**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | |
| ONE POLISH WZ. 38 MM MAROSZEK | ) | |
| SEMI-AUTOMATIC RIFLE, | ) | 1:13CV691 |
| SERIAL NUMBER 1019 | ) | |
| _____ | ) | |
| | ) | |
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| KRISTOPHER J. GASIOR | ) | |
| | ) | |
| Claimant | ) | |
| | ) | |
| REPUBLIC OF POLAND | ) | |
| | ) | |
| Claimant | ) | |

**MEMORANDUM OF LAW IN SUPPORT OF KRISTOPHER GASIOR'S RESPONSE TO POLAND'S MOTION TO STRIKE, RESPONSE TO POLAND'S MOTION TO DISMISS, RESPONSE TO POLAND'S MOTION FOR JUDGMENT, AND GASIOR'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST THE REPUBLIC OF POLAND**

Claimant Kristopher Gasior respectfully submits this Memorandum of Law in support of his response to Poland's Motion to Strike certain of Claimant Kristopher Gasior's defenses; response to Poland's Motion to Dismiss Mr. Gasior's claim to the Polish WZ.38M Maroszek Semi-Automatic Rifle, Serial Number 1019; Poland's Motion for Judgment on the Pleadings; and Gasior's Cross-Motion for Judgment on the Pleadings Against the Republic of Poland.

## INTRODUCTION

The Claimant, the Republic of Poland, alleges, in both its responsive pleadings to the interpleader action filed in this case and its various motions to strike, dismiss, and for judgment on the pleadings under Rule 12, that it is the owner of the Polish Semi-Automatic Rifle which is the subject of the interpleader filed in this case. It does so by virtue of the fact that the rifle was designed by Jozef Maroszek, a firearms engineer employed by the Polish government, and produced at an armaments facility in Warsaw, Poland known as Zbrojownia. Although certain reports indicate that 150 rifles had been manufactured in total, the statement attached to the responsive pleadings filed by Poland in this case (Exhibit B, Answer and Claim), Statement of Lieutenant-Colonel Zbigniew Gwozdz, states, "By July 1939, about 150 kbsp.wz.38 M were produced. The Armament Dept. distributed them among combat units." Gwozdz goes on to say, "After the German invasion on Poland, kbsp M rifles fell in the hands of the occupation forces. J. Maroszek claims seeing a group of German soldiers armed with his rifles in 1940."

The Claimant Kristopher Gasior is a firearms dealer who alleges that he purchased the rifle at a gun show in California in 1993 from a federal firearms licensee by the name of Mark James Herrick. Gasior claims ownership of the rifle as a bona fide purchaser whose claim and right is superior to Poland's claims.

## LEGAL STANDARD

Although Gasior is still of the view that the current Republic of Poland is not a proper party in this action, we have no objection to the Court entering an appropriate order.

As to the standards to be met with respect to a motion under Rule 12 of the Federal Rules of Civil Procedure, there is no need to reinvent the wheel. Poland has accurately capsulized the

holdings of both *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcraft v. Iqbal*, 556 U.S. 662 (2009). Emphasis should be placed upon Poland's assertions under *Iqbal* that while the Court must accept the pleadings' allegations as true as a general matter, it need not accept legal conclusions or conclusory factual allegations as true. Gasior agrees that judgment on the pleadings is appropriate when all material allegations of fact are admitted in the pleadings and only questions of law remain. *Wells Fargo Equip. Fin., Inc. v. State Farm Fire & Cas. Co.*, 805 F. Supp. 2d 213 (E.D.Va. 2011).

Finally, the legal standards to be considered in dealing with Gasior's assertions that he is a bona fide purchaser for value and the presumption of ownership that arises out of his actual possession of the rifle at the time it was seized by the Department of Homeland Security is amply set forth in *Willcox v. Stroup*, 467 F.3d 409 (4th Cir. 2006), *State of Maine v. Adams*, 277 Va. 230, 672 S.E. 2d 862 (2009) and *Adams v. State of Maine*, 75 Va. Circ. 41 (2008). Under these authorities, once Gasior has established actual possession, the burden shifts to Poland to overcome the presumption that he is a bona fide purchaser for value.

