ALP, Inc. v Moskowitz
2021 NY Slip Op 30659(U)
March 4, 2021
Supreme Court, New York County
Docket Number: 652326/19
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
Index No. 652326/19
MOT SEQ 001, 007

- v -

LAWRENCE MOSKOWITZ, BENDER CICCOTTO & COMPANY CPA'S, LLP, ROBERT FRANK, ROBERT J. FRANK, GENE LUNTZ, LAUREN MOSKOWITZ,

Defendants.
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NANCY M. BANNON, J.:

I. INTRODUCTION

This is an action seeking damages and other relief arising from claims sounding in, *inter alia*, conversion, rescission of certain contracts, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty, and for 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"), a corporation formed by Peter Max, moves pursuant to CPLR 6301 and BCL § 720(a)(2) for a preliminary injunction directing the law firm Pryor Cashman LLP ("Pryor Cashman") to return to ALP funds that were transferred from ALP's operating account into a Pryor Cashman IOLA account. The plaintiff maintains that the funds, consisting of (a) $1.5

million wired between August 2, 2018, and September 4, 2018, pursuant to an escrow agreement (the "Insurance Proceeds Escrow Agreement") among the plaintiff, defendant Lawrence Moskowitz, and Pryor Cashman dated February 7, 2017, and (b) $500,000.00 wired on February 10, 2017, pursuant to a second escrow agreement (the "Moskowitz Loan Escrow Agreement") among the same parties dated February 15, 2017, were fraudulently or otherwise improperly paid (MOT SEQ 001). Moskowitz opposes the motion.

By a separate motion, ALP moves pursuant to CPLR 6301 and BCL § 720(a)(2) for a second preliminary injunction directing defendant Moskowitz and his wholly-owned business entity, non-party Lawrence Moskowitz CLU, Ltd., to return to ALP approximately $4.8 million that Moskowitz and Adam Max, an ALP shareholder, caused ALP to pay to Leichtman Law, PLLC, on December 20, 2018, or, alternatively, pursuant to CPLR 6201(1) to attach the funds through a directive that they be remitted to be held in escrow in a Schlam Stone and Dolan, LLP, trust account(MOT SEQ 007). Moskowitz opposes the motion and purports in his memorandum of law to cross-move to vacate a so-ordered stipulation among the parties dated October 10, 2019, pursuant to which $2.4 million of the disputed $4.8 million was placed in a segregated interest-bearing account.

The plaintiff's motions are granted to the extent discussed herein and the defendant's cross-motion is denied.

II. BACKGROUND

A complete recitation of the allegations contained in the complaint in this action is contained in this court's order dated October 30, 2020, in which the court, *inter alia*, granted in part Moskowitz's motion to dismiss the complaint as against him, and consolidated this action with a related action captioned ALP, Inc. v Park West Galleries, Inc., Index No. 153949/2019, for purposes of discovery and trial. What follows is a brief summary of the facts relevant to this motion.

A. Factual Background

In 2000, world-renowned artist Peter Max formed ALP to engage in the production, maintenance, marketing, licensing and commercialization of his artwork. Peter Max's two children, Adam Max ("Adam") and Libra Max ("Libra"), each own a 40% interest in ALP, with the remaining 20% belonging to Peter. Peter ran ALP's day-to-day operations until approximately 2012, when his health began to decline. Thereafter, Adam assumed control of the company's day-to-day operations as Chief Executive Officer and President of ALP.

The plaintiff alleges that Adam allowed Moskowitz, alongside co-defendants Bender Ciccotto & Company CPA's, LLP ("Bender"), Bender owner Robert Frank ("Frank"), his son, Robert J. Frank ("Frank Jr."), and Gene Luntz ("Luntz"), to assume control over the company, divert substantial corporate assets to themselves, brazenly sell-off ALP's most valuable assets at fire-sale prices, and otherwise loot the corporation.

