companion's repeated demands in 2004 and instead secretly sold the sculpture to a buyer in Lichtenstein. The companion sold his interest in the work to Toronto art collector, David Mirvish, who sued the estate and Mr. Mott. He also secured the return of the sculpture to escrow in New York, pursuant to a settlement agreement that provides that the sculpture would be awarded to whomever is deemed to have title. The Surrogate's Court, which handles probate issues, found that the only remaining issue in the dispute was title and determined that the 1997 gift was valid and Mr. Mirvish was the true owner of *the Cry*.

That decision was then reversed by the Appellate Division, the intermediate appeals court in New York. In 1998, Mr. Mott, not knowing of his mother's gift, had arranged to loan *the Cry* to the French government for exhibit at the Tuileries garden adjacent to the Louvre. The Appellate Division held that this loan, and not the 2004 demand and refusal on the executor, started the statute of limitations to run against Yulla Lipchitz's estate and Mr. Mott.

Mr. Mirvish appealed that decision, and the Court of Appeals selected the case as one of only sixty or so discretionary civil appeals it hears each year.⁴ The case presents an opportunity to perhaps reassess and reaffirm New York's demand-and-refusal requirement in the factual context of an alleged conversion where no theft has taken place. The Court of Appeals could confirm whether the policy concerns about becoming a haven for stolen property extend beyond fine art to other kinds of personal property. The court could find that a loan accompanied by a mistaken assertion of ownership is simply not a conversion that could bar later a claim by the true owner. Finally, the court could focus on the atypical factual circumstances of this case, in which *The Cry* is being held in escrow pursuant to a settlement agreement that provides that the sculpture will be delivered to whomever the courts find to have title, and make it clearer that the statute of limitations for conversion is entirely separate from, and irrelevant to, the legal issue of title. We will see what factual, policy and legal issues resonate with the Court of Appeals – and perhaps shed new light on its holding in *Guggenheim* -- when the Court issues its decision later in 2012.

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NOTES

¹ To result in an acquisition of title, adverse possession of real property generally must be (i) hostile and under claim of right; (ii) actual; (iii) open and notorious; (iv) exclusive; and (v) continuous. See, e.g., *Belotti v. Bickhart*, 228 N.Y. 296, 302 (1920); see also N.Y. Real Property Actions and Proceedings Law § 501 et seq.

² 77 N.Y.2d 311.

³ The author, with Gary D. Sesser and Ronald D. Spencer of Carter Ledyard & Milburn LLP, represents the appellant, David Mirvish, in this case.

⁴ See Court of Appeals, 2010 Annual Report of the Clerk of the Court, at p. 7, available at <http://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2010.pdf>. See also CPLR 5601 (appeals as of right); 22 NYCRR 500.22 (discretionary appeals).

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