## ARGUMENT

### I. POLAND'S CLAIM AND CROSS-CLAIM SHOULD BE DISMISSED BECAUSE THEY FAIL TO STATE A CLAIM, AND GASIOR SHOULD BE AWARDED A JUDGMENT ON THE PLEADINGS.

Poland, in argument, throughout the pleadings, alleges the rifle in question was stolen or looted by the Germans. Poland's pleadings, however, belie this proposition and nowhere does Poland plead any set of facts which could establish this proposition. In Poland's Answer and Claim to Property and Cross-Claim in paragraph 11, Poland alleges that approximately 150 rifles

were manufactured in Warsaw, Poland in the factory known as Zbrojownia. In Exhibit B incorporated into Poland's pleading, the assertion is made that by July of 1939, approximately 150 of those rifles were distributed amongst combat units. Paragraph 12 of the pleading clearly asserts that, "As a consequence of Nazi Germany's invasion of Poland in September 1939, WZ.38M rifles likely fell into the hands of occupying German forces, which stole the property." This is not a statement of fact, but is pure speculation and conjecture. Indeed, Poland does not know what happened to any of these rifles after they were distributed to the troops. The history of possession of these rifles is a blank page from the time they were distributed to the troops until the time that Gasior purchased the rifle from Herrick.

Poland has set forth no factual basis for its claim that the rifles were stolen or looted, and indeed any number of possibilities come to mind. The rifles could have been lost on the battlefield, they could have been discarded by retreating soldiers, they could have been surrendered to German captors or Russian captors . . . the possibilities are endless. Poland appears to agree that there are many possibilities. In its Memorandum under C, page 19, Poland concedes, "Rather than being captured from the enemy, the property could have been simply found abandoned in an area not within the contemporary control of Nazi forces; it could have been bartered for by a United States soldier."

Gasior has suggested the possibility that the rifle in question could have been brought to this country as a war trophy. Poland seeks to limit this possibility with a scenario where the rifle was captured from the Polish government or its soldiers by a United States soldier directly. This suggestion, of course, flies in the face of Poland's earlier assertions that some of the 150 rifles were last seen in the possession of German soldiers. Without conceding that this scenario

actually happened, if indeed it did, there is no evidence to suggest that this buttresses Poland's claim that this is stolen property. Indeed Poland's memo on this issue seems to support Gasior's claim.

The Polish government speculates that the rifle at issue was "stolen" by German military forces and that title remains in the Polish government. While the only fact certain in this case is that the rifle was lawfully purchased by and was possessed for many years by Mr. Gasior, Poland's argument is inconsistent with provisions of the Hague Convention, which distinguishes the lawful confiscation of arms and other war booty of the defeated state from the unlawful confiscation of other public property and of private property. These norms of international law were not altered by the conviction of Nazi war criminals for waging aggressive wars.

Article 53 of the Hague Convention provides:

> An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depôts of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.

"The law of occupation is a subset of the laws of war and many of its governing principles, including the rights of an occupant with respect to state-owned property, are set forth in the Hague Regulations of 1907. . . . [T]he Hague Regulations . . . generally reflect customary international practice . . . ." *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617, 642-43 (E.D. Va. 2005),[1] *aff'd in part & rev'd in part on other grounds*, 562 F.3d 295

[1]Citing Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (hereinafter "Hague Regulations".) *Id.* N.71.

(4th Cir. 2009) (qui tam False Claims Act action arising out of state funds confiscated in Iraq war). Quoting the above provision of Article 53, the court noted: "Pursuant to this regulation, an occupying force is permitted to seize public movable property and appropriate such property for its own uses, at least to the extent that it furthers the occupying force's military operations." 376 F. Supp.2d at 643[2]. By contrast, "the Hague Regulations distinguish public movable property from private property, which cannot be 'confiscated' . . . ." *Id*.

Pursuant to the above principles, claims related to World War II have involved the unlawful looting of private property and of state property that is not subject to seizure, not the lawful confiscation of war booty under the Hague Convention. The judgment of the Nürnberg war crimes court included an entire section entitled "Pillage of Public and Private Property." *United States v. Goering*, 6 F.R.D. 69 (Int'l. Military Tribunal at Nürnberg 1946-47). It made no allegation that the confiscation of the types of state property listed above in Article 53 violated the Hague Convention. Instead, it cited that and other provisions as establishing binding norms: "under the rules of war, the economy of an occupied country can only be required to bear the expenses of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear." *Id*. That many of the defendants were found guilty of charges of waging "wars of aggression . . . in violation of international treaties," *id*. at 76, did not negate actions taken that were consistent with the Hague Convention.

