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Battle over a Monet: The Requirement of Due Diligence in the Lawsuit by the Owner against a Good Faith Purchaser and Possessor

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BATTLE OVER A MONET: THE REQUIREMENT OF DUE DILIGENCE IN A LAWSUIT BY THE OWNER AGAINST A GOOD FAITH PURCHASER AND POSSESSOR

I. INTRODUCTION

According to current estimates, there are over one billion dollars in stolen art at large.[1] Indeed, the President of the International Foundation for Art Research said there has been an "explosion in art thefts" and there is a "worldwide phenomenon of art theft which has reached epidemic proportions."[2] That stolen art is often re-sold countless times and ends up in the hands of an innocent, good faith purchaser who has no actual knowledge that the work of art was originally stolen.[3] Our legal system must be prepared to deal with suits by owners against possessors—lawsuits which may take owners years to initiate and will usually be brought against good faith purchasers.[4] The United States Court of Appeals for the Second Circuit in *DeWeerth v. Baldinger*[5] concluded that the focus should be on the owner's conduct to determine the diligence he used to investigate and pursue his claim.[6]

The better rule would be one which focuses both on the conduct of the owner and the good faith purchaser. Only if courts recognize that the conduct of *both* parties must be analyzed will a rule of law evolve which will protect not only the individual parties but the art world as well.

A. Background Facts

In 1879, the renowned French impressionist painter Claude Monet finished one of his most famous works, "Champs De Ble A Vetheuil" (the "Monet").[7] That work, measuring sixty-five by eighty-one centimeters, shows a wheat field, a village and a tree. To many scholars, historians and art lovers, the Monet represents one of the finest examples of

1. Hamblin, *The Billion Dollar Illegal Art Traffic-How it Works and How to Stop It,* SMITHSONIAN, Mar. 1972, at 16-17.

2. O'Keeffe v. Snyder, 83 N.J. 478, 499, 416 A.2d 862, 872 (1980).

3. *See, e.g.,* Burnham, *The Black Market in Art, reprinted in* J. Merryman & A. Elsen, LAW, ETHICS AND THE VISUAL ARTS: CASES AND MATERIALS 6-182 (1979).

4. DeWeerth v. Baldinger, 658 F. Supp. 688, 694-95 (S.D.N.Y. 1987).

5. 836 F.2d 103 (2d Cir. 1987), *cert. denied,* 108 S. Ct. 2823 (1988).

6. *Id.* at 110-11.

7. *DeWeerth,* 658 F. Supp. 688, 690 (S.D.N.Y. 1987).

French impressionism, a school of art which flourished in the late nineteenth century.[8]

In 1910, the Monet was purchased by a German art collector, Karl Von Der Heyt. In 1922, his daughter, Gerda Dorothea DeWeerth ("DeWeerth"), inherited the Monet from her father. Between 1922 and 1943 the Monet hung on the wall of DeWeerth's private residence in the northern part of Germany.[9]

Unfortunately DeWeerth, like many other German art collectors, was forced to relocate her collection once the collapse of the German Third Reich became inevitable. As a result, DeWeerth sent the Monet to her sister, Gisela von Palm, in southern Germany for safekeeping.[10]

In 1945, after the end of World War II, American soldiers were quartered in von Palm's residence. After their departure, von Palm noticed that the Monet had disappeared.[11] Soon after, in the fall of 1945, von Palm reported the disappearance of the painting to her sister.[12]

Upon hearing of the loss of the Monet, DeWeerth took various steps to obtain its return. First, in 1946, she filed a report with the military government administering the northern German provinces after the war. However, there is no evidence that any investigation resulted from that report.[13] Second, in 1948, she wrote a letter to her lawyer asking if anything could be done to obtain the return of the Monet.[14] However, despite her written request, the lawyer undertook no efforts to facilitate the return of the Monet.[15] Third, DeWeerth sent a picture of the Monet to a historically renowned art professor and asked him to investigate the painting's whereabouts. He responded that the single photograph was insufficient evidence and refused to pursue the matter further.[16] Finally, in 1957 DeWeerth sent a list of artwork, including the Monet, that she had lost during the war to the West German Federal Bureau of

8. *DeWeerth,* 836 F.2d at 104. Indeed, from Monet's early work "Impression: Sunrise, LeHavre," the term "impressionism" was coined. *Id.*

9. *Id.*

10. *Id.* at 105.

