



AlaFile E-Notice

11-CV-2018-900431.00

Judge: BRIAN P HOWELL

To: DEAN MICHAEL GREGORY
mdean@ago.state.al.us

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA

STATE OF ALABAMA ET AL V. AMERICAN PLUMBING AND SEPTIC SERVICE, LLC E
11-CV-2018-900431.00

The following matter was FILED on 8/8/2018 11:46:45 AM

D001 AMERICAN PLUMBING AND SEPTIC SERVICE, LLC

D002 AMERICAN PLUMBING AND SEPTIC SERVICE, LLC

D004 PESNELL JESSICA

D005 PESNELL RICHARD G

D003 PESNELL RICHARD JOSHUA

EMERGENCY MOTION TO MODIFY THE TEMPORARY RESTRAINING ORDER

[Filer: GRESHAM COLE ROBINSON]

Notice Date: 8/8/2018 11:46:45 AM

KIM MCCARSON
CIRCUIT COURT CLERK
CALHOUN COUNTY, ALABAMA
25 WEST 11TH STREET
ANNISTON, AL, 36201

256-231-1750
Kim.McCarson@alacourt.gov



ELECTRONICALLY FILED
8/8/2018 11:45 AM
11-CV-2018-900431.00
CIRCUIT COURT OF
CALHOUN COUNTY, ALABAMA
KIM MCCARSON, CLERK

STATE OF ALABAMA
Unified Judicial System
11-CALHOUN
Revised 3/5/08
 District Court Circuit Court

Cas
CV2

STATE OF ALABAMA ET AL V. AMERICAN
PLUMBING AND SEPTIC SERVICE, LLC E

CIVIL MOTION COVER SHEET

Name of Filing Party: D001 - AMERICAN PLUMBING AND SEPTIC
SERVICE, LLC
D002 - AMERICAN PLUMBING AND SEPTIC
SERVICE, LLC
D003 - PESNELL RICHARD JOSHUA
D004 - PESNELL JESSICA
D005 - PESNELL RICHARD G

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.
COLE ROBINSON GRESHAM
100 BROOKWOOD PL. 7TH FL.
BIRMINGHAM, AL 35209
Attorney Bar No.: GRE127

Oral Arguments Requested

TYPE OF MOTION

Motions Requiring Fee

Motions Not Requiring Fee

- Default Judgment (\$50.00)
Joinder in Other Party's Dispositive Motion
(i.e. Summary Judgment, Judgment on the Pleadings,
or other Dispositive Motion not pursuant to Rule 12(b))
(\$50.00)
- Judgment on the Pleadings (\$50.00)
- Motion to Dismiss, or in the Alternative
Summary Judgment (\$50.00)
- Renewed Dispositive Motion (Summary
Judgment, Judgment on the Pleadings, or other
Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Summary Judgment pursuant to Rule 56 (\$50.00)
- Motion to Intervene (\$297.00)
- Other _____
pursuant to Rule _____ (\$50.00)

- Add Party
- Amend
- Change of Venue/Transfer
- Compel
- Consolidation
- Continue
- Deposition
- Designate a Mediator
- Judgment as a Matter of Law (during Trial)
- Disburse Funds
- Extension of Time
- In Limine
- Joinder
- More Definite Statement
- Motion to Dismiss pursuant to Rule 12(b)
- New Trial
- Objection of Exemptions Claimed
- Pendente Lite
- Plaintiff's Motion to Dismiss
- Preliminary Injunction
- Protective Order
- Quash
- Release from Stay of Execution
- Sanctions
- Sever
- Special Practice in Alabama
- Stay
- Strike
- Supplement to Pending Motion
- Vacate or Modify
- Withdraw
- Other _____
Emergency Motion to Modify the
Temporary Restraining Order

*Motion fees are enumerated in §12-19-71(a). Fees
pursuant to Local Act are not included. Please contact the
Clerk of the Court regarding applicable local fees.

Local Court Costs \$ 0

pursuant to Rule Rule 65 (Subject to Filing Fee)

Check here if you have filed or are filing contemporaneously with this motion an Affidavit of Substantial Hardship or if you are filing on behalf of an agency or department of the State, county, or municipal government. (Pursuant to §6-5-1 Code of Alabama (1975), governmental entities are exempt from prepayment of filing fees)

Date:
8/8/2018 11:43:41 AM

Signature of Attorney or Party
/s/ COLE ROBINSON GRESHAM

*This Cover Sheet must be completed and submitted to the Clerk of Court upon the filing of any motion. Each motion should contain a separate Cover Sheet.
**Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.

