

**Epstein v Figman**

2018 NY Slip Op 32260(U)

September 12, 2018

Supreme Court, New York County

Docket Number: 656742/2016

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. SALIANN SCARPULLA PART IAS MOTION 39EFM**

*Justice*

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**INDEX NO. 656742/2016**

STEVEN EPSTEIN, FIGMAN & EPSTEIN, LLP,

**MOTION DATE N/A**

Plaintiff,

**MOTION SEQ. NO. 002**

- v -

ALAN FIGMAN,

Defendant.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for ENFORCE/EXEC JUDGMENT OR ORDER.

Upon the foregoing documents, it is

In this action for a judicial accounting and winding up of partnership affairs, Plaintiff Steven A. Epstein (“Epstein”) moves for an order enforcing a Stipulation of Settlement and Winding Up (the “Settlement Stipulation”) entered into with defendant Alan Figman (“Figman”).

Figman and Epstein were partners in Figman & Epstein, LLP (“F&E”), a law firm that they created in 2004 which primarily practiced personal injury and malpractice law. On or about August 1, 2016, Figman and Epstein both withdrew from the partnership and moved to separate offices, dissolving F&E. Plaintiff’s motion for partial summary judgment was resolved pursuant to a Settlement Stipulation executed by the parties on September 5, 2017. The Settlement Stipulation was so-ordered by the Court on September 6, 2017.

Pursuant to section 7 of the Settlement Stipulation,

Within ninety (90) days of the signing of this Agreement, Figman shall deposit into the F&E operating account Thirty One Thousand Five Hundred and 00/100 (\$31,500.00) Dollars (the "Settlement Payment"), and F&E is authorized to release \$31,500.00 to Epstein.

Figman, however, did not make the \$31,500 payment.

In the event of default, Section 13 of the Settlement Stipulation states that if the defaulting party "fails to cure his default within ten (10) days' notice, the aggrieved party may move the Court for the appropriate relief." On December 11, 2017, Epstein served a ten-day notice of default ("Default Notice") on Figman demanding that the latter cure his default by December 22, 2017.<sup>1</sup> Figman informed Epstein on December 20, 2017 that he did not have the money to make the Settlement Payment and that he would not "unconditionally commit" to making the payment.

Epstein filed this motion on December 29, 2017 and requested the Court to 1) enter judgment in his favor against Figman in the amount of \$31,500 plus interest, costs and expenses, including attorneys' fees; and 2) direct Figman to deliver Epstein's Personal Documents and Information, permanently delete and destroy Epstein's Personal Documents and Information from all computer files and other sources, and produce affidavits from Figman, his attorney, and all third parties to whom they have disclosed or provided access to Epstein's Personal Documents and Information, attesting to compliance with the terms of paragraph 10 of the Settlement Stipulation.

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<sup>1</sup> The Default Notice was served via email as permitted by section 18(b) of the Settlement Stipulation.

## Discussion

When parties to a lawsuit enter into a settlement agreement, the action does not terminate “unless there has been an express stipulation of discontinuance or actual entry of judgment in accordance with the terms of the settlement.” *Church Extension Plan v. Harvest Assembly of God*, 79 A.D.3d 787, 788 (2d Dept. 2010) (quotation marks and citation omitted). Moreover, absent termination of the lawsuit, the court keeps its supervisory power over the lawsuit and can assist a party seeking enforcement of a settlement. *Id.*

Courts will strictly enforce parties’ settlement stipulations due to the “principle that the parties to a civil dispute are free to chart their own litigation course.” 291 *Pleasant Avenue, LLC v. Morris*, No. 570470/05, 2006 WL 1408361 at \* 1 (1st Dept. May 22, 2006). Settlement stipulations “will not be set aside in the absence of fraud, collusion, mistake, or such other factors as would vitiate a contract.” *Ramnarain v. Ramnarain*, 46 A.D.3d 655, 655 (2d Dept. 2007); *see also In re Hofmann*, 287 A.D.2d 119, 121 (1st Dept. 2001).

Here, Epstein asks the Court to enforce the signed, so-ordered Settlement Stipulation against Figman who defaulted in December 2017 by not making the required Settlement Payment. Epstein properly notes that Figman’s obligation to pay \$31,500 was not conditioned upon any event.

In opposition, Figman does not contest that he defaulted on his payment obligation under the Settlement Stipulation. Instead, Figman argues that subsequent to the

Settlement Stipulation, “exigent circumstances” arose regarding case resolutions. He also claims that there have been disproportionate contributions of services on cases involving the partnership. Figman states that the exigent circumstances and disproportionate contributions demonstrate that modifications should be made to the Settlement Stipulation “in the interests of justice and fairness.”

First, because there has been neither a final judgment nor a stipulation of discontinuance in this action, this Court can act to enforce the Settlement Stipulation’s terms. *See Crecca v. Narofsky*, 41 A.D.3d 216, 216 (1st Dept. 2007).

Second, the plain language of the Settlement Stipulation shows that Figman’s payment of the \$31,500 within 90 days of the agreement’s signing was not conditioned on a further occurrence. Further, Figman fails to show fraud, collusion, or mistake at the time that the Settlement Stipulation was signed. In the absence of such a showing, I will enforce the parties’ Settlement Stipulation and enter judgment against Figman. *See Peralta v. All Weather Tire Sales & Service, Inc.*, 58 A.D.3d 822, 822 (2d Dept. 2009) (stating that court should enforce settlement stipulations ““with rigor and without a searching examination into their substance’ as long as they are ‘clear, final and the product of mutual accord’”) (citation omitted).

