

SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES		Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Stanley Mosk Courthouse 111 North Hill Street, Los Angeles, CA 90012		FILED Superior Court of California County of Los Angeles 06/13/2023
PLAINTIFF/PETITIONER: Traci Morgan		David W. Slayton, Executive Officer / Clerk of Court By: <u> A. Barton </u> Deputy
DEFENDANT/RESPONDENT: Zarco Hotels Incorporated, a California Corporation		
CERTIFICATE OF MAILING		CASE NUMBER: 22STCV07447

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Minute Order (Motion of Defendant, Zarco Hotels Incorporated, for Attorneys...) of 06/13/2023 upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Amanda Seabock
Potter Handy LLP
100 Pine St.
Suite 1250
San Francisco, CA 94111

Stuart K Tubis
Jeffer Mangels Butler & Mitchell LLP
Two Embarcadero Center
5th Floor
San Francisco, CA 94111

David W. Slayton, Executive Officer / Clerk of Court

Dated: 06/13/2023

By: A. Barton
Deputy Clerk

CERTIFICATE OF MAILING

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 39

22STCV07447

**TRACI MORGAN vs ZARCO HOTELS INCORPORATED, A
CALIFORNIA CORPORATION**

June 13, 2023

8:30 AM

Judge: Honorable Stephen I. Goorvitch

CSR: Edith Navas-Mouneimne, CSR #13797
(LA CourtConnect)

Judicial Assistant: A. Barton

ERM: None

Courtroom Assistant: K. Ghazarian

Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Amanda Seabock by Sara Johnson (LA CourtConnect)

For Defendant(s): Stuart K Tubis (LA CourtConnect)

NATURE OF PROCEEDINGS:

Motion of Defendant, Zarco Hotels Incorporated, for Attorneys' Fees

Matter is called for hearing.

There being no objections, Order Appointing Court Approved Reporter as Official Reporter Pro Tempore is signed and filed this date.

The cause is argued.

The Court takes the matter under submission.

LATER:

The Court, having taken the matter under submission, now rules as follows:

INTRODUCTION

Plaintiff Traci Morgan ("Plaintiff") filed this action against Zarco Hotels Inc. ("Defendant"). Plaintiff alleged that Defendant's website did not comply with the Americans with Disabilities Act (the "ADA"). Defendant filed a motion for summary judgment based upon evidence that its website was, in fact, ADA-compliant, following which Plaintiff dismissed the case. Now, Defendant seeks attorney's fees. The Court posted a tentative order in advance of the hearing, following which the Court took the motion under submission. Now, the motion is granted in part

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and denied in part. The Court grants the motion with respect to Plaintiff's counsel, the Center for Disability Access and its owners. The Court denies the motion with respect to Plaintiff Traci Morgan.

PROCEDURAL HISTORY

Plaintiff suffers from Usher Syndrome Type II, meaning that she is partially deaf and partially blind. (Complaint, ¶ 1.) Plaintiff uses screen reader software ("SRS") to navigate the internet. (Complaint, ¶ 11.) Plaintiff allegedly attempted to use Defendant's website to locate hotel accommodations for Superbowl Weekend and was unable to do so due to "design faults that prevented her from navigating the site successfully using SRS." (Complaint, ¶ 18.)

Plaintiff's counsel filed the complaint on March 1, 2022. The complaint asserts two causes of action, a violation of the Unruh Civil Rights Act, and a violation of Business and Professions Code section 17200. (See Complaint, pp. 7-8.) However, Plaintiff seeks remedies under the ADA. The complaint states: "Pursuant to 42 U.S.C. § 12188 and the remedies, procedures and rights set forth and incorporated therein, Plaintiff requests relief as set forth below." (Complaint, ¶ 41.) The complaint states: "Plaintiff seeks a permanent injunction ordering compliance with the Americans with Disabilities Act." (Complaint, ¶ 9.) Plaintiff's counsel also listed a cause of action under the ADA on the civil case cover sheet, writing that there are two causes of action, one under the Americans with Disabilities Act and one under the Unruh Civil Rights Act. (See Civil Case Cover Sheet, filed on March 1, 2022, p. 1.)

