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CLEPK. U.S. DISTRICT COURT SCUTHER DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

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LYNN J. HUBBARD and BARBARA J. HUBBARD,

CASE NO. 04cv1129 WQH

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VS.

HAYES, Judge:

Plaintiffs,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SOBRECK, LLC dba JOHNNY CARINO'S; EASTLAKE VILLAGE MARKETPLACE, LLC,

to Rule 52(a) of the Federal Rules of Civil Procedure.

Defendants.

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BACKGROUND

The matter before the Court is the Findings of Fact and Conclusions of Law pursuant

Plaintiffs Lynn Hubbard and Barbara Hubbard brought this action against Defendants for violations of the Americans with Disabilities Act ("ADA"); the California Disabled Persons Act; and the California Unruh Act which prevent their full and equal access to the Johnny Carino's restaurant at 2245 Otay Lakes Road, Chula Vista, California ("the Restaurant"). The pretrial order set forth following issues and no others which remained to be litigated at trial: 1) the men's restroom and women's restroom the P-trap encroaches into

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the required knee clearance space; 2) the men's restroom and women's restroom have a waste basket receptacle obstructing the knee clearance underneath the lavatory; 3) the men's restroom and women's restroom stall doors do not have self-closers; 4) the men's restroom and women's restroom stall doors do not have a loop or U shaped handle immediately below the latch; 5) the Restaurant does not provide directional signage to the restrooms; 6) the entry door has the International Symbol of Accessibility mounted below the 60-inch requirement of the California Building Code; 7) the men's restroom and women's restroom toilet paper dispensers project into the stall more than four inches; 8) the bar area seats 23 and no accessible seating is provided and the distance between structural wall element and barrel is 31 inches; and 9) the pipes underneath the lavatory are not wrapped to prevent contact. See Pretrial Order, pages 3 and 4. The matter was tried to the Court on May 2, 2006 and May 3, 2006. Having heard testimony and received evidence, the Court issues the following Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

Lynn Hubbard and Barbara Hubbard are individuals in their eighties who have health conditions which limit their mobility. Barbara Hubbard uses an electric wheelchair and a van with a lift when traveling. Lynn Hubbard suffers from shortness of breath and uses a cane at times when he walks.

Plaintiff Barbara Hubbard testified at trial that she had visited the Johnny Carino Restaurant in Chula Vista six or seven times since the Restaurant opened in 2004. Barbara Hubbard testified that she initially had trouble parking because there was no van accessible parking but that the parking problems were corrected. Barbara Hubbard testified that she encountered barriers inside the Restaurant which included difficulty finding the front door, seating at a very small table, and no accessible seating in the bar area. Barbara Hubbard testified she had problems with the toilet and sink in the women's restroom. Barbara Hubbard testified that the "worst thing was that big toilet paper holder that was on the side of the wall that prevented me from using the toilet." Trial transcript at page 55. Barbara Hubbard

testified that "the pipes weren't wrapped . . . You can have real bad burns or scrapes on your legs. . ." *Id.* at 56. Barbara Hubbard testified that she could not get the water turned because "there were three huge garbage cans" under the sinks. *Id.*

Barbara Hubbard testified at trial that she had no idea whether she had filed somewhere in the vicinity of 200 ADA lawsuits, that she does not necessarily become aware of the fact that she filed a lawsuit when her attorney prepares and files a lawsuit on her behalf, and that she did not read the complaint in this case. Barbara Hubbard testified at her deposition taken in this case on March 31, 2005 that she had no idea what lawsuits she has been a party to and that she was a party to more than ten lawsuits but could not remember any of them.

The Court finds that testimony of Barbara Hubbard regarding the architectural barriers she encountered at the Restaurant was not credible testimony. The Court finds that Barbara Hubbard's demeanor as a witness was evasive and argumentative and that her testimony regarding barriers she encountered at the Restaurant was contrived and not believable. Barbara Hubbard testified at her deposition and at trial that she could not remember any of her prior lawsuits yet recalled the size of the toilet paper holders in this Restaurant. Specifically, the Court finds the testimony that the big toilet paper holder on the side of the wall prevented her from using the toilet, that the pipes under the sink were not wrapped exposing her to the risk of bad burns or scrapes on her legs, and that there were big garbage cans which prevented her from using the sinks is not believable testimony.