11. *Id.* The District Court "inferred" that either those soldiers or someone else stole the Monet from the von Palm castle. *DeWeerth,* 658 F. Supp. at 690.

12. *DeWeerth,* 836 F.2d at 105.

13. *Id.* The fact that no effort was made to investigate this particular report is not surprising since it was only one of literally millions received after the Second World War. *Id.*

14. *Id.* In particular, DeWeerth was primarily concerned whether her insurance would cover the disappearance of the Monet. *Id.* The lawyer responded that insurance would *not* cover DeWeerth's loss. *Id.*

15. *Id.*

16. *DeWeerth,* 836 F.2d at 105.

Investigation.[17]

Unfortunately, none of DeWeerth's efforts during the period of 1945 to 1957 to locate the Monet were fruitful.[18] Thereafter, DeWeerth made no further attempts to recover the Monet until after 1980.[19]

The Monet suddenly reappeared in the art world in 1956. In December, 1956, a New York City art gallery, Wildenstein & Company, obtained the Monet on consignment from Francois Reichenbach, an art dealer from Geneva, Switzerland.[20] After being shown to several potential purchasers, the Monet was eventually purchased in June 1957, by Edith Baldinger ("Baldinger") for $30,900.00.[21] It was undisputed that Baldinger was a "good faith" purchaser.[22]

Since 1957, the Monet was shown at public exhibitions, once in 1957, and again in 1970.[23] With the exception of those two occasions, the Monet continuously hung in Baldinger's private residence in New York City.[24]

Sometime in 1980, DeWeerth learned from a nephew living in America that the Monet had reappeared.[25] DeWeerth was eventually able to identify Baldinger as the possessor of the painting.[26] Thereafter, DeWeerth demanded, and Baldinger refused, the return of the Monet.[27]

Subsequently, DeWeerth filed suit against Baldinger to compel the return of the Monet, then valued at over $500,000.[28] The main issue the court considered was whether DeWeerth, who claimed ownership of stolen personal property in a suit against a good faith purchaser, had exercised due diligence in attempting to locate the property thereby tolling

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17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* Defendant Baldinger has also filed a cross-complaint and named Wildenstein as a third-party defendant in the suit brought by DeWeerth.

21. *DeWeerth,* 836 F.2d at 105. Thereafter, Wildenstein paid a commission to Reichenbach. *Id.*

22. *Id.*

23. *Id.* The first occasion was a weekend benefit showing of the Monet at the Waldorf-Astoria Hotel in 1957; the second occasion was a month long exhibition of the Monet in the summer of 1970 at Wildenstein's New York Gallery. *Id.*

24. *Id.*

25. *Id.* By happenstance, the cousin noticed the Monet in question in an art catalog and recalled that it had been stolen from DeWeerth during World War II. *Id.*

26. *DeWeerth,* 836 F.2d at 106. DeWeerth filed suit against Wildenstein to compel the disclosure of who had, in fact, purchased the Monet. *Id.* Wildenstein was subsequently forced by court order to name Baldinger as the possessor of the Monet. *Id.*

27. *Id.* The demand letter by DeWeerth was dated December 27, 1982; the refusal letter by Baldinger was dated February 1, 1983. *Id.*

28. *Id.* The instant action was filed on February 16, 1983. *Id.*

the statute of limitations.[29]

Baldinger asserts that DeWeerth's action was "untimely" because the delay between the painting's disappearance in Europe in 1945 and DeWeerth's demand for its return in 1982 was unreasonable.[30] DeWeerth responded that she could not be charged with unreasonable delay before learning the identity of Baldinger in 1982 because she could not have known to whom to make the demand.[31]