Early in the litigation, Defendant's counsel "reached out to Plaintiff's counsel and expressed that the claims lacked merit, that the website at issue was fully accessible, and complaint with law, and expressed that the lawsuit should be dismissed." (Declaration of Stuart K. Tubis, ¶ 7.) On August 18, 2022, Defendant then filed a motion for summary judgment, which was supported by a declaration by someone who was able to use the website with SRS. Only then, on September 26, 2022, did Plaintiff dismiss this case.

The instant motion was filed on November 22, 2022, and was noticed for hearing on March 7, 2023. No opposition was filed. Out of an abundance of caution, to ensure proper notice and opportunity to be heard, the Court continued the hearing date and ordered Defendant's counsel to re-serve the motion. Then, Plaintiff's counsel filed an opposition to the motion. The Court has considered the motion, opposition, and reply briefs and declarations.

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LEGAL STANDARD

The Court may award attorney's fees only when authorized by statute or an agreement of the parties. (*Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 809.) Defendant's motion relies on two statutes. Title 42, United States Code, section 12205 states: "In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual." Code of Civil Procedure section 1021.5 authorizes attorney's fees if a significant benefit has been conferred on the general public or a large class of persons, the necessity and financial burdens of private enforcement are such as to make the award appropriate, and such fees would not be paid from the recovery, if any. (Code Civ. Proc., § 1021.5.)

EVIDENTIARY ISSUES

Defendant requests judicial notice of the following exhibits: (1) Exhibit #1, pages from its website; (2) Exhibit #2, videos of its witness's use of the website with SRS technology; and (3) Exhibit #3, a case from the U.S. District Court for the Northern District of California. Plaintiff's counsel filed an opposition to the motion, but does not oppose the request for judicial notice. Per California Rules of Court, rule 8.54(c), the failure to file an opposition may be deemed consent. However, the Court need not take judicial notice of these documents, as it is not necessary in order to resolve the instant motion. Defendant relies upon the declaration of Craig Davis, filed in connection with the motion for summary judgment, which makes clear that Defendant's website is ADA-compliant. Defendant's counsel incorporates that declaration by reference in the moving papers. This provides sufficient notice to Plaintiff that Defendant relies on that declaration in support of the motion, i.e., Plaintiff's counsel could have responded to the declaration in the opposition to the motion for attorney's fees or provided her own evidence in response. The Court discussed the declaration at the hearing, and Plaintiff's counsel did not object to the Court considering this declaration in ruling on the motion. Therefore, the Court considers this declaration if necessary to rule on the instant motion.

DISCUSSION

A. Title 42, United States Code, section 12205

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The parties dispute whether section 12205 applies to this case. Plaintiff's counsel argues that section 12205 is not applicable because there is no cause of action under the ADA. The Court first reviews the plain language of section 12205. "The cardinal rule of statutory construction is to ascertain the intent of the Legislature and thus effectuate the purpose of the law. We start by looking to the plain meaning of the statutory language and, if further analysis is necessary, apply a reasonable and common sense interpretation and avoid absurdity." (Westerfield v. Superior Court (2022) 99 Cal.App.4th 994, 997, citation omitted.) "If there is no ambiguity in the plain language of a statute, a court presumes the lawmakers meant what they said, and the plain meaning of the language governs." (Allen v. Sully-Miller Contracting Co. (2002) 28 Cal.4th 222, 227, 120 Cal.Rptr.2d 795, 47 P.3d 639.)

