

APPELLATE DIVISION
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

ALEJANDRA PEREZ,

Plaintiff and Respondent,

v.

CROCKER'S "THE WELL
DRESSED FRANK" INC., et al.,

Defendants and Appellants.

30-2023-01341920

(Super. Ct. No. 30-2022-
01251260)

OPINION

Appeal from a judgment of the Superior Court of Orange County,
Central Justice Center, Corey S. Cramin, Judge. Reversed.

Sahelian Law Offices and Ara Sahelian, for Defendants and Appellants.

Morse Mehrban for Plaintiff and Respondent.

* * *

Defendants Crocker's "The Well Dressed Frank" Inc. and Victoria De Frenza appeal the judgment against them in an action for a violation of the Unruh Civil Rights Act (Unruh Act) under Civil Code section 51. Defendants contend plaintiff never demonstrated a bona fide intent to use their restaurant's services, and therefore plaintiff lacks standing to sue. We agree and reverse.

PROCEDURAL BACKGROUND

On March 22, 2022, plaintiff Alejandra Perez filed a complaint with a single cause of action for violation of the Unruh Act against defendants. The complaint alleges plaintiff, who is legally blind, uses screen reader software to vocalize visual website content. It further alleged defendants operated a restaurant, Crocker's The Well Dressed Frank, in Newport Beach (Crocker's). Plaintiff alleged on or about February 8, 2022 she visited defendants' website "in order to learn about the restaurant and review its menu" but could not because it was incompatible with screen reader software.

Defendants filed an answer on May 16, 2022, and the court conducted a bench trial on June 7, 2023. Following trial, the court issued a statement of decision with factual findings. The court did not make a finding plaintiff had a bona fide intent to visit Crocker's, i.e., that she intended to make use of the restaurant's services. Instead, on this issue the court stated, "[w]hile planning a trip to Orange [C]ounty with her boyfriend, Plaintiff navigated to the restaurant's website on her Apple iPhone, *hoping to learn about* the restaurant's food offerings through the use of the mobile device's screen reader software." (Emphasis added.)

The court entered judgment for plaintiff for \$4,000, finding by a preponderance of the evidence defendants violated the Unruh Act. Defendants appeal.

FACTUAL BACKGROUND

Plaintiff testified she has been completely blind for 10 years. She uses a screen reader software, VoiceOver, to read everything on a screen. She has sued between 17 and 20 restaurants in the past.

Plaintiff testified she has never been to Balboa Island, where Crocker's is located. She loves the beach and Balboa Island in general was recommended to her. Plaintiff was looking for a place on Balboa Island to celebrate Valentine's Day with her boyfriend. On February 8, 2022, she first visited Crocker's website using an iPhone 11 with VoiceOver. Plaintiff found the restaurant through Siri, a virtual assistant on her iPhone. She attempted to view the menu but could not because the website menu had only images. Her phone was unable to read the menu as her VoiceOver application merely stated, "Image, image." After realizing she could not read the menu, she left the website.

Plaintiff testified she originally planned to visit but decided not to after being unable to see the menu. Plaintiff never tried to obtain Crocker's phone number or ask someone to contact Crocker's for her. Plaintiff had not visited Balboa Island but planned to do so. Her inability to read the restaurant's menu contributed to her not visiting the area, but plaintiff denied it was the exclusive reason for not visiting Balboa Island. At the time of trial, she had no concrete plans to visit Balboa Island. And she had no idea which restaurant she would frequent once she arrived.

When asked about checking other websites for Crocker's menu, the restaurant did not show up in DoorDash because she lived in Arleta, which is 60 miles away. She did not try other food ordering websites, such as Grubhub or Square.

The trial court admitted the declaration of plaintiff's expert, Beth Franssen, in lieu of live testimony pursuant to Code of Civil Procedure section 98. Franssen is an expert in accessibility of websites to visually impaired individuals. Franssen declared as it existed on February 8, 2022, the native electronic versions of the menus appearing on Crocker's website

were all images that did not contain and had not been encoded with any actual text that could be recognized by screen reader software.

At the time of trial, however, defense counsel had his assistant, Alejandro Vo, demonstrate using VoiceOver on the website. The demonstration attempted to show VoiceOver could read the menu on the order page.

De Frenza's husband, John De Frenza (John) handles the Crocker's website.¹ The menu was available on the website, which was established in 2014 through the merchant platform, Square. When someone visits the website, the person is redirected to Square's platform, which provides an option for pickup or delivery. The order page reflects the latest menu items. There was no option for Crocker's to change the platform other than choosing the background color or placement of composition. According to John, at the time plaintiff visited the website in February 2022, there were two ways to view the menu, through a photographic PDF document that was not readable or by visiting the order page.

