

**Cherpelis v W. 46th Group, Inc.**

2009 NY Slip Op 30479(U)

February 27, 2009

Supreme Court, New York County

Docket Number: 106196/08

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **JUSTICE DORIS LING-COHAN**

PART 36

*Justice*

*Cherpelis*

INDEX NO. 106196/2008

MOTION DATE \_\_\_\_\_

- v -  
*W. 46<sup>th</sup> Group, Inc. et al.*

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits \_\_\_\_\_

5

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

3, 4

Upon the foregoing papers, It is ordered that this motion *for summary judgment* dismissing this case is granted in accordance with the attached memorandum decision. Plaintiff's motion is deemed moot.

**FILED**  
MAR 05 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: *[Signature]*  
**JUSTICE DORIS LING-COHAN**<sup>J.S.C.</sup>

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 36

-----x  
STEPHEN CHERPELIS,  
Plaintiff,

Index No.: 106196/08

-against-

DECISION AND ORDER

W. 46<sup>TH</sup> GROUP, INC. d/b/a BULL RUN  
RESTAURANT, CONSTANTINE IOANNOU  
and CELE IOANNOU,  
Defendants.

Motion Seq.: 002

-----x  
DORIS LING-COHAN, J.:

**FACTUAL BACKGROUND**

Defendants move for summary judgment pursuant to CPLR 3212, alleging that the same matter was litigated and settled between the same parties in an earlier litigation. Plaintiff cross-moves to preclude and/or strike defendants' answer because of defendants' failure to appear for depositions.

In 2003, plaintiff instituted an action against the same parties, except that the instant action does not name Chelsea Savoy Restaurant Corp. as a defendant, instead naming Cele Ioannou, the corporate defendant's bookkeeper, as a defendant.

Plaintiff and defendant Constantine Ioannou are shareholders in the corporate defendant, which operates a restaurant. The 2003 litigation alleged that plaintiff was excluded from the restaurant, in derogation of his rights as a shareholder. In that litigation, plaintiff sought damages for alleged financial

mismanagement of the corporation. On April 25, 2007, the matter was settled on the record, and the court fully allocuted and so-ordered a stipulation between the parties.

Pursuant to the terms of the so-ordered stipulation, plaintiff agreed to accept \$130,000.00 as a full global settlement of all claims he had against defendants regarding the management and financial affairs of the restaurant, from the beginning of time and going forward. In addition, it was agreed that plaintiff would receive 25% of the profits going forward, but that he would be deemed a 15% shareholder for the purpose of buying him out of his interest in the corporation.

On July 23, 2008, plaintiff signed a release, indicating that in consideration of receiving the sum of \$148,113.48, he discharged the corporate defendant and Constantine Ioannou for all causes of action as set forth in the 2003 litigation, reserving the right to contest the use of corporate distributions to satisfy the judgment in that case.

On May 2, 2008, plaintiff filed the instant action, alleging that defendants have failed to provide plaintiff with a proper accounting for the operation of the corporation since March 15, 2001.

#### **DISCUSSION**

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of

[\* 4 ]

law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

In the instant matter, both sides have provided the transcript of the allocution of the so-ordered stipulation made in open court, as well as the written reduction of that agreement signed by the allocating judge. As stated above, the agreement between the parties settled all disputes between them with respect to the management and financial operation of the business in question. When plaintiff received the consideration for that agreement, he released defendants for all purposes alleged in that litigation, except to reserve the right to challenge the use of corporate distributions to satisfy that payment.

"Stipulations of settlement are favored by the courts and not lightly cast aside. This is all the more so in the case of 'open court' stipulations...where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court

calendars and integrity of the litigation process. Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation [citations omitted]."

*William E. McClain Realty, Inc. v Rivers*, 144 AD2d 216, 217 (3d Dept 1988); see also *64<sup>th</sup> Street-3rd Avenue Associates v Wall*, 257 AD2d 487 (1<sup>st</sup> Dept 1999); *City of New York v. 130/40 Essex Street Development Corp.*, 302 AD2d 292 (1<sup>st</sup> Dept 2003).

Stipulations that are not unreasonable, not against good morals or sound policy, have been and will be enforced, particularly those that have been "so-ordered" by the court, thereby indicating the parties' willingness to be bound thereby. See *Tepper v Tannenbaum*, 83 AD2d 541 (1<sup>st</sup> Dept 1981).

The general rule is that a party is bound by the terms of a stipulation made in open court. See *Hallock v. State of New York*, 64 NY2d 224 (1984). Once a release based on that stipulation has been signed, it may only be set aside where there is cause sufficient to invalidate a contract, such as duress, undue influence, or lack of mental capacity. *Lee v Boro Realty, LLC*, 39 AD3d 715, 716 (2d Dept 2007).

Plaintiff has proffered no grounds to invalidate the stipulation or the release, but merely asserts that the instant cause of action is different from the earlier cause of action. However, both lawsuits concern an accounting for profits and operation of the business, and such matter was specifically

included in the so-ordered stipulation.

The transcript of the stipulation's allocution unequivocally establishes that plaintiff knowingly and voluntarily consented to its terms. See *Yuzary v Yuzary*, 223 AD2d 540, 541 (2d Dept 1996). The stipulation of settlement was complete when entered on the record and assented to by the parties, and therefore must be enforced. See *Doolittle v. Quiggle*, 238 AD2d 949 (4<sup>th</sup> Dept 1997). Furthermore, plaintiff's signed release, having the same contractual force as a stipulation, precludes him from re-arguing the issues included therein. See *Shklovskiy v Khan*, 273 AD2d 371, 372 (2d Dept 2000).

Lastly, the individual defendants are named in their personal capacities, but the complaint fails to allege any claims against them individually, and merely asserts causes of action against them in their roles as employees and officers of the corporate defendant. Therefore, the complaint must be dismissed as against them.

#### **CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is

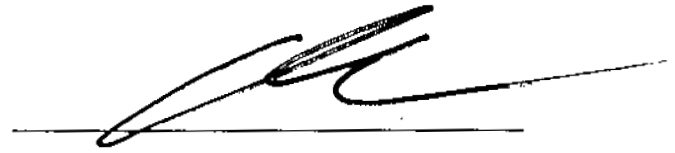
[\*7]  
further

ORDERED that plaintiff's cross-motion is hereby rendered moot; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiff with notice of entry.

Dated: February 27 2009



Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Cherpelis. w 46th.wpd

