

UMG Recordings Inc. v FUBU Records, LLC

2005 NY Slip Op 30153(U)

December 23, 2005

Supreme Court, New York County

Docket Number: 0600875/2005

Judge: Karla Moskowitz

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

PRESENT:

0600875/2005

PART 03

UMG RECORDINGS
vs
FUBU RECORDS, LLC

C

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

SEQ 1

DISMISS ACTION

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*Is decided in accordance with
the accompanying decision and
order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
DEC 29 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/23/2005

CA

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: I.A.S. PART 3

-----x
 UMG RECORDINGS INC.,

Index No. 600875/2005

Plaintiffs,

-against-

FUBU RECORDS, LLC, GTFM, INC., and
 GTFM, LLC,

Defendants.
 -----x

KARLA MOSKOWITZ, J:

This case involves a December 4, 2000 agreement (the "Agreement") to collaborate on the production and exploitation of sound recordings and music videos. Plaintiff UMG Recordings Inc., ("UMG") was to provide recording and video production services to recording artists. FUBU Records was the signatory on the Agreement and was supposed to reimburse UMG for half its production costs. Plaintiff alleges that FUBU Records is the name that all three defendants, FUBU Records LLC, GTFM, Inc. and GTFM, LLC, use to do business. FUBU Records is itself not a legal entity despite its signature on the Agreement. UMG alleges that it incurred substantial recording and video production costs but that none of the defendants have paid FUBU Records' share.

By this motion, all defendants have moved to dismiss. They assert two basic arguments. The first is that plaintiff should have brought this action as a compulsory counterclaim to a trademark dispute in federal court entitled *GTFM LLC et al v. Universal Studios, Inc. et al*, 02 CIV 0506 currently pending in the Southern District of New York (the "Federal Litigation"). The second is that UMG has failed to allege facts sufficient to pierce the corporate veil against GTFM, Inc and GTFM, LLC.

The plaintiffs in the Federal Litigation, who are the same as the defendants in this litigation, allege appropriation of FUBU's trademarks to promote a "drug culture" film named "How High" that is antithetical to FUBU's goal of empowering multicultural youth. The Federal Litigation involves the Agreement only tangentially. Only the eighth cause of action of that complaint alleges breach of paragraph 12(b) in which UMG agreed that it would not impair FUBU's trademarks. The remainder of the complaint in the Federal Litigation asserts various federal law claims against Universal Studios, not UMG, one cause of action for defamation against Universal Studios and a cause of action under New York law for unfair competition against Universal Studios and UMG.

The parties disagree about the standard this court should apply when assessing whether to dismiss this action on the grounds that it is properly a compulsory counterclaim in the Federal Litigation. Plaintiff asserts that the claims in this case need to be identical to the claims in the other before this court can dismiss this action. Defendants argue they only need be "substantially similar."

It is not necessary to decide which standard to apply because these two lawsuits are not even substantially similar. The movie "How High" and the use of the FUBU trademark in that film is the subject of the Federal Litigation. The movie is not the subject of this lawsuit or the Agreement. The claims in the Federal Litigation focus on the actions of Universal Studios--not a party to this action. More important, the eighth cause of action in the Federal Litigation that touches on the Agreement asserts breach of contract for infringing on FUBU's trademarks. It does not involve the simple breach of contract for non-payment at issue here. Defendants argue that, should UMG recover on its breach of contract claim, it may set off that recovery against a

loss in the Federal Litigation. However, the mere possibility of a set-off in the future is not a basis for dismissal of this action when the two actions involve substantially different underlying facts. Further, the court is unaware of a reason why plaintiff could not set off a recovery in this action against a loss in the Federal Litigation. Accordingly, the court denies defendants' motion to dismiss, pursuant to CPLR 3211(a)(4) based on the prior pending action in federal court.

