Jonke v Foot Locker, Inc.

2010 NY Slip Op 31661(U)

June 20, 2010

Supreme Court, New York County

Docket Number: 111794/99

Judge: Emily Jane Goodman

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SCANNED ON 6/28/2010

[* 1]

6/24 CD

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

PRESENT: EMILY JANE GOODMAN Justice

PART 17

JAMES JONKE

INDEX NO. 111794/99

- v -

MOTION DATE

MOTION SEQ. NO. 13

FOOT LOCKER, INC., ET AL.

MOTION CAL. NO.

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

	PAPERS NUMBERED
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 and cross motion are decided per attached

FILED
JUN 25 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/20/10

J.S.C.
EMILY JANE GOODMAN

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☒ Reference

[* 2]

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 17

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JAMES JONKE,

Plaintiff,

Index No.: 111794/99

-against-

DECISION

THE FOOT LOCKER, INC. and THE BOOT LOCKER, INC.,

Defendants.

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FILED
JUN 25 2010
COUNTY CLERK'S OFFICE
NEW YORK

EMILY JANE GOODMAN, J.:

BACKGROUND

Non-party Foot Locker, Inc. (Foot Locker) moves, pursuant to CPLR 5240, to: (1) vacate the "Restraining Notice to Judgment Debtor Including Notice to Judgment Debtor Who Is A Natural Person," dated September 14, 2009, served on non-party Foot Locker at 112 West 34th Street, New York, NY 10120; (2) require plaintiff's attorneys to withdraw in writing any other restraining notice, information subpoena with restraining notice or any other enforcement device served on any other non-party; (3) enjoin plaintiff and his attorneys from any future attempts at enforcing the judgment obtained against The Foot Locker, Inc. and/or The Boot Locker, Inc. against non-party Foot Locker; and (4) award costs, including reasonable attorney's fees and sanctions against plaintiff's counsel. Plaintiff cross-moves, pursuant to CPLR 3025 (c), for leave to amend the caption by adding or substituting Foot Locker, Inc. as the admitted

successor in interest to The Foot Locker, Inc.

According to Foot Locker, in 1999, when the underlying action was filed, Foot Locker was not in existence as a corporate entity. Allegedly, on November 1, 2001, Venator Group, Inc. became known as Foot Locker, Inc. by changing its name on its Certificate of Incorporation with the New York Department of State. Motion, Ex. A. Foot Locker asserts that, despite the similarity of names, it is not and never was affiliated with defendant The Foot Locker, Inc., nor has Foot Locker ever operated a business or maintained an address at 140 Auramar Drive, Rochester, NY 14609, where the notice of the default judgment against The Foot Locker, Inc. was served. Aff. of Dennis E. Sheehan, Vice President and General Counsel to Foot Locker; Aff. of Wook Kim (Kim), attorney for Foot Locker.

In the original action, along with the above-captioned defendants, plaintiff sued Venator Group Specialty, Inc. According to Kim, Venator Group Specialty, Inc., formerly known as F.W. Woolworth Co. (another original defendant in the underlying action) and now known as Foot Locker Specialty, Inc., is a subsidiary of Foot Locker. *Id.* The underlying action concerns injuries plaintiff allegedly sustained while riding a bicycle, and plaintiff's complaint named 11 defendants, including certain affiliates of Foot Locker. However, Foot Locker itself was never named as a defendant.

In August of 1999, plaintiff was awarded a default judgment against The Foot Locker, Inc., and on April 14, 2005, Venator Group Specialty, Inc. and F.W. Woolworth Co. were granted summary judgment dismissing all claims as against them, which was affirmed on appeal to the Appellate Division on January 12, 2006. Plaintiff's motion for leave to appeal that decision to the Court of Appeals was denied on July 5, 2006.

In July, 2008, based on the default judgment entered against The Foot Locker, Inc., plaintiff requested an inquest on damages, which was referred to a Special Referee by this court. On July 14, 2009, the inquest on damages was held, and plaintiff subsequently served an application to confirm the Special Referee's report on Foot Locker.

Thereafter, on July 27, 2009, counsel for Foot Locker wrote to counsel for plaintiff, explaining that Foot Locker was not related to The Foot Locker, Inc., and that the wrong entity had been served. Motion, Ex. N. On or about September 9, 2009, plaintiff served the Restraining Notice on Foot Locker. On September 14, 2009, counsel for Foot Locker participated in a conference call with plaintiff's counsel, requesting that the Restraining Notice be removed, but plaintiff's counsel refused. Aff. of Kim.

Plaintiff maintains that Foot Locker is the successor-in-interest to The Foot Locker, Inc., and, therefore, he should be

entitled to amend the caption to include Foot Locker as the successor-in-interest to The Foot Locker, Inc., and enforce its Restraining Notice against it. Plaintiff makes this contention based on the affirmation of Venator Group's counsel, filed as defendants' answer to the underlying action in 2000. Cross Motion, Ex. 2.

The portions of the Amended Verified Answer upon which plaintiff bases his contention are the paragraphs in which Barry, McTiernan & Moore (Barry, McTiernan) affirmed that they were counsel for "Defendants Venator Group as successor in interest of F.W. Woolworth Co., Venator Group d/b/a The Foot Locker, Inc., Venator Group Specialty Inc., and Village Wheels Bicycle Shop." *Id.*

In its opposition to plaintiff's cross motion, Foot Locker asks, as alternative relief, that the default judgment entered against The Foot Locker, Inc. be vacated for a full hearing on the merits.

DISCUSSION

CPLR 5240 states:

> "The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure."

Section 5222 (b) of the CPLR states:

> "A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at

> the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served."

