Filed 1/8/14 Frye v. VH Property CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

STEVE FRYE, Plaintiff and Appellant, v. VH PROPERTY CORP., Defendant and Respondent.	B246991 (Los Angeles County Super. Ct. No. BC470726)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ramona G. See, Judge. Affirmed.

Fuller Jenkins Clarkson, Erik C. Jenkins, Karen L. Wishnev; The Rava Law Firm and Alfred G. Rava for Plaintiff and Appellant.

Jill A. Martin for Defendant and Respondent.

* * * * * *

Plaintiff and appellant Steve Frye brought and action for violation of the Unruh Civil Rights Act (Civ. Code, §§ 51, 51.5) (Unruh Act) and the Gender Tax Repeal Act of 1995 (Civ. Code, § 51.6) (Gender Tax Repeal Act) after he played golf at a course owned and operated by defendant and respondent VH Property Corp., doing business as Trump National Golf Club (Trump). He alleged the statutory violations on the basis of Trump's promotion offering a discount to women during breast cancer awareness month. The trial court granted Trump's motion for summary judgment.

We affirm. The trial court properly ruled any discriminatory effect resulting from the discount was not unreasonable, arbitrary or invidious under the Acts, and promoting public awareness of breast cancer was consistent with strong public policy.

FACTUAL AND PROCEDURAL BACKGROUND

Trump is a luxury public golf course located in Rancho Palos Verdes. During October 2010, Trump offered a promotion in recognition of breast cancer awareness month (Promotion). The flyer announcing the Promotion, captioned "Think Pink at Trump National in October," provided: "In recognition of breast cancer awareness month, come encounter a considerably more pink Trump National in October! From pink golf tees to pink-ribbon headwear and ball markers wherein a portion of their sales supports breast cancer research, we would like all of our golfers to remember the significance of this month. [¶] As a special exclusively for ladies this month, **ladies can enjoy 25% off greens fees** through the end of October!" The flyer continued to describe the promotional code that must be mentioned at the time of booking in order to receive the promotional rate.

According to Trump's general manager, the golf course was closed from October 26 to October 28, 2010 for green aerification and fairway overseeding. When the course reopened on October 29, 2010, Trump offered a different Promotion whereby golfers could play at a discounted rate of $150 any time of day. Between October 26 and October 31, 2010, no golfer was offered or was able to purchase a round of golf at the rate described in the Promotion.

Appellant, a self-described "men's rights activist," has previously filed at least 30 lawsuits against assorted business establishments, alleging their gender-based promotional pricing violated California public policy. After reading about Trump's Promotion, he called Trump and was told that the Promotion would run through the end of the month. Appellant played golf at Trump on October 29, 2010 and contacted his attorney later that day.

Through his foundation, Donald Trump donated a total of $35,000 to the Susan G. Komen Foundation in February and April 2011.

In September 2011, appellant filed an action against Trump on behalf of himself and others similarly situated, alleging causes of action for violation of the Unruh Act and the Gender Tax Repeal Act. Trump answered, generally denying the allegations and asserting multiple affirmative defenses.

In August 2012 Trump moved for summary judgment on the grounds appellant could not establish any statutory violation and he lacked standing because the Promotion ended before he played the course. In support of the motion it offered Donald Trump's declaration, and current and former employees' declarations; depositions excerpts, including from appellant's deposition; Web site excerpts related to breast cancer awareness; copies of assembly bills related to gender equality in athletics; and excerpts from articles related to women's participation in golf.

Appellant opposed the motion, asserting that triable issues of fact existed as to whether Trump had raised a legally-recognized public policy exception to the Unruh Act and whether the Promotion remained available when he played golf at Trump. In support of his opposition, he submitted his own declaration, deposition excerpts and a copy of his telephone records, and sought judicial notice of articles about organizations profiting from breast cancer awareness and proposed legislation. He also filed evidentiary objections to portions of the declarations offered by Trump. In turn, Trump filed evidentiary objections to a portion of appellant's declaration.

Following a November 6, 2012 hearing, the trial court granted the summary judgment motion "on the grounds that the subject promotion's discriminatory effect was

not unreasonable, arbitrary, or invidious under the Unruh Act or the Gender Tax Repeal Act, and is consistent with strong public policy in California." Alternatively, the trial court found the undisputed evidence showed the Promotion was not offered when appellant played at Trump, and thus he lacked standing because he had not suffered any injury from the Promotion. The trial court overruled appellant's evidentiary objections and sustained in part and overruled in part Trump's evidentiary objections.

Judgment was entered in November 2012 and this appeal followed.

DISCUSSION

Appellant maintains the trial court erred in granting summary judgment because it misconstrued the law relating to gender-based promotions and because he offered evidence sufficient to raise a triable issue of fact as to whether the Promotion was available on the date he played golf. Because we find no merit to appellant's first contention, we need not address the second. (E.g., *JEM Enterprises v. Washington Mutual Bank* (2002) 99 Cal.App.4th 638, 644 [appellate court may affirm summary judgment on any ground raised by the moving party]; *Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1057, fn. 10 [same].)

