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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MIGUEL CASTANEDA, KATHERINE CORBETT, and JOSEPH WELLNER, on behalf of themselves and others similarly situated, Plaintiffs, vs. BURGER KING CORPORATION, Defendant.	Case No. C 08-04262 WHA (JL) **DEFENDANT BURGER KING CORPORATION'S NOTICE OF MOTION, MOTION FOR PARTIAL SUMMARY JUDGMENT, AND MEMORANDUM OF POINTS AND AUTHORITIES** **Date:** **March 18, 2010** **Time:** **8 a.m.** **Before:** **Hon. William H. Alsup** **Location:** **Courtroom 9, 19th Floor**

TO PLAINTIFFS MIGUEL CASTANEDA, KATHERINE CORBETT, and JOSEPH WELLNER, and THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 18, 2010, at 8:00 a.m., or as soon thereafter as the matter may be heard by the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco,

California, Defendant Burger King Corporation ("BKC") will bring on for hearing this motion for partial summary judgment pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.

By this motion, BKC seeks partial summary judgment as to:

(i) Plaintiffs' claims for damages under state accessibility statutes, because it is beyond legitimate dispute that BKC, which does not operate the restaurants at issue, did not cause, encourage, aid or abet discrimination against the disabled, as the statutes require for damages claims; and

(ii) Plaintiffs' claims under the Americans with Disabilities Act (the "ADA") based on the design and original construction of the restaurants, because it is undisputed that all ten restaurants were designed and constructed prior to the January 26, 1993 effective date of the new construction provisions of the ADA; accordingly, Plaintiffs cannot assert such claims against any of these restaurants.

This motion is based upon this Notice of Motion and Motion and this Memorandum of Points and Authorities and exhibits hereto, all orders, pleadings and papers on file in this action, and upon such other matters of which the Court may take judicial notice or which may be presented to the Court at the time of hearing.

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I. INTRODUCTION

BKC seeks summary judgment as to the statutory damages claims Plaintiffs have asserted against BKC under the Unruh Civil Rights Act, Cal. Civ. Code §§ 51 - 51.15 (the "Unruh Act"), and the California Disabled Persons Act, Cal. Civ. Code § 52 (the "CDPA"). Both statutes provide that damages are only available from defendants who have engaged in discriminatory conduct or have encouraged or aided such conduct. No facts suggesting that BKC engaged in such conduct exist. To the contrary, the evidence that BKC has always fully supported compliance with all accessibility laws is uncontroverted. Indeed, BKC's agreements with its franchisees require that they design, construct, operate and maintain their restaurants in compliance with all applicable access laws. And it is beyond legitimate dispute that, to the extent any class member has been subjected to an accessibility barrier within the class period, the barrier was maintained by a franchisee, and not by BKC. Because it is uncontroverted that BKC has not engaged in the discriminatory conduct prohibited by the California statutes, BKC is entitled to judgment on Plaintiffs' state-law damages claims, as a matter of law.

BKC also seeks summary judgment as to Plaintiffs' claims that the restaurants were not designed and constructed in compliance with Title III of the ADA, because it is undisputed that all ten restaurants at issue were designed and constructed years before the ADA was enacted, and, accordingly, were not required to comply with ADA standards.

II. FACTUAL BACKGROUND

A. The Relationship Between BKC and the Franchisees/Lessees

BKC is the franchisor of Burger King® restaurants selling hamburgers and related fast-food items, approximately 600 of which are located in California. (Docket No. 226 at 2).[1] BKC has never operated any of the Burger King® restaurants located in California. (Docket No. 30 ¶¶ 2, 3).[2] Instead, all California Burger King® restaurants are operated and maintained by independent franchisees.

[1] Where possible, BKC bases its recitation of the facts on factual findings made by the Court in connection with its September 25, 2009 Order Granting Class Certification As To Ten Burger King Stores And Otherwise Denying Class Certification. (Docket No. 226).

[2] Docket No. 30 is the Declaration filed on November 26, 2008 by BKC's Director and Senior Attorney Thomas G. Archer in support of BKC's Motion to Dismiss.

(Docket No. 30 ¶ 3). This litigation relates to ten franchised California restaurants that BKC leased or subleased to franchisees during the class period (the "BKLs"), each of which allegedly was visited by a named Plaintiff and is the subject of a separate class certified by this Court. (Docket No. 226 at 2, 27).

