

ALP, Inc. v Park W. Galleries, Inc.

2022 NY Slip Op 33687(U)

October 24, 2022

Supreme Court, New York County

Docket Number: Index No. 153949/2019

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

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ALP, INC.,
Plaintiff,

- v -

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

Defendants.

-----X

ALP, INC., and LIBRA MAX,
Plaintiffs,

- v -

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

Defendants.

-----X

ADAM MAX, on behalf of himself and derivatively on behalf of
ALP, INC., a New York corporation,

Plaintiff,

- v -

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

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 014) 485, 486, 487, 488,
489, 490, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 556

were read on this motion to/for DISCOVERY.

In these consolidated actions arising from a dispute over control of ALP, Inc. (ALP),
plaintiff (in the actions filed under Index Nos. 153949/2019 [the Park West action] and
652326/2019 [the Moskowitz action]) / defendant and counterclaim plaintiff (in the action filed
under Index No. 650618/2019 [the Adam Max action]), defendant Park West Galleries, Inc.

(Park West), moves pursuant to CPLR 3124 to compel ALP to produce certain documents sought in discovery. ALP opposes the motion and seeks sanctions against Park West.

The facts underlying the claims in these consolidated matters have been recited in numerous prior orders. As relevant here, the gravamen of ALP's claims against Park West is that Park West, acting in concert with defendants Gene Luntz and Gene Luntz Management, Inc. (together, Luntz), Robert M. Frank, Robert J. Frank, and Bender Ciccotto & Co. CPAs, LLP, and Lawrence Moskowitz (Moskowitz), and with the permission of plaintiff / counterclaim defendant Adam Max (Adam), looted ALP of close to 100 million dollars of cash and artwork while Adam served as ALP's President. Central to ALP's claims is that Park West wrongfully purchased 20,000 of ALP's most valuable artworks (the Peter's Keepers) at fire sale prices Park West knew were extraordinary (the Park West transaction). ALP further alleges that the Park West transaction was not authorized because, it being a sale of substantially all of ALP's assets, it required shareholders' approval. Park West asserts counterclaims sounding in breach of warranty of good title, breach of contract, and breach of the covenant of good faith and fair dealing, and further seeks a declaration that its purchase of the Peter's Keepers was valid.

Discovery in the consolidated actions commenced in or about 2019. Park West served initial document demands on ALP on June 12, 2019, and a second set of demands on September 6, 2019. ALP served responses to the first set of demands on July 12, 2019, and to the second set of demands on September 20, 2019. Park West also served a fourth set of interrogatories on December 3, 2021, and ALP responded on December 27, 2021. The parties met and conferred on the disputed demands and appeared for pre-motion conferences on October 28, 2021, and February 17, 2022. In connection with the disputed demands, ALP has agreed to produce documents reflective of ALP's unsold inventory of artwork from January 2016 through March 2019, communications and documents regarding sales to Park West from 2010 to the present, a redacted copy of ALP's settlement agreement with Moskowitz, emails and inventory reports pertaining to the Peter's Keepers, information about how ALP's by-laws were adopted, and documents pertaining to the Peter's Keepers purchased by Park West and not delivered to Park West. ALP also amended its response to Luntz's interrogatory, which is analogous to an interrogatory served by Park West, seeking a more detailed computation of its alleged damages.

Park West nonetheless remains unsatisfied with ALP's proposed production and seeks further production, namely (1) ALP's financial documents and tax returns from 2010 to the present; (2) ALP's unredacted settlement agreement with Moskowitz; (3) all communications and documents regarding sales to Park West from 2010 to the present not already produced; and (4) responses to its fourth set of interrogatories on (a) the Peter's Keepers and (b) the location of the Peter's Keepers purchased by Park West but not delivered to Park West. Park West has withdrawn the branch of its motion seeking to compel responses to its interrogatories on ALP's bylaws and a computation of ALP's damages.

