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SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 17-03083-D

Notice sent
6/17/2020
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AMY NAILS & SPA, LLC,
Plaintiff,

BELLISSIMO NAIL & SPA, LLC, NGOCTUYET HUYNH TRAN, and
PHUNG PORZIO STUDIO OF ARCHITECTURE, INC.,
Defendants.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT

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Defendants Bellissimo Nail & Spa, LLC ("Bellissimo") and its owner Ngoctuyet Huynh ("Amy") Tran¹ moved for summary judgment on the sole remaining claim against them filed by the plaintiff, Amy Nails & Spa, LLC ("ANS"), alleging unfair or deceptive practices under G. L. c. 93A. (Docket # 12) The third defendant, Phung Porzio Studio of Architecture, Inc. ("PPS"), moved for summary judgment on the sole claim against it filed by ANS, alleging negligence. (Docket # 13) The Court heard oral argument on May 27, 2020. Because the admissible evidence in the summary judgment record creates no disputed issue of material fact as to ANS's two remaining claims, the defendants' motions are ALLOWED, and judgment shall enter in their favor.

¹ The Court uses the nicknames that Amy Nails & Spa, LLC uses for its owner Oanh Le ("Kim") Tran and that Ngoctuyet Huynh ("Amy") Tran uses for herself in their respective briefs.

UNDISPUTED MATERIAL FACTS

The undisputed material facts needed to decide defendants' motions are limited and straightforward. In 2013, Oanh Le ("Kim") Tran and her husband Ryan Tran opened a business they called "Amy Nails & Spa"² at 66 Cross Street in the North End neighborhood of Boston. SOF 1.³ Kim Tran had a sublease with RBS Citizens, N. A. ("Lease") that expired on December 31, 2017. J.A. Ex. 5 at 1-2. The landlord was planning to tear down the block of buildings that included 66 Cross Street. SOF 4. This was widely known in the North End. *Id.*

Amy Tran began working for ANS in 2014. SOF 2. In 2016, Amy Tran informed Kim Tran of ANS that she was going to open her own nail salon, and offered to leave ANS, but Kim Tran asked her to stay and work at ANS while she was working on opening her own salon. SOF 6; J.A. Ex. 1, par. 6. Amy Tran retained PPS to do architectural work for the new salon and obtain the necessary approvals and permits. SOF 7. During this time period, PPS was doing work for ANS in connection with another ANS spa, on Portland Street in Boston. PPS J.A. Ex. I (Ryan Tran Affidavit), ¶¶ 3, 5-6, 9-10.

In April 2016, Amy Tran and Mai Phung, a co-owner of PPS ("architect Phung"), appeared at a meeting of the North End/Waterfront Neighborhood Council (the "Neighborhood Council") to get approval for Amy Tran's new business. SOF 7; PPS J.A. Ex. F, ¶¶ 2-4. The

² At oral argument, ANS's attorney informed the Court that "Amy Nails & Spa" was named after the owners' daughter, not defendant Amy Tran. This potential for confusion may explain the inaccuracy in news articles about the April 2016 neighborhood council meeting at issue in this case. As discussed below, there is no evidence that any defendant made any false or misleading statement that might have taken advantage of this potential for confusion.

³ "SOF" refers to the Rule 9A Statement of Undisputed Material Facts and "J. A. Ex. ___" refers to the exhibits to the joint appendix, both filed in connection with Amy Tran and Bellissimo's summary judgment motion. "PPS SOF" refers to the Joint Statement of Undisputed Material Facts and "PPS J. A. Ex. ___" refers to the exhibits to the joint appendix, both filed in connection with PPS's summary judgment motion. "ANS Br. ___" refers to ANS's brief in opposition to Docket # 12.

presentation to the Council was recorded by audio/video.⁴ Architect Phung spoke on Amy Tran's behalf, except that Amy Tran can be heard on the recording stating the hours that her nail spa would be open. See J. A. Ex. D (transcript); audio/video recording.

An on-line article written shortly after the Neighborhood Council meeting states that "Bellissimo Nails and Spa is coming to Fleet Street...The shop is bringing the team from Amy's Nails currently on Cross Street that will be closing shortly." PPS J.A. Ex. 1, Exhibit 1. Amy Nails & Spa is owned and operated by ANS, not Amy Tran; Amy Tran was an employee of the business. SC 1-2. Nor was ANS closing shortly; it remained open even after December 2017 for some period of time under a month-to-month lease. See J.A. Ex. 6.

