11-4042-cv

United States Court of Appeals
for the
Second Circuit

DAVID BAKALAR,

Plaintiff – Counter-Defendant – Appellee,

v.

MILOS VAVRA and LEON FISCHER,

Defendants – Counter-Plaintiffs – Appellants.

On Appeal from the United States District Court for the
Southern District of New York – Case No. 05-CIV-3037 (WHP)

ART DEALERS ASSOCIATION OF AMERICA, SOCIETY OF LONDON ART DEALERS, AND RICHARD NAGY AS PROPOSED *AMICI CURIAE*'S REPLY IN RESPONSE TO APPELLANTS' OPPOSITION TO PROPOSED *AMICI CURIAE*'S MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

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INTRODUCTION

As members of the international art community, Proposed *Amici Curiae*, the Art Dealers Association of America (the "ADAA"), the Society of London Art Dealers (the "SLAD"), and Richard Nagy (collectively, the "Amici"), are vitally interested in ensuring that all disputes over title to works of art are resolved fairly and efficiently. Accordingly, Amici have sought leave to file an *amicus curiae* brief in this appeal that focuses on the importance of the laches doctrine to good-faith purchasers of works of art, art dealers, and public art museums (the "Proposed Brief"). In particular, Amici believe that Appellants' interpretation of the laches doctrine is contrary to established New York law and, if adopted by this Court, would have a significant negative impact on New York's art market by eliminating the essential protections the laches doctrine provides to good-faith purchasers.

Being unable to challenge the relevance or importance of the arguments raised in the Proposed Brief, Appellants seek to preclude this Court from considering these arguments by making unsupported and inaccurate allegations regarding Amici and their counsel, and by arguing that the Proposed Brief does not comply with the technical requirements of Federal Rule of Appellate Procedure 29. Appellants' arguments are without merit and should be rejected for four reasons. First, the Proposed Brief clearly satisfies the fundamental requirements of Rule 29 because it will help this Court better understand the importance of the laches doctrine and the potential impact this case would have on the New York art

market. Second, the Proposed Brief accurately describes Amici's interest in this appeal as required by Rule 29. Contrary to Appellants' unsupported allegations, Amici's participation in this appeal is entirely appropriate. Third, Amici have complied with Federal Rule of Appellate Procedure 29(c)(4). There is simply no merit to Appellants' inflammatory suggestion that counsel for Amici did not have authority to file the Proposed Brief on behalf of the ADAA. Fourth, the Proposed Brief does not, as Appellants suggest, contain arguments that are "untested by the adversary process."

Accordingly, Amici respectfully request that the Court grant Amici's Motion for Leave to File Brief *Amici Curiae*.

ARGUMENT

I. THE PROPOSED BRIEF IS APPROPRIATE UNDER RULE 29(b)(1) BECAUSE IT IS RELEVANT AND DESIRABLE

The fundamental requirement of Rule 29 is that an *amicus curiae* brief must be "relevant" and "desirable." Fed. R. App. Proc. 29(b)(1). For example, Judge Richard Posner of the Seventh Circuit has noted that *amicus* briefs should "assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542 (7th Cir. 2003). Similarly, Justice Samuel Alito, while serving on the Third Circuit, noted that some *amicus* briefs "'argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. *Still others*

explain the impact a potential holding might have on an industry or other group.'" *Neonatology Assoc. v. Commissioner of Internal Revenue*, 293 F.3d 128 (3d Cir. 2002) (quoting Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. App. Prac. & Process 279 (1999)) (emphasis added). Here, the Proposed Brief meets these basic requirements.

First, the Proposed Brief is clearly relevant. One of the primary legal questions to be addressed in this appeal is whether the district court properly interpreted and applied the laches doctrine under New York law. (*See* Appellee's Br. at 1; Appellants' Br. at 39.) In particular, Appellants have argued that: (1) the "duties of diligence relevant to a laches defense inquiry trigger only *after* the true owner learns of the location of the stolen chattel," and (2) the knowledge or actions of a claimant's ancestors cannot be imputed to the claimants when determining if laches should apply. (Appellants Br. at 38, 49.) Amici believe that Appellants' interpretation of the laches doctrine would require this Court to effectively overrule twenty-five years of established New York law and have a significant negative impact on the New York art market. Amici's argument is clearly relevant to the issues on appeal.

Second, the Proposed Brief is desirable because it presents arguments not addressed in either parties' briefs and therefore may assist this Court in reaching its decision in this appeal. The Proposed Brief raises four key arguments regarding the importance of the laches doctrine to New York's art market:

(1) The laches doctrine provides critical protections to good-faith purchasers of art, including individual art collectors, art dealers, and public museums by protecting them against stale or frivolous claims. (Proposed Br. at 6-10.)

(2) For the past twenty-five years, the laches doctrine has provided district courts with a fair and balanced approach to resolve difficult and complex claims regarding art that is alleged to have been lost or stolen. (Proposed Br. at 10-14.)

(3) Appellants' interpretation of the laches doctrine would lead to unjust and absurd results by subjecting good-faith purchasers to replevin actions indefinitely. (Proposed Br. at 14-17.)

