

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

THERESA WALLEN,

CASE NO. CV-F-10-676 LJO GSA

Plaintiff,

**ORDER ON MOTION TO DISMISS** (Docs.  
11, 15)

vs.

TAHOE JOES'S, INC., VIETTY  
ENTERPRISES, LTD., and ERMA  
RUTH VIETTY,

Defendants.

---

Plaintiff Theresa Wallen (“Ms. Wallen”), who is physically disabled, initiated this civil rights action against defendants for discrimination at the building, structure and land of Tahoe Joe’s Famous Steakhouse (“Tahoe Joe’s”) located on Shaw Ave in Fresno, California. Ms. Wallen asserts claims under the Americans with Disabilities Act, 42 U.S.C. §12180 et seq., Disabled Persons Act, Cal. Civ. Code §54, Unruh Civil Rights Act, Cal. Civ. Code §51, and Denial of Full and Equal Access to Public Facilities, Cal. Health and Safety Code §19955.

On May 15, 2010, defendant Erma Ruth Vietty (“Ms. Vietty”) moved to dismiss herself as a defendant. Ms. Vietty argues that Ms. Wallen fails to state a claim against her because she does not own, operate, and/or Lease Tahoe Joe’s. Although this is a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), in which this Court accepts as truthful the allegations of the complaint and does not consider evidence outside of the complaint, Ms. Vietty presents evidence to support her motion to dismiss,

1 including the following:

2 On July 1, 1980, Jeffrey S. Klein Companies, as Lessee, and Albert A. Vietty and Ms. Vietty,  
3 as Lessors, entered into a ground lease (“Lease”) for certain property located at the northeast corner of  
4 Shaw Ave. and Marks Ave. in Fresno, California. On June 15, 1981, Ms. Vietty and Albert Vietty sold  
5 the land and all of their rights under the lease to defendant Vietty Enterprises, Ltd. (“Vietty  
6 Enterprises”). Ms. Vietty is not a partner of, or involved in, Vietty Enterprises. Other than the payment  
7 on the June 15, 29181 note, she receives no income or revenue from Vietty Enterprises. Ms. Vietty is  
8 no longer a party to the Lease. According to the documents presented, Ms. Vietty does not own, or have  
9 any interest in, the land where the Tahoe Joe’s is located, and does not own, operate or lease any  
10 buildings on the land.

11 On June 9, 2010, Ms. Wallen filed a statement of non-opposition to Ms. Vietty’s motion to  
12 dismiss. In her statement, Ms. Wallen requests that the complaint be dismissed as to Ms. Vietty only.  
13 Fed. R. Civ. P. 41 confers onto a plaintiff “an absolute right to voluntarily dismiss his action prior to  
14 service by the defendant of an answer or a motion for summary judgment.” *American Soccer Co. Inc.,*  
15 *v. Score First Enterprises*, 187 F.3d 1108, 1109 (9th Cir. 1999) (citing *Wilson v. City of San Jose*, 111  
16 *F.3d 688, 692* (9th Cir. 1997) (citations and footnote omitted). Because Ms. Vietty has filed no answer,  
17 Ms. Wallen’s request to dismiss needs Ms. Vietty operates automatically.

18 Accordingly, and pursuant to Fed. R. Civ. P. 41, this Court DISMISSES this action against Ms.  
19 Vietty only. The clerk of court is DIRECTED to terminate Ms. Vietty as a defendant and to terminate  
20 Ms. Vietty’s motion to dismiss (Doc. 11).

21

22 IT IS SO ORDERED.

23 **Dated: June 10, 2010**

**/s/ Lawrence J. O’Neill**  
UNITED STATES DISTRICT JUDGE

24

25

26

27

28