

**Art Litigation Dispute Resolution Institute
New York County Lawyers' Association
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**Panel II: Commencing an Action
Part 3: Laches: The Latest Trends**

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I. Background

- A. Although New York has adopted the “demand and refusal” rule in connection with the statute of limitations, a claimant cannot just sleep on his or her rights because conduct will be a factor if the defendant asserts the affirmative defense of laches.
- B. *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 3211 (1991). Court rejects a duty of reasonable diligence by claimant for purposes of the statute of limitations, but holds that it will be considered in the context of a laches defense.

II. Legal Elements

- A. Laches is “an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party.” .
- B. To make out the affirmative defense of laches, party must show that (i) claimant was aware of its right, (ii) claimant delayed unreasonably in taking action, and (iii) defendant suffered prejudice as a result.
 - 1. Burden of proof is on defendant.
- C. Laches is an equitable defense
 - 1. Applies only to claims at equity.
 - 2. Determined by the court, not a jury.
 - 3. Applying laches to bar a claim is entirely within the discretion of the court.
- D. Several federal cases also decided in 1991 shortly after *Guggenheim* reinforced the use of laches rule in New York, including *Golden Budha Corp. v. Canadian Land Co. of America, N.V.*, 931 F.2d 196 (2d Cir. 1991). Plaintiff claimed to be the assignee of a treasure hunter’s interest in a golden budha, gold bullion, jewelry, works of art and coins worth \$600 billion that was allegedly unearthed in the Philippines in 1971. The complaint alleged that the defendants were entities under the control of

Ferdinand and Imelda Marcos that stole the treasure shortly after it was discovered, and that the treasure hunter was first held prisoner, then went into hiding until Marcos departed from the Philippines in 1986. The district court dismissed the complaint on the grounds of the statute of limitations. On appeal the Second Circuit vacated the judgment, finding, among other things, that the lower court improperly disposed of the equitable defenses when there were factual issues.

III. The requirements of unreasonable delay and prejudice

- A. Length of delay is not dispositive; issue is whether the delay was reasonable under the circumstances.
- B. Prejudice may be demonstrated “by a showing of injury, change of position, loss of evidence or some other disadvantage resulting from the delay.” *In re Linker*, 803 N.Y.S.2d 534 (1st Dep’t 2005)(citation omitted).
 - 1. Examples of prejudice:
 - a. Long delay in bringing claim makes it almost impossible to prove that initial transferee of the property acquired good title or made a vigilant effort to make sure the transaction was legal.
 - b. Critical witnesses are no longer alive or their memories have faded.
 - c. Key documents are missing.
 - 2. Rejected as grounds for prejudice:
 - a. Expense and inconvenience.
 - b. Inability to sell the property due to pending lawsuit.

IV. Summary Judgment

- A. Because of the equitable nature of laches, resolution is based on the particular facts and circumstances of the case.
- B. Whether the delay in bringing an action was reasonable and whether claimants were reasonably diligent in searching for their property sounds like quintessential issues of fact that must be resolved at trial.
- C. But in a number of cases, particularly in the past decade, courts have granted summary judgment after finding claimant’s lack of diligence and the resulting prejudice to defendant so apparent that laches can be found as a matter of law.

1. In *Wertheimer v. Cirker's Hayes Storage Warehouse*, 752 N.Y.S,2d 295 (1st Dep't 2002) the court dismissed the complaint on the grounds of laches because the "uncontradicted evidence establishes that for nearly half a century prior to the commencement of this action" the plaintiffs failed to take any action to recover the paintings, thereby prejudicing defendants by making it impossible for them to prove any predecessors acquired good title.
2. In *The Greek Orthodox Patriarchate of Jerusalem v. Christies, Inc.*, No. 98 Civ. 7664(KMW) (S.D.N.Y. Aug. 30, 1999) plaintiff was the Patriarchate, an order of monks seeking to recover a tenth century manuscript which had been in its library since at least the nineteenth century. The manuscript was apparently moved on several occasions, and may have last been in a Patriarchate monastery in Turkey. Sometime in the 1920s the manuscript was acquired by a French civil servant. It remained in his family until the 1990s when it was consigned to Christie's. One week before the auction the Patriarchate told Christie's that it believed itself to be the owner of the manuscript. Defendant moved for summary judgment under both French and New York law, and the court granted the motion, finding that not only was the Patriarchate not diligent, it did not even know the manuscript was missing until it learned about the Christies' auction. The court also found that the delay of almost seventy years in bringing the case prejudiced the family that possessed the manuscript by making it almost impossible to prove ownership.

