

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

MEANITH HUON,)
)
Plaintiff,)
v.) CIVIL ACTION NO.: 1: 11-cv-3054
)
)
)
BREAKING MEDIA, LLC a/k/a)
BREAKING MEDIA;)
BREAKING MEDIA, INC. a/k/a)
BREAKING MEDIA;)
DAVID LAT; ELIE MYSTAL;)
JOHN LERNER; DAVID MINKIN;)
("ABOVETHELAW DEFENDANTS");)
)
GAWKER MEDIA, LLC a/k/a)
GAWKER MEDIA;)
BLOGWIRE HUNGARY SZELLEMI)
ALKOTAST HASZNOSITO KFT)
GAWKER MEDIA GROUP, INC. a/k/a)
GAWKER MEDIA;)
GAWKER ENTERTAINMENT, LLC)
GAWKER TECHNOLOGY, LLC)
GAWKER SALES, LLC,)
NICK DENTON; IRIN CARMON;)
GABY DARBYSHIRE)
("JEZEBEL DEFENDANTS").)
)
Defendants.)

PLAINTIFF, MEANITH HUON'S,
MOTION FOR LEAVE TO TAKE LIMITED AND EXPEDITED DISCOVERY
AND TO COMPEL DEFENDANTS TO DISCLOSE ITS AFFILIATES
PURSUANT TO FRCP 7.1 AND LOCAL RULE 3.2

Plaintiff, Meanith Huon, states as follows:

FACTS

Plaintiff, Meanith Huon, was and is a citizen of the State of Illinois. (4th Am. Compl., par. 9). Mr. Huon sued Defendants, Breaking Media, LLC a/k/a Breaking Media, Breaking

Media, Inc. a/k/a Breaking Media, David Lat, Elie Mystal, John Lerner, and David Minkin (“Abovethelaw Defendants”).

Defendant, Breaking Media, Inc. a/k/a Breaking Media, is a Delaware corporation organized and operating under the laws of the State of New York with its principal place of business in New York. On or about December 30, 2011, after Mr. Huon filed this lawsuit. Defendant, Breaking Media, Inc. merged with Breaking Media, LLC. The name of the surviving corporation is Breaking Media, Inc. (4th Am. Compl., par. 15). Separate corporations lose their separate identity after merger. Hoefflerle Truck Sales, Inc. v. Divco-Wayne Corp., 523 F.2d 543, 548-549 (7th Cir. Ill. 1975). After a foreign corporation merges into a Delaware corporation, the surviving corporation for diversity jurisdiction is a citizen of Delaware. Hoefflerle Truck Sales, Inc. v. Divco-Wayne Corp., 523 F.2d 543, 548-549 (7th Cir. Ill. 1975). In this case, the surviving corporation is Breaking Media, Inc., a citizen of both New York and Delaware, with its principal place of business in New York.

Mr. Huon also sued Defendants, Gawker Media LLC a/k/a Gawker Media, BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT, Gawker Media Group Inc. a/k/a Gawker Media, Gawker Entertainment, LLC, Gawker Technology, LLC, Defendant, Gawker Sales LLC, Nick Denton, Gabby Darbyshire, Irin Carmon (the “Jezebel Defendants”).

Defendant, Gawker Media Group Inc. a/k/a Gawker Media, was and is a Cayman Islands corporation with its principal place of business in New York City, New York. Defendant, Gawker Media Group, Inc. is a shell corporation for the Defendants, Gawker Media LLC, Gawker Entertainment LLC, Gawker Technology LLC, Gawker Sales LLC.

<http://blogs.reuters.com/felix-salmon/2010/12/01/the-new-gawker-media/>;

<http://www.newyorker.com/online/blogs/johncassidy/2010/12/gawker-stalker-nick-denton->

spotted-in-cayman-islands.html. The offices of Gawker Media Group Inc. a/k/a Gawker Media are located at 210 Elizabeth Street, Fourth Floor, New York, NY 10012, and its principal place of business is in New York City, New York. <http://advertising.gawker.com/contact/>; <http://advertising.gawker.com/execteam/>. (4th Am. Compl., pars. 24-48).

