

IN THE CIRCUIT COURT OF THE 19TH
JUDICIAL CIRCUIT IN AND FOR MAR-
TIN COUNTY, FLORIDA

CASE NO.

GARDEN HOSPITALITY, INC.
d/b/a 2nd STREET BISTRO, a
Florida corporation,

Plaintiff,

v.

AARON BROWN AND ASSO-
CIATES, INC., a Florida
Corporation, d/b/a ADVANTAGE
HR SERVICES,

Defendant.

**COMPLAINT FOR FRAUD SEEKING THE IMPOSITION
OF A CONSTRUCTIVE TRUST AND FOR BREACH
OF FIDUCIARY DUTY SEEKING RESTITUTION**

COMES NOW the Plaintiff GARDEN HOSPITALITY, INC. d/b/a 2nd STREET BISTRO (“Garden”), a Florida corporation, by and through its under- signed attorneys sues Defendant, AARON BROWN AND ASSOCIATES, INC., d/b/a ADVANTAGE HR SERVICES (“Advantage”), and alleges as follows:

General Allegations

1. This is an action for damages which exceeds \$50,000 exclusive of in- terest, costs, and attorney’s fees.

2. Garden is a Florida corporation which operates a restaurant located in St. Lucie County, Florida. In the ordinary course of its business, Garden has employees in various capacities including but not limited to servers, kitchen personnel and hostesses. Garden pays wages to these individuals and as required by federal law, withholds federal income and other taxes such as social security, which Garden is obligated to pay to the Internal Revenue Service (“IRS”).

3. Defendant Advantage is a Florida corporation which operates a payroll service with its principal place of business in Martin County, Florida. At all times material to this action, Advantage represented itself as an experienced payroll service company with vast experience in paying wages and withholding taxes of employees of businesses who retain Advantage to provide such services.

4. On or about November 21, 2014, Garden and Advantage entered into a payroll service agreement by which Advantage agreed to provide Garden payroll tax services and filings, and other payroll and human resource services. A copy of the contract between the parties is attached as Exhibit “A”

5. The agreement created an agency relationship between Garden and Advantage whereby Advantage acting as Garden’s agent, promised to pay to the IRS, the tax monies withheld by Garden from its employees.

6. In hiring Advantage and allowing Advantage to withdrawn funds from Garden’s accounts to pay the taxes owed by Garden to the IRS and relying on

Advantage to pay the taxes, Garden reposed confidence in Advantage to do so and Advantage, by its actions, accepted the trust imposed by Garden.

7. Each pay period, Advantage would withdraw from Garden's bank account the amount necessary to cover the wages and taxes owed by Garden for that pay period. Advantage was then to pay to the IRS the money it had withdrawn for taxes from Garden's account. Advantage furnished an invoice to Garden for each withdrawal which indicated the amount withdrawn including how much had been withdrawn for taxes which Advantage was to pay the IRS on Garden's behalf.

8. Each quarter Advantage prepared and filed with the IRS on Garden's behalf a Form 941 Employer's Quarterly Tax Return. On this form, Advantage listed each tax payment it had made during the quarter for Garden.

9. In February of 2023, Garden discovered there had been an error in the 941 Employer's Quarterly Federal Income Tax returns for the fourth quarter of 2020 and the third quarter of 2021. The returns prepared and filed by Advantage with the IRS on Garden's behalf indicated that no monies had been paid to the IRS for these quarters notwithstanding that Advantage had withdrawn in each quarter the money necessary to pay the monies withheld by Garden for the taxes. When Garden brought this discrepancy to the attention of Advantage, Advantage advised Garden the tax return was a clerical error committed by an individual no longer employed by Advantage. Advantage filed an amended return and paid the money

that IRS contended had not been paid and was owed. This was Garden's first indication that anything was amiss with regard to Advantage's payment of the withholding and other taxes to the IRS from the monies paid to Advantage by Garden,

10. Garden was not satisfied with Advantage's response and explanation of the error. As a result, Garden hired a third party to conduct a review and compare the payments actually received by the IRS against the amounts reported by Advantage as being paid to the IRS in the Quarterly Tax Returns Advantage prepared on Garden's behalf.

