2003 WL 25315383 (Cal.Superior) (Trial Order)
Superior Court of California.
Alameda County

CALIFORNIANS FOR DISABILITY RIG, Plaintiff/Petitioner(s),
v.
MERVYN'S CALIFORNIA, INC., Defendant/Respondent(s).

No. 2002051738.
July 14, 2003.

Motion for Summary Judgment Denied

Order

Disability Rights Advocates, Attn: Paradise, Laurence W., 449 Fifteenth Street, Suite 303, Oakland, CA 94612.

Morrison & Foerster LLP, Attn: McElhinncy, Harold J., 425 Market Street, San Francisco, CA 94105-2482.

Judge Ronald M. Sabraw.

The Motion for Summary Judgment filed for Mervyn's California, Inc. was set for hearing on 07/09/2003 at 02:00 PM in Department 22 before the Honorable Ronald M. Sabraw. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The motion of Mervyns' for Summary Judgment is DENIED.

PROCEDURAL STATUS AND ISSUES.

Plaintiff alleges that Mervyn's stores fail to provide access to persons who need to use wheelchairs, scooters and other mobility devices.

The Complaint filed May 21, 2002, alleges a single cause of action under the Unfair Competition Law, Business and Professions Code 17200 ("UCL"). The Complaint asserts that Mervyn's has engaged in unlawful and unfair business practices. Insofar as the complaint states an "unlawful" claim, the UCL claim borrows Civil Code 51 and 54. Plaintiff is not asserting a claim under either the unfair or fraudulent prong of the UCL. (UMF #27-28.)

Mervyn's has filed a motion for summary judgment, not a motion for summary adjudication. Because the UCL claim relies on two distinct statutes, the parties have addressed the statues separately. The Court holds that for purposes of a motion for summary judgment or summary adjudication a single cause of action under the UCL can be parsed along many lines depending on the facts of any case and the aspect of the UCL that is alleged.

The Court may only summarily adjudicate entire causes of action, affirmative defenses, and issues of duty. C.C.P. 437c(f). The Court may not engage in piecemeal adjudication of facts that do not "dispose of a substantive area." Catalano v. Superior

Court, 82 Cal. App. 4th 91, 97. The Court is not, however, bound by the organization of claims in the complaint, as a complaint may join several causes of action into a single count when the causes of action are in fact separate and distinct causes of action, having no relationship to each other. Lilienthal & Fowler v. Superior Court (1993) 12 Cal.App.4th 1848, 1854.

There is a body of law concerning the distinction between a count (a theory of recovery) and a cause of action (a primary right). See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2002) §§ 6:107 et seq and 10:39 et seq. The distinction between a count and a cause of action appears to assume different contours depending on whether the distinction is relevant to a "claim" under an insurance policy, Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co. (1993) 5 Cal. 4th 854, 860 fn 1, the scope of res judicata when a "cause of action" has been resolved, Slater v. Blackwood (1975) 15 Cal. 3d 791, 795-796, and the definition of a "cause of action" for purposes of summary adjudication.

For purposes of summary judgment and summary adjudication, it appears that a "cause of action" means "a group of related paragraphs in the complaint reflecting a separate theory of liability." Catalano, 82 Cal.App.4th at 96. The focus on the theory of liability makes sense in the summary judgment/adjudication context because each theory of liability has different elements, and the inquiry at summary adjudication is whether there are triable issues of material fact regarding the elements of a theory. Only by isolating a legal theory can the court determine whether a disputed fact is material to that theory and might preclude summary judgment/adjudication.

A motion for summary judgment/adjudication regarding a count under the UCL presents many of the same challenges as determining the statute of limitations under the Unruh Act. In Gatto v. County of Sonoma (2002) 98 Cal.App.4th 744, 754-760, the Court held that although the Unruh Act comprises only Civil Code section 51, all Unruh Act claims are not subject to the same statute of limitations. The Court noted that the Unruh Act "is increasingly treated as an omnibus anti-discrimination statute no longer limited to merely ensuring equal access to accommodations," that Courts should not assume that all Unruh Act claims are subject to the same statute of limitations, and that such an assumption "fails to attend to the complexity of the Unruh Act and the variety of claims that may be adjudicated under its rubric." The Court concluded that no single statute of limitations applies to all claims under the Unruh Act and that the nature of the claim will determine the applicable limitations period. Similarly, although the UCL is a single statute all UCL counts do not state a single cause of action. The statute is complex and a variety of causes of action may be adjudicated under its rubric.

