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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RONALD WILSON,

Plaintiff,

v.

Civ. S-07-0822 JAM GGH

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT AND
GRANTING SUMMARY JUDGMENT SUA
SPONTE FOR DEFENDANTS

TONY M. SANCHEZ AND COMPANY,
Inc., dba MCDONALD'S # 7543;
MCDONALDS CORPORATION,

Defendants.

This matter comes before the Court on Plaintiff Ronald Wilson's ("Wilson") motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. Defendants Tony M. Sanchez and Company, Inc. doing business as McDonald's #7543 and McDonald's Corporation (collectively "Defendants") oppose the motion. For the reasons set forth below¹, Plaintiff's motion

¹ Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

1 is DENIED and Defendants' request for summary judgment to be
2 entered sua sponte by the Court is GRANTED.

3 I. FACTUAL AND PROCEDURAL BACKGROUND

4 This matter arises from Plaintiff Wilson's numerous visits
5 to the McDonald's Restaurant ("Restaurant") in Dixon, California
6 owned by Tony Sanchez and Company, Inc. Wilson is a seventy-two
7 year old man and has been disabled since 1993. Pl's Mot. for
8 Summary Judgment, filed November 5, 2008, ("Pl's Mot.") at 2:19-
9 20. Wilson claims he visited the Restaurant 33 times spanning
10 from July 1, 2001 to his last visit on March 15, 2008. Pl's
11 Mot. at 3:11-19. During these visits, Wilson asserts he
12 struggled to overcome numerous architectural barriers that
13 prevented him from enjoying full and equal access to the goods
14 and services at the Restaurant. Id. at 3:19-21. Wilson claims
15 he sent a letter to the Restaurant on February 15, 2008
16 informing Defendants of the barriers and requesting that the
17 barriers be removed. Id. at 3:22-23.

18 On April 30, 2007, Wilson filed a complaint against
19 Defendants seeking declaratory, injunctive, and monetary relief
20 pursuant to the American with Disabilities Act ("ADA"), 42
21 U.S.C. §§ 12181 *et. seq.*, and California's Unruh Civil Rights
22 Act ("Unruh Act"), California Civil Code §§ 51 *et seq.* Doc. #
23 1. According to Wilson, Defendants denied him full and equal
24 enjoyment in the use of the Restaurant and failed to remove
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1 architectural barriers that violate federal disability access
2 standards as proscribed by the Americans with Disabilities Act
3 Accessibility Guidelines ("ADAAG"). Pl's Mot. at 2:1-9. In the
4 instant motion, Wilson seeks summary judgment against
5 Defendants. Doc. # 33. Defendants argue Plaintiff has no
6 competent evidence to support the alleged violations and thus,
7 summary judgment should be denied. Defs' Memorandum of Points
8 and Authorities in Opposition to Pl's Mot., filed December, 3
9 2008, ("Defs' Opp.") at 2:8-22. In addition, Defendants request
10 this Court to grant summary judgment on their behalf. See Defs'
11 Request for Summary Judgment, Doc. # 34 at Attachment #7.

14 II. OPINION

15 A. Legal Standard

16 Summary judgment is proper "if the pleadings, depositions,
17 answers to interrogatories, and admissions on file, together
18 with affidavits, if any, show that there is no genuine issue of
19 material fact and that the moving party is entitled to judgment
20 as a matter of law." Fed. R. Civ. P. 56(c). The purpose of
21 summary judgment "is to isolate and dispose of factually
22 unsupported claims and defenses." Cleotex v. Catrett, 477 U.S.
23 317, 323-324 (1986).

24 The moving party bears the initial burden of demonstrating
25 the absence of a genuine issue of material fact for trial.
26 Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 248-49 (1986).

1 If the moving party meets its burden, the burden of production
2 then shifts so that "the non-moving party must set forth, by
3 affidavit or as otherwise provided in Rule 56, 'specific facts
4 showing that there is a genuine issue for trial.'" T.W. Elec.
5 Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626,
6 630 (9th Cir. 1987) (quoting Fed. R. Civ. P. 56(e) and citing
7 Celotex, 477 U.S. at 323). The Court must view the facts and
8 draw inferences in the manner most favorable to the non-moving
9 party. United States v. Diebold, Inc., 369 U.S. 654, 655
10 (1962).
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13 The mere existence of a scintilla of evidence in support of
14 the non-moving party's position is insufficient: "There must be
15 evidence on which the jury could reasonably find for [the non-
16 moving party]." Anderson, 477 U.S. at 252. This Court thus
17 applies to either a defendant's or plaintiff's motion for
18 summary judgment the same standard as for a motion for directed
19 verdict, which is "whether the evidence presents a sufficient
20 disagreement to require submission to a jury or whether it is so
21 one-sided that one party must prevail as a matter of law." Id.
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24 B. The ADA