Defendants next contend that this court should dismiss GTFM, Inc. and GTFM, LLC because UMG has failed to plead sufficient facts to pierce the corporate veil to hold the GTFM defendants liable for the actions of its subsidiary FUBU Records LLC. Plaintiff need not plead fraud to pierce the defendant's corporate veil. (*Lederer v. King*, 214 AD2d 354 [1st Dep't 1995]). The plaintiff need only demonstrate that: (1) defendant completely controlled the corporate defendant whose veil plaintiff is seeking to pierce and (2) defendant used its complete control of the corporate entity "to perpetuate a wrongful or unjust act toward plaintiff." (*Id.*). However, "[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance." (*TNS Holdings, Inc., v. MKI Securities Corp.*, 92 NY2d 335, 339 [1998]; *see also Morris v. New York State Department of Taxation and Finance et al.*, 82 NY2d 135, 141 [1993]).

The Complaint makes the allegation that:

Upon information and belief, each of the Defendants is the alter ego of each of the other Defendants, in that each Defendant is a mere instrumentality of the others with respect to the transaction alleged herein. Upon information and belief, the business and corporate affairs of each Defendant is intermingled with those of each of the other Defendants, and each Defendant is used as a "shell" corporation of each of the others. Upon information and belief, Defendants' principals dominated and controlled each of the Defendants with respect to the transaction alleged herein and have used such domination and control to perpetuate wrongs resulting in injury to UMG.

(Complaint ¶ 6).

Plaintiff then points to the contract between the parties that clearly designates Larry Blenden, the general counsel to GTFM, Inc and GTFM LLC, as an employee of FUBU Records. Plaintiff then contrasts that language with the affidavit of Larry Blenden in which he disclaims anything more than “familiarity” with FUBU Records, LLC.

Plaintiff has also interposed the affirmation of Jerry Juste, the attorney at UMG primarily responsible for negotiating the Agreement. Juste does state in his affirmation that he “was advised and understood that “FUBU Records” was simply the entertainment arm of GTFM,” and that he did not “perceive a distinction between FUBU Records, FUBU Records, LLC and GTFM”. (Juste Affirm. ¶ 3). Juste also states that the three companies “appeared to have the same principals, the same executives, the same decision-makers, and were essentially a single company for all practical purposes.” (Id.)

Taking the Juste Affirmation together with the complaint and the contract, plaintiff has sufficiently pleaded that the defendants were operating more or less as one company. More problematic for plaintiff is the second arm of the veil piercing test, namely defendants having used the corporate form to perpetrate a wrongdoing upon plaintiff. Plaintiff only makes the naked allegation that “[u]pon information and belief. . . Defendants. . .have used such domination and control to perpetuate wrongs resulting in injury to UMG.” (Complaint ¶ 6). The Complaint then goes on to assert only a claim for breach of contract. There is not one word in the complaint, or anywhere else for that matter, that defendants, for example, left FUBU Records undercapitalized and unable to pay a judgment debt. Nor does plaintiff plead disregard of corporate formalities together with personal use of corporate funds. In the Juste affirmation,

plaintiff claims that the information regarding these issues is within the exclusive purview of the defendants, but there is nothing in the complaint even suggesting that defendants had engaged in wrongdoing sufficient to pierce the corporate veil. Plaintiff also contends that it needs discovery to substantiate these claims. However, presumably, had defendants used the corporate form to perpetrate a wrong upon it, plaintiff would at least have some idea how this had happened. It would appear that plaintiff has no reason for believing that FUBU Records LLC is undercapitalized or that defendants have misused the corporate form to harm plaintiff. The court cannot allow discovery without any basis whatsoever.

Accordingly, it is


ORDERED THAT defendants' FUBU RECORDS, LLC, GTFM, INC., and GTFM, LLC motion to dismiss is granted to the extent of dismissing the complaint against GTFM, Inc. and GTFM LLC and is otherwise denied; and it is further

ORDERED THAT the clerk is directed to enter judgment dismissing the action against GTFM, INC., and GTFM, LLC and sever and continue the action against FUBU RECORDS, LLC, and it is further

ORDERED THAT the remaining parties are directed to attend a preliminary conference on February 2, 2006 at 10:00 a.m., in the courtroom, room 248, 60 Centre Street.

Dated: December, 13, 2005

FILED
DEC 29 2005
COUNTY CLERK'S OFFICE
NEW YORK



J.S.C.