

<b>EB Brands Holdings, Inc. v McGladrey LLP</b>
2015 NY Slip Op 32764(U)
January 2, 2015
Supreme Court, Westchester County
Docket Number: 64265/14
Judge: Alan D. Scheinkman
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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
COMMERCIAL DIVISION**

**Present: HON. ALAN D. SCHEINKMAN,  
Justice.**

-----X  
EB BRANDS HOLDINGS, INC.

Plaintiff,

-against-

Index No. 64265/14  
Motion Sequence No. 1  
Motion Date: November 14, 2014

**DECISION & ORDER**

McGLADREY LLP, f/k/a McGLADREY &  
PULLEN, LLP,

Defendant.

-----X

Scheinkman, J:

In this action sounding in professional malpractice, Defendant McGladrey LLP ("Defendant" or "McGladrey") moves to dismiss the Complaint of Plaintiff EB Brands Holdings, Inc. ("Plaintiff" or "EB") on a number of grounds:

- a) pursuant to CPLR 3211(a)(4), prior action pending;
- b) alternatively, pursuant to CPLR 3211(a)(5), *res judicata*;
- c) pursuant to CPLR 510 and 511, changing venue to "Justice Oing's Courtroom in New York County".

Plaintiff opposes all aspects of the motion.

**RELEVANT FACTS**

EB is a consumer packaged goods company which is located in Elmsford, Westchester County, New York. McGladrey is a public accounting firm with offices in

New York County. McGladrey performed audit work for EB for a number of years, ending in the 2011 fiscal year.

This litigation has its origins in an action that EB commenced against McGladrey in Supreme Court, New York County on December 17, 2013 (Index No. 654342/13) (the “New York County Action”). Plaintiff selected New York County as the venue based upon its assertion that McGladrey has an office in New York County and some of its partners reside in New York County. McGladrey moved to dismiss the Complaint in the New York County Action and filed a Request for Judicial Intervention, which led to the case being assigned to Hon. Jeffrey K. Oing, Supreme Court Justice, New York County, Commercial Division.

Rather than opposing McGladrey’s motion, EB interposed an Amended Complaint. Once again, McGladrey moved to dismiss; a motion that was opposed by EB.

Justice Oing heard oral argument on the motion to dismiss the Amended Complaint on August 14, 2014. After a lengthy argument (the transcript of just the argument portion of the proceedings spans 86 pages), Justice Oing proceeded to determine the motion by oral decision spread on the record. Justice Oing commenced the decision by announcing the result: “I am going to grant the motion to dismiss and dismiss the complaint,” finding that “the allegations here are insufficient to plead a claim for professional malpractice, gross negligence, or breach of contract” (Affirmation of Veronica Rendón, dated October 17, 2014, Ex. 4, Transcript [“NYTr.”] at 86). The Court proceeded to explain the basis for its decision over the next 6 pages. At the end, the Court added a caveat to its decision: “Of course, the dismissal is without prejudice to the plaintiff’s decision, if they are so advised to replead. And that’s where we stand. So that’s my decision and order” (*id.* at 92). Justice Oing directed that McGladrey’s counsel, as the moving party, order the transcript and stated that he would “so order” the transcript (*id.*).

On August 14, 2014, Justice Oing signed an order which stated that “the motion [was] decided on the record, noted that the movant had been directed to order the transcript, and that the transcript would be ‘so ordered.’” This order of August 14, 2014 [the “Dismissal Order”] was entered by the New York County Clerk on August 18, 2014.

It appears from the moving papers (Ex. 4 to Rendón Aff.) that counsel for McGladrey served the Dismissal Order as well as the transcript which was “so ordered” on September 2, 2014, with notice of entry. The notice of entry refers only to the order entered on September 2, 2014, and not to the order of August 14, 2014. This discrepancy is immaterial for purposes of this Decision and Order.