A count under the UCL may allege unlawful, unfair, or fraudulent business practices and there is a separate jurisprudence for each prong of the UCL. The unlawful prong borrows state and federal statutes; the unfair prong rests on policies tethered to state and federal statutes; and the fraudulent prong has its own elements distinct from common law fraud. Therefore, triable issues may exist under one prong and not another.

Insofar as a UCL count alleges an unlawful or unfair business practice, several state and federal statutes may be implicated. The Court may grant summary judgment/adjudication of causes of action alleging "unlawful" or "unfair" business practices that borrow or rest on one statute or common law rule, while finding triable issues on causes of action that rest on other statutes.

Finally, the Court may determine whether one or more business practices are at issue, as summary adjudication may be appropriate for one "business practice" but not another.

This differentiation within a single UCL count is appropriate because the Court should not permit a meritless UCL cause of action to proceed to trial merely because it is bundled in a broad UCL count with potentially meritorious causes of action.

Therefore, consistent with the separate arguments of the parties regarding Civil Code 51 and 54, the Court will address each section separately.

The Court also notes that the claim under the UCL is equitable in nature. Therefore, in reviewing a motion for summary judgment, the Court can weigh the equities of the case and is not limited to determining whether a triable issue of material

fact exists. Prata v. Superior Court (2001) 91 Cal. App. 4th 1128, 1135-1136.

CIVIL CODE 51 AND 54 - NATURE OF THE CLAIMS.

Plaintiffs assert a claim under the UCL that borrows Civil Code sections 51 and 54. Section 51 requires Mervyn's to provide "full and equal accommodations, advantages, facilities, privileges, or services" and Section 54 requires "full and equal access." Mervyn's asserts that these terms are vague and that it cannot know to what standard it is held.

The Court holds that if it were interpreted standing alone, the "full and equal" standard is not overly vague given the age of the statute (enacted 1905) and the number of cases that have applied the standard. Furthermore, even if the statute were new and there were no case law, the application of the statute urged by Plaintiff does not appear to be so novel that the standard would be applied prospectively only. United States v. Lanier (1997) 520 U.S. 259, 268-271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope); United States v. AMC Entm't. Inc. (C.D. Cal. 2002) 232 F. Supp. 2d 1092, 1114 ("lines of sight comparable" requirement in ADA Accessibility Guidelines not unconstitutionally vague).

The Court holds that as applied to disability discrimination the "full and equal" standard in sections 51(b) is identical to the federal ADA standard except where the California Legislature expressly provides otherwise. This collapses the disability provisions of section 51(b) into section 51(f) except where otherwise provided. The Court reaches this conclusion for several reasons. First, section 51(f) is more specific than section 51 (b), and as a matter of legislative interpretation a specific statute governs a general statute. Second, section 51(f) was enacted in 1992 and section 51(b) was enacted in 1905, and as a matter of legislative interpretation a latter enacted statute governs an older statute. Third, such a reading would give identical meaning to the term "full and equal" in Civil Code sections 51(b) and 54 and in 42 U.S.C. § 12182(a). consistent with the principle that identical terms be given identical meaning. Fourth, this reading of section 51(b) is consistent with Section 1 of Stats 1992, c 913 (A.B. 1077) where the Legislature stated that in enacting section 5 l(f), it wanted to both strengthen the rights of persons with disabilities under Section 51(b) and to set a floor under any interpretation of 51(b).

The Court likewise holds that as applied to disability discrimination the "full and equal" standard in section 54 is identical to the federal ADA standard except where the California Legislature expressly provides otherwise. This conclusion is suggested by section 54.1(a)(3), which states expressly that "full and equal access" in its application to transportation is the same as the ADA standard except where the laws of California prescribe higher standards. This conclusion also ensures that section 51 and 54 can be interpreted in parallel, which appears to be the Legislative intent.

Other than the California Building Code, Plaintiff has not identified any California statutes other than Civil Code 51 and 54 that apply to the claims in this case. The application of the Building Code is addressed in the next section.

CIVIL CODE 51 - TREATMENT OF ARCHITECTURAL FIXTURES UNDER SECTION 51(d).

Mervyn's argues that Civil Code 51(d) creates an exception to the Unruh Act that applies in this case. Mervyn's argues (1) Civil Code 51(d) states that the Unruh Act does not require construction, alteration, repair or modification of fixtures of any sort whatsoever other than those required by the Building Code (Title 24); (2) the Building Code does not regulate the spacing of moveable racks; so (3) the Unruh Act does not regulate the spacing of moveable racks.