I. Summary Judgment Principles and Standard of Review.

Summary judgment is properly granted when no triable issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment meets "his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) Once the moving defendant has met its initial burden, "the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Ibid.*)

We review the trial court's grant of summary judgment de novo, independently evaluating the correctness of the trial court's ruling and applying the same legal standards as the trial court. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138,

1142; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843–857.) Issues of statutory interpretation likewise raise pure questions of law, subject to independent appellate review. (*American Civil Rights Foundation v. Los Angeles Unified School Dist.* (2008) 169 Cal.App.4th 436, 448; *Slocum v. State Bd. of Equalization* (2005) 134 Cal.App.4th 969, 974.)

II. The Trial Court Properly Granted Summary Judgment Because the Undisputed Evidence Showed the Promotion Was Not Unreasonable, Arbitrary or Invidious.

In pertinent part, 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, or sexual orientation 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).) Correspondingly, the Gender Tax Repeal Act addresses gender-based price discrimination and provides that "[n]o business establishment of any kind whatsoever may discriminate, with respect to the price charged for services of similar or like kind, against a person because of the person's gender." (Civ. Code, § 51.6, subd. (b).) Both provisions are frequently analyzed collectively. (See *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 166, fn. 5 [declining to consider separately claims under the Unruh Act and the Gender Tax Repeal Act, given claims under both provisions are subject to the same analysis with respect to notice and injury]; see also *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 30 [finding that gender-based price discounts also violate the Unruh Act].)

"The objective of the [Unruh] Act is to prohibit businesses from engaging in unreasonable, arbitrary or invidious discrimination. [Citation.] Therefore, the [Unruh] Act applies not merely in situations where businesses exclude individuals altogether, but also where treatment is unequal." (*Pizarro v. Lamb's Players Theatre* (2006) 135 Cal.App.4th 1171, 1174; accord, *Sunrise Country Club Assn. v. Proud* (1987) 190 Cal.App.3d 377, 381 ["the Unruh Civil Rights Act does not purport to prohibit all

differences in treatment or accommodations offered, only unreasonable, arbitrary or invidious discrimination"].) "However, the [Unruh] Act does not entirely prohibit businesses from drawing distinctions on the basis of the protected classifications or personal characteristics; . . . . [t]hus, 'certain types of discrimination have been denominated "reasonable" and, therefore, not arbitrary.' [Citation.]" (*Howe v. Bank of America N.A.* (2009) 179 Cal.App.4th 1443, 1450.) "One basis relied on by the courts for upholding discriminatory practices as nonarbitrary is when a strong public policy exists in favor of disparate treatment." (*Pizarro v. Lamb's Players Theatre, supra,* at p. 1174; accord, *Howe v. Bank of America N.A., supra,* at p. 1451 [discrimination based on a "'"compelling societal interest"'" is not arbitrary and therefore not violative of the Unruh Act].)

In granting summary judgment, the trial court relied primarily on *Cohn v. Corinthian Colleges, Inc.* (2008) 169 Cal.App.4th 523, 525–526 (*Cohn*), where the court held neither the Unruh Act nor the Gender Tax Repeal Act was violated by a professional baseball team's Mother's Day celebration that included a tote bag giveaway to honor mothers and the recipients were limited to women over age 18. The *Cohn* court explained that the type of unreasonable, arbitrary or invidious discrimination against which the Unruh Act was designed to protect "is present where the policy or action '"emphasizes irrelevant differences between men and women"' or perpetuates any irrational stereotypes. [Citations.] The State of California has a legitimate interest in eradicating this type of discrimination because of the negative impact such prejudice has on society. [Citation.] [¶] The instant case does not emphasize an irrelevant difference, nor perpetuate an irrational stereotype. It is a biological fact that only women can be mothers. Neither men nor women are harmed by this, and the Angels did not arbitrarily create this difference. . . . The tote bag giveaway honors mothers as a group of individuals without promoting any irrational stereotypes, and therefore does not violate the [Unruh] Act." (*Cohn, supra,* at pp. 528–529.)

Applying the same reasoning, the trial court ruled: "Here, it is undisputed that Defendant ran the subject promotion in recognition of Breast Cancer Awareness Month.

[Citations.] The Promotion did not emphasize 'irrelevant differences' between men and women or 'perpetuate' any kind of stereotype, but rather, supported public awareness of breast cancer. Therefore, as a matter of law, the subject promotion's discriminatory effect, if any, was not unreasonable, arbitrary, or invidious under either the Unruh Act or the Gender Tax Repeal Act, and is consistent with strong public policy in California. [Citation.]"

