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Small decision, big impact

Recent ruling could change the legal landscape for art forgery cases in New York

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Scott Reeder's *Real Fake*, 2013. Which "forgery experts" will make the final call?

A recent decision in New York's Supreme Court could cause chaos in art forgery cases. The ruling places a fresh burden on collectors seeking to challenge the authenticity of works. It suggests that, even if a work is obviously fake, a case could be thrown out unless the claimant produces an expert who examined the work before its sale and after the dispute, and who can testify that it is the same work as the one sold. "That can't be right, yet it seems to be what the case says," says the art lawyer Donn Zaretsky of John Silberman Associates.

This potentially adds another layer of complication to an already muddy area of the law, and could result in fewer forgery cases coming to light or being resolved. It “is a huge disruption to the way the art trade works because it introduces a whole new level of due diligence, which becomes mandatory”, Zaretsky says. **The “custody chain”** The ruling in this case is directly related to the court’s concerns about the “chain of custody” of the works (see box). But its language allows for a broader interpretation. Dealers who are sued over authenticity could use this as precedent in their defence: “The work might be fake, but I didn’t sell it to you.” It is “certainly a strategy that a good defence attorney would employ”, says Todd Levin, the art adviser and director of the Levin Art Group. He says the ruling makes sense because “if an expert testifies only after the transaction, there’s really no way to prove that what they examined afterwards is the same work of art initially shown”. But there are several issues. One of the difficulties would lie in having a work examined by the same specialist if a long period of time has elapsed, since people become ill, retire and die. The decision does not include details of what, or whom, is meant by “forgery expert”. In today’s litigious climate, “we are already witnessing the erosion of the process of authentication, which used to be governed by experts who now seem to be driven further and further away by threats of legal action where so much financial value is at stake”, says the art adviser Allan Schwartzman. It seems unlikely that advisers and scholars would freely voice their opinions on forgeries. The issue is “not a new one. It has arisen before and, in a way, is always a possible argument”, says Jo Backer Laird, a lawyer with Patterson Belknap Webb & Tyler. Nevertheless, “we all need to be hyper-vigilant”, says the art adviser Lisa Schiff, who believes there is an “urgent need for some kind of digital chip system, a homing device or a foolproof document that accompanies a work of art upon sale”. The ruling could indicate a shift, with courts putting more emphasis on the responsibilities of buyers. Last year, a New York court ruling on a forgery claim by ACA Galleries against Joseph Kinney for his sale of an allegedly fake painting by Milton Avery decided that, even if Kinney knew the work in question was fake and so committed fraud, the case should be dismissed because the gallery should have done more research into the work before buying it. “It could be that the courts don’t want to get in the middle of disputes,” says a source. “The instinct behind these cases could be that they don’t want to deal with rich people’s problems.” **‘If they are forgeries, when were they forged?’** The decision is part of a case so colourful that Justice Kornreich calls it “ridiculous” in court transcripts. The dispute is between Gary Tatintzian, a Russian art dealer, and Lew Nussberg, an artist, art historian and collector, who was born in Russia and lives in Connecticut. It concerns non-payment for and breach of contract over allegedly faked Russian Suprematist works. The ruling has sprung from the need to establish a “chain of custody” because the works left the US for Russia several years ago and have passed through several hands since. “Even if they are forgeries, when were they forged?”, Kornreich asks. Describing herself as “an addict who goes to museums all the time and can recognise many works of art”, Kornreich says she “could not possibly tell you if [a work] is forged or not. And I think that’s true of most gallery owners... you would need an expert in forgery—it’s a specific type of expert—to be able to tell you if a piece of art is forged and, as a result, to tell you whether the piece of art they are identifying is the same piece of art as they identified previously”.