

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITE, NEW ENGLAND REGIONAL)
JOINT BOARD,)

Plaintiff)

v.)

Docket No. 01-34-P-C

GLOBALTEX, LLC, et al.,)

Defendants)

**MEMORANDUM DECISION ON DEFENDANTS' EMERGENCY MOTION
TO DISSOLVE ATTACHMENT AND TRUSTEE PROCESS**

The defendants, Globaltex, LLC doing business as Bates of Maine, and North American Heritage Brands, Inc. (“NAHB”), move to dissolve the *ex parte* attachment in the amount of \$431,452 granted on the plaintiff’s motion by the Maine Superior Court (Androscoggin County) (Docket No. 1H) before this action was removed to this court by the defendants. The parties have submitted affidavits, exhibits and memoranda of law. An evidentiary hearing was held before me on February 14, 2001. I grant the motion.

The complaint in this action alleges that the plaintiff is a labor organization that represents the employees of the defendants and that defendant NAHB is the “parent corporation” of and “owns and operates” Globaltex. Complaint (Docket No. 1B) at 1 & ¶¶ 1, 11-12. It seeks damages under the Worker Adjustment and Retraining Notification Act (the “WARN Act”), 29 U.S.C. § 2101 *et seq.*, and a Maine statute requiring severance pay to terminated employees under certain circumstances, 26 M.R.S.A. § 625-B. *Id.* ¶¶ 20, 22, 24-25.

The Maine Rules of Civil Procedure governing attachment and trustee process are applicable in this court. Fed. R. Civ. P. 64; Loc. R. 64; *Ali, Inc. v. Fishman*, 855 F. Supp. 440, 442 (D. Me. 1994). Those rules provide, in pertinent part:

(g) Ex Parte Hearings on Attachments. An order approving attachment of property for a specific amount may be entered ex parte only in an action commenced by filing the complaint with the court together with a motion for approval of the attachment as provided in subdivision (c) of this rule. The hearing on the motion shall be held forthwith. Such order shall issue if the court finds that it is more likely than not that the plaintiff will recover judgment in an amount equal to or greater than the aggregate sum of the attachment and any insurance, bond, or other security, and any property or credits attached by other writ of attachment or by trustee process known or reasonably believed to be available to satisfy the judgment, and that either (i) there is a clear danger that the defendant if notified in advance of attachment of the property will remove it from the state or will conceal it or will otherwise make it unavailable to satisfy a judgment, or (ii) there is immediate danger that the defendant will damage or destroy the property to be attached. The motion for such ex parte order shall be accompanied by a certificate by the plaintiff's attorney of the amount of any insurance, bond, or other security, and any other attachment or trustee process which the attorney knows or has reason to believe will be available to satisfy any judgment against the defendant in the action. The motion, in the filing of which the plaintiff's attorney shall be subject to the obligations of Rule 11, shall be supported by affidavit or affidavits meeting the requirements set forth in subdivision (i) of this rule.

(h) Dissolution or Modification of Attachments. On 2 days' notice to the plaintiff or on such shorter notice as the court may prescribe, any person having an interest in property that has been attached pursuant to an ex parte order entered under subdivision (g) of this rule may appear, without thereby submitting to the personal jurisdiction of the court, and move the dissolution or modification of the attachment, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. At such hearing the plaintiff shall have the burden of justifying any finding in the ex parte order that the moving party has challenged by affidavit.

* * *

(i) Requirements for Affidavits. Affidavits required by this rule shall set 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. The provisions of the rule governing trustee process are essentially similar to Me. R. Civ. P. 4A(g) and (h) as set forth above. Me. R. Civ. P. 4B(i) & (j).

I. WARN Act Claim

The defendants take the position that the WARN Act does not apply to their operation of the Bates mill in Lewiston, Maine. Defendants' Emergency Motion to Dissolve Attachment and Trustee Process, etc. ("Motion to Dissolve") (Docket No. 4) at 4-6. The Act prohibits a plant closing or mass layoff until the end of a sixty-day period after an employer serves written notice of such an event to affected employees or their representatives. 29 U.S.C. § 2102(a). Here, the defendants do not dispute the assertion that they did not provide such notice before they laid off enough of the Lewiston employees to meet the statutory definition of a "mass layoff," 29 U.S.C. § 2101(a)(3), but do contend that they are not "employers" as that term is defined in the Act and, in the alternative, that the exceptions set forth at 29 U.S.C. § 2102(b)(1) & (2)(A) apply. Motion to Dissolve at 4-5.