B. The District Court Decision

At trial, the defendant, Baldinger, argued that the plaintiff's claim should be barred both by laches[32] and the statute of limitations governing actions for replevin[33] because of DeWeerth's long delay in asserting her claim.[34]

Baldinger maintained that DeWeerth "did little to locate the Monet and nothing to publicize her loss."[35] As a result, Baldinger argued that DeWeerth's claim was barred by her own lack of diligence in investigating and pursuing her cause of action.[36]

After a lengthy bench trial, the district court ruled in favor of DeWeerth.[37] The district court concluded that, under New York law,[38] DeWeerth was only required to bring suit within three years of her demand and the refusal *by Baldinger* to return the Monet.[39] Since DeWeerth satisfied that requirement, the lower court determined that

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29. *Id.*

30. *Id.* at 107.

31. *DeWeerth,* 836 F.2d at 107.

32. *DeWeerth,* 658 F. Supp. at 693. The defense of laches is composed of four elements which must be established by the defendant:

> (1) conduct on the part of the defendant . . . for which the complainant seeks a remedy;
> (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute a suit;
> (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and
> (4) injury or prejudice to the defendant in the event that relief is accorded to the complainant or that the suit is not held to be barred.

Dedvukaj v. Madonado, 115 Misc. 2d 211, 214, 453 N.Y.S.2d 965, 968 (citing 36 N.Y. Jur., Limitations & Laches, § 153 at 141 (1964)).

33. *DeWeerth,* 658 F. Supp. at 693.

34. *Id.*

35. *Id.* at 694.

36. *Id.*

37. *Id.* at 698.

38. *DeWeerth,* 658 F. Supp. at 692-93.

39. *Id.* at 696.

DeWeerth was entitled to the return of her stolen property.[40] Baldinger appealed.[41]

C. *The Appellate Court Decision*

The Court of Appeals for the Second Circuit reversed the district court's ruling.[42] The appellate court ruled that DeWeerth's efforts were insufficient to constitute the requisite due diligence that a person who claims ownership of stolen personal property must establish in a suit against the good faith purchaser.[43]

Most importantly, the appellate court concluded that the inquiry had to focus on the conduct of DeWeerth and not the actions by Baldinger.[44] In particular, the appellate court concluded that, under New York law, "an owner's obligation to make a demand without unreasonable delay includes an obligation to use due diligence to locate stolen property."[45]

The appellate court concluded that DeWeerth's "minimal investigation,"[46] combined with her failure to utilize several mechanisms to locate stolen art after World War II[47] and her failure to publicize her loss,[48] did not constitute due diligence and thus ruled in favor of Baldinger.[49] Accordingly, the Second Circuit allowed Baldinger to retain possession of the Monet.[50]

II. ANALYSIS

The Second Circuit decision in *DeWeerth* exemplifies the trend among American courts in cases involving stolen chattels to focus on the conduct of the owner and not on the conduct of the possessor.[51] The dispute between these principles has been characterized as the conflict between applying the "discovery rule" and the "doctrine of adverse possession."[52]

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40. *Id.*
41. *DeWeerth,* 836 F. Supp. at 103.
42. *Id.* at 112.
43. *Id.*
44. *Id.* at 109.
45. *Id.* at 110.
46. *DeWeerth,* 836 F. Supp. at 111.
47. *Id.*
48. *Id.* at 111-12.
49. *Id.* at 112.
50. *Id.*
51. *DeWeerth,* 836 F. Supp. at 112.
52. O'Keeffe v. Snyder, 83 N.J. 478, 492-93, 416 A.2d 862, 866-67 (1980).

