THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

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Case Name: **Siemens Financial Services, Inc. v LASC, INC., et al**
Case Number: **211-2015-CV-00280**

Enclosed please find a copy of the court's order of April 01, 2016 relative to:

Order (RE: Motions Hearing 3/24)

April 04, 2016

Abigail Albee
Clerk of Court

(406)

C: Jeffrey T. Philpot, ESQ

STATE OF NEW HAMPSHIRE

CARROLL, SS. **SUPERIOR COURT**

Siemens Financial Services, Inc.

v.

LASC, Inc., Thomas Oakley and Lori McLee-Oakley

Docket No. 211-2015-CV-0280

ORDER

The plaintiff, Siemens Financial Services, Inc. ("Siemens"), filed a complaint for breach of a lease and writ of replevin against defendants LASC, Inc., Thomas Oakley and Lori McLee-Oakley. The Oakleys owned and operated Laconia Area Swim Club ("Club"). On November 29, 2011, Siemens and LASC, Inc. entered into a lease agreement for athletic equipment ("Lease"), which the Oakleys personally guaranteed. The Club closed in late November, 2015 and real estate is due to be foreclosed on April 5, 2016. The Oakleys are considering filing for bankruptcy protection.

The plaintiff petitioned for an ex parte attachment of the Oakley's property at 30 Beech Hill Road in Meredith, in the amount of $62,500. The Court (Temple, J.) found no basis for an ex parte attachment and scheduled the matter for hearing with notice. Before ruling on the petition to attach with notice, the Court (O'Neill, J.) recognized the case presented a potential conflict and on March 14, 2016, he recused himself from further involvement in the case. A new hearing on the petition to attach was held on March 24, 2016, in Carroll County. Also pending before the Court are the defendants' January 4, 2015, motion to dismiss on the basis of jurisdiction and objection to the

petition to attach, the plaintiff's January 25, 2016, motion to strike the defendants' responses, and the plaintiff's responses addressing the defendants' filings on the merits.

The plaintiff first argues the defendants' motion to dismiss and objection to the petition to attach should be stricken as untimely. According to the plaintiff, the defendants' answer and/or motion to dismiss were due December 28, 2015 and the objection to the petition to attach with notice was due on November 28, 2015. The motion to dismiss and the objection to attach were in fact filed on January 4, 2016. Notwithstanding the late filings, the Court asked the parties to present their positions on the merits.

The defendants argue the case should be dismissed because the complaint was brought in the wrong forum. According to the defendants, paragraph 13 of the Lease requires the complaint to be filed and heard in New Jersey, stating in pertinent part, "[t]his Lease will be governed by the laws of New Jersey and you submit to that jurisdiction of any federal, state or local court sitting in or for the County of Middlesex, New Jersey in any action or proceeding related to the Lease."

The plaintiff differs on the proper interpretation of this language, arguing that paragraph 13 establishes that the parties will not contest jurisdiction for any case brought in New Jersey, but does not mandate that all cases be brought in New Jersey. That is, the provision is "permissive" and not "mandatory" under The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972).

Regarding the attachment, the defendants assert the amount to be attached is "excessive" without further elaboration. At hearing, the defendants argued that because

they are only guarantors of the Lease entered into by LASC, Inc. it is unlikely they will be held liable for $62,500 in Lease obligations. The defendants also assert that the equipment is secured and not at risk of being moved or sold; thus an attachment is not necessary. They did note, however, that other creditors have made claims, or likely will make claims, on equipment and other property at the Club.

The plaintiff argues attachment of $62,500 is not excessive, as the Lease obligation is over $113,000. As of the date of filing in November, 2015, over $52,000 in lease payments were overdue. That, plus reasonable attorney's fees and costs, led the plaintiff to seek a $62,500 attachment. According to the plaintiff, the property can easily be moved and the time for holding off to allow the defendants to work to reopen the Club has passed. The defendants' comment that other creditors may be coming forward was also a concern and, the plaintiff argues, it should be entitled to the attachment sought in November of 2015.