Instead of filing a further amended Complaint, as was allowed by Justice Oing, EB commenced a new action in this Court (Supreme Court, Westchester County) on September 8, 2014. Following a Preliminary Conference held by this Court on October 3, 2014, McGladrey filed the present motion to dismiss.

### THE PARTIES' CONTENTIONS ON THIS MOTION

In support of the aspect of its motion that seeks dismissal on the grounds that a prior action (the New York County Action) is pending, McGladrey asserts that, because Justice Oing gave Plaintiff leave to replead, and that Plaintiff "could have filed" a further amended complaint, the New York County Action is still pending (Def. Mem. at 6).

In response to the contention of Plaintiff's counsel at the October 3, 2014 Preliminary Conference that the Dismissal Order reflects that a box, appearing on a pre-printed line underneath Justice Oing's signature, was checked so as to indicate the case was "disposed," McGladrey argues that this was simply an administrative formality (*id.* at 6).

Alternatively, argues McGladrey, if the New York County Action was finally disposed, then the present case in Westchester should be viewed as barred *by res judicata*. McGladrey asserts that EB cannot have it both ways: either the New York County Action is still pending, in which event this second action should be dismissed for prior action pending, or the New York County is disposed, in which event *res judicata* should bar this action (*id.* at 7).

McGladrey argues that EB's filing of a second action in Westchester County may deprive it of the benefit of the "law of the case" doctrine that it would have had if the action had proceeded before Justice Oing. Further, says McGladrey, if EB wants to amend the Westchester Complaint as of right, it might have the ability to do so, even though it used up its as of right amendment in New York County. It also points out that, if this Court were to dismiss the Westchester Complaint, EB might try to replead in the New York County Action, given that Justice Oing did not set a specific time limit for a repleading in his court (*id.* at 8). McGladrey contends that Justice Oing is in the best position to judge whether Plaintiff's new pleading overcomes the defects Justice Oing identified in his dismissal decision, pointing out its belief that EB did not fix the deficiencies (*id.* at 9-10).

To the extent that Plaintiff's counsel offered at the Preliminary Conference to forego its opportunity to replead in New York County, McGladrey contends this maneuver would be a "procedural fiction" (*id.* at 10).

McGladrey asserts that Plaintiff is engaging in forum-shopping and judge-shopping, contrary to the spirit of the Individual Assignment System. It asserts that if EB succeeds with the tactic of bringing its case here, a dangerous precedent would be set whereby a plaintiff, who has multiple possible venues to choose from, could simply file a new case in a different county if its case is dismissed on motion in the county originally selected (*id.* at 13-14).

In opposition, EB denies any intention to forum-shop. It states that, after Justice Oing dismissed the New York County Action, EB's executives and Board decided to take a more active role in the litigation and, therefore, requested that counsel file a new action in Westchester County, where the courthouse is within miles of EB's headquarters (Plf. Mem. at 5). It contends that the institution of an entirely new action is permitted by CPLR 205, which, for purposes of statute of limitations, permits a new action (which would otherwise be time barred) to be brought within six months of a dismissal without prejudice.

EB takes McGladrey to task for not proceeding with its original intention to move for a change of venue under CPLR 511, notwithstanding its service of a demand for a change in venue (Plf. Mem. at 6-7).

More to the present point, EB contends that the New York County Action is not pending because Justice Oing dismissed that case and caused the Dismissal Order to be marked "case disposed" (Plf. Mem. at 7-8). EB asserts that there is nothing pending before Justice Oing or any other court (such as the Appellate Division, First Department) and, therefore, there is nothing that could be said to be "pending" under standard dictionary definitions of that term (*id.* at 8).

EB contends that there is no basis to transfer venue to New York County. It argues that the rule establishing the IAS System (22 NYCRR §202.3) only means that each case should be presided over by a single judge and has no application to a situation where new action is brought after a prior case was dismissed and marked disposed (*id.* at 13). EB states that venue is proper in Westchester because its headquarters are here and McGladrey has not shown that the convenience of witnesses and the ends of justice would be promoted by a discretionary change of venue (*id.* at 16).

