

Max v ALP, Inc.

2023 NY Slip Op 30904(U)

March 23, 2023

Supreme Court, New York County

Docket Number: Index No. 650618/2019

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

-----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

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

ALP, INC.,

Plaintiff,

- v -

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

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 009) 535, 536, 537, 538,
539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 573, 575, 576, 578, 591, 592, 593, 594, 595, 596, 597,
598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610

were read on this motion to/for MISCELLANEOUS.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 549, 550, 551, 552,
553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 574,
577, 579, 582, 583, 584, 585, 586, 587, 588, 589, 590, 611

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]), Adam Max (Adam) (plaintiff and counterclaim defendant in the Adam Max action) moves pursuant to CPLR 3124 to compel ALP and Libra Max (Libra) (plaintiff in the Moskowitz action / defendant and counterclaim plaintiff in the Adam Max action), to produce certain documents sought in discovery (SEQ 009). ALP and Libra oppose the motion. ALP and Libra separately move pursuant to CPLR 3124 to compel Adam to produce certain documents sought in discovery (SEQ 010). Adam opposes the motion and cross moves to seal unredacted copies of documents filed in support of and in opposition to ALP and Libra's motion pursuant to 22 NYCRR § 216.1.

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 Adam is that Adam, during his tenure as President of ALP, acquiesced to and enabled the looting of hundreds of millions of dollars of cash and artwork from ALP by the defendants Park West Galleries, Inc. (Park West), Gene Luntz and Gene Luntz Management, Inc. (together, Luntz), Robert M. Frank (Frank Sr.), Robert J. Frank (Frank Jr.), and Bender Ciccotto & Co. CPAs, LLP (Bender Ciccotto), and Lawrence Moskowitz (Moskowitz). ALP and Libra claim that Adam suffered from physical and mental health issues that led him to abdicate his responsibilities as President and permit Adam's co-defendants to make executive decisions for ALP. ALP and Libra further claim that Adam continued to breach his fiduciary duties after he was removed as President by entering into a voting agreement with Peter Max's financial guardian, Lawrence Flynn (Flynn), in or around 2020 (the voting agreement), whereby Adam purported to trade ALP's most valuable inventory in exchange for Flynn's vote to oust Libra and reinstate Adam as President of ALP.

Discovery in the consolidated actions commenced in or about 2019. However, Adam refused to exchange discovery until July 2021. ALP and Libra served initial document demands on Adam, and Adam served initial document demands on ALP and Libra, on July 30, 2021. On August 27, 2021, ALP and Libra served a response and objections to Adam's demands. On the same date, Adam served a limited response to ALP and Libra's demands and objected to nearly every demand, frequently on inappropriate grounds without basis in law. On November 1, 2021, the court issued a status conference order directing Adam to serve revised responses and production and cautioning that Adam's "continued refusal to produce any document discovery in the absence of a good faith objection based in law may result in sanctions pursuant to CPLR 3126." On November 11, 2021, Adam served amended and supplemental responses to ALP and Libra's demands. The parties met and conferred on still-disputed demands in November 2021. Thereafter, Adam obtained new counsel. The parties met and conferred again on several occasions in early 2022. On September 13, 2022, the court entered an order permitting the parties to file motions to compel with respect to the categories of disputed demands discussed at the conference and identified in their May 12, 2022, emails, "except for categories already the subject of pending discovery motions."

Adam seeks further production from ALP and Libra, consisting of (1) responsive documents for the period of July 2019 through the present, (2) documents relevant to ALP's financial condition from January 2019 through the present, (3) all of ALP's board documents from February 2019 through the present, (4) documents reflecting the performance of services by Libra as an officer, director or employee of ALP and records pertaining to Libra's sale, transfer, gifting, or other disposal of any artwork belonging to ALP for which proceeds were not paid or delivered to ALP, and (5) documents reflecting efforts by ALP, Libra, or others acting on their behalf to obtain insurance for ALP's warehouse and/or the contents thereof.

ALP and Libra seek further production from Adam, consisting of (1) documents pertaining to physical health ailments that caused Adam to be out of the office for more than one week and mental health ailments that required Adam to consult a professional or to take prescription medication, (2) documents and communications between Adam and his co-defendants that do not pertain to ALP or its business, and (3) non-privileged attorney communications regarding the voting agreement.

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." Osowski 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. See Horn v Nestor, 172 AD3d 659, 659 (1st Dept. 2019).

