

Cantina v Pan Asian Bistro Les, Inc.

2016 NY Slip Op 31587(U)

August 17, 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,

Index No.: 653581/2014

Plaintiff,

Motion Date: 11/10/2015

- v -

Motion Seq. No.: 004

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

Defendants.

The following papers, numbered 1 to 4 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

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant the motion of defendants Connie Yu and Nicky Dawda ("Yu and Dawda") for an order dismissing the complaint as against each such defendant pursuant to CPLR §§ 3211 (a) (1) and (7) as to the first cause of action sounding in fraud only, the second cause of action sounding in breach of contract against Nicky Dawda only, and the cross claims as against both such defendants, but shall otherwise deny the motion.

This lawsuit involves the purchase by "sale, transfer or

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

assignment in bulk" ("bulk sale") to plaintiff Mission Cantina ("Buyer") of a restaurant located on Orchard Street, New York City, by defendant Pan Asian Bistro Les, Inc. ("Seller"), the latter of whose principals are Yu and Dawda.

As for the first cause of action of the complaint against Yu and Dawda, Buyer alleges that the Seller, Yu and Dawda "failed to pay sales tax which they were responsible for; fraudulently advised, through their attorney Ahn and their accountant Miu, that taxes had been paid and/or were being paid; all of these statements were false since defendants never paid the sales tax to the New York State tax authorities." Buyer seeks damages sounding in fraud against Buyer, Yu and Dawda in that Buyer "was required to pay the sum of at least \$228,265.34 plus interest and penalties []in sales tax; was required to incur fees for accountants and attorneys; its business interfered with; its account seized".

As for the second cause of action of the complaint against Yu and Dawda, Buyer alleges that Buyer, Yu and Dawda "pursuant to the contract...were supposed to hold the plaintiff harmless and to pay any attorney and related fees fro breach of their representations and warranty." Buyer asserts that it is "entitled to recover all of the money it was required to pay in taxes, fees for attorneys and accountant and related fees, and consequential damages for having its bank account seized, its

business interfered with, and being required to pay interest on money it was required to pay the tax authorities."

Yu and Dawda move for an order dismissing the complaint against them pursuant to CPLR §§ 3211(a)(1) and (7). Co-defendants Hofmann and Elke A. Hofmann, PLLC ("the Hofmann defendants") and the Buyer each oppose the motion.

Turning to the first cause of action sounding in fraud, this court concurs with defendants that complaint does not allege facts sufficient to state a cause of action for fraud as there is no assertion that Yu and/or Dawda misrepresented any existing facts as to which Buyer could not have learned the truth had it conducted or engaged a consultant to conduct on its behalf an independent investigation of whether there were any outstanding sales taxes to be satisfied. See HSH Nordbank v UBS AG, 95 AD3d 185, 207 (1st Dept 2012).

As provided in Tax Law § 1141 (c):

Whenever a person required to collect tax shall make a sale, transfer, or assignment in bulk of any part or the whole of his business assets, otherwise than in the ordinary course of business, the purchaser, transferee or assignee shall at least ten days before taking possession of the subject of said sale, transfer, or assignment, or paying therefor, notify the tax commission by registered mail of the proposed sale and of the price, terms and conditions thereof and whether or not the seller, transferee or assignor, has represented to, or informed the purchaser, transferee or assignee that he owes any tax pursuant to this article, and whether or not the purchaser, transferee, or assignee has knowledge that such taxes are owing, and whether any such taxes are in fact owing.

4]

For failure to comply with the provisions of this subdivision the purchaser, transferee or assignee, in addition to being subject to the liabilities and remedies imposed under the provisions of article six of the uniform commercial code, shall be personally liable for the payment to the state of any such taxes theretofore or thereafter determined to be due to the state from the seller, transferor or assignor, except that the liability of the purchaser, transferee or assignee shall be limited to an amount not in excess of the purchase price or fair market value of the business assets sold, transferred or assigned to such purchaser, transferee, or assignee, whichever is higher, and such liability may be assessed and enforced in the same manner as the liability for tax under this article.

Thus, providing safe harbor to any purchaser in a bulk sale, Tax Law § 1141 (c) placed squarely upon Buyer the responsibility of mailing the notice of bulk sale to the Tax Department. Unless Buyer complied with such requirement, Buyer became statutorily liable for the payment of any outstanding sale taxes, notwithstanding any misrepresentations by the Seller that such taxes had been paid. See Harcel Liquors, Inc v Evsam Parking, Inc, 48 NY2d 503 (1979); Nordheimer v McMorrow, 176 AD2d 600 (1st Dept 1991); Sabhlok v Dana, 112 AD2d 411 (2d Dept 1985). Therefore, Tax Law § 1141 refutes any claim for fraud and the allegations by the Buyer that it detrimentally relied on the Seller's misrepresentations about outstanding sales taxes in consummating the bulk sale transaction.

As for the second cause of action sounding in breach of contract, the copy of the bulk sale agreement ("contract") attached to the opposing affidavits constitutes irrefutable

documentary evidence that Dawda was not a signatory to such contract and therefore, as a matter of law, Dawda may not be held individually liable for breach of such contract. However, Yu, executing the contract "By Connie Yu, President", was a signatory to the contract, which provides in pertinent part:

15. The seller, and each of its officers and stockholders, warrants and represents the following to be true as of the date of closing:***f) Seller has and owns good and marketable title to all of the Assets, free and clear of all liens, pledges, claims, security interests and encumbrances of any kind and nature...

21. The seller, its officers and stockholders if a corporation, jointly and severally agree to indemnify and keep the purchaser safe and harmless from and of (i) the payment of any obligations of any kind or nature incurred by the seller prior to date of closing, except those obligations assumed by the purchaser and (ii) any losses, damages or expenses including reasonable attorneys' fees resulting from or in connection with any breach or failure of observance or performance of any surviving representation, warranty, covenant or other provision of this agreement by the seller.

As signatory to the contract that stated that the Seller and corporate officers and shareholders of the Seller would be jointly and severally liable, Yu, as president and shareholder, may be cast in damages for breach of such contract.

Nor does the court agree with the moving defendants that complaint insufficiently pleads the cause of action for breach of contract, as the complaint specifically references the hold harmless provisions of the contract. Moreover, by opposing affidavit, Buyer and the Hofmann defendants each appends a copy

of the contract. Cf Valley Cadillac Corp v Dick, 238 AD2d 894 (4th Dept 1997), in which no copy of the complaint was before the court.

Finally, the moving defendants are correct that the cross claims interposed by the Hofmann defendants state no cause of action for indemnification or contribution. No claims of negligence against the moving defendants survive, so that it is clear that the Hofmann defendants can allege neither that they may be held vicariously liable without any negligence or actual supervision nor that the moving defendants were actually negligent or exercised supervision or control over the defendants Hofmann's injury-producing work. See Naughton v City of New York, 94 AD3d 1, 10 (1st Dept 2012).

Accordingly, it is

ORDERED that the motion of defendants Connie Yu and Nicky Dawda to dismiss is granted only to the extent that the first cause of action against both such defendants, the cross claims against both defendants and the second cause of action against defendant Nicky Dawda are dismissed, but the motion is otherwise denied, and the first cause of action against Connie Yu is dismissed, the complaint in its entirety and all cross claims against defendant Nicky Dawda are dismissed, with costs and disbursements to defendant Nicky Dawda 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 parties 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 17, 2016

ENTER:

Debra A. James
DEBRA A. JAMES J.S.C.