The Court holds that section 51(d) creates a safe harbor for those matters that are encompassed within the Building Code. Section 51(b)'s prohibition against disability discrimination is not, however, limited to enforcement of the Building Code. Section 51(b) can require persons to provide "full and equal access" regarding matters outside the scope of the Building

Code.

To the extent that the alleged impediments to access consist of architectural fixtures (walls, posts, counters, etc.). the limits of the Unruh Act are identical to the limits of the Building Code. Plaintiff has presented evidence that creates a triable issue of material fact whether Mervyn's has a business practice of failing to fix architectural features that do not comply with the Building Code. (Atwood Expert Report, Exh C; Adler Expert Report, Exh B, Attachment 5.) Regarding the scope of the claims in this case, Mervyn's argues that the scope of the case does not include architectural features. Although the focus of the case has apparently been on moveable features, the reference in paragraph 21 of the Complaint to Health and Safety Code 19955 et seq indicates that the claims also encompass Mervyn's policy concerning architectural features.

To the extent that the alleged impediments to access consist of moveable fixtures (clothing racks, displays. trash cans, etc.), the general terms of the Unruh Act are applicable because the size, nature, and placement of those objects are not within the scope of the Building Code. Plaintiff has presented evidence that creates a triable issue of material fact whether Mervyn's has a business practice of placing moveable fixtures that fails to comply with the Unruh Act. (Fact #38.)

CIVIL CODE SECTION 51 - INTENT

Mervyn's argues that Plaintiff must prove not only that persons with mobility disabilities are denied full and equal access to its stores, but also that Mervyn's intended to deny those persons full and equal access to its stores. Mervyn's relies on Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1175 ("a plaintiff seeking to establish a case under the Unruh Act must plead and prove intentional discrimination in public accommodations in violation of the terms of the Act"), and Hankins v. El Torito Restaurants, Inc. (1998) 63 Cal. App. 4th 510, 517-518 (same). Mervyn's also relies on BAJI 7.92.

The Court holds that intent to discriminate is not an element of disability discrimination under Civil Code 51. The Court preliminarily notes that this holding is limited to discrimination based on disabilities, and it does not extend to discrimination based on race, sex, and other characteristics. As noted in Gatto v. County of Sonoma (2002) 98 Cal.App.4th 744, 754-760, the Unruh Act "is increasingly treated as an omnibus anti-discrimination statute no longer limited to merely ensuring equal access to accommodations." Because the statue is complex and a variety of claims "may be adjudicated under its rubric," the Court cannot presume that the elements of a discrimination claim based on one characteristic apply to all characteristics.

Unlawful discrimination based on disability is fundamentally different from other forms of discrimination. Whereas the legislative goal in prohibiting discrimination based on race, sex, and other characteristics is to ensure that all persons are treated equally, the legislative goal in prohibiting discrimination based on disability is to ensure that persons with disabilities are provided with reasonable accommodations so that they will have equal access. Unlike other forms of discrimination, inaction in the form of an inattentive or unintentional failure to provide a reasonable accommodation for the disabled can constitute unlawful discrimination.

This interpretation of section 51 is consistent with section 54 and the ADA. Donald v. Cafe Royale, Inc. (1990) 218 Cal. App. 3d 168. 179 (intent is not an element of a claim under section 54.); Boemio v. Love's Restaurant (S.D. Cal. 1997) 954 F. Supp. 204, 208 (same); Lieber v. Macy's West (N.D.Cal. 1999) 80 F.Supp.2d 1065, 1074 ("In enacting the ADA, Congress sought to remedy discrimination in public accommodations whether such discrimination is intentional or not.").

Having held that intent to discriminate is not an element of disability discrimination under Civil Code 51, the Court does not need to reach the issue of whether there are triable issues of material fact whether Mervyn's intended to discriminate against persons with disabilities.

CIVIL CODE SECTION 51 - LEGITIMATE BUSINESS REASON

Mervyn's argues that the Unruh Act's requirement of full and equal access is tempered by legitimate business concerns. Harris, 52 Cal.3d 1142, 1163. Plaintiff argues that under the Unruh Act there can be no economic justification for disability discrimination. Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 38.

The Court holds that the Unruh Act's requirement of full and equal access is tempered by legitimate business concerns insofar as disability discrimination is concerned. First, having found that the Unruh Act's requirement of full and equal access for persons with disabilities is coextensive with the ADA requirements, the Court necessarily holds that Unruh Act incorporates the economic considerations in the ADA.