CPLR 3101(a) provides that "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." This language is "interpreted liberally to

require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” Oowski v AMEC Constr. Mgt., Inc., 69 AD3d 99, 106 (1st Dept. 2009) (quoting Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406-407 [1968]). Nonetheless, demands for disclosure must be “relevant, describe documents with ‘reasonable particularity,’ not impose an undue burden and not represent a ‘fishing expedition.’” Konrad v 136 E 64th St. Corp., 209 AD2d 228, 228 (1st Dept. 1994) (citations omitted); see, e.g., Abony v TLC Laser Eye Center, Inc., 44 AD3d 553 (1st Dept. 2007); Thomas v Holzberg, 227 AD2d 175 (1st Dept. 1996). Accordingly, speculation that the materials sought may include relevant information does not meet the threshold for relevance. See, e.g., Dani v 551 W. 21st St. Owner LLC, 181 AD3d 420, 420-21 (1st Dept. 2020); McAlwee v Westchester Medical Associates, PLLC, 163 AD3d 547, 549 (2nd Dept. 2018); Vyas v Campbell, 4 AD3d 417, 418 (2nd Dept. 2004). Moreover, a party does not establish entitlement to disclosure where the party could not establish his or her claims or defenses even with such disclosure. Horn v Nestor, 172 AD3d 659, 659 (1st Dept. 2019).

Here, Park West does not establish entitlement to the discovery it seeks to compel.

First, the branch of Park West’s motion seeking production of ALP’s tax returns from 2010 to the present mirrors a motion to compel the same documents previously filed by Luntz (SEQ 013). To the extent Park West repeats Luntz’s arguments in favor of production, its application fails for the same reasons stated in the court’s October 14, 2022, decision and order denying Luntz’s motion. Additionally, Park West avers that it requires over a decade of ALP’s tax returns, including for several years *after* the Park West transaction, to disprove ALP’s assertion that the Park West transaction involved the sale of substantially all of ALP’s assets. However, it offers no response to ALP’s argument that documents showing all of ALP’s unsold inventory from 2016 through March 2019, which ALP has already agreed to produce, suffice to show the percentage of ALP’s assets involved in the Park West transaction. Since Park West presents no reason why the relevant information in ALP’s proposed production would not be duplicated by the relevant information in ALP’s tax returns, Park West is not entitled to relief.

Second, Park West has never demanded production of ALP’s settlement agreement with Moskowitz. Therefore, its motion to compel such production is premature. CPLR 3124 allows for a motion to compel only where “a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order.” Additionally, Park West’s argument as to the relevance of the settlement agreement’s financial terms is based only upon the broad proposition that any settlement is directly probative of liability in a particular action. Such rationale is tantamount to pure speculation, which does not establish a right to disclosure. See Bd. of Managers of 141 Fifth Ave. Condo. v 141 Acquisition Assocs. LLC, 186 AD3d 1147, 1148 (1st Dept. 2020). Further, Park West itself concedes that the information it seeks would be inadmissible at trial pursuant to CPLR 4547. Thus, even if the information were disclosed, Park West could not use it to establish its defenses or counterclaims at trial. See Horn v Nestor, supra at 659.

Third, there does not appear to be any actual dispute as to ALP’s production of all communications and documents regarding sales to Park West from 2010 to the present. Indeed, ALP asserts, and Park West does not deny, that ALP has repeatedly agreed to produce such documents. Nonetheless, for the first time in its reply, Park West states that it does not find credible ALP’s representations as to the unavailability of certain emails exchanged prior to 2014. However, as of the filing of its motion, Park West had neither received nor reviewed ALP’s full production because production was ongoing. Thus, Park West presents no argument as to what, if anything, is missing from production. It is not even clear from the parties’ submissions that ALP was ultimately unable to produce any emails from prior to 2014.

Finally, Park West fails to dispute ALP’s assertion that the parties had not completed the meet and confer process as to its fourth set of interrogatories prior to filing the instant motion, as is required pursuant to Uniform Court Rule 202.20-f. Park West also failed to seek a pre-motion conference on the fourth set of interrogatories prior to filing its motion, as this court has expressly required in these matters. The branch of Park West’s motion seeking to compel responses to certain items in its fourth set of interrogatories must therefore be denied. Further, even if this branch of the motion were procedurally proper, Park West fails to establish that the information it seeks is not duplicative of information already provided by ALP or irrelevant to the claims and defenses in these matters.

ALP’s application for an order imposing sanctions against Park West pursuant to 22 NYCRR 130-1.1, made in its opposition papers, is denied without prejudice.

Accordingly, it is

ORDERED that the motion to compel discovery pursuant to CPLR 3124 filed by Park West Galleries, Inc., is denied; and it is further

ORDERED that the demand for sanctions against Park West Galleries, Inc., made by ALP, Inc., is denied without prejudice.

This constitutes the Decision and Order of the Court.


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

10/24/2022
DATE

CHECK ONE:

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<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART