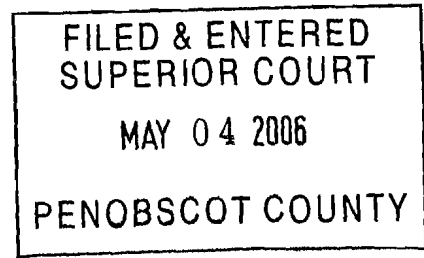


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STATE OF MAINE  
PENOBSCOT, SS.

SUPERIOR COURT  
CIVIL ACTION  
Docket No. CV-06-26

PEN-344-5/3/06



Katahdin Publishing LLC,  
Plaintiff

v.

Order (Motion for Attachment/Trustee  
Process)

Daryl Kessler et al.,  
Defendants

Pending before the court is the plaintiff's motion for attachment and attachment by trustee process. The court has reviewed the parties' submissions on the motion and has considered counsel's oral argument. At oral argument, the defendants expressed their reliance on the evidence presented at a testimonial hearing on the plaintiff's motion for preliminary injunction. A hearing on a motion for attachment and trustee process does not require the opposing party to file an affidavit. (Such a submission is required only in a motion to dissolve an ex parte order. *See* M.R.Civ.P. 4A(h), 4B(i).) From the record, which also includes the affidavit attached to the complaint, the court does not find that the plaintiff is likely to recover judgment for the liquidated damages included in the employment contracts and therefore denies the motion.

The plaintiff seeks attachment and trustee in the amounts characterized as liquidated damages in the two employment contracts into which it entered with the two defendants. The contract with Kessler provided for liquidated damages of \$50,000 if he were to breach the contract, and defendant McLeod would be exposed to liability for \$25,000 if she breached the contract. The basis for the relief sought here is the same basis as the relief sought by the plaintiff in the motion for preliminary injunction that the court denied:<sup>1</sup> the defendants violated the non-competition provisions in their employment contracts when they became associated with a new publication in the

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<sup>1</sup> In the motion for preliminary injunction, the plaintiff sought an order enforcing the non-competition agreement that was included in the defendants' respective employment contracts with the plaintiff.

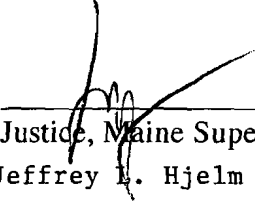
plaintiff's general circulation area. For the reasons set out in the February 24 order denying the motion for preliminary injunction, the court concluded that the lack of mutuality rendered enforcement of that provision inequitable. The same consideration raises significant questions about the assessment and imposition of liquidated damages: where the plaintiff unilaterally terminated both defendants from employment after they had worked for the plaintiff for a very short period of time, the imposition of a very substantial financial obligation on them bears little relationship to appropriate contractual relief.

This observation also supports the conclusion that the magnitude of the damages ostensibly allowed by the liquidated damages provision of the contracts is punitive rather than remedial. As is discussed in the February 24 order, the plaintiff has not made a meaningful showing of damages it alleges the defendants have caused. Nonetheless, at oral argument, plaintiff's counsel stated that the plaintiff would prove actual damages at trial. This weakens the basis for liquidated damages as expressed in the contract, namely, the difficulty of ascertaining actual damages upon a breach. It also suggests that, if such damages can be established, the large damages amounts specified in the contract are more likely to be penal. *See generally* HORTON AND MCGEEHEE, MAINE CIVIL REMEDIES § 4-7 (4<sup>th</sup> ed. 2004).

The entry shall be:

For the foregoing reasons, the plaintiff's motion for attachment and attachment by trustee process is denied.

Dated: May 3, 2006

  
\_\_\_\_\_  
Justice, Maine Superior Court  
Jeffrey L. Hjelm

05/04/2006

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KATAHDIN PUBLISHING LLC VS DARYL KESSLER ET AL

UTN:AOCSSr -2006-0014357

CASE #:BANSC-CV-2006-00026

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