AlaFile E-Notice

11-CV-2018-900431.00

Judge: BRIAN P HOWELL

To: MR. JEFFERY SCHNEIDER AS RECEIVER (PRO SE)

, AL, 00000-0000

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

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C001 STATE OF ALABAMA

MOTION TO DISSOLVE THE RECEIVERSHIP AND SEQUESTRATION OF ASSETS

[Filer: DEAN MICHAEL GREGORY]

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CIRCUIT COURT OF
CALHOUN COUNTY, ALABAMA
KIM MCCARSON, CLERK

IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA

STATE OF ALABAMA	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CV-18-900431.00**
	)	
AMERICAN PLUMBING AND	)	
SEPTIC SERVICE, LLC, et al.	)	
Defendants.	)	

STATE'S RESPONSE TO DEFENDANTS' MOTION TO DISSOLVE THE RECEIVERSHIP AND SEQUESTRATION OF ASSETS

COMES NOW the Plaintiff, State of Alabama, and submits this response in opposition to the "Motion to Dissolve the Receivership and Sequestration of Assets" filed by Defendants American Plumbing Service, LLC, American Drain Cleaning & Plumbing Service, Richard J. Pesnell ("Josh Pesnell"), Jessica Pesnell, and Richard G. Pesnell. As grounds therefore, the State offers the following:

Section 8-19-8(b) of the Code of Alabama provides that "[t]he court may appoint a master or receiver or order sequestration of assets whenever it shall appear 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[.]" The Defendants complain that the Court erroneously determined that the appointment

of a receiver and the sequestration of the Defendants' assets were warranted in this case.[1] (Motion at 1-3) The Court was right; the Defendants are wrong.

In their motion, the Defendants contend that, because the Receiver has identified liquid assets belonging to the Corporate Defendants in the amount of $360,000.00 and the State is only seeking consumer restitution in the amount of $118,270.87, there is no need for a receiver or a sequestration of assets because they are willing deposit over $130,000.00 with this Court in order to pay restitution should they be found liable. In other words, the Defendants, having cheated and bullied their way into their ill-gotten gains, are now trying to buy their way out of their predicament.

But the Receiver's duties in this case go well beyond granting the Defendants access to Receivership property. For example, the Receiver is also responsible for identifying additional victims of Defendant's dangerous business practices. Though the State quickly identified numerous victims of the Defendants' illegal conduct, including seven victims of the Defendants' dangerous, unlicensed

[1] To the extent the Defendants challenge whether the State properly sought the issuance of the TRO itself or met any sort of burden-of-proof in seeking the TRO, those challenges are meritless. The Deceptive Trade Practices Act ("DTPA") provides that the Office of the Attorney General can seek a TRO if it "has reason to believe that any person is engaging in, has engaged in or is about to engage in any act or practice declared to be unlawful by" the DTPA. Ala. Code § 8-19-8(a). The Office of the Attorney General did conclude from its investigation of the Defendants' conduct that they intended to continue violating the DTPA. Thus, it properly sought a TRO under the authority of Section 8-19-8(a).

electrical and LP Gas work, the State's investigation was essentially limited to consumers who made a complaint to a state or local agency, or the Better Business Bureau, within the last two years. There are, without a doubt, additional victims of Defendants' illegal conduct. Indeed, the State and the Receiver have already heard from numerous consumers who have been victimized by the Defendants' illegal business practices, and there are potentially thousands more affected consumers. In light of that, there is no way to determine at this point what the total restitution will be should the State seek restitution for these consumers, either by virtue of the State's existing request for relief in its Complaint, or through an amended complaint. The Defendants simply cannot ensure that depositing $130,000 with this Court will ultimately be sufficient to pay all claims, nor can they show any other reasonable basis for removing the Receiver from this case.

The Defendants also complain about this Court's order because, they assert, it was "cut-and-pasted" from an order issued by another court in a separate case. (Motion at 4) But there is nothing that forbids the State from submitting a proposed order that tracks another court issued in a separate case, nor is there anything that prohibits a court from signing such a proposed order. In the end, this Court issued an order it deemed proper, and there was no error in it. *See, e.g.*, *Ex parte Ingram*, 51 So. 3d 1119, 1122 (Ala. 2010)("the general rule is that, where a trial court does

in fact adopt the proposed order as its own, deference is owed to that order in the same measure as any other order of the trial court.").

In any event, the fact that the State submitted a proposed order based on an order issued in another case only serves to bolster the Court's adoption of that order. The Defendants may be unaware – or uninterested – in the provisions of Section 8-19-6 of the Code of Alabama, which provides that "due consideration and great weight shall be given where applicable to interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended." Given that, it makes perfect sense for the State to use an order similar to an order used in a successful action prosecuted by the Federal Trade Commission. Likewise, it makes perfect sense for this Court, or any court hearing a DTPA claim, to issue an order that is similar to other orders issued by federal courts in actions brought to enforce the Federal Trade Commission Act. To assert otherwise is misguided.

