

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

OCEAN VILLAGE
BISTRO, INC.,
a Florida corporation,

CASE NO.

Plaintiff,

v.

AARON BROWN AND
ASSOCIATES, INC., a Florida
corporation, d/b/a ELITE PAYROLL
SOLUTIONS,

Defendant.

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

COMES NOW the Plaintiff, OCEAN VILLAGE BISTRO, INC, (“Ocean Village”), a Florida corporation, by and through its undersigned attorneys sues Defendant, AARON BROWN AND ASSOCIATES, INC., d/b/a ELITE PAYROLL SOLUTIONS (“Elite”), and alleges as follows:

General Allegations

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

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

3. Defendant Elite 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, Elite represented itself as an experienced payroll service company with vast experience in paying wages and withholding taxes of employees of businesses who retain Elite to provide such services.

4. On or about April 6, 2021, Ocean and Elite entered into a payroll service agreement by which Elite agreed to provide 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 Ocean and Elite whereby Elite acting as Ocean’s agent, promised to pay to the IRS, the tax monies withheld by Ocean from its employees.

6. In hiring Elite and allowing Elite to withdrawn funds from Ocean’s accounts to pay the taxes owed by Ocean to the IRS as withholding taxes and rely-

ing on Elite to pay the taxes, Ocean reposed confidence in Elite to do so and Elite, by its actions, accepted the trust imposed by Ocean.

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 Elite was then to pay to the IRS the money it had withdrawn for taxes from Ocean's account. Elite furnished an invoice to Ocean for each withdrawal which indicated the amount withdrawn including how much had been withdrawn for taxes which Elite was to pay the IRS on Ocean's behalf.

8. Each quarter Elite prepared and filed with the IRS on Ocean's behalf a Form 941 Employer's Quarterly Tax Return. On this form, Elite listed each tax payment it had made during the quarter for Ocean. Elite also sent a copy of this form to Ocean, thereby representing to Ocean that the tax payments had been timely made to IRS and that the IRS had been fully paid for all tax monies owed for the quarter.

9. On April 28, 2023, Ocean received a letter from the IRS which indicated there was a discrepancy between the amounts reported by Elite on the Form 941 Employer's Quarterly Tax Returns as having been paid to the IRS and what Elite actually paid to the IRS. A copy of this letter is attached hereto as Exhibit "B". When Ocean brought this discrepancy to the attention of Elite, Elite described it as a clerical error committed by an individual no longer employed by

Elite. Elite filed an amended return and paid the money that IRS contended had not been paid and was owed. This was Ocean's first indication that anything was amiss with regard to Elite's payment of the withholding and other taxes to the IRS from the monies paid to Elite by Ocean,

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

11. This review established that each Quarterly Return filed by Elite with the IRS and sent to Ocean for the period of time from the third quarter of 2021 through the first quarter of 2023 were false because they reported many payments which had not actually been paid to the IRS. The review revealed a constant and ongoing failure of Elite to make the tax payments which Elite indicated in the Employer's Quarterly Tax Return had been made to the IRS for Ocean in each quarter. These unpaid monies total \$348,436.86.

12. The review establishes a course of conduct on the part of Elite of the non-payment of withheld taxes notwithstanding Elite's receipt of the withheld funds from Ocean. The numerosity of the non-payments over a two (2) year period suggests that Elite'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 Elite's non-payment of the withholding taxes for certain pay periods, Ocean 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. Ocean 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. Ocean realleges and reaffirms paragraph 1 through 14 of the general allegations of this complaint as if fully alleged herein.

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

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

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

19. Elite has retained and failed to pay to the IRS \$348,436.86 which it received from Ocean to pay withholding taxes. As a result Elite is unjustly enriched to the detriment of Ocean.

20. Elite holds as a trustee for a constructive trust with Ocean as the beneficiary, the \$348,436.86 as the res of the trust.

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

22. Ocean is without an adequate remedy at law.

Wherefore, Plaintiff OCEAN VILLAGE BISTRO, INC, requests:

A. The imposition of a constructive trust against Defendant Aaron Brown and Associates, Inc. d/b/a Elite Payroll Solutions finding that Elite is holding \$348,436.86 as a constructive trustee for Ocean and ordering Elite to these funds to Ocean;

B. A temporary injunction notice freezing \$348,436.86 in Elite'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. Ocean 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 Ocean and Elite existing with regard to the payment of withholding taxes by Elite on behalf of Ocean to the IRS and/or the reposing of confidence by Ocean in Elite to pay the taxes and Elite's acceptance of this confidence, a fiduciary or confidential relationship exists between Ocean and Elite.

