08-4879-cv

United States Court of Appeals

for the

Second Circuit

LUISA C. ESPOSITO,

Plaintiff-Appellant,

– v. –

STATE OF NEW YORK, OFFICE OF COURT ADMINISTRATION OF THE UNIFIED COURT SYSTEM, THOMAS J. CAHILL, in his official capacity, NAOMI GOLDSTEIN, in her official capacity, ALBERT S. BLINDER, in his official capacity, HARVEY GLADSTEIN & PARTNERS LLC, formerly known as GLADSTEIN & ISAAC, ALLEN H. ISAAC, individually and as a partner of HARVEY GLADSTEIN & PARTNERS LLC formerly known as GLADSTEIN & ISAAC, JOHN DOES, JANE DOES, CITY of NEW YORK,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE ALLEN H. ISAAC, INDIVIDUALLY AND AS A PARTNER OF HARVEY GLADSTEIN & PARTNERS LLC FORMERLY KNOWN AS GLADSTEIN & ISAAC

GORDON & REES LLP
Attorneys for Defendant-Appellee Allen H. Isaac, individually and as a partner of Harvey Gladstein & Partners LLC formerly known as Gladstein & Isaac
90 Broad Street, 23rd Floor
New York, New York 10004
(212) 269-5500

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COUNTER STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Did Judge Scheindlin correctly dismiss Plaintiff-Appellant Luisa Esposito's ("Esposito") Second Amended Complaint.

2) Did Judge Scheindlin correctly determine that the District Court lacked subject matter jurisdiction over the claims against Defendant-Appellee Allen H. Isaac ("Isaac").

3) Did Judge Scheindlin correctly decline to exercise pendent jurisdiction over the state law claims against Isaac after holding that the District Court lacked subject matter jurisdiction over the federal law claims against Isaac.

COUNTER STATEMENT OF THE FACTS[1]

This litigation arises out of Esposito's retention of Defendant-Appellee Pollack, Pollack, Isaac & DeCicco to represent her in a lawsuit resulting from a car accident. (A. 17). In May or June of 2005, that firm forwarded the case file to Defendant-Appellee Gladstein & Isaac. (A. 17). On or about July 8, 2005, Esposito went to the offices of Gladstein & Isaac to meet with one of the attorneys for trial preparation. (A. 17). During this meeting, Esposito alleges that attorney grabbed Esposito's left breast. (A. 17). After the meeting, that attorney told Esposito that if

[1] The facts in this section are taken from Esposito's Second Amended Complaint and were assumed to be true for purposes of Isaac's pre-answer motion to dismiss.

she were to tell anyone what happened, he would no longer represent her. (A. 17).

Esposito alleges that the attorney then began to continuously harass her. (A. 17). He repeatedly telephoned Esposito, asked her to compile a list of sex acts that she could no longer perform as a result of the accident, demanded details of her personal life, and requested that she send him provocative photos. (A. 17-18). Esposito allegedly recorded some of these conversations. (A. 18). On another occasion, Esposito alleges, the attorney demanded that Esposito try on clothing in front of him, grabbed her breasts, and told her that he would not represent her unless she performed oral sex on him. (A. 18).

In October or November of 2005, Esposito contacted the New York County District Attorney and met with ADA Jennifer Steiner Crowell, who interviewed Esposito and had her sign medical releases. (A. 18). Crowell told Esposito she would pursue charges of extortion, coercion, and sexual abuse against the attorney. (A. 18).

On December 23, 2005, Esposito called the Rape Crisis Hotline and was sent to meet with Detective Arbuiso of the Manhattan Special Victims Unit. (A. 18). Arbuiso questioned Esposito and Wyckoff about the assault and then told them that he would arrest the attorney. (A. 18-19). However, some time later, Arbuiso told Esposito that he wanted to make the arrest but was unable to do so. (A. 19). He also explained that it was ADA Lisa Friel that was not allowing the

arrest. (A. 19).

