

UMG Recordings Inc. v FUBA Records, LLC
2006 NY Slip Op 30271(U)
June 19, 2006
Supreme Court, New York County
Docket Number: 0600875/2005
Judge: Karla Moskowitz
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----x
UMG RECORDINGS INC.,
Plaintiffs,
-against-
FUBU RECORDS, LLC, GTFM, INC., and
GTFM, LLC,
Defendants.
-----x

INDEX NO 600875/2005
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

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

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

FILED
JUN 26 2006
CLERK'S OFFICE
NEW YORK

Dated: June 19 2006

Kay
KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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,

DECISION and ORDER

Defendants.

-----X
KARLA MOSKOWITZ, J:

This motion seeks reargument of my decision and order dated December 23, 2005 that dismissed this breach of contract action against defendants GTFM, Inc and GTFM LLC (the “prior decision”). In addition to the motion papers, the court has also considered the post-submission letter from defendant dated April 25, 2006 and the post submission letter from plaintiff dated April 26, 2006. In the prior decision, I dismissed the complaint against GTFM Inc and GTFM LLC (collectively the “GTFM Defendants”) because (1) they were not signatories to the contract of December 4, 2000 (the “Agreement”) and (2) plaintiff had failed to plead misuse of the corporate form to perpetrate a wrong upon plaintiff so that the court could consider the GTFM defendants as the alter egos of the signatory. (prior decision pgs. 4-5)

Plaintiff admits that it has not pled wrongdoing on the part of the defendants. Instead, plaintiff now claims that it intended to and did argue on the prior motion that the court should consider the GTFM Defendants signatories to the Agreement because these two entities, along with FUBU Records LLC, were all doing business as FUBU Records, although the actual signatories to the contract are plaintiff and FUBU Records. Plaintiff points to the same evidence that it pointed to on the motion to dismiss, namely: (1) that Jerry Juste, the attorney at UMG

primarily responsible for negotiating the agreement between the parties, stated he did not perceive a distinction between the companies; and (2) that Larry Blendon, the general counsel for GTFM, Inc and GTFM LLC was also a FUBU Records' employee. Plaintiff also again points to FUBU Records' signature on the Agreement, instead of the legal entity FUBU Records LLC as evidence that FUBU Records LLC, GTFM Inc. and GTFM LLC all operated as FUBU Records. Citing Van Valkenburgh Nooger & Neville, Inc., v. Hayden Publishing Co., 30 NY 2d 34 (1972) and A.W. Fuir Co., v. Ataka & Co., 71 AD2d 370 (1st Dept 1979), plaintiff argues for the application of "the line of case law where a parent was held liable for the contracts of a subsidiary on an agency theory where no showing of intended harm to the plaintiff is required." (Reply Mem. at 5 n. 4).

If this was the argument plaintiff was trying to make on the motion to dismiss, the court certainly did miss it as plaintiff buried the only discussion resembling this argument at the bottom of page twelve of its opposition to the motion to dismiss. In addition, plaintiff accuses the court of "sua sponte raising the issue as to whether UMG adequately alleged that Defendants 'used the corporate form. . .to perpetrate a wrongdoing upon plaintiff.'" (Pl. Reply Mem at 5). However, as the table of contents to plaintiff's opposition on the prior motion indicates, plaintiff (and defendant) devoted the bulk of their arguments to whether or not plaintiff had properly pled that the defendants were alter egos of each other, including the factor of misusing the corporate form. Indeed, it was because of these lengthy arguments that the court took pains to analyze and address in the prior decision whether or not the plaintiff had properly pled the circumstances appropriate for veil-piercing.

The court does not condone a party burying an argument in the recesses of an opposition

brief and then accusing the court of missing the argument or of sua sponte raising a different point as the basis for reargument. However, in the interest of justice, the court grants reargument to consider what plaintiff raised on the bottom of page 12 of its opposition as the court did indeed miss that argument. As the ensuing discussion indicates, it makes no difference to the outcome.

The Van Valkenburgh line of cases the plaintiff cites no longer appears to be good law in light of the more recent decision of the New York Court of Appeals in TNS Holdings, Inc. v. MKI Securities Corp., 92 NY2d 335 (1998). In Van Valkenburgh, the Court found that a parent could be liable on the subsidiary's contract because "the parent company's officers and employees so controlled the actions of their subsidiaries in the present controversy that unitary liability . . . could be interposed." (Id. at 42). However, in TNS Holdings, Inc., the Court of Appeals rejected the notion that control alone is sufficient to tie a non-signatory to contractual obligations:

Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or iniquitable consequences. . . Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance.