The Act defines an "employer" as

any business enterprise that employs—

- (A) 100 or more employees, excluding part-time employees; or
- (B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime).

29 U.S.C. § 2101(a)(1). In support of its motion for *ex parte* attachment, the plaintiff submitted to the Maine Superior Court four affidavits. These affidavits establish that the Lewiston plant manager told Neena Quirion that Bates employed approximately 128 people as of January 1, 2001; that a company document showed 123 employees as of January 19, 2001; that, except for "part time and consultant employees," all of these employees were employed full time as of November 1, 2000 and until January 6, 2001; that seven employees were laid off on January 6, 2001; that thirty-three employees were laid off on January 13, 2001; that after January 23, 2001 only twenty-eight employees would be retained; and that as of August 14, 2000 there were 87 employees whom the vice president of the union

believed “average around 40 hours a week.” Affidavit of Neena Quirion (Docket No. 1E) ¶¶ 5-6, 11; Affidavit of Michael J. Martin (Docket No. 1F) ¶ 9. In support of their motion to dissolve the attachment, the defendants submitted the affidavit of Marshall Masko, then chief executive officer of both defendants,¹ which states in pertinent part that “[a]s of the November 4, 2000 payroll period Globaltex employed 87 employees at the Bates mill, excluding employees who worked less than twenty hours per week or who had been employed by Globaltex for 6 or fewer months out of the previous 12 months,” and that

it is not correct that most or all of Globaltex’s employees worked forty hours per week. Rather the employees worked a variety of different hours. During the November 4, 2000 pay period, out of the 125 employees on the payroll that week, 34 employees worked fewer than 40 hours per week and 18 worked fewer than 30 hours per week.

[Affidavit of Marshall Masko] (“Masko Aff.”) (Docket No. 5) ¶¶ 6, 14.² The employee exclusion referenced in the first quoted sentence from the Masko affidavit tracks the definition of part-time employees created by regulations implementing the WARN Act. 20 C.F.R. § 639.3(h).

The parties appear to agree that the question whether a defendant is an employer under the WARN Act is to be determined as of the date upon which notice would have been required by the Act to have been given — 60 days before a plant closing or mass layoff. Motion at 4-5; Plaintiff’s Response at 4; Plaintiff’s Memorandum of Law Concerning Defendants’ Emergency Motion, etc.

¹ Masko testified at the evidentiary hearing that he had very recently become chairman of the board of NAHB.

² The plaintiff argues that the Masko affidavit is defective because it is made in part on information and belief, Masko Aff. at 4, but does not state that “so far as upon information and belief, . . . the affiant believes this information to be true,” Me. R. Civ. P. 4A(i). Plaintiff’s Response to Defendants’ Emergency Motion to Dissolve Attachment, etc. (“Plaintiff’s Response”) (Docket No. 6) at 2-3. Because the affidavit, the only one submitted by the defendants in support of their motion to dissolve the attachment, is therefore invalid, the plaintiffs contend, the motion must be summarily denied. *Id.* at 4. The defendants filed an amended affidavit, with the required language in the jurat, on February 1, 2001. Docket No. 8. In *Englebrecht v. Development Corp. for Evergreen Valley*, 361 A.2d 908 (Me. 1976), the only case cited by the plaintiff that is potentially applicable to the facts in this case, the affidavit at issue failed to include the required language concerning the affiant’s belief, but the Law Court also found that the substance of the affidavit would not meet the requirements of Rule 4A even if the jurat had included the proper language. *Id.* at 911. Here, the factual statements in the Masko affidavit are sufficient, and the defendants have remedied the defect before it was necessary for the court to rely on the affidavit. Under these circumstances, no reasonable purpose would be served by striking the affidavit or ignoring its (continued on next page)

(“Plaintiff’s Second Response”) (Docket No. 15) at 3. *See generally* 20 C.F.R. § 639.5(a)(1). For purposes of the motion to dissolve the attachment, the defendants do not object to the use of a date in early November 2000. Motion at 5 n.1. The plaintiff has not provided evidence to dispute Masko’s testimony that there were only 87 full-time employees at Bates at the relevant time. *See* Plaintiff’s Response at 4 (“Plaintiff believes that Masko’s information may in fact be correct.”). However, it has provided evidence, specifically Exhibit 38 which was admitted at the evidentiary hearing without objection by the defendants, which establishes that the total hours worked by all employees at Bates at the relevant time, excluding overtime and including both full-time and part-time workers, was more than 4,000. The defendants have not provided any evidence contradicting this conclusion, and the plaintiff has therefore met its burden with respect to this element of a showing that it is more likely than not to recover judgment on its WARN Act claim.

