

**ALP, Inc. v Max**

2021 NY Slip Op 30061(U)

January 7, 2021

Supreme Court, New York County

Docket Number: 651181/2019

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., a New York corporation, and LIBRA  
MAX, in her official capacity as President,  
Chief Executive Officer, and Chair of the  
Board of Directors of ALP, Inc.,

DECISION AND ORDER

Plaintiffs,

Index No. 651181/2019

MOT SEQ 001

- v -

ADAM MAX, as an officer of ALP, Inc.,

Defendant.

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

I. INTRODUCTION

In this proceeding pursuant to Article 78 of the CPLR, arising from a broader intra-company dispute over control of ALP, Inc. ("ALP"), the petitioners, ALP and Libra Max ("Libra"), ALP's President and CEO, seek an order of mandamus compelling the respondent, Adam Max ("Adam") to perform certain duties imposed upon him by ALP's board of directors. Adam opposes the motion and cross-moves for an injunction against Libra. For the reasons described herein, the petition and the cross-motion are both denied.

II. BACKGROUND

ALP is a New York corporation in the business of marketing, selling, and licensing works of art created by Libra's and

Adam's father (the "Artist"), a world-famous artist whose property interests and financial affairs are currently under the supervision and control of a court-appointed guardian (the "Property Guardian"). Libra and Adam each own 40% of the common voting shares of ALP. The Property Guardian is authorized to vote the remaining 20% of common voting shares, which are owned by the Artist. Libra and Adam have been members of ALP's three-member board of directors (the "Board") since ALP's formation in 2000. The Artist occupied the third member seat on the Board from 2000 until his resignation in June 2014. From June 2014 through December 10, 2018, the third seat on the Board remained vacant. During this period, Adam was ALP's President and Libra was Vice President and Secretary.

Libra avers that during Adam's tenure as President, she was frozen out of ALP and denied access to company information. Following her commencement of an Article 78 proceeding captioned Libra Max v Adam Max and ALP, Inc., Index No. 156641/2017, seeking access to such information, Libra called a special meeting of ALP's shareholders on December 10, 2018. After the court declined to grant Adam a temporary restraining order preventing the meeting, sought in another related proceeding captioned ALP, Inc. v Libra Max and Lawrence Flynn, Index No. 161352/2018, the meeting took place as scheduled, and a new board of directors was elected. The new board consisted of

Libra, Adam, and Michael Anderson.

On December 17, 2018, the newly constituted Board held a meeting and, suspecting that Adam was improperly disbursing ALP's funds, resolved that "all checks, payments or other transactions of business that expend, relate to assets or claimed assets of the company or obligate the company for over \$25,000 in one transaction or in a series of checks or transactions for the same purpose, shall require prior Board approval, indicating, for the sake of clarity that this would include the potential distribution of the insurance funds currently held in escrow." The reference to insurance funds related to an insurance award recovered in August 2018 for damages to ALP's New Jersey warehouse and its contents caused by Superstorm Sandy in 2012. The Board also resolved (a) to "review and approve the projected year-end financial position of [ALP] prior to the books being closed for the year to approve final decisions in an effort to reduce or ameliorate having to report phantom income to the shareholders" and (b) to "direct counsel for [ALP] to immediately withdraw any pending appeals and other actions relating to the pending litigation brought on behalf of [ALP] or any officers acting on behalf of the company." At a subsequent meeting held on December 21, 2018, the Board resolved that Libra would request that Adam, as President, have ALP's accountant, CPA Robert Frank, provide "a

year-end projection based on the current situation with the likely tax outcomes" for discussion at the next Board meeting.

Notwithstanding the resolutions, on December 25, 2018, Libra learned that Adam caused ALP to pay a sum of approximately \$4.8 million in consideration of an undocumented agreement to pay an insurance salesman named Lawrence Moskowitz 10% of the insurance award, without advising the Board or obtaining its approval. The petitioners aver that Adam has further caused ALP to transfer \$2.5 million to an attorney escrow account in connection with the settlement of certain claims against the Artist, without prior approval. The petitioners also state that none of the other resolutions were complied with. Accordingly, at a January 4, 2019, meeting, the Board resolved to terminate ALP's counsel for failure to withdraw and discontinue prosecuting litigation, as directed on December 17, 2018, and to authorize an investigation into the circumstances of ALP's \$4.8 million payment to Moskowitz.

