SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE
Superior Court of California

Minute Order/Judgment

CASE NO: MCC1900691 DATE: 12/09/19 DEPT:S302
CASE NAME: MARTINEZ VS KYDIA INCORPORATED
CASE CATEGORY: Civil Rights-Over $25,000 (Southwest)

HEARING: Hearing re: Motion to/for Judgment on the Pleadings by KYDIA INCORPORATED

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Honorable Judge Angel M. Bermudez, Presiding

Clerk: A. Behrmann

Court Reporter: J. Fogleman

ABELARDO MARTINEZ JR represented by PACIFIC TRIAL ATTORNEYS - Richard H. Hikida present.

KYDIA INCORPORATED AN ILLINOIS CORPORATION Represented by/in Steven T. Gebelin via Court Call

At 8:58, the following proceedings were held:

Court has read and considered documents relating to this matter.

Counsel Argue.

Matter is taken under submission.

Court subsequently rules on matter taken under submission on 12/09/19.

The Unopposed RJN is GRANTED. The Motion as to the Independent UCRA Claim is GRANTED with Leave to Amend of 10 days. The Motion as to the CLRA claim based on the ADA violation is DENIED.

Leave to amend Complaint of MARTINEZ granted, with 10 days leave to amend.

Court's ruling attached to Minute Order and incorporated herein by reference.

Notice to be given by Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE
30755-D Auld Road
Murrieta, CA 92563
www.riverside.courts.ca.gov

CLERK'S CERTIFICATE OF MAILING

ABELARDO MARTINEZ JR

vs. CASE NO. MCC1900691

KYDIA INCORPORATED

TO: PACIFIC TRIAL ATTORNEYS
4100 NEWPORT PLACE DR #800
NEWPORT BEACH CA 92660

I certify that I am currently employed by the Superior Court of California, County of Riverside and I am not a party to this action or proceeding. In my capacity, I am familiar with the practices and procedures used in connection with the mailing of correspondence. Such correspondence is deposited in the outgoing mail of the Superior Court. Outgoing mail is delivered to and mailed by the United States Postal Service, postage prepaid, the same day in the ordinary course of business. I certify that I served a copy of the attached 12/09/19 Motion for Judgment Minute Order on this date, by depositing said copy as stated above.

Court Executive Officer/Clerk

Dated: 12/09/19

by: _____
ANGELA M BEHRMANN, Deputy Clerk

Martinez vs Kydia Inc.

MCC1900691

Motion for Judgment on the Pleadings

RULING

Independent UCRA Claim

Under Section 51(b), a plaintiff must plead and prove intentional discrimination in public accommodations. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1175.) The facts of the Complaint here are conclusory and insufficient. While Plaintiff is correct that the rules of pleading generally require only ultimate facts to be alleged (*McKelly v. Washington Mut., Inc.* (2006) 142 Cal.App.4th 1457, 1469), "[f]acts, not conclusions, must be pleaded." (*Zumbrum v. University of Southern California* (1972) 25 Cal.App.3d 1, 8.) Further, where, as here, statutory remedies are invoked, the facts "must be pleaded with particularity." (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 410.) there are no allegations that the construction or design of the website was intended to prevent blind individuals from using it or that Defendant was motivated by animus towards the blind when designing the website. In fact, Plaintiff fails to even identify or describe any barrier to access, other than the bare conclusion that there was. Plaintiff has failed to allege facts showing willful, intentional discrimination and the pleading does not give adequate notice to Defendant. Plaintiff's citation to *Ruiz v. Musclewood Inv. Props, LLC* (2018) 28 Cal.App.5th 15 is misplaced in that in this case there are no facts that Plaintiff complained to Defendant or that Defendant otherwise had prior knowledge of any access barrier.

CLRA Claim based on ADA violation

Precept of equality is a cornerstone of this nation. The issue before this court is whether equality applies to a non-physical marketplace within the meaning of Title III of ADA. This court finds that it does.

There is no direct guidance in California through the District Court. In the recent decision of *Thurston v. Midvale Corp.* (Sept. 3, 2019), 39 Cal.App.5th 634, the California Court of Appeal recognized there is a three-way split among federal circuit courts as to whether websites qualify as places of public accommodation within the meaning of Title III. There, the court applied the Ninth Circuit's Nexus test. "We hold that including websites connected to a physical place of public accommodation is not only consistent with the plain language of Title III, but it is also consistent with Congress's mandate that the ADA keep pace with changing technology to effectuate the intent of the statute." Id. at p.644.

The Second District, Court of Appeal, did not directly address the issue at hand but provided some key language.

"Thurston urges us to go farther and hold that Title III can apply to websites independent of any connection between the website and a physical place, as the First, Second and Seventh Circuits have found. Here appellant's website provides information and services connected to The Whisper Lounge, a specific restaurant and bar and a physical place to which the public has access. The website **would be just a fictional page** on the Internet if it provided menus and other information and services for a restaurant and bar that did not exist. Accordingly, we need not consider here the wholly hypothetical question whether Title III of the ADA governs a website unconnected to a physical place of public accommodation offering only purely Internet-based services or products." Id. (emphasis added).

Additionally, the court stated about the ADA: "Congress intended that the ADA "keep pace with the rapidly changing technology of the times." (*See* H.R.Rep. No. 101-485, 2d sess, p. 391 (1990).) "In a society in which business is *644 increasingly conducted online, excluding businesses that sell services through the Internet from the ADA would 'run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public.' " (*National Ass'n of the Deaf v. Netflix, Inc., supra*, 869 F.Supp.2d at p. 200.) **Excluding websites just because they are not built of brick and mortar runs counter to the purpose of the statute.**" Id. at pp. 643–44. (emphasis added).