The defendants next contend that they come within the following exceptions to the WARN Act.

(1) An employer may order the shutdown of a single site of employment before the conclusion of the 60-day period if as of the time that notice would have been required the employer was actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

(2)(A) An employer may order a plant closing or mass layoff before the conclusion of the 60-day period if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable as of the time that notice would have been required.

29 U.S.C. § 2102(b).³ The implementing regulation provides that subsection (b)(1) “applies to plant closings but not to mass layoffs and should be narrowly construed,” setting out four elements of proof

contents.

³ The plaintiff contends, Plaintiff’s Second Response at 3, that the following regulatory requirement overrides the language of Me. R. Civ. P. 4A(h): “The employer bears the burden of proof that conditions for the exceptions have been met.” 20 C.F.R. § 639.9. Allocation of the burden of proof in connection with the instant motion is unnecessary because I determine that, if the burden at this
(continued on next page)

to establish eligibility under the exception. 20 C.F.R. § 639.9(a). While the word “shutdown” used in that subsection is not defined in the Act, the evidence before the court establishes that a “plant closing” as defined by the Act⁴ did occur. The plaintiff does not contend otherwise.

Here, Masko’s testimony, provided at the evidentiary hearing and in his affidavit, leads me to conclude that it is more likely than not that the defendants will succeed in establishing their entitlement to the section 2102(b)(1) exception. His testimony established that NAHB was actively seeking capital as of early November 2000; that, as of that time, there was a realistic opportunity to obtain the financing from Lombard North America; that the \$2.5 million sought for Globaltex would have been sufficient to enable it to avoid or postpone the shutdown that took place in January 2001; and that he reasonably and in good faith believed that giving the required notice in November 2000 would have precluded Globaltex from obtaining the capital from Lombard or any other potential investor. *See* 20 C.F.R. § 639.9(a)(1)-(4); *compare In re Old Electralloy Corp.*, 162 B.R. 121, 125-

stage is in fact properly placed on the defendants, they have established that it is more likely than not that they will succeed in establishing their entitlement to this exception or affirmative defense, however it is characterized.

⁴ “[T]he term ‘plant closing’ means the permanent or temporary shutdown of a single site of employment, or on or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees.” 29 U.S.C. § 2101(a)(2).

26 (W.D. Pa. 1993) (discussing facts sufficient to establish subsection (b)(1) exception after hearing on merits) *with Childress v. Darby Lumber Inc.*, ___ F. Supp.2d ___, 2001 WL 25417 (D. Mont. Jan. 4, 2001), at *7 (discussing facts insufficient to establish exception on motion for summary judgment). Nothing further is required at this stage of the proceedings.

My conclusion that subsection (b)(1) applies to the facts of this case makes it unnecessary to address the defendants' contention that the exception set forth in subsection (b)(2)(A) also applies.

The plaintiff has failed to justify the finding of the Superior Court that it is more likely than not that it will recover on its claim under the WARN Act.

II. The State Statutory Claim

The Maine statute under which the plaintiff makes its claim provides in relevant part:

2. Severance pay. Any employer who relocates or terminates a covered establishment shall be liable to his employees for severance pay at the rate of one week's pay for each year of employment by the employee in that establishment. The severance pay to eligible employees shall be in addition to any final wage payment to the employee and shall be paid within one regular pay period after the employee's last full day of work, notwithstanding any other provisions of law.

3. Mitigation of severance pay liability. There is no liability under this section for severance pay to an employee if:

* * *

D. That employee has been employed by the employer for less than 3 years.

26 M.R.S.A. § 625-B. The defendants contend that the exception found at subsection (3)(D) applies to all of the employees in this case. Motion at 9-10. The plaintiff responds that the purchase and sale agreement by which the defendants acquired ownership of Bates in 1998 contains an agreement by the defendants to assume this statutory liability. Plaintiff's Second Response at 5-6. At the evidentiary hearing, counsel for the plaintiff also argued that the 3-year statutory provision should not apply because the 1998 sale was not an arm's length transaction.