DISCUSSION

At trial and on appeal, defendants challenge plaintiff's genuine intent to patronize Crocker's. The court agrees there is insufficient evidence of intent, and therefore plaintiff lacks standing.

A. *Standard of Review*

To the extent a standing determination is based on underlying factual findings, we review those findings of the trial court for substantial evidence. (*Loeber v. Lakeside Joint School Dist.* (2024) 103 Cal.App.5th 552, 570.) Substantial evidence is defined as evidence of ponderable legal significance,

¹ John De Frenza is referred to as John to avoid confusion. No disrespect is intended.

reasonable in nature, credible, and of solid value. (*Nolte Sheet Metal, Inc. v. Occupational Safety & Health Appeals Bd.* (2020) 44 Cal.App.5th 437, 442.) It is also relevant evidence that a reasonable mind might accept as adequate to support a conclusion. (*Ibid.*)

B. *The Unruh Act and ADA*

“The Unruh Act provides: All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. (Civ. Code, § 51, subd. (b).) The law was designed to create and preserve a nondiscriminatory environment in California business establishments by banishing or eradicating arbitrary, invidious discrimination by such establishments.” (*Saurman v. Peter’s Landing Property Owner, LLC* (2024) 103 Cal.App.5th 1148, 1168 (cleaned up).)

The Unruh Act also includes protections for disabled persons guaranteed under the federal Americans with Disabilities Act (ADA). (Civ. Code, § 51, subd. (f).) “A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under [Civil Code] section 52.” (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665.)

Under the ADA, “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 by any person who owns, leases (or leases to), or operates a place of public accommodation.” (42 U.S.C. § 12182(a).)

The ADA defines discrimination to include “a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden[.]” (42 U.S.C. § 12182(b)(2)(A)(iii).)

Department of Justice regulations require that a “public accommodation shall furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.” (28 C.F.R. § 36.303(c)(1).) Auxiliary aids and services include screen reader software or “other effective methods of making visually delivered materials available to individuals who are blind or have low vision.” (28 C.F.R. § 36.303(b)(2); see also 42 U.S.C. § 12103(1)(B).)

C. *Standing*

“[A]n individual bringing an Unruh Civil Rights Act claim against an online business must allege, for purposes of standing, that he or she visited the business’s website, encountered discriminatory terms, and intended to make use of the business’s services. These requirements are sufficient to limit standing under the Unruh Civil Rights Act to persons with a concrete and actual interest that is not merely hypothetical or conjectural.” (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1032 (*White*).) A person who visits a business’s website must possess the intent to use its services. (*Ibid.*) At trial, or on summary judgment, a defendant may challenge plaintiff’s bona fide intent to use its services. (See *ibid.*)

In *Thurston v. Omni Hotels Management Corp.* (2021) 69 Cal.App.5th 299, 301 (*Omni*) plaintiff was blind and used a screen reader. She sued alleging Omni's website was not fully accessible by the blind and visually impaired in violation of the Unruh Act. (*Id.* at p. 302.) The jury found she never intended to make a hotel reservation or ascertain Omni's prices and accommodations for the purpose of making a hotel reservation, and the court of appeal affirmed the jury verdict in defendant's favor. (*Ibid.*) Noting a litigant's standing is a threshold issue to be resolved before the matter can be reached on the merits (*id.* at p. 309), the court concluded plaintiff had not established standing, because even though plaintiff had visited the website on multiple occasions in search of a hotel room in Palm Springs or San Diego, she never tried to book a reservation by using a third party website or by calling Omni directly, nor did she look at other hotel websites and never actually made any hotel reservations during these occasions when searching for a room. (*Id.* at pp. 302-303.)

Here, plaintiff did not allege she intended to patronize Crocker's, and the statement of decision did not make a factual finding she intended to patronize Crocker's. In her respondent's brief, plaintiff concedes she had to prove a bona fide intent to use Crocker's facilities. Plaintiff's testimony demonstrates she never had concrete plans to visit Balboa Island or Crocker's and as of the time of trial, she had never visited Balboa Island or attempted to order takeout or delivery food from Crocker's. Like *Omni*, these facts are insufficient to confer standing.

On appeal plaintiff contends under the conflicting evidence and conflicting inference rule, an appellate court must defer to the trial court. True, but here there is no conflicting evidence or conflicting inference. There is a failure of proof. Plaintiff fails to distinguish *White* or *Omni*.

DISPOSITION

The judgment is reversed. Defendants are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.891(a).)



Kimberly A. Knill
Judge

WE CONCUR:



Robert A. Knox
Presiding Judge



John R. Zitny
Judge