(4) Appellants' interpretation of the laches doctrine, if adopted, would have a significant negative impact on the New York art market by eliminating any certainty and order to disputes over title to works of art. (Proposed Br. at 17-20.)

These arguments are appropriate and desirable as they will assist this Court in understanding the impact this case could have on the New York art market and good-faith purchasers of works of art. *See Neonatology Assoc.*, 293 F.3d at 132.

Appellants do not challenge the relevance or desirability of arguments contained in the Proposed Brief. Indeed, Appellants' Opposition does not contain any legitimate challenge to the substance of the Proposed Brief. Rather, Appellants merely state in passing that the Proposed Brief "mischaracterize [sic] the arguments of the Co-Heirs and is thus untrustworthy and unhelpful." (Opp. at 8.) This superficial argument lacks merit. The fact that Appellants do not agree with Amici's arguments regarding the laches doctrine does not make those

arguments untrustworthy or unhelpful.[1] Accordingly, Amici's Motion for Leave to File Brief *Amici Curiae* should be granted.

II. AMICI HAVE PROPERLY DISCLOSED THEIR INTEREST IN THIS APPEAL AND THEIR INVOLVEMENT IS ENTIRELY APPROPRIATE UNDER RULE 29

A. It is Entirely Appropriate for the ADAA and Richard Nagy to Appear as *Amici Curiae* in this Appeal

Unable to challenge the relevance or desirability of the Proposed Brief, Appellants assert that it would be improper for this Court to allow the ADAA and Nagy to appear as *amici* in this appeal because they are interested in the "subject matter of this action" and therefore are not impartial. (Opp. at 4-6.) This argument should be disregarded because it reflects a fundamental misunderstanding of the Federal Rules of Appellate Procedure and the purpose of *amicus curiae* briefs.

Rule 29 does not require that an *amicus* be impartial. Rather, under Rule 29(b)(2), an *amicus* is specifically required to have an interest in the case. *See Neonatology Assoc.*, 293 F.3d at 131 (noting that "Rule 29 requires that an amicus have an 'interest in the case,' and the appellants' argument that an amicus must be

[1] Appellants complain that Amici have mischaracterized Appellants' position by arguing that the Appellants "seek to 'reset the clock' to allow each successive generation of heirs to pursue claims barred by laches." (Opp. at 9). While Appellants have not used this precise language, Appellants have repeatedly argued that the their ancestors' knowledge of the Drawing and lack of due diligence cannot be imputed to Appellants. (Appellants' Br. at 38). This is a distinction without a difference. (*See* Proposed Br. at 14-17.)

'impartial' is difficult to square with this requirement.") (internal citations omitted). Indeed, Justice Alito has noted:

> The argument that an amicus cannot be a person who has "a pecuniary interest in the outcome" also flies in the face of current appellate practice. A quick look at Supreme Court opinions discloses that corporations, unions, trade and professional associations, and other parties with "pecuniary" interests appear regularly as amici. . . . I thus reject the appellants' argument that an amicus must be an impartial person not motivated by pecuniary concerns.

Id. at 131-32 (internal citations omitted).

Accordingly, Appellants' speculation that one of the members of the ADAA or Nagy might somehow benefit financially if this Court were to rule in favor of the Appellee does not preclude the ADAA or Nagy from appearing as *amici* in this appeal. Rather, under Rule 29, the ADAA and Nagy's involvement as *amici* is entirely appropriate for this reason.

B. The Proposed Brief Accurately Describes Amici's Interests

Appellants also argue that leave to file the Proposed Brief "should be denied because Proposed *Amici Curiae* fail to disclose their interests in the subject matter of this litigation." (Opp. at 3-6.) Contrary to Appellants' assertions, the ADAA and Nagy have accurately disclosed their interests in this appeal. Indeed, Appellants' speculation regarding other possible interests is not only irrelevant, but is factually inaccurate.

Appellants assert that Proposed *Amicus Curiae* Richard Nagy has an "undisclosed direct financial interest in this case." (Opp. at 5.) This is untrue.

Nagy does not now, nor has he ever had any financial interest in the drawing by Egon Schiele, "Seated Woman with Bent Left Leg (Torso)," which is the only work of art at issue in this appeal. (Nagy Decl. ¶ 2.) Appellants further suggest that Nagy has an undisclosed interest in another work of art by Schiele, titled "Woman in Black Pinafore," that Appellants now allege was also stolen from Fritz Grunbaum. This is likewise inaccurate. While Nagy previously purchased an ownership interest in "Woman in Black Pinafore," Nagy voided the purchase in October 2011 and no longer possesses "Woman in Black Pinafore." (Nagy Decl. ¶ 3.) Moreover, other than "Woman in Black Pinafore," Nagy has never sold or purchased, or acted as an agent in connection with any of Schiele's works with the Mathilde Lukacs and Eberhard Kornfield provenance.[2] (Nagy Decl. ¶ 4.) Accordingly, Appellants' allegations regarding Nagy's interests are without merit.

