

<b>ALP, Inc. v Park W. Galleries, Inc.</b>
2020 NY Slip Op 34161(U)
December 11, 2020
Supreme Court, New York County
Docket Number: 153949/2019
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 42

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ALP, INC.,

Plaintiff,

DECISION AND ORDER

- v -

Index No. 153949/2019

PARK WEST GALLERIES, INC., GENE LUNTZ,  
GENE LUNTZ MANAGEMENT, INC.,

MOT SEQ 001

Defendants.

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**NANCY M. BANNON, J.:**

I. INTRODUCTION

This is an action for, *inter alia*, conversion, rescission of certain contracts, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and replevin of approximately 23,300 pieces of valuable art known as "Peter's Keepers," which were created by the American artist Peter Max. The plaintiff, ALP, Inc. (ALP) moves pursuant to CPLR 6301, 6312, 2701 and 7109(a) for a preliminary injunction enjoining defendant Park West Galleries Inc. (Park West), and anyone acting in concert with it, from selling, transferring, encumbering, hypothecating, or otherwise disposing of or taking any kind of action with regard to Peter's Keepers, requiring Park West to cancel any pending auctions or sales of Peter's Keepers and otherwise retrieve such works to the extent that they are held by third parties, maintain Peter's Keepers in a secure segregated

location or deliver them to a person by the court to be maintained until further order, and electronically file with the court an accounting in the form of an affidavit by a person with knowledge specifically identifying or listing all of the Peter's Keepers, their current location, and any Peter's Keepers that have already been sold or transferred. No opposition is submitted. The motion is granted in part.

## II. BACKGROUND

A full recitation of the allegations contained in the complaint in this action is contained in this court's order dated October 30, 2020, denying, *inter alia*, Park West's pre-answer motion to dismiss the complaint as against it and consolidating this action with a related action ALP, Inc. v Lawrence Moskowitz et al., Index No. 652326/2019.

In 2000, 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 Max (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. As Peter Max became ill in 2012, he became less involved in the day-to-day management of ALP. As such, he allowed Adam to assume the position of chief executive

officer and president. Upon ceding control of the company to Adam, the plaintiff alleges that Adam, suffering from multiple physical and mental illnesses himself, allowed for the defendants in the consolidated action to assume control over the company, divert substantial corporate assets to themselves, and brazenly sell-off ALP's most valuable assets, Peter's Keepers, at fire-sale prices to Park West.

In 2015, Libra began investigating the events at ALP. In July 2017, Libra commenced a special proceeding before this court entitled Libra Max v Adam Max and ALP, Inc., Index No. 156641/2017, seeking access to the books and records of ALP and a special shareholder meeting to reconstitute ALP's board of directors. That action culminated with Libra calling a special meeting of the shareholders of ALP pursuant to BCL § 603, to be held on December 10, 2018, in order to reconstitute ALP's board of directors so that ALP would no longer be looted.

At the same time that Libra and Adam were struggling over ALP's control, on October 31, 2018, Park West coordinated with Adam and the other defendants allegedly looting the company and submitted an order for the "purchase" of the Peter's Keepers— a transaction by which Adam purportedly "sold" over \$400 million of ALP's most valued assets to Park West for just \$14.7 million.

On December 10, 2018, the shareholder meeting went forward, and a new board of directors consisting of Libra, Adam, and Michael Anderson, an acquaintance of Libra's, were elected. Notwithstanding the election of a new board of directors, on December 12, 2018, two days after the board meeting that installed this new board, the sale of 23,300 of Peter's Keepers, was expedited by Adam with the \$14.7 million broken up into two installment payments. The first of two installment payments to ALP was made on December 10, 2018 as the pieces of art were prepared for shipment on a rush basis.

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. At the same meeting the board resolved that Adam would have no authority to hire or engage counsel or other advisors, or to execute contracts, loan documents, or other financial instruments on behalf of the company unless specifically granted by resolution of the board. Despite the January 11, 2019 meeting, Adam continued to act as if he were still ALP's acting president.

Following her election, Libra began to suspect that the looting of ALP had not yet ceased, and in January 2019 became worried about the status of Peter's Keepers. Unaware of the ongoing illicit sale and shipment of Peter's Keepers to Park

West, on February 28, 2019, Libra, on behalf of ALP, filed a petition, entitled ALP, Inc. v Adam Max, under Index No. 651181/2019 seeking to enjoin the sale or waste of ALP's property, including its artwork, and to restrain Adam from his continued obstruction of Libra's access to ALP's books and records. The temporary restraining order was granted by this court. In all of the proceedings before the court, Adam Max did not disclose that the sale of Peter's Keepers to Park West had already occurred and that ALP had been denuded of its most valuable artwork.

