

Asher Enters., Inc. v Digital Brand Media & Mktg. Group, Inc.
2016 NY Slip Op 32776(U)
July 20, 2016
Supreme Court, Nassau County
Docket Number: 600717-14
Judge: Jerome C. Murphy
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**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

ASHER ENTERPRISES, INC.,

Plaintiff,

TRIAL/IAS PART 19

Index No.: 600717-14

Motion Date: 6/2/16

Sequence No.: 009

DECISION AND ORDER

- against -

**DIGITAL BRAND MEDIA & MARKETING GROUP,
INC. and LINDA PERRY,**

Defendants.

MD

The following papers were read on this motion:

Order to Show Cause, Affirmation in Support and Exhibits.....	1
Motion Opposing Appointment of a Receiver and Affidavit of Linda Perry.....	2
Reply Affirmation.....	3

PRELIMINARY STATEMENT

Plaintiff brings this application for an order: (1) appointing a receiver of the assets and properties of the defendant-judgment debtor, Digital Brand Media & Marketing Group, Inc., pursuant to CPLR §§ 5106 and/or 5228; (2) ordering and directing the defendant and its President, Linda Perry, to respond to and comply with the plaintiff's information subpoena, pursuant to CPLR § 5251; and (3) granting to the plaintiff such other further relief as to the Court may deem just and proper. Defendants have submitted opposition to this application.

BACKGROUND

By Decision and Order dated June 2, 2015, this Court granted plaintiff's motion for summary judgment against defendant Digital Brand Media & Marketing Group, Inc., and dismissed the Complaint against the individual defendant, Linda Perry (Exh. "A"). On July 15, 2015, the Court granted the Judgment in favor of plaintiff against Digital Brand Media &

Marketing Group, Inc., in the amount of \$122,801.87, which was entered in the Office of the Nassau County Clerk on July 20, 2015 (Exh. "B"). By Decision and Order dated October 7, 2015, the Court granted defendants' motion for reargument, but, upon reargument, adhered to its original decision (Exh. "C").

On July 21, 2015, and again on September 10, 2015, counsel for Asher Enterprises, Inc. served a Notice to Judgment Debtor, Restraining Notice, Information Subpoena and Questions and Answers (Exh. "D"). Plaintiff claims that defendant has not responded to these documents. Counsel also contemporaneously served such documents upon Linda Perry, against whom the action had been dismissed.

Since the entry of judgment, the parties agreed to a settlement in the amount of \$85,000, of which defendant has paid \$25,000. Plaintiff claims that the settlement was conditioned upon timely \$10,000 payments by defendant, but that they have not been forthcoming. They contend that the settlement has now been vitiated, and the amount due from defendant is no longer \$60,000, but more than \$100,000. They seek the appointment of a Receiver, which Defendant opposes.

DISCUSSION

CPLR § 5228 (a) provides for the appointment of receivers as follows:

(a) Appointment of receiver. Upon motion of a judgment creditor, upon such notice as the court may require, the court may appoint a receiver who may be authorized to administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest or to do any other acts designed to satisfy the judgment.

The decision of a Court to appoint a Receiver is within its discretion (*Hotel 71 Mezz Lender, LLC v. Falor*, 14 N.Y.3d 303 [2010]). A motion to appoint a Receiver should only be "granted . . . when a special reason appears to justify one." Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5228:1, at 324). In deciding whether the appointment of receiver is justified, courts have considered the " '(1) alternative remedies available to the creditor . . . ; (2) the degree to which receivership will increase the likelihood of satisfaction . . . ; and (3) the risk of fraud or insolvency if a receiver is not appointed.' " (*Id.* at

316, quoting *United States v. Zitron*, 1990 WL 13278.

Plaintiff is understandably anxious to have their judgment, or settlement, satisfied. There is, however, a serious question as to whether the appointment of a Receiver will in any way enhance the likelihood of payment. Linda Perry, against whom the Complaint was dismissed, is the principal of Digital Brand Media & Marketing Group, Inc. Her affidavit asserts that she continues to believe that the company is viable, and that she has every intention of complying with the settlement agreement. She anticipates that after the filing of the company's 10K with the Securities and Exchange Commission, the company will be in a better position to raise additional capital and attract new business based on being able to make current information available to prospective new clients.

The business of the company is to design and execute digital marketing strategies utilizing multiple advertising platforms and social media networks for a broad variety of clients. Ms. Perry claims that the brand identity of the company is suffering because the 10K is not filed. She claims that the funds which they intended to utilize to hire a public auditor were expended on the first installment of the settlement agreement. She asserts that at the present time, the company is unable to generate sufficient income to pay the balance owed to plaintiff.

According to plaintiff, defendant company has not responded to an Information Subpoena, which was originally served one year ago, on July 21, 2015. The Court directs the company to respond to the Information Subpoena within 20 days of receipt of a copy of this Decision and Order with Notice of Entry. The company is also directed to contemporaneously provide plaintiff with a copy of the 10K. With this information, alternative avenues for recovery by plaintiff may become known.

The Court does not believe that the appointment of a Receiver would enhance the likelihood of reimbursement of the amount owed. The business of defendant is somewhat esoteric, and appears to require interpersonal relationships with existing and prospective clients, a skill not readily available to the average person. Any Receiver would have to be skilled in these areas if any income were to be generated. The amount at issue would necessarily limit the funds to a Receiver to the extent that it would not be an attractive venture.

For the foregoing reasons, the Court does not find special reasons to justify the appointment of a Receiver, and does not believe that such an appointment would be reasonably likely to result in a more expeditious satisfaction of the amount claimed.

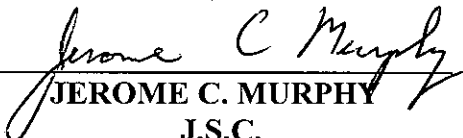
Plaintiff's motion for the appointment of a Receiver is denied.

To the extent that requested relief has not been granted, it is denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
July 20, 2016

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED

AUG 05 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE