UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
ABBOTT LABORATORIES, ABBOTT DIABETES CARE INC., and ABBOTT DIABETES CARE SALES CORPORATION,

Plaintiffs,

-against-

ADELPHIA SUPPLY USA, et al.,

Defendants.
----------x

NOT FOR PUBLICATION
MEMORANDUM & ORDER
15-CV-5826 (CBA) (LB)

AMON, United States District Judge:

Abbott[1] initiated this action in October 2015, asserting claims against multiple defendants, including the H&H Defendants[2], in connection with the unlawful sale of Abbott's international FreeStyle test strips in the United States. (ECF Docket Entry ("D.E.") # 1.) Following extensive discovery, Abbott moved for summary judgment against the defendants, seeking, inter alia, summary judgment on its claims against H&H under the Lanham Act for trademark infringement and willfulness. (D.E. # 1414.) The Court granted Abbott's motion for summary judgment as to liability, finding H&H liable for willful infringement as a matter of law. (D.E. # 1563.) The Court also found all defendants (save for a few individual defendants) liable at summary judgment for Lanham Act trademark infringement, although it determined that damages could not be resolved on summary judgment.

During the same time in which Abbott was preparing its motion for summary judgment, Abbott commenced a related action, Abbott Laboratories et al. v. H&H Wholesale Services Inc. et al., No. 17-cv-3095 (E.D.N.Y.), against the H&H Defendants for their sale of international

[1] Plaintiffs Abbott Laboratories, Abbott Diabetes Care Inc., and Abbott Diabetes Care Sales Corp. (collectively, "Abbott").

[2] H&H Wholesale Services, Inc. ("H&H"), Howard Goldman, and Lori Goldman (collectively, the "H&H Defendants").

FreeStyle strips repacked in counterfeit U.S. packaging. In that action, Abbott conducted a Court-authorized search of H&H's premises, which resulted in the seizure of their email server. Review of the contents of that server revealed that the H&H Defendants had engaged in a calculated pattern of discovery misconduct in this action that amounted to a fraud on the Court. (D.E. # 1613 at 4–6.)

Abbott moved for case-ending sanctions against the H&H Defendants in the instant action, and the motion was referred to Magistrate Judge Bloom for report and recommendation ("R&R"). See Jan. 14, 2019 Order Referring Mot. On May 2, 2019, Judge Bloom issued an R&R recommending that the Court grant Abbott's motion and enter a default judgment against the H&H Defendants. (D.E. # 1545.) After receiving objections to the R&R and Abbott's reply to those objections, the Court adopted Judge Bloom's R&R in its entirety and entered a default judgment against the H&H Defendants. (D.E. # 1613.) Among the Court's findings were that "the H&H Defendants—including the Goldmans—had a duty to comply with the Court's orders, and each willfully and grossly failed to do so." Id. at 15; see also id. at 16, 19 (finding the Goldmans "individually liable for the willful discovery fraud and cover-up they undertook personally or that was undertaken by their agents in their name"); id. at 25 (finding that "the H&H Defendants' withholding of … documents constituted willful discovery misconduct" regardless of the reason they were withheld).

Given the entry of default, on March 24, 2020, the Court ordered briefing on the issue of when the damages inquest under Federal Rule of Civil Procedure 55(b)(2) against the H&H Defendants should occur in relation to trial against the remaining non-defaulting defendants.

Abbott, the H&H Defendants, the G&S Defendants[3] and the S&S[4] Defendants have all submitted briefing on the issue. The H&H Defendants argue that the damages inquest should either (a) come after the non-defaulting defendants' trial; or (b) be consolidated with the non-defaulting defendants' trial. (D.E. # 1614.) Abbott and the S&S Defendants argue that the damages inquest as to the H&H Defendants should be held prior to the trial for the non-defaulting defendants. (D.E. ## 1619, 1622.) The G&S Defendants express no view on the sequencing, arguing only argue that the inquest and trial should not be consolidated. (D.E. # 1618.)

A more developed statement of the facts, issues, and procedural history of this complex action is provided in the Court's September 30, 2019 Memorandum and Order. Familiarity with the matter is here presumed, and the Court recounts only those facts necessary to adjudicate the present issue. For the reasons provided below, the damages inquest shall be held prior to the trial for the non-defaulting defendants.

