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## Mac'Avoy v. The Smithsonian Institute, 757 F. Supp. 60 (D.D.C. 1991)

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found that the city had no earlier notice of Hoelzer's intent to keep the murals. Consequently, there was no issue of "unreasonable delay" by the city in attempting to recover the paintings since the "unreasonable delay" issue was removed from this context in *Guggenheim v. Lubell*.<sup>5</sup>

In evaluating the requirements set forth in *DeWeerth* and *Guggenheim*, the court concluded that New York law imposes no such duty of due diligence on owners of lost or stolen art for statute of limitations purposes.<sup>6</sup> The court rendered this conclusion in the event that the judiciary may encounter a dispute between a good faith possessor and a theft victim. This approach, noted the court, serves to balance the equities in these types of situations, including the reasonableness of the efforts of the theft victim made to locate property, and the reasonableness of the possessor's grounds for believing that he is entitled to the property.

The court next addressed Hoelzer's abandonment of property claim, stressing that proof of actual abandonment turns on intent. The court defined that such intent be demonstrated by a virtual throwing away of the property, and cannot simply be presumed. The court concluded that the letter sent by the Stamford superintendent to the Board of Education requesting that the murals be stored properly during the school's renovation clearly proved that the school district did not intend for the murals to be thrown away.

### Conclusion

The court concluded that the city's claim was barred neither by the statute of limitations nor by the doctrine of abandonment. Therefore, the murals remain public property. Hoelzer, the court added, remains free to seek compensation for his restoration work on the art. Ω

*Kirsten Benner-Mulvihill*

1. Hiram H. Hoelzer v. City of Stamford, 933 F.2d 1131, 1153 (2d Cir. 1991).

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

3. *Id.* at 106.

4. *Id.* at 107.

5. Hiram H. Hoelzer v. City of Stamford, 933 F.2d at 1145.

6. *Id.*

## Mac'Avoy v. The Smithsonian Institute, 757 F. Supp. 60 (D.D.C. 1991)

### Introduction

Eduoard Mac'Avoy, plaintiff, brought this action against the Smithsonian Institution (the "Smithsonian") for recovery of artwork created by the artist Romaine Brooks claiming possession of the artwork through a French Act of Sale.<sup>1</sup> The United States District Court for the District of Columbia granted a Motion to Dismiss and Summary Judgment for the Smithsonian, holding: (1) the artist's transfer of her artwork to the museum did not create a bailment; (2) the plaintiff's replevin claim is subject to the strictures of the Federal Tort Claim Act;<sup>2</sup> and (3) the plaintiff failed to state a claim for a fifth amendment taking and a violation of due process.

### Facts

This case concerns the rightful possession of pieces of artwork by the late artist Romaine Brooks. The pieces of artwork in dispute are currently held by the Smithsonian. The plaintiff claims possession of these pieces through an Act of Sale issued in France on April 27, 1966.<sup>3</sup> Under various theories,<sup>4</sup> the plaintiff sought declaratory, injunctive, and nominal damage relief.

Prior to her death, Ms. Brooks executed an Act of Sale that allegedly conveyed to the plaintiff her two Nice apartments and the "*meubles meublants*" contained therein. Attached to this Act of Sale was a list of eleven paintings and their prices. Ten of these paintings are now held by the Smithsonian. The Act of Sale also included a clause stating that Ms. Brooks had the right to use and enjoy her apartment and its contents until her death.

During the time between the execution of the Act of Sale and Ms. Brooks' death on December 17, 1970, Ms. Brooks regularly corresponded with the Smithsonian regarding her artwork and its exhibit. On several occasions, the Chief Curator of the museum and other representatives visited Ms. Brooks in France and Italy. They spoke with Ms. Brooks about selected pieces which she would give to the museum. Following the discussions, Ms. Brooks sent numerous shipments of her work to the Smithsonian. Each shipment was followed by a letter of

receipt and a thank you to Ms. Brooks for her gifts to the museum. In June of 1983, the plaintiff wrote to the Smithsonian claiming to be the owner of eleven pieces of Ms. Brooks' artwork in the Smithsonian's possession. Both the museum and its attorney sent letters in July and September of 1983, respectively, to the plaintiff informing him that the artist's work had been given to the museum as gifts by the artist before her death.