The plaintiff alleges that upon Adam's assuming control of ALP in 2012, Moskowitz appeared, holding himself out as an insurance professional with connections to New York Life Insurance, although he does not have insurance licenses in New York or New Jersey. Moskowitz claimed to be "an old friend of Peter Max" who had expended over $500,000 of his own money in loans to Peter, ALP, or its predecessor, ViaMax. Moskowitz has also claimed that he rented Peter's home in the U.S. Virgin Islands for an extended period and spent his own money to pay for improvements to the residence, that Peter Max gave him a 10% interest in ALP at some point, and that he entered into an undated consulting agreement with ALP in 2016 in exchange for $15,000 per month.

According to the plaintiff, to ensure he and Frank remained in control of ALP, Moskowitz orchestrated the firing of ALP's longtime outside accountant and lawyer and induced Adam to hire Moskowitz's chosen outside corporate counsel, Pryor Cashman, which took direction directly from Moskowitz and Frank. In 2017 and 2018, Moskowitz allegedly directed Pryor Cashman to set up multiple escrow agreements

between ALP and Moskowitz, with Pryor Cashman as Escrow Agent. The Insurance Proceeds Escrow Agreement, dated February 7, 2017, provided that ALP "expects to receive, from time to time, from one or more insurance companies insurance proceeds and related payments arising out of property damage losses incurred from Superstorm Sandy" and that "[ALP] and Moskowitz desire to establish a non-interest-bearing account with the Escrow Agent into which the insurance companies shall deposit checks or wire transfers for the payment of money …" Pursuant to the Insurance Proceeds Escrow Agreement, Pryor Cashman could only release funds upon receiving a joint instruction from ALP and Moskowitz. ALP wired $1.5 million to the Insurance Proceeds Escrow from its operating account in 2018.

Likewise, the Moskowitz Loan Escrow Agreement provides that "[ALP] has requested that Moskowitz make available to [ALP] a loan in the principal amount of $500,000 for working capital purposes" and that "Moskowitz has agreed to make such a loan and to deposit funds in escrow." Further, the Moskowitz Loan Escrow Agreement requires that "Moskowitz shall deposit with the Escrow Agent by check or wire transfer the amount of $500,000" and that "[t]he Escrow Agent shall receive money directly from Moskowitz." Again, Pryor Cashman was permitted to release funds only upon receiving a joint instruction from ALP and Moskowitz. ALP wired $500,000 from its operating account to the Moskowitz Loan Escrow in 2017.

In 2015, Libra Max began investigating the direction ALP was taking under Moskowitz and Frank's alleged control. To that end, in

July 2017, Libra commenced a series of special proceedings against Adam and ALP. Ultimately, control over ALP was transferred to Libra in February 2019. Libra continues to serve as ALP's President. Notwithstanding Libra's increased involvement in ALP's affairs, the plaintiff alleges that Moskowitz remained steadfast in retaining his control over ALP and looting it to the maximum extent possible.

On May 21, 2018, Moskowitz and ALP, through Adam, entered into an assignment agreement purporting to assign to Moskowitz 10% of any insurance proceeds due to ALP as a result of Superstorm Sandy's destruction of significant amounts of ALP's artworks stored in a New Jersey warehouse. On December 7, 2018, Moskowitz, through counsel, sent a letter to ALP's insurance counsel, Cullen and Dykman LLP ("Cullen and Dykman"), which was holding the insurance proceeds in escrow, claiming $4.8 million of the proceeds, representing 10% of the entire $48.8 million insurance award as of that date. Moskowitz asserted that he was entitled to the money because he was engaged by ALP as its insurance consultant and business manager in connection with ALP's claims to insurance proceeds against various insurance companies in connection with Hurricane Sandy.

Both Libra's counsel and Peter Max's property guardian objected to the payment. Further, on December 17, 2018, as a preventative measure, the ALP board of directors resolved that prior board approval was required for the payment of any expense over $25,000.00, "includ[ing] the potential distribution of the insurance funds currently held in escrow." Nonetheless, three days later, Moskowitz

emailed Adam wiring instructions for Moskowitz's lawyers' trust account and ALP transferred Moskowitz $4.8 million from its operating account. According to the plaintiff, the $4.8 million was from the proceeds of an improper sale of artworks to Park West Galleries, Inc., received 10 days earlier. Without the sale, there would not have been sufficient funds in ALP's operating account to pay Moskowitz $4.8 million. Libra did not find out about the payment until December 25, 2018.

