

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CHERYL WALLACE et al.,

Plaintiffs and Respondents,

v.

LOIS MCCUBBIN et al.,

Defendants and Appellants.

A127287

(San Francisco County
Super. Ct. No. CGC-09-488803)

ORDER MODIFYING OPINION

[NO CHANGE IN JUDGMENT]

It is ordered that the opinion filed herein on June 27, 2011, be modified as follows:

1. On page 2, in part I.A., the first sentence of the fourth paragraph is amended to read: “In January 2005 (or 2004), Wallace’s psychiatrist informed landlord Victor Wu and the building manager, Campbell Peters, that Wallace was disabled and required a service dog, and that a landlord must allow a tenant to keep a service dog even if pets are otherwise prohibited.”

2. On page 17, in part II.B.3., the last sentence of footnote 7 is amended to read: “We grant the request for judicial notice of the verified answer as an indication that such a declaration could have been filed.”

3. On page 19, in part II.B.4.a., the first full paragraph is amended to read: “Conceivably, Wallace and Owen are contending that they are victims of discrimination because, in treating them the same as other tenants, Victor Wu did not accommodate their disability. Or they might be pursuing a tenuous theory that they were victims of discrimination because Victor Wu tried to evict them on a ground that was different than the one he employed against other tenants: he attempted to get rid of Wallace and Owen

(and Nemo) for having an illegal subtenant, since their disability and need for a service dog precluded evicting them on the ground of having an impermissible pet. This rather odd theory would ultimately run into serious problems, of course, since Rent Ordinance section 37.9 and Civil Code section 1942.5 prohibit certain acts, not discrimination per se. Nonetheless, we proceed to the merits of their gestalt argument.”

4. On page 26, the heading “B. *Second Prong: Wallace and Owen’s Burden to Show Probability of Prevailing*” is amended to read “C. *Second Prong: Wallace and Owen’s Burden to Show Probability of Prevailing.*”

5. On page 48, in former part II.B.2., now part II.C.2., the second full paragraph (beginning with the words, “In any event”) and footnote 23 are deleted. The subsequent footnotes are to be renumbered accordingly.

6. On page 51, the heading “C. *Relief*” is amended to read “D. *Relief.*”

7. On page 51, in former part II.C., now part II.D., a new paragraph is inserted immediately following the heading “D. *Relief,*” to read: “While we have focused our discussion on Wallace and Owen’s assertions of liability based on the three-day notice and unlawful detainer action, we have thoroughly considered their allegations, evidence, and arguments in regard to unprotected activity as well as protected activity. Based on the showing Wallace and Owen made in the trial court, they failed to establish a probability of prevailing on their first and thirteenth causes of action as against McCubbin and Merck.”

The modification effects no change in the judgment.

The petition for rehearing is denied.

Wallace and Owen’s request for judicial notice is denied as untimely and for failure to comply with rule 8.252(a) of the California Rules of Court.

Jones, P.J., would grant the petition for rehearing.

Date _____, P.J.