---

[2]Citing Gerhard von Glahn, *The Occupation of Enemy Territory* 180 (1957) ("An occupant is therefore entitled to seize and use for his own purposes any and all funds belonging to the enemy state and found in the occupied territory."); *id.* at 183 ("In all instances in which a belligerent occupant lawfully seizes enemy movable public property, he has a complete and legal right to use such property, remove it from the occupied territory, or consume it, if such is possible."). *Id*. n.74.

The Hague Convention was violated, however, by the "systematic 'plunder of public or private property,'" *id*. at 121, such as in the following manner: "In addition to the seizure of raw materials and manufactured articles, a wholesale seizure was made of art treasures, furniture, textiles and similar articles in all the invaded countries." *Id*. at 122.

The above explains why there are precedents on recovery of private property such as art seized by the Nazis, but none regarding war trophies or such items. An instructive decision is *Menzel v. List*, 49 Misc.2d 300, 305, 267 N.Y.S.2d 804 (1966), which held that the seizure of a painting taken by Nazis from a private owner could not "be treated as lawful booty of war by conquering armies," but was "classified as plunder and pillage, as those terms are understood in international and military law." "Booty is defined as property necessary and indispensable for the conduct of war, such as food, means of transportation, and means of communication; and is lawfully taken." *Id*., citing V. Hackworth, *Digest of Int'l. Law*, pp. 682, 689 et seq.; *Planters' Bank v. Union Bank*, 16 Wall. (83 U.S.) 483, 495 (1872) (noting that private property is "exempt from capture as booty of war"). The court added that "booty is described" in Article 53 of the Hague Convention, which provides that an army of occupation may take possession of, among other things, "depôts of arms." *Id*. at 305-06.

"Pillage, or plunder, on the other hand, is the taking of private property not necessary for the immediate prosecution of war effort, and is unlawful." *Id*. at 307, citing Hackworth at 403. "Where pillage has taken place, the title of the original owner is not extinguished." *Id. Menzel* held that the painting in that case, which was seized by an organ of the Nazi Party, thus violated the Hague Convention and could be recovered. *Id*. at 311.

A later decision noted that *Menzel* "distinguished illegal plunder and pillage from lawful booty, the latter referring to conquered objects taken for military operations . . . ." *In re Flamenbaum*, 27 Misc.3d 1090, 1095, 899 N.Y.S.2d 546 (2010). That case involved a German museum's claim against an estate to an object that was allegedly taken by the Russians in the aftermath of World War II. "In reviewing the executor's assertion that the tablet was taken by Russian troops, the court notes that support for the estate's theory is largely circumstantial; the estate has not introduced evidence to raise this theory above the level of conjecture." *Id*. at 1096. Moreover, "the estate's inability to present relevant proof in response to a claim filed more than 60 years after an event may be considered in the context of laches." *Id*.

By contrast, the claim in the case at bar is wholly unprecedented. The only judicial precedents on war trophies relate to whether machine guns were deactivated sufficiently. For instance, such allegations were made against a collector "in connection with a publicly advertised sale of his collection of war trophies and memorabilia, of which the guns were a part." *United States v. Whalen*, 337 F. Supp. 1012, 1015 (S.D. N.Y. 1972). "[T]he war trophy firearms deactivation program, [was] inaugurated in 1945 as a safety measure which would permit, under certain conditions, returning servicemen to retain war trophies and also afford the opportunity to effect the registration, and control of subsequent transfers, of deactivated firearms." *Id*., quoting Rev. Rul. 55-590, 1955-2 Cum. Bull. 483. The rifle here, of course, is not a machine gun and was not subject to deactivation.

In a similar case, the court found that a veteran obtained firearms "while a paratrooper in combat during World War II; that these weapons were shipped by petitioner as authorized by the U.S. Military authorities to petitioner's parents . . . ." *McKeehan v. United States*, 438 F.2d 739,

740 (6th Cir. 1971). "The weapons were not contraband. They were war trophies brought into this country by a soldier, with the permission of the Government." *Id*. at 746 (Weick, J., concurring).