Plaintiff Lynn Hubbard testified at trial that he encountered barriers at the Restaurant in his first visit in April 2004 because he "couldn't open the front door" and his table was in the "path of traffic." *Id.*, page 64. Lynn Hubbard testified that he took his scooter into the bar area but "all the tables were high." Lynn Hubbard testified that "there's one spot [in the bar area] where the waiter. . . would get drinks that I could possible use, but they had this cement, a big curb of cement." *Id.*, page 65. Lynn Hubbard testified that he "had difficulty finding [the bathroom] and finding the path of travel to get to there," and that "nothing was handy. *Id.*, page 66. Lynn Hubbard testified that the "toilet paper holders were out of position. It seems like I hit it when I was walking into it" and that the "faucets were too hard to reach." *Id.*

Lynn Hubbard testified at his deposition in this case on March 31, 2005 that he "remember[ed] having dinner" at Johnny Carino's in Eastlake Village but that he had no specific recollection of the visit. *Id.* at page 75. Lynn Hubbard could not estimate the date of his visit to the Restaurant or recall any of the circumstances that gave rise to this action at the time of his deposition. Lynn Hubbard could not recall whether his visit was lunch or dinner but testified "I believe that I was walking with cane . . . the scooter stayed in the van." *Id.* at page 79. Lynn Hubbard's testified at his deposition taken in this case that he could recall giving his deposition in three prior lawsuits but could not recall any other lawsuits he has filed.

Plaintiff made no effort to explain why Lynn Hubbard was able to testify at trial about the condition of the restroom and the bar seating but was not able to recall any of the circumstances surrounding this action at his deposition in March of 2005. In light of Lynn Hubbard's deposition testimony more than a year before the trial that he had no specific recollection of his visit to the Restaurant, the Court finds that Lynn Hubbard's trial testimony was not believable and not reliable to support any claim of discrimination based upon accessibility.

Brian Price, Chief Administrative and Development Officer for Defendant Sobreck, testified that he is responsible for the construction of restaurants and involved with all the entitlement process. Price testified that the Johnny Carino's Restaurant in Chula Vista was built in 2003 from a prototype designed by a company out of Austin, Texas; and that a local architect in Irvine, California took the prototype and revised it to comply with the laws and codes of California.

Plaintiffs presented the expert testimony of Reed Settle. Settle is a licensed architect who has conducted over 100 inspections for architectural barriers under the ADA Accessibility Guidelines ("ADAAG") and Title 24 of the California Building Code (Title 24). Defendants presented the expert testimony of Michael Gibbens. Gibbens is a licensed general contractor who has been involved in disabled access work for 20 plus years. Gibbens has worked in the field of compliance with state and federal accessibility standards for the past 20 plus years including writing books, developing computer programs, consulting in litigation, and

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27 28 participating in advisory boards and committees. Gibbens was employed by Defendants approximately two years ago to review the first report by plaintiff's expert Settle. Both experts visited the Restaurant on two occasions and testified as to each violation listed in the pretrial order.

The Court has examined and considered all of the testimony at trial including the testimony of Plaintiffs' expert and Defendants' expert as well as the exhibits received into evidence and makes the following findings of fact regarding the alleged ADA violations:

1) P-trap encroachment

The Court finds that the evidence presented at trial established that the hot water and drain pipes under the lavatories comply with the required knee and toe clearance in ADAAG § 4.19.2 and the provisions of the California Building Code.

2) waste basket under sinks

The Court finds that the evidence at trial established that the wicker waste baskets identified Plaintiffs Exhibit 10 are not architectural fixtures which create an obstruction to the lavatory in violation of ADAAG § 4.19.3 or the California building code.

3) self-closers on the men's and women's restroom stall doors

The evidence at trial established that the men's and women's restroom stall doors have self-closers in compliance with ADAAG § 4.13.10 and the California Building Code.

4) loop or U-shaped handles stall doors

The evidence at trial established that the men's and women's restroom stall doors have loop or U-shaped handles in compliance with ADAAG § 4.13.9 and the California Building Code.

5) directional signage to the restrooms

There is no requirement in the ADAAG to provide directional signage to restrooms in the Restaurant.

6) entry door has ISA mounted 60 inches high

There is no requirement in the ADAAG for the ISA mounted sign on the entry door of the Restaurant to be mounted 60 inches high.