Amy Tran had no contract that barred her from competing with ANS or from soliciting customers of ANS, and Tran never took any customer list or other alleged proprietary information of ANS. SOF 12, 14.

DISCUSSION

I. The Legal Standard on Summary Judgment

Summary judgment serves as a "device to make possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts or if only a question of law is involved." Kourouvacilis v. Gen. Motors Corp., 410 Mass. 706, 715-716 (1991), and authorities cited. The familiar standard governing motions for summary judgment provides that summary judgment shall be granted forthwith where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Barrows v. Wareham Fire Dist., 82 Mass. App. Ct. 623, 625 (2012).

⁴ The recording ("audio/video recording"), posted on YouTube at www.YouTube.com/watch?v=M71OGbuHNWU, is the best evidence of what was said at the meeting, and has been viewed by this Court. The summary judgment record includes a transcript of the hearing prepared by counsel for PPS, which has missing words but otherwise appears to be accurate. Plaintiff submitted no alternative transcript.

(citing Cassesso v. Comm'r of Corr., 390 Mass. 419, 422 (1983)). In assessing the record on a motion for summary judgment, all reasonable inferences are drawn in favor of the nonmoving party. Terra Nova Ins. Co. v. Fray-Witzer, 449 Mass. 406, 411 (2007). Moreover, in reviewing a summary judgment motion, the court does not “resolve issues of material fact, assess credibility or weigh evidence.” Kelly v. Brigham & Women’s Hosp., 51 Mass. App. Ct. 297, 299 n.4 (2001). The moving party bears the burden of demonstrating the absence of evidence to support the nonmoving party’s claims. Flesner v. Technical Communications Corp., 410 Mass. 805, 817 (1991).

II. Application of the Legal Standard

Amy Tran, a productive employee of ANS, opened her own competing nail salon on Fleet Street in the North End, which she had every right to do. Newspaper articles inaccurately reported that Amy Tran would soon be moving her own business there from Cross Street, when in fact Amy Nails & Spa was Ryan Tran’s and Kim Tran’s business, and it was not about to close. However, no defendant made any false or misleading statement about ANS’s business. ANS’s claims against the defendants rely on unsupported factual allegations, hearsay statements, an inaccurate description of the Neighborhood Council meeting, and inaccurate news coverage of the meeting. In the absence of any evidence of a false or deceptive statement by any defendant, summary judgment must be granted for the defendants.

A. ANS Has No G. L. c. 93A Claim Against Amy Tran or Her Business Bellissimo.

- 1. There is no evidence of any false or misleading statement, or other unfair or deceptive practice, by Amy Tran or Bellissimo.**

ANS argues that Amy Tran and her business Bellissimo violated G. L. c. 93A by falsely representing to the Neighborhood Council that she was moving her own North End business

from 66 Cross Street to a new location at 12 Fleet Street, in order to get approval for the new business from the Neighborhood Council. ANS Br. at 1. This Court's review of a transcript and an audio video recording⁵ of architect Phung's presentation to the Neighborhood Council on their behalf reveals no false statement or other misrepresentation by Amy Tran or Bellissimo.

ANS alleges that architect Phung's presentation to the Neighborhood Council was designed to deceive the Council into believing that it was considering the relocation of ANS. See ANS Br. at 2. Nothing in the transcript or audio video recording supports this claim. A Council member begins by stating, "So, the petitioner is seeking to change *the retail location that used to be Twilight retail store* to a nail salon and spa." PPS Ex. D (emphasis added). The issue before the neighborhood Council is the conversion of a retail store to a nail salon, not the relocation of ANS's business.

ANS further argues that the following statements by architect Phung were unfair and deceptive statements of Bellissimo and Amy Tran, falsely suggesting that Amy Tran was moving her business instead of opening a new business that would compete with ANS:

Phung: ... The project is converting an existing retail space into a nail salon. My client, we call her Amy, she has been working in this area for 20 years and unfortunately the employment that she have [sic] right now the lease will end at the end of next year, so they have to move out -- and she found this place -- unfortunately we have to go to the zoning board of appeals because the zoning is for a multi-family residence; but there's retail space that we want a beauty salon therefore we appeal.