As has been pointed out by both Gasior and Poland, at the conclusion of World War II, United States policy regarding war trophies was set forth in Circular 155 issued on May 28, 1945 by General G.C. Marshall, Chief of Staff, by Order of the Secretary of War. This circular, attached as Exhibit A to Poland's brief, expressly permits the retention of war trophies by military personnel and civilians. The only class of firearms restricted by Circular 155 was fully automatic machine guns. Circular 155 goes on to state, "Retention by individuals of captured enemy equipment as war trophies in accordance with the instructions contained herein is considered to be for the service of the United States and not in violation of the 79th and 80th Articles of War." Circular 155 was amended September 5, 1945 by Circular 267. That amendment limited the number of firearms to one per individual, thereby again confirming that a firearm was permitted as a war trophy.

It is interesting to note that Circular 155 further explained, "In view of the various laws, both Federal and State, pertaining to the transportation, registration, and ownership of firearms and other lethal weapons, it must be understood by service personnel and others that it may be necessary to register such firearms or other weapons with proper authorities and otherwise comply with Federal, State and local laws, depending on the locality in which these firearms are to be retained."

Paragraph 4 of Circular 155 states, "When military personnel returning to the United States bring in trophies not prohibited above, each person must have a certificate in duplicate,

signed by his superior commissioned officer, and bearing appropriate official theater stamp indicating that the bearer is officially authorized by the theater commander under the provisions of this circular to retain as his personal property the articles listed on the certificate. The signed duplicate certificate will be taken up by an officer of the port of embarkation (and a consolidated certificate accomplished) or by the Customs Bureau or military authorities at the port of debarkation. The original will be retained by the bearer." It is apparent from the language set forth in 155 that one of the main purposes of the certificate was to authorize a possessor of the war trophy to travel with it in his possession to return it to the United States. There is nothing in Circular 155 that requires the person in possession of the war trophy to maintain this document once its purpose has been served. More importantly, there is no sanction set forth in Circular 155 that would require the return of the war trophy to the original source in the event of any violation of Circular 155. Indeed since Circular 155 represents a concession on the part of the United States to allow property technically belonging to the United States by virtue of its seizure on the battlefield to be given to the person claiming it as a war trophy, it would appear that only the United States could make a claim for such property if it felt that the mandates of Circular 155 had been violated. This has not been done, and the United States has waived any claim to this property by virtue of the very fact that it has filed this interpleader and asking the Court to award the property to either Gasior or Poland.

Finally, Poland suggests in its memo that Circular 155 was also violated in that the rifle violated that section of the Circular which states, "It is not the intention of these instructions to permit the return of war trophies for sale or barter in the United States. The return of several and any similar items of enemy equipment by an individual under this regulation may be considered

an indication of intent to traffic in war trophies and can be cause for confiscation of such items shipped or brought into the United States by the individual." The simple response to this assertion is that Poland has plead no facts which in any way establish how the rifle was brought into the United States, by whom it was brought into the United States, the intention of the person or persons who brought the rifle into the United States, and whether or not any other similar items of enemy equipment were brought into the United States by the individual bringing the rifle into the United States. It should be noted that once again the sanction for this violation of 155 would not be the return of the property to Poland, but rather confiscation, presumably by the United States, and once again it is clear that the United States has waived any claim to this property.

## II. BURDEN OF PROOF AND BONE FIDE PURCHASER FOR VALUE

> That possession is nine-tenths of the law is a truism hardly bearing repetition. Statements to this effect have existed almost as long as the common law itself. *See Oxford English Dictionary* (draft rev. 2003) (citing a 1616 collection of adages for "Possession is nine points in the Law"). *See also* Frederick Pollock & Robert Samuel Wright, *An Essay on Possession in the Common Law 5* (1888) ("[I]n the eyes of medieval lawyers . . . Possession largely usurped not only the substance but the name of Property.")
>
> The importance of possession gave rise to the principle that "[p]ossession of property is indicia of ownership, and a rebuttable presumption exists that those in possession of property are rightly in possession." 73 C.J.S. *Property* § 70 (2004). The common law has long recognized that "actual possession is, prima facie, evidence of a legal title in the possessor." William Blackstone, 2 *Commentaries* *196. *See, e.g.*, Edward Coke, 1 Commentary upon Littleton 6.b. (19th ed. 1832) (strong presumption of ownership created by "continuall and quiet possession"); *Jeffries v. Great W. Ry. Co.* (1856) 119 Eng. Rep. 680 (K.B.) ("[T]he presumption of