At oral argument for MOT SEQ 007 on October 10, 2019, counsel for Moskowitz represented that only $2.4 million of the disputed $4.8 million paid to Moskowitz remained in his possession. Thereafter, the parties entered a so-ordered stipulation whereby the remaining $2.4 million was to be placed in an interest-bearing account, until further order of the court, and the remaining provisions sought by the plaintiff in the temporary restraining order were withdrawn without prejudice.

III. DISCUSSION

"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 (1st 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 (1st Dept 1985).

Although preliminary injunctions are typically prohibitory in form, mandatory injunctions may be necessary to direct the undoing of past acts which produced injury and may render future judgment ineffective. As such, a preliminary mandatory injunction, such as those sought here, should be granted where it is necessary to preserve or restore the status quo of the parties. See Solow v Liebman, 175 AD2d 120 (2nd Dept. 1991); Engelhardt v Fessia, 31 Misc.2d 127 (Sup Ct, NY County 1961) citing Bachman v Harrington, 184 NY 458 (1906).

Moreover, CPLR 6301 permits injunctive relief with respect to "the subject of the action" and "injunctive relief is appropriate to remedy the conversion of identifiable proceeds as sought in the underlying action." Amity Loans, Inc. v Sterling Nat'l Bank & Trust Co., 177 AD2d 277, 279 (1st Dept. 1991).

Where a fiduciary has diverted traceable corporate funds, title to which is free from doubt, injunctive relief is warranted to ensure the immediate return of such funds. See 1650 Realty Assocs., LLC v Golden Touch Mgmt., 101 AD3d 1016 (2nd Dept. 2012).

As to an order of attachment, a plaintiff seeking such an order "must show the probability of its success on the merits of its cause of action, that one or more grounds provided for in CPLR 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff." Reed Smith LLP v LEED HR, LLC, 156 AD3d 420, 420 (1st Dept. 2017). The plaintiff must also demonstrate an "identifiable risk that the defendant will not be able to satisfy the judgment." CSC 4540, LLC v Vernon 4540 Realty, LLC, 2018 WL 6103213, *5 (NY Sup Ct Nov. 21, 2018).

In support of their motions, ALP submits, *inter alia*, the escrow agreements pursuant to which money was transferred to Pryor Cashman, transaction reports substantiating the amounts transferred and the dates of the transfers, and the affidavit of Libra Max detailing Moskowitz's attempts to gain control over the insurance payments he received. With respect to the sums sought in MOT SEQ 001, these submissions demonstrate by clear and convincing evidence (1) a 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. Although the plaintiff has not demonstrated entitlement to a preliminary injunction with respect to the $4.8 million sought in MOT SEQ 002, the plaintiff is nonetheless entitled to the alternative relief of attachment.

A. Likelihood of Success on the Merits

ALP alleges causes of action against Moskowitz sounding in conversion, rescission of contract, breach of fiduciary duty and the aiding and abetting thereof, actual and constructive fraud, civil conspiracy, and replevin.

For the purposes of the instant motions, the court focuses primarily on ALP's likelihood of success on its claims of conversion against Moskowitz relating to (a) the $500,000.00 allegedly converted under the Moskowitz Loan Escrow Agreement and currently held in escrow by Pryor Cashman, (b) the $1.5 million allegedly converted under the Insurance Proceeds Escrow Agreement and currently held in escrow by Pryor Cashman, and (c) the $4.8 million allegedly converted when Adam Max authorized payment to Moskowitz in December 2018, of which the remaining $2.4 million is currently being held in a segregated interest-bearing account.

To establish a cause of action sounding in conversion, a plaintiff must demonstrate that the defendant intentionally and without authority assumed or exercised control over property

belonging to someone else, thereby interfering with that person's right of possession. See William Doyle Galleries, Inc. v Stettner, 167 AD3d 501 (1st Dept. 2018). The two key elements to establish a cause of action for conversion are "1) the plaintiff's possessory right or interest in the property, and 2) the defendant's dominion over the property or interference with it, in derogation of the plaintiff's rights." Reif v Nagy, 175 AD3d 107, 118 (1st Dept. 2019).

