



AlaFile E-Notice

11-CV-2018-900431.00

Judge: BRIAN P HOWELL

To: BARNES NOEL STEVEN
nbarnes@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 10/1/2018 4:34:15 PM

C001 STATE OF ALABAMA

RECEIVER'S MOTION FOR LEAVE TO SEEK VACATION OF JUDGMENT AGAINST CONSUMER

[Filer: DEAN MICHAEL GREGORY]

Notice Date: 10/1/2018 4:34:15 PM

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

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

*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.



**IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA
 CASE NO.: 11-CV-2018-900431**

THE STATE OF ALABAMA,
 THE ALABAMA BOARD OF ELECTRICAL CONTRACTORS,
 THE ALABAMA DEPARTMENT OF PUBLIC HEALTH,
 THE ALABAMA LIQUEFIED PETROLEUM GAS BOARD,
 THE ALABAMA ONSITE WASTEWATER BOARD,
 THE ALABAMA PLUMBERS AND GASFITTERS EXAMINING BOARD,

Plaintiffs,

vs.

AMERICAN PLUMBING AND SEPTIC SERVICE, LLC,
 an Alabama corporation;
 AMERICAN PLUMBING AND SEPTIC SERVICE, LLC
 d/b/a A American Drain Cleaning & Plumbing Service;
 RICHARD JOSHUA PESNELL, individually
 and as owner/incorporator of AMERICAN
 PLUMBING AND SEPTIC SERVICE, LLC
 and AMERICAN PLUMBING AND SEPTIC
 SERVICE, LLC d/b/a A American Drain &
 Cleaning & Plumbing Service;
 JESSICA PESNELL, individually
 and as incorporator of AMERICAN PLUMBING
 AND SEPTIC SERVICE, LLC and AMERICAN
 PLUMBING AND SEPTIC SERVICE, LLC
 d/b/a A American Drain & Cleaning &
 Plumbing Service;
 RICHARD G. PESNELL, individually
 and as owner/incorporator of AMERICAN PLUMBING
 AND SEPTIC SERVICE, LLC
 and AMERICAN PLUMBING AND SEPTIC SERVICE, LLC
 d/b/a A American Drain Cleaning & Plumbing
 Service;
 DAVIS UNLIMITED, LLC, an Alabama
 corporation; RICHARD JOSHUA PESNELL,
 as co-owner of DAVIS UNLIMITED, *et al*,

Defendants.

**MOTION FOR LEAVE TO SEEK
 VACATION OF JUDGMENT AGAINST CONSUMER**

Jeffrey C. Schneider, not individually, but solely in his capacity as the court-appointed receiver for American Plumbing and Septic Service, LLC, and A American Drain Cleaning &

Plumbing Service (the “Receiver”), hereby moves this Court for leave to seek vacation of the Final Order obtained by American Plumbing and Septic Service, LLC (“American Plumbing”) against David Brian Plokhooy, and in support thereof, the Receiver states as follows:

1. On September 14, 2018, after the conclusion of a three-day evidentiary hearing, this Court entered the preliminary injunction and extended my appointment to permanent equity receiver for American Plumbing. One of the witnesses who testified for the Plaintiffs was David Plokhooy. As the Court will likely recall, American Plumbing had obtained a judgment *in absentia* against Mr. Plokhooy related to Mr. Plokhooy’s purported refusal to pay for plumbing and septic work done at his home. That judgment was entered on January 25, 2018 via the Final Order attached hereto as Exhibit A.

2. Mr. Plokhooy also testified that, in addition to the civil judgment it sought against Mr. Plokhooy, American Plumbing also pressed criminal charges against Mr. Plokhooy related to the same refusal to pay, which resulted in Mr. Plokhooy being arrested, ironically, on the same day that this Court initially entered the TRO and appointed me as temporary receiver over American Plumbing.

3. At the PI hearing, Mr. Plokhooy explained that the so-called “full amount” being sought by American Plumbing in the Final Order included items that American Plumbing added after the fact that were not included in the original estimate or part of the original scope of work, which is precisely the type of deceptive trade practices that this Court found justified entry of the PI Order against American Plumbing.

4. The PI Order specifically provides that the Receiver “shall not attempt to collect on any judgment that the Defendants obtained against a consumer if the Receiver believes the consumer was a victim of the unfair or deceptive acts or practices alleged in the Complaint in this

matter or if the Receiver believes the consumer was a victim of unfair or deceptive acts or practices similar to those alleged in the Complaint in this matter.” (DE 238 at 13, B. ¶ 2.) The Receiver was further authorized to appear in, adjust, or compromise any actions in this and other courts to the extent the Receiver deems it necessary to fulfill his mandate. (*See id.* at 15, ¶ 11.)

