Sleep Services of America, *et al.*	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
McBee Associates, Inc.	*	ANNE ARUNDEL
Defendant.	*	Case No. C-08-131424

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MEMORANDUM OPINION

This matter came before the Court on October 9, 2008, for a hearing on Defendant's Motion to Stay Proceedings. Upon consideration of the arguments of the parties, both written and oral, the Court presents its conclusions below.

BACKGROUND

Plaintiff Sleep Services of America ("SSA") and Plaintiff Do You Snore, Maryland ("DYS-M)[1] allege that they suffered damages in the purchase of three Georgia-based businesses. This litigation arises from the acquisition of the Georgia-based companies, Do You Snore, LLC, Southern Medical Equipment, Inc., and Advanced Sleep Technologies of Georgia, Inc. (collectively "Georgia Companies"). All of the Georgia Companies provided sleep diagnostic services in Georgia. Prior to the acquisition, the Georgia Companies and Plaintiffs engaged in detailed negotiations and due diligence. The Georgia Companies supplied financial statements and relevant records to Plaintiffs and Plaintiffs hired McBee Associates, Inc. ("McBee") to conduct a due diligence review of the of the Georgia Companies' operations. Following the receipt of McBee's Due

[1] Do You Snore, Maryland ("DSY-M") was formed to acquire the assets of the Georgia-based Do You Snore, LLC.

Diligence Final Report of March 21, 2007, Plaintiffs purchased the Georgia Companies for approximately $11,500,000.

I. The Georgia Action

On December 10, 2007, Plaintiffs filed a civil complaint in the Superior Court of Fulton County, Georgia ("Georgia Action") against Randall Lenz, Jeffrey Kunkes, M.D., Renee McPhee, and McPhee Properties. The complaint alleges breach of contract and fraud, stemming from the Plaintiffs' acquisition of the Georgia Companies. In particular, Plaintiffs allege that Renee McPhee and Randall Lenz[2] knew that the Georgia Companies' financial statements provided during negotiations and attached to the Asset Purchase Agreement were "incorrect and misleading in that they substantially overstated accounts receivables and understated accounts payable and, thus substantially overstated earnings." As a result of the alleged overstatement of earnings, Plaintiffs claim that they paid too much for the Georgia Companies.

II. The Maryland Action

Several months later, on April 29, 2008, Plaintiffs filed suit in this Court against McBee Associates, Inc. The Maryland Action claims that Plaintiffs sustained losses as a result of McBee's failure to perform the obligations and duties required of proper due diligence. Plaintiffs claim damages of $5,000,000, alleging negligence and breach of contract for "failing to identify material weaknesses in multiple areas of [the Georgia Companies] and by failing to identify material misstatements and misrepresentations in [the Georgia Companies'] financial statements." Plaintiffs allege that McBee "failed to discover that [the Georgia Companies] had materially understated [their] accounts

[2] At the time of the purchase, Renee McPhee was a shareholder and CEO of the Georgia Companies. Randall Lenz was a lawyer and accountant for the Georgia Companies

payable." Further, Plaintiffs claim that McBee breached its agreement by failing to identify material issues that would have impacted Plaintiffs' decision to acquire the assets of the Georgia Companies and by failing to competently perform the proper detailed assessment and analysis of key areas of the Georgia Companies.

On June 20, 2008, Defendant McBee filed its Response. That same day, McBee counterclaimed against Plaintiffs and brought a Third-Party Complaint for indemnification or contribution against Renee McPhee, Mrs. Blondeau, Mrs. Coleman, and Randall Lenz ("Third-Party Defendants"),[3] alleging that Third-Party Defendants fraudulently or negligently misrepresented the financial performance of the Georgia Companies.

On October 9, 2008, the parties appeared before this Court for a hearing on Defendant McBee's Motion to Stay Proceedings. To ensure that the Maryland Action does not proceed unnecessarily, to prevent judicial waste, and duplicative efforts by the parties, McBee argues that the Maryland Action should be stayed until the Georgia Action has been finally resolved.