Second, the FEHA indicates that the law against disability discrimination should take into account economic considerations. Under Government Code 12940(a)(1) and (2), an employer must make a "reasonable accommodation" for disabled persons but is not required to undertake unreasonably expensive or burdensome efforts to ensure that a person with a disability can perform the work that he or she is otherwise qualified to perform. The concept of a "reasonable accommodation" that takes into account economic burden does not exist with regard to race, sex, and other forms of unlawful discrimination.

Third, as a matter of general policy, discrimination based on disabilities is different from discrimination based on other characteristics. A business incurs no substantial additional cost or expense by providing equal treatment to consumers without regard to race, sex, or other characteristics. In contrast, a business may incur a substantial additional cost or expense if it is to provide accommodations to ensure full and equal access to persons with disabilities.

Koire, cited by Plaintiff, supports the conclusion that disability discrimination should take into account economic considerations. Koire noted that discrimination such as price discounts for children or senior citizens might be permissible under the Unruh Act if it furthers a Legislatively recognized social goal. With regard to disability discrimination, the California Legislature recognized in Government Code 12940(a)(1) and (2), and the United States Congress recognized in the ADA, that the law will only require "reasonable accommodations."

The nature and scope of economic considerations is delineated in the ADA. The ADA regulations that most closely address the same topic as the Unruh Act are at 28 C.F.R. 201 et seq. 28 C.F.R. 201(a) states the general policy that "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges. advantages, or accommodations of any place of public accommodation ..." 28 C.F.R. 36.304(a) states, "A public accommodation shall remove architectural barriers in existing facilities, including communication barriers that are structural in nature, where such removal is readily achievable, i.e., easily accomplishable and able to be carried out without much difficulty or expense." 28 C.F.R. 36.304(b) then states explicitly that steps to remove barriers include "(4) Rearranging tables, chairs, vending machines, display racks, and other furniture." Regarding the effort to which a retailer must go, 28 C.F.R. 36.304(f) states, "The rearrangement of temporary or movable structures, such as furniture, equipment, and display racks is not readily achievable to the extent that it results in a significant loss of selling or serving space." In addition, 28 C.F.R. 36.305(a) and (b) state that under federal law, if the relocation of barriers is not readily achievable, a retailer can provide alternatives such as "Retrieving merchandise from inaccessible shelves or racks."

Relying on the incorporation of the ADA into the Unruh Act and the Legislature's use of a reasonable accommodation standard in Government Code 12940(a)(1) and (2), Court holds that the Unruh Act requires that merchants must remove all barriers where the removal is "readily achievable" and provide alternate accommodations where the removal is not "readily achievable."

Plaintiff asserted at the hearing that Mervyn's must remove barriers not only when to do so is "readily achievable" but also whenever it would not "fundamentally alter" the nature of Mervyn's business. The Court does not address the interaction between the "readily achievable" and "fundamentally alter" standards and which party bears the burden to prove what. The parties did not brief these issues and this motion does not require the Court to resolve this issue. The Court observes, however, that several courts have held that a plaintiff has the burden of proving that the existing facility presents an architectural barrier that is prohibited under the ADA and the removal of which is readily achievable in a general sense and that if the plaintiff makes that showing, then the burden shifts to the defendant to present as an affirmative defense based on the specific facts of its situation that the requested modification would fundamentally alter the nature of the public

accommodation. Johnson v. Gambrinus Company/Spoetzl Brewery (5th Cir. 1997) 116 F.3d 1052, 1059; Access Now, Inc. v. S. Fla. Stadium Corp. (S.D. Fla 2001) 161 F. Supp. 2d 1357, 1363; Lieber v. Macy's West (N.D.Cal. 1999) 80 F.Supp.2d 1065, 1077.

This is a motion for summary judgment and not trial, so Mervyn's must demonstrate with undisputed evidence that Plaintiff cannot prove its case. Mervyn's has not presented undisputed evidence that its business practice (including both the written policies and the implementation of those policies) is to remove all barriers where removal is readily achievable.

Plaintiff has presented evidence that disabled patrons of Mervyns cannot get access to merchandise. A sufficient number of complaints may create a triable issue of fact as to whether the defendant has a "business practice" as opposed to a series of unrelated problems with consumers at the retail level. In People v. Dollar Rent-A-Car Systems, Inc. (1989) 211 Cal. App. 3d 119, the Court found, after trial, that the use of confusing contracts and failure to train customer service representatives constituted a business practice of deceiving consumers. In People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 526, the Court found, after trial, that a nursing home's repeated failure to render treatment and repeated giving of treatment without orders evidenced a business practice of the unlawful provision of nursing care. The evidence of repeated complaints is sufficient to create a triable issue of material fact as to whether Mervyn's had a business practice of failing to provide equal access. Even if Mervyn's's guidelines complied fully with the law (and the Court expresses no opinion as to whether they do), there is a triable issue of fact whether Mervyn's acts takes reasonable steps to ensure that its stores comply (or substantially comply) with the guidelines.