In addition, because a settlement agreement is a contract, Epstein is entitled to statutory interest at the rate of “nine per centum per annum,” on the Settlement Payment of \$31,500. *See Town House Stock LLC v. Coby Hous. Corp.*, 49 A.D.3d 456, 457 (1st Dept. 2008).

#### Costs and Fees

According to Epstein, he is entitled to an award of costs and expenses, including reasonable attorney's fees, pursuant to section 13 of the Settlement Stipulation. Figman objects to the amount of the fee request by Epstein stating that the billing is "exaggerated."

Generally, parties must pay their own attorneys' fees absent an agreement between the parties that authorizes an award of fees or if such fees are authorized by statute or court rule. *Dupuis v. 424 East 77th Owners Corp.*, 32 A.D.3d 720, 722 (1st Dept. 1996).

In the Settlement Stipulation in this case, section 13's Default provision states that

...in the event a Partner defaults in any of the terms or conditions of this Agreement and fails to cure his default within ten (10) days' notice, the aggrieved party may move the Court for appropriate relief, and the prevailing Partner shall be entitled to recover from the other Partner all costs and expenses, including but not limited to reasonable attorney's fees, incurred in connection with such legal action.

Thus, pursuant to section 13, Epstein is entitled to his costs and expenses, including attorney's fees, which were incurred in connection with this motion.

An award of attorney's fees is within the trial court's discretion. *Mastrandrea v. Mastrandrea*, 268 A.D.2d 293, 293, 702 N.Y.S.2d 19 (1st Dept. 2000). Notably, an award of attorneys' fees pursuant to a contractual provision is only enforceable if the amount of fees requested is "reasonable and warranted for the services actually rendered." *Kamco Supply Corp. v. Annex Contracting Inc.*, 261 A.D.2d 363, 365 (2d Dept. 1999).

To determine the attorney's fees, costs and expenses that Epstein expended in this action, I order a hearing before a Special Referee.

### **Epstein's Personal Documents and Information**

Epstein contends that Figman failed to comply with section 10 of the Settlement

Stipulation which provides:

Simultaneously with or prior to the discontinuance with prejudice of the parties' causes of action and counterclaims... Figman or his attorneys shall personally deliver to Epstein's attorney... all of Epstein's personal documents and information, including but not limited to all emails and documents Figman produced in discovery under Bates Stamp Nos. 000013-000190, and all documents/information obtained as a result thereof, together with all copies thereof (including but not limited to hard copies, computer files, storage devices, disk drives, optical discs, flash drives and other disk images) (hereinafter collectively "Epstein's Personal Documents and Information"), in their possession, custody or control, and in the possession of any third party to whom Figman or his attorney have provided access or disclosed any of Epstein's Personal Document and Information. Additionally, simultaneously with or prior to discontinuance of the parties' causes of action and counterclaims Epstein's Personal Documents and Information shall be permanently deleted and destroyed by Figman, his attorneys, and any third parties to whom Epstein's Personal Documents and Information have been disclosed or provided, from all sources... Figman further agrees that, effective immediately, he, his attorneys, and any third persons within his control will never access, keep copies of, duplicate, disclose, transmit, or many any use whatsoever of Epstein's Personal Documents and Information. Simultaneously with or prior to the discontinuance Figman, his attorney, and all third parties to whom Figman and his attorney have disclosed or provided access to Epstein's Personal Documents and Information, shall provide [Epstein's attorney] with sworn affidavits attesting to their compliance with all of the terms of this provision.

Figman does not deny his noncompliance with the requirements of section 10.

Section 12 of the Settlement Stipulation required the parties to file a final stipulation of discontinuance within one day of Epstein's receipt of the Settlement Amount provided that Figman fully complied with section 10. A stipulation of discontinuance was never filed because Figman failed to pay the Settlement Amount.

However, I am entering judgment in accordance with the terms of the Settlement Stipulation which terminates this action, obviating the need for a stipulation of discontinuance. Accordingly, Figman must comply with section 10's requirements concerning Epstein's Personal Documents and Information.

In accordance with the foregoing, it is

ORDERED that plaintiff Steven A. Epstein's motion to enforce the settlement stipulation and enter judgment against defendant Alan H. Figman is granted; and it is further

ORDERED that the Clerk of the Court enter judgment in favor of the plaintiff Steven A. Epstein and against defendant Alan H. Figman in the amount of \$31,500.00, with interest thereon at 9% per annum from December 5, 2017 to the date judgment is entered; and it is further

ORDERED that plaintiff Steven A. Epstein's motion to enforce compliance with section 10 of the Settlement Stipulation is granted and defendant Alan H. Figman is directed to comply with section 10's requirements concerning Epstein's Personal Documents and Information; and it is further

ORDERED that plaintiff Steven A. Epstein's request for an order awarding his costs, expenses, and attorneys' fees and interest incurred in connection with this action to enforce the parties' Settlement Stipulation against defendant Alan H. Figman is granted; and it is further

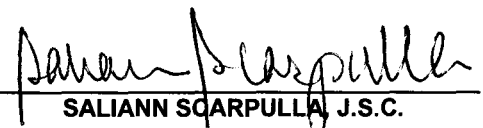
ORDERED that a hearing shall be conducted before a Special Referee on the amount of reasonable attorney's fees, costs and expenses to be awarded plaintiff Steven

A. Epstein. The Special Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR § 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that counsel for Steven A. Epstein shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part SOR) for the earliest convenient date; and it is further

ORDERED that, upon receipt of the Special Referee's report and plaintiff Steven A. Epstein's motion to confirm the Special Referee's report, I will direct entry of a separate judgment for attorney's fees, costs and expenses.

This constitutes the decision, order and judgment of the Court.

<u>9/12/2018</u>		
DATE		SALIANN SCARPULLA, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE