

OCEAN STATE JOB LOT OF)	
MAINE, 2017, LLC,)	
)	
Plaintiff,)	
v.)	ORDER GRANTING PLAINTIFF'S
)	MOTION FOR ATTACHMENT AND
20 THAMES STREET, LLC,)	ATTACHMENT ON TRUSTEE
and 122 PTIP, LLC,)	PROCESS
)	
Defendants.)	

Before the Court is the motion for attachment and attachment on trustee process brought by Plaintiff Ocean State Job Lot of Maine, 2017, LLC (“Ocean State”). In its motion, Ocean State seeks attachment in the amount of \$444,033.09, which reflects the amount of attorney fees it incurred defending against Defendants’ two unsuccessful commercial Forcible Entry and Detainer actions. Ocean State asserts that it is more likely than not to succeed on its breach of contract claim, and is without sufficient security to satisfy a judgment in its favor. In opposition, Defendants argue that there is security to satisfy an eventual judgment, the lease provision at issue in this matter is inapplicable, Ocean State improperly split its cause of action against Defendants, and Ocean State’s attorney fees are unreasonable. Ocean State’s motion for attachment is supported by its Complaint and attached exhibits (“Complaint”), and the Supplemental Affidavit of Micah A. Smart, Esq., (“Smart Aff.”) and its attached exhibits. For the following reasons, the Court grants Ocean State’s motion.

FACTUAL BACKGROUND

Ocean State is a discount retailer that operates locations throughout New England and the Tri-State area, including a location in Falmouth, Maine. Smart Aff. ¶¶ 3. Ocean State’s Falmouth

location is located at the Falmouth Shopping Center (the “Shopping Center”). *See* Smart Aff. ¶ 10. Ocean State’s lease at the Shopping Center began on August 3, 2017, when the parties entered into a lease for a term of approximately ten years (until July 31, 2028), with three separate five-year extension terms, the last of which expires on July 31, 2043 (“the Lease”). *Id.* At the time Ocean State agreed to the Lease, Falmouth Realty Associates owned the Shopping Center. Smart Aff. ¶ 8. However, the Shopping Center was later sold to Defendants on March 23, 2018. Smart Aff. ¶ 21. Defendants began a series of attempts to evict Ocean State approximately six weeks later. Smart Aff. ¶ 23; Compl., Ex.2.

First, in May 2018, Defendants began a Forcible Entry and Detainer (“FED”) action asserting that Ocean State had refused to provide an estoppel certificate and had left trailers parked at a loading dock overnight in violation of the Lease. Smart Aff. ¶ 23; Compl., Ex. 2. The FED trial lasted three days where representatives of the parties testified on numerous issues, including but not limited to the estoppel certificate and trailer parking. Smart Aff. ¶ 24; Compl., Ex. 3. On August 14, 2018, the Business and Consumer Court (“BCD”) granted judgment for Ocean State and against Defendants on the merits in the FED action. *Id.* Ocean State followed up with a Petition for costs and attorney fees. Smart Aff. ¶¶ 25-26; Ex. 9. On September 20, 2018, the Court granted the Petition, and awarded Ocean State attorney fees and costs in the amount of \$216,651.06. Smart Aff. ¶ 28; Ex. 4. Defendants timely appealed the BCD’s judgment to Superior Court. Smart. Aff. ¶ 29.

On April 25, 2019, while the 2018 FED case was on appeal, Ocean State brought suit against Defendants in Superior Court for breach of the Lease provisions regarding roof repairs and memorandum of lease. Defendant’s Opposition to Plaintiff’s Motion to Attach (Def.’s Opp’n to Pl.’s Mot. Attach.), page 4 (citing to *Ocean State Job Lot of Maine 2017 LLC v. 20 Thames Street,*

LLC & 1222 PTIP, LLC, Docket No. PORSC-CV-2019-149). The parties eventually filed cross-motions for summary judgment in that case, and those motions are still pending.