Section 12205 applies to "any action . . . commenced pursuant to [the ADA]." (42 U.S.C. § 12205.) Plaintiff's action falls within this very definition because she states in her complaint: "Pursuant to 42 U.S.C. § 12188 and the remedies, procedures and rights set forth and incorporated therein, Plaintiff requests relief as set forth below:" (Complaint, ¶ 41.) In other words, Plaintiff clearly and expressly sought to invoke the "remedies, procedures, and rights" of the ADA "pursuant to" Title 42, United States Code, section 12188. In addition, Plaintiff expressly requested one such remedy in her complaint. The complaint states: "Unlimited jurisdiction is proper because Plaintiff seeks a permanent injunction ordering compliance with the Americans with Disabilities Act." (Complaint, ¶ 9.) This is one of the "remedies" that is available "[p]ursuant to 42 U.S.C. § 12188." Section 12188 incorporates section 2000a-3(a) of Title 42. (See 42 U.S.C. § 12188(a)(1).) Section 2000a-3(a) authorizes a "person aggrieved" to pursue "a civil action for preventive relief, including . . . a permanent injunction . . ." (42 U.S.C. § 2000a-3.) Simply, not only did Plaintiff file this complaint "[p]ursuant to 42 U.S.C. § 12188," invoking "the remedies, procedures and rights" set forth in the statute, she expressly requested "a permanent injunction ordering compliance with the Americans with Disabilities Act." Based upon the plain language of section 12205, these allegations are sufficient to invoke the attorney's fees provision. This action was "commenced pursuant to" the ADA.

Plaintiff's counsel argues that she asserted only claims under the Unruh Civil Rights Act and Business and Professions Code section 17200. As discussed, Plaintiff's allegations are sufficient to invoke section 12205. Regardless, Plaintiff's causes of action are predicated exclusively upon an alleged violation of the ADA. There is no independent basis for either cause of action, i.e., there would be no violation of the Unruh Civil Rights Act or section 17200 without a violation of the ADA. That supports the Court's view that this action was "commenced pursuant to" the ADA (in addition to the express allegations in the complaint). "He who takes the benefit must

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bear the burden.” (Civ. Code, § 3521.)

Plaintiff’s counsel argues that it was necessary to reference the ADA in asserting claims under the Unruh Civil Rights Act and section 17200. These causes of action did not require Plaintiff’s counsel to allege: “Pursuant to 42 U.S.C. § 12188 and the remedies, procedures and rights set forth and incorporated therein, Plaintiff requests relief as set forth below.” (Complaint, ¶ 41.) Plaintiff’s counsel argues that the Unruh Civil Rights Act incorporates the “rights” of the ADA. This argument does not address how invoking the “remedies” and “procedures” of the ADA is appropriate in a case that (purportedly) does not assert a cause of action under the ADA.

Defendant’s counsel argues that Plaintiff’s counsel wrote on the civil case cover sheet that Plaintiff is asserting a “cause of action” under the “Americans with Disabilities Act.” Plaintiff’s counsel typed “Americans with Disabilities Act” rather than simply checking a box on the form, suggesting that this was an intentional representation rather than inadvertent mistake in completing the form. The civil case cover sheet is not an operative pleading, and the Court has sufficient information to resolve the motion without relying on this document. The Court need not determine whether the civil case cover sheet is incorporated by reference to the complaint, given the express ADA allegations in the complaint, and/or whether it evidences Plaintiff’s counsel’s intent to proceed under the ADA.

In sum, Plaintiff filed a complaint seeking relief “[p]ursuant to [the ADA],” invoking the “remedies” and “procedures” of the ADA. Now, Plaintiff attempts to walk away from those admissions and argue that this was not an action “commenced pursuant to the [ADA].” Plaintiff is bound by the allegations in her complaint, especially when those allegations were not necessary to assert causes of action under the Unruh Civil Rights Act and Business and Professions Code section 17200.

Based upon the foregoing, the Court finds that this action falls within the purview of section 12205. Attorney’s fees are available to a defendant “only upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation.” (Kohler v. Bed Bath & Beyond of California, LLC (2015) 780 F.3d 1260, 1266.) The Court makes such a finding in this case based upon Plaintiff having dismissed the case without opposing the motion for summary judgment in the absence of a settlement. (See Declaration of Stuart Tubis, ¶¶ 7-8.) The Court also bases its finding on Plaintiff’s counsel having advanced no evidence with the opposition to this motion suggesting there was any potential merit to the claims. That alone supports the Court’s finding that this action was meritless. In addition, the declaration of Craig Davis supports the Court’s

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finding that this action was frivolous. At the hearing, Defendant's counsel attempted to reference alleged misconduct by Plaintiff's counsel in other cases. The Court rejects that argument. The Court considers only the record in this particular case in ruling on the motion.