In February of 2006, Esposito was called to meet with Crowell and Friel. (A. 19). She had brought an attorney, but the attorney was not permitted in the room. (A. 19). Friel told her that that attorney's version of the story was more credible. (A. 19). The D.A.'s office closed the investigation. (A. 19). Esposito then hired an attorney, Anthony Denaro, who sent a letter to Police Commissioner Raymond Kelly asking that the attorney be arrested. (A. 19).

In October or November of 2005, Esposito filed a grievance with the Appellate Division, First Department, Departmental Disciplinary Committee ("DDC") against the attorney. (A. 19-20). The grievance was handled by Naomi Goldstein. (A. 20). From 2006 through 2007, Goldstein conducted telephone interviews of Esposito. (A. 20). The DDC began hearings in April of 2007. (A. 20). The Hon. Albert S. Blinder was the referee on the complaint. (A. 20). At the hearings, the DDC produced transcripts of Esposito's recordings that were inaccurate and refused to return the original tapes to Esposito. (A. 20). On May 1, 2007, Esposito wrote numerous letters to various judges of the New York State Courts. (A. 20). Esposito also complained to Thomas J. Cahill, Chief Counsel for the DDC. (A. 20).

On May 30, 2008, Esposito filed her Second Amended Complaint with the United States District Court for the Southern District of New York. (A. 69). All

Defendants-Appellees filed pre-answer motions to dismiss. (A. 6-8).

In a detailed, 55-page decision dated August 8, 2008, the Honorable Shira A. Scheindlin, United States District Judge for the Southern District of New York, granted the Defendants-Appellees' motions in their entirety. (A. 14-55).

This appeal followed.

SUMMARY OF ARGUMENT

Pursuant to Section 1983, Esposito claims that all Defendants-Appellees violated her rights to due process and equal protection, as well as her First Amendment right to petition the government for redress of grievances. (A. 20). She also claims that the City of New York, Kelly, Arbuiso, and Lamboy violated her rights to due process and equal protection. (A. 20-21). Finally, she pleads state law breach of contract, breach of fiduciary duty, and assault claims against the attorney, Harvey Gladstein & Partners, LLC and Pollack, Pollack, Isaac & DeCicco. (A. 21).

In properly dismissing the Section 1983 claim as against Isaac, the District Court held that a plaintiff must show that the conduct complained of was committed by a person or entity acting under color of state law and that the conduct deprived a person of rights, privileges or immunities secured by the Constitution. (A. 46-47)

In properly dismissing Esposito's state law claims, the court declined to exercise supplemental jurisdiction because all federal law claims were dismissed and the underlying disputes were more appropriate for litigation in state court. (A. 62-63).

ARGUMENT

I. THE STANDARD OF REVIEW

The appropriate standard of review over a District Court's dismissal of a claim under Rule 12(b)(6) is *de novo*. *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 115 (2d Cir. 2008). The allegations of the Complaint are to be taken as true, and the Court is to determine whether, under any theory, the allegations are sufficient to state a cause of action in accordance with the law. *Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (2d Cir. 1994).

A claim may be dismissed on motion of a party where the claims fail to state a valid cause of action. Fed. R. Civ. P. 12(b)(6). Such a motion should be granted if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989)(internal quotation marks and citation omitted). Although on a motion to dismiss, the well-pleaded allegations in the Complaint are to be taken as true, *Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 188 (2d Cir. 1998), a plaintiff must provide concrete facts to establish each and every element of her claim in order to "justify dragging a defendant past the pleading threshold." *DM Research, Inc. v. College of Amer. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999)(citations omitted).

II. THE DISTRICT COURT PROPERLY DISMISSED ESPOSITO'S SECTION 1983 CLAIMS

Esposito contended in vague and conclusory fashion that Isaac, a private attorney, somehow, someway and in some equally vaguer manner conspired with city and state officials to deprive her of rights guaranteed under the First and Fourteenth Amendments of the United States Constitution and is therefore liable under Section 1983. (A. 71-89). To survive a motion to dismiss, this Court has held that a plaintiff's complaint must allege facts establishing three elements: "(1) two or more people entered into an agreement; (2) the alleged co-conspirators shared in the general objective of the conspiracy; and (3) the particular defendant committed an act in furtherance of the conspiracy." *Jones v. Nat'l Commc'n & Surveillance Networks*, 409 F. Supp. 2d 456, 472 (S.D.N.Y. 2006), citing *Ciambriello v. County of Nassau*, 292 F.3d 307, 324-25 (2d Cir. 2002). *See also Leon v. Murphy*, 988 F.2d 303, 311 (2d Cir. 1993).