CIVIL CODE SECTION 54 - TREATMENT OF FIXTURES

Mervyn's argues that Plaintiff can establish liability under section 54 only by proving either (1) that fixtures were not in compliance with the Building Code or (2) an express policy to discriminate.

Regarding any fixtures, the Court holds that the relationship between Civil Code 54 and the Building Code is the same as the relationship between Civil Code 51 and the Building Code. Therefore, to the extent that the alleged impediments to access consist of architectural fixtures, the limits of Civil Code 54 are identical to the limits of the Building Code and to the extent that the alleged impediments to access consist of moveable fixtures, the general terms of the Civil Code 54 are applicable. Plaintiff has presented evidence that creates a triable issue of material fact whether Mervyn's stores have architectural and moveable fixtures that fail to comply with the Civil Code 54.

CIVIL CODE SECTION 54 - POLICY

Mervyn's argues that it has no policy to deny access, as was the case in Hankins, supra, 63 Cal.App.4th 510. Mervyn's asserts that its policy is the guidelines on spacing and that those guidelines are intended to provide full access.

Plaintiff argues that Mervyn's's guidelines are inadequate, that they are mere guidelines rather than requirements, and Mervyn's has received and ignored complaints about accessibility.

The Court holds that Plaintiff is not required to prove a formal written policy to establish a policy of denying access under Civil Code 54. Where the statute imposes an affirmative duty to provide access, the failure to have an effective pro-active policy could amount to a violation. See discussion above concerning the role of intent in disability discrimination.

The Court finds a triable issue of material fact whether Mervyn's's guidelines and alleged failure to enforce those guidelines constitutes a violation of Civil Code 54. (Fact #38.)

UCL - COMPLEX ECONOMIC POLICY AND LIMITS OF INJUNCTIVE RELIEF

Mervyn's asserts that this case is not amenable to resolution under the UCL because it concerns a host of individualized issues. Plaintiff responds that it seeks only injunctive relief, not individual damages and that its claims concern a company wide policy (or lack therof), not the placement of individual barriers.

The Court holds that this case is an appropriate use of the UCL. The claims do not require the Court to make complex economic decisions that should be left to the Legislature. Desert Healthcare Dist. v. Pacificare FHP, Inc. (2001) 94 Cal.App.4th 781, 795-796.

The Court is capable of providing a practical remedy. This case concerns a "business practice" rather than individualized problems, so any remedy may be directed at establishing or altering a policy and requiring a good faith enforcement of the policy rather than requiring the removal of specific barriers at specific stores. The feasibility of such a remedy is demonstrated in cases such as Lieber v. Macy's West, Inc., 80 F. Supp. 2d 1065, and Alford v. City of Cannon Beach, 2000 U.S. Dist. LEXIS 20730. This is not a case such as Diaz v. Kay-Dix Ranch (1970) 9 Cal.App.3d 588, where the Court cannot provide an effective remedy.

EVIDENCE

The parties requested the Court to make evidentiary rulings on their objections to evidence. See City of Long Beach v. Farmers & Merchants Bank of Long Beach (2000) 81 Cal.App.4th 780.

Mervyn's objection to Goracke Declaration, Exhibit RR, is SUSTAINED. The compilation by Plaintiffs' counsel of statements of consumers that they complained to Mervyns is inadmissible hearsay. Exhibit RR is not admissible for either the truth of the matters underlying the complaints or for the limited purpose of showing the knowledge of Mervyn's. Exhibit RR does not contain any first hand information that a consumer complained to Mervyn's or that Mervyn's received a complaint.

Mervyn's objection to Goracke Declaration, Exhibit TT. is OVERRULED and the document is admitted for the limited purpose of showing the knowledge of Mervyn's. The compilation by Mervyn's of consumer complaints is a business record that demonstrates that the complaints were made. Exhibit TT is not admissible for the truth of the matters underlying the complaints.

The evidentiary objections by the parties are OVERRULED except as specifically stated otherwise. The Court's consideration of the evidence is limited to this motion only and is not to be construed as an indication of admissibility in future motions or at trial.

CONCLUSION

The Motion of Mervyns' for Summary Judgment is DENIED.

Dated: 07/14/2003 <<signature>>

Judge Ronald M. Sabraw

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