

**Max v ALP, Inc.**

2022 NY Slip Op 32482(U)

July 25, 2022

Supreme Court, New York County

Docket Number: Index No. 650618/2019

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 42

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ADAM MAX,

Plaintiff,

- v -

ALP, INC., LIBRA MAX, and MICHAEL ANDERSON,

Defendants.

INDEX NO. 650618/2019

MOTION DATE 12/08/2021

MOTION SEQ. NO. 007

**DECISION + ORDER ON  
MOTION**

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HON. NANCY BANNON:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 413, 414, 415, 418, 419, 420, 424, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 489, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

**I. INTRODUCTION**

In this action arising from a dispute over control of the defendant, ALP, Inc. (ALP), the defendants ALP and its President and CEO, Libra Max (Libra, and together with ALP, the defendants), move pursuant to CPLR 6301 and BCL §§ 706(d) and 716(c) for a preliminary injunction enjoining plaintiff Adam Max (Adam) or anyone acting in concert with him, including nonparty Lawrence J. Flynn, Esq. (Flynn), from (1) holding a special shareholders’ meeting pursuant to BCL § 603 and (2) prosecuting, or taking any other action to continue, a lawsuit Adam filed against the defendants in the Superior Court of New Jersey, Chancery Division, Bergen County, captioned Adam Max v ALP, Inc. et al., Civil Action C-193-21 (the New Jersey Action). By order to show cause dated September 20, 2021, the court granted the defendants’ application for a temporary restraining order (TRO) staying a special shareholders’ meeting,

which Adam had originally noticed for September 17, 2021. The court declined to grant a TRO staying the prosecution of the New Jersey Action.

Adam and nonparty Flynn oppose the defendants' motion. The parties represent that on or about October 14, 2021, the New Jersey Action was dismissed, rendering the branch of the defendants' motion seeking to enjoin such action moot. The balance of the motion is granted as provided herein.

## II. BACKGROUND

A full recitation of the factual allegations in this action is contained in this court's orders dated November 13, 2020, and June 6, 2021. What follows is a brief summary of the facts and procedural developments following the inception of this action, as relevant to the instant motion.

ALP is a corporation created by the artist Peter Max (Peter) for, *inter alia*, the production, maintenance, marketing, licensing, and commercialization of his artwork. Peter owns 20% of ALP, and his son, Adam, and daughter, Libra, each own 40%. In 2012, due to a decline in Peter's health, Adam assumed control of ALP's day-to-day operations. Thereafter, it is alleged in the counterclaims and in various related actions before this court, including ALP, Inc. v Larry Moskowitz et al., Index No. 652326/2019 (the Moskowitz Action), and ALP, Inc. v Park West Galleries et al., Index No. 153949/2019 (the Park West Action), Adam began acting in concert with other parties to divert corporate assets and loot ALP of millions of dollars during his tenure as President and CEO of ALP. Adam maintains that he did not loot company assets and that ALP thrived under his management.

In 2015, Peter consented to the appointment of a property guardian to assist him in managing his assets. Flynn is the second property guardian appointed for Peter by the State of

New York and has been in that role since December 2016. Among other things, Flynn is empowered to vote on Peter's behalf at ALP shareholder meetings.

In September 2018, Flynn demanded a shareholders' meeting under BCL § 603 for the purpose of ousting Adam from control of ALP. Following this court's ruling in a related special proceeding entitled Libra Max v Adam Max and ALP, Inc., Index No. 156641/2017, the shareholders of ALP, consisting of Libra, Adam, and Peter, represented by Flynn, convened on December 10, 2018, to elect a new board of directors. The new board consisted of Libra, Adam, and Michael Anderson. On December 17, 2018, the new board appointed Libra as Chair and on January 11, 2019, it appointed her as President and CEO to replace Adam. Adam was appointed Executive Vice President and COO of ALP but was terminated from those roles in August 2019.

