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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

AARON HORSLEY,

Plaintiff and Appellant,

v.

TOURMALINE REAL ESTATE
PARTNERS, LLC,

Defendant and
Respondent.

B277926

Los Angeles County
Super. Ct. No. BC595535

APPEAL from an order of the Superior Court of
Los Angeles County, Susan Bryant-Deason, Judge. Affirmed.

Law Offices of Dayton Magallanes and Dayton Magallanes
for Plaintiff and Appellant.

Posner Law Corporation and Ashley D. Posner for
Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Aaron Horsley (plaintiff) appeals from a postjudgment order awarding defendant and respondent Tourmaline Real Estate Partners, LLC (defendant) attorney's fees as a prevailing party under Civil Code section 55.¹ We affirm.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff became paralyzed in 2007 after he was hit by a truck. He is disabled and uses a wheelchair. In August 2015, plaintiff attempted to patronize a jewelry store on Melrose Avenue to buy his mother a gift. Defendant owns the parking lot that services the jewelry store. Because the parking lot did not contain handicap accessible parking spaces, plaintiff was not able to park his vehicle; accordingly, he was not able to patronize the store.

In September 2015, plaintiff sued defendant and asserted two causes of action in a three-page verified complaint. In his first cause of action for violations of sections 54 and 54.1, plaintiff alleged that defendant "failed and refused and continue[s] to fail and refuse to provide Plaintiff and the class of disabled individuals to which he belongs a designated van-accessible, handicap parking spot in said parking lot." Plaintiff also alleged that "the alleged misconduct is ongoing or is likely to recur in the event that Plaintiff revisits the facility." In his second cause of action for violation of section 51, plaintiff only alleged that "Each of the foregoing paragraphs is incorporated by reference." In his prayer for relief, plaintiff requested "\$4,000 in damages,

¹ All further statutory references are to the Civil Code.

permanent injunctive relief, attorney's fees and costs, and all other relief that the Court may deem proper."

The case was tried to the court in June 2016. Before the first witness was called, the court confirmed that plaintiff was proceeding on both causes of action—count one for violations of sections 54 and 54.1, and count two for violation of section 51. After hearing testimony from four witnesses the court ruled in defendant's favor. The court found that defendant "has not violated the Americans with Disabilities Act, has not violated any similar California statute, rule or regulation and has no liability to plaintiff, Aaron Horsley."

After entry of judgment, defendant moved for attorney's fees under section 55, which provides for prevailing party fees in actions to enjoin disability access violations. Citing *Jankey v. Lee* (2012) 55 Cal.4th 1038 (*Jankey*), defendant argued that plaintiff's unsuccessful claims were predicated on sections 54 and 54.1 and those "claims carry with them prevailing party attorney's fees provisions under [section] 55." In opposition, plaintiff argued that he did not sue under section 55, which provides an independent basis for relief. Instead, plaintiff argued that he sought recovery under section 51, and since there was no basis for concluding his lawsuit was frivolous or unreasonable, defendant could not recover fees under that provision. In August 2016, the court awarded defendant reasonable attorney's fees of \$29,600.00, plus costs.

This timely appeal followed.

DISCUSSION

Plaintiff contends the trial court erred by applying the bilateral attorney's fee provision for prevailing parties in section 55.

1. Standard of Review

Generally, a trial court's determination of whether a party is entitled to an award of attorney's fees, and the calculation of such an award, is reviewed for abuse of discretion. (*Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 315; *Molski v. Arciero Wine Group* (2008) 164 Cal.App.4th 786, 790 (*Molski*).) But where the propriety of an attorney's fee award turns on an issue of statutory interpretation, the review is de novo. (*Silver v. Boatwright Home Inspection, Inc.* (2002) 97 Cal.App.4th 443, 448–449.)