Board: What's the present location?

Phung: 66 Cross Street.

⁵ As noted *supra* at 2, n. 4, the only evidence in the summary judgment record of what was said at the meeting is a transcript prepared by counsel for PPS. However, in order to give ANS the benefit of the doubt, and because all parties rely on what allegedly was said at the meeting, this Court has reviewed the best evidence of the meeting, the audio video recording.

PPS J.A. Ex. D. Review of the above statements shows three flaws with ANS's argument. First, as noted above, architect Phung is addressing the Neighborhood Council's concern about conversion of retail space into a nail salon, not the relocation of a business. Second, Phung informs the board that Amy Tran is an employee of ANS, not an owner. Third, Phung's statement that ANS's "lease will end at the end of next year" is accurate; the meeting was in April 2016 and the Lease expired on December 31, 2017.

ANS argues that, notwithstanding that the Lease expired on December 31, 2017, and that 66 Cross Street and other buildings on that block were to be demolished, Amy Nails & Spa was not closing and Amy Tran knew this. ANS Br. at 7-8. If there was evidence that Amy Tran knew that ANS might continue to operate in 2018, after the Lease expired, relying on termination of the Lease to get Neighborhood Council approval could arguably be unfair or deceptive. However, there is no evidence that Amy Tran possessed this knowledge, and indeed ANS essentially admits that Amy Tran did not have such knowledge. ANS's manager Ryan Tran states in his affidavit that the "only party [sic] who had actual knowledge of the terms of the Plaintiff's lease at all relevant times after 2016 [were] myself, my wife, our agent Budi Setiyono, and our landlord." PPS J.A. Ex. I, ¶ 29. Although a duty exists under G. L. c. 93A to disclose material facts known to a party at the time of a transaction, see Sheehy v. Lipton Industries, Inc., 24 Mass. App. Ct. 188, 195 (1987), "[t]here is no liability for failing to disclose what a person does not know." Underwood v. Risman, 414 Mass. 96, 100 (1993), citing Sheehy, 24 Mass. App. Ct. at 196.

Moreover, even if there were evidence that Amy Tran knew of the possibility of ANS remaining open after December 31, 2017, and there is no such evidence, it defies logic to

conclude that she caused architect Phung to make the misleading statement that she was moving her own business. Had this been her intent, Phung would not have referred to her as an employee of the business.

The Court further notes that Neighborhood Council members asked questions about the proposed nail salon's hours of operation, how long construction would take, the venting of fumes, signage, and the broken awning currently in front of the retail store. See PPS J.A. Ex. D. No one asked any questions about geographic concentration of nail salons, and ANS admits that 12 Fleet Street is several blocks away from 66 Cross Street. ANS Br. at 1. Given the Neighborhood Council's concerns, it is unclear whether statements about the future of Amy Nails & Spa's location on Cross Street would even have been material.

ANS futilely relies on news coverage of the Neighborhood Council hearing, in particular an on-line article stating that "Bellissimo Nail and Spa is coming to Fleet Street, in the former location of the Twilight clothing shop. The shop is bringing the team from Amy's Nails currently on Cross Street that will be closing shortly." See PPS J.A. Ex. I, Exhibit 1. Any inaccurate information in the article was surely frustrating for ANS. But there is no evidence that the defendants had anything to do with the content of the article, other than architect Phung making a truthful presentation to the Neighborhood Council.

ANS also alleges that, in 2016, Amy Tran was "secretly" telling ANS's customers about her move. ANS Br. at 2. However, the summary judgment record does not contain a single affidavit from any current or former ANS customer. Moreover, ANS's owner Kim Tran admits that Amy Tran informed her that she would be opening her own salon and that Amy Tran offered to leave, but Kim Tran specifically asked her to stay and continue working at ANS while she was working on opening her own salon. SOF 6.

ANS admits that Amy Tran had no contract that barred her from competing with ANS or from soliciting customers of ANS, and that Tran never took any customer list or other alleged proprietary information of ANS. SOF 12, 14. Therefore, the only alleged unfair and deceptive practice by Amy Tran and Bellissimo is the making of false or misleading statements. There is no evidence in the summary judgment record that Amy Tran made or caused to be made any false or misleading statement, and there is no evidence that anyone other than Amy Tran or architect Phung made any statement on behalf of Bellissimo. Therefore, summary judgment must be granted in favor of Amy Tran and Bellissimo on ANS's sole remaining claim against them, under G. L. c. 93A.

