

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

EMILE PIERRE,

Plaintiff,

-against-

JARVIS ELLIS, UNCLE CRAB'S
CARIBBEAN RESTAURANT, INC.,

Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 013958/07

MOTION DATE: April 18, 2011
Motion Sequence # 002

The following papers read on this motion:

Order to Show Cause..... X
Affirmation in Opposition..... X
Affidavit in Reply..... X

Motion by plaintiff to deem defendants in default of the stipulation of settlement and to enter judgment is **denied**.

Plaintiff Emile Pierre commenced this proceeding for the dissolution of a closely held corporation, defendant Uncle Crab's Caribbean Restaurant, Inc., and for an accounting on August 13, 2007 (Index No 13958/07). Pierre owned 60 % of the stock of Uncle Crab's Caribbean Restaurant, and defendant Jarvis Ellis was the other 40 % shareholder.

On January 11, 2008, the parties entered into a stipulation of settlement before Justice Austin. The stipulation provided that defendant would purchase plaintiff's interest for \$30,000. \$5,000 was to be paid on or before January 18, 2008. The balance of \$25,000 was

to be paid over a period of three years, at a rate of \$749.27 per month, which included interest at the rate of 5 %. Defendant consented to the entry of a judgment in the amount of \$40,000, which was not to be entered unless defendant was in default in payment. Payments were to be made on the 18th of the month, and if payment was not made by the 25th of the month, plaintiff could send a notice requiring defendant to cure the default within five days. If the default was not cured, a judgment could be entered based upon plaintiff's counsel's affidavit.

The stipulation further provided that defendant would indemnify plaintiff for all "liabilities of the business [of] Uncle Crab's Carribean Restaurant, including but not limited to reasonable attorney's fees and costs." The matter was marked discontinued with prejudice, except for enforcement of the terms of the settlement. The court notes that the transcript of the stipulation of settlement carries a different Index No, 21951/07.

Plaintiff served defendant with notice of default on November 5, 2010. In the notice, plaintiff asserted that the payments for September and October 2010 had not been tendered.

By order to show cause dated February 14, 2011, plaintiff moves for an order deeming defendants in default of the stipulation entered into before Justice Austin. Plaintiff requests judgment in the amount of \$19,495.63, plus attorney's fees of \$3,500. Plaintiff further requests that defendant be ordered to vacate the restaurant and return possession to plaintiff. In opposition, defendant contends that plaintiff has failed to provide him with access to the corporate books and records or a final statement of account.

A trial court has power to exercise supervisory control over all phases of pending actions and proceedings (*Teitlebaum Holdings v Gold*, 48 NY2d 51,54 [1979]). Incident to this general authority, a court has discretionary power to relieve parties from the consequences of a stipulation effected during litigation (Id). As a corollary to this power, a court may enforce a stipulation within a pending action or proceeding (*White House Manor v Benjamin*, 11 NY3d 393, 401 [2008]). "Because of its relative simplicity and lesser burden upon the litigants and the court," a motion within the action or proceeding tends to be the "favored procedural mode" (*Teitlebaum Holdings*, 48 NY2d at 55). However, if the stipulation relates to an action which has previously terminated, it must be enforced in a plenary action (Id). Thus, a plenary action is required if the parties have executed an express, unconditional stipulation of discontinuance or have entered judgment in accordance with the settlement (Id at 56).

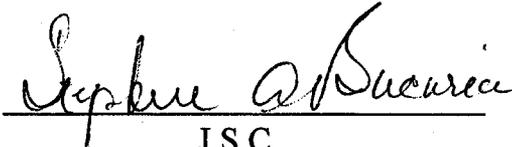
PIERRE v ELLIS, et al

Since the matter was marked discontinued with prejudice, the court concludes that plaintiff cannot enforce the stipulation by motion. Thus, plaintiff is required to prove defendant's noncompliance with the terms of the stipulation in a plenary action. Moreover, plaintiff has not established prima facie that the amount outstanding is \$19,495.63 or that defendant undertook to pay plaintiff's attorney's fees in connection with enforcement of the stipulation.

Plaintiff's motion to enter judgment in the amount of \$19,495.63 plus attorney's fees of \$3,500 and possession of the premises is **denied**. Counsel shall appear for a status conference on August 19, 2011 at 9:30 a.m. in Chambers of the undersigned.

So ordered.

Dated JUN 08 2011


J.S.C.

ENTERED

JUN 13 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**