BKC's relationship with the franchisees/lessees of the BKLs is governed primarily by two contracts – a franchise agreement and a lease agreement. (Docket No. 226 at 6).[3] The contract provisions setting out the responsibilities of BKC and the franchisees/lessees are substantially the same with respect to the ten restaurants at issue. (Docket No. 226 at 6; Docket No. 148 ¶ 4).[4] Pursuant to their leases, the franchisees/lessees are required, at their own cost and expense, to operate the restaurants, to maintain the restaurants in good order, to obtain all necessary licenses and permits, and to otherwise promptly observe and fully comply with all applicable laws and regulations, including specifically the ADA. (Docket No. 226 at 8; Docket No. 148 ¶ 4, and Exs. A-E at §§ 5.1, 5.2, 5.7).[5] Indeed, this Court previously recognized that the franchisees "operate and maintain the facilities in question" and that the stores at issue are "under their control." (Docket No. 226 at 27).

BKC required each of the franchisees/lessees to contract independently at their own expense for local architectural and engineering services, to create their own blueprints and construction or remodeling plans for their own restaurants, and to ensure that those plans and blueprints complied with applicable building codes and accessibility laws. (Docket No. 226 at 6-8; Docket No. 148 ¶ 4 and Exs. A-E at §§ 5.2, 5.3, 5.7). Upon request, BKC occasionally provides informational drawings that a franchisee's architects or engineers may use as a starting point in designing a new restaurant for the franchisee. (Docket No. 226 at 6). However, even then, BKC expressly required the franchisees to ensure that their final plans complied with all local government standards, including accessibility laws.

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[3] BKC is a mere sublessor to some franchisees and a direct lessor to others. (Docket No. 226 at 2). Subleases and leases are referred to collectively herein as "leases."

[4] Docket No. 148 is the Declaration filed by Mr. Archer on July 31, 2009 in support of BKC's Motion to Add the Franchisees As Additional Defendants.

[5] The leases for the five BKLs expressly identified in Plaintiffs' Amended Complaint were attached as Exs. A-E of Mr. Archer's July 31, 2009 Declaration. BKC's standard Franchise Agreement was attached as Exhibit F.

(Docket No. 226 at 6). As the Court previously noted, these drawings:

> required no particular feature that would constitute an ADA violation. . . . In other words, [BKC] insisted that the franchisees build out their stores in compliance with disability laws and did not dictate the specifics.

(Docket No. 226 at 6-7). In fact, BKC's drawings are reviewed for compliance with ADA requirements by a nationally recognized accessibility consulting firm, and Plaintiffs, who received copies of the drawings in discovery, have not claimed that any of them violate those standards.

BKC's franchise agreements and other operational documents, such as its Operations ("Ops") Manuals and Image standards, require periodic upgrades and remodeling work to be done to the restaurants. (Docket No. 182 ¶¶ 10, 11; Docket No. 183 ¶ 8).[6] BKC does not provide informational plans for remodels; instead, BKC requires the franchisees to develop any needed plans and to ensure that such plans comply with applicable building codes and accessibility laws. (Docket No. 182 ¶ 10). Moreover, in connection with such remodels, BKC requires the franchisees to provide BKC with a registered architect's or professional engineer's certification confirming that, after completion of the remodel, the restaurant complies with the ADA. (Docket No. 182 ¶ 11 and Ex. 2).

Consistent with the fact that the franchisees accept full responsibility for compliance with accessibility laws, they indemnify BKC for any litigation-related costs or expenses that BKC might incur relating to the conditions of their restaurants. (Docket No. 148, Exs. A-E, § VII).

B. The Class Certification Order

In its ruling on Plaintiffs' class certification motion based on this evidence, this Court found that Plaintiffs "failed to make the case the Burger King Corporation has any common offending policies or design characteristics that called for common accessibility barriers at different restaurants." (Docket No. 226 at 14). The Court also rejected Plaintiffs' newly-minted claim that BKC was liable for accessibility violations at the leased restaurants because of BKC's alleged "failure to enforce compliance with accessibility standards" which the Court characterized as a claimed "failure of oversight:"

[6] Docket No. 182 is the Declaration of BKC's Construction Manager Jim McGrory filed august 21, 2009 in opposition to Plaintiffs' motion for class certification.

> [I]t is no answer that Burger King Corporation may have nondelegable liability [under the ADA] as a lessor. That is the easy part of the case. The hard part, which cannot be escaped, is the extent to which the ADA and state laws were violated in the first place, if at all.

(Docket No. 226 at 17). Thus, this Court distinguished between the question of whether a violation existed and the question of who was liable if a violation existed. That distinction is crucial to a determination as to whether BKC is entitled to summary judgment on Plaintiffs' state law claims.

