UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ARISTA RECORDS, LLC, a Delaware Limited Liability Company, *et al.*,

Plaintiffs,

1:08-CV-0765 (GTS/RFT)

v.

DOES # 1-16,

Defendants.

APPEARANCES: OF COUNSEL:

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Counsel for Plaintiffs
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HON. GLENN T. SUDDABY, United States District Judge

DECISION and ORDER

Currently before the Court in this copyright infringement action is an appeal from a Decision and Order issued by Magistrate Judge Randolph F. Treece on February 18, 2009. (Dkt. No. 40.) The appeal is brought by Defendant Does 3, 7, 11 and 15 ("Defendants"). Magistrate Judge Treece's Decision and Order denied a motion filed by Defendants requesting two alternative forms of relief: (1) the issuance of an Order quashing a subpoena, under Fed. R. Civ. P. 45(c)(3), or (2) the issuance of an Order severing Defendants from this action, under Fed. R. Civ. P. 20 and 21. (Dkt. No. 12.) For the reasons set forth below, Defendants' appeal is denied.

Defendants argue that the appropriate standard of review of Magistrate Judge Treece's Decision and Order is *de novo*, not clear error, because the motion decided by the Decision and Order is dispositive in nature. (Dkt. No. 41.) However, generally, a motion to quash a subpoena is a non-dispositive matter. *See Chesher v. Allen*, 122 F. App'x 184, 187 (6th Cir. 2005); *Etten v, U.S. Food Serv., Inc.*, 2006 WL 1390395, at *4 (N.D. Iowa 2006); *Stacey v. Caterpillar, Inc.*, 901 F. Supp. 244, 246 (E.D. Ky. 1995); *Tri-Star Airlines, Inc. v. Willis Careen Corp.*, 75 F. Supp.2d 835, 839 (W.D. Tenn. 1999).

Granted, Defendants argue, in their motion, that Plaintiff's subpoena should be quashed because, *inter alia*, "Plaintiffs' complaint is not sufficient to state a claim ...." (Dkt. No. 12, ¶ 4.) However, a movant may not convert a motion to quash into a dispositive matter simply by arguing that one of the reasons that the motion to quash should be granted is that the plaintiff's complaint fails to state a claim. *See Interscope Records v. Does 1-12*, 2008 WL 4939105, at *1 (N.D. Ind. 2008) (treating motion to quash subpoena as nondispositive even though defendant argued subpoena should be quashed because complaint did not allege prima facie claim). If a movant could do so, every motion to quash in a First Amendment "right of anonymity" case would be elevated into a dispositive motion. This is because one of the factors to be considered on such a motion is whether plaintiffs have made a concrete showing of a prima facie claim. *See Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp.2d 556, 565 (S.D.N.Y. 2004).

In any event, the Court agrees with Magistrate Judge Treece that unserved defendants such as Defendants Does 6, 7, 11 and 15 may not properly move for dismissal for failure to state a claim. (Dkt. No. 40, at 5-6.) Rule 12(b)(6) confers upon "a party" the right to move to dismiss for failure to state a claim *See* Fed. R. Civ. P. 12(b)(6). Unserved defendants are not yet

"parties" to the action. *Sampson v. Village Discount Outlet, Inc.*, 1994 WL 709278, *2 (7th Cir. 1994). As a result, they may not properly move for dismissal for failure to state a claim. *Chandler v. McKee Foods Corp.*, 2009 WL 210858, at *2 (W.D. Va. 2009); *Flex Homes, Inc., v. Ritz-Craft Corp. of Mich.*, 2008 WL 746669, at *1, n.2 (N.D. Oh. 2008).

Turning to Defendants' motion for severance of claims, the filing of such a motion is also properly viewed as a non-dispositive matter since the practical effect of the motion, if granted, would not be to terminate Plaintiff's claims against Defendants (nor would it be to necessarily terminate the current action). *See Grand River Enterprise Six Nations, Ltd. v. Pryor*, 2008 WL 3166657, at *1 (S.D.N.Y. 2008); *Hawkins v. Waynesburg College*, 2007 WL 4268765, at *1 & n.1 (W.D. Pa. 2007); *Cruzan Terraces, Inc. v. Antilles Ins., Inc.*, 138 F.R.D. 64, 65 (D. V.I. 1991); *U.S. v. Bolden*, 2008 WL 4174914, at *1, n.1 (N.D. Iowa 2008); *U.S. v. Schneider*, 2007 WL 2407060, *1 (E.D. Wis. 2007); *cf. Gwynn v. Clubine*, 302 F. Supp.2d 151, 155, n.1 (W.D.N.Y. 2004).

As a result, the proper standard of review of Magistrate Judge Treece's Decision and Order is clear error, not *de novo*. After carefully reviewing the papers in this action, the Court finds that no clear error in Judge Treece's thorough Decision and Order. Indeed, the Court finds that his Decision and Order would survive even a *de novo* review. The Court makes this finding for the reasons set forth in Judge Treece's Decision and Order. (Dkt. No. 40.) The Court would add only two points.

First, *Bell Atlantic v. Twombly* did not impose a heightened pleading standard, as Defendants argue, but merely clarified the proper pleading standard, which requires only factual allegations plausibly suggesting an actionable claim. *Bell Atlantic v. Twombly*, 127 S.Ct. 1955,

1965-74 (2007). The simplified fair-notice pleading standard of Fed. R. Civ. P. 8(a)(2) still governs, and all complaints must still be liberally construed so as to do justice under Fed. R. Civ. P. 8(e).

Second, in addition to being persuaded by the reasons offered by Judge Treece as to why the parties should not be severed at this time (*see* Dkt. No. 40, at 15-16), the Court is persuaded by (1) the reasons offered in *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp.2d 153, 161, & n.7 (D. Mass. 2008), and (2) defense counsel's representation that at least one of his four clients (Defendant Doe 7) intends to settle with Plaintiffs (*see* Dkt. No. 41, Part 2, ¶ 2).

Finally, in Defendants' appellate papers, defense counsel requests an Order pursuant to Local Rule 83.2(b) and 22 N.Y. Comp. Codes R. & Regs. § 1220.15, permitting him to withdraw as counsel for Defendants Does 7, 11 and 15. (Dkt. No. 41, Part 1, at 2.) Defense counsel asserts that the reason for his request is that Defendants Does 11 and 15 have "failed to comply with an agreement with me regarding fees," and that Defendant Doe 7 no longer would like his services and intends to attempt to settle with Plaintiffs. (Dkt. No. 41, Part 2, ¶ 2.) Defense counsel asserts that, by March 2, 2009, he served his request on Defendant Does 7, 11 and 15. (*Id.*)

ACCORDINGLY, it is

ORDERED that Defendants' appeal from Magistrate Judge Treece's Decision and Order of February 18, 2009 (Dkt. No. 41) is **DENIED**; and it is further

ORDERED that defense counsel's request for an Order pursuant to Local Rule 83.2(b) permitting him to withdraw as counsel for Defendants Does 7, 11 and 15 (Dkt. No. 41) is **GRANTED**; and it is further

ORDERED that defense counsel shall promptly serve a copy of this Decision and Order on Defendants Does 7, 11 and 15, and file an affidavit of such service with the Clerk's Office.

Dated: March 5, 2009
Syracuse, New York

Hon. Glenn T. Suddaby
U.S. District Judge