On January 11, 2019, ALP's Board held another meeting, wherein it resolved to remove Adam as ALP's President and name Libra as CEO and President, effective immediately. Adam was appointed as ALP's Executive Vice President and Chief Operating Officer, "subject to and in accordance with the direction of the Board and the President" with "such powers and duties" as the President or Board should delegate or assign to him from time to

time. At that meeting, the board further resolved to remove Adam as an authorized signatory on ALP's checking accounts and to withhold from Adam any authority "to hire or engage counsel or other advisors to [ALP] or its officers, [or] to execute contracts, loan documents or other financial instruments on behalf of [ALP] unless specifically granted by resolution of the Board." At a January 18, 2019, meeting, the Board noted that Adam had not complied with the prior resolution limiting his banking and transactional authority and resolved to execute new banking resolutions removing Adam and designating Libra as an authorized signatory.

Adam subsequently filed an action, captioned Adam Max v ALP, Inc., Libra Max, and Michael Anderson, Index No. 650618/2019, challenging the validity of the December 10, 2018, election and the Board's subsequent actions, including the removal of Adam as President. That action remains pending before the court. Adam continued to refuse to comply with the resolution changing the authorized signatories on ALP's bank accounts.

At a February 8, 2019, meeting, the Board therefore resolved to authorize Libra as President/CEO to take all necessary measures, including commencing legal proceedings, to compel Adam's compliance with prior resolutions concerning (a) changing the authorized signatories on ALP's bank accounts, (b)

providing the President/CEO with immediate access to all company information and IT systems including login/username and passwords to any company accounts, software, program, security cameras and video, website, keys and all other means of access to the business premises, warehouse, storage units, etc., and (c) establishing control and oversight of art inventory at the warehouse and studio, as well as control and oversight of sales. On the same date, the Board held a special meeting to adopt new by-laws for ALP. The new by-laws fixed the number of directors of ALP at three, established the powers of ALP's President, and explicitly obligated ALP's Vice President to perform only those duties assigned to him by the Board and the President.

The petitioners contend that Adam has openly defied the newly elected Board and its resolutions, as well as ALP's by-laws, continuing to conduct business as if he were ALP's President. They aver that Adam has made millions of dollars in improper, unauthorized payments and sold off ALP's most valuable assets. These allegations are the subject to two related actions before this court, captioned ALP, Inc. v Lawrence 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.

The petitioners also commenced this Article 78 proceeding against Adam to compel his performance of certain "ministerial

duties" as an officer of ALP. Specifically, the petitioners seek to compel Adam to: 1) execute an affidavit consenting to his removal as an authorized signatory on ALP's account with Bank of America; 2) identify ALP's other accounts in order to do the same with them; 3) refrain from transacting business on behalf of ALP except as expressly authorized by the Board or by Libra; 4) provide the petitioners with all login/usernames and passwords for ALP information technology and security systems, software, data, and accounts with third-party hosts, and with all physical electronic keys, codes, devices, and means of gaining access to ALP's business premises, warehouse, and any storage units; and 5) provide petitioners with the "Max number" or other identifying number of ALP's works of art and receive Libra's authorization before a work's removal from ALP's studio or warehouse. On February 28, 2019, this court granted a temporary restraining order in this proceeding enjoining Adam from transferring any of ALP's assets, approving any sale of ALP's works of art or intellectual property, incurring any financial obligations on ALP's behalf in excess of \$2,500.00 without Libra's approval, or interfering with or instructing ALP's employees not to provide Libra access to ALP's books and records.

The petitioners concede in their papers that, since the initial filing of this petition, Adam has signed an affidavit to

remove himself as a signatory on ALP's Bank of America Account. Thus, the portion of the petition seeking that relief is denied as academic.

In response to the petition, Adam filed an answer in this special proceeding asserting a counterclaim seeking to enjoin Libra from removing any art from ALP's studio, warehouse, or any other such facility, save for art that is either sold, committed, or consigned in the ordinary course of ALP's business. Adam cross-moves for relief under that counterclaim.