III. DISCUSSION

A. Standard for Summary Judgment

In considering a motion for summary judgment, the Court must determine if there are any genuine issues of material fact that preclude judgment as a matter of law to the moving party. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In making this determination, all reasonable inferences must be drawn in favor of the nonmoving party. *Id.* at 256. In order to survive summary judgment, the non-movant must present more than "mere allegations." *Id.* at 248. Instead, the non-movant must come forward with specific factual evidence to establish the existence of each element essential to his case on which he will bear the burden at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 320 (1986). In other words, the non-movant must show, by affidavits or as otherwise provided in Rule 56, that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. Absent such a showing, the movant is entitled to summary judgment as a matter of law.

Here, BKC is entitled to summary judgment as to Plaintiffs' state law claims because there is no legitimate dispute that BKC has done nothing that violates or fosters a violation of those laws. BKC also is entitled to summary judgment as to Plaintiffs' ADA-based design and construction claims because it is undisputed that they were designed and constructed years before the ADA was enacted and therefore were not required to comply with the ADA's new construction standards.

B. BKC Is Entitled to Summary Judgment as to Plaintiffs' State Law Claims

1. Unruh and CDPA Claims for Damages May Only Be Asserted Against Persons Who Engaged in or Fostered Discrimination

The statutory schemes of the three disability access laws at issue in this litigation are similar: each includes: (1) a section defining the acts that constitute the prohibited discrimination (the "rights" section), and (2) a section identifying the parties who may be sued and the remedy against such person(s) if a prohibited act of discrimination occurs (the "remedy" section).

The ADA's rights section defines the discriminatory acts, in relevant part, as the failure to design and construct new buildings, alter existing buildings, or remove architectural barriers from existing buildings, when required to do so. 42 U.S.C. §§ 12183(a)(1), (2); 42 U.S.C. § 12182(a). The specific architectural standards that such buildings must meet are set forth in an appendix to the ADA called the ADA Accessibility Guidelines or "ADAAG." Under the ADA's remedy provision, a claim for injunctive relief as to any such act of discrimination may be brought against "any person who owns, leases (or leases to), or operates" the public accommodation at issue. 42 U.S.C. § 12182(a). Accordingly, BKC does not contest Plaintiffs' right to name it as a defendant on their ADA claims, based on its status as a lessor, even though any accessibility violations that might exist would have been caused by the franchisees/lessees that operate the restaurants, and not by BKC.

The Unruh Act defines the types of discrimination prohibited by it in Sections 51 through 51.15 of the Act, and expressly precludes businesses such as restaurants from discriminating on the basis of disability in Section 51.5. *See* Cal. Civ. Code §§ 51 – 51.15. The separate "remedy" section of the Act identified the parties that can be sued for violations of the Act. It expressly limits liability to: "Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51 [or] 51.5." Cal. Civ. Code § 52(a).

Separate provisions describing the right not to be subjected to discrimination versus the remedy applicable to such discrimination have existed since the Act's enactment in 1905:

> While section 51's statement of the substantive scope of protections afforded and section 52's statement of the remedies available have both changed over the course of time, section 51 has always provided substantive protection against invidious discrimination in public accommodations, without specifying remedies, and section 52 has always provided remedies, including a private action for damages, for violations of section 51.

Munson v. Del Taco, Inc., 208 P.3d 623, 626 (Cal. 2009).

Similarly, the CDPA sets forth the right of the disabled to be free from discrimination, including in restaurants, in Section 54 of the Act. Cal. Civ. Code §§ 54, 54.1. Like the Unruh Act, the CDPA was drafted with a separate "remedy" section that identifies who can be sued for violations of the CDPA in terms of their discriminatory actions: "Any person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities as specified in Sections 54 and 54.1 or otherwise interferes with the rights of an individual with a disability under Sections 54 [or] 54.1." Cal. Civ. Code § 54.3.

Thus, unlike Title III of the ADA, which imposes status-based strict liability for injunctive relief against every person who owns, operates, or leases a place of public accommodation that currently contains accessibility barriers, both California statutes impose damages liability only against persons who have actually engaged in discriminatory conduct or have encouraged/aided such conduct.