Defendant, Gawker Media LLC a/k/a Gawker Media, was and is a limited liability company organized and operating under the laws of the State of Delaware with its principal place of business in New York. In response to a request for the original formation document for Gawker Media, LLC, the Delaware Secretary of State produced a Certificate of Incorporation for Blogwire, Inc. The sole incorporator of Blogwire, Inc. is Nick Denton. (4th Am. Compl., par. 24). The Delaware Secretary of State allows a Delaware corporation to be converted to a Delaware LLC. 6 Del. C. § 18-214.

Defendant Nick Denton was and is, a citizen of Hungary and the United Kingdom. He resides at 76 Crosby Street, Apt 2B, New York, NY 10012-3957 and/or 81 Spring Street, Apt. 2B, New York, NY 10012-3904. Mr. Denton was the founder of Gawker Media and currently owns Gawker Media. <http://www.facebook.com/nicknotned>; <http://advertising.gawker.com/execteam/>. (4th Am. Compl., pars. 24-48).

Defendant, BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT, a/k/a Gawker Media was and is a Hungarian offshore company. Thus, Defendant, BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT is a citizen of Hungary, pursuant to 28 U.S.C. 1332(c). Defendant, BLOGWIRE HUNGARY SZELLEMI ALKOTAST HASZNOSITO KFT, owns the domains Gawker.com and Jezebel.com. <http://whois.domaintools.com/gawker.com>; <http://whois.domaintools.com/jezebel.com>. (4th Am. Compl., pars. 24-48). A “KFT” is a Hungarian corporate entity. Tempel Steel Corp. v.

Loranger Ipari KFT, 1998 U.S. Dist. LEXIS 4003 (N.D. Ill. Mar. 27, 1998); Hawkins v. Borsy, 2007 U.S. Dist. LEXIS 14358 (E.D. Va. Feb. 6, 2007); Dorfman v. Marriott Int'l Hotels, Inc., 2001 U.S. Dist. LEXIS 642 (S.D.N.Y. Jan. 26, 2001); Tableau Software, Inc. v. AnyAspect KFT, 2008 U.S. Dist. LEXIS 11364 (N.D. Cal. Feb. 1, 2008); Dorfman v. Felvono, 2002 U.S. Dist. LEXIS 3749 (S.D.N.Y. Mar. 5, 2002).

The members of the Gawker LLCs are identified as Nick Denton, Gabby Darbyshire (4th Am. Compl., pars. 24-48).

In this case, the Abovethelaw Defendants filed its responsive pleading on or about September 26, 2011 (Docket No. 49) and the Jezebel Defendants filed its responsive pleading on or about September 30, 2011 (Docket Nos. 57 and 58.).

The Abovethelaw Defendants and the Jezebel Defendants have not filed their disclosure statements.

ARGUMENT

I. DEFENDANTS SHOULD BE ORDERED TO COMPLY WITH FRCP 7.1 AND LOCAL RULE 3.2.

FRCP 7.1 states that a “nongovernmental corporate party” must file a Disclosure Statement that “identifies any parent corporation and any publicly held corporation owning 10% or more of its stock” or “states that there is no such corporation.”

Pursuant to FRCP 7.1, the corporate party must “file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court” and “promptly file a supplemental statement if any required information changes.”

Local Rule 3.2 states that any “nongovernmental party, other than an individual or sole proprietorship, shall file a statement identifying all its publicly held affiliates. If a non-governmental party has no publicly held affiliates, a statement shall be filed to that effect.”

Pursuant to Local Rule 3.2, a party must file the disclosure “statement with the complaint or answer, or upon filing a motion, response, or petition, whichever occurs first.”

Local Rule 3.2 defines “affiliate” to include:

- A. In the case of a corporation, any entity owning more than 5% of the corporation.
- B. In the case of a general partnership, joint venture, LLC, LLLP, or LLP, any member.
- C. In the case of any other unincorporated association, any corporate member.

