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2 **FOR APPELLANT:**

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7 **FOR APPELLEES:**

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10 Appeal from a judgment of the United States District
11 Court for the Southern District of New York (Pauley III,
12 J.).

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14 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
15 **AND DECREED** that the judgment of the district court be
16 **AFFIRMED.**

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18 This is an ownership dispute concerning a 1917 drawing
19 by Egon Schiele (the "Drawing"), between David Bakalar, who
20 seeks a declaration that he owns it by purchase from a
21 dealer, and Milos Vavra and Leon Fischer, who are heirs of
22 Austrian cabaret performer, Fritz Grunbaum, who owned it
23 before he was murdered by the Nazis in 1941. The United
24 States District Court for the Southern District of New York
25 (Pauley III, J.) awarded judgment to Bakalar on the basis of
26 laches. Bakalar v. Vavra, 819 F. Supp.2d 293, 307 (S.D.N.Y.
27 2011). "Following a bench trial, we set aside findings of
28 fact only when they are clearly erroneous However,
29 we review de novo the district court's conclusions of law
30 and its resolution of mixed questions of law and fact."
31 Phansalkar v. Andersen Weinroth & Co., L.P., 344 F.3d 184,
32 199 (2d Cir. 2003) (citations omitted). We assume the
33 parties' familiarity with the underlying facts, the
34 procedural history, and the issues presented for review.

35
36 [1] In a title action under New York law, a good faith
37 purchaser of an artwork has the burden of proving that the
38 work was not stolen. Bakalar v. Vavra, 619 F.3d 136, 147
39 (2d Cir. 2010) (citing Solomon R. Guggenheim Found. v.
40 Lubell, 77 N.Y.2d 311, 321 (1991)). Here, the district
41 court found that the Drawing was not looted by the Nazis.
42 Bakalar, 819 F. Supp. 2d at 298-99. Vavra and Fischer argue
43 that the district court's finding is clearly erroneous and
44 that the Nazis stole the Drawing. However, Bakalar traced

1 the provenance back to Mathilde Lukacs, Grunbaum's sister-
2 in-law, who sold it to a gallery in 1956. Vavra and
3 Fischer's hypothesis--that the Nazis stole the Drawing from
4 Grunbaum only to subsequently return or sell it to his
5 Jewish sister-in-law--does not come close to showing that
6 the district court's finding was clearly erroneous.
7

8 After finding that the Drawing was not stolen by the
9 Nazis, the district court extended its Lubell analysis by
10 requiring Bakalar to show that Lukacs acquired proper title
11 in the Drawing, and found that he could not. Bakalar, 819
12 F. Supp. 2d at 299-302. We do not decide whether Bakalar
13 discharged his burden under Lubell by tracing the provenance
14 back to Lukacs, who was a close relative of Grunbaum (she
15 was sister to Mrs. Grunbaum, who survived Grunbaum before
16 herself being murdered by the Nazis). The point was not
17 pressed by Bakalar, and we affirm instead on the district
18 court's ruling that the claim against Bakalar is defeated by
19 laches.
20

21 This Court previously recognized that Bakalar could
22 assert a laches defense under New York law. See Bakalar,
23 619 F.3d at 147. In order to prevail on laches, Bakalar had
24 to show that "(1) [Vavra and Fischer] were aware of their
25 claim [to the Drawing], (2) they inexcusably delayed in
26 taking action, and (3) Bakalar was prejudiced as a result."
27 Bakalar, 819 F. Supp. 2d at 303 (citing Ikelionwu v. United
28 States, 150 F.3d 233, 237 (2d Cir. 1998)). The district
29 court found that Vavra and Fischer's "ancestors were aware
30 of--or should have been aware of--their potential intestate
31 rights to Grunbaum property," and that the ancestors "were
32 not diligent in pursuing their claims to the Drawing." Id.
33 at 305-06.
34

35 Vavra and Fischer contend that the district court
36 committed two errors of law bearing on the laches defense.
37 First, they argue that the court erroneously "imputed
38 knowledge of 'potential intestate rights' to [Vavra and
39 Fischer] based upon previous actions or inactions of other
40 family members." But it was obviously necessary for the
41 court to do just that; the alternative was to reset the
42 clock for each successive generation. See Bakalar, 819 F.
43 Supp. 2d at 303 ("This inquiry focuses not only on efforts
44 by the party to the action, but also on efforts by the

1 party's family.") (internal quotation omitted). Second,
2 Vavra and Fischer argue that their families had no legal
3 duty of diligence until they knew of the actual *location* of
4 the Drawing. They rely on language in Lubell declining to
5 "impose the additional duty of diligence before the true
6 owner has reason to know where its missing chattel is to be
7 found." 77 N.Y.2d at 320. However, though "[l]ack of
8 diligence in locating the property" is not a consideration
9 for a statute of limitations analysis, it is absolutely
10 relevant "with respect to a laches defense." SongByrd, Inc.
11 v. Estate of Grossman, 206 F.3d 172, 182 (2d Cir. 2000)
12 (citing Lubell, 77 N.Y.2d at 321).

13
14 Vavra and Fischer's factual arguments are no more
15 persuasive. Their theories about what their ancestors knew
16 (or didn't know) are speculative, and we do not have a
17 "definite and firm conviction that a mistake has been
18 committed.'" Mobil Shipping & Transp. Co. v. Wonsild Liquid
19 Carriers Ltd., 190 F.3d 64, 67-68 (2d Cir. 1999) (quoting
20 Anderson v. Bessemer City, 470 U.S. 564, 574 (1985)).

21
22 Next, Vavra and Fischer contest whether Bakalar was
23 prejudiced by their ancestors' delay in pursuing the
24 Drawing. There can be no serious dispute that the deaths of
25 family members--Lukacs and others of her generation, and the
26 next--have deprived Bakalar of key witnesses. See Sanchez
27 v. Trustees of the Univ. of Pa., 2005 WL 94847, *3 (S.D.N.Y.
28 Jan. 18, 2004) (noting that the death of potential witnesses
29 is prejudicial) (citing Solomon R. Guggenheim Found. V.
30 Lubell, 153 A.D.2d 143, 149 (1st Dep't 1990)). And while a
31 "defendant's vigilance is as much in issue as [a]
32 plaintiff's diligence," Lubell, 153 A.D.2d at 152, Vavra and
33 Fischer's speculation has not established clear error in the
34 district court's finding that Bakalar, a good faith
35 purchaser, was prejudiced by the delay. See Bakalar, 819 F.
36 Supp. 2d at 306-07.

37
38 In sum, there is no clear error in the findings that
39 Vavra and Fischer's ancestors knew or should have known of a
40 potential claim to the Drawing, that they took no action in
41 pursuing it, and that Bakalar was prejudiced in this
42 litigation as a result of that delay. It was therefore
43 sound to recognize Bakalar's title on the basis of his
44 laches defense.