A. The Discovery Rule

In order to determine when the statute of limitations begins to run, the court must decide when the cause of action accrues.[53] In particular, under the governing New York law, the applicable three-year statute of limitations does not commence until a demand is made for the painting's return and the demand is refused.[54] However, "a party may not unreasonably delay in making a demand which starts the running of the limitations period."[55] The question of what constitutes a reasonable time to make a demand depends upon the circumstances of the case.[56]

One of the main purposes of a statute of limitations is to "stimulate to activity and punish negligence" and promote repose by giving security and stability to human affairs.[57] A statute of limitations achieves those purposes by barring a cause of action after the statutory period.[58] In *Riddlesbarger v. Hartford Insurance Company*[59] the United States Supreme Court noted that:

> Statutes of limitation are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original that it has ceased to subsist. This presumption is made by those statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth.[60]

However, in certain instances, courts have ruled that the literal lan-

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53. "A cause of action comes into existence and thereby accrues when all the elements necessary to establish . . . liability occur." Comment, *The Revolution of Illinois Tort Statutes of Limitation: Where Are We Going and Why?*, 53 CHI-KENT L. REV. 673, 675 n.17 (1977).

54. N.Y.C.P.L.R. § 214(3)(1976). That section provides, in pertinent part, that "[t]he following actions must be commenced within three years . . . an action to recover a chattel or damages for the taking or detaining of a chattel."

55. *DeWeerth*, 658 F. Supp. at 694, (citing Kunstsammlungen ZuWeimar v. Elicofon, 536 F. Supp. 829, 849 (E.D.N.Y. 1981)).

56. *DeWeerth*, 658 F. Supp. at 694.

57. Wood v. Carpenter, 101 U.S. 135, 139 (1879).

58. *Id.* (*See also* Rosenau v. City of New Brunswick, 51 N.J. 130, 136, 238 A.2d 169, 172 (1968) (statutes of limitation serve to "stimulate litigants to prosecute their claims diligently . . . they penalize dilatoriness and serve as measures of repose")).

59. 74 U.S. 386, 390 (1919).

60. *Id. See also* Basque v. Yuklun Liau, 50 Haw. 397, 399, 441 P.2d 636, 637 (1968) (presumption that people do not voluntarily delay in prosecuting genuine claims).

guage of a statute of limitations should yield to other considerations. For example, to avoid harsh results from the mechanical application of the statute, the courts have developed a concept known as "the discovery rule."[61] The discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and investigation should have discovered, facts which form the basis of a cause of action. The rule is essentially a principle of equity, the purpose of which is to mitigate unjust results that otherwise might flow from strict adherence to a rule of law.[62] The discovery rule is designed to allow courts

> to balance the equities between plaintiff and defendant to determine whether the cause of action may be asserted after the limitations period, as measured from the date of the wrongful act, has expired. In applying the rule, the defendant's interest in being free from false or fraudulent claims is balanced against the plaintiff's interest in having his valid claim heard on the merits. Courts also consider the increased difficulty of proof resulting from the passage of time: "Where the passage of time does little to increase the problems of proof, the ends of justice are served by permitting plaintiff to sue within the statutory period computed from the time at which he knew or should have known of the existence of the right to sue." Finally, the court examines the hardship to the plaintiff in having his claim barred when he was faultlessly ignorant of his ability to sue. When the balance of these factors is struck in favor of the plaintiff the statute of limitations will not be held to bar the assertion of the cause of action.[63]

The germinal cases involving the discovery rule relate to medical malpractice.[64] For example, in one case a wing nut was left in a patient's abdomen following surgery and was not discovered for three years.[65] In that case, the court held that fairness and justice mandates that the statute of limitations should not have commenced running until the plaintiff knew or had reason to know of the presence of the foreign object in her body.[66]

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61. PROSSER AND KEETON, THE LAW OF TORTS (5th ed. 1984), § 30 at 165-68; 51 AM. JUR. 2D *Limitation of Actions*, § 146 at 716.

62. *O'Keeffe*, 83 N.J. at 495, 416 A.2d at 869.

63. Comment, *The Recovery of Stolen Art: of Paintings, Statues and Statutes of Limitation*, 27 U.C.L.A. LAW REV. 1122, 1151 (1980) (citations omitted).

64. *O'Keeffe*, 83 N.J. at 494, 416 A.2d at 870.