If any such affiliate is itself a partnership, joint venture, LLC, LLLP, LLP or any other unincorporated association, its “affiliates” (as defined above) shall also be included within the definition of “affiliate”.

See Dressler v. Mizuho Orthopedic Sys., 2010 U.S. Dist. LEXIS 93543 (S.D. Ill. Sept. 8, 2010);

Shelter Mut. Ins. Co. v. Dial, 2009 U.S. Dist. LEXIS 44 (S.D. Ill. Jan. 5, 2009);

Kelley v. Rinck, 2008 U.S. Dist. LEXIS 81141 (S.D. Ill. Oct. 14, 2008) (“Lastly, defendant Ozburn should be reminded of its responsibility to comply with FEDERAL RULE OF CIVIL PROCEDURE 7.1”).

In this case, the AbovetheLaw Defendants and the Jezebel Defendants have not filed their disclosure statements and should be compelled to do so.

II. EXPEDITED AND LIMITED DISCOVERY SHOULD BE ALLOWED UNDER FRCP 26(d) REGARDING THE MEMBERS OF THE DEFENDANT LLCs.

A court's discretion to dismiss for lack of subject matter jurisdiction when the plaintiff could have pleaded the existence of jurisdiction and when in fact such jurisdiction exists, should be exercised sparingly. Hoefflerle Truck Sales, Inc. v. Divco-Wayne Corp., 523 F.2d 543, 549 (7th Cir. Ill. 1975). Dismissal of the action would seem inappropriate here, given (1) what would appear to be a strong likelihood that the necessary diversity of citizenship actually exists

and (2) the consequent potential for curing the existing error under Section 1653. Tempel Steel Corp. v. Loranger Ipari KFT, 1998 U.S. Dist. LEXIS 4003 (N.D. Ill. Mar. 27, 1998).

Other District Courts have asserted or retained subject matter jurisdiction over Gawker Media based on diversity jurisdiction. Biro v. Condé Nast, 2012 U.S. Dist. LEXIS 113188 (S.D.N.Y. Aug. 10, 2012); Terry Bollea, professionally known as Hulk Hogan, v. Blogwire Hungary Szellemi Alkotast Hasznosito KFT, et. al., No. 8:2012-cv-02348 (Middle District of Florida).

Pursuant to FRCP 26(d)(1), Mr. Huon seeks expedited discovery from Defendants regarding the identities of the members of the Defendant LLCs, their names, addresses, principal place of business, place of incorporation, and citizenship, before Plaintiff has conferred with any party.

FRCP 26(d)(1) gives the Court authority to order expedited discovery. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. O'Connor, 194 F.R.D. 618, 623 (N.D. Ill. 2000). Rule 26(d) allows for discovery before the parties have conferred, as required by Rule 26(f), when authorized by a court order. Fed.R.Civ.P. 26(d)(1). A court has wide discretion in managing the discovery process. Merrill Lynch v. O'Connor, 194 F.R.D. 618, 623 (N.D. Ill. 2000); Lynch v. O'Connor, 194 F.R.D. 618, 623 (N.D. Ill. 2000); Ibarra v. City of Chicago, 816 F. Supp. 2d 541, 554 (N.D. Ill. 2011).

In assessing whether expedited discovery is necessary, courts are to evaluate a motion for expedited discovery on the entirety of the record to date and the reasonableness of the request in light of all the surrounding circumstances. Ibarra v. City of Chicago, 816 F. Supp. 2d 541, 554 (N.D. Ill. 2011).

In Maclin v. Paulson, 627 F.2d 83, 87 (7th Cir. Ind. 1980), Defendants ordered to disclose information that was readily available to reach the merits of plaintiff's claim.

Plaintiff has a need for expedited discovery because the discovery will allow the Plaintiff identify the members of the Defendant LLCs in this case. Here, the lawsuit against the Defendant LLCs cannot proceed without discovering the identities of the members of the LLCs, since the Court has *sua sponte* raise the issue of subject matter jurisdiction.

Plaintiff's request is reasonable in light of the circumstances. Defendants would have the identifies of the LLC members, their addresses, principal place of business, and facts relating to their citizenship. This information would assist Plaintiff in identifying the citizenship of the Defendant LLCs.