Following Adam's ouster as President and CEO, Adam commenced the instant proceeding both derivatively, on behalf of ALP, and directly, seeking, *inter alia*, to invalidate ALP's newly elected board. Adam claimed that Libra colluded with Flynn to gain a majority vote within ALP and remove Adam so that Libra, who allegedly showed no prior interest in doing any work for ALP, could take control of the company. According to Adam, Libra is so unskilled in the conducting of ALP's business and the sale of art that she is leading ALP to financial ruin.

In opposition to Adam's emergency application to invalidate the board in this action, Flynn submitted an affidavit in which he averred that Adam ran ALP "as his personal fiefdom," "mismanage[d]" ALP, and engaged in "dubious business transactions" as ALP's President. Flynn further stated that Adam acted with "unbridled greed" and sought to steal from Peter, calling Adam's actions a "classic case of 'elder abuse.'" According to Flynn, it would have been a breach of his fiduciary duty to Peter to allow Adam to continue his dominion over ALP. By

order dated March 21, 2019, the court denied Adam's emergency application. By order dated June 6, 2021, the court dismissed Adam's amended complaint in its entirety and severed the defendants' counterclaims.

In connection with Libra's efforts to undo the wrongs Adam allegedly committed while in control of ALP, Libra commenced the Moskowitz Action and the Park West Action. In the Park West action, Libra and ALP moved to enjoin Park West Gallery, Inc. (Park West), from selling over 23,000 Peter Max artworks known as "Peter's Keepers," which Libra and ALP allege were wrongfully sold to Park West by Adam at fire sale prices. In support of that application, Flynn submitted an affidavit seeking the return of the Peter's Keepers to ALP and averring that Adam's transaction, if not undone, would cause "irreparable harm to Peter Max's interest in ALP." The court granted a temporary restraining order barring Park West from selling the Peter's Keepers. Park West later stipulated to a preliminary injunction pending a final determination in the Park West action.

ALP and Libra allege that in June 2019, Flynn informed ALP that he viewed Peter, and not ALP, as the rightful owner of all artwork Peter had ever created. Flynn commenced a proceeding in the guardianship court against ALP on Peter's behalf in December 2019, seeking the delivery of all of Peter's artwork and intellectual property to Flynn as Peter's property guardian, under the umbrella proceeding captioned Anonymous 1 and Anonymous 2 v Anonymous 3, Index No. 500198/2015 (the guardianship proceeding). In his petition, Flynn again confirms that he supported Libra's efforts to wrest control of ALP from Adam because he believed Adam and his advisors were acting improperly in many respects and were taking advantage of Peter. That proceeding remains pending.

On March 20, 2020, Adam called for a shareholders' meeting pursuant to BCL § 602 for the purpose of removing Libra and Anderson from the board. On March 30, 2020, Adam issued a further demand for a meeting pursuant to BCL § 603 "for the election of directors." After this court directed Adam to turn over a purported voting agreement between Adam and Flynn, it was revealed that prior to Adam's calling for a special meeting, on March 13, 2020, Adam and Flynn entered into a written shareholders' agreement. The agreement and attached settlement agreement between Flynn, as Peter's representative, and Adam provides that, in exchange for Flynn's vote to remove Libra and Michael Anderson from ALP's board and make Adam President and CEO, ALP, under Adam's control, would surrender all intellectual property rights, ALP's website and social media accounts, approximately 1,000 one-of-a-kind artworks allegedly valued at over \$70 million, and 60% of ALP's other inventory to Peter Max in the guardianship proceeding. Flynn further agreed to discontinue his proceeding claiming ownership of all of Peter's artwork, not to oppose the termination of ALP's pending actions against Adam's co-defendants in this matter, and to retain defendant Lawrence Moskowitz and his accounting firm to consult with ALP and Flynn to obtain additional insurance funds resulting from the destruction of artworks at ALP's New Jersey warehouse during Superstorm Sandy. Adam further agreed to not object to Flynn's fees request in the guardianship proceeding.

