*UNITED STATES DISTRICT COURT*

*DISTRICT OF MAINE*

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| ***MOUNTAIN WIRELESS, INCORPORATED,*** | ) | |
| ***Plaintiff*** | ) | |
| ***v.*** | ) | ***Civil No. 01-04-P-H*** |
| ***CUMULUS BROADCASTING, INC.,*** | ) | |
| ***Defendant*** | ) | |
| ***v.*** | ) | |
| ***GEORGE SILVERMAN,*** | ) | |
| ***Party-in-Interest*** | ) | |

***MEMORANDUM DECISION ON MOTION FOR ATTACHMENT AND TRUSTEE PROCESS***

Plaintiff Mountain Wireless, Incorporated ("Wireless") moves pursuant to Me. R. Civ. P. 4A and 4B for approval of attachment and trustee process against the property of defendant Cumulus Broadcasting, Inc. ("Cumulus") in the amount of $469,258.85. Motion for Approval of Attachment and Trustee Process, etc. ("Motion") (Docket No. 3) at 1. For the reasons that follow, the Motion is granted in the amount of $43,963.75 and otherwise denied.

## I. Applicable Legal Standards

In accordance with Federal Rule of Civil Procedure 64 and Local Rule 64, this court looks to Maine law and procedure in adjudicating a motion for attachment or trustee process. Applicable Maine law provides that an order of approval of the entry of attachment or trustee process "may be

entered only after notice to the defendant and 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 sum of the attachment or trustee process plus any 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. Me. R. Civ. P. 4A(c), 4B(c).[1]

A motion for attachment or trustee process must be accompanied by an affidavit or affidavits setting forth "specific facts sufficient to warrant the required findings and shall be upon the affiant's own knowledge, information or belief; and so far as upon information and belief, shall state that the affiant believes this information to be true." Me. R. Civ. P. 4A(i), 4B(c). The opponent may file affidavits or other documents in support of its memorandum in opposition to attachment. Me. R. Civ. P. 4A(c), 4B(c), 7(c).

## II. Analysis

Wireless claims entitlement to (i) $250,000 in liquidated damages pursuant to paragraph 7(e) of the parties' Asset Purchase Agreement; (ii) $40,713.75 in reimbursement for station expenses pursuant to the parties' Local Marketing Agreement; (iii) $64,335.78 for equipment damaged or lost during operation pursuant to the Local Marketing Agreement; (iv) $113,634.32 in lost advertising revenue for the months of October through December 2000; (v) and $500 in rent plus $75 in late charges allegedly due for the month of October 2000 pursuant to the parties' Transitional Services Agreement. *See* Motion at 2-3. For purposes of this Motion, Cumulus concedes Wireless's entitlement to an attachment in the amount of $40,713.75 for station expenses. Memorandum in

[1]Notwithstanding the hearing requirement of Me. R. Civ. P. 4A(c), the Law Court has held that a formal hearing with oral argument is not necessary prior to ordering attachment. *See, e.g., Southern Me. Properties Co. v. Johnson*, 724 A.2d 1255, 1257 (Me. 1999).

Opposition to Motion for Attachment ("Opposition") (Docket No. 8) at 7 n.2.[2] Apart from the amount conceded by Cumulus, I find that Wireless demonstrates that it is more likely than not to recover judgment only in the sum of $3,250 for claimed engineering and cleanup costs.