Proposed *Amicus Curiae*, the ADAA, have also properly disclosed their only true interest in this appeal—the significant negative impact this case would have on the New York art market if this Court were to adopt Appellants' interpretation of the laches doctrine. (Proposed Br. at 1-3.) Appellants, however, argue that the Proposed Brief should be rejected because it did not disclose that the Galerie St.

[2] While not at issue in this appeal, Appellants have previously alleged that all of Schiele's works with this provenance were stolen from Fritz Grunbaum and should be returned to Appellants. Nagy does not possess any such works. (Nagy Decl. ¶ 4.) There is no reason to believe that any other Schiele works sold or purchased by Nagy have any connection to Grunbaum or Appellants.

Etienne, whose proprietor Jane Kallir testified in this matter, is a member of the ADAA. (Opp. at 5-6.) This argument is without merit. Galerie St. Etienne is but one of over 175 members of the ADAA. Galerie St. Etienne's individual interest in this case is irrelevant.[3] Rule 29(b)(2) does not require the ADAA to disclose the potential interests of each of its members.

Simply put, there is no merit to Appellants' claim that Nagy and the ADAA failed to accurately disclose their interests in this appeal.[4]

III. THE PROPOSED BRIEF COMPLIES WITH RULE 29(c)(4)

Appellants also argue that leave to file the Proposed Brief "should be denied because Proposed *Amici Curiae* fail to disclose the source of their authority to file a brief on behalf of the ADAA." (Opp. at 6-7.) In particular, Appellants state that the Amici were required to provide evidence that the ADAA's Board of Directors approved the filing. Appellants have misconstrued the requirements of Rule 29(c)(4), which were clearly met by Amici.

Rule 29(c)(4) requires that an *amicus* brief state "the source of [the amicus curiae's] authority to file the [brief]." The Advisory Committee Notes to Rule 29(c)(4) clearly state that to comply with Rule 29(c)(4), the "amicus simply

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[3] Appellants cite no authority suggesting that it is improper for the ADAA to appear as *amicus* simply because one member of the ADAA was involved in, but not a party to, the underlying district court action.

[4] Appellants do not challenge the interests of the SLAD. *See infra* note 4. The SLAD's interests were properly disclosed under Rule 29.

must identify which of the provisions in Rule 29(a) provides the basis for the amicus to file its brief." Fed. R. App. Proc. 29 notes (1998). This means that an *amicus* brief must indicate whether it is filing the brief as a government entity, with leave of court, or with the consent of all parties. Fed. R. App. Proc. 29(a). Here, Amici filed the Proposed Brief while concurrently moving for the Court's leave to do so, in satisfaction of Rules 29(a) and 29(c)(4). In other words, contrary to Appellants' interpretation, Rule 29(c)(4) does not require the ADAA to provide evidence that its Board of Directors approved the filing.

Moreover, to the extent that Appellants assert that counsel for Amici did not have authority to file the Proposed Brief on behalf of the ADAA, this assertion is simply not true.[5] Gilbert S. Edelson, Administrative Vice President and Counsel for the ADAA, authorized the filing of the Proposed Brief on behalf of the ADAA in accordance with the ADAA's internal procedures. (Andre Decl. ¶ 2.)

IV. THE PROPOSED BRIEF DOES NOT "SET FORTH ASSERTIONS UNTESTED BY THE ADVERSARY PROCESS"

Appellants argue that "leave to participate as *amici curiae* should be denied because the Proposed *Amici Curiae* set forth assertions untested by the adversary

[5] Appellants incorrectly state that the Society of London Art Dealers withdrew as Amici. (Opp. at 7.) The SLAD was not included as a party to the Proposed Brief initially because counsel was waiting to receive final approval from SLAD at the time of filing. Authority to include the SLAD as an *amicus* was, however, received from Christopher Battiscombe, the SLAD's Director General, and a Notice of Joinder and an Amended Proposed Brief including the SLAD was immediately filed with the Court. (Dkt. No. 104; Andre Decl. ¶ 3.)

process." (Opp. at 7-9.) Appellants' argument is unintelligible and must be rejected.[6] The focus of the Proposed Brief is the proper interpretation of the laches doctrine, an issue which was squarely before the district court. Moreover, Amici explicitly state that they take no position regarding the district court's factual findings or other rulings. There is simply no support for Appellants' arguments that the Proposed Brief presents "untested assertions" and that the consideration of the Proposed Brief would prejudice Appellants.

CONCLUSION

Amici's Proposed Brief is relevant and desirable, and clearly complies with the requirements of Rule 29. Accordingly, Amici respectfully request that this Court grant Amici's Amended Motion for Leave to File Brief *Amici Curiae*.

[6] Appellants appear to argue that it is unfair to allow Amici to participate in this appeal because the Appellants were denied discovery by the district court regarding the whereabouts of other works of art by Egon Schiele. This argument makes no sense. The district court's discovery ruling is not at issue in this appeal. (*See* Appellants' Br. at 3-4 (identifying issues on appeal).) Moreover, Appellants cite to no authority that suggests that the district court's denial of Appellants' discovery motion is a legitimate basis for denying Amici, who were not a party before the district court, leave to file its Proposed Brief.

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Respectfully submitted,

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