

**Max v ALP, Inc.**

2020 NY Slip Op 33851(U)

November 13, 2020

Supreme Court, New York County

Docket Number: 650618/2019

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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ADAM MAX,

Plaintiff,

- v -

ALP, INC., LIBRA MAX and MICHAEL ANDERSON,

Defendants.

-----X

INDEX NO. 650618/2019
MOTION DATE 01/21/2020
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 175

were read on this motion to/for APPOINT RECEIVER.

In this action arising from a dispute over control of defendant ALP, Inc. (ALP), the plaintiff, Adam Max (Adam), moves pursuant to CPLR 6401 and Business Corporation Law (BCL) § 1202(a)(3) to appoint a temporary receiver. The defendants oppose the motion. The application is denied.

In 2000, the artist Peter Max formed ALP to engage in the production, maintenance, marketing, licensing and commercialization of his artwork. Peter Max named ALP for himself and his two children. Specifically, the "A" in "ALP" is for his son, defendant Adam and the "L" is for his daughter, Libra Max (Libra). Adam and Libra each own a 40% interest in ALP with the remaining 20% belonging to Peter. In 2012 Peter Max became ill and ceded the position of ALP's president and chief executive officer to Adam. Thereafter, it is alleged in various related actions before this court, including ALP, Inc. v Larry Moskowitz et al., Index No. 652326/2019 and ALP, Inc. v Park West Galleries, Gene Luntz, and Gene Luntz Management, Inc., Index No. 153949/2019, that Adam and other individuals and entities brought in by Adam began looting the company assets by, among other things, generating artworks using 'ghost artists' that would then be signed by the ailing Peter Max and sold as if they were his originals works, and collecting enormous and unwarranted fees, commissions or other payments from ALP.

Following a special proceeding before this court entitled Libra Max v Adam Max and ALP, Inc., Index No. 156641/2017, a special meeting of the shareholders of ALP was held on December 10, 2018. At that meeting, a new board of directors was elected. The new board consisted of Libra, Adam, and defendant Michael Anderson. On January 11, 2019 ALP's board of directors held another meeting, wherein it resolved that Libra would be named as CEO and president effective immediately.

On January 30, 2019, Adam commenced this action. On the same day, he moved by order to show cause to (i) invalidate the December 10, 2018 election of the current board of directors of ALP and (ii) for appointment of a temporary receiver for ALP under CPLR 6401. By order dated March 21, 2019, this court denied the motion in its entirety on the grounds that the Adam's submissions and arguments, including those advanced at oral argument on February 27, 2019, failed to demonstrate his entitlement to the relief sought. Adam appealed the order on April 25, 2019 but failed to perfect his appeal. Adam also did not move to reargue or renew the March 21, 2019, order pursuant to CPLR 2221(e).

Rather, Adam filed an amended complaint in this action approximately four months later, on August 1, 2020, and filed the instant motion on August 23, 2019, again seeking the appointment of a temporary receiver pursuant to CPLR 6401(a) on the grounds that there is a danger that the property of ALP will be wasted, dissipated, or destroyed. Specifically, Adam alleges that, since assuming her role as president of ALP following the denial of Adam's previous motion seeking a receivership, Libra has failed to generate sales, reduced the amounts paid out of ALP to its shareholders, surrendered ALP's lease to its Manhattan studio with an intent to relocate ALP's assets to New Jersey, disrupted ALP's previous business model and its relationships with art dealers who previously purchased from ALP, engaged in costly litigation against former employees and business partners, and terminated approximately 40 employees. The instant motion also seeks the appointment of a receiver pursuant to BCL § 1202(a)(3) on the grounds that ALP purportedly lacks an officer within the state, as Libra resides in California. Once again, however, Adam has failed to meet its burden.

Resort to a receivership is appropriate only when necessary for the protection of the interests of the parties. See Armienti v Brooks, 309 AD2d 659 (1<sup>st</sup> Dept. 2003); Matter of Harrison Realty Corp., 295 AD2d 220 (1<sup>st</sup> Dept. 2002). Such an appointment is warranted only


where a party has adequately demonstrated his or her apparent interest in the property at issue and shown that there is a danger of irreparable loss and damage to such property. See CPLR 6401; Matter of Sobol, 14 AD3d 426 (1<sup>st</sup> Dept. 2005); Dolgoff v Projectavision, Inc., 235 AD2d 311 (1<sup>st</sup> Dept. 1997). Specifically, a party seeking the appointment of a temporary receiver must establish, by clear and convincing evidence, a danger of irreparable loss or material injury to the corporation or its assets, such as diversion or wasting of the assets. See Armienti v Brooks, supra; Matter of Harrison Realty Corp., supra; McBrien v Murphy, 156 AD2d 140 (1<sup>st</sup> Dept. 1989). “It is well recognized that courts of equity exercise extreme caution in appointing receivers *pendente lite* because such appointment results in the taking and withholding of possession of property from a party without an adjudication on the merits [citations omitted].” Hahn v Garay, 54 AD2d 629, 629-630 (1<sup>st</sup> Dept. 1976); see Vardaris Tech, Inc. v Paleros, Inc., 49 AD3d 601 (2<sup>nd</sup> Dept. 2008).

Adam does not, on these papers, meet this burden. Contrary to his contention, ALP’s current chosen strategy in seeking to shed liabilities and reduce expenses, such moving the studio from the large Manhattan studio to a smaller space, and to realign its business model and business relationships such that it is not selling artwork in bulk to any single dealer or a few buyers, is not evidence of irreparable loss or damage. Furthermore, there is no dispute that the business is still generating income. See B.D. and F. Realty Corp. v Lerner, 232 AD2d 346 (1<sup>st</sup> Dept. 1996). Moreover, as observed by Libra in her opposition to this motion, many of the actions that Adam claims constitute waste or mismanagement by Libra may well be attributable to his own mismanagement, misuse and misdirection of corporate assets, as well as to the unfortunate decline in Peter Max’s health, all of which likely rendered ALP’s previous business model unsustainable. Adam’s additional contention that Libra is “not an officer within this state qualified to administer” ALP (BCL § 1202[a][3]) is specious and wholly conclusory. Further, it is contradicted by Libra’s affidavit averring that since becoming the president of ALP she has purchased a home in New York and works here full time, such that appointment of a temporary receiver on those grounds is not warranted. To the extent that Adam can ultimately establish that Libra mismanaged, diverted or wasted corporate assets, further proceedings in this action can afford him sufficient relief, if warranted, without the necessity of a receiver being appointed *pendente lite*. See Lemle v Lemle, 92 AD3d 494, 498 (1<sup>st</sup> Dept. 2012); McBrien v Murphy, supra.

Accordingly, it is hereby,

ORDERED that plaintiff's motion for appointment of a temporary receiver is denied.

This constitutes the Decision and Order of the court.

  
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 NANCY M. BANNON, J.S.C.  
**HON. NANCY M. BANNON**

11/13/2020  
 \_\_\_\_\_  
 DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	SETTLE ORDER	DENIED	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>				<input type="checkbox"/>	