**A. Claim for $250,000 in Liquidated Damages**

Wireless initially sought liquidated damages pursuant to section 7(e) of the Asset Purchase Agreement on the basis of Cumulus's alleged (i) failure to remit accounts receivable ("AR"), (ii) failure to consummate the asset-purchase transaction; and (iii) misrepresentation of power and authority to enter the transaction. Motion at 2. In its reply memorandum, and in the face of patently persuasive arguments by Cumulus, *see* Opposition at 3-4, Wireless dropped the third assertion, effectively waiving it. Reply Memorandum to Defendant's Response to Plaintiff's Motion for Attachment and Trustee Process ("Reply") (Docket No. 11) at 2; *Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990) ("It is settled beyond peradventure that issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived.") (citation and internal quotation marks omitted). In its reply memorandum Wireless also attempted to add two new bases for the triggering of the liquidated-damages clause: (i) withholding of commissions from AR collected and (ii) failure to provide an AR accounting. Reply at 2. These are afterthoughts, neither forthrightly asserted in the Motion nor responsive to new matter in Cumulus's opposition. I therefore disregard them. *See, e.g.*, Loc. R. 7(c) (noting that a reply memorandum "shall be strictly confined to replying to new matter raised in the objection or opposing memorandum"); *In re One Bancorp Sec. Litig.*, 134 F.R.D. 4, 10 n.5 (D. Me. 1991) (court generally will not address an argument raised for the first time in a reply memorandum).[3]

[2] Cumulus states that it has been unable to evaluate the claim for unpaid station expenses in the short time available. Opposition at 7 n.2.

[3] While the Motion and/or the first affidavit of Wireless President and CEO Alan W. Anderson mention these issues, neither suggests (*continued on next page*)

1. Failure To Remit Accounts Receivable

While it is entirely possible that Wireless will succeed in the course of this litigation in proving that AR sums are due and owing, it fails to carry its burden of demonstrating for purposes of this Motion that judgment in its favor is more likely than not. Cumulus claims that it has paid Wireless all the AR to which it is entitled and denies that any additional AR sums are due and owing. *See* Opposition at 7; Affidavit of Michael Bavely in Response to Motion for Attachment ("Bavely Aff.") (Docket No. 10) ¶¶ 8-9.[4] In the face of this denial, Wireless fails to submit material that concretely establishes its entitlement to additional AR. Wireless President and CEO Anderson states that he has repeatedly been unsuccessful in obtaining an AR accounting due under the parties' contracts and that "based on the records I have available to me" Cumulus still owes Wireless at least $30,713.62 in AR. First Anderson Aff. ¶¶ 9-11. One such record is appended to the Anderson affidavit; however, it is impossible to tell whether it supports the claimed amount due. *See* chart labeled "Cumulus Remits – 1999," attached to Letter dated August 25, 2000 from Alan W. Anderson to Tim Gatz, attached as Plaintiff's Exh. 18 to First Anderson Aff.

Wireless also claims that (i) a Cumulus business manager stated, "It will make Alan Anderson very happy we owe him a bundle," (ii) AR amounts remitted to Wireless by Cumulus fell significantly short of historic collection levels and (iii) Wireless has received or itself collected a total of only $132,812.54 of $245,215.69 in "good accounts receivable" turned over to Cumulus. Reply at 3-4; Second Affidavit of Alan Anderson ("Second Anderson Aff.") (Docket No. 12) ¶¶ 2, 9-10. None of

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that these asserted breaches form a predicate for the triggering of the liquidated-damages provision. *See* Motion at 2-4; Affidavit of Alan W. Anderson ("First Anderson Aff.") (Docket No. 4) ¶¶ 9-11, 22. Cumulus understandably did not perceive them as such. *See* Opposition at 6-7.

[4] Wireless points out that Bavely, upon whose affidavit Cumulus relies for this proposition, has no personal knowledge that the AR has been paid. Reply at 3. However, Bavely's oath that his statements are "true based upon his own knowledge, information and belief," Bavely Aff. at 4, satisfies the requisites for evidence submitted in this context.

this establishes that it is more likely than not that Cumulus owes Wireless the claimed amount of at least $30,713.62 in additional AR.

