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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ORLANDO GARCIA,

Plaintiff-Appellant,

v.

GUADALUPE ALCOCER, in individual and representative capacity as Trustee of The Lancor Trust dated November 23, 1976 and of The Trust C (Bypass Trust) of The I.C. Alcocer Trust dated 6/17/71; DIGITAL CURRENCY SERVICES, INC., a California corporation,

Defendants-Appellees,

and

SU CASA DE CAMBIO, INC., a California corporation; DOES, 1-10,

Defendants.

No. 22-55183

D.C. No. 2:20-cv-08419-VAP-JEM

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, Chief District Judge, Presiding

Submitted December 6, 2022[**]
Pasadena, California

Before: BEA, IKUTA, and CHRISTEN, Circuit Judges.

Orlando Garcia appeals the district court's award of attorney's fees against him in his unsuccessful Americans with Disabilities Act (ADA) / Unruh Act action against Defendant-Appellees Guadalupe Alcocer and Digital Currency Services, Inc. After Garcia filed this suit, two of his other ADA / Unruh Act cases were dismissed on standing grounds. Garcia continued to litigate, and after a one-day evidentiary hearing, the district court dismissed this suit for failure to establish standing. Because the dismissal of his earlier cases gave Garcia notice of the standard for establishing Article III standing in this type of case and his testimony as to standing was not credible, the district court awarded attorney's fees. Garcia appeals only the court's order awarding attorney's fees. We have jurisdiction, *see* 28 U.S.C. § 1291, and we affirm.

We review fee awards for abuse of discretion. *Kohler v. Bed Bath & Beyond of Cal., LLC*, 780 F.3d 1260, 1263 (9th Cir. 2015). 42 U.S.C. § 12205 gives courts discretion to award "a reasonable attorney's fee" to prevailing parties in ADA litigation. However, a court may award a prevailing civil rights defendant

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

attorney's fees only if the court "finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Hughes v. Rowe*, 449 U.S. 5, 15 (1980) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)).

1. Garcia challenges the fee award on two grounds: (1) *D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031 (9th Cir. 2008), and *Civil Rights Education & Enforcement Center v. Hospitality Properties Trust*, 867 F.3d 1093, 1101 (9th Cir. 2017) [*CREEC*] provided a colorable legal basis for Garcia's standing theory; and (2) the district court improperly awarded fees due to its unfavorable impression of Garcia's litigation history. Neither argument demonstrates that the district court abused its discretion.

In *D'Lil*, we held that to establish "actual or imminent injury" for the purposes of Article III standing, an ADA plaintiff must plead "an intent to return . . . and a desire to visit the accommodation if it were made accessible." 538 F.3d at 1037. Garcia invokes *D'Lil* because the court there held that an ADA plaintiff's litigation history, alone, is not a basis for finding that the plaintiff lacks credibility. *See id.* at 1040. In *CREEC*, we held that ADA plaintiffs can assert tester standing when their "intent to visit" an establishment "renders their harm 'actual or imminent, not conjectural or hypothetical.'" 867 F.3d at 1099 (quoting *Lujan v. Defs. of Wildlife*,

504 U.S. 555, 560 (1992)). Garcia invokes *CREEC* because the court there discouraged giving "talismanic weight" to the word "return" and clarified that secondhand knowledge of a barrier could be enough to establish standing where the plaintiff had the actual intent to visit the establishment once the barrier was removed. *Id.* at 1100. Although *D'Lil* and *CREEC* support Garcia's argument that civil rights standing is broad, neither *D'Lil* nor *CREEC* held that non-credible assertions of intent to return to a defendant's establishment are enough to establish ADA standing. The district court did not abuse its discretion in determining that neither case provided a colorable legal basis supporting Garcia's standing.

In the context of Defendants' fee motion, the district court relied on Garcia's litigation history only to show that he was on "notice that the same issue [of standing] would arise in this case." Garcia is correct that *D'Lil* cautioned against the use of past ADA litigation as the sole basis for credibility determinations, 538 F.3d at 1040, but *D'Lil* did not speak to the use of litigation history to show that the defendant was on notice that a particular legal argument was frivolous, unreasonable, or groundless. Here, the district court's credibility determination did not depend on Garcia's litigation history. Rather, the district court found Garcia's stated intent to return was not credible because: (1) he visited Defendants' store only once; (2) he testified that he does not have any use for check-cashing stores; (3) Garcia had not returned to any

of the 14 Los Angeles check-cashing stores he had sued; (4) Defendants' store is 10.5 miles from his home and over an hour away on public transit; (5) there were check-cashing stores closer to Garcia's home; and (6) Garcia had an account with a bank that did not charge him for cashing checks and had a branch within half a mile of his home.

The district court relied on Garcia's litigation history to show he was on notice that his legal arguments would not succeed. It found that "two of Plaintiff's ADA lawsuits . . . were dismissed for lack of standing . . . months before the [evidentiary hearing] in this matter took place." Those lawsuits share pertinent similarities with this case. In *Garcia v. 1971 Fateh, LLC*, the court dismissed Garcia's claims against an Indian restaurant for failure to allege standing, in part because Garcia asserted standing based on his intent to return and then incongruously testified that he "doesn't remember ever eating Indian food" and that the Indian restaurant would be his "'last' choice." No. 2:20-CV-07661-SVW-AS, 2021 WL 3556674, at *3 (C.D. Cal. Apr. 21, 2021). In *Garcia v. Digital Currency Services, Inc.*, the court dismissed Garcia's claims against a check-cashing store, finding that Garcia failed to demonstrate an intent to return to the business because he "has visited 14 check cashing stores and has not returned to any of them." Order Granting Motion to Dismiss at 4–5, No. 2:20-cv-8986-DSF (C.D. Cal. July 12, 2021), ECF No. 29. The orders of dismissal in *1971*

Fateh and *Digital Currency* explained in detail the ADA standing requirements under binding Ninth Circuit and Supreme Court caselaw and why Garcia failed to meet those requirements. Accordingly, the district court in this case did not improperly consider Garcia's litigation history under *D'Lil*, or otherwise abuse its discretion in concluding that Garcia was on notice that his assertion of standing was frivolous, unreasonable, and groundless.

2. For the first time on appeal, Garcia urges the panel to extend the *Noerr-Pennington* doctrine to prevent fee-shifting in ADA cases. *See Sosa v. DIRECTV, Inc*., 437 F.3d 923, 929 (9th Cir. 2006) (noting that the *Noerr–Pennington* doctrine provides that "those who petition any department of the government for redress are generally immune from statutory *liability* for their petitioning conduct" (emphasis added)). Although Garcia did not raise the *Noerr-Pennington* issue below, we consider it within our discretion because it is a pure question of law. *See Emmert Indus. Corp. v. Artisan Assocs., Inc*., 497 F.3d 982, 986 (9th Cir. 2007).

In *Sosa,* we extended *Noerr-Pennington* immunity to prelitigation settlement demands. 437 F.3d at 931–32. We reasoned that imposing liability for attempts to settle legal claims burdened a plaintiff's First Amendment right to petition. *See id.* at 930–32. But unlike imposing liability based on prelitigation demands or lawsuits, fee

shifting does not punish or make a party liable for (allegedly) illegal conduct. It merely requires non-prevailing parties to bear litigation costs.

AFFIRMED.