

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33043
G/nl

_____AD3d_____

Submitted - November 4, 2011

WILLIAM F. MASTRO, A.P.J.
ANITA R. FLORIO
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2010-08178

DECISION & ORDER

Bubba Gump Fish & Chips Corp., et al., appellants,
v Harold W. Morris, Jr., respondent, et al., defendant.

(Index No. 19433/04)

Stephen David Fink, Forest Hills, N.Y., for appellants.

In an action, inter alia, to recover damages for breach of fiduciary duty and for an accounting, the plaintiffs appeal from a judgment of the Supreme Court, Queens County (Yablon, Ct. Atty. Ref.), entered March 19, 2009, which, upon a decision dated August 29, 2008, made after a nonjury trial, is in favor of the plaintiff John R. Scrip and against the defendant Harold W. Morris, Jr., in the principal sum of only \$66,150.

ORDERED that the appeal by the plaintiff Bubba Gump Fish & Chips Corp. is dismissed, without costs or disbursements, as it is not aggrieved by the judgment appealed from (*see* CPLR 5511); and it is further,

ORDERED that the judgment is affirmed on the appeal by the plaintiff John R. Scrip, without costs or disbursements.

In 1997, the plaintiff John R. Scrip and the defendant Harold W. Morris, Jr., entered into an oral agreement to be equal partners in the operation of a business known as the Bubba Gump Fish & Chips Corp., which operated a restaurant of the same name. The restaurant ceased operation after 14 months and, in 2001, the proceeds from the sale of some of the restaurant equipment were distributed to Scrip and Morris. In 2003, another entity purchased the restaurant for a price of \$140,000. In his complaint and thereafter at a nonjury trial, Scrip asserted, in pertinent part, that he alone made an initial investment of \$94,504.86 and that Morris made no contribution, either in terms

December 6, 2011

Page 1.

BUBBA GUMP FISH & CHIPS CORP. v MORRIS

of working at the restaurant or making any financial investment and, therefore, Scrip was entitled to the return of his initial contribution plus half the profit from the 2003 sale of the restaurant, for a total sum of \$117,252.57.

Where parties enter into an oral agreement, their obligations may be determined based upon the evidence, including their course of conduct (*see Czernicki v Lawniczak*, 74 AD3d 1121, 1125-1126).

“In reviewing a determination made after a nonjury trial, the power of this Court is as broad as that of the trial court, and the Appellate Division may render the judgment it finds warranted by the facts, bearing in mind that in a close case, the trial judge had the advantage of seeing the witnesses” (*Parr v Ronkonkoma Realty Venture I, LLC*, 65 AD3d 1199, 1201; *see Northern Westchester Professional Park Assoc. v Town of Bedford*, 60 NY2d 492, 499). Applying this standard here, we find that credible evidence supported the Supreme Court’s finding that Scrip contributed the capital while Morris, with experience in restaurant management, supervised the business without salary. The evidence thus supports the determination that the parties were equal partners who were entitled to share equally in the sale of the corporation’s assets, with adjustment for the amount distributed at the time of the 2001 equipment sale, and that Scrip was entitled to recover the sum of \$66,150 (*see Czernicki v Lawniczak*, 74 AD3d at 1125-1126).

MASTRO, A.P.J., FLORIO, LOTT and COHEN, JJ., concur.

ENTER:

A handwritten signature in cursive script that reads "Aprilanne Agostino".

Aprilanne Agostino
Clerk of the Court