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United States Court of Appeals for the Second Circuit Reverses District Court Holding that Application of Diligent Search Rule Instead of New York's Demand and Refusal Rule for Return of Stolen Artwork was Sufficient Grounds to Relieve Party from Prior Judgment

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United States Court of Appeals for the Second Circuit reverses district court holding that application of diligent search rule instead of New York's demand and refusal rule for return of stolen artwork was sufficient grounds to relieve party from prior judgment

New York City, with international auction houses such as Sotheby's and Christie's, has evolved as a central location for the world of art.[1] The particularly high prices paid to acquire works of art have created another profitable activity, namely art theft.[2]

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[1] *See* Porter v. Wertz, 53 N.Y.2d 696, 701, 421 N.E.2d 500, 502, 439 N.Y.S.2d 105, 107 (1981) (citing amicus brief by Art Dealers Association of America, Inc., noting that art business is centered in New York); Leah E. Eisen, *The Missing Piece: A Discussion of Theft, Statutes of Limitations, and Title Disputes in the Art World*, 81 J. CRIM. L. & CRIMINOLOGY 1067, 1067-68 (1991) (discussing skyrocketing prices of art works sold through New York's auction houses); Sydney M. Drum, Comment, DeWeerth v. Baldinger: *Making New York a Haven for Stolen Art?*, 64 N.Y.U. L. REV. 909 (1989). "New York City, the mecca of [art and antique sales], boasts over 500 private art dealers and auction houses. Buying and selling art and collectibles is chic, liquid, and profitable." *Id.* at 909 (footnotes omitted).

[2] *See* Andrea E. Hayworth, *Stolen Artwork: Deciding Ownership Is No Pretty Picture*, 43 DUKE L.J. 337 (1993) (noting that "art is no longer mere exhibition 'fare' but an investment worth millions of dollars . . . ."); Charles D. Webb, Jr., *Whose Art Is It Anyway? Title Disputes and Resolutions in Art Theft Cases*, 79 KY. L.J. 883 (1990-91). "Given the uniqueness of individual works of art, their high value, their rapid appreciation, and numerous occasions of theft, courts often are called upon to resolve disputes between two parties claiming ownership of a particular piece of art." *Id.* at 883; Stephen L. Foutty, Comment, Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.: *Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art*, 43 VAND. L. REV. 1839, 1840 (1990) ("The inflated prices have inspired people without a prior interest in art to conceive a sudden passion for collecting by any available means."); J. Robert Horton, *Beyond* Cyprus v. Goldberg: *Recommendations for Dealers*, N.Y. L.J., Apr. 27, 1990, at 5 (discussing syndicated art sales); Eisen, *supra* note 1, at 1067-68 ("[E]xorbitant sale prices are by no means extraordinary.").

The market for collectible art has not always been so profitable; much of the growth has come within the last thirty years. Susan Lee, *Greed Is Not Just for Profit*, FORBES, Apr. 18, 1988, at 65. Interests have been fueled in collectible art because the market "has become a more liquid market in which transaction costs are lower, information is better, instruments are more diversified and the financing of purchases and sales has become more refined." *Id.* at 66. Auction houses adapted their business methods to accommodate these developments. For example, auction houses print detailed catalogs when conducting sales and employ staffs of experts who conduct research in appraising pieces of art. *Id.* at 68-69. This trend boomed during the 1980s. *See The Art Market: Back to Reality*, NEWSWEEK, Jan. 13, 1992, at 66 (discussing economy's effect on art sales). "[A]uction sales drove the prices of the impressionist, mod-

Frequently, valuable pieces of stolen artwork end up in the hands of a good-faith purchaser who has no knowledge of the original theft.[3] In New York, the statute of limitations for the recovery of stolen property is three years.[4] As against a good-faith purchaser, however, the statute of limitations does not begin to run until the owner demands the return of the property, and the good-faith pur-

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ern and contemporary works to giddy heights. By spring 1990, the price of an average picture had risen roughly 150 percent . . . ." *Id.*; *see also* Sophie Burnham, *As the Stakes in the Art World Rise, So Do Laws and Lawsuits*, N.Y. TIMES, Feb. 15, 1987, § 2, at 1 (noting that 80% of all money spent on art occurred between 1977 and 1987).

Art theft has also become quite a lucrative business; 1988 estimates characterized art theft and fraud as a "billion-dollar-a-year" business. Pam Lambert, *Magazine of Art and Larceny*, WALL ST. J., July 22, 1988, at 16. Recovering stolen artwork is not easily accomplished. Drum, *supra* note 1, at 912. Further thwarting the original owner's efforts to locate the painting is the lack of investigation by the art dealer into the source, *id.*, or the title of the art work. *Porter*, 53 N.Y.2d at 701, 421 N.E.2d at 502, 439 N.Y.S.2d at 107 (citing amicus brief from Art Dealers Association of America, Inc. stating that duty of inquiry would "cripple" New York art business). Investigation by the art dealer is not the accepted practice in the art business. *Id.* Trafficking stolen art work is thought to be one of the most profitable criminal activities, second only to the international drug trade. *See* Eisen, *supra* note 1, at 1068 (citing Milton Esterow, *Confessions of an Art Cop*, ARTNEWS, May 1988, at 134).

