SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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In the Matter of the Application of

DAVID TOREN,

Pursuant to Section 3102(c) of the Civil Practice Laws and Rules Prior to the Commencement of an Action from

VILLA GRISEBACH AUCTIONS, INC.

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Index No.: 653822/2016

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

Petitioner David Toren moves by order to show cause, pursuant to CPLR 3102(c), for pre-action disclosure from respondent Villa Grisebach Auctions, Inc. (Villa) of the identities of the purchasers of two works of art auctioned by Villa's German parent company, non-party Grisebach GmbH (Grisebach). Seq. 001. Villa opposes the motion and also moves by order to show cause to dismiss the petition. Seq. 002. For the reasons that follow, Villa's motion is granted, and the petition is denied without prejudice and with leave to amend in accordance with this decision.

I. Background

This case concerns two works of art – *Basket Weavers*, a painting by Max Liebermann; and *Nach Hause*, a painting by Franz Skarbina (collectively, the Art) – that were stolen by the Nazis from Toren's great uncle, David Friedmann, during the Holocaust. The art was later auctioned by Grisebach. *Nach Hause* was sold in 1995, and *Basket Weavers* was sold in 2000. Grisebach, a German corporation, and its New York subsidiary corporation, Villa, know the identity of the purchasers. Toren does not.[1] The sole purpose of this petition is to compel Villa

[1] At oral argument, the court was informed that the purchaser of *Basket Weavers* lives in Israel. After the instant motions were fully submitted, by stipulation dated April 5, 2017 (Dkt. 55), the

to disclose the identity of the purchasers so that Toren may commence an action for replevin of the Art.[2]

The petition tells the story of how Friedmann's art was stolen, which is set against the horrifying backdrop of the Holocaust. It contains extensive detail of how art stolen by the Nazis came to be auctioned half a century later by Grisebach. In addition to the tragedy that befell Toren's family, and the extraordinary story of how Toren escaped the Holocaust on a "kinder transport" and eventually emigrated to the United States, the petition also recounts the efforts of the "Monuments Men", who sought to recover art stolen by the Nazis during World War II.

The court will not repeat the compelling history recited in the petition, and limits its discussion to facts pertinent to this decision. The Petition explains:

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parties settled the portion of the petition that seeks the identity of the purchaser of *Basket Weavers*. Thus, this decision only concerns *Nach Hause*, the location of which is not in the record. As explained herein, the location of the purchasers is essential to determining the applicable law.

[2] While Toren also allegedly has a claim for conversion of the Art, as explained herein, replevin of the Art appears to be the only non-time barred predicate claim justifying pre-action discovery. While Toren suggests that Grisebach may have committed wrongdoing, the petition does not state a claim against it. Indeed, Grisebach is not subject to this court's jurisdiction; that is why only Villa is a named respondent. While Villa is indisputably subject to this court's jurisdiction, Toren does not claim to have any substantive cause of action against it. Villa is sued solely for pre-action disclosure of information within its possession, custody, or control. It also should be noted that, notwithstanding Toren's conclusory allegations that Villa and Grisebach should not be treated as separate entities, Toren has not genuinely attempted to establish grounds for piercing Villa's corporate veil under New York law. *See Morris v NY State Dep't of Taxation & Finance*, 82 NY2d 135, 140 (1993). Villa is a subsidiary that purports to operate as a legitimate separate entity. Toren's conclusory assertions to the contrary are not worthy of serious discussion. That being said, the concepts of veil piercing and possession, custody, and control are distinct, and Villa should not expect to be excused from complying with the court's disclosure orders merely on the basis of being separate from Grisebach. *See Richbell Info. Servs., Inc. v Jupiter Partners L.P.*, 32 AD3d 150 (1st Dept 2006). Villa has not actually denied having access to the names or locations of the purchasers, and will not be permitted to do so for the first time after an adverse ruling on the merits. The only reasonable inference to be drawn from Villa's vigorous opposition and failure to actually deny that it has the ability to disclose the purchasers' identities is that Villa actually has the means to do so.