> law is that the person who has possession has the property.").
>
> This presumption has been a feature of American law almost since its inception. "Undoubtedly," noted the Supreme Court, "if a person be found in possession . . . it is prima facie evidence of his ownership." *Ricard v. Williams*, 20 U.S. (7 Wheat.) 59, 105, 5 L.Ed. 398 (1822). Almost eighty years later, the Court reaffirmed, "If there be no evidence to the contrary, proof of possession, at least under a color of right, is sufficient proof of title." *Bradshaw v. Ashley*, 180 U.S. 59, 63 (1901). *See also*, Oliver Wendell Holmes, *The Common Law* 241 (1881) ("The consequences attached to possession are substantially those attached to ownership, subject to the question of the continuance of possessory rights. . . . ").

*Willcox v. Stroup*, 467 F.3d 409, 412 (4th Cir. 2006)

The best that can be gleaned from the pleadings in this case, from both sides of the aisle, are that the rifle in question was manufactured in a Polish factory in approximately 1939 and distributed, along with others of its ilk, to Polish soldiers. It may or may not have been one of the rifles later seen in the hands of German soldiers. From that date to 1993, the pleadings are completely silent as to the location of the rifle and how it arrived in the United States. Poland in its pleadings asserts that the rifle likely fell into the hands of occupying German forces but concedes in its memorandum that there are several other possibilities as to how the rifle could have been taken. Neither of the suggestions as to how the rifle could have been taken, be it through abandonment or barter, is consistent with Poland's claim that the rifle was stolen. In *Willcox*, the court held

> Second, the presumption of ownership in the possessor promotes stability. "It is the policy and even the duty of the law, to have personal property vested as early as practicable." *Collins v. Bankhead*, 32 S.C.L. (1 Strob.) 25, 29 (S.C.Ct. App.1846). The presumption of ownership from possession is one of an array of legal principles designed to this end. The presumption means that, absent proof to the contrary, settled distributions and expectations

> will continue undisturbed. Even where evidence overcomes the presumption, other principles work to protect settled expectations, including the statute of limitations, the doctrine of adverse possession, and equitable defenses such as laches, staleness, abandonment, and waiver.

*Id.* at 413

In *Willcox*, the items in question were certain governors' papers found by Willcox in approximately 1999 in a shopping bag in his stepmother's home. The documents concerned Confederate military reports, correspondence and telegrams between various Confederate generals, officers, servicemen and government officials. These documents appear to have been among a large number of state archives and records which were removed from Columbia, South Carolina in February of 1865 in anticipation of an attack by Union forces. *Id.* at 411. Although the records themselves were seemingly in the possession of the state when they were removed from Columbia in February of 1865, and at the time of their removal were in the possession of the state, Willcox, however, found the papers in 1999, and indeed was in possession of the papers on August 6, 2004 when South Carolina commenced its action against him for the recovery of the papers. Since neither side of this issue is able to resolve the enigma as to how and under what circumstances the rifle left Poland in 1939 and found its way to the possession of Gasior in 1993, the presumption of possession recognizes and averts the possibility of a court's presiding over a historical goose chase. *Id.* at 413.

Although *Willcox* involved a lawsuit which had its inception in the State of South Carolina, the Supreme Court of Virginia in *State of Maine v. Adams*, 277 Va. 230, 672 S.E.2d 862 (2009) cited *Willcox* with approval when it stated:

> [4-5] The common law provides that possession of property constitutes prima facie evidence of ownership until a better title is