[3] *See* Hoelzer v. City of Stamford, 933 F.2d 1131 (2d Cir. 1991) (suit for declaratory judgment by possessor of murals stolen during high school renovation in 1970); Golden Budha Corp. v. Canadian Land Co. of Am., N.V., 931 F.2d 196 (2d Cir. 1991) (suit to recover "Yamashita Treasure" wrongfully converted by government of Philippines in 1971); Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278 (7th Cir. 1990) (suit by Republic of Cyprus to recover mosaics stolen from Greek-Orthodox church in late 1970s); Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982) (suit by German Government to recover paintings looted by American troops in 1945); Republic of Turk. v. Metropolitan Museum of Art, 762 F. Supp. 44 (S.D.N.Y. 1990) (suit by Turkish Government to recover artifacts stolen from excavation site); Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S.2d 623 (1991) (suit by museum to recover painting stolen by mailroom clerk in 1960s); Menzel v. List, 22 A.D.2d 647, 253 N.Y.S.2d 43 (1st Dep't 1964) (suit to recover painting stolen by Nazis in 1941); Lieber v. Mohawk Arms, Inc., 64 Misc. 2d 206, 314 N.Y.S.2d 510 (Sup. Ct. Oneida County 1970) (suit to recover collection of Hitler's belongings stolen by plaintiff's chauffeur).

In this country, the law generally holds that a thief receives void title upon stealing property and thus, can never convey good title. *See* J. Robert Horton, *How to Improve Standing as Good-Faith Art Buyer*, N.Y. L.J., Apr. 13, 1990, at 5. Subsequent buyers of the stolen property may not obtain or convey title, whether they purchase in good faith or not. *Id.* "This means that the original owner can recover stolen art from a perfectly innocent person in possession, many buyers removed, many years later, who paid full market value . . . ." *Id.*

[4] *See* CPLR 214(3) (McKinney 1990). "The following actions must be commenced within three years: . . . an action to recover a chattel or damages for the taking or detaining of a chattel . . . ." *Id.*

chaser refuses to return it.[5] Recently, in *DeWeerth v. Baldinger*,[6] the Court of Appeals for the Second Circuit refused to apply this rule, preserving instead a seven-year-old holding that required the true owner to make a diligent search for the stolen painting to prevent the statute of limitations from beginning to run.[7]

The painting in question in *DeWeerth* is Claude Monet's "Champs de Blé à Véthevil."[8] In 1943, the plaintiff, Gerda Doro-

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[5] *See* Gillet v. Roberts, 57 N.Y. 28, 30 (1874) ("It is well settled that a *bona fide* purchaser of personal property . . . from a wrong-doer is not liable for a conversion without a demand and refusal."); Goodwin v. Wertheimer, 99 N.Y. 149, 153, 1 N.E. 404, 405 (1885) ("The original possession of [the defendant] being lawful, and not tortious, it was necessary to change the character of his possession by a demand and refusal before the plaintiffs could maintain an action against him for conversion, or to recover the goods."); *see also Menzel*, 22 A.D.2d at 647, 253 N.Y.S.2d at 44 (holding statute of limitations begins to run at time of demand and refusal); Cohen v. Keiser, Inc., 246 A.D. 277, 285 N.Y.S. 488 (1st Dep't 1936) (holding that demand and refusal required to make possession tortious); *Lieber*, 64 Misc. 2d at 208, 314 N.Y.S.2d at 512 (holding that defendant acting in good faith has no title to property stolen from owner); DAVID D. SIEGEL, NEW YORK PRACTICE § 40, at 49 (2d ed. 1991). "In certain instances a demand may be necessary before a claim accrues, as where . . . one from whom property has been taken seeks to recover it from an innocent third person who may now have possession of it." *Id.* (citing *Menzel*).