Looking at the Federal Circuit Courts of Appeals, this court is most persuaded by the inclusive protections afforded to individuals by those rulings from the First (*Carparts Distribution Center v. Automotive Wholesaler's Association of New England, Inc.* 37 F.3d 12 (First Cir. 1994)), Second (*Pallozzi v. Allstate Life Ins. Co.* 198 F.3d 28 (Second Cir. 2000)) and Seventh Circuits (*Doe v. Mutual of Omaha Insurance Company*, 179 F.3d 557, (Seventh Cir 1999)).

In *Carparts Distribution Center v. Automotive Wholesaler's Association of New England, Inc.*, the court wrote: "Congress clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure. Many travel services conduct business by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. Likewise, one can easily imagine the existence of other service establishments conducting business by mail and phone without providing facilities for their customers to enter in order to utilize their services. It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not. Congress could not have intended such an absurd result." *Carparts, Id.* at 19. (In *Doe v. Mutual of Omaha Insurance Company*, the Seventh Circuit approvingly adopted the language of *Carparts. Doe, Id.* at p.559.)

In its application of the ADA, the *Carparts* Court noted the very purpose of the ADA is "'to bring individuals with disabilities into the economic and social mainstream of American life ... in a clear, balanced, and reasonable manner.' H.R.Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 99 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 382. In drafting Title III, Congress intended that people with disabilities have equal access to the array of goods and services offered by private establishments and made available to those who do not have disabilities. S.Rep. No. 116, 101st Cong., 1st Sess. at 58 (1989)." *Carparts, Id.* at p.19.

Logically, the court provided in 1994 before the explosion of internet shopping: " Many goods and services are sold over the telephone or by mail with customers never physically entering the premises of a commercial entity to purchase the goods or services. To exclude this broad category of businesses from the reach of Title III and limit the application of Title III to physical structures which persons must enter to obtain goods and services would run afoul of the purposes of the ADA and would severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges and advantages, available indiscriminately to other members of the general public." *Carparts, Id.* at p.20.

Although the *Pallozzi* court does not provide the powerful language of *Carparts*, the result is the same. In *Pallozzi*, authored nearly 20 years ago, the court found that disabled citizens were protected through the ADA whether the policy was acquired at an office site for the carrier was of no consequence. *Pallozzi, Id.* at p. 33. "We find no merit in Allstate's contention that, because insurance policies are not used in places of public accommodation, they do not qualify as goods or services "of a place of public accommodation." The term "of" generally does not mean "in," and there is no indication that Congress intended to employ the term in such an unorthodox manner in Section 302(a) of Title III." *Id.*

This court is not persuaded by *Robles v. Domino's Pizza LLC*, 913 F.3d 898 (Ninth Cir. 2019). The *Robles* court did recognized, that "[t]herefore, the ADA mandates that places of public accommodation, like Domino's, provide auxiliary aids and services to make visual materials available to individuals who are blind. *See* id. § 36.303. This requirement applies to Domino's website and app, even though customers predominantly access them away from the physical restaurant: "The statute applies to the services *of* a place of public accommodation, not services *in* a place of public accommodation. To limit the ADA to discrimination in the provision of services occurring on the premises of a public accommodation would contradict the plain language of the statute." Nat'l Fed'n of the Blind v. Target Corp., 452 F.Supp.2d 946, 953 (N.D. Cal. 2006). *Robles, Id.* at p. 905. However, the court then went on to point out that the "nexus between Domino's website and app and physical restaurants—which Domino's does not contest—[was] critical" to its analysis. *Robles, Id.* In doing so, the Robles court immediately cited its own opinion *in Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d. 1104 (9th Cir. 2000). In looking at *Weyer*, the *Robles* court noted: "the ADA only covers 'actual, physical places where goods or services are open to the public, and places where the public gets those

goods or services,' there had to be "some connection between the good or service complained of and an actual physical place.' [citation omitted]. While the insurance company had a physical office, the insurance policy at issue did not concern accessibility, or "such matters as **ramps and elevators** so that disabled people can get to the office." *Robles, Id.*

However, disabilities are not solely ambulatory restrictions. Further, the opinion does not recognize the technological shift that has occurred in the commercial world. Merchants' offices have physically moved from brick and mortar to computer terminals. Although not asked to take judicial notice of the recent holiday sales statistics from "Black Friday 2019," it is obvious to any citizen that as brick and mortar stores close all around us, in there stead one has to turn to the cyber world to acquire products. Additionally, brick and mortar cannot physically possess every item imaginable. Under the Robles opinion disabled citizens that need a critical item for their own existence, but can only find them through cyber stores, will not be afforded any protection under the ADA if there is no storefront with which to have a nexus. So the sight impaired person who has another chronic malady who might only be able to find a replacement part to deal with part of this other malady, will not be protected under the ADA because there is no storefront. This runs counter to the purpose of the ADA.

With an obvious extrapolation, this court was not persuaded by *Ford v. Sherling-Plough Corporation*, 145 F.3d 601 (Third Cir. 1998), *Parker v. Metropolitan Life Insurance Company*, 121 F.3d 1006 (Sixth Cir. 1997), and *Rendon v. Valleycrest Productions, Ltd.*, 294 F.3d 1279 (11th Cir. 2002).

Accordingly, the Motion as to CLRA claim based on the ADA violation is DENIED.

12/09/19

Angel Bermudez

Judge of the Superior Court