NEW YORK COURT OF APPEALS ROUNDUP

LOST ART, DEBTOR ACTION, 1993 TRADE CENTER BOMBING

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The Court of Appeals has issued a large number of decisions in recent weeks. This month, we discuss cases addressing the return of an ancient artifact looted from a German museum during World War II, the finality of a judgment arising out of the 1993 World Trade Center bombing, and the existence of a private right of action under the Exempt Income Protection Act of 2008.

'Spoils of War' Doctrine

It is not every day that the court finds itself presented with argument concerning the "spoils of war" doctrine, but *In the Matter of Riven Flamenbaum, Deceased* provided such an opportunity. In this probate proceeding, the Vorderasiatisches Museum in Berlin, Germany, sought to recover a 3,000-year-old gold tablet from the estate of a Holocaust survivor named Riven Flamenbaum. The tablet dates back to the reign of Assyrian King Tukulti-Ninurta I and was first discovered by German archeologists excavating in what is now Iraq before the First World War. It was sent to the museum in 1926. The museum was closed because of the Second World War in 1939 and a number of artifacts, including the gold tablet, were put in storage. By the end of the war in 1945, the gold tablet had gone missing.

It apparently ended up in the possession of the decedent, Riven Flamenbaum of Nassau County. When his daughter and executor, Hannah K. Flamenbaum, petitioned to judicially settle the final account of the estate in Nassau County Surrogate's Court, the decedent's son, Israel Flamenbaum, objected. He asserted that the value of a coin collection listed among estate assets was undervalued and included a "gold wafer" that is believed to be the property of a museum in Germany. Israel Flumenbaum also notified the Vorderasiatisches Museum about the gold tablet.

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The museum appeared in the probate proceeding to recover the tablet. The museum's director, Beate Salje, testified that the gold tablet is part of the museum's Assyrian collection and disappeared, along with many other objects, near the end of the war. She further testified that Russian troops had taken some objects back with them to Russia at the end of the war and returned them to the museum in 1957, but Dr. Salje did not know if the tablet had been taken from the museum by Russian troops, German troops or by individuals who had taken refuge in the museum during the war.

The museum also submitted a report from an assistant professor of assyriology at Yale University named Eckart Frahm. Frahm described a professional journal article which noted that a gold tablet that had been in a German museum before the war had been seen in the hands of a dealer in New York in 1954. There is an entry in the museum's record indicating some awareness of the information in the article, but the entry is undated and there is no other indication when the museum first learned that the tablet had been reportedly sighted in 1954.

At the conclusion of the hearing, the Surrogate's Court ruled that the museum had met its burden of proving legal title or superior right of possession, but that the museum's claim was barred by the doctrine of laches. The court based its determination on the museum's failure to report the tablet's disappearance to the authorities or list it on any international stolen art registries, and the court found that this inaction prejudiced the estate by affecting its ability to defend against the museum's claim.

The Appellate Division, Second Department, reversed this decision, granted the museum's claim for return of the gold tablet, and remitted the matter to the Surrogate's Court for further proceedings. The Second Department found that the estate had failed to establish a lack of reasonable diligence by the museum or that the estate had been prejudiced by any inaction on the part of the museum. The Second Department granted the estate's motion for leave to appeal pursuant to CPLR 5602(b)(1).

In a unanimous memorandum decision, the Court of Appeals affirmed the Second Department's decision. The court first addressed the issue of laches. The court reasoned that, while the museum could have taken steps to locate the tablet such as reporting it to the authorities or listing it on stolen art registries, the museum explained during the probate proceedings that it had not taken these steps with respect to many missing items because it would have been difficult to report each object that had disappeared during the war. The court also noted that the estate had failed to offer any evidence that had the museum taken these actions it would have discovered decedent was in possession of the tablet.

The court cited its decision in *Solomon R. Guggenheim Foundation v. Lubell*, 77 NY2d 2311, (1991), noting that with respect to the assertion of a statute of limitations defense, "'[t]o

place a burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would…encourage illicit trafficking in stolen art,'" 77 NY2d at 320.