The CPLR also provides that "where a demand is necessary to entitle a person to commence an action, the time within which the action must be commenced shall be computed from the time when the right to make the demand is complete . . . ." CPLR 206(a) (McKinney 1990). CPLR 206(a) would apply in a case of mistaken delivery, where the possessor of the property is known, and, therefore, the true owner is immediately aware of the identity of the defendant. Federal Ins. Co. v. Fries, 78 Misc. 2d 805, 355 N.Y.S.2d 741 (N.Y. Civ. Ct. N.Y. County 1974). Consequently, the statute of limitations begins to run immediately because the plaintiff is instantly entitled and able to demand the return of the property. *Id.* at 810, 355 N.Y.S.2d at 747. This prevents the plaintiff from "extend[ing] the statute indefinitely, merely by postponing the making of a demand." *Id.* Courts have rejected this analysis, however, in situations involving theft where the identity of the bona fide purchaser is not revealed. *See Menzel*, 22 A.D.2d at 647, 253 N.Y.S.2d at 44. "The precedents in this State suggest that with respect to a *bona fide* purchaser of personal property a demand by the rightful owner is a substantive, rather than a procedural, prerequisite to the bringing of an action for conversion by the owner." *Id.* (citations omitted); *see also Elicofon*, 678 F.2d at 1161-63 (following *Menzel*); DeWeerth v. Baldinger, 836 F.2d 103, 107 (2d Cir. 1987) (Newman, J.) (citing *Menzel*), *cert. denied*, 486 U.S. 1056 (1988), *relief from judgment granted*, 804 F. Supp. 539 (S.D.N.Y. 1992), *rev'd*, 38 F.3d 1266 (2d Cir.), *cert. denied*, 115 S. Ct. 512 (1994). A clear rationale for this distinction is that the true owner will not immediately know the identity of the bona fide purchaser of his or her stolen property, and therefore, unlike the mistaken delivery scenario, will not be in position to make an immediate demand. *See Elicofon*, 678 F.2d at 1162 & n.22.

[6] 38 F.3d 1266 (2d Cir.), *cert. denied*, 115 S. Ct. 512 (1994).

[7] *Id.* at 1276; *see DeWeerth*, 836 F.2d at 112 (holding that plaintiff's failure to conduct reasonably diligent search caused statute of limitations to run before demand was made).

[8] *DeWeerth*, 38 F.3d at 1268.

thea DeWeerth, gave the painting to her sister, Gisela von Palm, to hold for safekeeping until the end of World War II.[9] The painting, however, was missing from von Palm's castle at the conclusion of the war in 1945.[10] From 1946 to 1957, DeWeerth made several unsuccessful attempts to locate her painting.[11] In 1956, unbeknownst to DeWeerth, the painting resurfaced at Wildenstein & Co., Inc., a New York City art gallery.[12] The following year, as DeWeerth abandoned her search for the painting, Edith Marks Baldinger purchased the Monet and displayed it in her apartment in New York City.[13]

In 1982, DeWeerth finally discovered that Baldinger was in possession of the painting.[14] DeWeerth made a written demand

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[9] *DeWeerth*, 836 F.2d at 105. DeWeerth inherited the Monet from her father in 1922, who had originally purchased the painting in 1908. *Id.* at 104.

[10] *Id.* at 105. Toward the end of the War in 1945, DeWeerth's sister had American soldiers quartered in her castle. *Id.* Although no direct proof was ever offered as to what happened to the Monet, the painting's disappearance coincided with the departure of the American soldiers. *Id.*

[11] *Id.* DeWeerth began her search for the Monet with the filing of a standard report which described the items considered lost during the war. *Id.* Mrs. DeWeerth submitted the report to the military government serving the Bonn-Cologne area. *Id.* In 1948, she contacted her attorney and inquired into filing an insurance claim for the painting and other lost items. *Id.* Her attorney notified her that the Monet was not covered by insurance. *Id.* In 1955, DeWeerth enlisted the assistance of Dr. Alfred Stange, "a former professor of art and an expert in medieval paintings, and asked him to investigate the painting's whereabouts. Stange responded that the photo [she sent him] was insufficient evidence with which to begin a search, and DeWeerth did not pursue the matter with him further." *Id.* at 105. DeWeerth, at the age of 63, made one last effort to locate the painting in 1957, when she sent a list of her missing items to the Bandeskriminalamt, the West German equivalent of the United States Federal Bureau of Investigation. *Id.* This effort also proved fruitless. *Id.*

[12] *Id.*

[13] *Id.* Wildenstein acquired the painting from an art dealer in Switzerland, retained possession of it from December 1956 through June 1957, and offered it to several prospective buyers. *Id.* Baldinger purchased it for approximately $30,000. *Id.* Thereafter, Baldinger displayed the painting in her Park Avenue apartment. DeWeerth v. Baldinger, 658 F. Supp. 688, 691 (S.D.N.Y.), *rev'd*, 836 F.2d 103 (2d Cir. 1987) (Newman, J.), *cert. denied*, 486 U.S. 1056 (1988), *relief from judgment granted*, 804 F. Supp. 539 (S.D.N.Y. 1992), *rev'd*, 38 F.3d 1266 (2d Cir.), *cert denied*, 115 S. Ct. 512 (1994). It was displayed twice publicly, however, in New York from October 29 to November 1, 1957, and April 2 to May 9, 1970. *Id.*