5. The Receiver believes that Mr. Plokhooy was clearly a victim of American Plumbing’s deceptive practices and desires to vacate the Final Order against Mr. Plokhooy.

6. The Receiver believes that the PI Order’s mandate not to seek to collect judgments against victimized consumers includes the right to seek vacation of those judgments. However, in an abundance of caution, because the PI order does not specifically mention such actions, the Receiver seeks leave to pursue vacation of the Final Order against Mr. Plokhooy.

7. The proposed motion to vacate the Final Order against Mr. Plokhooy is attached hereto as **Exhibit B**, without exhibits.

WHEREFORE, the Receiver respectfully requests leave to seek vacation of the Final Order entered against David Plokhooy.

Dated: October 1, 2018

Respectfully submitted,

Jeffrey C. Schneider, P.A.
Court-Appointed Receiver
 201 South Biscayne Blvd.
 Citigroup Center, 22nd Floor
 Miami, Florida 33131
 Telephone: 305.403.8788
 Facsimile: 305.403.8789
 Email: jcs@lklsg.com

By: /s/ Jeffrey C. Schneider
 JEFFREY C. SCHNEIDER, P.A.
Court-Appointed Receiver

CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2018, the foregoing document was served this day on all counsel of record identified on the below Service List via electronic mail.

/s/ Jeffrey C. Schneider
Jeffrey C. Schneider, P.A.
Court-Appointed Receiver

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EXHIBIT A

AVS309

ALABAMA JUDICIAL DATA CENTER
CALHOUN COUNTY

TRANSMITTAL

CV 2016 900558.00
SHANNON C PAGE

IN THE CIRCUIT COURT OF CALHOUN COUNTY
AMERICAN PLUMBLING AND SEPTIC SERVICE L.L.C V. DAVID PLOOKHOY ET AL

TO: PLOOKHOY DAVID
12 ALICE RIDGE ROAD
ANNISTON ,AL 36207-0000

ATTY: *** PRO SE ***

PLEASE SEE THE ATTACHED ORDER. THANK YOU.

NOTICE DATE: 01/25/2018

CLERK: KIM MCCARSON
300 CALHOUN CO COURTHOUSE
ANNISTON AL 36201
(256) 231-1750

OPERATOR: CHC
PREPARED: 01/25/2018

IN THE CIRCUIT COURT OF CALHOUN COUNTY

STATE OF ALABAMA

AMERICAN PLUMBING AND SEPTIC)
SERVICE, LLC,)

Plaintiff,)

v.)

DAVID BRIAN PLOKHOY, and)
DAWN EVYTTE PLOKHOY)

Defendants.)

CASE NO.: CV-16-900558

FILED

JAN 25 2018

KIM McCARSON, CLERK

FINAL ORDER

This cause, having been appropriately noticed by the Court, came on for trial on January 24, 2018, in response to the Plaintiff's complaint for damages filed against the Defendants, DAVID BRIAN PLOKHOY and DAWN EVYTTE PLOKHOY in this matter.

The Plaintiff was present along with its attorney of record, Shaun L. Quinlan, Esq. The Defendants, DAVID BRIAN PLOKHOY and DAWN EVYTTE PLOKHOY, who were *pro se*, did not appear.

The Plaintiff proceeded to put on its evidence with regards to the claims it made in its complaint; in addition, based on the evidence proffered during trial, the Court granted the Plaintiff's motion to amend the complaint as provided for by Rule 15(b) of the Alabama Rules of Civil Procedure and make a claim for fraud as provided for in Section 6-5-100, *et. seq.*, of the Code of Alabama (1975).

After hearing the testimonial evidence and reviewing the documentary evidence submitted at trial, the Court makes the following findings:

1. On August 1, 2016, the Plaintiff entered into a written agreement with the Defendants, DAVID BRIAN PLOKHOOPY and DAWN EVYTTE PLOKHOOPY, whereby the Plaintiff would provide labor, materials, tools, supplies and equipment to perform plumbing and septic tank installation work for the Defendants at Defendants' real property, to wit: 12 Alice Ridge Road, Anniston, Alabama.
2. The total sum of the contract was \$12,025.00.00.
3. The Plaintiff complied with the terms and conditions of said written agreement, and that the Defendants acknowledged in writing said work was completed.
4. That the Defendants paid a total of \$4,000.00, towards the contract price, leaving an unpaid balance of \$8,025.00.
5. That the Defendant, David Brian Plokhooy, made false representations to the Plaintiff regarding his payment of the original contract price and led the Plaintiff to believe that the entire contract price would be paid in full at the conclusion of the Plaintiff's work at the Defendants residence. Furthermore, the Plaintiff relied on that the representations of the Defendants and that had the Plaintiff known the truth of those relied upon false representations, the Plaintiff would not have performed said work. The Court further finds that the Defendants' false representations to the Plaintiff were malicious and wilful, and made to deceive the Plaintiff.
6. That the Plaintiff suffered compensatory damages in the amount of \$8,025.00, because of the fraudulent representations made by the Defendants.
7. In addition, the written agreement entered into between the Plaintiff and the Defendants provided for the reasonable attorney's fees of Plaintiff in the event that the Plaintiff had to file an action to recover any unpaid monies the Defendants owed the Plaintiff.