2. Failure To Consummate Transaction

Wireless next argues that the liquidated-damages clause is triggered by Cumulus's alleged breach of its obligation to consummate the asset-purchase deal. Motion at 2. Cumulus adduces evidence that by letter dated September 26, 2000 it terminated the Asset Purchase Agreement in accordance with paragraph 9(a)(iv) on the ground of failure of a condition precedent FCC approval of the transaction. Opposition at 3; Bavely Aff. ¶ 5. Wireless rejoins that the September 26 letter is a nullity inasmuch as it (Wireless) had earlier terminated "the Agreements" for breach of contract by letter dated September 1, 2000. Reply at 2. The evidence adduced does not support the proposition. Rather, the September 1 letter clearly addresses only the Local Marketing Agreement. See Letter dated September 1, 2000 from Alan W. Anderson to Cumulus Broadcasting, Inc., attached as Plaintiff's Exh. 22 to Second Anderson Aff. Wireless points to no provision in either contract pursuant to which cancellation of one effectuates cancellation of the other. Wireless additionally asserts that Cumulus had no right to excuse its nonperformance pursuant to paragraph 9(a)(iv) because it had breached paragraph 6(d) regarding AR. Reply at 2-3. Wireless misreads the applicable provision, pursuant to which Cumulus would have been precluded from asserting it only if Cumulus's breach caused the condition itself to fail. *See* Asset Purchase Agreement, attached as Plaintiff's Exh. 13 to First Anderson Aff., ¶ 9(a)(iv). There is no evidence that the asserted AR problem had anything to do with the FCC's decision not to approve the transaction. In any event, Wireless fails for the reasons stated above to prove that Cumulus more likely than not failed to remit the AR it claims remains due and owing.

**B. Claim for $64,335.78 for Damaged or Lost Equipment**

The majority of Wireless's claim to an attachment for damaged or lost property founders on the shoal that the parties squarely join issue as to whether Cumulus damaged the equipment, to wit: (i) the Pristine Digital Automation/Production System ($29,040.00), (ii) two office computers ($2,500.00) and (iii) the DARTS system ($5,545.00). *Compare* First Anderson Aff. ¶¶ 15(A), (C) & (D) *with* Affidavit of Timothy Gatz in Response to Motion for Attachment ("Gatz Aff.") (Docket No. 9) ¶¶ 6(A), (C) & (D).[5] With the record thus in equipoise, Wireless fails to establish that it is more likely than not entitled to judgment as to those items.[6] Wireless contends, and Cumulus effectively concedes, that a portion of its PRM CD music library was missing. *Compare* First Anderson Aff. ¶ 15(B) ("the majority" missing) *with* Gatz Aff. ¶ 6(B) ("possible that some of the CDs are missing"); *see also* Second Anderson Aff. ¶ 4 (Cumulus employees permitted to pilfer CDs). However, Wireless fails to establish with sufficient certainty the value (whether depreciated or replacement) of the portion missing, relying instead on what appears to be a 1993 agreement between it and an unrelated party, with a 1995 renewal provision, setting forth the contract price over eighty-four months for the entire set plus periodic updates. *See* First Anderson Aff. ¶ 16(B); Second Anderson Aff. ¶ 5; Plaintiff's Exh. 26, attached to Second Anderson Aff.

I conclude, however, that Wireless proves that it is more likely than not entitled to judgment as to the remaining two components: (i) $3,000 in engineering services professedly incurred as the result of damage exceeding normal wear and tear and (ii) $250 in claimed cleanup expenses that are not disputed by Cumulus. *Compare* First Anderson Aff. ¶¶ 16(E)-(F) *with* Gatz Aff. ¶¶ 6(E)-(F).[7]

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[5] Wireless points out that Gatz submits inadmissible hearsay and lacks personal knowledge as to these points. Reply at 5. However, Gatz satisfies the requisites for evidence submitted in this context by averring that his statements "are true based upon his own knowledge, information and belief." *See* Gatz Aff. at 5.