As to the funds currently held in escrow by Pryor Cashman, ALP contends that since they were not deposited pursuant to the terms of the parties' escrow agreements, the funds remain ALP's property and must be returned. See National Union Fire Ins. Co. Pittsburgh, Pa. v Proskauer Rose Goetz & Mendelsohn, 165 Misc 2d 539, 545 ("[M]ere delivery of an instrument or property to an escrowee does not constitute a transaction in escrow. Fargo v Burke, 262 NY 229 [1933].").

With respect to the $500,000.00 deposited in the Moskowitz Loan Escrow, that agreement clearly provides that "Moskowitz shall deposit with the Escrow Agent by check or wire transfer" and "[t]he Escrow Agent shall receive money directly from Moskowitz by means of check or wire transfer." The funds deposited directly by Moskowitz would be defined as the "Escrow Funds." Under the plain terms of the agreement, then, funds not deposited by Moskowitz, are not "Escrow Funds." See Fargo v

Burke, supra at 233 ("Whether the holding of a document be under an escrow agreement depends upon that agreement."). As the $500,000.00 is not held pursuant to the Moskowitz Loan Escrow Agreement, it should be released, and as the funds were wired from ALP's operating account, the funds are properly ALP's. See Milestone Shipping, S.A. v Estech Trading LLC, 811 F Supp 2d 915, 924 (SDNY 2011) (where "according to the plain terms" of the agreement "the Attached Funds remain … free of encumbrance by the Escrow Agreement … they must be returned.").

Moskowitz contends that such a reading of the Moskowitz Loan Escrow Agreement should not be countenanced and that the court should consider the agreement's context. However, given the plain language meaning of the agreement and the agreement's merger clause, any such purported "context" fails to alter the agreement. See Primex Int'l Corp. v Wal-Mart Stores, Inc., 89 NY2d 594(1997).

Moreover, the purported context that Moskowitz attempts to interject into the document is his claim that ALP had agreed to pay $500,000.00 to him based upon a previous $500,000.00 loan he made to ALP, which he would then allow to stay in the Moskowitz Loan Escrow to be drawn upon by ALP again as yet another loan. To the extent that this claim is not nonsensical, it completely lacks documentary support and is contrary to Pryor Cashman's accounting records.

Therefore, the plaintiff has established a likelihood of success on the merits with regard to the $500,000.00 in the Moskowitz Loan Escrow inasmuch as it has demonstrated that the funds were paid to Moskowitz pursuant to the Moskowitz Loan Escrow Agreement from ALP's operating account, and that pursuant to the Moskowitz Loan Escrow Agreement, Moskowitz was supposed to have paid money into the escrow account, not be paid through it. The money remains ALP's property, and the plaintiff has demonstrated that by refusing to agree to release the money to ALP, Moskowitz is interfering with ALP's ownership.

As to the $1.5 million that the plaintiff contends was improperly deposited in the Insurance Proceeds Escrow, ALP contends that the deposit was improper because, *inter alia*, it came from ALP's operating account, rather than from insurance proceeds, as required by the Insurance Proceeds Escrow Agreement. Further, ALP argues that even if the deposit were proper, it is undisputed that $4.8 million was paid from ALP's operating account to Moskowitz in satisfaction of the purported fee agreement between Moskowitz and ALP in December 2018. Therefore, ALP avers, there is no continuing basis for restraining the funds in the Insurance Proceeds Escrow.

It is undisputed that the $1.5 million in the Insurance Proceeds Escrow was paid from ALP's operating account. Moreover, the $1.5 million that was transferred was not derived

from an insurance payout. ALP's financial documents demonstrate that the $15 million it received in 2012 and early 2013 in partial satisfaction of its insurance claims had been expended well before the $1.5 million was transferred into the Insurance Proceeds Escrow in 2018.