On June 20, 2019, the Superior Court affirmed the BCD's FED judgment on the merits and on costs, but vacated the award of attorney fees on the grounds that a trial court in an FED action lacks subject matter jurisdiction to award attorney fees. Smart Aff. ¶ 29; Compl., Ex. 5. Ocean State timely appealed the attorney fees issue to the Law Court.

On October 24, 2019, Defendants filed a second FED action, again claiming that Ocean State had violated the terms of the Lease by its trailer exchange practices. Smart Aff. ¶ 34; Compl., Ex. 7. On December 20, 2019, the BCD granted Ocean State's motion to dismiss, and dismissed Defendant's 2019 FED action. Smart Aff. ¶35; Comp. Ex. 8.

On May 5, 2020, the Law Court affirmed the Superior Court's decision to vacate the attorney fees award for lack of jurisdiction. Smart Aff. ¶ 30; Compl., Ex. 6. On May 27, 2020, Ocean State brought the current action based on Section 38(m) of the Lease, seeking reimbursement of the attorney fees incurred defending the 2018 and 2019 FED actions.

DISCUSSION

Pursuant to the Maine Rules of Civil Procedure 4A, attachment may be ordered upon a finding by the Court that:

[I]t is more likely than not that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the aggregate sum of the attachment and any liability 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.

M.R. Civ. P. 4A(c). A moving party must show a greater than fifty percent chance of recovering judgment in order for the Court to find the movant "more likely than not" to succeed. M.R. Civ. P. 4A advisory notes to 1992 amend., Feb. 1992, Me. Judicial Branch Website/Rules &

Administrative/Rules (last visited Sept. 11, 2020). The required showing must be made through affidavits, and there is no right to an evidentiary hearing. *Id.*; *see also Atlantic Heating Co. v. Lavin*, 572 A.2d 478, 479 (Me. 1996). Furthermore, plaintiff must provide supporting affidavits that “set forth specific facts sufficient to warrant the required findings, i.e., facts which warrant a finding that it is more likely than not the plaintiff will prevail at trial in an amount which at least equals the amount sought to be attached.” *Schneider v. Cooper*, 687 A.2d 606, 608 (Me. 1996) (internal quotations omitted); *see* M.R. Civ. P. 4A(c) & (i). In making such a determination, the Court is to assess the “merits of the complaint and the weight and credibility of the supporting affidavits”. *Porrazzo v. Karofsky*, 714 A.2d 826, 828 (Me. 1998). In sum, to succeed on a motion for attachment, a plaintiff must demonstrate through their affidavit(s): 1) a likelihood of success on the merits, and 2) the unavailability of sufficient insurance, bond, or “other security” to satisfy the potential judgment. M. R. Civ. P. 4A.¹

As an initial matter, Defendants assert that Ocean State has sufficient security available to satisfy any judgment it might obtain, and thus its motion must be denied because it fails the second element required for attachment. Def.’s Opp’n to Pl.’s Mot. Attach. 1. Defendants argue that a portion of the rent payments Ocean State is obligated to make for the term of the lease can be set aside in order to serve as security. However, the terms of the Lease expressly prohibit this approach. *See* Compl., Ex. 1, § 4 (“[Ocean State] shall have no right at any time to abate, reduce, or set-off any rent due hereunder. . .”). Moreover, given Defendants’ repeated attempts to terminate the Lease and evict Ocean State, it is unreasonable to consider a set-off of future rent payments as adequate security in this case. The Court is unaware of the existence of any alternative security. For these reasons, the Court finds that Ocean State lacks security to satisfy any eventual judgment.

¹ The standard for attachment on trustee process is set forth in M.R. Civ. P. 4(B)(c) and is virtually identical to that set out in Rule 4A. *See Libby O’Brien Kingsley & Champion, LLC. v. Blanchard*, 2015 ME 101, 121 A.3d 109.

I. Ocean State has established that it will more likely than not recover judgment against Defendants for breach of contract.