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

26. Elite breached this fiduciary or confidential duty by not paying the entirety of the monies received to pay the taxes and retaining \$348,436.86.

27. As a result of Elite's breach of fiduciary duty or confidential relationship, Ocean is entitled to restitution from Elite of the \$348,436.86 which Elite withdrew from Ocean's account but failed to pay to the IRS.

28. Upon information and belief, Elite is dissipating the \$348,436.86 to the detriment of Ocean causing Ocean irreparable harm.

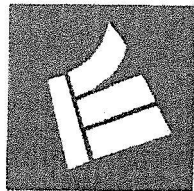
29. Ocean is without an adequate remedy at law.

Wherefore, Plaintiff OCEAN VILLAGE BISTRO, INC, requests:

- A. A judgment of restitution ordering Defendant Aaron Brown and Associates, Inc. d/b/a Elite Payroll Solutions to pay to Ocean \$348,436.86.
- B. A temporary injunction notice freezing \$348,436.86 in Elite'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.

JAY M. LEVY, P.A.
9100 South Dadeland Boulevard
Datan I, Suite 1600
Miami, Florida 33156
Phone: (305) 670-8100

BY: /s/Jay M. Levy
JAY M. LEVY, ESQUIRE
FL BAR NO: 219754
Primary Email jay@jaylevylaw.com
Secondary Email: wendy@jaylevylaw.com



ELITE
PAYROLL SOLUTIONS

PAYROLL PROPOSAL TO
Ocean Village Bistro, Inc.

COPY

Presented by
Jennifer Burke

EXHIBIT "A"

**Service Agreement
Elite Payroll Solutions**

PARTIES

This Agreement is entered into on by and between AARON BROWN AND ASSOCIATES, INC. d/b/a Elite Payroll Solutions, a Florida corporation (the "Service Provider", herein referred to as "SP"), and Ocean Village Bistro, 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.

DS
Init. 

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 ELITE PAYROLL SOLUTIONS

Corinna Sonillo

By: 04654112E00E47E

Sign

4/6/2021 | 11:57 AM CDT

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.

Ocean Village Bistro, Inc.

DocuSigned by:

Jeff Groth

By: CB3721BF514449B...

Sign

4/6/2021 | 12:52 PM EDT

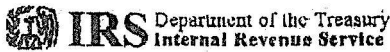
Date

Jeff Groth

Name

2400 East Ocean Dr., Ft. Pierce, Florida 34949

Address



Department of the Treasury
Internal Revenue Service
P.O. Box 145500
Cincinnati OH 45250-5500

In reply refer to: 0264449338
Apr. 28, 2023 LTR 99C K3
86-2441073 202112 01 0
Input Op: 0309928422 00003215
BODC: SB

OCEAN VILLAGE BISTRO INC
1816 WILDCAT CV
HUTCHINSON IS FL 34949-8889

Tax Year: 2021

Case identification number: [REDACTED]

Dear Taxpayer

The totals you reported on the following statements don't agree with the amounts you reported on your tax returns for the tax year above.

Statements filed with the Social Security Administration (SSA):

Form W-2, Wage and Tax Statement
Form W-3, Transmittal of Wage and Tax Statements

Tax returns filed with IRS:

Form 941, Employer's QUARTERLY Federal Tax Return

The information we have is shown below.

Total Social Security wages from Forms 941	\$	97,223.00
Total Social Security wages on Forms W-2		358,447.00
Difference		261,224.00

Total Social Security tips from Forms 941	\$	37,033.00
Total Social Security tips on Forms W-2		159,317.00
Difference		122,285.00

Total Medicare wages from Forms 941	\$	134,256.00
Total Medicare wages on Forms W-2		517,764.00
Difference		383,509.00

Total federal income tax withheld from Forms 941	\$	2,273.00
Total federal income tax withheld on Forms W-2/W-26/1099-R		28,771.00
Difference		26,498.00

POTENTIAL increase of Social Security and federal income tax	\$	85,175.00
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0264449338
Apr. 28, 2023 LTR 99C K3
86-2441073 202112 01 0
Input Op: 0309928422 00003216

OCEAN VILLAGE BISTRO INC
1816 WILDCAT CV
HUTCHINSON IS FL 34949-8889

If the above information shows a TAX DECREASE, we can give you a refund or tax credit for that amount if you file a completed, signed Form 941-X, Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund, to correct what you previously reported to us.