65. Fernandi v. Strully, 35 N.J. 434, 173 A.2d 277 (1961).

66. *Id.* at 439, 173 A.2d at 277.

Increasing acceptance of the principle of the discovery rule has extended the doctrine to contexts unrelated to medical malpractice: negligent installation of an underground water conduit;[67] negligent surgery;[68] amendment of a complaint against a corporate subsidiary;[69] and negligent construction of a new home.[70]

Applying the discovery rule to stolen chattel, the statute of limitations begins to run when the owner knows or reasonably should have known of his cause of action and the identity of the possessor of the chattel. Subsequent transfers of the chattel are viewed as simply part of the continuous dispossession of the chattel from the original owner.[71] Advocates of the discovery rule would assert that history, reason and common sense support the conclusion that the expiration of the statute of limitations bars the remedy to recover possession and also vests title in the possessor.

Indeed, under the discovery theory, before the expiration of the statute, the possessor has both the chattel and the right to keep it except as against the true owner. Accordingly, the only imperfection in the possessor's right to retain the chattel is the original owner's right to repossess it. Once that imperfection is removed, the possessor should have good title for all purposes.[72] As commentator Dean Ames wrote: "An immortal right to bring an eternally prohibited action is a metaphysical subtlety that the present writer cannot pretend to understand."[73] Recognizing a metaphysical notion of title in the owner would be of little

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67. Diamond v. New Jersey Bell Telephone Co., 51 N.J. 594, 242 A.2d 622 (1968).

68. New Mkt. Poultry Farms, Inc. v. Fellows, 51 N.J. 419, 241 A.2d 633 (1968) (discovery rule applicable to negligently prepared survey discovered eleven years after the act).

69. McCoy Co., Inc. v. S.S. Theomiter III, 133 N.J. Super. 308, 366 A.2d 80 (Law Div. 1975).

70. Rosenau v. City of New Brunswick, 51 N.J. 130, 238 A.2d 169 (1968).

71. The important point is not that there has been a *substitution* of possessors, as an effect of the expiration of the statute of limitations. Rather, contrary to the theory of adverse possession, the effect has been not only to bar an action for possession, but also to vest title in the possessor. One commentator explains the historical reason for construing the statute of limitations as barring the right of title as well as an action for possession:

> The metamorphosis of statutes simply limiting the time in which an action may be commenced into instrumentalities for the transfer of title may be explained perhaps by the historical doctrine of disseisin which, though more customarily applied to land, was probably originally controlling as to chattels also. By this doctrine the wrongful possessor as long as his possession continued, was treated as the owner and the dispossessed occupant considered merely to have a personal right to recapture his property if he could.

Brown, *infra* at note 77, § 4.1 at 34. *See* 3 Am. Jur. 2d, *Adverse Possession*, § 202 at 290-92; 3 *American Law of Property*, § 15.16 at 834.

72. Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 313, 321 (1890).

73. *Id.* at 319.

benefit to him or her and would create potential problems for the possessor and third parties.

If the court were to apply the discovery rule in *DeWeerth,* the burden of proof would be on the owner, here DeWeerth, the one seeking the benefit of the rule, to establish facts that would justify tolling the statute of limitations. Applying the doctrine to the conduct of DeWeerth, one could easily conclude, as the appellate court did, that DeWeerth failed to make reasonable diligent acts to investigate and pursue her claim.

B. Adverse Possession

Adverse possession, as developed in real property law, serves as a method for transferring interests in land without the consent of the owner. The theory rests upon social judgments that the time for asserting claims should be limited, and that after a reasonable time has passed the person claiming to be the owner should have his possessory interest secured by law.[74] In order to prove adverse possession five elements must be established: possession must be hostile and under claim of right, actual, open and notorious, exclusive and continuous.[75]

With these elements in mind, courts have held that a person who maintains actual, continuous, exclusive, open and notorious possession of a piece of land under a claim of right for the period of time prescribed by statute, not only deprives the owner of his right to remove the possessor from the land, but obtains title against the owner and all others. In this regard, acquisition of title to real and personal property by adverse possession is based on the expiration of a statute of limitations.[76]