8. The Plaintiff offered the expert testimony of a local attorney who found that the Plaintiff had expended the sum of \$4,965.55 in attorney's fees. Based on the testimony of said expert, the Court finds that this sum is reasonable.

Based on the forgoing, along with the other evidentiary matters admitted into evidence, the Court hereby ADJUDGES, DECREES and ORDERS the following;

1. Judgment is hereby entered in favor of the Plaintiff, AMERICAN PLUMBING AND SEPTIC SERVICE, LLC, against the Defendants, DAVID BRIAN PLOKHOY and DAWNEVYTTE PLOKHOY, jointly and severally, in the form of compensatory damages in the amount Eight Thousand and Twenty Five Dollars (\$8,025.00) for which execution may issue forthwith.
2. Judgment is hereby entered in favor of the Plaintiff, AMERICAN PLUMBING AND SEPTIC SERVICE, LLC against the Defendants, DAVID BRIAN PLOKHOY and DAWN EVYTTE PLOKHOY, jointly and severally, in the form of pre-judgment interest in the amount One Thousand Four Hundred and Ninety Six Dollars (\$1,496.00), for which execution may issue forthwith.
3. Judgment is hereby entered in favor of the Plaintiff, AMERICAN PLUMBING AND SEPTIC SERVICE, LLC against the Defendants, DAVID BRIAN PLOKHOY and DAWN EVYTTE PLOKHOY, jointly and severally, in the form of punitive damages in the amount of Twenty Four Thousand Dollars (\$24,000.00), for which execution may issue forthwith.
4. Judgment is hereby entered in favor of the Plaintiff, AMERICAN PLUMBING AND SEPTIC SERVICE, LLC against the Defendants, DAVID BRIAN PLOKHOY and DAWN

EVYTTE PLOKHOY, jointly and severally, for the attorney's fees incurred by the Plaintiff, in the amount Four Thousand Nine Hundred and Sixty Five Dollars and Fifty Five Cents (\$4,965.55), for which execution may issue forthwith.

5. Judgment is hereby entered in favor of the Plaintiff, AMERICAN PLUMBING AND SEPTIC SERVICE, LLC against the Defendants, DAVID BRIAN PLOKHOY and DAWN EVYTTE PLOKHOY, jointly and severally, in the form of court costs in the amount Three Hundred Thirty Eight Dollars and Forty Seven Cents (\$338.47), for which execution may issue forthwith.
6. The total judgment entered in favor of the Plaintiff, AMERICAN PLUMBING AND SEPTIC SERVICE, LLC against the Defendants, DAVID BRIAN PLOKHOY and DAWN EVYTTE PLOKHOY, jointly and severally, amounts to Thirty Eight Thousand Eight Hundred and Twenty One Dollars and Two Cents (\$38,821.02).
7. The Defendants' Counter-Claim is dismissed with prejudice.
8. This Final Order is made final pursuant to Rule 58 of the Alabama Rules of Civil Procedure.
9. The Clerk is directed to serve all Parties pro se and Counsel of record.

IT IS SO ORDERED this 25th day of January 2018.



SHANNON PAGE
Circuit Judge, Calhoun County

EXHIBIT B

IN THE CIRCUIT COURT OF CALHOUN COUNTY, ALABAMA
CASE NO.: CV-2016-900558

AMERICAN PLUMBING AND SEPTIC
SERVICE, LLC,

Plaintiff,

v.

DAVID BRIAN PLOKHOORY,

Defendant.

UNOPPOSED MOTION TO VACATE FINAL ORDER

Jeffrey C. Schneider, not individually, but solely in his capacity as the court-appointed receiver for American Plumbing and Septic Service, LLC, with the agreement of Defendant David Plokhoory and pursuant to Rule 60(b), Alabama Rules of Civil Procedure, moves to set aside the January 25, 2018 Final Order entered against Mr. Plokhoory and states as follows:

1. On January 25, 2018, this Court entered a Final Order against Defendant David Plokhoory and Dawn Plokhoory (who was since released from the Final Order) for \$38,821.02 in an action brought by American Plumbing and Septic Service, LLC (“American Plumbing”) for breach of contract, attorneys’ fees, punitive damages, and purported fraud, related to plumbing and septic tank work done at Mr. Plokhoory’s home. A copy of the Final Order is attached hereto as **Exhibit A.**

2. Mr. Plokhoory did not appear at the trial in this action, and the Final Order was entered against him *in absentia*. See Ex. A.