Adam does not establish entitlement to the discovery he seeks to compel. First, Adam's catchall demand for documents post-dating July 2019, to the extent it does not duplicate his other demands, is patently overbroad. The bare fact that Adam was sued in 2020 rather than in 2019, like his co-defendants, is not in itself a logically sufficient ground upon which to compel the disclosure of documents. Where a demand contains requests that are so overbroad as to be palpably improper, the appropriate remedy is to vacate the entire demand rather than prune it. Lerner v 300 West 17th Street Housing Development Fund Corp., 232 AD2d 249 (1st Dept. 1996); see Pascual v Rustic Woods Homeowners Assoc. Inc., 173 AD3d 757 (2nd Dept. 2019).

Second, Adam's rationale for seeking documents relevant to ALP's financial condition under Libra's leadership mirrors the arguments made by his co-defendants in multiple prior

motions seeking ALP's tax returns. It is rejected for the same reasons provided by the court in its orders dated October 14, 2022, and October 24, 2022.

Third, ALP's board documents from February 2019 through the present, documents relating to Libra's performance as President, and documents reflecting Libra's efforts to obtain insurance for ALP's warehouse and artwork are not relevant to any issue in this case. To the extent Adam argues that such documents are necessary to show a contrast between Adam's and Libra's conduct as Presidents of ALP, such rationale, again, mirrors the previously rejected arguments of Adam's co-defendants. As the court has held numerous times now, the current state of ALP's affairs is not a benchmark for determining whether the defendants breached their fiduciary duties, particularly given that Adam's breach of fiduciary duty claims against Libra have all been dismissed.

ALP and Libra are entitled to production of (1) documents pertaining to any physical health ailment that caused Adam to be out of the office for more than one week, including a list of all relevant prescription medications and (2) documents pertaining to any mental health ailment that impacted Adam's performance of his professional responsibilities. The foregoing is undoubtedly relevant to ALP and Libra's claim that Adam improperly delegated responsibilities to his co-defendants due to his health issues. Adam's protestation that all health-related documents in his possession, without distinction, are privileged and undiscoverable is incorrect on the law. Nor does Adam identify any specific document that would be subject to one of the privileges or protections he cites. ALP and Libra's broader request for documents pertaining to any mental health ailment that caused Adam to seek professional help is denied.

ALP and Libra are also entitled to nonprivileged communications between Adam's and Flynn's counsel pertaining to the voting agreement for the reasons stated in ALP and Libra's moving papers. ALP and Libra withdraw, in their reply, their demand for documents and communications between Adam and his co-defendants that do not pertain to ALP or its business.

Adam's cross-motion to seal unredacted copies of documents filed in support of and in opposition to ALP and Libra's motion pursuant to 22 NYCRR § 216.1, insofar as the redacted content pertains to Adam's personal health information, is granted.

Accordingly, it is

ORDERED that the motion to compel discovery pursuant to CPLR 3124 filed by Adam Max (SEQ 009) is denied in its entirety; and it is further

ORDERED that the motion to compel discovery pursuant to CPLR 3124 filed by ALP, Inc., (SEQ 010) is granted to the extent that, within 30 days of the date of this order, Adam Max shall produce (1) all documents pertaining to any physical health ailment that caused Adam to be out of the office for more than one week during the time period January 2012 through March 2019, including a list of all relevant prescription medications, (2) all documents pertaining to any

mental health ailment that impacted Adam Max’s performance of his professional responsibilities during the time period January 2012 through March 2019, and (3) all nonprivileged communications in the possession of Adam Max’s attorneys regarding the voting agreement between Adam Max and Lawrence Flynn, and the motion is otherwise denied; and it is further

ORDERED that Adam Max’s cross motion to seal unredacted documents containing his personal health information pursuant to 22 NYCRR § 216.1 (SEQ 010) is granted, without opposition, to the extent that the documents filed at NYSCEF Doc. Nos. 550, 562, 569, 583, 588, 589, 590, and 611 are permitted to be filed in their redacted forms, *nunc pro tunc*.

This constitutes the Decision and Order of the Court.



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

	03/23/2023		
	DATE		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>
SEQ 009	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED
SEQ 010	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
SEQ 010 X-MOT	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>
			<input checked="" type="checkbox"/>
			NON-FINAL DISPOSITION
			<input type="checkbox"/> GRANTED IN PART
			<input checked="" type="checkbox"/> GRANTED IN PART
			<input type="checkbox"/> GRANTED IN PART
			<input type="checkbox"/> SUBMIT ORDER
			<input type="checkbox"/> FIDUCIARY APPOINTMENT
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			<input type="checkbox"/> OTHER
			<input type="checkbox"/> REFERENCE