11. This review established that each Quarterly Return filed by Advantage with the IRS and sent to Garden for the period of time from the first quarter of 2017 through the first quarter of 2023 with the exception of the third quarter of 2019 and the first quarter of 2020, were false because they reported payments which had not actually been paid to the IRS. The review revealed a constant and ongoing failure of Advantage to make the tax payments which Advantage indicated in the Employer's Quarterly Tax Return had been made to the IRS for Garden in each quarter and/or for which Advantage had withdrawn the money to pay the taxes from Garden's account. These unpaid monies total \$1,449,098.68.

12. The review establishes a course of conduct on the part of Advantage of the non-payment of withheld taxes notwithstanding Advantage's receipt of the withheld funds from Garden. The numerosity of the non-payments over a six (6)

year period suggests that Advantage's excuse that any non-payments were the result of a clerical or other type of mistake or inadvertent error is false.

13. As a result of Advantage's non-payment of the withholding taxes for certain pay periods, Garden and its principals are liable for the payment of the unpaid payroll taxes and penalties and interest on all unpaid or late payments of the taxes when assessed by the IRS.

14. Garden has been obligated to retain the undersigned attorneys and is obligated to pay its attorneys a reasonable attorneys fee.

Count I
(Fraud Seeking Imposition of Constructive Trust)

15. Garden realleges and reaffirms paragraph 1 through 14 of the general allegations of this complaint as if fully alleged herein.

16. Advantage represented that the withholding taxes, the funds for which had been withdrawn by Advantage from Garden's accounts, had been timely paid to the IRS by Advantage on Garden's behalf. These representations included but were not limited to the Employer's Quarterly Tax returns received by Ocean from Advantage and Advantage's invoices indicating the amount withdrawn by Advantage from Garden's accounts.

17. These representations were false and Advantage either knew or should have known of their falsity.

18. Not having an indication that anything was amiss with regard to Advantage's payment of the taxes to the IRS, Garden reasonably relied on these representations and continued to allow Advantage to withdraw the taxes and wages each pay period.

19. Advantage has retained and failed to pay to the IRS \$1,449,098.68 which it received from Garden to pay withholding taxes. As a result Advantage is unjustly enriched to the detriment of Garden.

20. Advantage holds as a trustee for a constructive trust with Garden as the beneficiary, the \$1,449,098.68 as the res of the trust.

21. Upon information and belief, Advantage is dissipating the res of the trust to the detriment of Garden causing Garden irreparable harm.

22. Garden is without an adequate remedy at law.

Wherefore, Plaintiff GARDEN VILLAGE HOSPITALITY, INC, requests:

A. The imposition of a constructive trust against Defendant Aaron Brown and Associates, Inc. d/b/a Advantage HR Services finding that Advantage is holding \$1,449,098.68 as a constructive trustee for Garden and ordering Advantage to these funds to Garden;

B. A temporary injunction notice freezing \$1,44098.68 in Advantage's bank accounts:

C. The costs of this action;

- D. A reasonable attorney's fee; and
- E. Such other and further relief as this Court may deem mete and proper.

Count II
(Breach of Fiduciary Duty seeking Restitution)

23. Garden realleges and reaffirms paragraph 1 through 14 of the general allegations of this complaint as if fully alleged herein.

24. Due to the agency relationship between Garden and Advantage existing with regard to the payment of withholding taxes by Advantage on behalf of Garden to the IRS and/or the reposing of confidence by Garden in Advantage to pay the taxes and Advantage's acceptance of this confidence, a fiduciary or confidential relationship exists between Garden and Advantage.

25. As a result of this fiduciary or confidential relationship, Advantage had a fiduciary duty to pay the monies entrusted to it by Garden for the specific purpose of paying the withholding and other taxes to the IRS.