The court also found that the estate had failed to demonstrate the prejudice necessary for the application of laches where at least one member of the decedent's family was aware that the tablet belonged to the museum and the court could not imagine any scenario where the decedent, even if he were still living and able to testify, could have established title to the gold tablet.

Finally, the court considered and rejected the estate's argument that it was entitled to keep the tablet under the "spoils of war" doctrine. The estate claimed that the Russian government had gained title to the gold tablet as a spoil of war and then transferred title to the decedent. The court noted that this theory rested entirely on conjecture and that, even if it had been supported by actual proof, the court would not adopt any doctrine that would establish good title based on the looting of cultural objects by a conquering military force. So, any practitioners considering reliance on the spoils of war doctrine in their next case should understand that their arguments are not likely to receive a warm reception in the Court of Appeals.

Right of Action Under EIPA?

In *Cruz v. T.D. Bank, N.A. and Martinez v. Capital One Bank, N.A.*, the court was presented with certified questions from the U.S. Court of Appeals for the Second Circuit concerning the existence of a private right of action under the Exempt Income Protection Act of 2008 (EIPA), which provides certain protections to judgment debtors regarding funds that are exempt from restraint or execution. The court's rejection of plaintiffs' attempts to create a private right of action under the EIPA is instructive with respect to efforts to create private rights of action generally when the governing statute is silent on this issue.

Article 52 of the CPLR sets forth the procedures for the enforcement of money judgments in New York, including the imposition of a restraining notice against a judgment debtor's bank account to ensure that funds are not transferred before a judgment creditor can obtain those funds. State and federal law, however, provide that certain types of funds, such as public benefits and pension payments, are exempt from restraint or execution. Before the enactment of the EIPA, banks served with restraining notices often inadvertently froze accounts that included income from these exempt sources.

Accordingly, the EIPA was enacted to amend certain existing provisions of Article 52 by restricting the scope of a restraint that can be placed on the bank account of a natural person and requiring additional notification and claim procedures. Among other things, the EIPA precludes a bank from restraining certain minimum balances in a person's account. It also requires a restraining creditor to provide the bank with certain notices and forms and requires the bank to provide copies of them to the debtor-account holder.

The notices inform the debtor that his or her account is being restrained, describe the types of funds that are exempt, and provide other information regarding vacatur of money judgments. The debtor is advised to indicate on the forms any exempt funds in the account and to provide one copy to the bank and one copy to the judgment creditor. If the judgment creditor objects to an exemption claim, it must commence a special proceeding under CPLR 5240.

Plaintiffs in these two cases brought putative class actions in the U.S. District Court for the Southern District of New York seeking injunctive relief and money damages against their banks alleging that their accounts had been restrained in violation of the EIPA and that the banks had failed to forward the necessary forms. Plaintiffs sought return of the wrongfully restrained funds that had been disbursed to creditors and consequential damages arising out of the loss of access to the funds. TD Bank and Capital One both moved to dismiss, arguing that the EIPA does not create a private right of action for account holders. Both district courts dismissed on the grounds that no such private right of action exists. Plaintiffs appealed to the Second Circuit which certified the question to the court.

Plaintiffs acknowledged that the EIPA does not expressly provide for a private right of action but argued that one should be implied. In a decision by Judge Victoria A. Graffeo in which the other judges joined, the court noted that a private right of action will only be implied under a statute if: i) the plaintiff is a member of a class for whose benefit the statute was enacted, ii) recognition of a private right of action would promote the legislative purpose of the statute, and iii) creation of such a right would be consistent with the relevant legislative scheme. The court added that the third factor was the most important and noted that courts decline to recognize a private cause of action where the legislature already considered and provided for enforcement mechanisms.

In this case, the banks conceded that the first two factors were satisfied. Plaintiffs argued that satisfaction of the third factor was evidenced by the fact that the EIPA provides that an inadvertent failure by a bank to provide the required notices and forms will not give rise to liability. Accordingly, plaintiffs argued, by expressly providing that banks cannot be liable for an inadvertent failure to provide the notices and forms, the

Legislature must have intended that financial institutions could be liable for all other failures to comply with the statute.

