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Judgment of 21 July 2023 – V ZR 112/22

Today the Fifth Civil Panel of the Federal Court of Justice competent, amongst other matters, for ownership-related claims has ruled that the announcement of missing cultural property on the Lost Art data base's web page, if based upon true facts, does not represent an impairment of ownership and that, therefore, such announcement does not constitute a claim of the present owner against the initiator of the announcement to cause the announcement's deletion.

Facts and Circumstances:

In the year 1999 the plaintiff, who is an art collector, acquired the painting “Calabrian Coast” (Kalabrische Küste) of the painter Andreas Achenbach at an auction in London. During the period from 1931 through 1937, the painting had been in the possession of the gallery Stern in Düsseldorf, which the Jewish art dealer Dr. Max Stern took over from his father at that time. Already in the year 1935 he was banned from any further exercise of his profession by the Third Reich's Imperial Chamber of Fine Arts (Reichskammer der bildenden Künste); however, this order was not implemented initially. In March 1937 Dr. Stern sold the painting to an individual from Essen. In September 1937 he was ultimately forced to give up his gallery, whereupon he emigrated over England to Canada. His estate is managed by a Canadian trust whose trustees are the defendants.

In June 2016 an announcement of missing cultural property regarding the painting was published on the Lost Art Database's website at the behest of the defendants. This database, which is operated by a foundation based in Magdeburg, documents cultural property that their particularly Jewish owners were dispossessed of due to National Socialist persecution as well as cultural property in cases where such loss cannot be ruled out. The announcement shall serve the purpose of bringing together the former owners or their heirs, respectively, with today's possessors in order to facilitate the finding of a just and fair solution regarding the whereabouts of the respective cultural property. In the course of an exhibition of the painting in Baden-Baden the plaintiff was informed about the announcement of missing cultural property and an Interpol search for the painting which had been caused in Canada. The plaintiff feels that his ownership of the painting is impaired by its entry in the Lost Art Database and the Interpol search.

Previous Proceedings:

The plaintiff demands of the defendants to desist from asserting the ownership of the painting. Alternatively, he requests that the defendants be ordered to cause the deletion of the announcement of missing cultural property in the Lost Art data base. The action has remained unsuccessful at the regional court and higher regional court. With the appeal on points of law admitted by the higher regional court, the plaintiff continues to pursue his claim for relief.

Ruling of the Federal Court of Justice:

The Federal Court of Justice has rejected the plaintiff's appeal on points of law. The ruling is based upon the following considerations:

The plaintiff is not entitled under section 1004 (1) sentence 2 German Civil Code (Bürgerliches Gesetzbuch, BGB) to claim the forbearance demanded with his main request, as the defendants have not asserted the ownership of the plaintiff's painting. The factual assessment by the appellate court that the announcement of the missing painting on the Lost Art data base's web page as well as the Interpol search for the painting merely established a connection to the previously existing ownership of Dr. Max Stern without any present assertiveness of ownership, cannot be objected. The announcement on the Lost Art data base's web page serves the purpose of bringing together the former owners or their heirs, respectively, and the current proprietors of cultural property in order to assist them with developing a just and fair solution in the meaning of the Washington Declaration from 1998 on the handling of artworks that went missing during the National Socialist era. On this basis, the appellate court rightly assumes that the announcement of the missing painting merely refers to the former ownership of this artwork and to the circumstances that resulted in its loss; a statement regarding the present ownership or possible related claims is neither included, nor intended.

The same also applies to the painting's entry into the Interpol search data base, as the only fact reported was the loss of the painting on 13 November 1937 in Düsseldorf. This notice, too, does not include any statement to indicate that the defendants considered or presented themselves as the painting's owners according to the present legal situation. The fact that the plaintiff, in case he transferred the painting to Canada or the United States of America, might have to fear police measures restricting his power of disposal in regard of the painting, merely results from the circumstance that the legislations of individual states attach different legal consequences to the persecution-related loss and subsequent acquisition of cultural property. Even if the defendants had deliberately taken advantage of this circumstance, their notice did not constitute an assertiveness of ownership, because it solely contains (true) facts regarding the occurrences of the year 1937, whereas the legal assessment of such occurrences is left to the authorities or the courts, as the case may be.