[14] *DeWeerth*, 658 F. Supp. at 691. DeWeerth's nephew learned of one of the public displays of the painting through a catalogue of Monet's work. *DeWeerth*, 836 F.2d at 105; *see supra* note 13 (discussing public displays of painting). In 1982, DeWeerth, through her attorney, requested that Wildenstein identify the party in possession of the Monet, but Wildenstein refused. *DeWeerth*, 836 F.2d at 105-06. DeWeerth brought suit in the Supreme Court, New York County "seeking 'disclosure to aid in bringing an action'" pursuant to CPLR 3202(c). *DeWeerth*, 658 F. Supp. at 691-92. The court found for DeWeerth and "order[ed] Wildenstein to reveal the identity of the

for its return, which Baldinger refused.[15] Two weeks later, DeWeerth filed suit in federal court for its return.[16] The district court ruled in favor of DeWeerth, finding that (1) the defendant's claim that the plaintiff failed to conduct a reasonably diligent search was inappropriate;[17] (2) the statute of limitations did not run before a demand was made; and (3) the defense of laches was not available to the defendant.[18]

The Court of Appeals for the Second Circuit reversed,[19] concluding in its *Erie*[20] analysis that to prevent the statute of limitations from beginning to run, New York state courts would require the plaintiff to conduct a reasonably diligent search for the painting.[21] The court also determined that DeWeerth did not conduct a

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possessor. [DeWeerth] thereafter learned that defendant Baldinger possessed the Monet." *Id.* at 692.

15 *DeWeerth*, 836 F.2d at 106. On December 27, 1982, DeWeerth, by letter, demanded the return of the Monet from Baldinger. By a letter dated February 1, 1983, Baldinger refused to return the painting. *Id.*

16 The action was based on diversity of citizenship, applying New York substantive law. *Id.*

17 *DeWeerth*, 658 F. Supp. at 695.

18 *Id.* at 694-95; *see infra* note 25 (discussing laches defense).

19 DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987).

20 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

21 *DeWeerth*, 836 F.2d at 110-11. In so holding, the court noted that a reasonably diligent search had never been required in a suit against an innocent purchaser in New York, and stated:

> We have elected not to submit the *unresolved* state law issue in this appeal to the New York Court of Appeals pursuant to the recently authorized procedure permitting that Court to answer questions certified to it by the United States Supreme Court, a United States Court of Appeals, or a court of last resort of any state. That valuable procedure should be confined to issues likely to recur with some frequency. Though the issue presented by this appeal is interesting, we do not think it will recur with sufficient frequency to warrant use of the certification procedure.

Id. at 108 n.5 (emphasis added) (citations omitted). It is submitted that the court was faced with enough precedent for this issue to be deemed to occur with "sufficient frequency." *See, e.g.*, Menzel v. List, 22 A.D.2d 647, 253 N.Y.S.2d 43 (1st Dep't 1964) (holding statute of limitations commenced at demand and refusal of painting's return); Lieber v. Mohawk Arms, 64 Misc. 2d 206, 314 N.Y.S.2d 510 (Sup. Ct. Oneida County 1970) (holding that defendant acting in good faith obtains no title from thief); O'Keeffe v. Snyder, 416 A.2d 863 (N.J. 1980) (holding New York's demand and refusal rule not applicable); Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982) (holding that New York rule is demand and refusal). A number of cases have arisen since the *DeWeerth* decision in 1987 which have addressed this issue, explicitly holding that no diligent search is necessary to prevent the statute of limitations from running. *See supra* note 3; *see also A Stradivarius Lost 27 Years Now Brings Tug-of-War*, N.Y. TIMES, Oct. 23, 1994, at 35 (discussing UCLA dispute to recover violin missing since 1967).

diligent search, and, therefore, that the statute of limitations had run before she made her demand.[22]

Approximately three years later, the New York Court of Appeals addressed this statute of limitations issue in *Solomon R. Guggenheim Foundation v. Lubell*.[23] The *Guggenheim* court held that New York's demand and refusal rule *does not* require a plaintiff to conduct a reasonably diligent search in order to prevent the statute of limitations from running.[24] Rather, the statute of limitations will begin to run against an owner only when the owner's demand for return is refused by the good-faith purchaser.[25]

Thereafter, DeWeerth returned to federal court to seek relief from the prior judgment, pursuant to Federal Rule of Civil Procedure 60(b).[26] The district court concluded that it was appropriate to grant the motion because the decision to grant a Rule 60(b) motion is within the judge's discretion,[27] and the plaintiff had dis-

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[22] *DeWeerth*, 836 F.2d at 111-12.

[23] 77 N.Y.2d 311, 569 N.E.2d 426, 567 N.Y.S.2d 623 (1991).

[24] *Id.* at 317-18, 569 N.E.2d at 429-30, 567 N.Y.S.2d at 626-27. In *Guggenheim*, a Chagall painting disappeared from the museum during the 1960s. *Id.* at 315, 569 N.E.2d at 428, 567 N.Y.S.2d at 625. The museum, however, never notified any law enforcement agencies, museums, or galleries regarding the theft for fear of "driving the [painting] further underground and greatly diminishing the possibility that it would ever be recovered." *Id.* at 315-16, 569 N.E.2d at 428, 567 N.Y.S.2d at 625.

