Vorderasiatisches Museum Berlin Loses World War II Trophy Art Case in New York

First German Cultural Institution to Fail on Claim for Return in United States Court – Zugleich Besprechung von Surrogate's Court of the State of New York, County of Nassau, Urteil vom 30. März 2010 – 328146

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Vorderasiatisches Museum Berlin had never notified authorities of the wartime loss of a valuable gold tablet from what is now Iraq even though Soviet troops were seen taking valuables away from the Museum and the tablet was missing after that. Museum also failed to respond to a potential sighting of the tablet on the New York art market. New York state court judge found Museum's conduct inexplicable and unjustifiable noting that its failure to report or search for its missing tablet extended through the fall of the Berlin Wall and German reunification, extending up to the present day. In a cautionary tale for all German museums to have suffered wartime losses, New York Judge held that holder of the object, estate of deceased man who had purchased it, was prejudiced by evidence that could have been lost over the decades of Museum's neglect.

■ On March 30, 2010, Judge John B. Riordan of the Surrogate's Court of Nassau County, New York, ruled that the Estate of a deceased New York resident could retain possession of a small inscribed gold tablet believed to have been a wartime loss of the Vorderasiatisches Museum in Berlin. The Court ruled that the Museum had delayed unreasonably in notifying authorities or otherwise pursuing recovery of this World War II loss, even failing to respond in the 1950s to information it seems to have received that the tablet might be with a particular dealer in New York City. Judge Riordan was sensitive to the plight of the Museum under Communist times, noting that the Museum failed to pursue the tablet after the Museum had complete freedom of action upon German reunification. Because the Court concluded that the passage of time had unduly prejudiced the Estate's ability to defend itself, especially with the death of the man who purchased the tablet, it awarded the tablet to the Estate. *Matter of Flamenbaum*, File No. 328146 (New York Surrogate's Court March 30, 2010).

This ruling – the first court decision in the United States to go against a German cultural institution in a World War II trophy art case – ends an unbroken string of court victories and settlements going back to recovery of the Quedlinburg Treasures in 1991 and, even before that, to the City of Weimar's successful litigation against a collector who bought a looted painting from U.S. Army veteran. *Kunstsammlung zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982). The decision can be expected to send a chill through the hearts of officials of museums across Germany, particularly those within the territory of the former GDR, who may have been slow to list and publicize their wartime losses.

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Matter of Flamenbaum concerns a tablet found around 1914 by a German archeologist in an excavation of the Ishta Temple in modern-day Iraq. World War I interrupted the tablet's journey to Berlin; not until in 1934 did the tablet go on display at the Museum, only to be placed in storage five years later, with the commencement of World War II. In the immediate aftermath of the War, Soviet troops were seen carrying objects away from the Museum, and the tablet could not be found when Museum officials later returned.

Although a 1945 Museum inventory reflects the loss, Museum officials never reported the disappearance to Berlin, Allied or German authorities. (Soviet authorities returned other objects, but not the tablet, to the Museum in 1957.) Nor, with increasing interest in the area of trophy art since the mid-1990s, did the Museum report its loss to Interpol, the Art Loss Register, or even to www.lostart.de, where the Koordinierungsstelle Magdeburg maintains a database of cultural objects displaced during World War II. The Museum director testified, but did not present the judge with a credible explanation for the Museum's failure to report loss of the tablet, to seek its return or to follow up on a lead it received in 1954 that the tablet was seen with a particular dealer in New York.

No court testimony explained the exact manner in which the tablet reached American shores, although other German museum losses have come through the hands of Russian émigrés or *via* criminal networks. The tablet was found among the possessions of Riven Flamenbaum, a Polish-born survivor of Auschwitz. One of his children alerted the Museum to the presence of the tablet in Flamenbaum's Estate; rather than sue the Estate in U.S. federal court, the Museum elected to intervene before the Surrogate's Court which proceeded to rule on the Museum's ownership claim. According to one of his daughters, Flamen-

baum always told his children that he had acquired the tablet from Russians on the black market. Vesselin Mitev, „German Museum Loses Attempt to Reclaim Artifact from Estate," *New York Law Journal*, April 5, 2010, at 17 („German Museum Loses").

Since the case was governed, in the first instance, by New York law, the Estate had no statute of limitations defense; New York allows a claimant three years within which to sue after it has made demand for return of its property and the demand has been refused. Hence, only two serious defenses detained the Court: (1) whether the Museum may have lost title to the tablet through something the Estate and the Court referred to as the „Spoils of War" doctrine; and (2) whether the equitable doctrine of laches barred the Museum's claim, since the Estate claimed to be prejudiced in its ability to mount a defense because of the Museum's unreasonable failure to search for the tablet or to alert the art world to the loss.