2: There is no evidence that ANS suffered monetary damages caused by Amy Tran or Bellissimo

Although the Court need not reach the issue of damages, it notes that the summary judgment record contains no evidence of damages caused by defendants' conduct that would enable ANS to recover a damages award. ANS has adduced evidence that it "experienced the loss of more than half of their regular customers after Bellissimo opened," PPS J. A. Ex. I, ¶28, and it submitted gross income statements reflecting a drop in its revenues, see *id.* Ex. H. However, there is no evidence that any customer stopped patronizing ANS based on a mistaken belief that ANS had closed, as opposed to Amy Tran's loyal customers staying with her when she opened her new business. See SOF 6 (ANS's admission that when Amy Tran informed ANS's owner Kim Tran that she would be opening her own salon and offered to leave, Kim Tran specifically asked her to stay and work at ANS while she was working on opening her own

salon). Therefore, there is no evidence of causation of damages, a critical element of any damages claim.⁶

B. ANS Has No Negligence Claim Against PPS

ANS's sole claim against PPS is for negligence, based on PPS's alleged violation of 231 CMR 4.01(5)(f), part of the Rules of Professional Conduct for Massachusetts architects, which provides that an "architect shall not engage in conduct involving fraud or wanton disregard of the rights of others." See Complaint ¶¶ 77-81. ANS cites no case that would allow recovery against PPS on a theory of negligence or any other theory based on its representation of a client (here, Amy Tran and Bellissimo) to gain approval by a public board or council while simultaneously representing a competing business (here, ANS) in other matters, and the Court is aware of no case on point. Indeed, a claim of negligence based on alleged false and misleading representations seems internally inconsistent.

To the extent that a court might interpret ANS's negligence claim as a claim of fraud based on misrepresentation to the Neighborhood Council, such claim has no factual support, and amendment of the Complaint to add such a claim would be futile.⁷ The Court has explained why no reasonable jury could conclude that Amy Tran or Bellissimo caused architect Phung to make any false or misleading statement on their behalf. See *supra* at 4-8. However, the undisputed fact that PPS was performing architectural services for ANS at the time of the Neighborhood Council meeting raises the possibility that PPS had information about ANS's plans to keep operating Amy Nails & Spa at 66 Cross Street after its lease expired that was unknown to Amy

⁶ There is also no evidence in the summary judgment record that the decrease in revenues exceeded the decrease in ANS's costs after it ceased to employ Amy Tran. Presumably Tran was bringing in far more revenue than her salary and other costs of her employment, giving ANS a financial motivation to bring this lawsuit.

⁷ Amendment of the claim at this juncture could also be unfairly prejudicial to PPS. See Mass. R. Civ. P. 15.

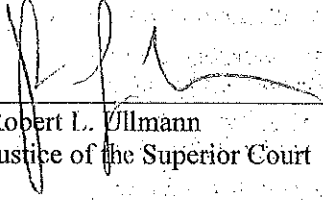
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Tran. Evidence of such knowledge could lead a reasonable trier of fact to find that certain statements made to the Neighborhood Council by architect Phung were misleading. However, there is no evidence in the summary judgment record of such knowledge. As noted above, ANS's manager Ryan Tran stated under oath that the "only party [sic] who had actual knowledge of the terms of the Plaintiff's lease at all relevant times after 2016 where myself, my wife, our agent Budi Setiyono, and our landlord." PPS J.A. Ex. I, ¶ 29. Therefore, even if the Court gives ANS the benefit of the doubt by interpreting its negligence claim as a claim for misrepresentation, summary judgment must be granted in favor of PPS.

CONCLUSION AND ORDER

Motion of Defendants Bellissimo Nail & Spa, LLC and Ngoctuyet Huynh Tran for Summary Judgment (Docket # 12) and Defendant Phung Porzio Studio of Architecture, Inc.'s Motion for Summary Judgment (Docket # 13) are both **ALLOWED**. Judgment shall enter against plaintiff in favor of all defendants, and the case shall be closed.

Dated: June 17, 2020


Robert L. Ullmann
Justice of the Superior Court