The crucial claim in this matter is Ocean State’s breach of contract claim based on the Lease. In order to obtain relief for breach of contract, a plaintiff must “demonstrate that the defendant breached a material term of the contract, and that the breach caused the plaintiff to suffer damages.” *Tobin v. Barter*, 2014 ME 51, ¶ 10, 89 A.3d 1088 (citing *Me. Energy Recovery Co. v. United Steel Structures, Inc.*, 1999 ME 31, ¶¶ 7-8, 724 A.2d 1248). Here, Ocean State asserts that Defendants breached § 38(m) of the lease by failing to reimburse them for the attorneys’ fees Ocean State incurred while successfully defending the 2018 and 2019 FED actions. Compl. On that basis, Ocean State requests that this Court grant its motion for attachment and motion for attachment on trustee process in the amount of \$444,033.09.

According to § 38(m) of the Lease, “a party that initiates an action to enforce the terms of the lease, and does not prevail, must pay to the prevailing party “attorneys’ fees, filing fees, and court costs.” Compl., Ex. 1 at § 38(m). According to Ocean State, Defendants initiated actions to enforce the terms of the Lease by filing the 2018 and 2019 FED complaints. *See* Compl. Ex. 2, and 6. The Court agrees, as both FED actions turned entirely on Defendants’ attempts to enforce the terms of the lease, which Defendants argued gave them superior rights to possession.

First, as set forth in the 2018 FED complaint, Defendants alleged that Ocean State failed to abide by the lease terms when they refused to provide Defendants with an estoppel certificate and left trailers parked at a loading dock overnight. As a consequence, Defendants sought possession of the property pursuant to the alleged termination and eviction rights described in the Lease. In the FED action, Defendants sought to enforce Sections 3, 9, 27, and 29 of the Lease, while demanding Ocean State comply with Sections 12, 21, and 24. Nonetheless, Ocean State

prevailed on the merits of the 2018 FED action, and according to the plain language of § 38(m), is entitled to its costs and attorneys' fees.

Likewise, in the 2019 FED action, Defendants initiated a second complaint to enforce terms of the Lease, again alleging violations relating to Ocean State's trailer exchange practices. *See* Compl. Ex. 7. In this action, Defendants sought enforcement of Section 3 of the Lease, while again demanding Ocean State comply with Sections 12, 21, and 24. Ocean State also prevailed in the 2019 FED action. Ocean State is therefore again entitled to its attorney fees pursuant to Section 38(m) of the Lease. Because Ocean State has already paid its attorneys, and Defendants have failed to provide reimbursement, Defendants have materially breached the Lease's terms. Ocean State's losses amount to \$444,033.09.

Defendants correctly assert that FED actions are summary proceedings, generally limited to deciding the single issue of who is entitled to immediate possession of real property. *Tozier v. Tozier*, 437 A.2d 645, 647 (Me. 1981). As such, parties are generally barred from joining related tort or contract actions with an FED action. M.R. Civ. P. 80D(g) (Forcible entry and detainer actions shall not be joined with any other action, nor shall a defendant in such action file any counterclaim.); *see also Bureau v. Gendron*, 2001 ME 157, ¶ 9, 783 A.2d 643. Despite the narrow focus of FED actions, there is no avoiding the fact that Defendants' FED actions attempted to enforce the terms of the Lease and thereby obtain possession of the property. In both FED actions, Defendants expressly sought the enforcement of various sections of the Lease, while demanding Ocean State comply with others.² Therefore, the FED action was brought with the purpose of enforcing terms and provisions of the lease, as described in § 38(m). Although from a statutory

² In both FED actions, Defendants sent letters to Ocean State purporting to terminate the Lease. The letters expressly stated that Defendants were exercising their termination rights pursuant to Section 24 of the Lease and detailed the sections of the Lease they argued Ocean State had violated. *See* Compl. Ex. 38 and 39.

perspective FED actions are limited in scope to evaluating parties' competing rights to possession of real property, in this case that analysis encompasses and turns on Defendants' attempt to enforce the terms of the Lease.