This matter was first initiated on Friday, August 3, by the State of Alabama seeking a TRO based on the complaints of thirty-three individuals who represent to be Defendants' customers, or less than one percent of Defendants clients. Even though it clearly took the Plaintiff time to conduct the investigation, and draft the Complaint and Motion for a Temporary Restraining Order, no notice was given to Defendants before the TRO was entered, which deprived Defendants of their business and froze all of their assets. The breadth of Plaintiff's TRO is staggering, as it goes so far as to prevent Defendants from paying for basic living expenses such as food. Moreover, by seizing Defendants' business, the TRO puts the jobs and livelihoods of Defendants forty-seven employees at risk. All of this is based on Plaintiff's one paragraph argument that fails to meet the requirements of Alabama Code § 8-19-8. As such, there is no basis for freezing Defendants' assets or the appointment of a receiver.

Even if Plaintiff was able to meet the requirements of Alabama Code § 8-19-8, the TRO violates Defendants' due process rights as it prevents them from spending money on basic living expenses until they have compiled complete financial statements and received the written permission of the receiver. Moreover, this matter is currently set for a hearing on Plaintiff's request for a preliminary

injunction on August 16, 2018.¹ By freezing Defendants' assets, Plaintiff's TRO has effectively prevented Defendants from mounting any defense to these allegations that threaten Defendants' very livelihood. In fact, Plaintiff has consented to modifying the TRO to allow Defendant to use funds under the control of the receiver for payment of legal expenses incurred or to be incurred in defense of this matter. Thus, at the very least, Defendants are entitled to have the TRO modified to allow Defendants to pay their legal fees and reasonable living expenses.

DISCUSSION

1. PLAINTIFF HAS FAILED TO MAKE THE REQUIRED FACTUAL SHOWING TO SUPPORT ITS REQUEST TO FREEZE DEFENDANTS' ASSETS AND APPOINT A RECEIVER.

According to Alabama law, in order for a receiver to be appointed and assets frozen, Plaintiff must demonstrate "that the defendant threatens or is about to remove, conceal, or dispose of his property to the damage of persons to whom restoration would be made. . . ." ALA. CODE § 8-19-8. Plaintiff has made no such showing. Plaintiff's Motion simply repeats the language from the statute and makes the unsubstantiated statement "there is real concern that, if this Court does not appoint a receiver to take control of defendants' assets, consumers' restitution and the States' [sic] penalties will be squandered and possibly lost forever." Motion at p. 8.

¹ Defendants intend to file a motion to continue this hearing, as it does not afford Defendants sufficient time to conduct the investigation necessary to effectively defend themselves.

Plaintiff, however, does not provide any factual support for this “concern,” and nothing in Plaintiff’s voluminous filings suggests that Defendants have threatened or are about to “remove, conceal, or dispose” of their assets. Before being entitled to such radical relief—that prevents Defendants from even mounting a defense—basic due process requirements certainly require Plaintiff to submit more than a one paragraph argument based on a one sentence, unsubstantiated reference regarding Plaintiff’s “real concern.” *See Connecticut v. Doehr*, 501 U.S. 1, 11–12 (1991) (holding that due process protection is merited when there is deprivation of property and deprivation need not be “complete, physical, or permanent” to merit protection but that “even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protections.”); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (The right to be heard “before being condemned to grievous loss of any kind . . . is a principle basic to our society” and the “fundamental requirement of due process is the right to be heard at a *meaningful time and in a meaningful manner.*”) (citations omitted and emphasis added).

Here, Defendants have been deprived of all of their assets and have been prohibited from paying for counsel to defend them against these very serious allegations without the benefit of a hearing, solely on the basis of Plaintiff’s unsubstantiated “concern.” Such a concern does not fulfill the requirements of § 8-

19-8, and it does not warrant the deprivation of Defendants' property without due process. Given Plaintiff's failure to comply with the requirement of § 8-19-8 and basic due process requirements, Sections III-VIII of the TRO are due to be dissolved.

2. AT THE VERY LEAST, THE TRO SHOULD BE MODIFIED TO ALLOW DEFENDANTS TO PAY THEIR LEGAL FEES AND REASONABLE LIVING EXPENSES.

The TRO, as currently entered, prevents Defendants from spending anything for any reason. Defendants are not even permitted to pay for basic living expenses until they have filed complete financial statements and received prior written consent from the receiver. TRO at p. 8. Additionally, the TRO does not allow Defendants to pay for attorneys to defend themselves against these allegations

The breadth of Plaintiff's TRO is beyond the scope envisioned by § 8-19-8 and violates Defendants' due process rights. The TRO goes beyond the limits allowed by § 8-19-8, as it freezes more assets than necessary to "prevent damage of persons to whom restoration would be made." ALA. CODE § 8-19-8. According to Plaintiff's allegations, Defendants only owe a total of \$118,270.87 in consumer restitution,² and Defendants have approximately \$500,000 in liquid assets. Ex. A at ¶ 5. As a result, Defendants' liquid assets are more than sufficient to allow Defendants to pay their attorneys' fees and reasonable living expenses, while still insuring that restitution can be paid in the event Plaintiff prevails.

