

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

In re:

P8H, Inc. d/b/a PADDLE 8,

*Debtor.*

Chapter 11

Case No. 20-10809 (SMB)

**DECLARATION IN OPPOSITION TO APPLICATION  
FOR AN ORDER AUTHORIZING THE RETENTION OF KRIBY AISNER & CURLEY  
AS ATTORNEYS FOR THE DEBTOR, *NUNC PRO TUNC* AS OF MARCH 16, 2020**

PAUL COSSU declares under penalty of perjury:

1. I am a member of Olsoff Cahill Cossu LLP, attorneys for creditors Penumbra Foundation, a not-for-profit New York corporation (“Penumbra”) and The New American Cinema Group, Inc., a not-for-profit New York corporation (“NACG”).<sup>1</sup> I make this declaration in opposition to the application of Kirby Aisner & Curley (“Debtor’s Counsel”) to be appointed as attorneys for P8H, Inc. d/b/a Paddle8 (“Debtor”).

2. Penumbra has been identified by Debtor as a creditor with an unsecured claim of \$14,300. (*See* ECF No. 1.) However, for the reasons set forth below, including the application of New York’s Arts and Cultural Affairs Law, the NACG and Penumbra are secured creditors of Debtor because the amounts owed to the NACG and Penumbra represent the sale proceeds from artworks consigned by artists (via the NACG and Penumbra as disclosed agents) to Debtor (as sub-agent of the artists as a matter of law).

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<sup>1</sup> Debtor’s Chapter 11 Petition was apparently precipitated by the lawsuit brought by the NACG against Debtor on March 10, 2020 in the Supreme Court of the State of New York captioned *The New American Cinema Group, Inc. v. P8H, Inc. d/b/a Paddle8*; Index No. 651595/2020 (the “Civil Action”). Oddly, despite the lawsuit, and the written acknowledgement by Debtor’s Board Director, Peter Rich, of the debt owed to the NACG, Debtor has *not included* NACG as a creditor of Debtor.

3. Debtor operates an online auction house that focuses, primarily, on the sale of works of fine art. Generally speaking, an auction house does not own art or other personal property: it earns revenue via commissions paid by those buying and selling works of art owned by others. There is no reason to believe that Debtor—which lists its total assets as having a value of \$0-\$50,000—has any significant assets.

4. Debtor is an art merchant under New York law.

5. Section 12.01(1) of New York’s Arts and Cultural Affairs Law (“NYACAL”)

provides that:

(a) Whenever an artist or craftsman, or a successor in interest of such artist or craftsman, delivers or causes to be delivered a work of fine art, craft or a print of such artist’s or craftsman’s own creation to an art merchant for the purpose of exhibition and/or sale on a commission, fee or other basis of compensation, the delivery to and acceptance thereof by the art merchant establishes a consignor/consignee relationship as between such artist or craftsman, or the successor in interest of such artist or craftsman, and such art merchant with respect to the said work, and:

(i) such consignee shall thereafter be deemed to be the agent of such consignor with respect to the said work;

(ii) such work is trust property in the hands of the consignee for the benefit of the consignor;

(iii) any proceeds from the sale of such work are trust funds in the hands of the consignee for the benefit of the consignor;

(iv) such work shall remain trust property notwithstanding its purchase by the consignee for his own account until the price is paid in full to the consignor; provided that, if such work is resold to a bona fide third party before the consignor has been paid in full, the resale proceeds are trust funds in the hands of the consignee for the benefit of the consignor to the extent necessary to pay any balance still due to the consignor and such trusteeship shall continue until the fiduciary obligation of the consignee with respect to such transaction is discharged in full; and

***(v) such trust property and trust funds shall be considered property held in statutory trust, and no such trust property or trust funds shall become the property of the consignee or be subject or subordinate to any claims, liens or security interest of any kind or nature whatsoever of the consignee’s creditors.***

(Emphasis added.)<sup>2</sup>

6. On or about 2019-January-08, NACG entered into an “Online Benefit Auction Agreement” with Debtor to sell a series of works of fine art (the “Artworks”) via an online auction (the “Charity Action”) to raise funds for the NACG.

7. The Charity Auction was hosted on Debtor’s website from 2019-November-04 to 2019-November-18.

8. During the Charity Auction, and as a result of sales made shortly thereafter, over 30 Artworks were sold by Debtor.

9. With the exception of one single Artwork sold by Debtor, every other Artwork sold was identified as being consigned to Debtor “Courtesy of the artist” or the “artist’s estate.”