At the hearing, Plaintiff's counsel claimed that there was evidence supporting the merits of the case. None of this purported evidence was provided to the Court with Plaintiff's opposition to this motion. Nor did Plaintiff's counsel request a continuance of the hearing and an opportunity to file a supplemental opposition addressing this evidence. The Court is skeptical of Plaintiff's counsel's claim that such evidence exists. It should have been a straightforward issue to determine whether Defendant's website could be used with the assistance of SRS.

Defendant's counsel argues that litigation is necessary because there are "no defined standards that explain what is required . . ." While there may be cases where this is true, the instant case is not one of them. The standard is whether Plaintiff was able to access Defendant's website fully. Plaintiff alleged in her complaint that she is able to do so if the website is compatible with SRS. Litigation is not necessary to resolve issues in such a straightforward case like this one. Plaintiff's counsel simply needed to verify the experience of her client. The Court has considered Plaintiff's counsel's remaining arguments and finds that none has merit. The Court finds that this action was frivolous, unreasonable, and without foundation.

Nevertheless, the Court affords Plaintiff Traci Zarco and Plaintiff's counsel some benefit of the doubt. It might have been reasonable for Plaintiff Traci Zarco to believe the website was not ADA-compliant at first use, e.g., if she made an error using the website. It might have been reasonable for Plaintiff's counsel to file the complaint "based upon information and belief," as represented in Paragraph #32. Sanctions should not impede access to justice or punish honest mistakes. Out of an abundance of caution, and in an effort to afford Plaintiff and her counsel the benefit of the doubt, the Court grants a "safe harbor" for a limited time period. At some early point in the litigation, however, Plaintiff's counsel should have checked the website (especially after receiving notice from Defendant that the website was, in fact, ADA-compliant). The complaint was filed on March 1, 2022; the motion for summary judgment was filed on August 18, 2022; and the request for dismissal was filed on September 26, 2022. It should not have taken this length of time for Plaintiff's counsel to determine whether this was a meritorious case.

Based upon the foregoing, the Court grants the motion in part and denies the motion in part. The Court will not predicate the award of attorney's fees on activities between the filing of the complaint and April 30, 2022. The Court believes that 60 days is a reasonable period of time for

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Plaintiff's counsel to have determined whether her client's allegations had merit. In addition, Defendant's counsel's entries make clear the parties' communications began in April 2022, which should have put Plaintiff's counsel on notice as to a problem with her case. Based upon the foregoing, the Court grants the motion with respect Plaintiff's counsel—the Center for Disability Access and its owners—for attorney's fees incurred on or after May 1, 2022. The Court denies the motion with respect to Plaintiff Traci Morgan in its entirety because Defendant's counsel advances no evidence that she did anything improper (or anything at all in connection with the litigation) on or after May 1, 2022.

The determination of reasonable amount of attorney fees is within the sound discretion of trial courts. (PLCM Group v. Drexler (2000) 22 Cal.4th 1084, 1095; Akins v. Enterprise Rent-A-Car Co. (2000) 79 Cal. App. 4th 1127, 1134.) The burden is on the party seeking attorney fees to prove reasonableness of the fees. (Center for Biological Diversity v. County of San Bernardino (2010) 188 Cal. App. 4th 603, 615.) The Court has broad discretion in determining the amount of a reasonable attorney's fee award which will not be overturned absent a "manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence." (Bernardi v. County of Monterey (2008) 167 Cal. App. 4th 1379, 1393-94.) The Court need not explain its calculation of the amount of attorney's fees awarded in detail; identifying the factors considered in arriving at the amount will suffice. (Ventura v. ABM Industries Inc. (2012) 212 Cal.App.4th 258, 274-75.)