2. BKC Has Not Engaged in, Encouraged or Aided in Discrimination

Here, no evidence exists to support a claim that BKC engaged in, encouraged, or aided in the types of discriminatory conduct required to establish an Unruh or CDPA claim against BKC. It is undisputed that, at all relevant times, all ten restaurants were possessed, operated and maintained by franchisees -- not by BKC. It is also undisputed that the franchisees have always been contractually obligated to ensure that the restaurant and its operations complied with all applicable accessibility laws. (*See* Docket No. 226 at 6-8; Docket No. 148 ¶ 4 and Exs. A-E at §§ 5.2, 5.3, 5.7). Indeed, this Court has already found that the franchisees, not BKC, operated and maintained the restaurants. (Docket No. 226 at 2).

It also is undisputed that BKC did not require that the restaurants be built according to a common architectural design or impose any common policies or other obligations on the franchisees/lessees that constituted or required a violation of accessibility laws. (Docket No. 226 at 6-8, 15-16). On the contrary, in the numerous documents governing the relationship between BKC and the franchisees/lessees and their respective obligations – including but not limited to the franchise agreements, the leases, the Ops Manuals, and the Image manuals and standards – BKC repeatedly required that the franchisees/lessees comply with all applicable accessibility standards. (*See, e.g.*, Docket No. 148 ¶ 4 and Exs. A-E at §§ 5.2, 5.3, 5.7; Docket No. 182 ¶¶ 10, 11; Docket No. 183 ¶ 8).

BKC even required franchisees that remodeled their restaurants to submit a compliance certificate, signed by a California-licensed architect or engineer, certifying that the building as remodeled complied with the accessibility laws. (Docket No. 182 ¶ 11 and Ex. 1). Accordingly, BKC did not "deny, aid or incite a denial, or make any discrimination or distinction contrary to" Sections 51 or 51.5 of the Unruh Act, Cal. Civ. Code § 52(a), nor did BKC "deny or interfere with" any Plaintiffs' "admittance to or enjoyment of" any Burger King® restaurant. Cal. Civ. Code § 54.3. Thus, even if some of the restaurants failed to satisfy a state accessibility standard at some point in time, only the franchisees -- and not BKC -- could be subject to liability under Unruh or CDPA for that failure.

3. The Amendments to State Law Providing That a Violation of the ADA Constitutes a Violation of State Law Confirm That Conduct That Causes or Aids Discrimination Is Required Under the Unruh Act and the CDPA

After the ADA was enacted, the California legislature amended the Unruh Act and the CDPA to provide that "[a] violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section." Cal. Civ. Code §§ 51(f), 54(c). Significantly, the legislature inserted this language into the rights sections of the Unruh Act and the CDPA, and not in the sections describing who may properly be sued and the remedies available. The reason for this is self-evident -- the Legislature merely desired to ensure that Unruh and CDPA incorporated ADAAG standards for each element of a public accommodation, to the extent that the California Building Code, Title 24, did not impose a tougher standard. (Assem. Judiciary Rep. on Assem. Bill No. 1077 (1991-1992 Reg. Sess.) at p. 2; Sen. Com. On Judiciary, Rep. on Assem. Bill 1077 (1991-1992 Reg. Sess.), as amended June 1, 1992, p. 5).

The legislature's decision not to amend the statutes' separate "remedy" sections to copy the ADA's status-based prescription for liability must be presumed intentional. *Jurcoane v. Superior Ct.*, 93 Cal. App. 4th 886, 894 (Cal. Ct. App. 2001) (courts must "presume the Legislature intended everything in a statutory scheme, and … should not read statutes to … include omitted language"); *In re Christian S.*, 7 Cal. App. 4th 768, 776 (Cal. Ct. App. 1994) ("we are aware of no authority that supports the notion of legislation by accident"). If the Legislature had intended to make landlords and lessors liable for damages under state law based solely on their status, it "could have used the same clear language" as it did in making violations of the ADA violations of state law. *Brown v. Kelly*

Broadcasting Co., 771 P.2d 406, 413 (Cal. 1989) ("It is a well recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded"). Thus, both the express language of the relevant statutes and time-honored principles of statutory construction support the conclusion that the amendment to the "rights" sections of the state laws, to include violations of the ADA as violations of state law, was meant only to address *what* constitutes a violation of law, and not *who* can be sued for that violation.

The California Supreme Court's recent decision in *Munson* also mandates this conclusion. As the Court noted, the provision making a violation of the ADA a violation of state law was added to the "rights" section of the Unruh Act that defined the prohibited conduct, but did not change the section of the law defining the remedy and the persons liable:

> [S]ubdivision (f) of section 51 states only that an ADA violation is also "a violation of this section," i.e., of section 51. **Section 51 does not, in itself, establish any remedy for its violation. And section 52 does not expressly state that its remedies apply to every "violation of section 51." Instead, section 52 applies its remedies to any person who "denies, aides or incites a denial, or makes any discrimination or distinction contrary to Section 51."**

208 P.3d at 629 (emphasis added). Thus, the Court made clear that, although a violation of section 51 may not require proof of intentional discrimination, the addition of ADA violations to the list of violations in section 51 did nothing to change the remedy set forth in section 52. *Id.* at 629-30.