> The Gestapo looted approximately 54 works of museum quality art, including *Basket Weavers* and *Nach Hause* from [Friedmann] in or around 1940. In turn, [the Art was] sold to Hildebrand Gurlitt, who was one of Adolph Hitler's principal art dealers. Upon his death in 1956 in an automobile accident, his entire collection passed to his family, including to his son, Cornelius Gurlitt, and to his daughter, Renate Gurlitt. In November of 2013, the prosecutor's office in Munich, Germany, held a press conference, at which they announced the seizure of approximately 1,200 works of art from the apartment of Cornelius Gurlitt. The press conference was widely reported throughout the world, including on the front page of *The New York Times*, which featured a photograph of a painting, *Two Riders on the Beach ("Two Riders")*, also by Max Liebermann, and also stolen by the Nazis from [Friedmann]. Despite overwhelming evidence that the painting belonged to Petitioner and to his brother's family, the painting was returned to the heirs of [Friendmann], including Petitioner, only after Petitioner had brought suit against the government of Germany and Bavaria in the Federal District Court in and for the District of Columbia. During the process of investigating the provenance of *Two Riders* that ultimately led to its recovery, Petitioner obtained for the first time a list of paintings owned by [Friedmann], and compiled at or near the time the Nazis took the paintings from him. Prior to obtaining this information, Petitioner did not know and had no way of knowing that [the Art] belonged to [Friedmann] and w[as] stolen from him by the Nazis. Subsequently, Petitioner also learned that Grisebach had previously arranged for the sale of *Basket Weavers* and *Nach House*.

Petition ¶¶ 2-4 (paragraph breaks and numbering omitted). Toren claims that, "[a]t the time of the sale of *Basket Weavers*, Grisebach knew, among other things, that the painting had been owned by Hildebrand Gurlitt, the infamous Nazi art dealer, and was being sold on behalf of his daughter. Despite this, Grisebach conducted no further investigation into the true owner of the painting." Petition ¶ 4.

On July 20, 2016, Toren commenced this action, filed the petition, and moved by order to show cause to compel the requested disclosure.[3] On July 27, 2016, Villa opposed Toren's motion and moved to dismiss the petition. The court reserved on the parties' motions after oral

[3] Toren actually commenced these proceedings on March 29, 2016 by way of a virtually identical petition under a different index number (651667/2016). Due to non-compliance with Judiciary Law § 470, by stipulation so-ordered on July 13, 2016, the parties agreed to permit the original proceeding to be discontinued without prejudice to Toren filing the instant action. *See* Index No. 651667/2016, Dkt. 40.

argument. *See* Dkt. 53 (9/16/16 Tr.).[4] As noted above, all that remains is Toren's claims regarding *Nach Hause*.

II. Discussion

CPLR 3102(c) provides that "[b]efore an action is commenced, disclosure to aid in bringing an action ... may be obtained, but only by court order." It is well settled that pre-action discovery under CPLR 3102(c) may be obtained to "identify potential defendants." *Uddin v N.Y. City Transit Auth.*, 27 AD3d 265, 266 (1st Dept 2006). However, pre-action discovery "may not be used to ascertain whether a prospective plaintiff has a cause of action worth pursuing." *Id.* Consequently, "[a] petition for pre-action discovery should only be granted **when the petitioner demonstrates that he has a meritorious cause of action** and that the information sought is material and necessary to the actionable wrong." *Id.* (emphasis added), quoting *Holzman v Manhattan & Bronx Surface Transit Operating Auth.*, 271 AD2d 346, 347 (1st Dept 2000); *see Thomas v MasterCard Advisors, LLC*, 74 AD3d 464, 465 (1st Dept 2010). To satisfy its burden, the petitioner must allege "facts **fairly indicating** that he or she has some cause of action." *Konig v CSC Holdings, LLC*, 112 AD3d 934, 935 (2d Dept 2013) (emphasis added). In other words, "the applicant must show the existence of a prima facie cause of action." *Toal v Staten Island Univ. Hosp.*, 300 AD2d 592, 593 (2d Dept 2002). "In determining whether the petitioner has demonstrated a prima facie case, the evidence presented must be considered in a light most favorable to the petitioner." *Id.* The requirement that a petitioner demonstrate the existence of a viable claim "is designed to prevent the initiation of troublesome and expensive procedures, based upon a mere suspicion, which may annoy and intrude upon an innocent party." *Houlihan-Parnes, Realtors v Cantor, Fitzgerald & Co.*, 58 AD2d 629, 630 (2d Dept 1977). "Where,

