

Plaintiffs to pursue the return of all artworks that were not part of the Nierenberg Litigation through this new procedure. (*See* Dec. 2, 2015 Tr. (ECF 118) at 62-63.) This Court requested supplemental briefing.²

The so-called “formal procedure” that Defendants created as a result of the 2013 Legislation is not a valid basis for this Court to decline to exercise subject matter jurisdiction over Plaintiffs’ claims. Defendants’ own submission, as well as other publicly available statements by Hungarian governmental officials, confirms that any efforts by Plaintiffs to pursue their claims under the 2013 Legislation would be futile and would only result in substantial delay. Accordingly, for the reasons set forth below and in Plaintiffs’ opposition to Defendants’ motion to dismiss (ECF No. 110), this Court should decline Defendants’ invitation to abstain from exercising jurisdiction on the ground that Plaintiffs have purportedly failed to exhaust available remedies in Hungary.

ARGUMENT

THIS COURT SHOULD NOT DECLINE TO EXERCISE JURISDICTION ON THE BASIS OF THE 2013 LEGISLATION

It is well-settled that subject matter jurisdiction is generally determined based on the facts as they exist at the time of the filing of the Complaint and does not depend on subsequent events. *See, e.g., Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 570-71 (2004) (“It has long been the case that ‘the jurisdiction of the court depends on the state of things at the time the

² In its December 2, 2015 Order (ECF No. 117), this Court ordered Defendants to “submit any Hungarian laws or regulations issued since 2013 that establish compensation programs for takings during World War II, and provide how many claimants have recovered property pursuant to those programs, how many Jewish claimants have recovered property pursuant to those programs, and whether Hungary has permitted any such recovered artwork to be removed from Hungary.”

action is brought.”). While this rule is not absolute where federal question, as opposed to diversity, jurisdiction is at issue, “it is clear that where the jurisdictional question is really a question of exhaustion, a defendant cannot defeat jurisdiction by simply creating a new avenue for exhaustion of . . . remedies that had not been available at the time of the original filing.” *Ford Motor Co. v. United States*, 688 F.3d 1319, 1326 (Fed. Cir. 2012) (holding that defendant could not defeat jurisdiction by creating new post-complaint administrative remedies for plaintiff to exhaust). Accordingly, even if exhaustion of remedies were required for this Court to have jurisdiction under Section 1605(a)(3) of the FSIA (which as set forth in Plaintiffs’ Opposition Brief (ECF 110 at 56-59) it is not), the procedure created by the 2013 Legislation is not a valid remedy that Plaintiffs should be required to exhaust.

I. The Procedure Is Arbitrary, Ineffective And Entirely Within Defendants’ Control

Up until December 2, 2015 – the same day that this Court heard oral argument on the Motion – the entity responsible for evaluating and deciding any claims brought pursuant to the 2013 Legislation was the very entity that purports to own artworks on behalf of the state – the Hungarian State Holding Company (“MNV Zrt.”) itself. (Decl. of Dr. Roland Srágli (ECF 119-1) ¶¶ 5-6; Decl. of Zoltán Novák (ECF 119-2) ¶ 5d & Ex. D.) Not surprisingly, this entirely arbitrary procedure was not particularly effective for claimants. Since the law was enacted two years ago, only two claimants have received favorable decisions. (Def. Supp. Br. at 2.) Moreover, while Defendants state that 273 artworks and other objects were physically returned pursuant to the 2013 Legislation (*see id.*), public statements made by Dr. Roland Srágli (who also submitted a declaration on behalf of Defendants) and various news articles confirm that almost all of those objects belonged to a single family – the Sigray family – who, unlike the Herzog family, also brought a successful art restitution lawsuit against the Hungarian state prior

to the enactment of the 2013 Legislation (*See* Decl. of Dr. Mark Pető dated January 11, 2016 (“Pető Decl.”) Exs. 1-3.)³

The 2013 Legislation was amended – effective December 2, 2015 – to make the Minister responsible for the protection of cultural heritage the ultimate arbiter of whether the state will assert ownership over a particular piece of art. (*See* Def. Br. at 2 (role of decision maker has shifted to the Minister responsible for the protection of cultural heritage).) However, this amendment continues to give Defendants exclusive control over whether to decide to reconstitute a particular piece of art – only the name of the decisionmaker has changed. There is no neutral, independent decisionmaker. Accordingly, the 2013 Legislation – including as amended – does not in any way create a forum that could possibly pass the rigorous impartiality tests imposed by Article 6 of the European Convention of Human Rights.⁴ Nor is it grounds for transferring decisionmaking over Plaintiffs’ claims from this Court back into Defendants’ hands.

II. It Would Be Futile For Plaintiffs To Pursue A Claim Under The New Procedure

Even if the 2013 Legislation did create a viable forum (which it does not), it would be futile for Plaintiffs to pursue a claim under the 2013 Legislation, including as amended, because the 2013 Legislation only provides for the return of artworks that the relevant decision maker (formerly MNV Zrt. and now the Minister responsible for the protection of cultural heritage) determines, after investigation, are not owned by the state. Here – with the benefit of full fact

³ According to the articles, the Sigray family agreed to leave more than 130 out of the 273 items in museum deposit. (*Id.*, Ex. 1.) Besides the Sigray family, the Károlyi family allegedly recovered 9 portrait paintings and the Mikes family recovered a drawing, a clergy vestment and a painting. (*Id.*, Exs. 1 & 2.) None of these families were Jewish families bringing Holocaust era claims.

⁴ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS.

discovery – Defendants continue to insist that all of the artworks are owned by them, not Plaintiffs. (Motion at 38-40; Pl. Opp. Br. (ECF 110) at 59.) Accordingly, the outcome of any claim under the 2013 Legislation is pre-ordained.

As Mr. Srágli explained in May 2015, if the relevant decisionmaker concludes that an artwork is owned by the state – including because it was nationalized, sequestered as a result of a criminal proceeding, or otherwise subject to a prior court order (even if wrongful) – there is no provision in the 2013 Legislation that allows for compensation for the taking, even if the taking constituted a violation of international law. (Petó Decl. Ex. 3.) Hungary has repeatedly asserted that each of these grounds bar Plaintiffs’ claims in this case. (Motion at 7-9, 38-40.) Moreover, Hungary continues to apply technical defenses – such as statute of limitations and adverse possession – to defeat restitution claims (including for an artwork held in bailment since 1919) under the 2013 Legislation. (Petó Decl. Ex. 4.)

CONCLUSION

For all of these reasons, Plaintiffs respectfully request that this Court deny Defendants’ motion to dismiss.

Dated: January 11, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

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