District Courts routinely dismiss complaints that fall short of this pleading standard. *See, e.g., Jones* 409 F. Supp. 2d at 472 (dismissing Section 1983 lawsuit brought because plaintiff's complaint "never properly allege[d] a meeting of the minds, nor identifie[d] the individuals that affected such [an] agreement"); *Fisk v. Letterman*, 401 F. Supp. 2d 362 (S.D.N.Y. 2005)(same); *Pollack v. Nash*, 58 F. Supp. 2d 294, 300 (S.D.N.Y. 1999)(same).

This Complaint, bereft of any operative facts showing a coordinated plan by Isaac and government officials to deprive Esposito of her civil rights, deserved the same fate. Esposito neither alleged what role Isaac played in this alleged conspiracy, nor offered any concrete examples of overt acts. Instead, Esposito pointed to alleged instances of Isaac's sexual advances, which are patently insufficient to impose liability. (A. 76-77). *See also Fine v. City of New York*, 529 F.2d 70, 74 (2d Cir. 1975)(observing that private attorney is not a state actor).

Moreover, Esposito's own pleadings contain allegations that thoroughly undermine her theory of a conspiracy. Defendant-Appellee Goldstein, who handled Esposito's complaint, allegedly told her that Isaac had been asked "to hand in his law license with admissions to sexually and physically abusing Plaintiff." (A. 81). Defendant-Appellee Arbuiso allegedly expressed a strong desire to arrest Isaac. (A. 79). Contrary to Esposito's claim that they unlawfully colluded with Isaac, their actions suggested a desire to punish him.

Nothing in Esposito's Complaint comes close to "some factual basis supporting a meeting of the minds, such that the defendants entered into an agreement, express or tacit, to achieve an unlawful end." *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003) quoting *Romer v. Morgenthau*, 119 F. Supp. 2d 346, 363 (S.D.N.Y. 2000). Because Esposito utterly failed to present any facts that could

plausibly establish a conspiracy, the District Court properly dismissed Esposito's Section 1983 claims.

III. THE DISTRICT COURT PROPERLY DECLINED TO EXERCISE PENDENT JURISDICTION OVER ESPOSITO'S STATE LAW CLAIMS

The District Court has broad discretion to dismiss state law claims when a litigant's federal claims fail. *Brennan v. Metro. Life Ins. Co.*, 275 F.Supp.2d 406, 411 (S.D.N.Y. 2003)(Scheindlin, J.). Judicial economy, fundamental fairness, and the existence of duplicative litigation all militated in favor of dismissal of Esposito's state law claims. *See Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006). So did the lack of diversity between the parties. (A. 72-73). Federal courts routinely dismiss state law claims when all federal claims in a complaint are dismissed before trial. *Castellano v. Board of Trs. of Police Officers' Variable Supplements Fund*, 937 F.2d 752, 758 (2d Cir. 1991); *Bilyou v. Dutchess Beer Distribs., Inc.*, No 99 Civ. 4231, 2001 WL 286779, at * 1 (S.D.N.Y. Mar. 9, 2001)(dismissing New York State Labor Law claims where all federal claims were dismissed), *aff'd*, 300 F.3d 217 (2d Cir. 2002).

Because Esposito's federal claims were barred as a matter of law, the District Court properly declined to address Esposito's state law claims sounding in breach of contract, breach of fiduciary duty and assault.