The Insurance Proceeds Escrow Agreement provides that "[ALP] expects to receive, from time to time, from one or more insurance companies insurance proceeds and related payments arising out of property damage losses incurred from Superstorm Sandy" and that "[ALP] and Moskowitz desire to establish a non-interest-bearing account with the Escrow Agent into which the insurance companies shall deposit checks or wire transfers for the payment of money …" Correspondence between Moskowitz and Adam Max in February 2017 confirms that the parties intended the Insurance Proceeds Escrow to be funded solely with insurance proceeds. Inasmuch as the amounts paid into the Insurance Proceeds Escrow from ALP's operating accounting were not derived from insurance proceeds, and appear to have been made exclusively so that Moskowitz could withdraw what he claimed he was due when he wanted to, upon ALP's sign-off, they were not made in accordance with the terms of the parties' agreement. Accordingly, ALP has demonstrated that the $1.5 million in the Insurance Proceeds Escrow belongs to ALP and that Moskowitz's

failure to agree to release the funds to ALP interferes with its title to the funds.

Furthermore, to the extent that Moskowitz was already paid 10% of ALP's insurance proceeds to date as of December 2018, the plaintiff correctly contends that Moskowitz has no further claim to the funds in the Insurance Proceeds Escrow. Moskowitz's argument that the plaintiff may ultimately receive more in insurance proceeds as a consequence of its continuing litigation against the insurance companies is speculative and does not constitute a basis for Moskowitz's continued interference with the plaintiff's money. It is well-settled that a party asserting entitlement to money under an alleged contract "has no rights as against the property of the defendant until he obtains a judgment, and until then he has no legal right to interfere with the defendant in the use and sale of the same." Credit Agricole Indosuez v Rossiysky Kredit Bank, 94 NY2d 541, 545-46 (2000).

In their second motion for preliminary relief, the plaintiff seeks the return of $4.8 million paid from ALP's operating account to Moskowitz at the direction of Adam Max in December 2018. The plaintiff contends that Moskowitz exercises control over the funds in derogation of ALP's ownership because, *inter alia*, the funds were paid without the approval of the ALP board and in accordance with a purported compensation agreement

that failed to satisfy the requirements of New York and New Jersey law.

The plaintiffs' submissions demonstrate a likelihood that Moskowitz was compensated for work as an insurance adjuster that he was not licensed to perform. Under New York law, a "public adjuster" includes anyone who "for money, commission or any other thing of value, acts or aids in any manner on behalf of an insured in negotiating for, or effecting, the settlement of a claim or claims for loss or damage to property …" N.Y. Ins. Law § 2101(g)(2). With respect to such services, "[n]o person, firm, association or corporation shall act as an … adjuster … in this state without having authority to do so by virtue of a license issued and in force pursuant to the provisions of this chapter." N.Y. Ins. Law § 2102(a)(1)(A). Additionally, for an individual or entity providing adjusting services to be compensated, they must have entered into a written agreement that complies with the Department of Financial Services' regulations and prescribed form: "A public adjuster may be compensated by an insured for or on account of services rendered to such insured by the public adjuster solely as provided for by a written compensation agreement obtained by the public adjuster which shall consist of substantively the same information and statements contained in Form 1 in section 25.13(a) of this Part. 11 NYCRR 25.6; N.Y. Ins. Law § 2102(p)). New Jersey maintains

similar requirements for public adjusters. See N.J. Stat. Ann. § 11:1-37.2; N.J. Stat. Ann. § 17:22B-13.

Moskowitz contends that he is a licensed public adjuster in the U.S. Virgin Islands. Further, he relies on a series of emails and agreements between him and Adam Max wherein it was repeatedly stated that Moskowitz was entitled to 10% of the insurance payout for his services, as well as a series of emails showing that Moskowitz took part in the negotiations regarding the settlement of ALP's insurance claims. However, nothing Moskowitz has submitted demonstrates that he was properly licensed in either New York or New Jersey, or that any of the documents that he relies on is a sufficient written compensation agreement pursuant to 11 NYCRR 25.6 or N.Y. Ins. Law § 2102(p). Accordingly, "any agreement, express or implied, to pay for services … would be null and void … as the statute has expressly prohibited the performance of such services for compensation." William Stake & Co. v Roth, 91 Misc 45, 46-47 (1st Dept. 1915) (holding that any compensation to an unlicensed adjuster is illegal); see also Public Adj. Bur., Inc. v Greater N.Y. Mut. Ins. Co., 135 AD3d 41, 44 (1st Dept. 2015) (citing Roth and reaffirming that "the lack of a certificate absolutely precluded a public adjuster from recovering for services it rendered on behalf of an insured.").

