State of New York
Court of Appeals

OPINION

No. 76
Estate of Margaret Kainer, &c.,
et al.,
Appellants,
v.
UBS AG, &c., et al.,
Respondents,
et al.,
Defendants.

Robert S. Smith, for appellants.
Marshall R. King, for respondents UBS AG et al.
The Raoul Wallenberg Centre for Human Rights et al., amici curiae.

CANNATARO, J.:

On this appeal, plaintiffs ask us to hold that defendants' motion to dismiss the complaint on forum non conveniens grounds must be denied as a matter of law. We conclude, however, that Supreme Court did not abuse its discretion in granting defendants' motion to dismiss and therefore affirm.

This action involves a dispute over ownership of the proceeds of sale of an Edgar Degas painting entitled *Danseuses* that was stolen from Margaret Kainer by the Nazi regime in the 1930s. After she was dispossessed of her extensive art collection, Kainer, a former resident of Germany, lived as a refugee in Switzerland during World War II, and then relocated to France where she died in 1968. Plaintiffs are Kainer's estate and 11 putative heirs who allege that Kainer's estate passed to them under French intestacy law. Defendant Norbert Stiftung, previously known as the Norbert Levy Stiftung (hereinafter referred to as "the Foundation") is a foundation allegedly provided for in the 1927 will of Kainer's father, to be established in the event that she died without children or grandchildren. Plaintiffs assert that, after Kainer's death, the predecessor of defendants UBS AG and UBS Global Asset Management (Americas) created the Foundation as a Swiss public entity under UBS's direction and control, and improperly obtained all of Kainer's assets. Plaintiffs further allege that the Swiss Canton of Vaud and the City of Pully were determined—based on false claims that Kainer was domiciled in these localities at the time of her death and had no heirs—to be sole legal heirs to Kainer's estate under a Swiss certificate of inheritance. A prior action in Germany between the Foundation and the Swiss localities resulted in a settlement dividing Kainer's estate among those parties.

In 2000, the Foundation, allegedly acting in its capacity as heir, registered the painting as stolen in lost and looted art databases. In 2009, defendant Christie's Inc. contacted the Foundation seeking to facilitate a private sale of the painting by a Japanese gallery. The Foundation entered into a Restitution Settlement Agreement with the gallery in which it renounced its rights to the painting in exchange for 30% of the proceeds from

its sale. Christie's then arranged a private sale of the painting in Japan from which the Foundation received $1.8 million. A few days after the private sale, Christie's offered the painting at public auction in New York where it sold for $10.7 million.

Plaintiffs commenced this action in Supreme Court in January 2013, asserting numerous claims against the Foundation defendants, the UBS defendants and Christie's including conversion, unjust enrichment, and conspiracy based on the 2009 sale of the painting and seeking damages. Defendants moved to dismiss the complaint on forum non conveniens grounds. In the alternative, all defendants except Christie's and the American arm of UBS moved for dismissal based on lack of personal jurisdiction.[1] While the motion was pending, Congress enacted the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act) (*see* Pub L 114-308, 130 US Stat 1524 [114th Cong., Dec. 16, 2016]) which extended state statutes of limitations in civil actions to recover artwork "that was lost [from 1933-1945] because of Nazi persecution" (*id.* § 5 [a]). Supreme Court allowed supplemental briefing with respect to the HEAR Act but plaintiffs did not address or preserve any specific argument regarding the Act's applicability to the propriety of a forum non conveniens dismissal in an action seeking damages.