Discovery is also reasonable appropriate under the circumstances where there are no known defendants with whom to confer. Maclin v. Paulson, 627 F.2d 83 (7th Cir. Ind. 1980).

Mr. Huon does not know the identity of the members of the Defendant LLCs. Discussing John Doe defendants, the Seventh Circuit stated:

As Bivens and the cases collected in note 4 recognize, when, as here, a party is ignorant of defendants' true identity, it is unnecessary to name them until their identity can be learned through discovery or through the aid of the trial court. In this case, since the pro se plaintiff was denied counsel by the district court, he could hardly be expected to discover the names of the arresting officers through the discovery route. Therefore, the district judge should have ordered their disclosure, as in Southern Methodist University Ass'n v. Wynne and Jaffe, 599 F.2d 707, 710, 712-713 (5th Cir. 1979), or else plaintiff should have been permitted to obtain their identity through limited discovery. See Owens v. Haas, 601 F.2d 1242, 1247 (2d Cir. 1979); Gordon v. Leeke, 574 F.2d 1147, 1152-1153 (4th Cir. 1978), certiorari denied, 439 U.S. 970, 99 S. Ct. 464, 58 L. Ed. 2d 431. n5 Once their names were divulged, proper service could be made pursuant to Rule 4(d)(1). Maclin v. Paulson, 627 F.2d 83, 87-88 (7th Cir. Ind. 1980).

Although the Seventh Circuit in Maclin v. Paulson was discussing John Doe defendants, the same reasoning applies to this case. Mr. Huon does not know who all the members of the LLCs are, because the Secretary of State of New York and Delaware does not require the disclosures of

all the members of the LLCs. But the Defendants know the members of its own LLCs and can easily divulge them.

The Delaware Secretary of State does not require LLCs to disclose the identity of all their members. “§ 18-201. Certificate of formation. (a) In order to form a limited liability company, 1 or more authorized persons must execute a certificate of formation . . .”6 Del. C. § 18-201. The New York Secretary of State does not require LLCs to disclose all its members when the LLC formation document is filed: “§ 203. Formation. (a) One or more persons may act as an organizer or organizers to form a limited liability company by (i) preparing the articles of organization of such limited liability company in accordance with subdivision (e) of this section . . .” NY CLS LLC § 203.

The cases cited by the Court’s in its prior order, White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc., 647 F.3d 684 (7th Cir. Ill. 2011), involved the attorneys for the plaintiff, White Pearl Inversiones S.A, who did not know their client’s legal name or what kind of entity it was. More importantly, the Seventh Circuit didn’t dismiss plaintiff’s complaint. The Seventh Circuit stated that “Complete diversity has been established—though the lawyers took needless risk, and wasted a lot of the judges' time, by ignoring the proper treatment of foreign business entities until the case reached the court of appeals.” White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc., 647 F.3d 684, 687 (7th Cir. Ill. 2011).

The other case cited by the Court in its prior order, Thomas v. Guardsmark, LLC, 487 F.3d 531, 534 (7th Cir. Ill. 2007), originated as a removal proceedings. The Seventh Circuit pointed out that the Defendant

Guardsmark was, at the time of removal, a limited liability company. Consequently, an LLC's jurisdictional statement must identify the citizenship of each of its members as of the date the complaint or notice of removal was filed, and, if those members have members, the citizenship of those members as well. In its opening brief, Guardsmark failed to identify the citizenship of

any of its members. And in its Notice of Removal before the district court, Guardsmark incorrectly identified itself as a corporation rather than an LLC. (R. at 1). Thomas v. Guardsmark, LLC, 487 F.3d 531, 534 (7th Cir. Ill. 2007).

Furthermore, the Seventh Circuit didn't dismiss the Plaintiff's complaint but gave the Defendant "gave the parties a more-than-generous third opportunity" to identify its affiliates. Id.