"Courts have broad discretionary power, under CPLR article 52, to control and regulate the enforcement of a money judgment in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice." *Gryphon Domestic VI, LLC v APP International Finance Co.*, 58 AD3d 498, 498 (1st Dept 2009); *Paz v Long Island Railroad*, 241 AD2d 486 (2d Dept 1997). In the instant matter, there is no concrete evidence that Foot Locker has or had an interest in the defaulting defendant, The Foot Locker, Inc., nor that Foot Locker is in possession of any property in which The Foot Locker, Inc. has or had an interest that could be used to satisfy a debt owed by The Foot Locker, Inc. *Burstin Investors, Inc. v K.N. Investors, Ltd.*, 255 AD2d 478 (2d Dept 1998).

As a consequence, in the interests of justice, in order to prevent "unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice," the court exercises its discretionary power and grants that portion of non-party Foot Locker, Inc.'s motion seeking to vacate the Notice of Restraint as against it. *Costello v Casale*, 39 AD3d 797 (2d Dept 2007).

The court denies that portion of Foot Locker's motion seeking to require plaintiff's attorneys to withdraw in writing any other restraining notice, information subpoena with restraining notice or any other enforcement device served on any other non-party, since Foot Locker is not authorized to make requests on behalf of other entities not before this court.

Similarly, the court denies Foot Locker's request to vacate the default judgment entered against The Foot Locker, Inc. This request appeared only as part of Foot Locker's attorney's affirmation in opposition to plaintiff's cross motion and, since Foot Locker failed to serve plaintiff with a notice of cross motion, pursuant to CPLR 2215, it is not entitled to the relief requested in its affirmation in opposition to plaintiff's cross motion. *Thomas v The Drifters, Inc.*, 219 AD2d 639 (2d Dept 1995). Further, a non-party has no standing to challenge a default judgment entered against another party without a showing of some legitimate interest in the underlying action. *Morgenthow & Latham v Bank of New York Co., Inc.*, 40 AD3d 454 (1st Dept 2007).

Additionally, the court, in the exercise of its discretion, declines to grant that portion of Foot Locker's motion seeking to impose sanctions against plaintiff's counsel. 22 NYCRR Part 130-1.1.

All of the other relief requested by both parties in the

motion and cross motion are dependent upon the court's determination of the factual issue as to whether Foot Locker is a successor-in-interest to The Foot Locker, Inc., a determination that the court cannot make at this point based on the limited evidence accompanying these motions.[1]

In the Verified Answer to the underlying complaint, Barry, McTiernan affirmed that Venator Group became the successor-in-interest to The Foot Locker, Inc. According to Foot Locker, Venator Group thereafter changed its name to Foot Locker, Inc. Hence, reading both these affirmations together, Foot Locker is the successor-in-interest to The Foot Locker, Inc. because Venator Group was the initial successor-in-interest to The Foot Locker, Inc. Pursuant to the de facto merger doctrine, if the above turns out to be true, Foot Locker, under certain circumstances, the facts of which are not here presented, may be held liable for the obligations of The Foot Locker, Inc. *Fitzgerald v Fahnestock & Co., Inc.*, 286 AD2d 573 (1st Dept 2001).

Foot Locker, in its affirmation in opposition, denies that Venator Group was the successor-in-interest to The Foot Locker, Inc.; that Barry, McTiernan lacked the personal knowledge of the

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[1] It is noted that plaintiff argues against the affirmations submitted by Foot Locker on the issue of Barry, McTiernan's representation of The Foot Locker, Inc. in the underlying matter; however, as stated above, until such time as it can be determined whether Foot Locker is the successor-in-interest to The Foot Locker, Inc., all such arguments must be held in abeyance.

situation, thereby lacking probative value (*Steinberg v Metro Entertainment Corp.*, 145 AD2d 333 [1st Dept 1988]); and that Barry, McTiernan lacked the authority to speak on behalf of The Foot Locker, Inc. However, this assertion only highlights the questions that remain as to whether Foot Locker is the successor-in-interest to The Foot Locker, Inc., especially since it could only be The Foot Locker, Inc., as presumptive principle, that could question Barry, McTiernan's authority as its presumptive agent.

As a consequence, the question as to whether Foot Locker, Inc. is a successor-in-interest to The Foot Locker, Inc. is referred to a Special Referee to hear and report on the issue, and all other relief requested by the parties is held in abeyance pending the Special Referee's report.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the portion of non-party Foot Locker, Inc.'s motion seeking to vacate the Restraining Notice served is granted; and it is further

ORDERED that the Restraining Notice to Judgment Debtor Including Notice to Judgment Debtor Who is a Natural Person served on non-party Foot Locker, Inc. at 112 West 34th Street, New York, New York 10120 is hereby vacated; and it is further

ORDERED that the portion of non-party Foot Locker, Inc.'s

motion seeking to require plaintiff's attorneys to withdraw in writing any other restraining notice, information subpoena with restraining notice or any other enforcement device served on any other non-party is denied; and it is further

ORDERED that the portion of non-party Foot Locker, Inc.'s motion seeking the imposition of sanctions is denied; and it is further

ORDERED that the issue as to whether non-party Foot Locker, Inc. is the successor-in-interest to defendant The Foot Locker, Inc. is referred to a Special Referee to hear and report (other than Jack Suter) with recommendations, except that in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that the counsel for the party seeking the reference or, absent such party, counsel for defendant shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,[2] upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee Part (Part 50 R) for the earliest convenient date; and it is further

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[2]Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.

ORDERED that all other relief requested in non-party Foot Locker Inc.'s motion and plaintiff's cross motion is held in abeyance pending the herein ordered report and recommendation of the Special Referee.

Dated: 6/20/10

ENTER:

Emily Jane Goodman, J.S.C.

FILED
JUN 25 2010
NEW YORK
COUNTY CLERK'S OFFICE