Supreme Court granted the motions of the Foundation defendants and the UBS defendants to dismiss the complaint on forum non conveniens grounds, partially granted Christie's motion to the extent of dismissing certain causes of action against it for failure

[1] Notably, plaintiffs did not request that Supreme Court condition any forum non conveniens dismissal on the European courts reaching the merits in the pending proceeding, thereby failing to preserve any argument in that regard.

to state a claim, and stayed the remainder of the action against Christie's with leave to restore if plaintiffs obtained a final favorable determination on the question of ownership rights from the European courts. The court declined to address the issue of personal jurisdiction over the Foundation and UBS defendants as a threshold matter, relying upon the U.S. Supreme Court's decision in *Sinochem Intl. Co. v Malaysia Intl. Shipping Corp.* (549 US 422 [2007]). Instead, the court presumed personal jurisdiction over defendants and addressed the merits of their forum non conveniens arguments, concluding that the relevant factors "weigh heavily in favor of a forum non conveniens dismissal." Upon plaintiff's appeal, the Appellate Division unanimously affirmed (175 AD3d 403 [1st Dept. 2019]). This Court granted plaintiffs' motion for leave to appeal as against the Foundation and UBS defendants but dismissed the motion for leave as against Christie's for nonfinality (*see* 35 NY3d 997 [2020]).

As a preliminary matter, plaintiffs assert that the courts below should not have addressed forum non conveniens without first resolving—and rejecting—certain defendants' claims that the court lacked personal jurisdiction over them. Plaintiffs rely upon a statement in this Court's decision in *Ehrlich-Bober & Co. v University of Houston* (49 NY2d 574, 579 [1980]) that "the doctrine [of forum non conveniens] has no application unless the court has obtained in personam jurisdiction of the parties." Plaintiff's reliance on this statement for the proposition that personal jurisdiction must be resolved before a

forum non conveniens argument can be considered is misplaced.[2] This procedural issue was not presented to either the Appellate Division or this Court in *Ehrlich-Bober*, where Supreme Court had, in fact, addressed and credited both grounds for dismissal, concluding that personal jurisdiction was lacking and the action should be dismissed on forum non conveniens grounds. The statement on which plaintiffs rely appears in the procedural history portion of our decision and was simply a description of the Appellate Division decision—in concluding that a forum non conveniens dismissal was not warranted and dismissing on an unrelated ground, the Appellate Division implicitly disagreed with the conclusion of Supreme Court that personal jurisdiction was lacking. We did not hold in *Ehrlich-Bobe*r that a court invariably must resolve any outstanding personal jurisdiction issue prior to addressing forum non conveniens, decline to adopt such a rule in this case, and conclude that the court here did not abuse its discretion in that regard (*see Sinochem*, 549 US at 432).

With respect to forum non conveniens, we reject plaintiffs' arguments that the motion to dismiss should have been denied as a matter of law. CPLR 327 (a) provides that "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just." Generally, "a decision to grant or

[2] Plaintiff has partially abandoned the argument, contending in a self-contradictory fashion that although Supreme Court abused its discretion by declining to first determine whether it had personal jurisdiction over defendants before considering whether dismissal on forum non conveniens grounds was appropriate, this Court should not reach the procedural issue unless we first consider and reverse the determination of the courts below on the forum non conveniens issue.

deny a motion to dismiss on forum non conveniens grounds is addressed to a court's discretion" (*Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co*., 23 NY3d 129, 137 [2014]) and, if the courts below considered the various relevant factors in making such a determination, "there has been no abuse of discretion reviewable by this [C]ourt," even if we would have weighed those factors differently (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). However, "where there are special and unusual circumstances favoring acceptance of a suit between nonresident parties based on an out-of-state [claim], it is error of law for the [courts below] to exclude consideration of such circumstances in deciding whether to exercise [their] discretion in favor of accepting or of rejecting jurisdiction" (*Varkonyi v S.A. Empresa De Viacao Airea Rio Grandense [Varig]*, 22 NY2d 333, 338 [1968] [internal quotation marks and citation omitted]). Nevertheless, special circumstances that impact even compelling state interests do not mandate retention of a case with only a tenuous connection to New York (*see Mashreqbank*, 23 NY3d at 137 [New York's compelling state interest in protecting the integrity of its banks in the face of a foreign national's alleged $150 million fraudulent transaction moved through a New York bank insufficient to warrant retention of jurisdiction]). Moreover, although "the availability of another suitable forum is a most important factor," it is not "a prerequisite for applying the conveniens doctrine" or a "precondition to dismissal" (*Pahlavi*, 62 NY2d at 481).