2. The Statutory Scheme

In California, two overlapping laws, the Unruh Civil Rights Act (§ 51) and the Disabled Persons Act (DPA) (§§ 54–55.3), are the principal sources of state disability access protection. (See *Jankey, supra*, 55 Cal.4th at pp. 1044-1045.)

The Unruh Civil Rights Act broadly outlaws discrimination in public accommodations and includes disability as one among many prohibited bases. (§ 51, subd. (b).) The Unruh Civil Rights Act was enacted to “create and preserve a nondiscriminatory environment in California business establishments by ‘banishing’ or ‘eradicating’ arbitrary, invidious discrimination by such establishments.” (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 167.) Subdivision (f) of section 51 incorporates the protections against discrimination created by the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.), stating: “A violation of the right of any individual under the federal [ADA] shall also constitute a violation of this section.” Section 52, which provides remedies for violations of section 51, authorizes a damages award of no less than \$4,000 and injunctive relief. (*Turner v. Association of American Medical*

Colleges (2011) 193 Cal.App.4th 1047, 1058 (*Turner*); *Molski, supra*, 164 Cal.App.4th at p. 791.) Subdivision (a) of section 52 contains a unilateral fee award provision, that is, “the plaintiff can recover attorney fees if he or she prevails, but the defendant cannot.” (*Molski, supra*, 164 Cal.App.4th at p. 791.)

The DPA also establishes protections for disabled persons. (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 674 (*Munson*).) “More narrow in focus than the Unruh Civil Rights Act, it generally guarantees people with disabilities equal rights of access ‘to public places, buildings, facilities and services, as well as common carriers, housing and places of public accommodation.’ (*Munson*, at p. 674, fn. 8; see §§ 54, subd. (a), 54.1, subd. (a)(1).) As with the Unruh Civil Rights Act, the Legislature amended the [DPA] to incorporate ADA violations and make them a basis for relief under the act. (§§ 54, subd. (c), 54.1, subd. (d); *Munson*, at p. 674; *Wilson v. Murillo* (2008) 163 Cal.App.4th 1124, 1131 [citation].)” (*Jankey, supra*, 55 Cal.4th at pp. 1044—1045. Under section 54.3, subdivision (a), anyone who violates the DPA “is liable for each offense for the actual damages and any amount as may be determined by a jury, or the court sitting without a jury, up to a maximum of three times the amount of actual damages but in no case less than one thousand dollars . . . , and attorney’s fees as may be determined by the court in addition thereto, suffered by any person denied any of the rights provided in [s]ections 54, 54.1, and 54.2.” Like the fee award provision in section 52 of the Unruh Civil Rights Act, the fee award provision here is unilateral, that is, it authorizes awards only to prevailing plaintiffs. (*Turner, supra*, 193 Cal.App.4th at pp. 1058–1060; *Molski, supra*, 164 Cal.App.4th at p. 792.)

In a separate provision, however, the DPA authorizes injunctive relief “to correct violations of DPA standards.” (*Turner, supra*, 193 Cal.App.4th at p. 1059.) Section 55 states: “Any person who is aggrieved *or potentially aggrieved* by a violation of [s]ection 54 or 54.1 ... may bring an action to enjoin the violation. *The prevailing party in the action* shall be entitled to recover reasonable attorney’s fees.” (Italics added.)

There are two important differences between section 55 and section 52, the latter of which provides for injunctive relief under the Unruh Civil Rights Act. Because section 55 permits a person who is “potentially aggrieved” to seek an injunction, “virtually any disabled person can bring an action to compel compliance with the DPA under section 55 . . . ,” without proving that the violation actually denied him or her equal access to some facility. (*Urhausen v. Longs Drug Stores California, Inc.* (2007) 155 Cal.App.4th 254, 265–266; see *Jankey, supra*, 55 Cal.4th at p. 1051.) In contrast, section 52, subdivision (c) affords injunctive relief to “any person aggrieved,” but contains no reference to “potentially” aggrieved persons. Furthermore, unlike the fee award provision in section 52, the analogous provision in section 55 is bilateral. Because section 55 authorizes an award to the prevailing party, “either party will be entitled to . . . fees if [it] prevail[s].” (*Molski, supra*, 164 Cal.App.4th at p. 792.)