However, adverse possession does not create title by prescription apart from the statute of limitations.[77] As a result, to establish title to chattels by adverse possession the rule of law has been that the possession must be hostile, actual, open and notorious, exclusive, and continuous.[78]

If the court in *DeWeerth* decided to apply the doctrine of adverse possession to the instant action, the burden of proof would be on the possessor, Baldinger, to prove the requisite elements of adverse possession.[79] Except for two brief occasions, Baldinger continuously hung the

74. C. SMITH & R. BOYER, SURVEY OF THE LAW OF PROPERTY at 157-58 (1971).

75. Risi v. Interboro Industrial Parks, Inc., 99 A.D.2d 174, 470 N.Y.S.2d 174, 175 (2d Dept. 1984) (citing Belotti v. Bickhardt, 228 N.Y. 296, 127 N.E. 239 (Ct. App. 1920)).

76. SMITH & BOYER, SURVEY at 158-59.

77. R. BROWN, THE LAW OF PERSONAL PROPERTY § 4.1 at 33 (3d ed. 1975).

78. Walsh, *Title by Adverse Possession,* 17 N.Y.U.L.Q. REV. 44, 82 (1939); (*See also* Note, *Developments in the Law; Statutes of Limitations,* 63 HARV. L. REV. 1177 (1950).

79. 54 C.J.S., *Limitations of Actions,* § 87 at 123.

Monet in her private residence[80] and because "courts and commentators have noted that the mere residential display of paintings may not constitute the type of open and notorious possession sufficient to afford notice to the true owner,"[81] the court would likely conclude that Baldinger failed to obtain the Monet pursuant to the doctrine of adverse possession.

C. *Application of Due Diligence or Adverse Possession*

The Court of Appeals for the Second Circuit establishes a standard which, in effect, would require the owner, DeWeerth, to conduct an in-depth, exhaustive investigation to attempt to locate the Monet.[82] However, the court completely ignores the conduct of Baldinger. Even though the appellate court would have reached the same result applying *either* the discovery rule[83] or the doctrine of adverse possession,[84] the failure of future courts to incorporate at least some of the elements of adverse possession into the rationale will result in unjust results in future cases.

It is undoubtedly true that many works of art have had notorious pasts—ranging from simple thefts to battles between nations. As a result, possessors of famous art works certainly are aware of at least the possibility that some past "owner" has at least a claim or an argument for repossession of the art work.

Accordingly, if the Second Circuit's reasoning was followed, those possessors would have no incentive to reveal to anyone that they possessed that particular work of art. Indeed, if it were irrelevant whether the possessor's actions were open and notorious, he would have no incentive to exhibit the piece. He would have every reason *not* to show the art work—since such a course of action could only facilitate the location of works of art by their former owners.

As a result, the better rule would be one which analyzed *both* the conduct of the owner (i.e., did he act with due diligence in investigating and locating the possessor?) and the conduct of the possessor (was his possession open and notorious?).

III. CONCLUSION

While the Second Circuit reached the appropriate result, its reason-

80. *DeWeerth*, 658 F. Supp. at 695-96.

81. Wilomay Holding Co. v. Peninsula Land Co., 36 N.J. Super. 440, 443, 116 A.2d 484 (App. Div. 1955).

82. *Elicofon*, 678 F.2d at 1164 n.25 (citations omitted).

83. *DeWeerth*, 836 F.2d at 103.

84. *See supra* at note 78.

ing failed to take into account the conduct of owners of fine pieces of art. Accordingly, a rule taking into account both the conduct of the owner and the possessor would in the long run, be in the interests of the owner, the possessor and the art world in general. Absent courts of law applying such a process, the art collectors of the world will have every incentive to hide from the public's view the world's great art and in the process deny future generations the opportunity to view the art which changed, characterized and exemplified mankind's history. Such an unfortunate result would only serve to harm us all.

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