The Defendants also complain about this Court's appointment of Mr. Schneider as Receiver, contending that because he is based in Miami, Florida, his travel to Alabama is an inordinate drain on receivership assets. (Motion at 3) But the Defendants do not get to choose the Receiver, the Court does. The State recommended Mr. Schneider to this Court because he is the most qualified

candidate to be Receiver. Despite the Defendants' concerns Mr. Schneider is, from his office in Miami, paying the Corporate Defendants' bills, answering telephone calls made to the business, and communicating with the Defendants' customers, employees, and vendors to make sure everyone is fully apprised of the Defendants' circumstances. In reality, any significant problems related to travel or administrative expenses based on Mr. Schneider's office location lie at the feet of the Defendants. As discussed in more detail below, the Defendants have regularly refused to cooperate with Mr. Schneider, thereby requiring at least one otherwise unnecessary trip to Alabama to turn over assets that the Defendants initially did not disclose. To suggest then that it is Mr. Schneider, and not the Defendants themselves, who "creates a drain on company assets" is incorrect, if not hypocritical.

Next, the Defendants make multiple complaints about the effect their inability to operate has on their employees and their business. (Motion at 4) These arguments are meritless. First, the Defendants complain that they have been unable to pay their employees. But the TRO had to take effect at some point, and it is neither the State's nor this Court's fault that the Defendants pay their employees two weeks in arrears and have not paid them since the TRO took effect. Furthermore, the State wanted a hearing on the TRO in accordance with the ten-day provision set out in Rule 65 of the Alabama Rules of Civil Procedure, but the

Defendants wanted the hearing continued. This is simply a side-effect, however unfortunate, of that request.

Second, the Defendants make various complaints about their inability to run their business under the receivership, and they accuse the State of seeking to punish them through the receivership and the sequestration of assets. But it is not the receivership that has stopped the Defendants from operating; it is the TRO as a whole, which was issued based on the Defendants' own misconduct. The Defendants seem to have forgotten that the State is authorized to seek a TRO if it finds that the Defendants intend to continue their illegal conduct. *See* Ala. Code § 8-19-8(a). The State made that precise determination in this case, and, as Section 8-19-8(a) authorizes, it sought the TRO to temporarily halt the Defendants' business practices. There is no reason to set aside the receivership based on these arguments.

Finally, the Defendants' conduct since the issuance of the TRO should not give this Court any comfort that the Defendants can be trusted or that any sort of relief from the provisions of the TRO is warranted. The Defendants have proven time and again that they cannot be trusted to refrain from attempting to "to remove, conceal, or dispose of [their] property to the damage of persons to whom restoration would be made[.]" Ala. Code § 8-19-8(b). As detailed in a previous filing, both Richard J. "Josh" Pesnell and Jessica Pesnell directly told the Receiver

on August 3rd that no one had in their possession any cellular phones or vehicles that were paid for by the business. The Defendants also represented to the Receiver, on more than one occasion, that all of the company vehicles had been returned to the business. Then, on the afternoon of Tuesday, August 7th, the Defendants' former attorney informed the Receiver via email that both Josh and Jessica Pesnell had in their possession cellular phones that are paid for by the business; that Josh Pesnell's personal Mercedes Benz is leased through the business; that the Defendants had recently purchased a "pump truck," which, the attorney believed, was being stored at the residence of Defendant Richard G. Pesnell; and that multiple employees, acting under the direction of Defendant Richard J. Pesnell, took vehicles belonging to the company home rather than return them to the business as specifically directed by the Receiver pursuant to this Court's order.

The Defendants' current attorney made arrangements to return this property on Saturday, August 11th. But before meeting the Receiver to turn over these items, the Defendants' revealed that they actually had *four* phones and two tablets paid for by the company, and they argued with the Receiver that they should be able to keep the phones, or at the very least, that the Receiver should not be able to access them despite the fact that they are assets of the Corporate Defendants.

Moreover, as noted previously, both the State and the Receiver have received evidence that the Defendants have attempted to continue operating their business since this Court issued the TRO. With their bank accounts frozen and access to their buildings foreclosed, the Defendants could not legitimately accept payments for the work they attempted to do or for any work they actually did. But, as their history shows, they were not going to do work *pro bono*. So, any payments the Defendants received (or would have received) from consumers went (or were going to go) somewhere beyond the control of the Receiver where they would not have been found easily, if ever. The entirety of the Defendants' conduct since this Court issued the TRO demonstrates a clear intent to withhold existing assets and accrue new assets that would also be hidden from this Court, the Receiver, and ultimately, the victims of the Defendants' conduct.

Given the information already before this Court, and the Defendants' continued deceptive conduct in violation of this Court's order, there can be no reasonable argument that this Court erroneously determined that the Defendants intended to conceal, remove or otherwise dispose of property or assets to the detriment of consumers who will be due restitution from the Defendants. Their offer to buy their way out of the appointment of the Receiver and the sequestration of their assets is – like so much of their conduct – a deceit, and this Court should reject it. Furthermore, this Court has scheduled a full hearing on this matter for

September 6th. It is the Defendants, not the State, who wanted the hearing continued from its original setting. It has begun to appear that the Defendants asked for the continuance so they could attempt to derail the hearing and not simply, as they represented, to have more time to prepare for it. Their efforts should not succeed.

Respectfully submitted, this the 14th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of August, 2018, I have served a copy of the foregoing upon counsel for the Defendants by mailing copies of the foregoing by email or by first-class U.S. Mail, at the following addresses:

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