> proven. *Smith v. Bailey*, 141 Va. 757, 776, 127 S.E. 89, 95 (1925); *see Tate v. Tate*, 85 Va. 205, 214, 7 S.E. 352, 356 (1888); *Willcox v. Stroup*, 467 F.3d 409, 412-13 (4th Cir. 2006). We have explained that possession of personal property is presumptive proof of ownership because individuals generally own the personal property that they [**Page 239]** possess. *Saunders v. Greever*, 85 Va. 252, 280, 7 S.E. 391, 410 (1888); *see Willcox*, 467 F.3d at 412.
>
> This common law presumption of ownership based on possession requires that the party not in possession of the disputed personal property produce evidence of superior title. If the party not in possession is able to produce such evidence of superior title, the presumption of ownership in the possessor is defeated. *Willcox*, 467 F.3d at 413; *see Brunswick Land Corp. v. Perkinson*, 146 Va. 695, 708, 132 S.E. 853, 857 (1926). However, if the party not in possession fails to establish superior title to the property, the presumption of ownership based on possession prevails and relieves a court from having to preside over "a historical goose chase." *Willcox*, 467 F.3d at 413.

227 Va. 239.

The Adams case dealt with what was referred to as a "broadside" copy of the Declaration of Independence which was purchased by a Virginia resident from a third party. The State of Maine contended that the document was a public record owned by the town of Wiscasset, Maine. The broadside was given to one Edmond Bridge, the town clerk of Pownalborough, Maine in November of 1776. As such, at that time the town clerk had possession of the document. The Circuit Court for Fairfax County in *Adams v. State of Maine*, 75 Va. Cir. 41 (2008) not only found that the broadside was not a public record, but more importantly stated:

> Similarly, in Virginia, proof of possession is presumptive proof of ownership. Here, not only is Mr. Adams currently in possession of the Pownalborough Print – which is presumptive proof that he owns it – but Mr. Adams also asserts ownership over the print as a bona fide purchaser for value.

*Id.* at 50.

The Court pointed out that Mr. Adams had testified that he was not aware of any adverse claim to the print and the fact that the State of Maine had not introduced any evidence to the contrary. Instead, the Court noted that Maine had

> "relied heavily on its contention that neither the State of Maine nor the towns of Pownalborough and Wiscasset had conveyed title or ownership of the print to anyone. But this fact, standing alone, would not put Mr. Adams on notice of an adverse claim unless Maine's title to the Pownalborough Print was apparent."

*Id.* at 42.

Judge Ney further observed:

> In Virginia, a purchaser of goods acquires all title which his transfer had or had the power to transfer . . . A person with voidable title has power to transfer a good title to a good faith purchaser for value. Title following loss of possession by carelessness, neglect, mistake, or even fraud, is *voidable*, but not void. Therefore, a bona fide purchaser in those circumstances acquires valid title. But not even a bona fide purchaser can acquire valid title from a thief.
>
> Here, because Mr. Adams is a bona fide purchaser for value, his title to the print is valid unless the print was converted from its rightful owner. Under Virginia law, Maine, as the nonpossessory party bears the burden of proving that it lost ownership or possession of the Pownalborough Print by theft or conversion.

*Id.*

Finally, in *State of Maine v. Adams*, the Court in sustaining the findings of the Circuit Court in Fairfax, the Court stated:

> Even if we assume, without deciding, that the town owned the print by virtue of having had the print in its possession more than 200 years ago, the record does not establish that the print was converted. "Conversion is the wrongful assumption or exercise of the right of ownership over goods or chattels belonging to another in denial of or inconsistent with the owner's rights." *Economopoulos v. Kolaitis*, 259 Va. 806, 814,528 S.E2d 714, 719 (2000); *see Universal C.I.T. Credit Corp. v. Kaplan*, 198 Va. 67, 75-76, 92 S.E. 2d 359, 365 (1956); *accord Withers v. Hacket*, 714

> A.2d 798, 800 (Me. 1998); *Leighton v. Fleet Bank of Maine*, 634 A.2d 453, 457 (Me. 1993).
>
> Maine produced no evidence supporting its theory of conversion but merely asks us to speculate that because the print was found in Holbrook's daughter's attic, Holbrook or a member of his family converted the print. We will not engage in such speculation and conclude as a matter of law that Maine did not prove by a preponderance of the evidence that the print was converted by Holbrook or his family.

*Id.* at 243.

