

STATE OF MAINE  
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT  
Location: Portland  
Docket No.: BCD-CV-11-35

*J. N. - SUPER - 10/30/2011*



JAMES C. EBBERT, Court-appointed	)
Receiver for Associated Grocers of Maine,	)
Inc.,	)
	)
Plaintiff,	)
	)
v.	)
	)
P&L COUNTRY MARKET, INC.,	)
	)
Defendant	)
	)

**ORDER**  
**(Motion for Attachment)**

Plaintiff James C. Ebbert, the court-appointed Receiver for the Associated Grocers of Maine, Inc. (AGME),<sup>1</sup> moves, pursuant to M.R. Civ. P. 4A and 4B, for attachment and attachment on trustee process of the real and personal property of Defendant P&L Country Market, Inc. in the amount of \$58,500.08, plus all allowable pre- and post-judgment interest and other allowable expenses and costs of collection.

Plaintiff filed this motion along with the complaint in this matter, in which complaint he asserts four causes of action: 1) breach of contract for failure to pay amounts due on account (Count I); 2) action on account annexed, pursuant to 16 M.R.S. § 355 (2010) (Count II); 3) unjust enrichment (Count III); and 4) quantum meruit (Count IV). In each count, Plaintiff seeks payment of \$58,500.08, the balance of Defendant's customer account with AGME. The Receiver's attachment motion is supported by the affidavit of the Receiver and asserts it is more

<sup>1</sup> Ebbert was appointed receiver of AGME by consent, see *Savings Bank of Me. v. Assoc. Grocers of Me., Inc.*, KENSC-CV-11-92 (Me. Super. Ct., Ken. Cty., Apr. 27, 2011), prior to that case's transfer to the Business and Consumer Court on October 5, 2011, see *Savings Bank of Me. v. Assoc. Grocers of Me., Inc.*, BCD-CV-11-36 (Me. Super. Ct., Cum. Cty., Oct. 5, 2011).

likely than not that the Receiver will prevail on one of his theories of recovery against P&L in the amount of the account balance.

In response to Plaintiff's complaint, Defendant filed an answer and three-count counterclaim, alleging: 1) breach of contract for failure to maintain properly P&L's capital account (Count I); 2) setoff for the balance of the amount owed with the amount in the capital account (Count II); and 3) fraud regarding the capital accounts and the financial health of AGME (Count III). Defendant alleges in its counterclaim that it was required to purchase stock in AGME and maintain a capital account with AGME with a balance in an amount equal to one week of accounts receivable for produce, in this case, \$50,000. (Countercl. ¶ 5.) Defendant asserts it has demanded the balance of its capital account from the Receiver. (Countercl. ¶ 14.)

Defendant filed a written opposition to the attachment motion, in which opposition Defendant argues that Plaintiff has failed to demonstrate that it is not more likely than not that Plaintiff will prevail. Defendant first contends that the failure to supply the written contract between AGME and P&L is fatal to Plaintiff's attachment motion. Defendant further contends that the balance in the capital account is owed to P&L, and that the doctrines of setoff of mutual debts and recoupment preclude attachment.

Pursuant to M.R. Civ. P. 4A and 4B, the Court may approve an order of attachment or trustee process after notice to the defendant, a hearing, and

upon a finding by the court that it is more likely than not that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the aggregate sum of the attachment and any liability insurance, bond, or other security, and any property or credits attached by other writ of attachment or by trustee process shown by the defendant to be available to satisfy the judgment.

M.R. Civ. P. 4A(c); *see* M.R. Civ. P. 4B(c) (containing nearly identical language regarding trustee process). The "more likely than not" standard is "greater than 50% chance of prevailing."

*Richardson v. McConologue*, 672 A.2d 599, 600 (Me. 1996) (quotation marks omitted). An attachment motion or motion for trustee process must be supported by affidavits setting “forth specific facts sufficient to warrant the required finding and shall be made upon the affiant’s own knowledge, information or belief.” M.R. Civ. P. 4A(c), (i); *see* M.R. Civ. P. 4B(c) (requiring a motion for trustee process to be supported by affidavits meeting the requirements set forth in Rule 4A(i)).

Based on Plaintiff’s affidavits and the account attached to the motion, the Court concludes that Plaintiff will recover judgment in an amount equal to or greater than \$58,500.08, and there is no liability insurance, bond, or other security to satisfy the anticipated judgment. The amount sought is the sum of five invoices dated between April 20, 2011, and May 3, 2011. Defendant admits that it purchased products from AGME creating a debt to AGME (Def.’s Opp’n to Attachment 6), and Defendant does not dispute the balance on its customer account. Defendant’s opposition centers on its counterclaim for setoff and affirmative defense of recoupment. The amount of attachment, however, cannot be offset by claims of the nonmoving party. *See Casco N. Bank, N.A. v. New Eng. Sales, Inc.*, 573 A.2d 795, 797 (Me. 1990) (explaining a defendant’s own breach of contract claim cannot be considered as an offset when determining the amount of plaintiff’s attachment); 2 Charles Harvey, *Maine Civil Practice* § 4A:2 at 273 (3d ed. 2011). Thus, the Court does not address Defendant’s arguments regarding the capital accounts or any claim of setoff in its counterclaim. Further, because Plaintiff’s action does not sound solely in contract, the failure to include the contract is not fatal to the motion as suggested by Defendant.<sup>2</sup>

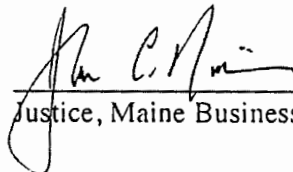
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<sup>2</sup> Defendant also contends that its affirmative defense of recoupment precludes an attachment in this case. Contrary to Defendant’s argument, the Court is not convinced, on this record, that Defendant’s capital account constitutes the same transaction as the alleged outstanding receivable.

The Court is, therefore, prepared to authorize an attachment of Defendant's property in the amount of \$58,500.08. However, the Court is not convinced that both an attachment and an attachment on trustee process are necessary to provide Plaintiff with sufficient security should Plaintiff ultimately prevail in this matter. The Court will limit the attachment to specific property, in accordance with M.R. Civ. P. 4A(d), if Defendant demonstrates that certain property available for attachment "would, if sold to satisfy any judgment obtained in the action, yield to the plaintiff an amount at least equal to" \$58,500.08. If Defendant would like the Court to consider an attachment on specific property, on or before January 11, 2012, Defendant shall submit the request with reliable proof of value of the property that Defendant proposes for attachment. Upon receipt of Defendant's request, the Court will decide whether an attachment limited to specific property is appropriate. If Defendant does not submit the request, the Court will issue an order granting to Plaintiff an attachment and attachment on trustee process.

Pursuant to M.R. Civ. P. 79(a), the clerk shall incorporate this Order into the docket by reference.

Dated: 12/29/11

  
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Justice, Maine Business & Consumer Court

CV-11-35

James C. Ebbert, Court-Appointed Receiver for Associated Grocers of Maine, Inc. v.  
P&L Country Market, Inc.

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