The court noted that this was an unusual application of the expressio unius doctrine as it is usually used to limit the expansion of a right or exception. Here, the court found that if the Legislature had intended to create a right of action against depository banks, it would have made that explicit in the statute, particularly since the EIPA was modeled on similar Connecticut legislation which expressly imposes liability on banks. The fact that New York did not include similar provisions when it enacted the EIPA militates against recognizing an implied right of action. Moreover, the court identified other provisions of Article 52 that enable "any interested person," including a judgment debtor, to commence a proceeding to determine rights in the property or debt at issue or seek to limit, condition or deny the use of any enforcement procedure. The existence of such enforcement mechanisms in the statute provides further support for the banks' arguments. Accordingly, the court declined to recognize a private right of action under the EIPA.

World Trade Center Bombing

Despite the passage of more than two decades, litigation arising out of the 1993 World Trade Center bombing continues in our state's courts. In *Nash v. The Port Authority of New York and New Jersey*, the court found that a final, non-appealable order could still be vacated based on subsequent rulings in a related case.

Linda Nash suffered traumatic brain injuries as a result of the 1993 bombing and filed suit against the Port Authority. Nash's case was consolidated with hundreds of others asserting similar claims against the Port Authority for a joint trial on liability in which it was found that the Port Authority's failure to maintain the World Trade Center in a safe and secure manner was a substantial factor in causing the plaintiffs' injuries. The individual plaintiffs then proceeded to try their individual damages cases. Nash was awarded approximately $4.5 million in damages in a verdict dated March 9, 2009, which was affirmed by the Appellate Division, First Department, on June 2, 2011. The Port Authority did not seek leave to appeal that decision, and it accordingly became final.

After a subsequent jury verdict on damages against another plaintiff, however, the Port Authority appealed that decision directly to the court which held in *Matter of World Trade Center Bombing Litig.*, 17 NY3d 428 (2011) (*Ruiz*), that the Port Authority was insulated from liability by the doctrine of governmental immunity. Four days after the publication of that decision, the Port Authority moved to vacate the now-final Nash judgment pursuant to CPLR 5015(a) and the Supreme Court's "inherent powers."

The Supreme Court granted the motion to vacate on the grounds that the *Ruiz* decision "eviscerated" any judgment against the Port Authority and required the court to find that the Port Authority was insulated from tortious liability. Nash appealed to the First Department which affirmed in a divided decision. The dissenting justices found that the Port Authority could no longer avoid enforcement of the Nash decision once it had become final. Nash then appealed to the court as of right.

In a decision by Judge Eugene F. Pigott Jr. in which Judges Susan Phillips Read, Robert Smith and Presiding Justice for the Appellate Division, Fourth Department, Henry J. Scudder concurred, the court found that the Nash verdict had become final but agreed with the Supreme Court and the First Department that this did not prevent further review pursuant to CPLR 5015(a)(5) since the prior liability order on which the Nash verdict was based had been reversed by the Ruiz decision.

The Supreme Court and the First Department, however, believed that vacatur was required by the Ruiz decision, but the court found that *Ruiz* simply provided the Supreme Court with discretion to vacate the judgment pursuant to CPLR 5015 if it believed it was required by the equities of the case. Accordingly, the court reversed the First Department and remanded the case to the Supreme Court for further proceedings.

Judge Graffeo issued an opinion joined by Presiding Justice for the Appellate Division, Third Department, Karen K. Peters, that dissented in part. Graffeo agreed that the First Department decision should be reversed, but found that the fact that the Port Authority allowed the Nash judgment to become final precluded any further review. Graffeo drew a distinction between grounds for vacatur under CPLR 5015 such as newly discovered evidence or fraud that could not have been raised in a direct appeal and grounds such as those in the instant case that could have been asserted in a direct appeal. The Port Authority's failure to do so here and the principles of finality render any remittal to the Supreme Court inappropriate in Graffeo's view. Chief Judge Jonathan Lippman and Judges Sheila Abdus-Salaam and Jenny Rivera took no part in the decision.

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