



WEEKLY LAW RESUME™

Issue By: LAURA S. FLYNN

March 22, 2012

ADA Plaintiff Subject to Breach of Contract Claim For Suing a Business Owner a Second Time

Thomas Mundy v. Laura D. Lenc

Court of Appeal, Second Appellate District (February 29, 2012)

Plaintiff Thomas Mundy is confined to a wheelchair. In June 2009, he went to a bar owned by Laura Lenc and could not use the restroom because it was not equipped with two adjacent grab bars. He was also unable to use the restroom mirror because it was mounted too high above the floor. Represented by attorney Morse Mehrban, Mundy sued Lenc for violating Civil Code sections 51, 54 and 54.1 because the restroom did not comply with the design accessibility standards set forth in the Americans with Disabilities Act (ADA). The parties entered into a settlement wherein plaintiff received \$2,500, his attorney received \$3,000 and Lenc received a general release of known and unknown claims. A year later, Mundy sued Lenc once again under Civil Code section 51 again claiming violation of the ADA. This time, he claimed that Lenc's facility did not provide him with van-accessible handicap parking. In response, Lenc filed a cross-complaint for breach of the settlement agreement, false promise, intentional misrepresentation, negligent misrepresentation and abuse of process. Mundy responded by filing a special motion to strike. The trial court denied the motion and ordered the parties to submit briefs regarding Lenc's entitlement to attorney fees as the prevailing party. Lenc was subsequently awarded \$21,506 in attorney fees against Mundy and Mehrban based on the trial court's finding that Mundy's motion was frivolous. An appeal followed.

On appeal, Mundy and Mehrban argued that the trial court's orders must be reversed because: (1) the claims in Lenc's cross-complaint arose from acts in furtherance of Mundy's right of

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petition and Lenc failed to demonstrate a probability of prevailing on her causes of action; and (2) Mundy's special motion to strike was neither frivolous nor brought in bad faith, as a consequence, there was no basis for an award of attorney fees.

Pursuant to California Code of Civil Procedure section 425.16, a cause of action against a person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a motion to strike unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. When determining whether an action is a strategic lawsuit against public participation (aka a SLAPP suit), the defendant bringing the motion must make a prima facie showing that the claims arise from protected activity. Once a moving defendant has met its burden, the motion will be granted unless the plaintiff establishes a probability of prevailing on the claim.

The Second District Court of Appeal determined that the motion was properly denied as to the breach of contract claim because although the first prong was satisfied i.e., the filing of a complaint fits the definition of an act in furtherance of a person's right to petition, Lenc had met her burden to demonstrate a likelihood of success. The release demonstrated that Mundy relinquished "any and all claims and causes of action that . . . could have been asserted in the [first] Lawsuit." Lenc established that the parking lot of the bar was in the same condition it was in at the time she acquired the bar in 1989. Therefore, any claim relating to the parking lot could have been asserted in the first lawsuit. As to the fraud claim, the Court determined the trial court had erred in not granting Mundy's special motion to strike concluding the fraud claim was barred by the litigation privilege. As to the abuse of process claim, the Court explained that "Mehrban's unethical chicanery" did not expand Lenc's exposure. Even though the court readily perceived that Mundy and Mehrban abused the legal process, due to policy reasons that transcended the case, they could not be held liable in tort and would simply have to recover damages through the claim for breach of contract. The Court ultimately reversed the trial court's award of attorney fees to Lenc finding that the motion to strike could not be considered frivolous or solely intended to cause unnecessary delay.

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COMMENT

The Appellate Court ruled that a general release with a provision waiving all known and unknown claims i.e., a waiver of California Civil Code section 1542, may prevent a plaintiff from suing a business owner a second time for ADA violations that existed at the time the plaintiff executed a release in association with the earlier action.

For a copy of the complete decision see:

[HTTP://WWW.COURTINFO.CA.GOV/OPINIONS/DOCUMENTS/B227962.PDF](http://www.courtinfo.ca.gov/opinions/documents/B227962.pdf)

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