[6] In its reply memorandum, Wireless clarifies that it claims the DART software is missing. Reply at 6; Second Anderson Aff. ¶ 6. However, Cumulus claims that it had licensed this software. Gatz Aff. ¶ 6(D). There is insufficient evidence from which to conclude that Cumulus more likely than not had a duty to turn over or return this software.

[7] Although Gatz attributes the need for engineering to the age of Wireless's equipment, he acknowledges that the stations "may well have required $3,000 in engineering costs" to make them operable. Gatz Aff. ¶ 6(E). The inference is inescapable that the need for

(*continued on next page*)

### C. Claim for $113,634.32 in Lost Advertising Revenue

Cumulus argues, and I agree, that Wireless fails to establish as a threshold matter that it is entitled to damages for cancellation of advertising contracts. *See* Opposition at 4. Wireless asserts (via Anderson) that "[u]nder the Agreements, Cumulus Broadcasting, Inc. was to continue to operate these stations in good faith as profitable radio stations." First Anderson Aff. ¶ 17. Wireless identifies neither a specific contract provision nor any other legal principle pursuant to which this is the case. Nor can I find any such reference in the Asset Purchase or Local Marketing agreements. Wireless accordingly falls short of demonstrating entitlement to an attachment in the claimed amount.

### D. Claim for $575 in Rent and Late Fee

Wireless's final claim, for $500 in rent and $75 in a late fee for the month of October 2000, again falls victim to a failure of proof. Cumulus contends that it does not owe these fees because it had vacated the Wireless premises by October 6. Opposition at 7. Wireless agrees that Cumulus did indeed vacate the premises by then. Reply at 1. However, it asserts that Wireless "was required to allow Cumulus to continue to operate WTOS radio station in the building even after retaking possession," and that Cumulus did in fact continue to operate WTOS from studios in the building through October. *Id*. at 2. I have searched the Transitional Services Agreement in vain for the requirement cited by Wireless. *See* Transitional Services Agreement, attached as Plaintiff's Exh. 19 to First Anderson Aff. [8]

## IV. Conclusion

engineering was attributable to Cumulus's temporary custodianship.

[8] Indeed, it is arguable whether the Transitional Services Agreement, which was to take effect upon the termination of the Local Marketing Agreement and which contemplated bridging the gap following consummation of the Asset Purchase Agreement, ever took effect. *See* Transitional Services Agreement at 1-2, ¶ 3.

For the foregoing reasons, the Motion is **GRANTED** in the amount of $43,963.75 and otherwise **DENIED**.[9]

Dated this 17th day of January, 2001.

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David M. Cohen
United States Magistrate Judge

STNDRD

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-4

MOUNTAIN WIRELESS v. CUMULUS BROADCASTING Filed: 01/05/01
Assigned to: JUDGE D. BROCK HORNBY
Demand: $0,000 Nature of Suit: 190
Lead Docket: None Jurisdiction: Diversity
Dkt # in Cumberland Superior : is 00-cv-752

Cause: 28:1441 Notice of Removal-Breach of Contract

MOUNTAIN WIRELESS INC
plaintiff

DANIEL J. BERNIER, ESQ.
[COR LD NTC]
PHILLIPS & BERNIER LLC
179 MAIN STREET
SUITE 307
WATERVILLE, ME 04901
207-877-8969

v.

[9] As Cumulus points out, there is an Escrow Agreement in the amount of $80,000; however, it secures only the parties' obligations pursuant to the Asset Purchase Agreement. *See* Opposition at 7; Asset Purchase Agreement ¶ 1(c); Escrow Agreement, attached as Plaintiff's Exh. 20 to First Anderson Aff. Inasmuch as the damages as to which I have found attachment appropriate do not emanate from breach of the Asset Purchase Agreement, the Escrow Agreement does not constitute "other security" that would reduce the amount subject to attachment and trustee process pursuant to Me. R. Civ. P. 4A(c) and 4B(c).

CUMULUS BROADCASTING INC
defendant

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GEORGE SILVERMAN
party in interest