We agree. The undisputed evidence established the Promotion was designed around breast cancer awareness. Trump offered undisputed evidence to show that the vast majority of breast cancer sufferers are women, with men comprising less than one percent of those annually diagnosed with breast cancer. (See *Battling Breast Cancer: New York's Laws are not Enough* (2007) 13 Cardozo Journal of Law & Gender 579, fn. 2 ["the incidence of breast cancer in women is about 100 times greater than in men"].) Thus, as in *Cohn, supra,* 169 Cal.App.4th at page 528, where the court found no Unruh Act or Gender Tax Repeal Act violation because "the giveaway was based on motherhood, with gender only a secondary consideration," the Promotion here was based on breast cancer awareness, with gender as a secondary consideration. We conclude that breast cancer awareness is a sufficiently strong public policy to warrant the differential treatment permitted by the Promotion. (See *Reins of Life v. Vanity Fair Corp.* (N.D. Ind. 1997) 5 F.Supp.2d 629, 632–633 [finding that the promotion of "denim day," designed to educate men and women about breast cancer, satisfied public interest element supporting denial of an injunction].) Indeed, the policy here is more compelling than that in *Pizarro v. Lamb's Players Theatre*, *supra*, 135 Cal.App.4th at page 1176, where the court held permissible an age-based ticket discount to baby boomers because the discount was reasonably and not arbitrarily designed to facilitate their attendance at a musical about them.

In the cases on which appellant relies, price discounts to women were untethered to any strong public policy and therefore held to violate the Unruh Act because they were arbitrary. In *Koire v. Metro Car Wash, supra,* 40 Cal.3d 24, the male plaintiff sued both car washes and nightclubs offering price discounts to women. The court rejected the

defendants' argument "that sex-based price differences are not arbitrary because they are supported by 'substantial business and social purposes,'" finding that neither increasing profitability nor encouraging interaction between genders was a sufficient public policy to support the price discounts. (*Id.* at pp. 32.) Addressing a gender-based price discount for nightclub entry, the court in *Angelucci v. Century Supper Club, supra,* 41 Cal.4th at page 175, reaffirmed the principles it articulated in *Koire v. Metro Car Wash*, stating: "We also acknowledged there might be public policies warranting differential treatment of male and female patrons under *some* circumstances, but '[t]he plain language of the Unruh Act mandates equal provision of advantages, privileges and services in business establishments of this state. Absent a compelling social policy supporting sex-based price differentials, such discounts violate the Act.' [Citation.]"

Appellant's other arguments are likewise insufficient to overcome the undisputed evidence showing the Promotion was reasonable and nonarbitrary. First, we reject appellant's argument that the Promotion was unreasonable because it reinforced harmful stereotypes. (See *Koire v. Metro Car Wash, supra,* 40 Cal.3d at pp. 34–35.) To the contrary, as in *Cohn, supra,* 169 Cal.App.4th at page 528, where the court held it was reasonable to provide tote bags to women over age 18 to honor mothers, it was reasonable for Trump to offer a discount to women as the predominant sufferers of breast cancer. (See *United States v. Virginia* (1996) 518 U.S. 515, 533 ["Physical differences between men and women, however, are enduring"].) Second, appellant offered no evidence to support his contention that the Promotion was unreasonably discriminatory because it tended to suggest that men are insensitive and disinterested in women's health. (See *Cohn, supra,* at p. 529 [rejecting the plaintiff's contention the tote bag giveaway "was invidious because it tended to cause discontent, animosity, or envy," given that the plaintiff offered no evidence to support the contention and no other patrons complained about the tote bags].) Finally, the Promotion was unlike the "Skirt and Gown Night" promotion found to amount to unlawful discrimination in *Peppin v. Woodside Delicatessen* (Md.App. 1986) 506 A.2d 263, 265. In that case, the court held the evidence showed a restaurant's offering a discount to those patrons wearing a skirt or

gown "was intended to—and did—have the same effect and serve the same function as Ladies' Night, *i.e.* it provided price discounts to women and, in fact, operated as a mere extension of Ladies' Night." (*Id*. at p. 266.) The record in that case contained no evidence that the promotion was designed to facilitate any public policy beyond increasing female patronage, whereas here the undisputed evidence showed the Promotion addressed breast cancer awareness. (See *Koire v. Metro Car Wash, supra*, at p. 38 [explaining "[t]here may also be instances where public policy warrants differential treatment for men and women"].)

The trial court properly determined that appellant's allegations "are not supported by the interpretation of, or policy behind, the [Unruh] Act." (*Cohn, supra*, 169 Cal.App.4th at p. 528.) "[T]he Unruh Act protects against intentional discrimination that is unreasonable, arbitrary, or invidious. This important piece of legislation provides a safeguard against the many real harms that so often accompany discrimination. For this reason, it is imperative we not denigrate its power and efficacy by applying it to manufactured injuries such as those alleged by the plaintiff in this case." (*Id*. at p. 526.) Summary judgment was properly granted.

DISPOSITION

The judgment is affirmed. Trump is entitled to its costs on appeal.

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_____, J. *

FERNS

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.