IV. EVEN IF THE DISTRICT COURT EXERCISED PENDENT JURISDICTION, ESPOSITO'S CLAIMS ARE FLAWED

A. Nearly identical state law claims are pending in state court.

The state law claims in the District Court were based on facts recited in a complaint filed in the New York County Supreme Court back in 2006. *See Esposito v. Isaac*, Index No. 109446/06 (Supreme Court New York County, 2006). Permitting Esposito to press these duplicative claims posed the danger of piecemeal litigation in multiple forums. *See Curtis v. Citibank, N.A.*, 226 F.2d 133, 138 (2d Cir. 2000)(observing that dismissal of duplicative lawsuits "protect[s] parties from the vexation of concurrent litigation over the same subject matter.")(Citation and internal quotation marks omitted). *See also Green v. Wolf Corp.*, 406 F.2d 291, 297 (2d Cir. 1968)("... early in the development of our civil procedures it became apparent that judicial efficiency demanded the elimination of multiple suits arising from the same facts and questions of law"). Dismissal was therefore appropriate.

B. Esposito's assault claim is time-barred.

Esposito's fourth cause of action was premised on alleged assaults occurring on July 8, 2005, and Sept. 16, 2005. (A. 76-77). Assault claims in New York are governed by a one-year statute of limitations. N.Y. C.P.L.R. 215(3). Esposito's

claim, brought more than a year after the alleged assaults, is therefore untimely and was properly dismissed.

C. Esposito's breach of fiduciary duty and breach of contract claims are duplicative.

Esposito's claims alleging breach of fiduciary duty and breach of contract are based on the same operative facts and must be dismissed under New York law. (A. 89-90). "A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand." *William Kaufman Org., Ltd. v. Graham & James*, 269 A.D.2d 171, 173, 703 N.Y.S.2d 439, (1st Dep't 2000)(citation omitted). Thus, Esposito's second and third causes of action were properly dismissed.

CONCLUSION

Isaac respectfully requests this Court affirm the District Court's decision and conclude that the grant of Isaac's pre-answer motion for judgment was entirely proper.

Dated: New York, New York
January 8, 2009

Respectfully submitted,

GORDON & REES, LLP

By: Thomas Coppola

Thomas B. Coppola (TC 1349)
Attorneys for Appellee
Allen H. Isaac
90 Broad Street, 23rd Floor
New York, New York 10004
Phone: 212-269-5500
Fax: 212-269-5505

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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LUISA C. ESPOSITO

Case No.: 08-4879-cv

Plaintiff-Appellant,

CERTIFICATION OF COMPLIANCE

-against-

THE STATE OF NEW YORK, ET AL.,

Defendants-Appellees.

----------X

I, Thomas B. Coppola, counsel to the Defendant-Appellee Allen H. Isaac, individually and as a partner of Harvey Gladstein & Partners LLC, formerly known as Gladstein & Isaac, hereby certify pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure that the foregoing brief complies with the type-volume limitation of Fed. R. App. 32 (a)(7)(B)(i) and contains less than 14,000 words, to wit: 2,161 words.

Dated: January 7, 2009

Thomas Coppola

Thomas B. Coppola

H

United States District Court, S.D. New York.
Michael BILYOU, individually and on behalf of others similarly situated, Plaintiff,
v.
DUTCHESS BEER DISTRIBUTORS, INC., Defendant.
No. 99 CV 4231 CM.

March 9, 2001.

Bleakley Platt & Schmidt, White Plains.
Dan Getman, Getman & Selcov, New Paltz.

MEMORANDUM DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MCMAHON, J.

*1 Plaintiff Michael Bilyou ("Bilyou") was employed as a route distributor by Defendant Dutchess Beer Distributors, Inc. ("DBD") from June 1986 to January 1999, when he was terminated for cause. DBD is located in New York, with warehouses in Poughkeepsie and Kingston, and Bilyou's distribution route was entirely within New York State. DBD's main supplier of product is Anheuser-Busch ("Busch") in St. Louis, Missouri, with production facilities in various states including New Jersey and New Hampshire.