In fact, the context in which this issue often comes up is when the defendant moves to remove the case from state court to federal court and fails to identify its affiliates in the removal documents (or in its disclosure documents). As one court explained the decision in Thomas v. Guardsmark, LLC:

Plaintiff cites no support for its assertion that remand is required solely because Pure Cattle's statement that "all of its members are citizens of Indiana" fails to identify each member. It is true that for diversity jurisdiction purposes, the citizenship of a limited liability company is the citizenship of each of its members. Hukic v. Aurora Loan Services, 588 F.3d 420, 427 (7th Cir. 2009). "[A]n LLC's jurisdictional statement must identify the citizenship of each of its members as of the date the complaint or notice of removal was filed, and, if those members have members, the citizenship of those members as well." Thomas v. Guardsmark, LLC, 487 F.3d 531 (7th Cir. 2007).

Integrated Livestock & Mgmt. Co. v. Pure Cattle, LLC, 2010 U.S. Dist. LEXIS 31563, 3-4 (C.D. Ill. Mar. 15, 2010). This issue comes up often in the context of the defendants moving to remand the case from state court to federal court and not identifying the citizenship of its LLC members, because the defendant can easily divulge that information. Even in those cases, the Court did not dismiss the complaint or remand the case back to state court.

In the case, Mr. Huon, *pro se*, has filed a lawsuit against the Defendants in federal court. The Defendants did not comply with FRCP 7.1 or Local Rule 3.2. The Court did not *sua sponte*

require the Defendants to comply with FRCP 7.1 or Local Rule 3.2, which would provide information as to the citizenship of the members of the LLCs. Instead, the Court dismissed Mr. Huon's complaint and ordered Mr. Huon to identify the citizenship of the Defendant LLCs. This required Mr. Huon, a *pro se* plaintiff, to investigate the membership of all the Defendant LLCs when the laws of Delaware and New York where the LLCs were formed do not even require the LLCs to disclose all their members.

Plaintiff should not be required to prove his case at the pleading stage.

Action Repair, Inc. v. American Broadcasting Cos., 776 F.2d 143 (7th Cir. Ill. 1985). Dismissal of the action would seem inappropriate here, given (1) what would appear to be a strong likelihood that the necessary diversity of citizenship actually exists, (2) the consequent potential for curing the existing error, and (3) that the Defendants can easily divulge all the members of its LL. See Tempel Steel Corp. v. Loranger Ipari KFT, 1998 U.S. Dist. LEXIS 4003 (N.D. Ill. Mar. 27, 1998).

As the 7th Circuit has stated:

the Supreme Court has emphasized that federal courts have a "virtually unflagging obligation" to exercise the jurisdiction that Congress has given them. *Id.* The Court has cautioned that the task of the district court "is not to find some substantial reason for the exercise of federal jurisdiction" but instead "to ascertain whether there exist 'exceptional' circumstances, the 'clearest of justifications,' . . . to justify the surrender of that jurisdiction." Huon v. Johnson & Bell, Ltd., 657 F.3d 641, 645 (7th Cir. Ill. 2011)

In this case, Defendants should be ordered to comply with FRCP 7.1 and Local Rule 3.2 and Mr. Huon should be given leave to conducted expedited and limited discovery.

WHEREFORE, Plaintiff, Flava Works, Inc., requests that this Honorable Court enter an order:

1. Requiring all Defendants to file its disclosures under FRCP 7.1 and Local Rule 3.2 within 7 days;
2. Granting Mr. Huon leave to take expedited and limited discovery;
3. Granting Mr. Huon leave to amend his complaint 28 days after Defendants provide the requested information.

Respectfully Submitted,

By: /s/ Meanith Huon /s/

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GABY DARBYSHIRE)
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)
Defendants.)

Under penalties of law, I certify that on November 15, 2012, I served the following documents or items:

PLAINTIFF, MEANITH HUON'S,
MOTION FOR LEAVE TO TAKE LIMITED AND EXPEDITED DISCOVERY
AND TO COMPEL DEFENDANTS TO DISCLOSE ITS AFFILIATES
PURSUANT TO FRCP 7.1 AND LOCAL RULE 3.2

by electronically serving all counsel of record.

Respectfully submitted,
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