Here, the motion court did not abuse its discretion in dismissing the action against the Foundation and UBS defendants on forum non conveniens grounds, and the Appellate Division did not err in affirming. To be sure, special circumstances are present: the origins

of plaintiffs' claims lie in "[t]he unique and horrific circumstances of World War II and the Holocaust" (Pub L 114-308, § 2 [6], 130 US Stat 1525). As explained in the Congressional findings accompanying the HEAR Act, "[i]t is estimated that the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups" (*id.* § 2 [1], 130 US Stat 1524). It has long been the public policy of the United States that "steps should be taken expeditiously to achieve a just and fair solution to claims involving such art that has not been restituted if the owners or their heirs can be identified" (*id.* § 2 [3] [internal quotation marks and citation omitted]). In addition, as plaintiffs point out, New York has a compelling interest in protecting the integrity of its art market and preventing the illicit trafficking of stolen art in the State (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 320 [1991]). Contrary to plaintiffs' argument, however, the record reflects that the courts below painstakingly considered the relevant factors, including the public policies at issue, and determined that the balance of factors militated in favor of dismissal.[3] Thus, plaintiffs' argument that this is one of the "relatively uncommon" cases in which forum non conveniens can be resolved, and denied, as a matter of law ultimately fails (*Mashreqbank*, 23 NY3d at 138). Inasmuch as the courts below

[3] Apart from the public policies implicated here, the relevant factors favoring dismissal include the substantial burden on New York courts in determining which foreign law is applicable and applying that law, the potential availability of Switzerland as an alternative forum given that all of the plaintiffs are currently litigating against the Foundation there, the substantial nexus of plaintiffs' claims to Europe, and that none of the plaintiffs and only two of the defendants reside in or are located in New York.

considered the various relevant factors, "there has been no abuse of discretion reviewable by this [C]ourt" (*Pahlavi*, 62 NY2d at 479).

Accordingly, the order insofar as appealed from should be affirmed, with costs.

FAHEY, J. (dissenting):

Justice is the only meaningful goal in the resolution of any lawsuit. The law may not always be just, but it does provide a path to justice.

Before us is a dispute over ownership of an Edgar Degas painting entitled *Danseuses*, stolen from Margaret Kainer by the Nazis. It is estimated that during their

occupation of Europe, the Nazis "pulled off the 'greatest theft in history,' seizing and transporting more than five million cultural objects to the Third Reich" (Robert M. Edsel, The Monuments Men xiv [2009]). This crime was part of the Holocaust, during which the Nazis perpetrated a systematic, state-sponsored mass murder of approximately six million innocent Jewish people. The Nazis looted or destroyed hundreds of thousands, if not millions, of pieces of artwork as one of their many crimes against humanity. This has been called the " 'greatest displacement of art in human history' " (*Von Saher v Norton Simon Museum of Art at Pasadena*, 592 F3d 954, 957 [9th Cir 2010], quoting Michael J. Bazyler, Holocaust Justice: The Battle for Restitution in America's Courts 202 [NYU Press 2003]; *see also* Chuck Grassley, Holocaust Expropriated Art Recovery Act of 2016, US Senate Rep No. 114-394, at 2 [2016]). For decades, the theft of many of these artworks was covered up, and the looted artwork displayed in museums and private collections with no restitution offered to the original owners or their heirs. More recently, efforts have been made to acknowledge and account for the Nazi theft of these precious items, including efforts by the United States government.

The majority concludes that we must apply our precedent regarding forum non conveniens, including the factors that we previously have articulated as relevant to that analysis. The Court further concludes that the lower courts did not abuse their discretion in dismissing plaintiffs' complaint on that ground. Yet CPLR 327 (a) allows a court to dismiss on forum non conveniens grounds "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum," and then only on "any conditions that may be just." Justice, then, is the prevailing consideration in any forum

non conveniens analysis. That analysis requires a court to assess not only the potential inconvenience to the parties of litigating in New York, but also whether the "interest of substantial justice" will be impaired if we conclude that they may not litigate in New York (*id.*). The factors that we have previously articulated as relevant to a forum non conveniens dismissal are simply inadequate when we are in the realm of the devastating aftermath of one of the greatest crimes in human history.

