

ALP, Inc. v Park W. Galleries, Inc.
2022 NY Slip Op 33714(U)
October 28, 2022
Supreme Court, New York County
Docket Number: Index No. 153949/2019
Judge: Nancy M. Bannon
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**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 016) 503, 504, 505, 506,
507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 521, 522, 523, 524, 525, 546, 547, 548, 549

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]), ALP and the plaintiff (in the Moskowitz action) / defendant and counterclaim plaintiff (in the Adam Max action) Libra Max (Libra) move pursuant to CPLR 3124 to compel defendants Gene Luntz Management, Inc., and Gene Luntz (together, Luntz) to produce certain documents sought in discovery. Luntz opposes the motion.

The facts underlying the claims in these consolidated matters have been recited in numerous prior orders. As relevant here, the gravamen of ALP and Libra's claims against Luntz is that Luntz, acting in concert with defendants Park West Galleries, Inc. (Park West), Robert M. Frank, Robert J. Frank, Bender Ciccotto & Co. CPAs, LLP, and Lawrence Moskowitz (Moskowitz), and with the permission of plaintiff / counterclaim defendant Adam Max (Adam), took advantage of the declining health of the artist Peter Max (Peter) and looted ALP of hundreds of millions of dollars of cash and artwork during Luntz's tenure as ALP's art sales manager. Central to ALP and Libra's claims is that Luntz facilitated the sale of over 20,000 of ALP's most valuable artworks (the Peter's Keepers) to Park West at fire sale prices (the Park West transaction). ALP and Libra further allege that Luntz wrongfully embezzled millions in commissions he did not earn from ALP's sales and for Peter's public appearance fees. Luntz has filed counterclaims in the Park West action seeking \$1.5 million in unpaid commissions purportedly due to him.

On April 12, 2022, the Appellate Division, First Department, *inter alia*, dismissed (1) ALP and Libra's conversion and breach of fiduciary duty claims against Luntz insofar as they concerned commissions paid to Luntz before April 16, 2016; (2) ALP and Libra's claims against Luntz for aiding and abetting other defendants' conversions of ALP's funds or assets other than the Peter's Keepers and breaches of fiduciary duty with respect to ALP's funds or assets other than the Peter's Keepers; (3) ALP and Libra's fraud claim against Luntz insofar as it alleged that Luntz committed fraud with respect to his receipt of commissions and by failing to disclose the misappropriation of funds and artwork other than the Peter's Keepers by the other defendants; and (4) ALP and Libra's civil conspiracy and replevin claims against Luntz in their entirety. ALP and Libra's claim for recoupment/setoff as against Luntz was previously dismissed by order of this court dated October 30, 2020. The balance of ALP and Libra's claims against Luntz, and Luntz's counterclaims, survive.

Discovery in the consolidated actions commenced in or about 2019. ALP served initial document demands on Luntz on June 12, 2019, and a second set of demands on September 6, 2019. Luntz served responses and objections to the first set of demands on July 12, 2019, and to the second set of demands on September 20, 2019. The parties met and conferred on the disputed demands and appeared for a pre-motion conference on the issues raised in ALP's motion on February 17, 2022.

ALP and Libra now seek to compel certain document production from Luntz, namely (1) all communications between Luntz and ALP, including those captured under the search term "petermax"; (2) all documents relating to payments made by Luntz to any person, including, but not limited to, Park West, relating to Peter Max and/or the sale of Peter Max artworks; and (3)

documents pertaining to Luntz's relationship with Park West, including those involving non-ALP business.

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).

As to the first of ALP's demands that are the subject of this motion, Luntz contends, and ALP and Libra do not dispute, that Luntz has agreed to produce communications between Luntz and ALP after April 30, 2014. Luntz has also agreed to produce communications with ALP prior to April 30, 2014, sufficient to show (a) offered or actual sale prices for Peter Max works, (b) commission payments to Luntz and (c) Adam and/or Peter's approval of sale prices or commission payments to Luntz. Nonetheless, ALP continues to seek *all* communications Luntz had with ALP employees, who used the email domain "@petermax.com," from January 1, 2010, through April 30, 2014. However, as explained above, the First Department has dismissed ALP and Libra's claims against Luntz as time-barred, inasmuch as they sought to claw back commissions paid prior to April 16, 2016. ALP and Libra's arguments as to the continued relevance of Luntz's work for ALP prior to that date, including whether it was sufficient to earn a commission, to their surviving claims against Luntz and other parties are unpersuasive. Accordingly, ALP and Libra do not show that such disclosure is proper.

Nor are ALP and Libra entitled to the remaining disclosure they seek to compel. ALP's demands for all documents showing payments made to Luntz by any person and for all documents pertaining to Luntz's relationship with Park West, including those that are unrelated to ALP and its business, are overbroad. They are also speculative inasmuch as they are based on the bare hope that such discovery will reveal some unspecified further relationship among the defendants that has not been alleged anywhere in the pleadings. Disclosure is not warranted on these facts.

Accordingly, it is

ORDERED that the motion to compel discovery pursuant to CPLR 3124 filed by ALP, Inc., and Libra Max is denied.

This constitutes the Decision and Order of the Court.



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

10/28/2022
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	