After discovering the sale of Peter's Keepers, ALP commenced the instant action on April 16, 2019. On April 17, 2019, ALP brought this motion by proposed order to show cause. Pending the hearing of this motion, the court issued a temporary restraining order enjoining Park West and anyone acting in concert with it from selling, transferring, encumbering, hypothecating, or otherwise disposing or taking any action with regard to any of the Peter's Keepers other than to hold the works in a segregated location and cease any already scheduled auctions or sales of Peter's Keepers and to withdraw such pieces from any auctions or sales pending further order of the court.

On August 1, 2019, this court so-ordered a stipulation between the parties that, *inter alia*, provided for the April 17,

2019 temporary restraining order to remain in effect until this action is disposed of and that no further briefing on the motion would occur.

### III. DISCUSSION

As the parties have consented to the continued effect of the temporary restraining order, much of the instant motion is moot. However, ALP has not withdrawn the instant motion and seeks additional relief pursuant to CPLR 7109(a) and CPLR 2701(2). Specifically, ALP is seeking an accounting for the whereabouts of all Peter's Keepers and an order directing Park West to turn over Peter's Keepers either to ALP or to the court. Additionally, no undertaking is currently in effect. Thus, the court shall address the merits of the motion and these issues.

#### A. Preliminary Injunction Pursuant to CPLR 7109(a)

A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing." 1234 Broadway LLC v West Side SRO Law Project, 86 AD3d 18, 23 (1<sup>st</sup> Dept 2011). A preliminary injunction may only be granted where the party seeking the injunction demonstrates, by clear and convincing evidence, (1) the likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor. See CPLR 6301;

Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839 (2005); Aetna Ins. Co. v Capasso, 75 NY2d 860 (1990). If any one of these three requirements are not satisfied, the application must be denied. See Faberge Intl. v Di Pino, 109 AD2d 235 (1<sup>st</sup> Dept 1985).

CPLR 7109(a) provides as follows: "Where the chattel is unique, the court may grant a preliminary injunction or temporary restraining order that the chattel shall not be removed from the state, transferred, sold, pledged, assigned or otherwise disposed of until the further order of the court."

To demonstrate entitlement to relief under CPLR 7109(a), a party must establish the uniqueness of the chattel and must satisfy the usual requirements for a preliminary injunction. See Danae Art Int'l Inc. v Stallone, 163 AD2d 81 (1<sup>st</sup> Dept. 1990). Works of art and other similar items have been held to be unique and subject to the injunctive provisions of CPLR 7109(a). See id.; Glick v Beer, 263 AD 599 (1<sup>st</sup> Dept. 1942); Staff v Hemingway, 47 AD2d 709 (4<sup>th</sup> Dept. 1975) (painting considered unique chattel under CPLR 7109).

Here, ALP has met its burden for relief pursuant to CPLR 7109(a). ALP has demonstrated that Peter's Keepers are unique works of art, as they are some of the most important pieces of ALP's inventory, that were specifically set aside by Peter Max

to not be sold. See Danae Art Int'l Inc. v Stallone, supra; Glick v Beer, supra; Staff v Hemingway, supra.

ALP has also demonstrated a likelihood of success on the merits as to its claims for replevin of Peter's Keepers. To establish a cause of action for replevin, a plaintiff must demonstrate a superior possessory right to property in the defendant's possession. See Reif v Nagy, supra; Pivar v Graduate School of Figurative Art of N.Y. Academy of Art, 290 AD2d 212 (1<sup>st</sup> Dept. 2002). Here, ALP correctly notes that according to ALPs bylaws and BCL § 909, Adam was only entitled to approve transactions in the ordinary course of business. As such, Adam was likely unable to unilaterally sell \$400 million of ALP's most valuable artworks for \$14.7 million without board approval. Thus, ALP has a likelihood of establishing that the contract for the sale of Peter's Keepers is unenforceable and that ALP has the superior possessory right to Peter's Keepers.

ALP has also demonstrated irreparable harm should the injunction not be granted. Without the injunction, Park West would be able to sell Peter's Keepers, rendering ALP's ability to recover the specific paintings impossible. Moreover, given the unique nature and value of the artworks, and Peter Max's declining health, ALP would be unable to replace the paintings. Although some argument may exist as to whether there this would

constitute irreparable, given that ALP is in the business of selling art, it is nonetheless appropriate to maintain the status quo pending a resolution of the issues presented. See Danae Art Int'l Inc. v Stallone, supra.

ALP has also demonstrated a balance of the equities in its favor. Park West appears to have purchased over \$400 million of ALP's most valuable assets at fire-sale prices from those accused of looting ALP. Not only does it seem likely that Park West was aware of the extraordinary nature of its purchase, but there are also allegations that Park West itself coordinated with those looting ALP so it could purchase as many Peter Max artworks as possible at a reduced price.