Against this uniquely horrifying backdrop, I cannot agree that the dismissal on forum non conveniens grounds is consistent with the "interest of substantial justice" (*id.*). I do not dispute that the majority arrives at a reasonable conclusion that is based upon our precedent regarding forum non conveniens and the Court's limited abuse-of-discretion standard of review. In my view, however, this is a unique circumstance for which our precedent does not adequately account. If the looting of the property of victims of the Holocaust is not included in the idea of what is meant by substantial justice, I am unsure what is.

I respectfully dissent.

I.

Plaintiffs are the estate of Margaret Kainer and her purported heirs who are seeking either to recover the painting or restitution for its theft. They allege that defendants UBS AG, UBS Global Asset Management (Americas, Inc.) (together, "UBS"), Norbert Stiftung (hereinafter, the Foundation), and Edgar Kircher conspired to create a sham foundation in order to divert Kainer's assets from her lawful heirs. Plaintiffs allege that the Nazis stole over 400 works of art from Kainer.

Plaintiffs further allege that, while falsely representing to defendant Christie's Inc. that it was the legitimate heir to Kainer's estate, the Foundation entered into a "Restitution Settlement Agreement" with Christie's in 2009, whereby the Foundation would renounce its claims of ownership in the Degas painting in order to make it marketable for sale in exchange for 30% of the proceeds of the sale. With that Restitution Settlement Agreement in place, Christie's then facilitated the sale of the painting twice in a matter of days, first in a private sale for approximately $6 million, then less than a week later at public auction in New York for $10.7 million. Plaintiffs, who assert that they were unaware of defendants' activities, the Restitution Settlement Agreement, or the sale of the painting until 2011 or 2012, have not received any compensation from the sale of the painting.

In 2012, plaintiffs obtained a French "certificate of inheritance," or COI, identifying them as the lawful heirs to Kainer's estate. A different COI issued in Germany in 1972 identifying the Foundation as the heir to three-quarters of the estate of Kainer's father was nullified in Germany in 2017. Plaintiffs assert that defendants are not currently challenging the French COI in any proceeding or otherwise currently challenging their status as heirs to Kainer's estate.

Plaintiffs commenced the present action in 2013 alleging numerous causes of action against defendants, including breach of fiduciary duty, conversion, unjust enrichment, and conspiracy, all centered around the Restitution Settlement Agreement and the 2009 sale of the painting in New York. Defendants moved to dismiss, as relevant here, on forum non conveniens grounds, asserting, among other things, that Switzerland was a suitable alternative forum. While those motions were still pending, the United States Congress

enacted the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act), and that bill was signed into law by the President. The HEAR Act extends the statute of limitations, under certain circumstances, for a cause of action to recover artwork appropriated by the Nazis to six years from the actual discovery by the claimant of the claimant's possessory interest in the artwork and the identity and location of the artwork (*see* Pub L 114-308, 130 Stat 1524, at § 5 [a]). Supreme Court allowed supplemental briefing on the HEAR Act. The court thereafter granted defendants' motions to dismiss on forum non conveniens grounds (*see* 2017 NY Slip Op 32316[U], 2017 WL 4922057 [Sup Ct, NY County 2017]),[1] and the Appellate Division affirmed (175 AD3d 403 [1st Dept 2019]).

II.

The rationale articulated by the lower courts for the forum non conveniens dismissal was based on their consideration of the factors that we have articulated are generally relevant to that analysis. Specifically, the courts reasoned that none of the plaintiffs resided in New York; that litigating in New York would present hardships for defendants; that New York courts would be required to apply foreign law to determine the parties' rights as heirs and concomitant ownership interests in the painting, which would be a significant burden; and that plaintiffs had commenced proceedings in Switzerland in which they sought determination of their claims regarding their rights as Kainer's heirs, and therefore

[1] Supreme Court granted Christie's motion to dismiss on forum non conveniens grounds, but only to the extent of staying the action against Christie's with leave to plaintiffs to restore the action against Christie's if plaintiffs obtained a "favorable final determination in the European court(s) that they have rights as heirs to an ownership interest in the Painting" (*id.* at *14). Christie's is not a party to this appeal.