26. Advantage breached this fiduciary or confidential duty by not paying the entirety of the monies received to pay the taxes and retaining \$1,449,098.68.

27. As a result of Advantage's breach of fiduciary duty or confidential relationship, Garden is entitled to restitution from Advantage of the \$1,449,098.68 which Advantage withdrew from Garden's account but failed to pay to the IRS.

28. Upon information and belief, Advantage is dissipating the \$1,449,098.68 to the detriment of Garden causing Garden irreparable harm.



ADVANTAGE HR

PAYROLL PROPOSAL TO

GARDEN HOSPITALITY INC

November 11, 2014

Presented by

Mike Colella

EXHIBIT "A"

**Service Agreement
Advantage HR Services**

PARTIES

This Agreement is entered into on _____ by and between AARON BROWN AND ASSOCIATES, INC. d/b/a Advantage HR Services, a Florida corporation (the "Service Provider", herein referred to as "SP"), and GARDEN HOSPITALITY INC (hereafter referred to as "Customer"), whose respective addresses are set forth on the signature page of this Agreement. Whereas the Customer desires the SP to provide certain payroll services, payroll tax services and filings and other payroll or Human Resources related activities subject to the terms and conditions as contained in this agreement and on Schedule "A" Fee Schedule.

I. Payroll Services, Tax Filings, and Related Payroll Services

A. Customer shall execute certain forms and agreements, including a Limited Power Of Attorney, IRS Form 2848, and IRS Form 8655, Magnetic Media Filing Authorization, in order to receive tax-filing services.

B. Customer acknowledges that payroll services and tax filings and deposits are based upon information supplied by the Customer, including proof of federal, state, and local tax identification numbers, including applicable state unemployment rates. Further, Customer is responsible for the accuracy of all such information and the verification of payroll, payroll tax filings, and other related data.

C. Customer will make available to SP sufficient and good funds within the applicable deadlines to satisfy Customers' tax and payroll obligations, including direct deposit of employee checks, and, or checks drawn on the account of the SP for the benefit of Customers' employees. SP may terminate this agreement, and /or any one or all of the services should Customer not make available sufficient, good funds within the deadlines established by SP. Upon notice of insufficient funds, Customer will become solely responsible for tax payments and further payments to employees and will become responsible for any penalties and interest charged by taxing authorities. SP may allocate any remaining good funds to the payment of services or invoices, and may allocate remaining funds to the taxing authorities on behalf of the Customer.

D. Customer agrees to provide and assist SP in preparing historic data to successfully convert company and employee information to SP's computer system.

E. Customer is responsible, exclusively, for the consequences of any instructions or input that Customer may give to SP, or for Customer's failure to properly utilize the SP's Software, or remote computer connections via modem or Internet.

F. Customer is responsible for reviewing all paychecks, direct deposits, reports, and bank drafts prepared by the SP for validity and accuracy according to the Customers' records and Customer agrees to notify the SP immediately of any discrepancies promptly after receipt of reports and payroll information.

II. Confidentiality and Record Retention

A. Customer files are the confidential property of Customer and SP will not make available to anyone or person other than an SP employee on a need to know basis to facilitate service to the Customer.

B. SP will retain Customer files to the extent necessary to perform payroll services and in conformity with SP's record retention policies. SP will dispose of client records by shredding documents in accordance with SP's record retention and disposal policies. Customer may obtain additional record retention services from SP.

III. Liability Limitations

A. SP's sole liability to Customer or any Third Party for claims arising out of errors or omissions in the services provided or to be provided by SP shall be to furnish a correct report, a correct paycheck, or the correct data as the case may be and to correct the Customer files, provided the Customer promptly advises the SP thereof.