[4] The extensive delay between argument and this decision is due to the parties' failure to submit the transcript to the part clerk until March 1, 2017.

however, the facts alleged state a cause of action, the protection of a party's affairs is no longer the primary consideration and an examination to determine the identities of the parties and what form or forms the action should take is appropriate." *Id.*[5] Ultimately, "the determination of whether a party has demonstrated merit lies in the sound discretion of the trial court." *Bishop v Stevenson Commons Assocs., L.P.*, 74 AD3d 640, 641 (1st Dept 2010).

As an initial matter, the court rejects all of Villa's procedural arguments, including Toren's alleged lack of standing.[6] On the merits, the court finds that Toren has failed to demonstrate a prima facie case for replevin. To be sure, if the Art were located in New York, the relevant inquiry would be whether Toren stated a non-time-barred claim for replevin under New York law. *See Feld v Feld*, 279 AD2d 393, 394 (1st Dept 2001) ("Replevin ... claims are governed by the three-year Statute of Limitations of CPLR 214(3). A cause of action for replevin or conversion requires a demand for the property and refusal."). Under New York law, "a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it." *Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 317-18 (1991). "Until

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[5] Villa's proffered concern about possible embarrassment of the purchasers and Grisebach's possible liability to them will be of no moment if Toren eventually demonstrates the existence of a viable claim against the purchasers.

[6] On a motion to dismiss, the movant bears the burden of definitively proving the plaintiff's lack of standing; the plaintiff merely must raise a question of fact to survive dismissal. *See Brunner v Estate of Lax*, 137 AD3d 553 (1st Dept 2016). Toren, at a minimum, has raised a question of fact by submitting evidence that he is Friedmann's heir and was granted the right to pursue the Estate's claim to the Art. That being said, since any ultimate action for replevin of the Art will likely be filed in a jurisdiction outside of the United States, where the Art is actually located, New York's standing law will not apply. Villa has not established that Toren would lack standing in the relevant foreign jurisdiction. Nothing herein should be construed as the court opining on whether Toren would have standing in a foreign jurisdiction to pursue a claim for replevin of the Art, which is an issue the parties did not meaningfully address on the instant motions.

demand is made and refused, possession of the stolen property by the good-faith purchaser for value is not considered wrongful." *Id.* at 318.[7] In this case, Toren has not demanded return of the Art from the purchasers because he does not know who they are. New York's statute of limitations for replevin has not run because the claim has not yet accrued.[8]

New York law, however, does not apply. A claim to recover property is generally governed by the law of the jurisdiction in which the property is located. *See Garrison Special Opportunities Fund LP v Fidelity Nat'l Card Servs., Inc.*, 130 AD3d 546, 548 (1st Dept 2015); *Wertheimer v Cirker's Hayes Storage Warehouse, Inc.*, 2001 WL 1657237, at *5 (Sup Ct, NY County 2001) (DeGrasse, J.) (New York's choice of law rules provide that questions relating to

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[7] "Although seemingly anomalous, a different rule applies when the stolen object is in the possession of the thief. In that situation, the Statute of Limitations runs from the time of the theft." *Lubell*, 77 NY2d at 318. Here, while the Art was originally stolen from Friedmann and sold by Grisebach (allegedly) without adequate provenance due diligence, Toren does not claim that the current owners are not good-faith purchasers.

