Everett v. Rogers

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Everett v. Rogers[1]

836 F. Supp. 1030
(S.D.E.C. 1995)

Plaintiff Steven Everett seeks recovery of the title to and possession of "Winter," an eighteenth-century masterpiece painted by Corrado Giaquinto (the "Painting"), currently possessed by defendant, John Rogers.

Findings of Fact

On July 24, 1960, the Painting was stolen from the home of John Rogers in Washington, D.C. Rogers was a foreign service officer with the State Department until 1963, having spent twenty-five years with that agency. He is neither an art collector nor a participant in ***1031** the fine arts community. He does not subscribe to or read periodicals on the fine arts.

On July 25, 1960, Rogers reported the theft of the Painting to the Metropolitan Police Department (the "Police Department") and provided them with a photo of the Painting. The Federal Bureau of Investigation ("F.B.I.") was also informed of the theft on the same day and started an investigation. The F.B.I. maintained frequent contact with the Police Department through October 1960. The F.B.I. also advised Interpol, a European investigative agency, of the theft. Local law enforcement authorities discouraged Rogers from hiring a private investigator, assuring him that the Police Department, F.B.I., and Interpol were doing everything and more than a private investigator could do.

At various times in 1961, 1966, 1972, 1974, and 1979, Rogers contacted the F.B.I., or the F.B.I.

1. This edited case is based on Eristoty v. Rizik, 1995 WL 91406 (E.D. Pa. Feb. 23, 1995).

contacted Rogers, regarding the status of the investigation or possible leads to discovering the Painting. But, from July 9, 1979, through August 2, 1993 (when the F.B.I. informed Rogers that the Painting had been located), there had been no further contact between the F.B.I. and Rogers.

In 1972, Rogers notified the Art Dealers Association of America ("ADAA") about the Painting. But until September 1992, Rogers never published any announcements or notices of the theft of the Paintings in any newspapers, magazines, art journals, or other periodicals. From 1961 through 1991 Rogers periodically visited museums to look for the Painting. He never provided museums, auction houses, art galleries, scholars, or experts on Giaquinto with photographs of the Painting or information identifying the Painting.

In March 1988, a woman who owned a home in East Carolina City removed furniture and objects from her home and hired a cleaning company to remove all other furnishings. While removing the furniture, one of the owners of the cleaning company, Mr. Kern, discovered the Painting, torn in five pieces, in a plastic trash bag behind a dresser.

Kern showed the Painting to an antiques dealer, who contacted the East Carolina Museum of Art ("ECMA") to identify the Painting's history and value. The ECMA examined the Painting. Although art experts were called in, no one was able to give information about the history of the Painting.

In March 1989, Kern turned over the Painting to an East Carolina City auction house to be sold. The plaintiff, Steven Everett, a professional conservator of paintings, purchased the Painting for $60,000 at an auction on April 16, 1989. Everett never contacted the International Foundation for Art Research ("IFAR"), the ADAA, or any law enforcement agency to determine whether the Painting had been missing or stolen. He was not required by law to do so. He later spent substantial time and money restoring the Painting.

In 1992, Rogers learned from a friend about IFAR, a nonprofit organization dedicated to preventing the circulation of stolen, forged, and misattributed works of art. Since IFAR's establishment in 1976, owners of stolen art have been able to register their losses with IFAR. IFAR publishes a magazine, *IFAR Reports*, that reports on stolen or lost art. The magazine circulates to art dealers, law enforcement officials, insurance agencies, museums (including the ECMA), and private collectors throughout the world.

Rogers filed a report with IFAR about the theft of the stolen Painting. The September 1992 issue of *IFAR Reports* included an announcement about the theft of the Painting and a photograph of the Painting. A conservator from the ECMA identified the Painting. He advised the proper law enforcement authorities, who tracked down the Painting. The F.B.I. retrieved the Painting from Everett's home and returned it to Rogers.