[25] *Id.* at 318, 569 N.E.2d at 429-30, 567 N.Y.S.2d at 626-27. In holding that the plaintiff's lack of due diligence was not relevant in determining when the statute of limitations begins to run, the court stated

> In *DeWeerth v. Baldinger*, . . . the Second Circuit took note of the fact that New York case law treats thieves and good-faith purchasers differently and looked to that difference as a basis for imposing a reasonable diligence requirement on the owners of stolen art. . . . We have reexamined the relevant New York case law and we conclude that the Second Circuit should not have imposed a duty of reasonable diligence on the owners of stolen art work for purposes of the Statute of Limitations.

Id. Guggenheim was remanded, however, because the court held that failure to conduct a reasonably diligent search is relevant "in the context of [the innocent purchaser's] laches defense. The conduct of both [the innocent purchaser] and the museum will be relevant to any consideration of this defense at the trial level, and . . . prejudice will also need to be shown." *Id.* at 321, 569 N.E.2d at 431, 567 N.Y.S.2d at 628 (citation omitted). Ultimately, the laches issue was never resolved because the parties settled the suit. Richard Pérez-Peña, *Suit over Chagall Watercolor Is Settled Day After Trial Starts*, N.Y. TIMES, Dec. 29, 1993, at B3.

[26] DeWeerth v. Baldinger, 804 F. Supp. 539 (S.D.N.Y. 1992), *rev'd*, 38 F.3d 1266 (2d Cir.), *cert. denied*, 115 S. Ct. 512 (1994); FED. R. CIV. P. 60(b) (relieving party from final judgment under certain circumstances).

[27] *DeWeerth*, 804 F. Supp. at 548; *see* Mendell *ex rel.* Viacom, Inc. v. Gollust, 909 F.2d 724, 731 (2d Cir. 1990) (stating that Rule 60(b) motions are discretionary and are granted "upon a showing of exceptional circumstances"), *aff'd*, 501 U.S. 115 (1991); *see also infra* notes 35-37 and accompanying text (discussing FED. R. CIV. P. 60(b)(6)).

played the "extraordinary circumstances" necessary to support the motion.[28] Thus, the court held for DeWeerth.[29] In an opinion written by Judge Walker, however, the Second Circuit reversed again, holding that the district court abused its discretion under Rule 60(b) in ruling that the interest of finality of litigation was outweighed by the unfairness resulting to DeWeerth.[30]

In a vehement dissent, Judge Owen criticized the use of the unreasonable delay rule.[31] After enumerating all of the New York authority for the demand and refusal rule[32] and discussing New York's long-standing policy of protecting the rights of the property owner,[33] Judge Owen agreed with the district court's holding that DeWeerth should not be penalized for suing in federal court rather than state court.[34]

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[28] *DeWeerth*, 804 F. Supp. at 548-50. The court held that DeWeerth was entitled to relief "[i]n order to prevent the working of an *extreme and undue hardship*. . . ." *Id.* at 550 (emphasis added).

[29] *Id.* at 551-52.

[30] *DeWeerth*, 38 F.3d at 1275. The Second Circuit characterized the *Guggenheim* decision as a *change* in the law of New York. *Id.* at 1272. As such, the court held that the fact that *Erie* requires a federal court to "follow state law when deciding a diversity case does not mean that a *subsequent change* in the law of the state will provide grounds for relief under Rule 60(b)(6)." *Id.* at 1272-73 (emphasis added). Thus, the Second Circuit concluded that the district court "inappropriately disturbed a final judgment in a case that had been fully litigated . . . . By filing her state law claim in a federal forum, [DeWeerth] knew that any *open question* of state law would be decided by a federal as opposed to a New York state court." *Id.* (emphasis added). While it is true that a federal court sitting in diversity, facing an unsettled issue of state law, must make only a reasonable prediction on how the courts of the state would decide an issue, it is submitted that there was no "unsettled" state law issue in *DeWeerth*—New York's rule to commence the running of the statute of limitations is, and always has been, demand and refusal. *See supra* note 5 (discussing New York authorities on demand and refusal).

[31] *DeWeerth*, 38 F.3d at 1277 (Owen, J., dissenting).

[32] *Id.* (Owen, J., dissenting); *see supra* notes 3 & 5 (discussing authority for demand and refusal rule).

[33] *DeWeerth*, 38 F.3d at 1277-78 & n.4 (Owen, J., dissenting). "New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value." *Id.* at 1277 (Owen, J., dissenting) (citation omitted).

