

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRENDA SAMPSON, as Personal Representative)
of the Estate of Judi Lynn Sampson, and)
MELINDA L. SALISBURY, as Personal)
Representative of the Estate of Ruth Rennebu,)
)
Plaintiffs)
)
v.) 1:11-cv-00442-GZS
)
HUGH R. FRASER,)
)
Defendant)

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

Melinda Salisbury, as personal representative of the Estate of Ruth Rennebu, has moved for attachment and trustee process against the property of Hugh R. Fraser, a resident of Canada. Fraser was the operator of a motor vehicle involved in a head on collision with a vehicle operated by Rennebu on Route 9 in Eddington, Maine. Rennebu and her passenger, Judi L. Sampson, died as a result of the accident. A third passenger, Milton Rennebu, sustained serious injuries. As part of his opposition to the motion for attachment Fraser has moved to strike Melinda Salisbury's affidavit (Doc. 10). I now grant the motion to strike Salisbury's original affidavit and deny the motion for attachment.

Applicable Legal Standards

In accordance with Rule 64 of the Federal Rules of Civil Procedure and Local Rule 64, this court looks to Maine law and procedure in adjudicating a motion for attachment or trustee process. The plaintiff must show that it is more likely than not that it will recover judgment, including interest and costs, in an amount equal to or greater than the aggregate 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)(g), 4B(c)(i). 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).

Motion to Strike

Melinda Salisbury’s original affidavit (Doc. 3-3) was procedurally defective in that Salisbury claimed that her averments were based on personal knowledge, but it was apparent on the face of the affidavit that she did not have personal knowledge about the circumstances of the accident. Salisbury has essentially cured those defects by filing a second affidavit (Doc. 18-1) which purports to be based upon both personal knowledge and upon her information and belief relating to information she believes to be true. Nothing more is required. Rule 4A allows a movant to submit information in a form that would be clearly inadmissible at trial. Precision Commc’ns, Inc. v. Rodrigue, 451 A.2d 300, 302 n.3 (Me. 1982).

According to paragraph 12 of the second affidavit, Salisbury received information about the circumstances of the accident from apparently reliable third-party witnesses who were at the scene and had seen the evidence and spoken with Fraser at the time of the incident. I now grant the motion to strike the original affidavit, but I have fully considered Salisbury’s second affidavit and the additional sworn statements filed by witnesses and investigators (Docs. 18-2—18-6).

Discussion

Based upon the affidavits submitted by Salisbury, it appears more likely than not that she will be able to recover judgment in this case. According to the accident investigation and

statements Fraser made at the scene, he must have fallen asleep at the wheel and crossed the center line of the highway into the path of Rennebu's oncoming vehicle. None of the witnesses suggests that Rennebu was driving erratically or speeding at the time of the accident.

It is undisputed that Fraser has liability insurance in the amount of \$1,000,000.00, which is available to satisfy any adverse judgment in this case. (Doc. 9-3.) It also appears that three potential victims may have to share that coverage, two of whom are deceased. The only verified information concerning the Rennebu Estate's damages is found in paragraph 11 of the Salisbury affidavit, which indicates that Rennebu earned \$25,000.00 per year and that "she was financially supportive of several family members including her children and grandchildren and there is a substantial pecuniary loss to the estate." Salisbury also alleges in paragraph 10 of her affidavit that there were "significant medical and treatment costs, as well as funeral related costs," but those amounts are not quantified. In her counsel's memorandum of law, counsel states that the lost earnings projection in this case is \$500,000.00 and that there is a \$500,000.00 loss of consortium claim. (Reply Mem. at 5, Doc 17.) According to Salisbury's calculations, this showing justifies an attachment in the range of \$750,000.00 to \$1 million dollars.

In terms of the pecuniary loss to the estate, in a matter of this sort where the estate claims damages in excess of the insurance coverage, it would be common to quantify those pecuniary losses by means of reports, a summary of bills, and/or some other evidentiary presentation. See, e.g., Jay v. Emery Lee & Sons, Inc., No. CV-04-89, 2004 WL 1925567, 2004 Me. Super. Lexis 162 (Me. Super. Ct., Pen. Cty., July 15, 2004) (Hjelm, J.) (finding that pecuniary loss supported by an economist's report and plaintiff's affidavit supported the claimed loss of consortium by describing the quality of marital relationship, the decedent's age, the decedent's health, and the children of the marriage). In Jay, the documentary evidence supported a finding of pecuniary

damages in the amount of \$1,130,984.00 and the maximum amount for loss of the decedent's comfort, society, and companionship in the amount of \$400,000.00 under the then-existing provisions of 18-A M.R.S. § 2-804(b) (now raised to \$500,000.00). There was \$1,000,000 in insurance coverage and the court was able to perform a simple subtraction exercise and conclude that attachment in the amount of \$530,984 was warranted.

Even prior to Rule 4A's amendment, which raised the standard of proof from "reasonable likelihood" to "more likely than not," Maine law has required that a motion for attachment contain sufficient information for the court to make a reasonable calculation of the amount of pecuniary and compensatory damages before entering an order. Bowman v. Dussault, 425 A.2d 1325, 1329 (Me. 1981) (vacating attachment where "allegations of facts bearing on the amount of [the movant's] recovery" were non-specific and described only "the general nature of her prospective damages"). See also Wilson v. DelPapa, 634 A.2d 1252, 1255 (Me. 1993) (explaining that the rule amendment means the movant must convince the court by a preponderance of the evidence as to the amount of the recovery). The court must be able to make an "informed projection" as to the amount of damages. Bates Fabrics, Inc. v. LeVeen, 590 A.2d 528, 531 (Me. 1991) (quoting Bowman, 425 A.3d at 1329). Arguments of counsel cannot substitute for the required sworn statements necessary to support a motion for attachment. Wilson, 634 A.2d at 1254.

In the present case, the only information I have is that the decedent earned \$25,000.00 per year and that any wrongful death damages would be shared by four heirs to the Estate. (Salisbury Aff. ¶¶ 10, 11, Doc. 18-1.) If I draw a reasonable inference that at least one-third of the \$1,000,000.00 in coverage is available to satisfy any judgment in this case, I am left with no facts upon which to base an informed projection that an attachment of between \$750,000.00 and

\$1,000,000.00 should issue. I do not know the decedent's age at the time of her death, what financial support she provided for dependents, the extent of medical expenses resulting from the accident, or any other factual information that would assist in formulating an informed projection as to the likely amount of recovery. In these circumstances a motion for attachment ought not to be granted. The issue of whether or not a particular Canadian court would or would not honor a prejudgment attachment issued from this Court is really beside the point.

Conclusion

Based upon the foregoing, the motion for attachment and trustee process is denied.

CERTIFICATE

Any objections to this Decision shall be filed in accordance with Fed.R.Civ. P. 72.

So Ordered.

January 18, 2012

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

SALISBURY v. FRASER

Assigned to: JUDGE GEORGE Z. SINGAL

Referred to: MAGISTRATE JUDGE MARGARET J.

KRAVCHUK

Member case:

[1:11-cv-00464-GZS](#)

related Case: [1:11-cv-00464-GZS](#)

Case in other court: Maine Superior Court, Penobscot
County, not assigned

Cause: 28:1332 Diversity-Personal Injury

Date Filed: 11/18/2011

Jury Demand: Defendant

Nature of Suit: 350 Motor Vehicle

Jurisdiction: Diversity

Consol Plaintiff

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