The burden is clearly upon Poland to set forth sufficient facts to allege a theft or a conversion to defeat Gasior's claim that he is a bona fide purchaser for value. The Court's attention is directed to the recent opinion of the United States Magistrate Douglas E. Miller in the United States District Court for the Eastern District of Virginia, Newport News Division, *Brown University v. Tharpe,* 2013 U.S. Dist., No. 4.10CV167, entered June 5, 2013. Brown University sought the recovery of a Tiffany presentation sword which it alleged was stolen from its collection more than 30 years ago. Defendants Donald R. Tharpe and Toni M. Tharpe (hereafter "Tharpe"), who acquired the sword from a collector in 1992, opposed Brown's claim on the grounds that they were bona fide purchasers for value without notice.

The Court's opinion underscores the burden that must be met to defeat the presumption relied upon by Gasior. The Court stated:

> To prove it has the right to immediate possession, Brown must show it has a superior claim to the Sword by proving it was "unlawfully divested" or possession of the Sword at a date prior to Tharpe's possession. See *Vicars*, 205 Va. at 940, 140 S.E.2d at 672. Thus the key fact to be resolved by the trial is what happened to the Sword when it was removed from the Memorial sometime before 1977. Because there is no question the Sword was removed

> during this time, the dispositive issue is whether its removal was unlawful such that the person removing it conveyed no title to successors, or whether it was due to negligence, mistake, or fraud such that a bona fide purchaser with no notice of the infirmity might take clear title. See *Oberdorfer v. Meyer,* 88 Va. 384, 386, 13 S.E. 756, 756-57 (1891) (bona fide purchaser can take good title from seller with voidable title); *Toyota Motor Credit Corp. v. C.L. Hyman Auto Wholesale, Inc.*, 256 Va. 243, 247, 506 S.E.2d 14, 16 (1998) (thief can never pass title superior to true owner's).

*Id*. at 5.

The Court went into great detail in its examination of the allegations and evidence presented by Brown in support of Brown's position.

> A. The Tiffany Sword was stolen from the Memorial sometime between 1975 and 1977.
>
> The evidence adduced at trial leads the Court to conclude that the Tiffany Sword was stolen from the Memorial while the Memorial building was closed from 1975 to 1977. It is uncontroverted that the Tiffany Sword was in the Memorial in 1971. The Sword was reflected on a typewritten card identifying both swords which were part of the Memorial's holdings (Trial Ex. 15) and Stanley testified that he conducted a thorough review of the Memorial's collections during his first six months at Brown in 1971. He observed both the Tiffany and Roanoke Island swords as well as several other items held in the painting storage room. Stanley testified that the swords were kept in presentation boxes atop cabinets in the painting storage room. The Tiffany Sword had a parchment testimonial outside of its presentation box. Stanley withdrew the Tiffany Sword from the scabbard on at least two occasions and viewed the scabbard on a few other occasions from 1971 to 1974. Stanley last viewed the Tiffany Sword inside its presentation box in 1974 before the Memorial was closed. He testified that the cabinets, upon which the presentation boxes rested, contained other items such as dinnerware, flatware, and a silver tureen which were wrapped with a transparent wrapping to prevent dust damage. Important to the issue of whether the Tiffany Sword was stolen is Stanley's testimony that each time he went to the painting storage room these items remained wrapped and in the same place.
>
> This was not the case in 1977 when the Memorial reopened and

> held an exhibit showcasing its artifacts. After realizing that the swords were not displayed, Stanley inquired of Hough why they were not included in the exhibit. Hough informed Stanley that he had never seen the swords which prompted Stanley to ask Hough if they could go down to the painting storage room where he has last seen the swords. Upon arriving in the painting storage room, everything appeared to be in the same location. The presentation boxes remained closed on top of the cabinets as they had before the Memorial closed and the parchment testimonial was still adjacent to the Tiffany Sword presentation box. However, after Stanley and Hough took down the presentation boxes and opened them, they found both swords missing. The Tiffany Sword box was missing the Sword and scabbard. The Roanoke Island case which has previously held the sword and the two scabbards was missing the sword and a field scabbard but a more ornate ceremonial scabbard remained in the case.

*Id.* at 6.