[34] *Id.* at 1278-79 (Owen, J., dissenting). Judge Owen agreed with the district court's reasoning that failure to grant the Rule 60 motion would deny DeWeerth the right to recover her property solely because she initially brought her action in federal rather than state court, and argued that such inconsistency is exactly the type of result that the *Erie* holding was meant to avoid. *Id.* at 1278 " '[T]he nub of the policy that underlies *Erie R.R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State Court a block away should not lead to a substantially different result.' " *Id.* (Owen, J., dissenting) (quoting Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) (Frankfurter, J.)). Judge Owen responded to the majority opinion by stating, "I cannot accept the

Rule 60(b)(6) provides that a "court may relieve a party . . . from a final judgment, order, or proceeding for . . . any . . . reason justifying relief from the operation of the judgment."[35] This discretionary rule permits a judge to relieve a party from a judgment when it is " 'appropriate to accomplish justice' "[36] or where there are "extraordinary circumstances or where the judgment may work an extreme and undue hardship . . . ."[37]

The Second Circuit's characterization of the district court's decision to grant the motion as an abuse of discretion[38] seems misplaced. In emphasizing the policy of finality, the majority apparently overlooked the existence of "extraordinary circumstances"[39] which permit a court to grant relief from a prior judgment. New York's demand and refusal rule is well established, and had been so in 1987 when *DeWeerth* first reached the Second Circuit.[40] Indeed, the Second Circuit conceded this in 1987 when the court recognized "that no New York court has ever held that the unreasonable delay rule applies *before* the plaintiff has learned the identity of the person to whom demand must be made."[41] Instead of certi-

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result here that Mrs. DeWeerth, who sought our federal diversity jurisdiction, must now suffer the consequences . . . of the said soon-corrected prediction . . . . Should not the impact of *Guggenheim* rather be shouldered by us, notwithstanding the integrity of our error?" *Id.* at 1279 (Owen, J., dissenting). Judge Owen suggested that the fear of having to deal with future Rule 60(b) invocations in potentially unworthy cases should not preclude the court from putting aside the doctrine of finality in this case where the requisite extraordinary circumstances exist. *Id.*

35 FED. R. CIV. P. 60(b)(6).

36 International Controls Corp. v. Vesco, 556 F.2d 665, 668 n.2 (2d Cir. 1977) (quoting Klapprott v. United States, 335 U.S. 601, 615 (1949)), *cert. denied*, 434 U.S. 1014 (1978).

37 Matarese v. LeFevre, 801 F.2d 98, 106 (2d Cir. 1986) (citations omitted), *cert. denied*, 480 U.S. 908 (1987). "The only criteria necessary is to 'accomplish justice.' Specifically, . . . 'the court has broad legal discretion to grant or deny relief in light of all the relevant circumstances' . . . ." *In re* Duralec, 21 B.R. 618, 620 (Bankr. E.D. Pa. 1982) (quoting *In re* Ireco Indus., Inc., 2 B.R. 76, 84 (Bankr. D. Or. 1979)). "Unquestionably, therefore, it is well within the jurisdictional ambit of [a court] to vacate an order or decree which is res judicata." *Id.*

38 *DeWeerth*, 38 F.3d at 1269.

39 DeWeerth v. Baldinger, 804 F. Supp. 539, 548 (S.D.N.Y. 1992) (quoting *Matarese*, 801 F.2d at 106), *rev'd*, 38 F.3d 1266 (2d Cir.), *cert. denied*, 115 S. Ct. 512 (1994).

40 *See* Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 317-18, 569 N.E.2d 426, 429-30, 567 N.Y.S.2d 623, 626-27 (1991). "[T]he abundant case law spell[s] out the demand and refusal rule, convinc[ing] us that that rule remains the law in New York and that there is no reason to obscure its straightforward protection of true owners by creating a duty of reasonable diligence." *Id.* at 319, 569 N.E.2d at 430, 567 N.Y.S.2d at 627; *see supra* note 5 (discussing New York case law on demand and refusal rule).

41 *DeWeerth*, 836 F.2d at 107.

fying the issue to the New York Court of Appeals,[42] the Second Circuit decided to reformulate the applicable law,[43] and in effect, made DeWeerth the only plaintiff under New York law ever to be denied the return of her painting from a good-faith purchaser on the grounds that the statute of limitations had run.[44]

When the Second Circuit originally decided *DeWeerth*, the court relied on only one case that supported the requirement of due diligence.[45] In *O'Keeffe v. Snyder*,[46] the New Jersey Supreme Court held that New Jersey law imposes the discovery rule, and therefore, the statute of limitations begins to run when the plaintiff knows or "reasonably should have known through the exercise of due diligence . . . the identity of the possessor . . . ."[47] It is submitted, however, that the Second Circuit should not have relied to such an extent on *O'Keeffe*. The New Jersey Supreme Court first determined whether New York or New Jersey law governed the action.[48] In holding that New Jersey law governed, the court distinguished New York's demand and refusal rule, ac-

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[42] *Id.* at 105 n.5; *see supra* note 21 (quoting text of court's footnote 5).

[43] *Cf.* Kunstsammlungen zu Weimar v. Elicofon, 678 F.2d 1150, 1163 (2d Cir. 1982) (refusing to add due diligence requirement to New York law). *See infra* notes 51-54 (discussing *Elicofon*).