As to *res judicata*, EB argues that a dismissal without prejudice is not *res judicata*. The Court notes that the principal case cited by EB involved a situation where both the first and the second cases were brought in the same county and were decided by the same judge (*see Canzona v Atanasio*, 118 AD3d 841 [2d Dept 2014] and *Canzona v Atanasio*, 118 AD3d 837 [2d Dept 2014]). Likewise, EB claims that "law of the case" does not apply. Nevertheless, EB claims that it has taken "careful steps" to

address the issues pointed out by Justice Oing, at least thereby acknowledging the prospect that any decision in this action as to the sufficiency of the Complaint would be informed, if not controlled, by Justice Oing's decision.

### THE NEW YORK COUNTY ACTION IS STILL PENDING

The Court concludes that the New York County is still pending.

The Court proceeds from the principle that all civil actions and proceedings end in judgments (CPLR 5011; Siegel, *New York Practice* § 409 at 716 [5th ed 2011] ["[a]ll actions and proceedings in the usual courts of civil jurisdiction today end in a 'judgment'"]). The doctrines of *res judicata* and collateral estoppel require a final judgment (Siegel, *supra*, at §444). On the other hand, motions are the expedients for securing orders, *i.e.*, motions are applications for orders. Orders are the directives by which courts manage litigation and resolve certain disputes between the parties (Siegel, *supra*, § 243 at 422). Since it is a judgment that is needed to conclude a case and there is no judgment in the New York County Action, the Court views that case as pending.

The Court views the Dismissal Order (whether the short form order signed and entered on August 14, 2014 or the "so ordered" transcript filed on September 2, 2014) as an order which determined McGladrey's motion to dismiss. However, neither side herein has claimed that a judgment was entered on that order.

There are at least some remaining ministerial issues that would be addressed in the judgment, such as whether McGladrey is entitled to any costs or disbursements. But more importantly, even if it is assumed that the time within which EB could appeal the Dismissal Order has expired without an appeal being taken, once a judgment is entered, EB could appeal from the judgment and bring up the Dismissal Order for review (*see, e.g., Matter of Aho*, 39 NY2d 241, 248 [1976]). It is well known that a party aggrieved by a non-final determination has the option of taking it up for review with an immediate appeal or elect to wait for final judgment (*see Siegel, supra*, at §542). Thus, in the case, if EB had elected to replead and McGladrey moved to dismiss the pleading thus amended, and if the motion were granted and no further repleading was permitted, once judgment was entered, EB could have appealed both the original and the second dismissal order.

Thus, even if it is assumed that there is nothing presently pending in New York County, the fact remains that at any time either party could seek to enter judgment and, upon entry of judgment, an appeal could be taken from the judgment so as to obtain appellate review of the Dismissal Order. Stated otherwise, if nothing is

immediately pending in New York County, that is only because the parties have decided not to do what should be done to bring the New York County Action to conclusion.

Entertaining this action at this time would create the possibility, if not the likelihood, that sooner or later there would be simultaneous, or contemporaneous, appeals to different Appellate Division Departments in the same case. Specifically, if this Court were to determine that this Complaint is legally sufficient (putting aside whether Justice Oing's decision sets the governing standard or not), McGladrey might well appeal to the Second Department, prompting EB to have judgment entered against it so that it could appeal the Dismissal Order to the First Department.

Further, notwithstanding the disclaimer of counsel for EB of any intent to take advantage of Justice Oing's grant of leave to replead, the fact remains that EB could do it at any time, perhaps even after changing counsel. And, a repleading would clearly trigger another motion before Justice Oing.