Globaltex acquired the assets of Bates of Maine pursuant to an order of the bankruptcy court dated May 22, 1998 approving a purchase and sales agreement for those assets and authorizing the sale of those assets by Bates of Maine. Exhibit 21. The asset purchase agreement is dated May 8, 1998. Exh. A to Debtor's Motion Pursuant to Section 363 of the Bankruptcy Code, etc. (Exhibit 18). An assignment and assumption of the collective bargaining agreement between the plaintiff and Bates of Maine was executed by the plaintiff, the defendants and Bates of Maine effective June 2, 1998. Exhibit 35. Globaltex was originally formed at the time it purchased the assets of Bates, "in or about June of 1998." Masko Aff. ¶ 4. In or about December 1998 NAHB purchased approximately twenty percent of the stock of Globaltex and in or about June 1999 it purchased the remaining stock of Globaltex. *Id.* ¶ 5.

In *Director of Bureau of Labor Standards v. Diamond Brands, Inc.*, 588 A.2d 734 (Me. 1991), the Law Court held that a successor corporation is not liable for severance pay under this statute if it has not owned and operated the covered establishment in question for three years at the time of relocation or termination of that establishment. *Id.* at 736-37. In language upon which the plaintiff relies, the court observed that "absent a contrary agreement by the parties . . . a corporation that purchases the assets of another corporation in a *bona fide*, arm's-length transaction is not liable for the debts or liabilities of the transferor corporation." *Id.* at 736.

Here, there is no apparent dispute that the employees at issue were laid off before three years had passed after Globaltex acquired the assets of Bates, whichever of the various dates set forth above is considered the operative date for the sale. It therefore becomes the plaintiff's burden to demonstrate that Globaltex nonetheless agreed to assume Bates' obligations under the state severance pay statute such that it became in effect the "employer" of all of the individuals employed by Bates at

the time of the sale from the date when each such employee was first employed by Bates. The plaintiff first contends that such an agreement is present in the asset purchase agreement at paragraph 2.1:

As of the Closing Date, the Buyer shall assume by express assumption agreement, . . . the Debtor's union labor agreement and all related wage and benefit obligations including accrued but unpaid severance, vacation and/or sick pay The Buyer will not assume, and hereby expressly disclaims any assumption of any other debts, liabilities or obligations (absolute or contingent) of any kind of the Debtor, including but not limited to . . . (d) claims, litigation, liabilities or obligations (whether now pending or hereafter asserted) arising out of or relating to the operations of the Debtor prior to the Closing Date hereof, . . . [and/or] (h) any employee-related matter or claim (except as set forth above) arising out of matters occurring prior to the Closing Date

First, the plaintiff has provided no evidence of an “express assumption agreement” between Globaltex and Bates entered into after the execution of the asset purchase agreement other than the Assignment and Assumption of Collective Bargaining Agreement effective June 2, 1998 (Exhibit 35), which makes no mention of severance pay. The language of the asset purchase agreement upon which the plaintiffs rely is only an agreement to enter into a future agreement, which from all that appears was not carried out. *See Zamore v. Whitten*, 395 A.2d 435, 440 (Me. 1978) (“A mere declaration of intention to enter into an agreement at some time in the future, even if the terms are stated with definite specificity, is not an offer which can be accepted to form a binding contract.”), *overruled on other grounds, Bahre v. Pearl*, 595 A.2d 1027, 1034 (Me. 1991).

Second, contrary to the plaintiff's view, the words “accrued but unpaid severance . . . pay” do not and cannot refer to an obligation to pay severance pay in the future under the terms of a state statute should the buyer relocate or terminate an establishment covered under that statute. No rights to severance pay under the statute “accrue” unless and until a covered establishment is relocated or terminated. No severance pay obligation was “unpaid” under the statute at the time of the sale, although the severance pay of some employee or employees may have been “accrued and unpaid” on

some other basis.⁵ More directly applicable to the circumstances of the plaintiff's claim here is the specific disclaimer of any liability for claims or obligations arising out of the operations of the debtor prior to the sale or for employee-related claims arising out of matters occurring prior to the sale. Until Globaltex had employed the former Bates employees for three years, any claim by those employees under the statute could only arise out of the operations of Bates or "matters occurring prior to" the sale.

In the alternative, the plaintiff argues, for reasons that are not entirely clear, that the sale approved by the bankruptcy court was not a *bona fide*, arm's-length transaction, and that the *Diamond Brands* opinion accordingly makes the three-year provision of the statute inapplicable.

This argument is weakened by the fact that the bankruptcy court approved the sale. The only evidence proffered by the plaintiff in support of this argument is Exhibits 9-12, which were admitted *de bene* at the evidentiary hearing, subject to the defendants' objection on the ground of relevance.