V. Problems with Laches

- A. Potential unfairness to bona fide purchaser.
- B. Because there are no bright line rules, litigation is likely to be protracted and expensive.

VI. Recent Developments

- A. Surprisingly, the majority of cases surveyed from the past five years have been resolved on summary judgment.
- B. Although it is impossible to draw bright line rules when it comes to laches, some patterns are apparent from the cases over the past five to ten years.
 1. Facts that tend to support a finding that the original owner's claims are barred by laches:

- a. Original owner had contemporaneous knowledge of the loss or alleged theft but did not report the theft or make demands for the return of the property
 - b. Original owner did not take any other steps to recover possession of the property and/or did not engage in conduct consistent with an ownership interest.
 - c. In the case of property that was lost, stolen or sold during the Holocaust, the original owner or immediate heirs did not seek restitution after the war, particularly if the original owner or immediate heirs did seek to recover other wartime damages.
 - d. Passage of 50 or more years with either no attempts or only sporadic, minimal efforts to locate property, or cases in which the claimants first efforts to recover the property is after learning of planned auction or sale of the painting.
 - e. Efforts to locate property only made by remote relatives or heirs several generations removed from original owner.
 - f. Witnesses long-deceased, making it virtually impossible for the possessor to establish that the work was not stolen and that the purchaser from whom they trace title conducted a proper investigation as to whether the seller had good title.
2. There are fewer cases in which laches did not defeat a claim by the original owners. But based on those cases and the factors relied upon by the court in finding a laches defense. The following are facts that may contribute to a finding that a laches defense has not been established:
- a. Original owner reported the theft.
 - b. In the case of works lost during the Holocaust, took steps shortly after the war to locate the missing property, including using diplomatic channels and other post-war procedures.
 - c. List missing or stolen works with appropriate registries, such as Holocaust related databases and making other efforts to publicize ownership.
 - d. Continuing to make significant efforts over time to locate the missing works and expending personal finances to do so, e.g., trips abroad, contacting numerous museums and art galleries.

- e. Immediate heirs of original owner continued to make diligent efforts to locate property.

C. Recent New York Cases

1. *Malanga v. Chamberlain*, No. 38886/05, 2008 WL 3521349 (N.Y. Sup., Kings County, Aug. 13, 2008). Malanga is an artist who alleged that he created 315 square canvas silkscreens which he later stored with the defendant. He commenced this action after learning that the defendant had depicted the silk screens as a genuine Andy Warhol work and sold them for \$5,000,000. When Malanga moved to amend the complaint, the defendant moved for summary judgment, arguing in part that the actions are barred on the ground of laches. The court denied the motion for summary judgment on the ground that there were factual issues that could not be resolved on a motion.
2. *Peters v. Sotheby's Inc.*, 821 N.Y.S.2d 61 (1st Dep't 2006). Plaintiff was the executrix of the estate of Maria Glasser, and brought this action to recover an Edvard Munch painting her husband, Professor Glasser, left in the care of his brother when he fled Germany in the 1930s. The painting eventually came into the possession of a German steel magnate, and in or around 2003 it was sold through Sotheby's to an unknown purchaser. On a motion for pre-action discovery, the Court held that the estate could not make out a claim for conversion, and that even if it could it was barred by the doctrine of laches. The Court found that Professor Glasser had contemporaneous, actual knowledge of the conversion, and not only did not report it as a theft, but in fact attempted to repurchase the painting. Professor Glasser and his heirs failed to assert any claim of ownership in the painting or make a demand for its return for almost 70 years.
3. *Sanchez v. Trustee of the University of Pennsylvania*, No. 04 Civ. 1253(JSR), 2005 WL 94847 (S.D.N.Y. Jan. 18, 2004). Case involved a collection of pre-Columbian gold art objects that the plaintiff's grandfather discovered on his land in Columbia around 1909. The collection disappeared no later than 1920, at which time it was sold to the defendant, a university museum. There was little evidence that the grandfather or his son made any efforts to locate the collection. When the plaintiff immigrated to the United States in 1970 his father gather him photos of the collection and told him to look for it. However, the plaintiff made no efforts to locate the collection until 1985, when he visited the Metropolitan Museum and several art galleries, and on two occasions allegedly attempted to find an attorney to help him. Finally in 2002 he hired an attorney who located the collection in a matter of months. The Court found