DISCUSSION

The decision of whether to enter a final judgment against some but fewer than all of the parties in an action is left to the sound discretion of the district court. Bleecker v. Zetian Sys., Inc., No. 12 CIV. 2151 DLC, 2013 WL 5951162, at *6 (S.D.N.Y. Nov. 1, 2013). The standard is governed by Rule 54(b), which provides in relevant part:

> [W]hen multiple parties are involved, the court may direct the entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

[3] Defendants Able Wholesalers of Tennessee LLC, Kevin Singer, Paul Leight, Massalah Trading U.S.A., Ltd. Saad (Sam) Haddad, Matrix Distributors, Inc. Christopher Benevent, Seth Grumet, Drugplace, Inc., Neil Feig, Save Rite Medical.com LLC, Mark Kaplan, Shie Greenfeld, Dream Cereal, Inc. and Douglas Hauck are represented by Goodman & Saperstein LLC, the ("G&S Defendants").

[4] Value Wholesaler, Inc., Adelphia Supply USA, and Primed Pharmaceuticals LLC are represented by Stern & Schurin LLP (the S&S Defendants").

Fed. R. Civ. P. 54(b).

In making such a determination, "there are no fixed criteria." Bleecker, 2013 WL 5951162, at *6 (S.D.N.Y. Nov. 1, 2013) (internal quotation marks omitted). However, courts have interpreted the Supreme Court's nineteenth-century decision in Frow v. De La Vega, 82 U.S. (15 Wall.) 552, 21 L.Ed. 60 (1872) as informing the propriety—at least in certain circumstances—of a court's entering final judgment against a defaulting defendant while answering defendants remain in the action. See id. Accordingly, the Court must determine whether holding a damages inquest and entering final judgment against the H&H Defendants prior to the trial of the non-defaulting defendants is consistent with both Rule 54 and Frow.

A. Frow *and Joint Liability*

The H&H Defendants primarily argue that a damages inquest conducted prior to the trial of the answering defendants is premature and impermissible in light of Frow. Abbott contends that Frow's holding is not controlling here, and that the rationale underlying Frow is not implicated by the facts of the present case. The Court concludes that Frow is not controlling here and does not necessarily prohibit the damages inquest and entry of a final judgment under Rule 54.

In Frow, the plaintiff filed a bill in equity to determine title to a parcel of real property. The pleading alleged that fourteen defendants engaged in a joint conspiracy to defraud plaintiff of the property. When one of these defendants failed to plead, a default judgment was entered against him. The answering defendants proceeded to trial and prevailed on the merits. The Supreme Court vacated the default judgment, observing that it would be "absurd[]" to have "one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge. . . ." Id. at 554.

Accordingly, courts have determined that where Frow applies, notice of defendant's default may be docketed, "but entry of final judgment should be deferred pending disposition as to the non-defaulting defendants, so that the case can be resolved by one final, consistent judgment." Mitchell v. Lyons Prof'l Servs., Inc., 727 F. Supp. 2d 116, 119 (E.D.N.Y. 2010). Exactly when Frow applies and what it stands for, however, is not entirely clear from the opinion itself. See Farzetta v. Turner & Newall, Ltd., 797 F.2d 151, 154 n.2 (3d Cir. 1986) (noting Frow's "ambiguity"). Courts interpreting Frow "have treated this holding narrowly," Rivera v. Mattingly, No. 06-CIV-7077(LAP)(HBP), 2017 WL 7050323, at *6 (S.D.N.Y. June 23, 2017), finding the holding applies to defendants who are jointly liable. See Lemache v. Tunnel Taxi Mgmt., LLC, 354 F. Supp. 3d 149, 152 (E.D.N.Y. 2019) ("[Frow] explained that in a multi-defendant case where defendants are alleged to be jointly liable, entering a default judgment runs the risk of inconsistent judgments.") (emphasis original); Mitchell, 727 F. Supp. 2d at 119 (noting Frow's "holding has been narrowed to cases involving true joint liability") (internal quotation marks omitted); see also 10A Charles Alan Wright, et al., Federal Practice and Procedure: Civil 3D § 2690 (2001) (Frow stands for the proposition that "when one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against that defendant until the matter has been adjudicated with regard to all defendants, or all defendants have defaulted.").

Similarly, the Second Circuit "has cast doubt on the vitality of Frow in light of the subsequent enactment of Federal Rule of Civil Procedure 54(b), which authorizes entry of default judgment against fewer than all parties as long as there is no just reason for delay." Consumer Fin. Prot. Bureau v. NDG Fin. Corp., No. 15-CIV-5211(CMR)(WL), 2018 WL 1605067, at *6 (S.D.N.Y. Mar. 12, 2018) (citing Int'l Controls Corp. v. Vesco, 535 F.2d 742, 746 n.4 (2d Cir. 1976)). The Second Circuit observed that "it is most unlikely that Frow retains any force

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.