I. The Estate's Claim of Title through a „Spoils of War" Doctrine

With regard to the „Spoils of War" argument, the Court noted the bedrock American legal principle that the taking of artwork during wartime is a theft and a thief cannot pass title to stolen property. The Court also recounted that the parties had cited a welter of authorities on the question of whether that rule would be trumped by an elaborate legal construction that a theft occurring on Soviet-occupied German territory might have been subject to some different law. The proposition that a wartime taking of property by Allied soldiers during World War II has never been vindicated by a U.S. court, and, in fact, there have been numerous decisions to the contrary. In 2002, the U.S. Court of Appeals for the Second Circuit (which includes New York) affirmed a criminal conspiracy conviction of a woman from Azerbaijan who had transported to the United States a group of drawings from Baku that had previously been stolen from the Bremen Kunstverein in the aftermath of World War II. *United States v. Aleskerova*, 300 F.3d 286 (2d Cir. 2002).

Since the Court, in the end, decided that the passage of time had hindered the Estate's preparation and presentation of its case on the „Spoils of War" issue, it would seem to have been incumbent upon the Court to determine whether U.S. law would ever condone wartime looting of cultural property. Since the Court failed to rule that there is such a thing as a „Spoils of War" doctrine that the Estate was relying on, it is difficult to understand how the Estate could have been prejudiced by the passage of time with regard to this issue.

II. The Estate's Laches Defense that It Was Prejudiced by the Museum's Delay

The Court's laches analysis is straightforward, if narrow in perspective. The Court notes that the Museum conducted no diligence whatsoever for this particular missing object, but takes no notice of generalized due diligence concerning wartime losses of the Berlin museums, such as the very early recovery actions taken immediately after the War, including repatriations by the U.S. military. With this approach, the Court – as did other New York courts in the face of complete and total inaction by a theft victim with regard to the particular object – easily concludes that the Museum acted unreasonably in failing to report the loss or otherwise pursue recovery of the tablet. *See, e.g., The Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, 1999 WL 673347, 1999 U.S. Dist. LEXIS 13257 (S.D.N.Y. 1999).

The nub of the case, then, was the Court's prejudice analysis. Without ever returning to the question of what evidence might have been lost over time concerning the lawfulness of Soviet trophy taking (which would seem to be a legal and not a factual question), and also ignoring the comments of Flamenbaum's daughter who said she told the Court that her father always said he acquired the tablet from Russians on the black market („German Museum Loses" at 17), the Court nonetheless concluded that the Estate was prejudiced by the Museum's delay: „As a result of the museum's inexplicable failure to report the tablet as stolen, or take any other steps toward recovery, diligent good-faith purchasers over the course of more than sixty years were not given notice of a blemish in the title." *Slip Opinion at 12.* (Worthy of note, the Court seems to assume that a good-faith purchaser can acquire title to stolen art, a maxim of law in continental Europe, but not in the United States.) Also, the Court said: „Riven Flamenbaum's death has forever foreclosed his ability to testify as to when and where he obtained the tablet, [and] has severely prejudiced the estate's ability to defend the museum's related claim to the tablet." *Slip Opinion* at *12.*

The holder of looted art has the burden to prove prejudice by producing specific evidence to show harm caused by the claimant's delay. *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008). Even if a buyer fails to conduct diligence at the time of purchase, in today's world, it should be no surprise that a museum-quality object floating on the black market was available because it had been stolen from a museum. These were the facts in *Sotheby's, Inc. v. Shene*, 2009 WL 762697, U.S. Dist. LEXIS 23596 (SD NY 2009), in which a book scout acquired a rare volume of prints and drawings with Stuttgart museum stamps on every page. A buyer who takes these risks, apparently with no diligence, is entitled to no sympathy or equities.

Unless the Estate has a colorable basis for claiming ownership, it cannot have been prejudiced by any loss of evidence. In addition, if the decedent had purchased a museum-quality object and not preserved evidence of a lawful purchase or of due diligence, that is the fault of his own recklessness, not the delay of the Museum in bringing its claim. Since there was no hint of a good faith purchase sometime in the past, the Estate apparently having no purchase documents or even a narrative other than a black market purchase, and since the Estate would have had no way to establish a valid transfer of title with a wartime looting of cultural property, the question of prejudice appears more difficult than the Court's treatment reflects. ■