Bilyou has instituted the present lawsuit in which he claims DBD failed to pay him overtime at the rate of time-and-a-half for all hours worked over forty per week throughout his employment, in violation of the Fair Labor Standards Act ("FLSA"), New York Labor Law Article 19 ("Article 19"), and New York Compilation of Codes, Rule and Regulations Title 12 ("Title 12"). However, the record indicates that DBD distributes Busch product in interstate commerce. Therefore Bilyou is exempt from FLSA under the "motor carrier" exemption found in 29 U.S.C. § 213(b)(1). Thus Plaintiff fails to state a claim under federal law against DBD. Since there is no federal issue before this Court, I decline to exercise pendant jurisdiction over the state claim.

Statement of Facts

The following facts are undisputed. DBD is a wholesale beverage distributor located in Poughkeepsie, New York with additional warehouse space in Kingston, New York.[FN1] DBD grossed more than $23,000,000 per year from 1995 to 1997. Ninety-eight per cent of DBD's business is beer, and the rest is water and tea. DBD's main supplier of beer is Busch; DBD hires an independent contractor (not named in this suit) to haul the Busch product from New Jersey to the Poughkeepsie warehouse.[FN2] According to DBD co-owner Stephen Kondysar ("Kondysar"), DBD takes title to the product when it reaches the Poughkeepsie warehouse. (Pl. Cross-Mot. for Summ. J. at Exh. A (Kondysar Dep.) at 87-88.) DBD's customers are all retailers within New York State.

FN1. DBD has adjacent warehouses straddling the line between Poughkeepsie and Kingston; they are not two separate facilities in remote locations.

FN2. DBD occasionally gets its Busch product from a plant in New Hampshire, in which case Busch generally arranges for the transportation to Poughkeepsie.

Bilyou drove a truck for DBD, distributing beer from the Poughkeepsie warehouse to DBD's customers: his route was entirely within New York State. There is a dispute about how many hours Bilyou worked each week: Bilyou claims he regularly worked more than 40 hours per week-up to 72 hours per week (Compl.¶ 19). By contrast, Kondysar claims Bilyou never worked more than 40 hours per week. (Kondysar Dep. at 87-88.) There are no records of the hours Bilyou worked, although his employer is required by law to keep same.

Discussion

It is well established that summary judgment is appropriate only where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law."Fed.R.Civ.P. 56(c); *see also* *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 247-250 (1986). In moving for summary judgment, the court must resolve all ambiguities and draw all inferences in favor of the non-moving party. *See id.* at 255.However, to defeat summary judgment, the non-moving party must go beyond the pleadings and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)

*2 The FLSA requires that an employee engaged in interstate commerce be compensated at a rate of one and one-half times the regular hourly rate for all hours worked in excess of forty per week. 29 U.S .C. § 207 provides:

Maximum hours

(a) Employees engaged in interstate commerce...

(1) Except as otherwise provided in this section, no employer shall employ any... employee[ ]... for a workweek longer than forty hours unless such employee receives compensation ... in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed...

However, employees who are subject to the Secretary of Transportation are exempt from FLSA. The maximum hour requirements of 29 U.S.C. § 213(b) provide:

The provisions of section 207 of this title shall not apply with respect to-

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of § 31502 of Title 49...

This is because the Secretary of Transportation has jurisdiction to set safety standards that may be incompatible with FLSA. *McGuiggan v. CPC Int'l Inc.*, 84 F.Supp.2d 470, 481 (S.D.N.Y.2000). Thus, 49 U.S.C. § 31502 provides:
(b) Motor carrier and motor private carrier requirements.-The Secretary of Transportation may prescribe requirements for-

(1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and

(2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation. 49 U.S.C. § 31502.

The question then becomes: who is a motor carrier? 49 U.S.C. § 13102(12) defines a "motor carrier" as "a person providing motor vehicle transportation for compensation."A "motor private carrier" is defined as:

a person, other than a motor carrier, transporting property by motor vehicle when-

(A) the transportation is as provided in section 13501 of this title;

(B) the person is the owner, lessee, or bailee of the property being transported; and

(C) the property is being transported for sale, lease, rent or bailment, or to further a commercial enterprise. 49 U.S.C. § 13102(13).