> In addition, Stanley noticed that several items which had previously been on the shelves and in the cabinets were also missing. The wrapping from these items and several others had been removed and scattered about. Some of the missing items which Stanley could remember included: the Tiffany sword and scabbard, the Roanoke Island Sword and one of its scabbards, silver candlesticks, a Venetian silver tureen, several serving dishes, and an ornamental box with ivory inlay. Hough documented the missing items in his contemporaneous memo to the Provost.
>
> The Court finds particularly relevant that the presentation boxes left in the Memorial building were in the same location as when Stanley had last seen them before the Memorial closed. Had the two swords been removed for repair or restoration and then negligently or mistakenly lost as Thorpe suggests, it is highly unlikely that their protective cases would have been left behind. Rather, it seems much more likely that the Tiffany Sword would have been taken and transported in its presentation box in which it fit precisely and securely. Additionally, the fact that several other items were missing and unwrapped, with the packaging scattered, strongly suggests theft rather than removal for repair or some legitimate purpose. Also, the missing items were all intrinsically valuable - two ornate swords removed from their velvet-lined cases, along with silver candlesticks and serving pieces. These circumstances of the Swords' disappearance strongly suggest they

> were unlawfully removed by someone intending to permanently deprive Brown of its right to possession.

*Id.* at 7.

> In addition to the limits imposed by the indenture and decree, the evidence at trial established that the Sword was regularly kept in a fitted case in a storage room along with other valuable artifacts. After a two year period, during which the Memorial building was not regularly staffed, the Sword along with other valuable items were discovered missing. Several people had access to the Memorial during this time but only the University President could authorize removal of a Memorial artifact. There is no recorded mention of the Sword's removal in the records which would have reflected it. The presentation box remained in the Memorial, as did packing materials from some of the other objects which has been left in disarray. All of the missing items were intrinsically valuable, where as many other rare documents and books remained. Finally, the Sword surfaces in the possession of an antiques collector with no known connection to Brown. A second sword lost at the same time was also later acquired by an unrelated private collector.

*Id*. at 8.

> In addition, had the items been legitimately removed for use by scholars or for restoration, they would not have been removed from their wrappings and protective cases with the latter left in the Memorial. Also, despite Tharpes' suggestion that the Memorial record keeping was inadequate, Stanley and Hough clearly documented the loss promptly after discovering it. Had the Sword and other objects been removed by someone connected with the Memorial - who might have had apparent authority to do so - that person would likely have learned of the reported loss when Hough documented it to the lead librarian in 1977.

*Id.* at 8, 9.

The Court's careful analysis and cataloging of all of the evidence eliminates the alternative possibilities suggested by Tharpe as to how the sword might have disappeared from Brown's possession. Here, Poland merely pleads that the rifle was probably issued to Polish

troops and was perhaps seized at some later date by German troops. Poland goes so far as to concede, "The Property could have been simply found abandoned in an area not within the contemporary control of Nazi forces, it could have been bartered for by a United States soldier." (Poland's Memorandum C, page 19). These are just two of a list of possibilities that are endless. World War II was indeed a World War involving many nations on many fronts throughout Europe. Inasmuch as Poland is unable to allege how or where and under what circumstances the rifle was obtained and later found its way to the United States, it cannot meet its burden of proof in this case.

Poland has failed to set forth or assert any facts that would defeat Gasior's claim that he is a bona fide purchaser for value without notice as has been set forth above, and Poland's failure to set forth sufficient facts to establish a conversion or a theft is fatal to their claim.

## CONCLUSION

In consideration of the foregoing, Gasior requests that the Court enter an Order denying Poland's Motion to Strike, Poland's Motion to Dismiss, and Poland's Motion for Judgment and granting Gasior's Cross-Motion for Judgment on the Pleadings against the Republic of Poland.

Respectfully submitted,

KRISTOPHER J. GASIOR
By Counsel

*/S/ John A. Keats*
John A. Keats VSB#12522
Keats & Meleen, PLC.
10521 Judicial Drive
Suite 310
Fairfax, VA 22030
(703) 273-3190
(703) 383-1241 (fax)
John_Keats@msn.com
Attorney for Kristopher J. Gasior

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum of Law was served, via ECF, on Karen Taylor, Assistant United States Attorney; David B. Smith, Esq.; Nicholas Smith, Esq., and Tai-Heng Cheng this 16th day of September, 2013

*/S/ John A. Keats*
John A. Keats