### Legal Analysis

The plaintiff alleged in his first theory that a contract or contracts for bailment were expressly or impliedly created between Ms. Brooks and the Smithsonian; therefore, as successor-in-interest upon Ms. Brooks' death, he was entitled to the possession of the artwork held by the Smithsonian. The court disagreed with this characterization of the transactions by the plaintiff.

Because bailments are defined by state law, the court was compelled to analyze the bailment theory under the law of the District of Columbia. The District of Columbia Court of Appeals has held that the subject matter of a bailment requires a delivery by a bailor and acceptance from a bailee.<sup>5</sup> The bailee does not acquire title but holds the property for the term of the bailment. Bailment is a form of contract and requires mutual assent on the part of both parties. If there is no express agreement, an implied in fact bailment can be found if mutual assent by both parties can be ascertained from the circumstances.<sup>6</sup>

Through testimony of two Smithsonian representatives and the documentary evidence of the museum's correspondence with Ms. Brooks acknowledging her "gifts", the court found there was no assent on the part of the Smithsonian for any type of bailment arrangement. Although Ms. Brooks is deceased and it is difficult to determine her subjective intent, the court concluded that she too did not consent to a bailment arrangement when she did not respond to the contrary to the Smithsonian's letters thanking her for her gifts. Moreover, when the artwork was shipped from France the documents reflected a permanent, rather than a temporary, export shipment of artwork. Therefore, since the court found no mutual assent between Ms. Brooks and the Smithsonian to consider the artwork as bailments, they granted summary judgement on these counts to the Smithsonian.

Plaintiff's second theory rested on a claim of replevin. The plaintiff alleged he was the rightful owner of Ms. Brooks' artwork and the Smithsonian's refusal to return the work was a wrongful

detainment of his personal property. Replevin is a remedy to recover the possession of one's property wrongfully detained by another.<sup>7</sup> The District Court for the District of Columbia has held that an action for replevin sounds in tort,<sup>8</sup> and therefore has held that a plaintiff's replevin claim is an action in tort.

The Smithsonian is part of the United States government.<sup>9</sup> Tort claims against the United States are governed by the Federal Tort Claims Act ("FTCA").<sup>10</sup> Suits brought against the United States are brought only with its consent and under the strictures of terms and conditions imposed by statute. The FTCA specifically sets out prerequisites to filing a tort claim. The first prerequisite is jurisdictional in that an action cannot be maintained in district court unless an administrative claim was filed within the two year statute of limitations.<sup>11</sup> The claim accrues from the time the claimant discovers, or should have discovered with due diligence, his injury and the cause of that injury.<sup>12</sup> If the administrative claim is not brought within the two year statute of limitations, it is forever barred.<sup>13</sup>

The Smithsonian's letters to the plaintiff in July and September of 1983 refusing to return the paintings and claiming ownership provided the plaintiff with notice. Yet, despite this notice, the plaintiff waited six years, until 1989, to file his claim. Therefore, since the court held that the plaintiff's replevin claim was a tort action, and the plaintiff failed to file an administrative claim within two years, the court dismissed this count for lack of jurisdiction.

Likewise, the plaintiff's failure to take advantage of relief under the FTCA precluded him from stating a fifth amendment due process claim for either damages or injunctive relief. The plaintiff relied on the *Bivens* doctrine<sup>14</sup> for money damages. In dismissing the plaintiff's due process damage claims, the court found that his reliance on the *Bivens* doctrine was misplaced for two reasons: first, he had not sued the museum officials in their individual capacities; and second, *Bivens* does not allow damage actions based on constitutional claims against the federal government.

On the question of injunctive relief, which is not precluded by *Bivens*, the court found that the plaintiff was required to prove that he was deprived of his property not merely by insufficient or inadequate procedures, but by constitutionally inadequate procedures. The procedures must contain a defect so grave that they can be characterized as fundamentally unfair and so basic as to result in a deprivation of due process.<sup>15</sup> The court found in this