² State's Exhibit 51.

Plaintiff's Motion claims that a receiver should be appointed to protect the potential penalties that may be collected in the event the State prevails. Motion at p. 8. This argument, however, is contrary to the plain language of the statute. Section 8-19-8, clearly provides that the only issue to be considered is possible "damage of **persons to whom restoration would be made.**" (emphasis added). Under the Plaintiff's claims and the DTPA, no restitution (or "restoration") is owed to the State. The State is only allowed "civil penalt[ies]" under the Alabama Code § 8-19-11(b). In other words, § 8-19-8 only allows the freezing of assets sufficient to insure that restitution will be made. In this case, the seizure of assets is substantially overbroad, given that Defendants' assets are substantially more than any potential restitution that may be owed.

Additionally, the breadth of the TRO violates Defendants' due process rights. As the Supreme Court stated in *Eldridge*, the right to be heard "before being condemned to grievous loss of any kind . . . is a principle basic to our society" and the "fundamental requirement of due process is the right to be heard at a *meaningful time and in a meaningful manner.*" 424 U.S. at 333. Plaintiff's TRO effectively prevents all of the Defendants from having a meaningful opportunity to be heard, as it prohibits them from paying their attorneys' fees. Given that the corporate Defendants cannot appear *pro se*, they have no choice but to accept a default judgment if the current TRO is left in place. Similarly, while the individual

Defendants may appear *pro se*, such a deprivation of counsel, in such a complex case, effectively deprives them of any meaningful ability to challenge Plaintiff's allegations.

Finally, Plaintiff's counsel has represented to Defendants that Plaintiff does not oppose modifying the TRO to permit Defendants access to funds under the control of the receiver for payment of legal expenses incurred or to be incurred in defense of the above-captioned matter. Therefore, Defendants request that the Court modify the TRO to allow Defendants to pay their attorneys' fees and reasonable living expenses.

CONCLUSION

Plaintiff has failed to make the required showing for the appointment of a receiver and freezing Defendants' assets, under Alabama Code § 8-19-8. Thus, Sections III-VIII of the TRO are due to be dissolved, or, at the very least, the TRO should be modified to allow Defendants to pay their attorneys' fees and reasonable living expenses.

Dated: August 8, 2018

Respectfully submitted,

/s/ Tabor R. Novak III

Tabor R. Novak III (ASB-3580-B60N)

J. Scott Dickens (DIC023)

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2018, I electronically filed the foregoing with the Clerk of the Court using the Ala-File system to the following:

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/s/ Cole R. Gresham
Cole R. Gresham (ASB-8993-L74G)

EXHIBIT A

IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA

STATE OF ALABAMA,

Plaintiff,

vs.

AMERICAN PLUMBING AND SEPTIC
SERVICE, LLC, et al,

Defendants.

CASE NO CV18-900431

AFFIDAVIT OF RICHARD JOSHUA PESNELL

1. My name is Richard Joshua Pesnell. I am the owner and Managing Member of American Plumbing and Septic Service, LLC (“American”). I am over the age of nineteen, and I do not suffer from any mental or physical conditions that would prevent me from stating, truthfully and accurately, the facts and matters contained herein, and I have personal knowledge of those facts.

2. American is a full-service plumbing and septic business that is located in Oxford, Alabama, and operates in Oxford and the surrounding areas.

3. In the early 1980s my father started a plumbing company called American Drain Cleaning and Plumbing Services. I began working for my father’s company full-time in 2010. In 2015, I acquired the assets of American Drain Cleaning and Plumbing Services and formed American Plumbing and Septic Service, LLC. I currently operate American.

4. Since 2014, we have grown the business from a small father-son venture, into a business that now employs thirty-nine people. Over the last several years, we have completed approximately 3,000-3,500 plumbing jobs per year. Personally and through American, we support many local causes, including Toys for Tots, Relay for Life, Boys & Girls Clubs, Big Oak Ranch, Salvation Army, Angel Tree, and Aces for Autism. American supports numerous other local charitable and civic causes.

5. Currently, American has liquid assets in excess of \$500,000.

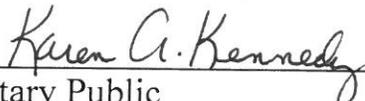
FURTHER AFFIANT SAITH NOT.


Richard J. Pesnell

STATE OF ALABAMA)
JEFFERSON COUNTY)

Before me, the undersigned, a Notary Public, in and for said County and State, personally appeared Richard J. Pesnell, who is known to me, who, after being duly sworn, deposes and says that he has read the above and foregoing Affidavit, and that said facts stated therein are true to the best of his knowledge and belief.

Sworn to and subscribed before me this 8th day of August, 2018.


Notary Public
My Commission
Expires: 4/11/2022

(OFFICIAL NOTARY SEAL)