[44] *See* Mary B.W. Tabor, *Rare Ruling Leave a Monet Hanging*, N.Y. TIMES, June 10, 1994, at B7. "Legal experts say . . . [it] is the first time in memory that the courts have denied someone the right to recover stolen work." *Id.*; *see also DeWeerth*, 38 F.3d at 1277-78 (Owen, J., dissenting). "[N]o prior New York statute of limitations ruling had any suggestion of a pre-demand due diligence requirement, or that the issue was ever raised, or even could have been considered." *Id.* at 1277 (Owen, J., dissenting). Furthermore, the Second Circuit has been called to interpret New York law in two stolen artwork cases after the *Guggenheim* decision. *See* Hoelzer v. City of Stamford., 933 F.2d 1131 (2d Cir. 1991) (stolen murals); Golden Budha Corp. v. Canadian Land Co. of Am., N.V., 931 F.2d 196 (2d Cir. 1991) (stolen treasure). In both cases, the court explicitly held that New York's demand and refusal rule does not impose a duty of due diligence on the plaintiff to prevent the statute of limitations from running. *Hoelzer*, 933 F.2d at 1136-37; *Golden Budha*, 931 F.2d at 201. It would appear, therefore, that DeWeerth is the only plaintiff in New York to have the statute of limitations run before ever even making a demand for the return of her property.

[45] *DeWeerth*, 836 F.2d at 109.

[46] 416 A.2d 862 (N.J. 1980).

[47] *Id.* at 870. In *O'Keeffe*, artist Georgia O'Keeffe sued to recover some of her own works which had been stolen from her New York art gallery in 1946. *Id.* at 865. With the exception of discussing the burglary with colleagues from the art world, she made absolutely no attempt to locate her paintings until 1972, when she contacted the Art Dealers Association of America, which maintains a registry of stolen paintings. *Id.* at 865-66. O'Keeffe discovered the whereabouts of her paintings in 1975, and demanded their return in February, 1976. *Id.* at 866. After the possessor refused, she brought an action for replevin. *Id.*

[48] *Id.* at 868.

knowledging that "[i]f the New York statute applied, [O'Keeffe's] action *would* have been commenced within the period of limitations."[49]

In relying on *O'Keeffe*, the Second Circuit ignored substantial contrary authority.[50] In *Kunstsammlungen zu Weimar v. Elicofon*,[51] the United States District Court for the Eastern District of New York stated that, while a due diligence requirement may or may not be justified, it was unnecessary to decide the issue, since the evidence clearly demonstrated that any required duty of due diligence was satisfied.[52] In affirming, the Second Circuit stated that "even if New York law might occasionally favor the thief or bad faith purchaser, *we are charged only with applying New York law, not with remaking or improving it.*"[53] The Second Circuit, however, disregarded these observations from *Elicofon* when deciding *DeWeerth*.[54]

The Second Circuit further ignored a bill which would have changed New York's demand and refusal rule.[55] In 1986, the New York Legislature passed a bill which "instituted a discovery rule in actions for recovery of art objects brought against certain not-

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[49] *Id.* (emphasis added). Furthermore, the *O'Keeffe* decision was not unanimous—two strong dissents were filed. *Id.* at 877-85 (Sullivan & Handler, JJ., dissenting). Both dissenting opinions criticized the application of a "due diligence" requirement. *Id.* In his dissent, Justice Handler argued that because the duty of diligence is placed on the owner and not the possessor or trafficker of the stolen property, art theft is not discouraged. *Id.* at 878 (Handler, J., dissenting).

[50] *See* DeWeerth v. Baldinger, 38 F.3d 1266, 1276-79 (2d Cir.) (Owen, J., dissenting), *cert. denied*, 115 S. Ct. 512 (1994); *supra* note 5 (reviewing New York authorities on demand and refusal rule); *see also infra* notes 55-59 and accompanying text (discussing Governor Cuomo's veto of bill to change demand and refusal rule).

[51] 536 F. Supp. 813 (E.D.N.Y. 1981) (applying New York law), *aff'd*, 678 F.2d 1150 (2d Cir. 1982).

[52] *Id.* at 849-50. "Efforts to locate the paintings . . . followed many channels . . . [and] reflect a continuous and diligent search." *Id.* at 852.

[53] *Elicofon*, 678 F.2d at 1163 (emphasis added). The court further argued that "[a]s between the policy . . . of allowing the statute of limitations to run against an owner regardless of his ignorance, and tolling it indefinitely against a good faith purchaser until a demand is made, *we are satisfied that New York has chosen the latter course.*" *Id.* at 1163-64 (emphasis added).

[54] *DeWeerth*, 836 F.2d at 110-11. Ironically, the court cited *Elicofon* to *support* the proposition that a reasonably diligent search is required. *Id.* at 110; *cf. Elicofon*, 678 F.2d at 1161 ("[T]he statute of limitations begins to run only upon the purchaser's refusal to return the property."). *Elicofon* is not the only case the Second Circuit ignored in reaching its decision. *See supra* note 5 (discussing New York authorities on demand and refusal).