The Court does not accept the contention advanced by EB that the administrative markings which appear underneath Justice Oing's signature are controlling or even meaningful. Since the markings were made under the judge's signature, it may reasonably be assumed that the Judge did not make them or take responsibility for them. These markings are made so that the clerks may enter the status of the case on the court's computer records and are not substantive decisions. For example, if EB did seek to replead, it would doubtless not be prevented from doing so on the ground that a check in the wrong box somehow overruled or rescinded Justice Oing's specific grant of leave to replead.

For these reasons, this Court views the New York County as dormant but, nonetheless still pending for purposes of CPLR 3211(a)(4). That said, the Court is not obligated to dismiss this case on that ground. Rather the statute authorizes the Court to dismiss or "make such order as justice requires."

Here, the parties, if they so desire, can bring the New York County Action to closure. For example, the New York County Action would be completely disposed by: (a) counsel entering into a binding stipulation to waive the opportunity to replead conveyed in the Dismissal Order; and (b) entering judgment in favor of McGladrey and then either (1) stipulating to waive any right of appeal from the judgment; (2) taking an appeal from the judgment and having the appeal determined; or (3) commencing the running of the time to appeal from the judgment and allowing that time to expire without an appeal being taken.

The Court believes that the appropriate course of action here is to stay this action until such time as the New York County Action is finally determined (see David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B,

CPLR C3211:20). Of course, in the event that new or different circumstances arise which cause counsel to for either party to seek relief from the stay provided herein, counsel are free to contact the Court for the purposes of seeking a pre-motion conference pursuant to Rule 24 of the Commercial Division Rules.

In view of this determination, it is not necessary to reach the other contentions advanced by the parties.

### CONCLUSION

The Court has considered the following papers:

1. Notice of Motion dated October 17, 2014; Affirmation of Veronica E. Rendón, Esq. dated October 17, 2014, together with the exhibits annexed thereto; and Memorandum of Law in Support of Motion dated October 17, 2014;
2. Affirmation of Joshua A. Berman, Esq. dated October 31, 2014, together with the exhibits annexed thereto; Memorandum of Law in Opposition to Motion dated October 31, 2014; and
3. Reply Memorandum of Law dated November 10, 2014.

Accordingly, for the reasons stated and based upon the papers aforesaid, it is hereby

ORDERED that the motion by Defendant McGladrey LLP, f/k/a McGladrey & Pullen, LLP, made pursuant to CPLR 3211(a)(4), to dismiss the Complaint of Plaintiff EB Brands Holdings, Inc., because of prior action pending, or pursuant to CPLR 3211(a)(5) as barred by *res judicata*, or, pursuant to CPLR 510 and 511, to change the place of trial is granted in part and denied part; and it is further

ORDERED that the branch of the said motion by said Defendant which is to dismiss the Complaint of said Plaintiff, pursuant to CPLR 3211(a)(4), because of prior action is pending is granted to the extent that this action shall be, and is hereby, stayed pending the final determination of the action pending in Supreme Court, New York County (Index No. 654342/13) entitled *EB Brands Holdings, Inc. v McGladrey LLP, f/k/a McGladrey & Pullen, LLP*) or further order of this Court; and it is further


ORDERED that, except to the extent set forth above, the said motion by

said Defendant is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York  
January 2, 2015

E N T E R :



ALAN D. SCHEINKMAN  
Justice of the Supreme Court

APPEARANCES:

TROUTMAN SANDERS, LLP

By: Joshua A. Berman, Esq.  
Stephen G. Rinehart, Esq.  
Mary Jane Yoon, Esq.

Attorneys for Plaintiff EB Brands Holdings, Inc.  
405 Lexington Avenue  
New York, New York 10174-0700

ARNOLD & PORTER, LLP

By: Veronica E. Rendón, Esq.  
Mary E. Sylvester, Esq.  
Bret A. Finkelstein, Esq.

Attorneys for Defendant McGladrey LLP, f/k/a McGladrey & Pullen, LLP  
399 Park Avenue  
New York, New York 10022