25 Plaintiff argues that summary judgment should be granted
26 with respect to his ADA claims against Defendants. Title III of
27 the ADA establishes that "[n]o individual shall be discriminated
28 against on the basis of disability in the full and equal

1 enjoyment of the goods, services, facilities, privileges,
2 advantages, or accommodations of any place of public
3 accommodation by any person who owns, leases (or leases to), or
4 operates a place of public accommodation." 42 U.S.C. §
5 12182(a). Here, Wilson alleges that Defendants discriminated
6 against him by failing to remove certain architectural barriers
7 at the Restaurant. Specifically, Wilson asserts that Defendants
8 violated the ADA by failing to abide by the ADAAG standards.
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11 The ADAAG regulations are divided into three categories.
12 The first category of regulations require that newly-constructed
13 public accommodations must comply with specific accessibility
14 requirements set forth in the ADAAG. See 28 C.F.R. Pts. 36.401,
15 36.406. The second category of regulations concerns the
16 accessibility requirements imposed on public accommodations
17 altered after January 26, 1992. See id. The third category
18 requires the removal of architectural barriers in preexisting
19 public accommodations. See 28 C.F.R. Pt. 36.304. "Under the
20 ADA's continuing barrier removal obligation, it is
21 discriminatory for owners, operators, lessors or lessees to fail
22 to remove architectural barriers that deny disabled persons the
23 goods and services offered to the general public." Wilson v.
24 Pier 1 Imports (US), Inc., 439 F.Supp.2d 1054, 1066 (E.D. Cal.
25 2006).

1 Here, Plaintiff asserts the Restaurant is a newly-
2 constructed public accommodation designed for occupancy after
3 1993. See Pls' Mot. at 13:19-22. As such, the Court will
4 assume, without deciding, that Defendants are required to comply
5 with the higher accessibility standards imposed on new
6 facilities rather than the lower standards imposed on existing
7 facilities. The Court will therefore assume that Restaurant
8 must comply with the ADAAG standards. See 28 C.F.R. Pt. 36.406
9 (newly constructed public accommodations must comply with the
10 accessibility requirements set forth in the ADAAG).
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13 In order to make a prima facie case under Title III of the
14 ADA, a plaintiff must prove that (1) he has a disability, (2)
15 defendants' facility is a place of public accommodation, and (3)
16 he was denied full and equal treatment because of his
17 disability. Wilson, 439 F.Supp.2d at 1067. Compliance with the
18 standards set forth in the ADAAG constitutes compliance with ADA
19 requirements. Id. at 1066. Here, because the parties do not
20 dispute that Wilson is disabled or that the Restaurant is a
21 place of public accommodation, the question is whether Wilson
22 was discriminated against on account of his disability based on
23 architectural barriers. That is, whether Defendants violated
24 the ADA by contravening specific standards set forth in the
25 ADAAG.
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1 Wilson claims Defendants violated the ADA by failing to
2 remove barriers that obstructed his access and use of the
3 Restaurant. Pl's Mot. at 11:27-28. However, the only evidence
4 Plaintiff provides in support of his motion for summary judgment
5 is a statement of 81 facts Wilson asserts are undisputed. These
6 facts are only supported by one declaration, that of Wilson.
7 However, Wilson's declaration is insufficient to factually
8 support his claims because it fails to show personal knowledge.
9 Wilson provided various measurements relating to alleged
10 architectural barriers such as slopes, heights, levels of
11 landings, poundage of pressures, etc., but Wilson did not state
12 how he made the measurements nor specify how he acquired this
13 knowledge (e.g., Wilson Decl. at ¶¶ 13-14.) Because Wilson did
14 not state that he was personally involved in any of the
15 measurements to which he testifies, and because personal
16 knowledge cannot be inferred, the statements in Wilson's
17 declaration referencing such measurements cannot be considered
18 by the Court. See Edwards v. Toys "R" Us, 527 F.Supp.2d 1197,
19 1200 (C.D. Cal. 2007) (under Rule 56(e), a declaration not based
20 on personal knowledge is inadmissible at the summary judgment
21 stage); see also Fed. R. Civ. P. 56(e) ("Supporting and opposing
22 affidavits shall be made on personal knowledge, shall set forth
23 such facts as would be admissible in evidence, and shall show
24 affirmatively that the affiant is competent to testify to the
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1 matters stated therein"). Thus, because the only affidavit
2 supporting Wilson's motion for summary judgment is his own
3 declaration and this declaration fails to demonstrate personal
4 knowledge, the facts alleged are not sufficiently supported to
5 create a cognizable claim for relief and thus do not support
6 granting a motion for summary judgment against Defendants.
7