7) toilet paper dispenser

There was no evidence in the trial record to support any violation of the ADA based upon the projection of the toilet paper dispenser. The evidence at trial established that the toilet paper dispenser complied with the requirements of ADAAG § 4.16.6 Figure 29(b) which does not include a dimensional clearance requirement.

8) accessible seating in the bar area and the barrel

There was no credible evidence at trial to establish that Barbara Hubbard or Lynn Hubbard ever sought service in the bar area of the Restaurant or that Barbara Hubbard or Lynn Hubbard were prevented by architectural barriers from seeking or receiving service in the bar area of the Restaurant.

The evidence at trial further established that there is only one functional area in the Restaurant with the same food and drink service which includes the bar area. The evidence at trial established that there is a sufficient number of tables in the functional area of the Restaurant which provide accessible seating as well as side approach accessible seating in the bar area which would accommodate a wheelchair patron. There is no evidence of any violation of the ADA or the California Building Code based upon the seating in the bar area.

There was no evidence at trial that the placement of an empty barrel in the bar area obstructed the path of travel of disabled individuals seeking access goods or services at the Restaurant.

9) pipe wrapping under sinks

The Court finds that the evidence presented at trial established that the hot water and drain pipes under the lavatories were insulated or otherwise covered in compliance with ADAAG § 4.19.4 and the California Building Code.

CONCLUSIONS OF LAW

Title III of the ADA prohibits discrimination against persons with disabilities in places of public accommodation. See 42 U.S.C. § 12182(a). This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343 for claims under the Americans with Disabilities Act. Supplemental jurisdiction for claims under parallel California disability laws arising from the

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same nucleus of operative facts is proper pursuant to 28 U.S.C. § 1367. In Clark v. State of California, 123 F.3d 1267 (9th Cir. 1997), the Court of Appeals held that the ADA is a valid exercise of congressional power under section 5 of the Fourteenth Amendment. The Court of Appeals for the Ninth Circuit subsequently held that it is unnecessary to decide the constitutionality of the ADA under the Commerce Clause because the Court has already held that the ADA is a valid exercise of congressional power under section 5 of the Fourteenth Amendment. Botosan v. Paul McNally Realty, 216 F.3d 827, 835-36 (9th Cir. 2000).

In order to prevail under the ADA, Plaintiffs must prove that 1) they are disabled under the ADA; 2) that the Defendant owns, operates, or leases a place of public accommodation; and 3) that they were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of that public accommodation. See D.R.A.C. v. Las Vegas Events, Inc., 375 F.3d 861, 866 (9th Cir. 2004) citing 42 U.S.C. §12183(a). Plaintiff bears the burden of proving the existence of an architectural barrier and suggesting a method of removing the barrier.

Title III gives the Department of Justice authority to develop regulations implementing the requirements of the ADA. 42 U.S.C. § 12186(b). The ADA Accessibility Guidelines ("ADAAG") are codified at 28 C.F.R. Pt. 36, Appendix A. 28 C.F.R. § 36.402(a) provides that "any alteration to a place of public accommodation ... after January 26, 1992, shall be made so as to ensure that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." The Restaurant was built in 2003 and is required to comply with the ADAAG and the applicable California Building Code. See 28 C.F.R. § 36.401(a)(1).

Plaintiffs are disabled individuals. Defendants operate and lease a place of public accommodation under 42 U.S.C. § 12182(a). Plaintiffs have not presented evidence sufficient to establish that they were denied full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations at the Restaurant.

The testimony of the Plaintiffs that they encountered barriers to the use of public accommodations at the Restaurant is not credible evidence. Lynn Hubbard's memory of any

events relevant to this action was so poor that his testimony at trial was unreliable and does not establish that he encountered any barriers at the Restaurant during any visit. Barbara Hubbard's testimony at trial was contrived and not believable.

Plaintiffs have not proven that any part of the Restaurant violates the ADAAG requirements or contains any barriers to access by disabled individuals. The evidence presented at trial established that the Restaurant meets all requirements of the ADAAG and the California Building Code.

Defendants are entitled to judgment in their favor on all of Plaintiffs' claims under the Americans with Disabilities Act; the California Disabled Persons Act; and the California Unruh Act. The Court concludes that Defendants are the prevailing party in this action. The Clerk of the Court is directed to enter judgment in favor of Defendants and against Plaintiffs as to all claims.

Dated: 8/4/06

WILLIAM Q. HÁYES United States District Judge

cc: All Counsel of Record