Further, the plaintiff's submissions show that the $4.8 million payment to Moskowitz was made by Adam Max using funds that were not derived from insurance proceeds and in direct contravention of ALP's rules requiring board approval. In light of the fact that Libra Max and other board members objected, in writing, to the release of $4.8 million from an insurance proceeds escrow at Moskowitz's request mere weeks before the payment, Moskowitz cannot claim ignorance of ALP's position. The plaintiff has thus demonstrated a likelihood of success on the merits of its conversion claim, as well as its declaratory judgment and rescission claims, against Moskowitz.

B. Irreparable Injury Absent Injunctive Relief

As a general matter, "there can be no irreparable harm from the mere loss of money." However, an exception to this rule exists where the monies at issue are identifiable proceeds that should be held for the party seeking injunctive relief but have been otherwise converted. See AQ Asset Mgmt. LLC v Levine, 111 AD3d 245, 269 (1st Dept. 2013), citing Amity Loans, Inc. v Sterling Nat'l Bank & Trust Co., supra.

Inasmuch as the $2 million at issue in MOT SEQ 001 is clearly identifiable, as it is currently held in escrow and, pursuant to the escrow agreements themselves, should properly be distributed to ALP, the plaintiff is entitled to recover the

funds upon a showing of entitlement to a preliminary injunction. See Amity Loans, Inc. v Sterling Nat'l Bank & Trust Co., supra.

However, the $4.8 million at issue in MOT SEQ 007 was transferred directly to Moskowitz in accordance with the terms of an agreement that the plaintiff is challenging, as described above. Approximately $2.4 million of those funds have been dissipated by Moskowitz. Most significantly, though the plaintiff makes a strong argument that it will ultimately prevail on its claims and demonstrate entitlement to the return of the $4.8 million paid to Moskowitz, none of the payment made to Moskowitz was "supposed to be held" for the plaintiff pursuant to any law or agreement. See AQ Asset Mgmt. LLC v Levine, supra (preliminary relief granted where funds at issue were given in escrow, but not with respect to money received as an "M&A fee"); Amity Loans, Inc. v Sterling Nat'l Bank & Trust Co., supra (preliminary relief granted where proceeds of certain accounts receivables were supposed to be held in trust for movant). Accordingly, the plaintiff does not demonstrate irreparable injury in its application for relief related to the $4.8 million dollar payment to Moskowitz in MOT SEQ 007.

C. Balancing of the Equities

With respect to the $2 million at issue in MOT SEQ 001, the balance of the equities tips in ALP's favor. As the court has discussed, the plaintiff has demonstrated that the amounts being

held in escrow are not held pursuant to the terms of the subject escrow agreements and are properly the plaintiff's property. Moskowitz's claim that he may be entitled to additional sums in the event that ALP succeeds in obtaining further funds from the insurance companies does not outweigh the harm to the plaintiff that would result from Moskowitz's continued interference with its property rights.

D. Attachment

The branch of MOT SEQ 007 seeking a preliminary injunction having been denied, the court turns to the plaintiff's alternative request for an order of attachment. As discussed above, ALP has demonstrated a likelihood of success on at least some of its claims against Moskowitz which seek the return of the $4.8 million paid to Moskowitz in December 2018. Moreover, Moskowitz maintains that he is a nondomiciliary of New York and does not dispute that he resides out of the state. See CPLR 6201(1); Hotel 71 Mezz Lender LLC v Falor, 14 NY3d 303 (2010). Nor does Moskowitz dispute the plaintiff's assertion that the amount demanded in ALP's claims exceeds any potential counterclaims.

Finally, the plaintiff shows that there is an identifiable risk Moskowitz will not be able to satisfy a judgment against him. The plaintiff's submissions demonstrate that Moskowitz currently does not appear to be working or generating any significant income, and that Moskowitz has dissipated a substantial portion of the monies in his possession, purchasing a property in California and using

approximately half of $4.8 million that came into his possession within a year of its receipt. In light of the foregoing, with particular emphasis on Moskowitz's nondomiciliary status, the liquid nature of the assets the plaintiff seeks to attach, and the gravity of the allegations against Moskowitz, the plaintiff has established the necessity of an order of attachment as to the remaining $2.4 million formerly in Moskowitz's possession and currently being held in an interest-bearing account pursuant to the parties' so-ordered stipulation. See Deutsche Anlagen-Leasing GMBH v Kuehl, 111 AD2d 69 (1st Dept. 1985); see also CI Sys. (Israel Ltd. v Melamed, 290 AD2d 266 (1st Dept. 2002).