Defendant requests a total of \$59,564.29 in attorney's fees and \$2,000 in expert costs. Plaintiff did not oppose the motion with respect to the amount sought. The Court deducts \$4,247 in fees that were incurred between March 1 and March 31, 2022. The Court deducts \$1,902.45 in fees that were incurred between April 1 and April 30, 2022. This leaves a total of \$53,414.84 in attorney's fees. The Court finds that the case was staffed appropriately, as Mr. Tubis appears to have performed the bulk of the work with Mr. Orlick performing a supervisory function. However, the records reflect some minor inefficiencies as is common in litigation cases. Martin Orlick bills at a rate of \$825 per hour and Stuart Tubis bills at a rate of \$635 (and \$645) per hour. The Court finds that these rates are slightly high but generally reasonable. Under ordinary circumstances, the Court would reduce the requested award for attorney's fees by 10 percent to account for these issues. The Court declines to do so in this case, however, because the motion does not include additional hours spent by Defendant's counsel, viz., the time to prepare a reply brief, as well as the time to prepare for and attend the hearing on this motion. Therefore, no reduction of the \$53,414.84 in attorney's fees is necessary. The Court approves the expenditure for the expert of \$2,000, finding that it was reasonable.

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In sum, the Court orders the Center for Disability Access and its owners to pay Defendant, by and through counsel, a total of \$55,414.84 within sixty (60) days. Plaintiff may lodge a proposed judgment if necessary.

B. Code of Civil Procedure section 1021.5

Defendant also seeks attorney's fees under Code of Civil Procedure section 1021.5. Defendant's counsel argues that Plaintiff's counsel, the Center for Disability Access, also known as Potter Handy, LLP, are "serial" filers who "are abusing the legal system and harming the public by filing thousands of lawsuits to unjustly force defendants into paying settlement money."

Defendant's counsel argues that Plaintiff's counsel's lawsuits have become "a cottage industry" giving rise to "shake-down" litigation, as a result of which "the district attorneys of two largely liberal cities, San Francisco and Los Angeles, even went so far as filing charges against Plaintiff's law firm and individual attorneys for filing fraudulent ADA/Unruh litigation."

Defendant's counsel cites numerous cases in which other courts have discussed the abusive litigation in this area of law and called for a legislative solution. Based upon the foregoing, Defendant's counsel argues that opposing this lawsuit confers a public benefit because it addresses this "social problem."

The Court rejects Defendant's counsel's argument for several reasons. As an initial matter, Defendant's counsel asks this Court to consider evidence outside the record, much of which is not admissible. The Court does not consider Plaintiff's counsel's alleged misconduct in other cases, the opinions of other judges, or anecdotal evidence in ruling on this motion. Nor does the Court consider the facts represented in Defendant's motion and reply brief on these issues. The Court admonishes Defendant's counsel not to reference inadmissible evidence and evidence outside the record. As discussed, the Court will consider only the record in this case in ruling on this motion. Based upon the record, the Court cannot conclude that one individual business having opposed one meritless lawsuit conveys the public benefit contemplated by section 1021.5. Therefore, the Court denies the motion for sanctions under Code of Civil Procedure section 1021.5.

CONCLUSION AND ORDER

Based upon the foregoing, the Court orders as follows:

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1. The Court grants Defendant's motion for attorney's fees against the Center for Disability Access and orders the firm and its owners to pay a total of \$55,414.84 to Defendant, by and through counsel, within sixty (60) days pursuant to Title 42, United States Code, section 12205. Plaintiff may lodge a proposed judgment if necessary. If there are any mathematical errors that require correction, Defendant's counsel may file a stipulation or ex parte application.
 2. The Court denies Defendant's motion for attorney's fees with respect to Plaintiff Traci Morgan personally. Plaintiff Traci Morgan shall not be responsible for any attorney's fees or costs, and the Court makes no adverse finding against her.
 3. Counsel for Defendant shall provide notice and file proof of such with the Court.

Certificate of Mailing is attached.