On May 5, 2020, Adam noticed a special meeting of ALP's shareholders to be held on May 29, 2020. ALP and Libra moved, in this action and the Moskowitz Action, for a TRO and preliminary injunction enjoining Adam or Flynn from holding the meeting and enjoining Adam from serving or acting as officer or director of ALP or directly or indirectly controlling ALP's affairs. By order to show cause dated May 27, 2020, the court granted TROs in both actions. By two orders each dated June 11, 2021, the court granted preliminary injunctions in both actions,

providing that Adam and Flynn were enjoined from commencing a shareholders' meeting pursuant to BCL § 603(a) for the purpose of restoring Adam as President and CEO of ALP, and that Adam was enjoined from serving or acting as an officer or director of ALP until further order of this court. On June 16, 2022, the Appellate Division, First Department, affirmed the preliminary injunctions.

Shortly after the court's decision granting the preliminary injunctions, Adam served a demand, dated June 18, 2021, pursuant to BCL § 602 for a shareholders' meeting to occur on or before July 1, 2021, for the removal of Libra and Michael Anderson as directors of ALP. On July 12, 2021, Adam and Flynn held a special shareholders' meeting pursuant to BCL § 1103, which Libra did not attend, where Adam and Flynn voted in favor of a resolution that would permit Adam to file a petition for judicial dissolution of ALP. On July 26, 2021, Adam filed a petition, in a new proceeding captioned Max v Max, pending before this court under Index No. 156927/2021 (the petition), seeking a declaratory judgment and a mandatory injunction compelling Libra to call a special meeting pursuant to Adam's BCL § 602 demand.

On June 29, 2021, Adam separately served a demand pursuant to BCL § 603 for a special shareholders' meeting to be held on September 1, 2021. Adam subsequently served a revised demand changing the special meeting date to September 17, 2021. On August 27, 2021, Adam noticed the special meeting "for the purpose of electing directors" of ALP. The instant motion ensued.

On or about September 17, 2021, shortly after filing this motion, Libra filed a petition in the guardianship part to remove Flynn as Peter's property guardian.

### III. DISCUSSION

A preliminary injunction may only be granted where the party seeking the injunction demonstrates, 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. 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).

In support of their application, ALP and Libra have submitted, *inter alia*, the affidavits of Libra Max, documents related to Peter's guardianship and the proceeding to recover all of Peter's artwork and intellectual property, the voting agreement between Adam and Flynn, Adam's demands and notices for a special shareholders' meeting, as described above, and a transcript of the July 12, 2021, special shareholders' meeting attended by Adam and Flynn.

In its decision and order dated June 11, 2021, granting ALP and Libra's first motion for a preliminary injunction in this matter, the court adopted the reasoning articulated in its decision and order, also dated June 11, 2021, in the related Moskowitz Action wherein ALP and Libra had moved for identical relief (the Moskowitz Injunction Order). In the Moskowitz Injunction Order, the court determined that ALP and Libra demonstrated a likelihood of success on the merits on at least some of their underlying claims against Adam, which corresponded with ALP and Libra's counterclaims in the instant action, as well as irreparable harm absent an injunction, and a balance of the equities in favor of ALP and Libra. Accordingly, the court enjoined Adam and Flynn from calling a special shareholders' meeting for the purpose of restoring Adam as ALP's President and CEO and enjoined Adam from serving or acting as an officer or director of ALP.

Adam avers that his August 27, 2021, notice for a shareholders' meeting "for the purpose of electing directors" to ALP's board does not violate the court's injunction because the injunction did not preclude him from holding or noticing any further shareholders' meetings or from voting his shares at such meetings *not* for the purpose of appointing or electing himself as an officer or director. Thus, Adam contends that he must be permitted to hold and notice future shareholders' meetings even though it would allow him to "directly or indirectly control[]" ALP's affairs.

Adam is correct inasmuch as he contends that, notwithstanding the temporary bar to his serving on ALP's board, his right to otherwise vote his shares as a shareholder of ALP was not totally extinguished by the court's prior orders. The Moskowitz Injunction Order makes clear that a predicate for injunctive relief was Max and Flynn's written agreement to remove Libra and Michael Anderson from ALP's board and restore Adam to his position as President and CEO, in exchange for ALP's surrender of its intellectual property rights and artwork to Peter in the guardianship proceeding. As the court explained at length, ALP and Libra's submissions demonstrated a likelihood of success on the merits of their claim that such voting agreement should be declared void for illegality. Thus, the injunction ultimately issued by the court was limited to preventing the stated method of implementation of the voting agreement, i.e., Adam's replacement of Libra as ALP's leader upon a shareholder vote.