On September 20, 1993, Everett's attorney sent a letter to Rogers demanding the return of the Painting. Rogers' attorney

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refused the demand. The Painting remains in the possession of Rogers.

Discussion

Everett contends that Rogers has no right to the Painting because the statute of limitations, which states how long a claim can be brought in court, had ended. Two potential issues relating to the statute of limitations are present in this case: First, what is the applicable statute, and, second, when did it begin to run?

To put the matter in context, the applicable statute of limitations is the replevin statute, which governs the time within which an original owner can sue for recovery of a stolen item. Given the instant factual setting, the statute would permit Rogers three years following Everett's acquisition of the painting in April 1989 to bring an action for recovery of the painting. E.C. Code § 4-201.[1] Since Rogers did not act within the period, he will be prevented from recovering the Painting "unless equitable principles justify tolling the statute of limitations." *Schuler v. Baldwin*, 594 F.2d 1285, 1287 (13th Cir. 1987).

Courts favor statutes of limitations because they "stimulate [claimants] to activity and punish negligence" and "promote peace by giving security [against stale claims] and stability to human affairs." *O'Keeffe v. Snyder*, 416 A.2d 862, 868 (N.J. 1980) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)). "A statute of limitations achieves those purposes by barring a cause of action after the statutory period." *Id.* at 868.

The statute of limitations will not begin to run if strict enforcement would work an injustice, such as where an original owner is unable to locate stolen artwork for many years despite reasonable search efforts. Under the discovery rule, an original owner's cause of action does not accrue "until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action." *O'Keeffe*, 416 A.2d at 869). In the stolen art context, such facts include "the identity of the possessor of the paintings." *Id.* at 870. In *O'Keeffe*, the Supreme Court of New Jersey described the focus of the discovery rule as follows: "The discovery rule shifts the emphasis from the conduct of the possessor to the conduct of the owner. The focus of the inquiry will [be] whether the owner has acted with due diligence in pursuing his or her property." *Id.* at 872. In stolen

1. CODE § 4-201 (2007) provides: "An action for taking, detaining, or injuring personal property, including actions for specific recovery thereof, must be commenced within three years after the cause of action has accrued." In the case where the owner is proceeding against a good faith purchaser of the property, the cause of action does not accrue until the time when the good faith purchaser acquired the property. Schuler v. Baldwin, 594 F.2d at 1287.

art cases, where a court finds that an owner has diligently searched for a painting "but cannot find it or discover the identity of the possessor, the statute of limitations will not begin to run." *Id.* The discovery rule fulfills "the purposes of a statute of limitations and accord[s] greater protection to the innocent owner of personal property whose goods are lost or stolen." *Id.* at 875.

In the present instance, the Painting could probably not have been discovered for nearly 30 years after its theft. The Painting may well have remained all the while in a trash bag — torn in five pieces — in the house in East Carolina, from 1960 until 1988. Usually an artwork has been resting comfortably with a new owner for many years before the original owner arrives on the scene; in this case the Painting was with Everett for a relatively brief four years before the whereabouts of the Painting became known.

The burden of proving due diligence under the discovery rule logically rests with the original owner as the party "seeking the benefit of the rule to establish facts that would justify deferring the beginning of the period of limitations." *Id.* at 873.

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Rogers relies on the discovery rule as grounds for preserving his claim to title to the Painting beyond the normal three-year statutory period. As such, the burden of proof as to this issue properly rests with Rogers.

Two precedents provide a helpful basis for applying the discovery rule to the present facts. The *O'Keeffe* court recognized that "[t]he meaning of due diligence will vary with the facts of each case, including the nature and value of the personal property." *Id.* Thus, the court explained, "with respect to jewelry of moderate value, it may be sufficient if the owner reports the theft to the police. With respect to artwork of greater value, it may be reasonable to expect an owner to do more." *Id.* In *Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278 (7th Cir. 1990), the Seventh Circuit followed *O'Keeffe* and adopted the discovery rule. In that case, the court emphasized that an original owner's obligation to search for missing property is a continuing one: "[W]e note that any 'laziness' this rule might seem to invite by the plaintiffs is heavily tempered by the requirement that, all the while, the plaintiff must exercise due diligence to investigate the theft and recover the works." *Id.* at 289.