⁵ The plaintiff offers the affidavits of Kevin Dean and Emile Clavet, who identify themselves as former "principals" in Globaltex, to support its argument on this point. In identical language, both affiants state that they instructed the attorney who drafted the purchase and sale agreement "with" the attorney who represented the debtor to protect all rights of employees and that this is why "severance pay" was included in the section of the agreement dealing with liabilities. Affidavit [of Kevin Dean] (Exhibit 30) ¶2; Affidavit [of Emile Clavet] (Exhibit 31) ¶2. They also state that they assured employees when they bought the mill that the employees "were losing no rights;" that after they took over operation of the mill, they "always applied 'continuous service' with the company in the contract as meaning all years with us and all predecessor companies;" and that after the closing they "had to come up with \$50,000 to pay the vacation pay due, based on 'continuous service' with prior companies." *Id.* ¶¶ 3-5. None of these assertions could change my conclusion about the language of the asset purchase agreement. With respect to that document, as is the case with any contract, the language of the document rather than the unexpressed intention of one of the parties to the document controls. *Hartford Fire Ins. Co. v. Merrimack Mut. Fire Ins. Co.*, 457 A.2d 410, 414 (Me. 1983). See also *Soucy v. Sullivan & Merritt*, 722 A.2d 361, 363 (Me. 1999) (if evidence outside written agreement is to be considered, it must show same intent by both parties). The actions of Dean and Clavet after the purchase cannot be used to determine the meaning of the language in the asset purchase agreement. Those actions may well have been required by the terms of the collective bargaining agreement, which Globaltex expressly assumed. Assignment and Assumption of Collective Bargaining Agreement (Exhibit 35). A copy of the collective bargaining agreement is included in Exhibit 35. It includes express terms regarding vacation pay. Collective Bargaining Agreement, Article XV. By assuming the contract, Globaltex assumed the liability for vacation pay to which the Dean and Clavet affidavits refer. The plaintiff has not identified any language in the collective bargaining agreement concerning the statutory severance pay requirements and I have found no such language in my review of the document.

These documents, none of which is complete, appear to refer to the sale of Globaltex to NAHB, although the acquiring entity is referred to only as “this corporation” in the plaintiff’s proffered Exhibit 9 and not identified elsewhere in the evidence before the court, on an unspecified date⁶ some time after the bankruptcy sale to Globaltex of the assets of Bates of Maine. Since it is that sale upon which the plaintiff relies for purposes of its argument that section 625-B applies to the employees laid off in January 2001, the relevance of documents concerning a later sale of the “membership interests” in Globaltex to NAHB is not apparent. No inferences can be drawn from the proffered exhibits to support the point for which they are assertedly offered. No link between these documents and the bankruptcy sale has been established or even suggested by the other evidence submitted by the plaintiff. The defendants’ objection is **SUSTAINED**, and Exhibits 9-12 are not admitted.

Accordingly, in light of the Law Court’s opinion in *Diamond Brands*, I conclude that the plaintiff has failed to establish that it is more likely than not that it will prevail on its claim under 26 M.R.S.A. § 625-B and the attachment based on that claim must therefore be dissolved.

III. Exhibits 22-26

The defendants objected at the evidentiary hearing to the admission of Exhibits 22-26 on the ground of relevance. As was the case with Exhibits 9-12, I admitted these exhibits *de bene* at that time, subject to my review of the documents and the objection. While I do not find it necessary to rely on any of these exhibits in reaching my decision on the motion to dissolve the *ex parte* attachment, and while I do not find helpful the argument of counsel for the plaintiff that these exhibits are admissible because they will assist the court in “assessing the corporate veracity” of the defendants, the exhibits do appear to concern issues or facts presented by affidavit and in-court testimony in this case with

⁶ The dates that appear on the partial letters offered by the plaintiffs, Exhibits 10 and 11, are inconsistent with the statement in Masko’s affidavit that NAHB purchased approximately 20% of the stock of Globaltex in or about December 1998 and the remainder of the stock in or about June 1999. Masko Aff. ¶ 5.

respect to the defendants' claim of entitlement to one or more of the exceptions to liability under the WARN Act and thus meet the test of relevance set forth in Fed. R. Evid. 401. The defendants' objection to the admission of Exhibits 22-26 is **OVERRULED**.

IV. Conclusion

For the foregoing reasons, the defendants' motion to dissolve the *ex parte* attachment ordered by the Maine Superior Court (Androscoggin County) on January 25, 2001 is **GRANTED**.

Dated this 16th day of February, 2001.

David M. Cohen
United States Magistrate Judge

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