[8] The First Department recently reiterated the rationale for New York's replevin statute of limitations:

> Under CPLR 214(3), the statutory period of limitations for conversion and replevin claims is three years from the date of accrual. The date of accrual depends on whether the current possessor is a good faith purchaser or bad faith possessor. An action against a good faith purchaser accrues once the true owner makes a demand and is refused. **This is because a good-faith purchaser of stolen property commits no wrong, as a matter of substantive law, until he has first been advised of the plaintiff's claim to possession and given an opportunity to return the chattel.** By contrast, an action against a bad faith possessor begins to run immediately from the time of wrongful possession, and does not require a demand and refusal. Thus, [w]here replevin is sought against the party who converted the property, the action accrues on the date of conversion.

Swain v Brown, 135 AD3d 629, 631 (1st Dept 2016) (emphasis added; internal citations and quotation marks omitted). It should be noted that since the Nazis, and not the purchasers, converted the Art from Friedmann, the accrual from demand rule would apply. It also should be noted that Villa's laches defense is uncompelling due to its failure to explain how Toren was supposed to discover the location of the Art when the rest of the world, including the German government, could not do so.

the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the transfer. This comports with the Restatement's view and the majority of jurisdictions in the United States.") (internal citations omitted), *aff'd on other grounds*, 300 AD2d 117 (1st Dept 2002). This rule is consistent with how New York courts make choice of law determinations. *See Cooney v Osgood Machinery, Inc.*, 81 NY2d 66, 77 (1993); *K.T. v Dash*, 37 AD3d 107, 111 (1st Dept 2006). While Toren's plight is highly sympathetic, New York, as a jurisdiction, simply has no nexus to or interest in his claims. New York law should not be applied where, as here, the prospective defendants "could hardly have expected to be [hailed] before a New York court." *Id.* at 77. Neither the auction house nor the purchasers could have been expected to be subject to New York law merely because one of Friedmann's heirs of happens to now live in New York (which they could not have known at the time of purchase, especially if they did not know the identity of the person, Friedmann, from whom the art was stolen).

The location of *Nach Hause* and the applicable law are not known.[9] While New York has a generous statute of limitations for replevin claims, New York law is not determinative of whether Toren has a cause of action against the purchasers. The appropriate jurisdictions' statutes of limitations may be different. Without briefing the applicable foreign law, an impossibility at this point, Toren has not demonstrated a prima facie case. As a result, Toren's petition is denied without prejudice and with leave to replead. He may file an amended petition for disclosure of the identity of the purchaser of *Nach Hause* if he can demonstrate, under the

[9] Had the parties not settled Toren's claim regarding *Basket Weavers*, Israeli law would have applied because the work is apparently in Israel.

substantive law applicable in his prospective lawsuit, that he can state a valid cause of action.[10] To state a claim for replevin of *Nach Hause*, Toren has to know the location of the purchaser.[11] Villa must provide him with that information, and it is ordered to do so below. Accordingly, it is

ORDERED that the motion by petitioner David Toren for pre-action discovery is denied, the motion by respondent Villa Grisebach Auctions, Inc. to dismiss the petition is granted, and the petition is dismissed without prejudice and with leave to file an amended petition for disclosure of the identity of the purchaser of *Nach Hause* within 45 days of the entry of this order on NYSCEF; and it further

ORDERED that within 7 days of the entry of this order on NYSCEF, Villa Grisebach Auctions, Inc. shall disclose to David Toren all information in its possession custardy and control regarding the jurisdiction in which *Nach Hause* is located.

Dated: May 9, 2017

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.

[10] If an amended petition is filed, the parties are directed to submit evidence of the applicable foreign law. *See* CPLR 4511.

[11] While Toren has discussed some German law, German law only would apply if *Nach Hause* is in Germany. It should be noted that, after oral argument, Villa submitted an affirmation (Dkt. 50) in which it claims that *Nach Hause* was sold on November 25, 1995 for less than 5,500 Deutschmarks (Germany started exclusivily using the Euro in 2002). The court's research indicates that the November 1995 Doller to Deutschmarks conversation rate was below 1.5. Assuming the value of *Nach Hause* has not skyrocketed since 1995, the cost of litigation will (if it has not already) easily exceed the value of the work. That being said, the emotional value and attendant moral issues may be of far more concern to Toren than the monetary value of the art. It is not for this court to decide whether a Holocaust survivor should decline to rectify wrongs purely on pecuniary grounds.