Neither is the plaintiff entitled to the claim under section 1004 (1) sentence 1 BGB to cause the deletion of the announcement of missing cultural property in the Lost Art data base, which the plaintiff demands with his auxiliary request. For the announcement of missing cultural property on the Lost Art data base's web page, if based upon true facts, does not represent an impairment of ownership in the meaning of this provision and, therefore, is not to be considered as an announcement to cause the announcement's deletion. As explained above, the allocation of ownership is not contested by the announcement and the owner's power of disposal is, at least from a legal perspective, not restricted. Furthermore, objective information about a suspected loss of cultural property due to National Socialist persecution, if based upon true facts, does not impair ownership-related rights for these alone, that normally the person concerned will have to accept the assertion and dissemination of true facts, even if these are unfavourable for him or her. The legitimate interest of previous owners of cultural property or their legal successors as well as the general public interest in the provenance of cultural property, which their former owners had been dispossessed of in the course of National Socialist persecution, will prevail, as a general rule, the present owner's interest to keep these facts confidential, as such interest is based solely on economic considerations. Whether an impairment of ownership has to be assumed in case false, market-relevant facts are asserted or value-creating factors are misrepresented in relation to a certain matter, is questionable; this issue, however, did not require a final decision, as it is not the plaintiff's intention to ward off unfounded averments in respect of the painting. Pursuant to section 44 sentence 1 no. 1 German Cultural Property Protection Act (Kulturgutschutzgesetz), the circumstances under which the painting was sold in the year 1937 at least give rise to the assumption that its previous ownership had been dispossessed of the painting due to National Socialist persecution. Therefore, the announcement of missing cultural property in the Lost Art data base only publicises what has to be assumed anyway in view of the sale's known circumstances and what requires further clarification, at least in case the painting is placed on the market for commercial purposes.

In contrast to the opinion of the appeal, an impairment of ownership can neither be substantiated with the argument that maintaining the announcement in the Lost Art data base would result in an unlawful condition. Entries and announcements in regard to cultural property in the Lost Art data base, indeed, are to be considered as governmental information acts; so in case the publication purpose is exceeded either a claim to remedial action under public law enforceable in administrative proceedings or, as meanwhile the data base is operated by a private-law foundation, a claim for cancellation under civil law according to the principles of the so-called Verwaltungsprivatrecht (rules for private-law transactions of public bodies) could be considered. However, such claim could be directed only against the foundation in its function as data base operator, but not against the defendants as mere initiators of the announcement. If the state arranges for an internet data base, where lost and found announcements of individuals regarding cultural property are published, then the state or, respectively, the foundation established by the state to act as data base operator is responsible to ensure that the published announcements will remain within the limits that are imposed on governmental information acts by public law and, particularly, by the constitutional rights, here the rights of the owners of the paintings concerned. The data base operator decides whether an announcement will be published and if or when it will be deleted. It is within the data base operator's responsibility to monitor the continuous compliance with the publication purpose and to ensure that the maintenance of a publication can still be justified to the owner of the artwork. Therefore, if the ownership of an artwork is impaired by maintaining an announcement, the responsibility lies with the foundation alone. Whether such impairment of ownership is existent here did not require a decision, as the action is directed against the defendants as the initiators of the announcement.

Lower Courts:

Regional Court Magdeburg – judgment of 27 November 2019 – 2 O 599/18
 Higher Regional Court Naumburg – judgment of 24 May 2022 – 1 U 292/19

Relevant legal provisions:

Section 1004 Claim for removal and injunction

(1) If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.
 (2) ...
 Cultural Property Protection Act (KGSG):

Section 41 General due diligence requirements

(1) Anyone who places cultural property on the market shall be obliged to exercise due diligence in checking whether the cultural property
 1. has been lost;
 2. has been unlawfully imported; or
 3. has been unlawfully excavated.
 (2) ¹The person placing cultural property on the market shall comply with the general requirements to exercise due diligence pursuant to subsection 1 if a reasonable person might assume that one of the offences referred to in subsection 1 has been committed. [...]

Section 42 Due diligence requirements related to the placing on the market for commercial reasons

(1) ¹Anyone who places cultural property on the market in conducting his business shall, in addition to the obligations referred to in Section 41, be obliged

[...]

3. to examine the provenance of the cultural property;

[...]

6. to examine whether the cultural property is registered in publicly accessible registers and databases; and

[...]

²The obligations pursuant to no. 2 of the first sentence shall not affect copyright rules.

³The obligations pursuant to no. 3 through 6 of the first sentence shall be met in compliance with the reasonable effort and the economic reasonableness, in particular.

[...]

Section 44 Increased due diligence requirements related to the placing on the market for commercial reasons

¹If cultural property is placed on the market for commercial reasons, the criteria regarding the reasonable effort pursuant to Section 42 (1), third sentence, shall not apply to cultural property,

1. if it has been proven or is assumed that this cultural property was taken from its original owner between 30 January 1933 and 8 May 1945 due to National Socialist persecution, unless it was restituted to the original owner or his heirs or they have come to a different final agreement regarding the deprivation;

[...]

Karlsruhe, 21 July 2023

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