However, Adam and Flynn's actions after the issuance of the preliminary injunctions, as well as their submissions on this motion, confirm that neither has abandoned the ultimate goals of their voting agreement. The court stated in the Moskowitz Injunction Order, "[T]he terms of the voting agreement between Adam and Flynn suggest that Adam has sought to trade ALP's most valuable assets in order to regain his position as President of ALP to oust Libra from ALP

and resume his alleged improper diversion of corporate assets, including by rehiring defendant Moskowitz for the same work the plaintiffs claim he improperly profited from in this action.” Now, while Adam and Flynn insist that Adam will not be allowed to regain his position as President, neither denies an intention to elect a President that would implement all other suspect terms of the voting agreement. To be sure, Adam devotes pages of his affidavit in opposition to this motion to defending Moskowitz, the Park West sale, and, rather strangely considering the seriousness of the allegations he has leveled against Adam in the past, Flynn and his guardianship. Likewise, Flynn submits an affidavit in which he contends that ALP cannot rightfully claim ownership to Peter’s intellectual property and artwork and professes that Libra has attempted “to bankrupt her father” and “to steal his life’s work and legacy.” Neither Adam nor Flynn has provided any indication or information as to who they intend to elect as ALP’s President. Nor have they cogently explained how the transactions and proposed transactions they defend would benefit ALP.

Thus, while each professes that the voting agreement is now a nullity, Adam and Flynn’s conduct in seeking to elect a new board immediately after being enjoined from electing Adam, voting in favor of a resolution to seek dissolution of ALP weeks thereafter, and refusing to make any assurances as to whether the new President they intend to vote for will perform the acts the voting agreement contemplated, alongside the prior conduct described in the Moskowitz Injunction Order, strongly suggests otherwise. The voting agreement was troubling not merely because it sought to restore Adam to ALP’s leadership, but also because it would require the transfer of ALP’s most valuable assets and permit ALP to return to the way it conducted business under Adam, who ALP and Libra claim looted the company. As the court has previously explained, where a majority of stock owners seek to use their power to prejudice the minority

owners of a corporation, a court may “enjoin all contracts or conspiracies of the kind complained of.” See Davidson v Am. Blower Co., 243 F. 167, 170 (2<sup>nd</sup> Cir. 1917); see Gamble v Queens Cty. Water Co., 123 NY 91 (1890); Robinson v New York & P.C.R. Co., 123 AD 339 (1<sup>st</sup> Dept. 1908); see also Waldman v 853 St. Nicholas Realty Corp., 64 AD3d 585, 587 (2<sup>nd</sup> Dept. 2009) (majority shareholders owe a fiduciary duty to minority shareholders in undertaking any corporate action).

The submissions before the court indicate that ALP and Libra have a likelihood of success on the merits of their claim that the terms of the voting agreement violated corporate fiduciary principles. Adam and Flynn, having laid out those terms so clearly in writing, cannot avoid this conclusion simply by taking the same actions absent formal agreement. Moreover, for the same reasons explained in the Moskowitz Injunction Order, ALP and Libra demonstrate irreparable harm in the absence of an injunction and a balancing of the equities in their favor. In light of the foregoing, ALP and Libra’s motion is granted.

#### IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of the defendants ALP, Inc., and Libra Max seeking a preliminary injunction pursuant to CPLR 6301 is granted to the extent that the defendant Adam Max and nonparty Lawrence J. Flynn, Esq., are hereby enjoined from holding, either in person or remotely, the Special Shareholders’ Meeting noticed by Adam Max on August 27, 2021, or any other Shareholders’ Meeting he might notice for the purpose of electing directors of ALP, Inc., until further order of this court, and the motion is otherwise denied as moot; and it is further

ORDERED that ALP, Inc., and Libra Max shall serve a copy of this order upon nonparty  
Lawrence J. Flynn, Esq., within 10 days.

This constitutes the Decision and Order of the court.

DATED: July 25, 2022

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