B. SP will make every reasonable effort to provide services in accordance with the scheduled due dates agreed upon by Customer and SP, but SP cannot guarantee such compliance. Accordingly, SP's sole liability to Customer or any third party for claims arising out of the non-compliance, or the interruption in or delay of the services for any reason, shall be to use its best effort to provide such services and /or to resume the services as promptly as reasonably practical. SP shall not be held liable for any delay or failure to perform under this agreement or for interruption of service resulting directly or indirectly from any cause beyond SP's control. Tax Filings:

Based upon the information provided by Customer, SP will be responsible for applicable payroll tax deposits, filings, and reconciliation's. SP's sole liability to Customer or any third party for claims is to furnish a correct report or data and to correct Customers' records or tax agency filings. Customer shall be responsible for any tax due and SP shall be responsible for any penalty levied due to the error or omission. SP shall be responsible for any interest charges levied if SP has debited the Customers bank account for the associated taxes and was holding the amount in SP's account prior to the error and omission in question. Customer is responsible for interest charges in all other cases.

C. SP's sole liability for money damages resulting from claims made by Customer or any third party related to fraudulent or dishonest acts or omissions of SP's officers, employees, or agents in performing the services shall be limited to the loss of funds caused by the fraudulent or dishonest acts or omissions with respect to tax filing services only.

IV. Service Fees and Payments

A. Customer agrees to pay SP for services rendered from the beginning date of this agreement until terminated by the Customer or SP. Further, Customer agrees to pay for year-end services, i.e. employee W-2s and related year-end tax filings, should this agreement be terminated and Customer desires that SP produce year information.

B. All invoices are due at time service is rendered and are electronically transferred from Customer's account at the same time as tax deposits are withdrawn one day prior to check date. SP and Customer must mutually agree upon any other payment arrangements. SP may levy fees for collection of insufficient funds and may charge one and a half percent (1.5%) on any delinquent account. Customer agrees to reimburse SP for any and all expenses, including reasonable attorney fees in taking action to collect any amounts due to SP from Customer.

C. Client will be charged a "dormant" fee in the amount of Twenty Dollars (\$20.00) per occurrence for failure to process any regularly scheduled payroll.

V. Term and Termination

A. Customer may terminate this agreement at any time by providing a thirty-day written notice to SP. Notice should be sent to the attention of the President, at the current location of the SP. This allows the SP to provide an accurate accounting of taxes held for future payments.


Init 

EXHIBIT "A"

B. Should client default in the payment of services or in providing sufficient and good funds for the future payment of Customers tax liabilities, or become the subject of any bankruptcy proceeding, or experience any material adverse change in its financial condition, then, in any such event, SP may upon written notice terminate this agreement and declare all amounts immediately due and payable or require Customer to deposit an amount equal to its average service fees to prepay for future services.

VI. Laws and Governmental Regulations

A. Customer shall be responsible for compliance with all laws and governmental regulations affecting its business, and for any use of SP's services to assist in complying with such laws and governmental regulations. SP shall not have any responsibility relating to Customers compliance with such governmental laws and regulations except for providing SP's tax filing services.

B. This agreement shall be bound under the laws of the state of Florida.

C. Customer shall not assign this agreement without the prior written consent of the SP.

D. Venue: Any legal proceeding, whether court proceeding, arbitration, mediation, administrative, or any other proceeding brought to determine any controversy or claim arising out of or related to this Contract, or the breach thereof, whether in tort, contract, strict liability, or any other legal theory, shall be brought and heard only in Martin County, Florida, which the parties agree shall be the exclusive and mandatory venue for such proceeding.

The above Agreement with "Schedule A" is hereby accepted with the terms and conditions above.

AGREED TO:

AARON BROWN AND ASSOCIATES, INC.
D/B/A ADVANTAGE HR SERVICES

By: _____
Name

Francis H. Brown

11/21/14
Date

PO Box 1097, Palm City, FL 34991
Address

Under penalties of perjury, I declare that I have read the foregoing document and that the facts stated herein are true. In addition, the foregoing Agreement is agreed to.

GARDEN HOSPITALITY, INC

By: _____
Name

[Signature]

11-11-14
Date

172 N 2nd Street Ft Pierce, FL 34950
Address

COPY