

<b>Mission Cantina v Pan Asian Bistro Les, Inc.</b>
2016 NY Slip Op 31570(U)
August 16, 2016
Supreme Court, New York County
Docket Number: 653581/2014
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY**

**PRESENT: DEBRA A. JAMES**  
***Justice***

**PART 59**

MISSION CANTINA,

Plaintiff,

- v -

PAN ASIAN BISTRO LES, INC., CONNIE YU,  
NICKY DAWDA, JENNY C. AHN, ELKE E. HOFMMAN  
and ELKE E. HOFMANN LAW, PLLC,

Defendants.

Index No.: 653581/2014

Motion Date: 11/10/2015

Motion Seq. No.: 001

The following papers, numbered 1 to 5 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits - Exhibits \_\_\_\_\_

**PAPERS NUMBERED**

1

2, 3

4, 5

**Cross-Motion:** ☐ Yes ☒ No

Upon the foregoing papers,

The court shall grant the motion of defendant Jenny C. Ahn ("Ahn") for an order dismissing the complaint as against such defendant pursuant to CPLR §§ 3211 (a) (1) and (7).

This lawsuit involves the purchase by "sale, transfer or assignment in bulk" ("bulk sale") of a restaurant located on Orchard Street, New York City, from defendant Pan Asian Bistro Les, Inc. ("Seller"), the latter of whose principals are defendants Connie Yu and Nicky Dawda, to plaintiff Mission

**Check One:** ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

**Check if appropriate:** ☐ **DO NOT POST** ☐ **REFERENCE**

**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING**

Cantina ("Buyer").

As to its complaint against Ahn, Buyer alleges that prior to the closing of the bulk sale transaction, which took place on July 8, 2013, Ahn, the attorney for the Seller, sent an e-mail message to defendant Elke E. Hofmann ("Hofmann"), the Buyer's attorney, to which was attached a bulk sale notice that stated that the closing date was August 8, 2013. Buyer asserts that such date was a misstatement of the actual closing date, which took place a full month before such date. The complaint further alleges that after the closing, Ahn held \$10,000 in her escrow account, which Ahn "finally paid on July 15, 2014" to the New York State Taxation and Finance Department ("Taxation Department") toward the outstanding balance of sales taxes. Buyer also alleges that on October 3, 2013, eight months before remitting such payment, Ahn falsely advised Buyer's counsel that the sale taxes for the restaurant that Seller, her client, collected prior to the bulk sale had been paid in full to the Tax Department and that Seller would provide a copy of the release that Seller received from the Taxation Department to Buyer. Such e-mail is attached to and incorporated by reference in the complaint.

Buyer seeks damages arising from Ahn's "falsely advising that all taxes were paid and a release had been received which she could not locate" and delaying notice to Buyer of the

outstanding sales taxes, thereby precluding Buyer from avoiding or mitigating the sales tax in the form of interest and penalties assessed on \$66,000, the amount of outstanding sales taxes, and/or negotiating for a reduction in sales taxes with the Tax Department. According to the opposing affidavit of the principal of Buyer, the past due taxes with penalties and interest now aggregate to over \$200,000.

Ahn moves for an order dismissing the complaint against her pursuant to CPLR §§ 3211(a)(1) and (7). Co-defendants Hofmann and Elke E. Hofmann, PLLC ("the Hofmann defendants") oppose the motion, arguing, inter alia, that their cross claims against Ahn should not be dismissed because Ahn specifically requested dismissal of the complaint only. The Buyer also opposes the motion.

The complaint does not contain any assertions as to the type of claim interposed against any of the defendants. The third cause of action, which is its only claim against Ahn, sounds in either legal malpractice, negligent representation and/or fraud against Ahn. As for any claims of legal malpractice or negligent representation, "[a]n attorney does not owe a duty of care to his adversary or one with whom he is not in privity" (Aglira v Julien & Schlesinger, PC, 214 AD2d 178, 183 [1<sup>st</sup> Dept 1995]). As in Aglira where the appellate court reversed the lower court's denial of defendant law firm's motion to dismiss the complaint of

the underlying medical malpractice plaintiff against such attorneys who represented the medical doctors in that underlying action, here, there is no question that Ahn acted exclusively for her client, Seller, with respect to the bulk sale transaction, and therefore owed a duty of reasonable care only to Seller and owed no duty to Buyer, who was represented by attorney Hofmann.

As to any fraud cause of action, as a matter of law, Buyer was not justified in relying upon the legal opinions or conclusions of his or her adversary counsel. Aglira, supra, at 185. Nor can Buyer claim to have consummated the bulk sale in justifiable reliance upon an e-mail message that Ahn sent months after the closing. Moreover, this court concurs with Ahn that the content of the e-mail from Ahn, which merely states that her client, Seller, advised Ahn both that the taxes were paid and that Seller received the release that Seller was trying to locate, disproves any alleged fraud or negligent representation on her part. Aglira, supra, at 186. Ahn is likewise correct that the Buyer's allegation that Ahn aided and abetted the fraud in providing legal advice to her client is insufficient as a pleading and does not give rise to an inference that Ahn participated in the alleged fraud or knew of the falsity of her client's statement about the payment of the sales tax. See Euryceleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 (2009). Nor does the complaint allege that Buyer detrimentally

relied upon the misstated date of the closing set forth in the unsigned notice of bulk sale, in closing the transaction.

In addition, nowhere in either the complaint or the opposing affidavit of Buyer's principal is there any allegation that Ahn breached the terms of the agreement with respect to her disposition of the escrow funds. Moreover, the evidence of the First and Final Demand of the Taxation Department dated June 30, 2014 referencing the escrow funds for Buyer, correctly addressed to Orchard Street, irrefutably establishes Ahn's compliance with the terms of the escrow agreement.

Finally, although in her notice of motion Ahn did not specifically request dismissal of the cross claims, because the complaint asserts no breach of the terms related to the escrow in the bulk sale agreement and there is irrefutable documentary evidence that she complied with the terms of the such agreement, the cross claims of the Hofmann defendants, which are based on the breach of the escrow agreement, shall be dismissed. See Lubov v Berman, 260 AD2d 236 (1<sup>st</sup> Dept 1999).

Accordingly, it is

ORDERED that the motion of defendant Jenny C. Ahn to dismiss the complaint herein is granted and the complaint and all cross claims against such defendant are dismissed in their entirety, with costs and disbursements to such defendant as taxed by the

Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendant; and it is further ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and all the papers filed with the court shall bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in IAS Part 59, Room 331, 60 Centre Street, on September 27, 2016, at 9:30 A.M.

This is the decision and order of the court.

**Dated:** August 16, 2016

**ENTER:**

~~Let's proceed~~  
**DEBRA A. JAMES** J.S.C.