[55] *See* Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 319, 569 N.E.2d 426, 430, 567 N.Y.S.2d 623, 627 (1991). "New York has already considered—and rejected—adoption of a discovery rule." *Id.*

for-profit institutions."[56] If such an institution came into possession of a work of art and gave the public notice of its possession, the statute of limitations would then begin to run.[57] Governor Mario Cuomo vetoed the bill, fearful that New York would become a " 'haven for cultural property stolen abroad since such objects [would] be immune from recovery under the limited time periods established by the bill.' "[58] This unambiguous declaration of New York's decision to reject a discovery rule arose eighteen months before the Second Circuit's original decision.[59] Moreover, the Second Circuit ignored a long line of case law in New York which clearly stated the rule to be demand and refusal and has never held that a plaintiff must conduct a diligent search to prevent the statute of limitations from running when a good-faith purchaser of unknown identity possesses the painting.[60]

Finally, in *Matarese v. LeFevre*,[61] the Second Circuit held that "[a] post judgment change in the law having retroactive application may, in special circumstances, constitute an extraordinary circumstance warranting vacation of . . . judgment."[62] Since *Guggenheim* was not a change in law, but merely a clarification of pre-

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56 *Id.* Both houses passed the bill. *See* N.Y.S. 3274-B, N.Y.A. 11462-A, 209th Sess. (1986).

57 *Guggenheim*, 77 N.Y.2d at 319, 569 N.E.2d at 430, 567 N.Y.S.2d at 627.

58 *Id.* (quoting Governor's veto message). Following the advice of the United States Department of State, the United States Department of Justice, and the United States Information Agency, the Governor vetoed the bill. *Id.*; *see* Irvin Molotsky, *3 U.S. Agencies Urge Veto of Art-Claim Bill*, N.Y. TIMES, July 23, 1986, at C15. The advice of the three agencies was unusual "because of the number of agencies involved and because of the forcefulness of their language." *Id.* "The bill does not balance fairly the legitimate interests of foreign countries [as art owners] in recovering their lost or stolen art work with the legitimate interests of museums or other good faith purchasers of art." *Cuomo Vetoes Art-Ownership Bill*, N.Y. TIMES, July 29, 1986, at C14 (quoting Governor Cuomo).

59 *See Cuomo Vetoes Art-Ownership Bill*, *supra* note 58, at C14 (discussing bill's defeat in 1986).

60 *See supra* note 5 and accompanying text (discussing New York case law regarding demand and refusal rule); DeWeerth v. Baldinger, 38 F.3d 1266, 1276-78 (2d Cir.) (Owen, J., dissenting), *cert. denied*, 115 S. Ct. 512 (1994).

61 801 F.2d 98 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987).

62 *Id.* at 106; *see* Overbee v. Van Waters & Rogers, 765 F.2d 578 (6th Cir. 1985) (holding change in state law sufficient "extraordinary circumstances"). "Had [the Ohio Supreme Court] reached the decision in [the original case] that it ultimately reached . . . plaintiffs would have prevailed . . . during *the first* appeal to this court." *Id.* at 580 (emphasis added). "To comply with the principle of comity which undergirds our federal system, we are obliged to give full effect to decisions of New York's highest court on issues involving the application of New York law." Sanchez v. United States, 696 F.2d 213, 216 (2d Cir. 1982) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)). "[I]t would seem that if the *Erie* factor does not make [*DeWeerth*] extraordinary it is

existing law,[63] it would seem that the district court was within its discretion in granting the motion pursuant to Rule 60(b).

It is submitted that the Second Circuit should not have reversed the district court's ruling granting DeWeerth's Rule 60(b) motion. The district judge determined that the clear misrepresentation of New York law by the Second Circuit compelled relief from the judgment and exercised his discretion pursuant to Rule 60(b)(6).[64] It is further suggested that the painting's value—currently worth over one million dollars—and DeWeerth's extremely advanced age met the requisite "extraordinary" circumstances necessary to relieve DeWeerth from the erroneous judgment.[65] It appears that the Second Circuit should have affirmed the district court in granting DeWeerth's Rule 60(b) motion, and that the Second Circuit's decision should be reversed *en banc*.

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difficult to determine what would be extraordinary." Robert A. Barker, *Principles of Finality; AIDS Phobia*, N.Y. L.J., July 18, 1994, at 3, 8.

[63] *See supra* note 5 (discussing New York authorities on demand and refusal); *supra* note 30 (discussing Second Circuit's mischaracterization of *Guggenheim* as "change" in law).

[64] *See DeWeerth*, 804 F. Supp. at 550.

[65] *See* Tabor, *supra* note 44, at B7 (noting current value of Monet). DeWeerth was approximately 100 years old at the time of this latest decision. *See Widow, 93, Loses Claim to Monet Landscape Valued at $500,000*, L.A. TIMES, Jan. 2, 1988, Part 6, at 2.