Exemptions to FLSA are to be construed narrowly against the employer. *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 900 (3d Cir.1991), *cert. denied*, 503 U.S. 936 (1992). In *McGuiggan v. CPC Int'l Inc.*, 84 F.Supp.2d 470 (S.D.N.Y.2000), this Court established two requirements for applying the motor carrier exemption to FLSA:

(1) the employer...must be either a "motor carrier" or a "motor private carrier" as defined by 49 U.S.C. § 31502(b)(2); and (2) the employees subject to the the regulation...must be engaged in activities that affect the safety of operation of motor vehicles transporting property in interstate commerce.

*3 *Id.* at 480-81.In addition, the employer must exhibit a "fixed and persisting" intent to transport goods *in interstate commerce*. *Klitzke v. Steiner Corp.*, 110 F.3d 1465, 1469 (9th Cir.1997).*McGuiggan* is instructive. Plaintiffs in *McGuiggan*, 84 F.Supp.2d at 472, were distributors of Thomas English Muffins. The muffins were produced in New Jersey and deliv-

ered by the defendant-employer, CPC, to depots in New York, where plaintiffs picked them up and distributed them to New York customers. *Id.* It made no difference that plaintiffs picked up the products in New York and then also delivered them in New York, since the products came from out-of-state. *Id.* at 482.The New York customers called their orders in to the CPC's New Jersey plant directly; shipments picked up and distributed by plaintiffs reflected customers' exact orders. *Id.* I found that this mechanism of order and delivery evidenced the "fixed and persisting" intent to transport goods in interstate commerce such that plaintiffs were exempt from FLSA standards by way of the "motor carrier" exemption. *Id.*"[A]dopting plaintiffs' suggestion [that they were not involved in interstate commerce] would render the motor carrier exception meaningless.... The products here were produced in one state and sold in another... If this does not qualify as interstate commerce, I am hard pressed to understand what is."*Id* .In spite of minor factual differences, the instant case is just as clear.

The motor carrier exemption to FLSA applies to Bilyou. Bilyou was a route driver for DBD; he drove a truck to deliver products to DBD's retail customers. (Compl.¶ 1.) Bilyou's duties fall within the literal definition of a motor private carrier. *See* McGuiggan, 84 F.Supp.2d at 481. Second, DBD is in the business of transporting goods in interstate commerce. Busch products, produced in New Jersey and New Hampshire, are distributed by DBD in New York; Busch retains significant control over its products on DBD premises and tailors orders to meet precise need. (Kondysar Dep. at 16, 18.) According to Kondysar, DBD pays a third party to transport the Busch product to the Poughkeepsie facility from other states, including New Jersey and New Hampshire. (Id. at 39.)From Poughkeepsie, the product is transported to retailers within New York by DBD route drivers, such as Bilyou. (Id.)

Bilyou argues that DBD does not participate in interstate commerce because DBD takes title to the Busch product only after it arrives at the Poughkeepsie warehouse. (Id.) Kondysar's deposition also indicates that there is no specific customer is associated with a particular delivery of Busch product to DBD's warehouse. (Id. at 49-50.)However, DBD's acquisition of title to the Anhueser product at the New York warehouse does not preclude a finding of interstate commerce. *McGuiggan,* 84 F.Supp.2d at 482. The Supreme Court has held that "the 'ritual' of placing goods in a warehouse before subsequent delivery to customers within the same state should not defeat the establishment of 'interstate commerce' for purposes of the motor carrier exemption."*Walling v. Jacksonville Paper Co.,* 316 U.S. 564, 568 (1943).

*4 The record also shows that Busch remains involved with the product even after it has reached the DBD warehouse, such that the chain of commerce cannot reasonably be deemed broken. According to Kondysar, Busch coordinates shipments to DBD based upon DBD's exact inventory:

[Busch has its] own software system that ties directly into our [DBD's] computer. It downloads twice per day sales and distribution information... [I]f I sell 10 cases of Bud Light to K & E beverage, they're going to know about it in St. Louis within 24 hours. So they directly tie into our sales and they also track it through what they call retail sales tracking.