E. 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. Rourke Developers Inc. v Cottrell-Hajeck Inc., 285 AD2d 805 (3rd Dept 2001).

As discussed herein, the court finds it appropriate to order injunctive relief only with respect to the $2 million currently held in escrow. As such, a bond equal to the total value of the monies being returned to ALP is appropriate.

Similarly, upon granting a motion for an attachment, the court must require the plaintiff to give an undertaking "in a total amount fixed by the court, but no less than five hundred dollars." CPLR 6212(b). The court finds that a bond equal to the value of the $2.4 million remaining out of the $4.8 million paid to Moskowitz is appropriate.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED that ALP, Inc.'s motion seeking a preliminary injunction directing Pryor Cashman LLP to pay $2,000,000.00 deposited by ALP, Inc., into its IOLA account and currently held in escrow pursuant to the Insurance Proceeds Escrow Agreement dated February 7, 2017, and the Moskowitz Loan Escrow Agreement dated February 15, 2017, to ALP, Inc., (MOT SEQ 001) is granted, on the condition that the plaintiff shall deposit an undertaking as fixed below, in the form of a surety bond or a deposit of cash, money order, or bank check, with the County Clerk of the

County of New York, and the undertaking shall remain in effect until further order of this court; and it is further,

ORDERED that the undertaking is fixed in the sum of $2,000,000.00, conditioned that the plaintiff, it if it is finally determined that it was not entitled to an injunction, will pay to the defendant Lawrence Moskowitz all damages and costs which may be sustained by reason of this injunction; and it is further,

ORDERED that Pryor Cashman LLP shall, within 30 days of this order, deposit the sum of $2,000,000.00 into either (i) ALP, Inc.'s operating account, or (ii) an escrow account designated by ALP, Inc.'s counsel, at the plaintiff's option; and it is further,

ORDERED that ALP, Inc.'s motion seeking a preliminary injunction directing Lawrence Moskowitz and/or Lawrence Moskowitz CLU, Ltd. to deposit the approximately $4.8 million transferred by ALP, Inc., from its operating account to Leichtman Law PLLC on December 20, 2018 back to ALP Inc.'s operating account, or in the alternative, to attach such funds (MOT SEQ 007) is granted to the extent that the $2,400,000.00 currently held in an interest-bearing account pursuant to the parties' so-ordered stipulation dated October 10, 2019, shall be remitted to be held in escrow in a Schlam Stone Dolan LLP Trust

Account, on the condition that the plaintiff shall deposit an undertaking in the form of a surety bond or a deposit of cash, money order, or bank check, with the County Clerk of the County of New York, and the undertaking shall remain in effect until further order of this court, and the motion is otherwise denied; and it is further,

ORDERED that the amount to be secured by this order of attachment, inclusive of probable interest and costs, shall be $2,400,00.00; and it is further,

ORDERED that the plaintiff’s undertaking is fixed in the sum of $2,400,000.00, conditioned that the plaintiff shall pay to the defendant Lawrence Moskowitz an amount not exceeding $2,400,000.00 for legal costs and damages which may be sustained by reason of the attachment if the defendant recovers judgment or if it is decided that the plaintiff is not entitled to an attachment of the property of the defendant; and it is further,

ORDERED that the parties, within 30 days of this order, shall remit the sum of $2,400,000.00 from the interest-bearing account described in the parties’ so-ordered stipulation dated October 10, 2019, to be held in escrow in a Schlam Stone Dolan LLP Trust Account; and it is further,

ORDERED that Lawrence Moskowitz’s cross-motion (SEQ 007) to vacate the so-ordered stipulation dated October 10, 2019, and

direct the return of funds described in the stipulation to Lawrence Moskowitz is denied.

This constitutes the Decision and Order of the Court.

Dated: March 4, 2021 **ENTER:** HON. NANCY M. BANNON