

ALP, Inc. v Moskowitz
2022 NY Slip Op 33781(U)
November 1, 2022
Supreme Court, New York County
Docket Number: Index No. 652326/2019
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

-----X

ALP, INC., and LIBRA MAX,

Plaintiffs,

INDEX NO. 652326/2019

MOTION DATE 06/21/2022

MOTION SEQ. NO. 016

- v -

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

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

ALP, INC.,

Plaintiff,

CONSOLIDATED
INDEX NO. 153949/2019

- v -

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

Defendants.

-----X

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

CONSOLIDATED
INDEX NO. 650618/2019

Plaintiff,

- v -

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

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 016) 784, 785, 786, 787,
788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829,
830, 831, 832, 833

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 Libra Max (Libra) (plaintiff in the Moskowitz action / defendant and counterclaim plaintiff in the Adam Max action) move pursuant to CPLR 3124 to compel defendants Bender, Ciccotto & Co. CPA's, LLP (Bender Ciccotto), Robert M. Frank (Frank Sr.), and Robert J. Frank (Frank Jr., and together with Bender Ciccotto and Frank Sr., the Bender Ciccotto defendants) to produce certain documents sought in discovery. The Bender Ciccotto defendants oppose 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 the Bender Ciccotto defendants is that the Bender Ciccotto defendants, acting in concert with defendants Park West Galleries, Inc. (Park West), Gene Luntz and Gene Luntz Management, Inc. (together, Luntz), 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 Adam's tenure as ALP's President. ALP and Libra contend that Bender Ciccotto, an accounting firm that entered into a consulting agreement with ALP under Adam's leadership in 2012, and its principals schemed to extract millions from ALP by, *inter alia*, issuing exorbitant and fraudulent invoices for work Bender Ciccotto did not perform, making corporate decisions on ALP's behalf, and threatening or firing those at ALP who might oppose the defendants. ALP and Libra further state that the Bender Ciccotto defendants facilitated the unauthorized sale of over 20,000 of ALP's most valuable artworks (the Peter's Keepers) to Park West at fire sale prices.

Notwithstanding that the Bender Ciccotto defendants have not yet filed an answer to ALP and Libra's claims, discovery in the consolidated actions commenced in or about 2019. ALP served initial document demands on the Bender Ciccotto defendants on January 8, 2021. The Bender Ciccotto defendants served responses and objections to the first set of demands on February 12, 2021. The parties met and conferred on the disputed demands and appeared for a pre-motion conference on the issues raised in ALP and Libra's motion on February 17, 2022.

ALP and Libra now seek to compel certain document production from the Bender Ciccotto defendants, namely (1) all documents captured under the search terms "Peter w/s Max" and "petermax"; (2) all documents relating to personal appearances by Peter at exhibitions or shows, including documents relating to commissions paid to Luntz in connection with the appearances, Peter's travel schedule, any of Peter's actual or suspected health issues during the appearances, and Peter's ability to appear at any event, (3) all communications and contracts between Bender Ciccotto and/or Frank Sr. and Peter, (4) all documents relating to Peter's mental state and/or health, (5) all documents relating to the alleged abuse of Peter, (6) all documents relating to Peter's relationship with Frank Sr., Luntz, Moskowitz, and/or Park West, (7) all contracts between the Bender Ciccotto defendants, on the one hand, and ALP or a member of the Max family, on the other, and related communications, and (8) all documents relating to payments by ALP or a member of the Max family to the Bender Ciccotto defendants.

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 ALP and Libra’s demand that the Bender Ciccotto defendants produce all documents captured under the search terms “Peter w/s Max” and “petermax,” the Bender Ciccotto defendants correctly observe that the application of such terms would require the production of virtually *all* communications between Bender Ciccotto and ALP employees, who formerly used the email domain “@petermax.com,” over a seven-year period, without regard for the subject matter of the communications. Counsel for the Bender Ciccotto defendants reports that ALP and Libra rejected his offer to run those search terms on the condition that they proposed additional limiting terms. ALP and Libra contend that they cannot further tailor the search terms because Bender Ciccotto has never detailed the nature of the work it performed for ALP. This contention is unconvincing; discovery in these matters, as in all matters, must be focused upon the specific allegations of wrongdoing contained in the pleadings. It is not a vehicle to investigate the possibility of other, unpleaded and unspecified misconduct. ALP and Libra’s proffered search terms are plainly overbroad. The court further notes that the absence of documents and communications related to work the Bender Ciccotto defendants allege they performed would tend to present a challenge for the Bender Ciccotto defendants, not the plaintiffs, at trial.

With respect to ALP and Libra’s demands for documents related to Peter, his public appearances, his health, his relationship with the defendants, and his purported abuse by other individuals, counsel for the Bender Ciccotto defendants avers that “[t]he Bender Ciccotto Defendants have produced any documents in their possession responsive to [such] requests.” Further, counsel states that to the extent that responsive documents have not been produced, “it is because no such responsive documents exist, *not* because the Bender Ciccotto Defendants have withheld them.” Thus, ALP and Libra’s application for compliance with these demands is moot. That ALP and Libra deem the Bender Ciccotto defendants’ representations “worthless,” for various unconvincing reasons, does not revive their application, which contains no branch seeking either sanctions for noncompliance or to compel production of a Jackson


affidavit. However, the Bender Ciccotto defendants are under a continuing obligation to produce such responsive documents should any be discovered.

With regard to ALP and Libra’s remaining demands for documents related to the relationship between Bender Ciccotto and members of the Max family, the Bender Ciccotto defendants represent, and ALP and Libra do not dispute, that they have already produced billing detail documents reflecting work performed for each member of the Max family. The Bender Ciccotto defendants further state that Bender Ciccotto did not enter into any separate contracts with any individual member of the Max family. Finally, ALP and Libra do not present a sufficient reason why communications related to accounting work performed by Bender Ciccotto for individual Max family members would be relevant and discoverable. The claims asserted against the Bender Ciccotto defendants in these matters relate to Bender Ciccotto’s work for ALP; there has been no claim asserted against Bender Ciccotto arising from work it performed for Peter, Adam, or Libra personally.

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

11/01/2022
DATE

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