

**New 5-7-9 and Beyond, Inc. v Foot Locker, Inc.**

2010 NY Slip Op 31647(U)

June 25, 2010

Supreme Court, New York County

Docket Number: 108897/2009

Judge: Jane S. Solomon

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: DAVE S. SOLOMON

PART 55

Justice

Index Number : 108897/2009  
**NEW 5-7-9 AND BEYOND, INC.**  
 vs.  
**FOOTLOCKER, INC.**  
 SEQUENCE NUMBER : 001  
 DISM ACTION/INCONVENIENT FORUM

INDEX NO. \_\_\_\_\_  
 MOTION DATE 2/18/10  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

**FILED**  
 JUL 01 2010  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits Exhibits ...  
 Answering Affidavits — Exhibits \_\_\_\_\_  
 Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1-3  
4-5


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum decision and Order

NB P.C. 8/2/10 @ 11A07

Set at end

Dated: June 25, 2010

  
 \_\_\_\_\_  
**DAVE S. SOLOMON** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X

THE NEW 5-7-9 AND BEYOND, INC. and  
LEXINGTON INSURANCE COMPANY, as  
subrogee of THE NEW 5-7-9 AND  
BEYOND, INC.,

Index No. 108897/2009  
DECISION and ORDER

Plaintiffs,

- against -

FOOT LOCKER, INC., FOOT LOCKER  
RETAIL, INC., and FOOT LOCKER  
SPECIALTY, INC.,

Defendants.

-----X

**FILED**  
JUL 01 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

**SOLOMON, J.:**

Plaintiffs The New 5-7-9 And Beyond, Inc. (579) and  
Lexington Insurance Company (Lexington), 579's subrogee, sue  
Defendants Foot Locker, Inc., Foot Locker Retail, Inc. and Foot  
Locker Specialty, Inc. (collectively, Foot Locker) for "gross  
negligence, negligence, recklessness, carelessness" stemming from  
a fire that started inside the storeroom of a Foot Locker retail  
store. Foot Locker now moves for an order dismissing the  
complaint on the ground of *forum non conveniens* (CPLR 327).

FACTS:

Foot Locker is a corporation that has offices in and  
does business in New York. It operates retail sporting goods  
stores across the country, including Puerto Rico. One such store  
is located at 252 Calle San Justo, San Juan, Puerto Rico (the  
Foot Locker Store). 579 is a New York Corporation. It operates

retail clothing stores across the country and in Puerto Rico, including a store located at 210 Calle de la Fortaleza, San Juan, Puerto Rico (the 579 Store), adjacent to the Foot Locker Store.

On June 28, 2008, a fire allegedly caused by Foot Locker's negligence spread from the Foot Locker Store to the 579 Store. On June 29, 2008, Miguel A. Cartagena Negrón (Negrón), a Puerto Rican Inspector Fire Marshall, investigated the damaged properties and concluded that the fire had originated on Foot Locker's premises and that Foot Locker had violated several provisions of the safety and fire protection code of the Commonwealth of Puerto Rico (Translated Investigation Assessment, attached to Motion, Ex. C).

On June 12, 2009, prior to the filing of this action, the landlord and owner of the property where the 579 Store is located, Jose Rivera Rosa, commenced an action against Foot Locker in San Juan, Puerto Rico for damages also arising from the fire (the Rosa Action). That action remains pending.

#### DISCUSSION

Under CPLR § 327, a court may stay or dismiss an action when it finds that in the interest of substantial justice the action should be heard in another forum. The doctrine of *forum non conveniens* is based upon "justice, fairness and convenience, and while various objective factors are to be considered, no one factor is controlling" (*Corines v. Dobson*, 135 AD2d 390, 391 [1<sup>st</sup>

Dept, 1987])). The heavy burden of establishing *forum non conveniens* rests on the party challenging the chosen forum to demonstrate that the action would be best adjudicated elsewhere (*Islamic Republic of Iran v. Pahlavi*, 62 NY2d 474, 479 [1984]).