Switzerland was a suitable alternative forum (*see* 2017 NY Slip Op 32316(U), at *9-13; 175 AD3d at 405-406).

These are the factors this Court has articulated as relevant to a forum non conveniens analysis (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). The lower courts cannot be faulted for applying those factors as we have articulated them. Nevertheless, we have also instructed that the "great advantage of the rule of *forum non conveniens* is its flexibility based on the facts and circumstances of each case" (*id.*). We have also placed the burden upon the defendant "challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation" (*id.*).

It is undisputed that "where there are special and unusual circumstances favoring acceptance of a suit between nonresident parties based on an out-of-state tort," the courts must consider those circumstances in a forum non conveniens analysis (*Varkonyi v S.A. Empresa De Viacao Airea Rio Grandense [Varig]*, 22 NY2d 333, 338 [1968] [internal quotation marks omitted]). The majority concedes that such special circumstances are present in this case (*see* majority op at 6-7). Nevertheless, the Court concludes that those special circumstances do not warrant the conclusion that the lower courts abused their discretion. I respectfully disagree.

The factors that we have articulated as relevant to a forum non conveniens dismissal are not exclusive. The unique circumstances of each case must be considered, and the interests of substantial justice are paramount (*see* CPLR 327 [a]). The special circumstances present here, as well as the interests of substantial justice, warrant retention

of this action in New York.

It is the established public policy of New York, with a "worldwide reputation as a preeminent cultural center," to protect the true owners of stolen artwork and to reject legal doctrines or policies that "encourage illicit trafficking in stolen art" (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 320 [1991]). This is not only the public policy of New York; it is the public policy of the United States. In 1998, the United States, along with 43 other participating nations, approved the Washington Conference Principles on Nazi-Confiscated Art, which include encouraging Holocaust victims and their heirs to "come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted," and to take steps "to achieve a just and fair solution" in such cases (U.S. Dept of State, Office of the Special Envoy for Holocaust Issues, *Washington Conference Principles on Nazi-Confiscated Art*, Dec. 3, 1998, available at https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/ [last accessed Dec. 7, 2021]; *see* US Senate Rep No. 114-394, at 3). Also in 1998, Congress enacted the Holocaust Victims Redress Act, which expressed Congress's sense that

> "all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner" (Pub L 105-158, 112 Stat 15, at § 202 [1998]).

The HEAR Act of 2016 is further evidence of the public policy of the United States that claims of Nazi-looted art be determined on the merits. The HEAR Act was borne of a recognition that despite its previous efforts, the United States had "not fulfilled its promise

to ensure that claims to art lost in the Holocaust are resolved on their merits" (US Senate Rep No. 114-394, at 5). One obstacle to resolving such cases on the merits was state statutes of limitations (*see id.*). As noted above, the HEAR Act remedied this problem by enacting a uniform federal limitations period for claims regarding Nazi-looted artwork: six years from the date of actual discovery of the identity and location of the artwork and the claimant's possessory interest in it (*see* Pub L 114-308, 130 Stat 1524, at § 5 [a]). The HEAR Act was intended to "guarantee that the United States fulfills the promises it has made to the world to facilitate just and fair solutions with regard to Nazi-confiscated and looted art and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims" (US Senate Rep No. 114-394, at 5-6 [internal quotation marks omitted]). The HEAR Act expresses the public policy of the United States, consistent with the public policy of New York, that claims of Nazi-looted art be resolved on the merits, and that the rights of true owners of stolen artwork are protected.