3. On August 3, 2018, in a case before Judge Howell in this court, the Office of the Attorney General, State of Alabama, (the “Attorney General”), the Alabama Board of Electrical Contractors, the Alabama Department of Public Health, the Alabama Liquified Petroleum Gas

Board, the Alabama Onsite Wastewater Board, and the Alabama Plumbers and Pipefitters Gasfitters Examining Board (collectively with the Attorney General, the “State”) sued American Plumbing and its principals for alleged violations of the Deceptive Trade Practices Act and for violations of various other provisions of the Alabama code regarding public health violations and unlicensed practices. The State sought temporary, preliminary, and permanent injunctive relief to prevent American Plumbing from continuing to provide plumbing, septic, and other unlicensed services to consumers. The State asserted that American Plumbing performed unlicensed work for consumers, employed improper business practices to increase the cost of services to consumers, drew consumers into high-interest-rate financing arrangements, and dumped raw sewage into freshwater streams.

4. On August 3, 2018, the Court entered a temporary restraining order, which appointed me as temporary receiver over the Receivership Defendants.

5. On September 14, 2018, after the conclusion of a three-day evidentiary hearing, during which time Mr. Plokhooy was a witness for the State, Judge Howell entered a preliminary injunction and extended my appointment to permanent equity receiver for American Plumbing. A copy of that preliminary injunction (the “PI Order”) is attached hereto as **Exhibit B**. At the PI hearing, Mr. Plokhooy testified that the so-called “full amount” being sought by American Plumbing included items that American Plumbing added after the fact that were not included in the original estimate or part of the original scope of work.¹ In the PI Order, Judge Howell specifically found that there was good cause to believe that American Plumbing had engaged in and would likely continue to engage in actions that violation the Deceptive Trade Practices Act, Sections 8-19-1 through -15 of the Code of Alabama.

¹ Unfortunately, Mr. Plokhooy was unable to provide that explanation as his defense to the claims asserted in this case.

6. The PI Order specifically provides that the Receiver “shall not attempt to collect on any judgment that the Defendants obtained against a consumer if the Receiver believes the consumer was a victim of the unfair or deceptive acts or practices alleged in the Complaint in this matter or if the Receiver believes the consumer was a victim of unfair or deceptive acts or practices similar to those alleged in the Complaint in this matter.” (Ex. B at 13, B. ¶ 2.) The Receiver was further authorized to appear in, adjust, or compromise any actions in this and other courts to the extent the Receiver deems it necessary to fulfill his mandate. (*See id.* at 15, ¶ 11.)

7. Having heard the testimony of Mr. Plokhooy during the hearing leading to entry of the PI Order, the Receiver is certain this judgment against Mr. Plokhooy is exactly the type of judgment that he is directed not to seek to collect, and indeed, represents an extension of the deceptive acts and practices of American Plumbing. It is the Receiver’s belief, and obviously that of Judge Howell, who entered the PI Order having heard the testimony of Mr. Plokhooy, among others, that Mr. Plokhooy was a victim of the deceptive practices of American Plumbing. Therefore, not only will the Receiver not seek to enforce this Final Order, but the Receiver believes that Mr. Plokhooy and his reputation have suffered enough, and the Receiver seeks to have this Final Order vacated.

8. The Receiver has consulted with Mr. Plokhooy who has no objection to and consents to the relief sought herein.

WHEREFORE, the Receiver respectfully requests that this Court vacate its Final Order against Mr. Plokhooy.

Dated: October __, 2018

Respectfully submitted,

Jeffrey C. Schneider, P.A.
Court-Appointed Receiver
201 South Biscayne Blvd.
Citigroup Center, 22nd Floor
Miami, Florida 33131
Telephone: 305.403.8788
Facsimile: 305.403.8789
Email: jcs@klsg.com

By: /s/ Jeffrey C. Schneider
JEFFREY C. SCHNEIDER, P.A.
Court-Appointed Receiver

CERTIFICATE OF SERVICE

I hereby certify that on October __, 2018, the foregoing document was served this day on David Plokhooy, 12 Alice Ridge Road, Anniston, AL 36207 via U.S. Mail.

/s/ Jeffrey C. Schneider
Jeffrey C. Schneider, P.A.
Court-Appointed Receiver