(Kondysar Dep. at 68.) Busch alters shipments to DBD to meet the demands of the New York customers to whom DBD distributes based upon this information.(Id.) Busch also dictates the warehouse policy (temperature, shelf-life) for its products at DBD's facilities. (Id. at 16). Despite the fact that customers place orders with DBD initially (and not directly with Busch, as in *McGuiggan*), Busch's monitoring of DBD inventory and tailoring of its shipments to meet the expected demands of DBD's New York customers shows a " 'fixed and persisting transportation intent at the time of shipment." *Klitzke v. Steiner Corp.,* 110 F.3d 1465, 1469 (9th Cir.1997).

DBD's shipment of recycled and recyclable materials in and out of New York State is further evidence of interstate commerce. For example, DBD ships "returns" (empty bottles and cans) back to Busch, for which DBD receives between $20,000-$30,000 in credit per month.[FN3](Id. at 65.)Busch sends DBD "preprinted invoices" for the shipment of returns; the amount DBD is credited for the return is exactly the same as the amount DBD pre-paid for deposits on the same product when it was originally shipped for distribution.(Id. at 66.)This mechanism of crediting DBD for returns to Busch not only indicates DBD's physical involvement in interstate commerce, it underscores the "fixed and persisting" nature of their

interstate business relationship. *Klitzke,* 110 F.3d at 1469.

> FN3. In addition, DBD ships recycled glass to facilities outside New York for Mid-Hudson Recycling, an independent facility located in a portion of one of DBD's Poughkeepsie warehouse buildings. (Kondysar Dep. at 10, 13.) Mid-Hudson Recycling is co-owned by the same two partners who own DBD, however Mid-Hudson Recycling is not owned by DBD. (Id.)

Bilyou tries to distinguish *McGuiggan* because, in *McGuiggan,* the defendant-employer took customer orders and produced the goods. *McGuiggan,* 84 F.Supp.2d at 481. The rationale for finding a "fixed intent" to transport through interstate commerce in *McGuiggan* was based, in part, on the fact that customers actually called the New Jersey plant to place orders. *Id.* at 483.Here, Busch produces the goods, and DBD takes customer orders and arranges to have goods brought back to the New York warehouses for distribution. (Kondysar Dep. at 39.) However, in light of Busch's significant control over and monitoring of inventory after goods have reached the DBD warehouse, Busch's tailoring of orders on that basis, and DBD's consistent shipment of returns to Busch, it would be unreasonable to conclude that DBD and Busch were not involved in interstate commerce. I find that the motor carrier exemption to the FLSA applies to Bilyou by the same rationale as in *McGuiggan:* the exemption would be rendered meaningless if not applied here, where there is obviously a "fixed and persisting intent" to transport and distribute goods produced in one state and sold in another. *Klitzke,* 110 F.3d at 1469.

***5** In the alternative, Bilyou argues that the motor carrier exemption does not apply because DBD's primary business is *selling* beer, not transporting it. (Kondysar Dep. at 39.) This argument is not persuasive. Plaintiffs in *McGuiggan* claimed they were in the business of making and selling baked goods, not transporting them. However because plaintiffs were in fact transporting goods they fit the "literal" definition of a motor carrier. *McGuiggan,* 84 F.Supp.2d at 481. The argument is even less-persuasive regarding Dutchess Beer Distributors, who admit to distributing beverages and whose very name indicates that transportation is their primary business.

Since the motor carrier exemption to the FLSA applies to Bilyou, Defendant's motion for summary judgment is granted with respect to the FLSA claims. Since there is no federal issue before this Court, I decline to exercise pendant jurisdiction over the state claims. They are dismissed without prejudice and may be brought in the New York State Supreme Court within the period prescribed in CPLR § 205.

The foregoing constitutes the decision and order of the Court.

S.D.N.Y.,2001.
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Not Reported in F.Supp.2d, 2001 WL 286779 (S.D.N.Y.), 143 Lab.Cas. P 34,235

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