(Id. at 339 [emphasis added])

Accordingly, decisions following TNS Holdings have dismissed complaints seeking to hold a parent liable for the contractual obligations of its subsidiary or affiliate absent allegations of the "indicia" of veil piercing such as self-dealing, commingling of funds, lack of corporate formalities and allegations that the defendant used the defendant-subsiary for the purpose of committing a wrong. (See, e.g., Hartej Corp. v. Pepsico World Trading Co., Inc., 225AD2d 233

[1st Dept 1998]; see also, Brainstorms Internet Marketing, Inc., v. USA Networks, Inc., 6 AD3d 318 [1st Dept 2004]]["Plaintiffs' conclusory allegations that [defendant] was the alter ego of the non-signatory defendants were insufficient to sustain the action as against the non-signatories particularly since they were unaccompanied by allegations supporting the inference that [defendant] was utilized by the non-signatories for fraud, malfeasance or other inequity"] Even the more recent case that plaintiff cites in support of its position, International Credit Brokerage Co., Inc. v. Agapov, 249 AD2d 77, 78 [1st Dept 1998] contained non-conclusory allegations of lack of corporate formalities, commingling of funds, and self-dealing.

Here, as I stated in the prior decision, the complaint contains only the most conclusory allegations that the defendants were "the alter ego of each of the other Defendants" (Complaint ¶ 6); that the "Defendants are doing business or have done business as 'FUBU Records'" (Complaint ¶ 7); that "the business and corporate affairs of each of the Defendants is intermingled with those of each of the other Defendants" (Complaint ¶ 6); that "each Defendant is used as a "shell" corporation of each of the others" (Complaint ¶ 6) and that "the Defendants' principals dominated and controlled each of the Defendants with respect to the transaction alleged herein and have used such domination and control to perpetrate wrongs resulting in injury to UMG" (Complaint ¶ 6). Although the affirmation of Jerry Juste states that the companies appeared to have the same principals, the same executives and the same decision makers, this is insufficient to hold the GTFM defendants liable under a contract they did not sign. Absent allegations that these defendants' control resulted in "some fraud or wrong mandating disregard of the corporate form," (INS, 92 NY2d at 339), the court must dismiss the complaint as to them. Here, there are no allegations, even on information and belief, that the GTFM defendants

schemed to deprive plaintiff of its rights under the contracts by, for example, creating FUBU Records LLC or FUBU Records in order not to pay plaintiff. Nor are there allegations in the complaint (or even in an affidavit of a person with knowledge) that FUBU Records LLC was undercapitalized so that it could not pay a judgment.

In addition, the Agreement itself rebuts plaintiff's contention that the GTFM defendants and FUBU Records LLC were doing business under the name FUBU Records so that the GTFM entities are in effect signatories to the Agreement. The Agreement refers to the GTFM defendants as separate entities without any indication that these separate entities were doing business as FUBU Records. For example, at paragraph 3(g)(ii) of the Agreement, plaintiff "expressly acknowledges that the main business of your affiliated company, GTFM, Inc, is the manufacture of . . . apparel. . ." In addition, paragraph 12(b) of the Agreement refers to FUBU Records and "your affiliated entities." Paragraph 3(g)(ii) of the Agreement refers to GTFM, Inc. separately from "you" (i.e. FUBU Records). There are several other instances where the Agreement refers to GTFM Inc. separately from FUBU Records (See references in Agreement ¶¶ 7[1] and 15.03[b]). Plaintiff does not dispute that UMG drafted the Agreement.

If UMG thought it was binding GTFM Inc and GTFM LLC along with FUBU Records, certainly a party as sophisticated as UMG would not have signed a contract without including these entities within the definition of FUBU Records. As the Agreement indicates, UMG had ample opportunity to do so as the Agreement defines "you" as FUBU Records. Instead, UMG signed an agreement that refers to the GTFM defendants as "affiliates" or "affiliated entities." In addition, if the GTFM defendants were doing business as FUBU Records, there would have been no reason to form FUBU Records, LLC.

Plaintiff makes much of this court's recognition in the prior decision that the signatory FUBU Records may not be the same as FUBU Records LLC and is not a legal entity. However, it does not follow that because the signatory is FUBU Records, a non-entity, that the GTFM Defendants were doing business as that entity. Rather, because the Agreement specifically designates GTFM Inc and GTFM LLC as "affiliates" of the signatory, it is likely that the opposite is true. Nevertheless, this speculation is irrelevant as plaintiff has not pled the requirements for veil-piercing sufficiently.


Nor does Mr Juste's affidavit on the prior motion in which he argues that FUBU Records was the umbrella term the parties used to refer to the music operations of the defendants coupled with the fact that the signature on the Agreement reads simply "FUBU Records" mean that the GTFM defendants in essence signed the agreement. This is simply a non-sequitor. Plaintiff would still need non-conclusory veil-piercing allegations to hold the GTFM defendants to a contract they did not sign.

Accordingly, it is

ORDERED THAT the court grants reargument and upon reargument adheres to its determination on the original motion.

The remaining parties are directed to attend a compliance conference on July 13, 2006 at 10:00 a.m. in the courtroom, room 248, 60 Centre Street.

Dated: June 19, 2006



 JSC

FILED
 JUN 26 2006
 COUNTY CLERK'S OFFICE
 NEW YORK