4. The Decision Not to Impose Strict Liability for Damages Against Anyone Who Has Any Interest in the Property Accords with Public Policy

Policy considerations also support the conclusion that damages claims cannot be asserted against BKC in this case. Several courts have stated that it "makes sense as a matter of policy" in the context of a remedial statute that provides only for injunctive relief, but not damages, to hold both the landlord and the tenant responsible for ADA violations in leased premises. *Botosan v. Fitzhugh*, 13 F. Supp. 2d 1047, 1054 (S.D. Cal. 1998). *See also Independent Living Resources v. Or. Arena Corp.*, 982 F. Supp. 698, 768 (D. Or. 1997), *supplemented on other grounds*, 1 F. Supp. 2d 1159 (D. Or. 1998) ("From an enforcement standpoint, making the landlord liable for the tenant's violations effectively enlists the landlord's help in monitoring compliance on its premises"); *Botosan v. Paul*

McNally Realty, 216 F.3d 827, 833 (9th Cir. 2000) (noting "significant policy reasons" for prohibiting owners of public accommodations from "contract[ing] away liability" by "leasing to smaller entities for which ADA compliance would not be 'readily achievable'"). Such status-based liability ensures maximum compliance with accessibility requirements via injunctive relief without imposing a penalty upon a party who was not responsible for the violation.

But it makes no sense, and establishes no useful incentives, for the law to compel someone who did not engage in discrimination to pay damages. Such a result would be unfairly punitive, and would constitute the imposition of an unlawful fine.

For all of these reasons, on the factual record before the Court, BKC is not liable for damages to Plaintiffs under the Unruh Act or the CDPA for the barriers Plaintiffs claim to have encountered, as a matter of law. Accordingly, the Court should enter summary judgment in BKC's favor on Plaintiffs' Unruh and CDPA claims.

C. BKC Is Entitled To Summary Judgment on Plaintiffs' Title III ADA "Design and Construction" Claims Because all Ten Restaurants Predate the ADA

Title III of the ADA contains three separate types of claims applicable to places of public accommodation such as restaurants, depending upon when the buildings were built or remodeled. The requirements for new construction are applicable only to buildings constructed after January 26, 1993. *See* 42 U.S.C. § 12183(a)(1) (all buildings constructed after January 26, 1993 must be designed and constructed in compliance with ADA standards).

In the First Claim for Relief in their Amended Complaint, Plaintiffs assert a "design and construction" claim against BKC. (*See* Docket No. 72 ¶ 58c). The express language of the ADA's design and construction requirement specifies that it applies only to "buildings constructed after January 26, 1993." 42 U.S.C. § 12183(a)(1). Moreover, Plaintiffs concede that the new construction standard does not apply to restaurants constructed prior to January 26, 1993. (Docket No. 299 at 5).

It is undisputed that all ten of the restaurants as to which classes have been certified were constructed in the 1970s and 1980s, long before the ADA was enacted in 1990 and certainly well before the January 26, 1993 effective date of the ADA's "design and construction" requirement. (*See*

Docket No. 183, Ex. 1).[7] Because all of the buildings at issue were constructed well before January 26, 1993, the express language of the statute precludes any "design and construction" claims with respect to these restaurants. Accordingly, BKC is entitled to summary judgment as to all "design and construction" claims under the ADA, as a matter of law.

CONCLUSION

For the reasons set forth herein, BKC is entitled to partial summary judgment as to:

(i) Plaintiffs' claims for damages under the California Unruh Civil Rights Act;

(ii) Plaintiffs' claims for damages under the California Disabled Persons Act; and

(iii) Plaintiffs' claims under the ADA based on the design and construction of the restaurants.

Dated: February 11, 2010

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[7] Exhibit 1 to Docket No. 183 is a chart listing, among other things, the dates on which the BKLs at issue were built. As this Court noted in its class certification order (Docket No. 226 at 7), 88 of the 96 restaurants that BKC leased to franchisees during the class period "were constructed before the ADA became effective as to newly-constructed buildings in January 1993." The ten restaurants as to which classes have been certified are among them.