that these efforts were “not remotely enough to satisfy the requirements of a diligent search” and granted the museum’s motion for summary judgment. The Court rejected plaintiff’s arguments that his actions were sufficient given his lack of education and low income, stating that the plaintiff could have written letters and asked his local library to help him do some research.

D. Recent Cases In Other Jurisdictions. Outside of New York, laches has not generally been raised in cases seeking the recovery of art. However, laches was asserted as an affirmative defense in three recent cases.

1. *The Detroit Institute of Arts. V. Ullin*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. March 31, 2007). A Vincent Van Gogh painting had been bequeathed to plaintiff in 1969. In 1999 the museum posted the painting on its website, and in 2004 it was contacted by the defendants. Defendants-Counterclaimants alleged that they were the heirs of Martha Nathan, who after fleeing from Germany to France in 1937, sold some of her artwork, including the Van Gogh. The Court dismissed the defendants’ counterclaims, relying in part on the doctrine of laches. Although Mrs. Nathan sought restitution for losses after World War II ended, she never sought damages for the painting, nor did her brother, who as executor of her estate sought additional wartime compensation for the family in an action in 1973. The Court granted the museum’s motion to dismiss the counterclaims, finding that the defendants had unreasonably delayed in asserting a claim to the painting.
2. *Vineberg v. Bissonnette*, 529 F.Supp.2d 300 (D. R.I. 2007). The original owner had an art gallery in Germany. In 1937 the Nazis ordered his son, Dr. Stern, to sell the gallery’s inventory. Dr. Stern fled the country and eventually settled in Canada. After the war he made numerous attempts to locate the art collection, filing claims for restitution and traveling in Europe. One of those works, a 19th century painting, was purchased by a Karl Wilharm, who kept it in his family’s private collection for over 60 years, except for one brief showing in Germany in 1954. The painting surfaced when the defendant, who had inherited the painting in 1959, consigned it for sale in 2003. Claimants learned about the painting shortly before its sale. On a motion for summary judgment, the Court held that Defendant’s laches defense failed because Dr. Stern took significant steps to locate his father’s collection, and because there was no prejudice to the defendant.
3. *Stuart & Sons, L.P. v. Curtis Publishing Co., Inc.*, 456 F.Supp.2d 336 (D. Conn. 2006). Plaintiff brought a declaratory judgment

action to determine ownership of three Norman Rockwell paintings. One of the plaintiffs, Kenneth Stuart, worked at the Saturday Evening Post and took possession of the paintings sometime in the early 1950s. Despite the fact that Stuart openly held himself out as the owner of the paintings, defendants, including companies affiliated with the Saturday Evening Post, did not demand return of the paintings until 2001 when they learned that Stuart was planning to sell the paintings through Sotheby's. On summary judgment the Court construed the defendants counterclaim as one for conversion, and found the claim barred by the statute of limitations, or, alternatively, barred by the doctrine of laches. In finding the claim barred by laches, the court focused on the prejudice to the plaintiffs resulting from the passage of time that made it almost impossible for Stuart to prove he owned the painting, and defendant's unreasonable delay.