### III. DISCUSSION

The adoption of Article 78 was meant to facilitate requests for relief based on the common law writs of mandamus, prohibition, and certiorari. Matter of Newbrand v City of Yonkers, 285 NY 164 (1941). The scope of Article 78 extends to "every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article." CPLR 7802(a). Thus, Article 78 applies to officers of a corporation formed pursuant to state law, such as ALP. See Matter of Silver v Farrell, 113 Misc 2d 443 (Sup Ct, Monroe Cnty 1982), citing Matter of Auer v Dressel, 306 NY 427 (1954) ("Judicial relief in the form of

mandamus in an Article 78 proceeding may be used to compel action by the officers of a corporation.”).

“A CPLR article 78 proceeding seeking mandamus to compel the performance of a specific duty applies only to acts that are ministerial in nature and not those that involve the exercise of discretion.” Matter of Maron v Silver, 14 NY3d 230, 249 (2010). An act is “ministerial” when the law clearly spells out the duty to be performed by the official with sufficient certainty that nothing is left to the exercise of discretion. See Mullen v Axelrod, 74 NY2d 580, 583 (1989). In order to demonstrate entitlement to an order of mandamus, a petitioner must establish 1) that the respondent has a duty to perform a ministerial duty, 2) that the petitioner has a clear legal right to have that duty performed, and 3) that no adequate remedy at law is available to petitioner. Matter of Silver v Farrell, supra (citing cases).

The petitioners contend that ALP’s new by-laws and board resolutions serve as the basis for the relief they seek. A by-law is “a contract among shareholders” and becomes a law of the corporation unless it violates some provision of law. Matter of Silver v Farrell, supra at 444; see Matter of Weisblum v Li Falco Mfg. Co., 193 Misc 473 (Sup Ct, Herkimer Cnty 1947). If the by-laws require specific action, then a petitioner may be entitled to compel such action in an Article 78 proceeding. See Matter of Silver v Farrell, supra; Matter of Weisblum v Li Falco

Mfg. Co., supra; 200 East 16th Street Housing Corp. v Realty,  
1996 WL 34574633 (Sup Ct, NY County, May 30, 1996, Index No.  
123259/94).

Here, Article V, Section 3 of ALP's new by-laws outlines the duties of the Vice-President: "A Vice-President shall have such of the President's powers and duties as the President may from time to time delegate to him/her, and shall have such other powers and perform such other duties as may be assigned to him/her by the Board of Directors." The Board's January 11, 2019, resolution, which preceded the adoption of the by-laws, further provides that Adam, as Vice President, shall not otherwise transact business on behalf of ALP, except as expressly authorized by the Board or President, as appropriate. As described above, the Board has adopted resolutions compelling Adam to provide specific information to Libra, also prior to the adoption of the new by-laws.

The by-laws' provision that the Vice President "perform such other duties as may be assigned to him/her by the Board of Directors" is insufficient to warrant mandamus relief insofar as it does not clearly spell out any specific duty to be performed by the Vice President with sufficient certainty that nothing is left to the exercise of discretion. Instead, the provision envisions a theoretically limitless range of directives that could be given to the Vice President at the Board's discretion.

The petitioners cite to no authority in support of the proposition that the type of language used in ALP's by-laws can properly be invoked to justify mandamus relief as to directives and obligations that are not explicitly included in the by-laws. Nor do they present any case where a court found that the corporate board's resolutions themselves formed a basis for mandamus relief against a corporate officer. Indeed, the cases cited by the petitioners merely recognize the right of a shareholder to compel a corporation to hold a shareholders meeting as clearly provided for in the corporation's by-laws. See Matter of Silver v Farrell, supra; Matter of Weisblum v Li Falco Mfg. Co., supra; 200 East 16th Street Housing Corp. v Realty, supra (further recognizing right of plaintiff to issuance of financial statements as provided for in the by-laws). Accordingly, the petition is denied.

The court has considered the respondent's cross-motion and denies it for the reasons stated in the petitioner's opposition. Specifically, Adam's cross-motion seeks the equivalent of summary judgment on its counterclaim, granting a permanent injunction prior to the petitioners' having joined issue. See CPLR 3212(a); Afco Credit Corp. v Mohr, 156 AD2d 287 (1<sup>st</sup> Dept. 1989). Additionally, even if the court were to consider Adam's request for a preliminary injunction, his papers fail to establish the elements necessary for such relief, *i.e.*, a

likelihood of success on the merits, irreparable injury absent the granting of preliminary injunctive relief, and 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).

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED and ADJUDGED that the petition is denied and the cross-motion is denied; and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: January 7, 2021

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