If the above information shows a TAX INCREASE and you agree with our figures, please sign below and return this letter to us along with your payment. We'll send you a bill if interest and penalties are due at the time of your payment.

CONSENT: _____
Signature and Title Date
(I agree with the tax increase shown above)

If the amount of wages you reported on Forms W-2 is greater than the amount of wages reported on your employment tax returns (Form 941, 944 or 943), the potential tax increase shown above may include Federal Insurance Contributions Act (FICA) tax calculated at 12.4% of the Social Security wages. You may be entitled to a reduction in the FICA tax rate for wages paid under the Families First Coronavirus Response Act, as amended by the COVID-related Tax Relief Act of 2020, (FFCRA).

If you paid wages subject to a 6.2% rate under the FFCRA that were not reported on your employment tax return, provide us with a breakdown of the wages and the rates you believe are applicable, and we'll adjust your employment tax increase accordingly.

You may have filed an incomplete number of Forms W-2, Wage and Tax Statement, with the Social Security Administration (SSA), or sent incomplete information to us on your employment tax returns.

We must receive and process accurate tax forms and information from taxpayers. The SSA must receive and process accurate information statements to figure each employee's entitlement to benefits and the amount of those benefits. Failure to file either or both may result in tax and penalty assessments.

If you made a mistake on the statements you filed with SSA, do the following:

1. Complete Forms W-2c, Corrected Wage and Tax Statement.
2. Complete Form W-3c, Transmittal of Corrected Wage and Tax Statements.
3. Send us Form W-3c and Copy A of Forms W-2c with a copy of this letter.

OCEAN VILLAGE BISTRO INC
1816 WILDCAT CV
HUTCHINSON IS FL 34949-8889

4. Give a copy of Form W-2c to each affected employee.

If you correctly filed your statements with the SSA and the IRS, please explain the difference between the statements and your tax returns. Send your explanation with a copy of this letter.

You reported less tax due on your tax returns than you reported on the statements you filed. If we don't hear from you by June 15, 2023, we'll increase the tax due, based on your statements. We'll send you a bill if interest and penalties are due at the time of your payment.

If you need to correct your Forms W-2, send us Forms W-2c, Corrected Wage and Tax Statement. If you show a decrease in federal income tax withheld, your employees need to file Form 1040-X, Amended U.S. Individual Income Tax Return, to show their corrected amount withheld.

To ensure we properly adjust yours and your employees' accounts, send us the missing, incomplete or incorrect Forms W-2, Wage and Tax Statement, and Forms W-3, Transmittal of Wage and Tax Statements, within 30 days from the date of this letter. VERIFY THE FORMS ARE LEGIBLE.

You can also fax your information to 855-755-3513 using either a fax machine or an online fax service. Protect yourself when sending digital data by understanding the fax service's privacy and security policies. Please include a cover sheet with the following information:

- Date
- Your name
- Your employer identification number or Social Security number
- Tax period
- Number of pages faxed

If you have questions, you can call 800-829-0115.

If you prefer, you can write to the address at the top of the first page of this letter.

Send the information to us by 06152023, to ensure we properly credit all amounts. If you previously reported wages or taxable tips subject to tax incorrectly, we'll advise the Social Security Administration so your employees receive proper credit.

You must send all information to us (not the SSA). Send the information to the address at the top of the first page of this letter to ensure your account and the accounts of your employees are properly

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Apr. 28, 2023 LTR 99C K3
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Input Op: 0309928422 00003218

OCEAN VILLAGE BISTRO INC
1816 WILDCAT CV
HUTCHINSON IS FL 34949-8889

adjusted. Failure to provide the information to us may result in additional taxes and penalties to your account. We'll use any information you provide to balance your account and then forward your forms to the SSA as applicable.

Refer to the enclosed Publication 1, Your Rights as a Taxpayer, for additional information about the examination process and your rights.

Find tax forms or publications by visiting [IRS.gov/forms](https://www.irs.gov/forms) or calling 800-TAX-FORM (800-829-3676).

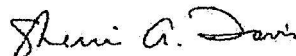
When you write, include a copy of this letter, and provide your telephone number and the hours we can reach you.

Keep a copy of this letter for your records.

Thank you for your cooperation.

A copy of this letter and any referenced enclosures have been forwarded to your authorized representative(s).

Sincerely yours,



Sherri A. Davis, Operations Manager
FSO

Enclosure:
Publication 1

COPY