Foot Locker contends that the action should be dismissed here because the fire and subsequent investigation took place in San Juan, the applicable safety codes are Puerto Rican statutes and must be interpreted according to Puerto Rican law, and the witnesses to the condition of the two premises will be inconvenienced by having to travel to New York to appear in court. 579 counters that its own witnesses are all located in New York and would be inconvenienced by being required to go to Puerto Rico and that all its witnesses' work product would need to be translated into Spanish. 579 also argues that it would be denied its choice of counsel, as its counsel is not licensed in Puerto Rico. Finally, 579 contends that were this action dismissed, it would be unable to refile in Puerto Rico because of the Puerto Rican statute of limitations. In its reply, Foot Locker states that it would waive the statute of limitations defense were this action dismissed, and argues that if this action were to remain in New York, then Foot Locker would be forced to defend this case here and the Rosa Action in Puerto Rico.

Among the factors the court may consider in determining whether to dismiss for forum non conveniens are "the residence of the parties, the location of the various witnesses, where the transaction or event giving rise to the cause of action occurred, the potential hardship to the defendant in litigating the case in New York, and the availability of an alternative forum" (*Grizzle v. Hertz Corp.*, 305 AD2d 311, 312 [1<sup>st</sup> Dept, 2003]).

In support of its motion, Foot Locker specifically identifies only one witness who might be inconvenienced; Inspector Fire Marshall Negrón, who resides in Puerto Rico and speaks Spanish as his primary language. In opposition, 579 specifically identified several witnesses who would be inconvenienced by a Puerto Rican forum, including an independent insurance adjuster, representatives from a salvage company, an accounting firm, a consulting firm and a fire investigator. It notes that all the work product they have produced would need to be translated into Spanish, all at 579's expense.

In *Grizzle, supra*, the plaintiff, a New York resident, was injured while in Jamaica. One of the defendants was a New York corporation. In denying the motion to dismiss for forum non conveniens, the First Department held that "[t]he fact that the police officer who responded--after the fact--to the accident scene is a resident of Jamaica does not provide a counterweight to the conclusion that the plaintiff's choice of forum should be

respected, since he was not a witness to the accident and there is no suggestion that he would be able to offer any material evidence other than his written report, which both parties presumably already have" (*Grizzle v. Hertz Corp.*, *supra*, 305 AD2d at 312). Here, Negron's investigative report has already been translated into English (Translated Investigation Assessment, attached to Motion, Ex. C), both parties have it within their possession, and there is no suggestion that Negron would offer other evidence beyond his report.

As presented, the locations of the witnesses militate in favor of 579. Moreover, Foot Locker and 579's maintenance of principal places of business in New York and their registration as New York corporations also lend credence to the determination that New York is not an inconvenient forum. Similarly, Foot Locker's argument that the laws and regulations involved in this action are Puerto Rican in origin is unavailing. The necessity of applying a foreign state's law does not render New York an inconvenient forum (see *Yoshida Printing Co. v. Aiba*, 213 AD2d 275 [1<sup>st</sup> dept, 1995])

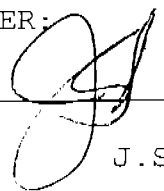
The issues that weigh in Foot Locker's favor include that the incident occurred in Puerto Rico, and the existence of a separate action arising from the same circumstances but involving a separate plaintiff.

Upon balancing all the above factors, it is determined that Foot Locker has not sustained the heavy burden to demonstrate that the interests of substantial justice require that this action be adjudicated elsewhere. Accordingly, it hereby is

ORDERED that the motion to dismiss is denied; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY, on August 2, 2010 at 11 AM.

Dated: June 25, 2010

ENTER:   
\_\_\_\_\_  
J.S.C.

JANE S. SOLOMON

**FILED**  
JUL 01 2010  
COUNTY CLERK'S OFFICE  
NEW YORK