Finally, counsel for the Oakleys asked that LASC, Inc. be defaulted. Counsel stated he does not represent LASC, Inc. and that LASC, Inc. did not file an appearance or answer. The plaintiff did not object to the request.

After hearing, the Court finds and rules as follows.

Analysis

I. Plaintiff's Motion to Strike

The plaintiff is correct in noting the motion to dismiss and the objection to the petition to attach are untimely. The Court nevertheless will rule on the merits of the pleadings.

II, Defendants' Motion to Dismiss

In ruling on a motion to dismiss, the Court must determine "whether the allegations contained in the pleadings are reasonably susceptible of a construction that would permit recovery." Pesaturo v. Kinne, 161 N.H. 550, 552 (2011). The Court must rigorously scrutinize the facts contained on the face of the complaint to determine whether a cause of action has been asserted. Williams v. O'Brien, 140 N.H. 595, 597 (1995). In rendering such a determination, the Court will "assume the truth of the facts alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to him." Harrington v. Brooks Drugs, 148 N.H. 101, 104 (2002) (quotation omitted). "The court will not, however, assume the truth or accuracy of any allegations which are not well-pleaded, including the statement of conclusions of fact and principles of law." ERG, Inc. v. Barnes, 137 N.H. 186, 190 (1993).

Pursuant to RSA 508-A:3, the Court will dismiss an action on the basis of jurisdiction when "the parties have agreed in writing that an action on a controversy shall be brought only in another state and it is brought in this state." While the New Hampshire Supreme Court has stated there are no "magic words" to confer exclusivity, if a reasonable and fair reading of a choice of forum clause would not confer exclusivity, the Court will not enforce the clause to be exclusive. Strafford Technology v. Camcar Div. of Textron, 147 N.H. 174, 177 (2001). The Court finds section 13 of the Lease to be permissive and not mandatory and as such, the parties did not commit to exclusive jurisdiction in New Jersey. The defendants' motion to dismiss is DENIED.

II. Plaintiff's Petition to Attach

In a petition to attach, the burden is on the plaintiff to show that there is a

reasonable likelihood that the plaintiff will recover judgment including interest and costs on any amount equal to or greater than the amount of the attachment. RSA 511-A:3 (1997); See Chi Shun Hua Steel Co., Ltd. v. Crest Tankers, Inc., 708 F.Supp. 18, 25 (D.N.H. 1989); Diane Holly Corp. v. Bruno & Stillman Yacht Co., Inc., 559 F.Supp. 661 (D.N.H. 1983) (a plaintiff seeking pre-judgment attachment must make a strong showing that he or she will ultimately prevail on the merits and the showing must be established by proof greater than proof by a mere preponderance of the evidence).

The plaintiff seeks an attachment in the amount of $62,500 based on the amount due under the lease as of the filing date of over $52,000 plus a reasonable amount of attorney's fees and costs. The Court finds that the evidence in the record, which includes the pleadings and offers of proof, supports the plaintiff's position by greater than a mere preponderance of the evidence. The amount attached is not excessive, as it is based on the Lease payments overdue at the time of filing, plus fees and costs. While the degree to which the defendants are ultimately held responsible remains to be resolved, the Court finds the plaintiff has met its burden and, as such, the petition to attach the property of the defendants in the amount of $62,500 is GRANTED.

Finally, the Court turns to the request by counsel for the Oakleys to default LASC, Inc. for its alleged failure to appear or file an answer. The assertion that counsel for the Oakleys does not represent LASC, Inc. or that it failed to file an appearance or answer is not correct. Counsel filed an appearance on January 4, 2016 on behalf of "LASC, Inc., Lori S. McLee-Oakley and Thomas E. Oakley." The motion to dismiss, the subject of the March 24, 2016, hearing, is captioned "Defendants Lori S. McLee-Oakley, Thomas E. Oakley and LASC, Inc.'s Motion to Dismiss." The Court makes no ruling at

this time on the request by counsel of record for LASC, Inc. that LASC, Inc. be defaulted.

SO ORDERED.

April 1, 2016

/s/Amy L. Ignatius
Amy L. Ignatius
Presiding Justice