After careful consideration of the law and the facts of this case, the court finds that Rogers' search efforts were reasonably diligent for discovery rule purposes. Several factors contribute to this conclusion. First, the evidence demonstrates that Rogers did make an affirmative, sustained effort to locate the Painting.

Foremost in this effort was Rogers' reporting of the theft to the F.B.I. and continued contact with the F.B.I. through the late 1970s. Rogers was reasonable to conclude on the advice of the police that the F.B.I.'s and Interpol's involvement constituted the best

investigative channels available for locating his missing artwork. Indeed, in light of Rogers' status as a government official and the highly responsive service he received from the F.B.I., culminating in its personal delivery of the Painting in 1993, Rogers' reliance on that agency was all the more reasonable.

Nor was Rogers' apparent lack of contact with the F.B.I. after 1979 necessarily unreasonable. The evidence indicates that Rogers and the F.B.I. communicated with each other from time to time over a 19-year period, usually occurring when either came into possession of potentially relevant information. Presumably no leads arose from 1979 until after the IFAR report was published in 1992. That assumption aside, it is quite understandable that one's efforts to search for a lost item would lessen somewhat as the years passed. Indeed, it would be unusual for theft victims such as Rogers to keep in frequent contact with law enforcement officials 20 to 30 years after the fact. Rather, it seems the more plausible approach for victims in Rogers' position is to keep their eyes and ears open and to expect that the police or F.B.I. would be in touch should any leads arise.

Furthermore, that Rogers did not discover IFAR sooner should not be fatal to his claim. Rogers is not a serious art collector; he is merely a man in search of lost artwork that decorated the walls of his home. This Court focuses on Rogers' exercise of diligence after discovering the IFAR registry — namely, Rogers' registering the Painting in 1992 — rather than his arguable lack of diligence in discovering IFAR's existence.

Additionally, the balance of equities weighs in Rogers' favor. Everett purchased the Painting without inquiring as to the painting's prior ownership or the identity of the consignor, without making any inquiry of art or law enforcement agencies, and with the knowledge that the Painting was in five pieces — suspicious circumstances to say the least. Everett took the risk that an original owner could appear at any time. In short, Everett took a gamble — he used his savings to purchase what he felt was a masterpiece — hoping to gain tremendous benefits by selling the restored Painting for a substantial profit.

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Rogers, on the other hand, suffered an intrusive crime, subsequently contacted the F.B.I. and remained in contact with that agency for many years, and, finally, set in motion the process of recovering the Painting through his diligence in contacting IFAR when he became aware of its existence. The fact that the Painting was located within a few years of purchase, yet many years after being stolen, was due specifically to the revived efforts of Rogers in 1992; this constitutes a continuing effort rather than a weak effort that lapsed in 1979.

The discovery rule is fact sensitive so as to adjust the level of scrutiny as is appropriate in light of the identity of the parties; what efforts are reasonable for an individual who is relatively unfamiliar with the art world, for example, may

not be reasonable for a savvy collector, a gallery, or a museum. While Rogers could certainly have been more aggressive in his search — for example, making inquiries at galleries and museums rather than merely visiting them — Rogers' occasional visits to galleries and museums, his follow-up on tips, and his reliance on the services of the F.B.I. (and, through it, Interpol) constitute a reasonable search effort under the discovery rule.

Notably, the standard is not whether Rogers did everything that might have been done with the benefit of hindsight, but whether his efforts were reasonable given the facts of the case.

In light of all the above factors, this Court finds that Rogers exercised reasonable due diligence in searching for the Painting and has satisfied the demands of the discovery rule. Accordingly, the statute of limitations did not begin to run until 1993 when Rogers discovered the whereabouts of the Painting and the identity of the possessor. Rogers' claim to the Painting is thus timely and will be honored by this Court.