Finally, Defendants argue that Section 38(m) is inapplicable, and that Section 24 of the Lease is the controlling attorney fees provision in this matter. The Court disagrees. By its plain language, Section 24 applies when Defendants terminate the Lease. Compl. Ex. 1, § 24. Here, the Lease was never terminated due to Ocean State prevailing in both FED actions. Thus, Section 38(m) controls, and Section 24 is inapplicable.

II. Neither *Res Judicata* nor Abatement Bar Ocean State's Recovery.

Regardless of whether Section 38(m) applies to this matter, Defendant asserts that Ocean State improperly split its cause of action, and this action for attorney fees is precluded by *res judicata* or abatement. Defendants argue that Ocean State should have amended its still pending 2019 breach of Lease action against Defendants to include the present claim for attorney fees. However, neither doctrine is applicable, and therefore neither doctrine bars Ocean State's recovery.

The doctrine of *res judicata* prevents the relitigation of matters already decided. *Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 7, 940 A.2d 1097. The doctrine consists of two components, issue preclusion and claim preclusion. *Id.* "Issue preclusion, or collateral estoppel, 'prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment, and the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding.'" *Id.* at ¶ 9 (quoting *Macomber v. MacQuinn-Tweedie*, 2003 ME 121, ¶ 22, 834 A.2d 131). Claim preclusion prevents relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the

matters presented for decision in the second action were, or might have been litigated in the first action. *Id.* at ¶ 8. Defendants assert that Ocean State should have brought its claim for attorney fees in the pending 2019 breach of lease action, and having failed to do so, once that action is decided the claim for attorney fees will be barred.

Neither component of *res judicata* bars Ocean State from recovering in this case. The present claim could not have been brought in Ocean State's 2019 breach of lease action, because the attorney fees issue remained on appeal to the Law Court until after cross motions for summary judgment were submitted in that action. By the time the appeal was decided, the deadlines for amending the pleadings in the 2019 breach of lease action had long since expired.³ A final judgment in Ocean State's 2019 breach of lease action will therefore not have preclusive effect on this matter. Further, in order to avoid the result of having two separate cases between the parties dealing with Lease issues, but on separate tracks, Ocean State can still move in its 2019 breach of lease action for permission to amend the pleadings, or either party can move in either case to consolidate the two cases.

Defendant also alleges that the doctrine of abatement bars Ocean State's recovery because a final judgment in the prior action would support the application of *res judicata* to the issues of the second action. *Lucas v. Porter*, 755 N.W.2d 88, 94-95 (2008). However, as previously stated, the doctrine of *res judicata* is not applicable to these separate cases, and thus abatement is likewise inapplicable.

III. Ocean State's Attorneys' Fees are Reasonable.

Finally, Defendants argue that even if Ocean State is entitled to an attachment, it should be limited to a maximum of \$191,463.57, as it would be unreasonable to accumulate \$444,033.09 in

³ Confirmed at oral argument.

attorney fees defending two FED actions. Defendants likewise assert that Ocean State should be unable to depend on the attorney fees award initially approved by the BCD but vacated by the Law Court. The Court disagrees. Despite the Law Court's vacation of the prior attorney fees award for *lack of subject matter jurisdiction*, there is no reason for this Court to believe the prior award is unreasonable or unjust, given the Court now has jurisdiction through this breach of Lease action. Further, in light of the frequency and intensity of litigation surrounding the Lease, the complexity of the FED actions at issue, and the degree of potential loss to Ocean State, and other factors, *see Homeward Residential, Inc. v. Gregor*, 2017 ME 128, ¶ 15, 165 A.3d 357, the Court finds Ocean State's attorney fees to be reasonable.

CONCLUSION

For the reasons set forth above, the Court finds that Ocean State is more likely than not to succeed on the merits of its claim, and there is no security available to satisfy the judgment. Accordingly, the Court grants Ocean State's motion for attachment and attachment on trustee process in the amount of \$444,033.09.

The Clerk is instructed to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

So Ordered.

Dated: September 14, 2020

_____/s_____
Michael A. Duddy,
Judge, Business and Consumer Court