JUDICIAL STANDARD

The ability to stay proceedings is "incidental to the power inherent in every court to control the disposition of the causes of its docket with the economy of time and effort for itself, for counsel, and for litigants. *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). In the interest of justice, the Court may stay proceedings pending the determination of "another proceeding that may affect the issues raised." *Coppage v. Orlove*, 262 Md. 665, 666 (1971); *Vaughn v. Vaughn*, 146 Md. App. 264, 279 (2002). *See also* MD. R. 2-508; MD. CODE ANN., CTS. & JUD. PROC. § 6-104(a). A stay is only

[3] Renee McPhee and Randall Lenz are also named Defendants in the Georgia Action.

proper when "the parties, the facts, and the essential basis of the relief" of two cases are "so much the same that if the pending case had already been disposed of it could be pleaded in bar as a former adjudication of the same matter." *Coppage v. Orlove*, 262 Md. 665, 666 (1971) (citations omitted).

Though the requirements set forth in *Coppage* are necessary for a stay in proceedings to be proper, they are not sufficient; proceedings may only be stayed in the interest of justice. "The granting or refusing of a stay rests in the discretion of the court." *Waters v. Smith***,** 27 Md. App. 642, 651 (1975) (citations omitted). It is precisely because the Court is granted such discretionary power in grating or dismissing a stay in proceedings that the wielding of it must be "exercised with extreme caution and a stay should not be ordered if it will work injustice." *Id.*

DISCUSSION

For the reasons set forth below, this Court is convinced that a stay in the Maryland Action would be both improper and unjust.

I. The Georgia Action and the Maryland Action involve different parties and different claims

Although both claims flow from the same transition, the Maryland and Georgia actions involve different claims asserted against different parties. In the Georgia Action, Plaintiffs filed suit against Renee McPhee, Randall Lentz, Jeffrey Kunkes, M.D., and McPhee Properties. In the Maryland Action, Plaintiffs filed suit against McBee Associates, Inc.[4] McBee is not a defendant in the Georgia Action and, in fact, is not even mentioned in the Georgia complaint.

[4] Through McBee's Third-Party Complaint, Renee McPhee, Randall Lenz, Kristin Blondeau, and Karen Coleman were all added as Third-Party Defendants in the Maryland Action.

Logically, the Maryland and Georgia actions involve different defendants because the claims themselves that give rise to the two actions involve different parties. The Georgia Action is based, in large part, on Georgia-Defendant Renee McPhee's breaches of certain representations and warranties. Specifically, more than half of the claims in the Georgia Complaint relate to Renee McPhee individually.[5] On the other hand, the Maryland action is built on the foundation of Plaintiffs' relationship with, and the due diligence performed by, McBee Associates Inc.

II. A stay in the Maryland Action would be unjust

Although the actions pending here and in Georgia may involve some overlapping facts, dissimilarities exist between the two actions rendering a stay in this Court improper, particularly at this stage of the litigation. Considering the procedural posture of both cases, it is in the interest of justice that the Maryland action not be stayed and proceed as scheduled.

By Order dated May 14, 2008, the Superior Court of Fulton County stayed all discovery and ordered the Georgia parties to mediate their disputes. Though the stay has recently been lifted, no defendant in the Georgia action has yet filed an answer. According to Georgia Uniform Superior Court Rule 5.1, there is a six-month discovery period after the filing of an answer. Therefore, no discovery has been exchanged in the Georgia Action and discovery in Georgia will not be concluded for at least six months.

In contrast, the Maryland parties have already exchanged written discovery. All discovery in the Maryland action will conclude on December 26, 2008, and the case is scheduled to be closed by October 26, 2009. The Maryland Action has an established scheduling order and discovery is proceeding.

[5] *See* Counts II, III, IV, V, VIII, and Count XII of the Georgia Complaint.

Moreover, the Georgia Action has recently been transferred from Fulton County to Dekalb County, Georgia. The transfer of the Georgia Action to another venue adds to the procedural distance between the Maryland and Georgia actions. Therefore, though the Maryland Action is the later-filed case, it is procedurally more advanced than the Georgia Action.

Case-processing time is a vital justice issue and a priority of the Maryland Judiciary. In Maryland, the energy of the Judiciary is concentrated on the fair and expeditious disposition of cases. Balancing Maryland's commitment to the timely disposition of cases with the procedural posture of the Maryland and Georgia actions, it will not serve the interest of justice to stay the Maryland Action.

Therefore, even if the parties were the same or had the same interests, a stay would nonetheless be unnecessary and improper because justice requires, in light of the unique facts of this case, that the Maryland Action proceed.

DISCUSSION

A stay in the Maryland proceedings would be both improper and unjust. For the reasons set forth in this Memorandum Opinion, the Court shall enter the order attached hereto.

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Ronald A. Silkworth, Judge
Circuit Court for Anne Arundel County