3. The court did not abuse its discretion in awarding defendant attorney’s fees under section 55.

As we discussed before, plaintiff asserted two causes of action against defendant. In his first cause of action under the DPA, plaintiff alleged that defendant violated sections 54 and 54.1 by refusing to provide him and a class of disabled individuals with a designated van-accessible handicap parking

spot. Plaintiff also alleged that “the alleged misconduct is ongoing or is likely to recur in the event that Plaintiff revisits the facility.” In his second cause of action under the Unruh Civil Rights Act, plaintiff alleged that defendant violated section 51. In support of this claim, plaintiff only alleged that “Each of the foregoing paragraphs is incorporated by reference.” In his prayer for relief at the end of the pleading, plaintiff requested “\$4,000 in damages, permanent injunctive relief, attorney’s fees and costs, and all other relief that the Court may deem proper.” Plaintiff did not, however, expressly state whether he was seeking injunctive relief under the Unruh Civil Rights Act, the DPA, or both. After plaintiff lost his case, the court granted defendant’s motion for attorney’s fees under section 55 of the DPA.

On appeal, Plaintiff advances two arguments as to why the court erred in awarding defendant attorney’s fees.² First, plaintiff contends that he never sued under section 55. Second, he contends that he sought recovery for violations of section 51 under section 52, and section 52, unlike section 55, does not contain a bilateral fee award provision. Neither argument is persuasive.

The plain language of section 55 makes an award of fees to any prevailing party mandatory when the action is brought to enjoin violations of section 54 and 54.1. Here, plaintiff’s first cause of action asserted violations of both of these sections of the DPA. As for the remedy, plaintiff is correct that his first cause of action, like his second cause of action under section 51, does not

² Plaintiff does not challenge the amount of fees awarded. He also does not argue that the fees should have been apportioned between his two causes of action.

specifically contain a request for injunctive relief. The prayer for relief at the end of the complaint, however, seeks, among other things, permanent injunctive relief. Plaintiff has cited no authority to support his contention that the court could not award defendant fees unless plaintiff specifically cited section 55 in his complaint, or unless he expressly stated that he was seeking injunctive relief to remedy violations of section 54 or 54.1. Notably at the beginning of the trial, plaintiff confirmed that he was proceeding on *both* causes of action, and, in his opening statement, plaintiff informed the court he would ask “for injunctive relief [to] have a handicapped parking spot placed in the defendant’s lot.”

Plaintiff’s argument that he only sought injunctive relief under section 52 to remedy violations of section 51 of the Unruh Civil Rights Act fares no better. Like his failure to refer to section 55, plaintiff did not refer to section 52 in his second cause of action, his prayer for relief, or anywhere else in the complaint. And, as discussed above, plaintiff made no election during the trial, or before judgment was entered, to pursue injunctive relief only as to his second cause of action under section 51. To be sure, plaintiff could have argued that where a defendant prevails against a plaintiff who sought injunctive relief under section 55 as well as under section 52, the defendant may not obtain an attorney’s fee award under section 55 for hours inextricably intertwined with hours spent defending the section 51 claim. (See *Turner, supra*, 193 Cal.App.4th at p. 1073.) Although this apportionment argument would have been persuasive, plaintiff did not make it below or on appeal.

As with all orders and judgments, a fee order “is presumed correct, all intendments and presumptions are indulged in its

favor, and ambiguities are resolved in favor of affirmance.”
(*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 765–766,
citing *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) On
this record, there is no basis for reversing the court’s fee order.

DISPOSITION

The order awarding defendant attorney’s fees is affirmed.
Defendant shall recover its costs on appeal.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

CURREY, J.*

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