10. Debtor held a similar artwork auction for Penumbra (the “Penumbra Auction”).

11. In the Penumbra Auction, every artwork sold was identified as being consigned to Debtor “Courtesy of the artist.”

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<sup>2</sup> The principle applies to all consignors of artworks to auction houses. In *Cristallina, SA v. Christie, Manson & Woods Intl., Inc.*, 117 A.D.2d 284, 292, 502 N.Y.S.2d 165 (1986), the court held:

The auctioneer is the agent of the consignor. As an agent, [the auction house] Christie's had a fiduciary duty to act in the utmost good faith and in the interest of Cristallina, its principal, throughout their relationship. When a breach of that duty occurs, the agent is liable for damages caused to the principal, whether the cause of the action is based on contract or on negligence. [Citations omitted.]

It is hard to imagine a more-egregious breach of an auction house’s fiduciary duty than misdirecting the sale proceeds of a consignor to the auction house itself. The consignor has no recourse under law to the good faith purchasers of the artworks, *see, e.g., Brown v. Mitchell-Innes & Nash, Inc.*, No. 06 Civ. 7871(PAC), 2009 WL 1108526 (S.D.N.Y. April 24, 2009) (owner had no claim against purchaser who bought painting from dealer in breach of consignment agreement), and the liability of fiduciary selling-consignees of art (*e.g., Salander-O’Reilly Galleries, RH Love Galleries, Chowaiki & Co. Fine Art*), for failing to hold in trust and deliver a consignor’s sale proceeds, is clear.

12. Pursuant to the NYACAL, the sale proceeds from the Charity Auction are trust funds and the NACG and Penumbra are secured creditors of Debtor, despite Debtor's failure to acknowledge them as such.

13. Over a dozen other non-profits and artists are identified as unsecured creditors in Debtor's Petition. (See ECF No. 1, Pgs. 8-13.)

14. After Debtor defaulted on making timely payment to the NACG, and after efforts to resolve the debt were unavailing, on March 10, 2020, the NACG filed the Lawsuit against Debtor.

15. Shortly after the Lawsuit was filed, the Board Director for Debtor, Peter Rich, wrote to me acknowledging Debtor's obligation to make payment, and stated "We have made arrangements to settle your client's monies due immediately." Mr. Rich directed me to communicate with Debtor's Counsel to make arrangements for payment in exchange for a release of Debtor.

16. Despite multiple requests to review the release and resolve the lawsuit, Ms. Kirby did not provide a release and, upon receiving a demand on March 17, 2020 for confirmation that Debtor's Counsel was acting as counsel for Debtor, advised that it had filed a bankruptcy petition for Debtor the day before.

17. Debtor's Chapter 11 bankruptcy petition asserts over \$10,000,000 in liabilities and less than \$50,000 in assets for Debtor.

18. Debtor's Counsel Application for Retention states that it has already received a \$30,000 retainer from Debtor. (See ECF No. 2, ¶ 11.)

19. As it appears that Debtor has been using the funds of others—including charities—to fund its operations, and those charities have immediate, pressing needs of those funds—we are advised by both NCG and Penumbra that they were counting on the trust funds misappropriated

by Debtor for immediate operating expenses—it would be grossly unfair to allow Debtor to use those misdirected funds for its own operating expenses and legal fees. (As NYACAL provides that Debtor and its principals are liable to pay our legal fees, we have provided services to, and covered costs for, the charities *pro bono* and with no expectation of compensation by the charities.)

20. Practically speaking, based on year of experience dealing with art merchants who do not pay their consignors the money collected from the sale of the consignor’s art, it is extremely unlikely that any of the charities or other consignors will be able to recover their funds directly from Debtor, which were to have been held in trust by Debtor. For both NCG and Penumbra, \$30,000 is a material sum—perhaps even “make or break” in these times; allowing it to be used by Debtor and its attorneys would be unjust.

21. Given the disparity between Debtor’s assets and debts, there is no viable path to reorganization, and Penumbra, NACG, along with several other charities that we have spoken with, intend to make an application to convert this Chapter 11 filing into a Chapter 7 filing.

22. Because Debtor, via its Board Directors, has already admitted that it segregated NACG’s secured, trust funds, which have now apparently been used to pay Debtor’s Counsel’s retainer fee, we respectfully submit that the Court should deny Debtor’s Counsel’s Application and direct that the \$30,000 retainer fee be deposited with the Court so that a Court-appointed Trustee can determine how those funds should be allocated.

Dated: New York, New York  
2020-March-19



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Paul Cossu