As none of the defendants oppose the motion, having consented to the temporary restraining order remaining in place during the pendency of the action, the motion for a preliminary injunction is granted to the extent that Park West and anyone acting in concert with it, remain enjoined from selling, transferring, encumbering, hypothecating, or otherwise disposing of or taking any kind of action with regard to Peter's Keepers, requiring Park West to cancel any pending auctions or sales of Peter's Keepers and otherwise retrieve such works to the extent that they are held by third parties, and maintain Peter's Keepers in a secure segregated location.

B. Accounting

ALP further requests an accounting in the form of an affidavit by a person with knowledge specifically identifying or listing all of the Peter's Keepers, their current location, and any Peter's Keepers that have already been sold or transferred. The court finds that such relief is not warranted.

Although preliminary injunctions are generally accomplished by an injunction prohibitory in form, mandatory injunctions may be necessary to direct the undoing of past acts which produced injury and may render future judgment ineffective. Preliminary injunctive relief that is mandatory in nature requires, in addition to the three traditional requirements for preliminary injunctive relief, that the mandatory injunction be essential to maintaining the status quo. See Bachman v Harrington, 184 NY 458 (1906). Here, ALP makes no such showing, failing to address why an accounting is essential to maintaining the status quo or advancing any other arguments in support of one.

C. Relief Pursuant to CPLR 2701

ALP also moves pursuant to CPLR 2701 for an order directing Park West to turn over Peter's Keepers either to a person appointed by the court or to the County Clerk. CPLR 2701 provides that:

"The court, upon motion or on its own initiative, with such notice as it deems proper, may order personal property capable of delivery which is the subject of the action, paid into court, or delivered to such person as it may direct, with such security as the court shall direct, and subject to its further direction if: 1) a party has such property in his possession, custody or control as trustee for another party or where it belongs or is due to another party; or 2) a party has such property in his possession, custody or control and it belongs or is due to another party, where special circumstances make it desirable that payment or delivery to such other party should be withheld; or 3) the ownership of such property will depend on the outcome of a pending action and no party is willing to accept possession or custody of it during the pendency of the action."

Again, ALP fails to establish entitlement to relief on these papers. Here ALP and Park West are disputing ownership of Peter's Keepers. As such, CPLR 2701(1) is inapplicable, as neither party is acting as trustee, and CPLR 2701(2) is inapplicable as it relates to instances where ownership is not at issue. See Costa v Fantasia Distrib. Corp., 79 AD2d 921 (1<sup>st</sup> Dept. 1981) (directing turnover of painting when it is uncontested that it belongs to the plaintiff); Mallan v Samowich, 94 AD2d 249 (1<sup>st</sup> Dept. 1983) (directing turnover of paintings held by executrix on behalf of estate). Moreover, while CPLR 2701(3) could apply in this instance, there is nothing in the record to suggest that either ALP or Park West is unwilling to accept possession or custody of Peter's Keepers during the pendency of this action.

D. Undertaking

The party seeking a preliminary injunction must post an undertaking in an amount that will pay the damages and costs to the person who is enjoined if it is ultimately determined that the preliminary injunction was erroneously issued. See Margolies v Encounter, Inc., 42 NY2d 475 (1977); CPLR 6312(b). Although CPLR 6312(b) provides the court with discretion in setting the undertaking, it also unequivocally mandates that the plaintiff furnish an undertaking "prior to the granting of a preliminary injunction." This requirement cannot be waived by the court. See Solomon v. RYTY Inc., 302 AD2d 275 (1<sup>st</sup> Dept. 2003); Smith v Boxer, 45 AD2d 1054 (2<sup>nd</sup> Dept. 1974); Rourke Developers Inc. v Cottrell-Hajeck Inc., 285 AD2d 805 (3<sup>rd</sup> Dept. 2001).

Here, the parties fail to address the issue of the undertaking. The granting of a preliminary injunction in this action would enjoin Park West from moving or selling Peter's Keepers, requiring storage or insurance costs to Park West. However, as noted in ALP's brief, Park West has been purchasing and retaining large amounts of Peter Max's work, possibly seeking to capitalize on any increase in value that may occur after Peter Max's death. In any event, the parties may submit supplemental papers on the issue of an undertaking, within 30 days.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion by the plaintiff, ALP, Inc., for a preliminary injunction pursuant to CPLR 6301, 6312, 2701 and 7109(a) is granted to the extent that the defendant Park West Galleries, Inc., and anyone acting in concert with it, are enjoined from selling, transferring, encumbering, hypothecating, or otherwise disposing of or taking any kind of action with regard to Peter's Keepers, and Park West must cancel any pending auctions or sales of Peter's Keepers, and maintain Peter's Keepers in a secure segregated location, and the preliminary injunction shall remain in effect until further order of this court, and it is further

ORDERED that the parties may submit supplemental papers on the issue of an undertaking within 30 days of the date of entry of this order.

This constitutes the Decision and Order of the court.

Dated: December 11, 2020

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