Contrary to the conclusion reached by the lower courts, Switzerland is not a suitable alternative forum for the claims asserted by plaintiffs in this action. As plaintiffs explained in opposition to the motions to dismiss, Christie's is not subject to jurisdiction in Switzerland, and UBS is not a defendant in the Swiss litigation. Plaintiffs' action filed in New York centered around the alleged conspiracy among the defendants, including Christie's and UBS, to facilitate the sale of the painting in New York in 2009. For that reason, I further disagree with my colleagues in the majority that plaintiffs' action has only a "tenuous connection to New York" (majority op at 6). All of the causes of action in the

complaint are based upon the 2009 Restitution Settlement Agreement and the sale of this particular painting in New York in 2009. As the lower courts observed, resolution of the issue of whether the Foundation had the authority to represent itself as the heir to Kainer's estate in order to enter into the Restitution Settlement Agreement with Christie's necessarily requires inquiry into the underlying issues of heirship and ownership, which will likely involve application of foreign law. But the New York courts are surely up to that task.

Moreover, defendants have asserted procedural defenses in the Swiss proceedings, including the statute of limitations, that may prevent the Swiss courts from ever reaching a determination on the merits of plaintiffs' claims to heirship. Granted, plaintiffs could have provided further information to the motion court about the limitations of the Swiss proceedings, including an explanation of the Swiss limitations period. Courts have recognized, however, that "Swiss law places significant hurdles to the recovery of stolen art, and almost 'insurmountable' obstacles to the recovery of artwork stolen by the Nazis from Jews and others during World War II and the years preceding it" (*Bakalar v Vavra*, 619 F3d 136, 140 [2d Cir 2010], citing *In re Holocaust Victim Assets Litigation*, 105 F Supp 2d 139, 159 [ED NY 2000] [observing that Switzerland "has been described as a country to which buyers of stolen art flock in order to claim Swiss law's protection of buyers" (internal quotation marks omitted)]). Indeed, the Swiss statute of limitations may present such an insurmountable bar to resolving plaintiffs' claims on the merits in that jurisdiction (*see Bakalar*, 619 F3d at 145 n 3).

The majority asserts that the availability of an alternative forum is not a precondition

to dismissal on forum non conveniens grounds (*see* majority op at 6). That is consistent with our statements in *Pahlavi*, but we also recognized in that case that "the availability of another suitable forum is a ***most important factor*** to be considered in ruling on a motion to dismiss" (*Pahlavi*, 62 NY2d at 481 [emphasis added]). Coupled with the public policy of New York and the United States in resolving claims of Nazi-looted art on the merits, as well as the overarching concern of substantial justice in a forum non conveniens dismissal, the barriers that Swiss law places on resolving such claims on the merits and defendants' invocation of those barriers in the Swiss proceedings weigh heavily against dismissal.

Plaintiffs did not ask the motion court to condition any forum non conveniens dismissal on the defendants' waiver of procedural defenses in the Swiss proceedings, nor did plaintiffs specifically ask the motion court to consider the policies espoused in the HEAR Act as relevant to the forum non conveniens dismissal. I question, however, whether either specific request was necessary when the primary obligation of the courts in assessing a forum non conveniens dismissal is to consider the "interest of substantial justice" (CPLR 327 [a]), and plaintiffs generally requested that the court consider public policy in opposing the dismissal. One of the stated purposes of Congress in enacting the HEAR Act was "[t]o ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art [and] the Holocaust Victims Redress Act" (Pub L 114-308, 130 Stat 1524, at § 3 [1]). As explained, that policy includes the resolution of claims involving Nazi-looted art expeditiously and on the merits.

Plaintiffs have waited a decade for resolution of their claims regarding the unlawful

2009 sale of the Degas painting on the merits. It has been almost a century since the Nazis stole and sold Margaret Kainer's art collection. A forum non conveniens dismissal does not comport with either substantial justice or the public policy of New York and the United States.

I respectfully dissent.

Order insofar as appealed from affirmed, with costs. Opinion by Judge Cannataro. Chief Judge DiFiore and Judges Garcia, Wilson and Singas concur. Judge Fahey dissents in an opinion. Judge Rivera took no part.

Decided December 16, 2021