8 In addition, Wilson's declaration is defective because it
9 contains opinions that constitute expert testimony despite the
10 fact that Wilson has not been disclosed as an expert. See id.
11 at ¶¶ 11-14. Plaintiff failed to disclose an expert by July 11,
12 2008 as ordered by this Court in its July 17, 2007 Status (Pre-
13 Trial Scheduling) Order. Doc. # 14. Rule 26 requires parties
14 to disclose the identity of expert witnesses "accompanied by a
15 written report prepared and signed by the witness." See Fed. R.
16 Civ. P. 26(a). Rule 37(c)(1) gives teeth to these requirements
17 by forbidding the use on a motion or at trial of any information
18 required to be disclosed by Rule 26 that is not properly
19 disclosed, unless the parties' failure to disclose the required
20 information is substantially justified or harmless. See Yetti
21 by Molly Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th
22 Cir. 2001) (citing Fed. R. Civ. P. 37(c)(1) ("If a party fails
23 to provide information or identify a witness as required by Rule
24 26(a) or (e), the party is not allowed to use that information
25 or witness to supply evidence on a motion, at a hearing, or at a
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1 trial, unless the failure was substantially justified or is
2 harmless.")). Rule 37(c)(1) was designed to be self-executing
3 in order to produce a strong incentive for disclosure of
4 material that the disclosing party would expect to use as
5 evidence whether at trial, at a hearing, or on a motion, such as
6 one under Rule 56. See Fed. R. Civ. P. 37, Advisory Comm. Note
7 (1993). The party failing to disclose the required information
8 bears the burden of demonstrating their failure was either
9 substantially justified or harmless. See Yetti by Molly, 259
10 F.3d at 1107.
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13 In Defendants' Opposition they contend that Plaintiff
14 failed to serve initial expert witness disclosures as required
15 by Rule 26. Defs' Opp. at 4:24-28, 5:1-16. Because Plaintiff
16 has not replied to Defendant's Opposition, the Court will treat
17 this failure as a concession that Wilson was not properly
18 disclosed in violation of Rule 26. Accordingly, because
19 Plaintiff did not demonstrate that his failure to disclose this
20 information was harmless or substantially justified, Wilson's
21 declaration cannot be considered by the Court on Plaintiff's
22 motion for summary judgment. See Yetti by Molly, 259 F.3d at
23 1106-1107.
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26 As such, Plaintiff has not provided evidence of a prima
27 facie case that architectural barriers existed or still exist at
28 the Restaurant. Plaintiff has not only failed to meet its

1 initial burden of demonstrating the absence of a genuine issue
2 of material fact for trial, Anderson, 477 U.S. at 248-249, but
3 also Plaintiff has failed to show essential evidence to
4 factually support his claims. Accordingly, Plaintiff's motion
5 for summary judgment against Defendants on the ADA claim is
6 denied.
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8 C. The Unruh Act

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10 Wilson's second claim for relief seeks to state violations
11 of the Unruh Act predicated upon violations of the rights under
12 the ADA. See Lentini v. California Center for the Arts,
13 Escondido, 370 F.3d 837, 846 (9th Cir. 2004) (a violation of any
14 right under the ADA is a violation of the Unruh Act). However,
15 because Wilson's Unruh Act claims turn on ADA liability, and
16 because Wilson failed to prove a violation of any right under
17 the ADA, Wilson's motion for summary judgment against Defendants
18 is denied.
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20 D. Summary Judgment Sua Sponte

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22 Defendants request the Court to exercise its inherent
23 discretion and enter summary judgment on Defendants' behalf.
24 See Defs' Request for Summary Judgment, Doc. # 34 at Attachment
25 #7. Defendants' request is based upon the fact that Plaintiff
26 has not disclosed an expert to testify in any manner. Plaintiff
27 does not have an expert to testify as to what architectural
28 barriers exist or existed at the Restaurant, to testify as to

1 what the ADAAG require and what sections pertain to which
2 alleged barriers, nor is there an expert to show whether removal
3 of any barriers is readily achievable as required by 42 U.S.C. §
4 12182(b)(2)(A)(iv).
5

6 District courts "possess the power to enter summary
7 judgment *sua sponte*, so long as the losing party was on notice
8 that [he] had to come forward with all [his] evidence."
9 Celotex, 477 U.S. at 326. To grant summary judgment on behalf
10 of defendant where defendant has not filed a motion, the
11 plaintiff must have (1) adequate notice and (2) a reasonable
12 opportunity to present an opposition. Kassbaum v. Steppenwolf
13 Productions, Inc., 236 F.3d 487, 494-495 (9th Cir. 2000). If a
14 court concludes that a non-moving party is entitled to judgment,
15 "great care must be exercised to assure that the original movant
16 has had an adequate opportunity to show that there is a genuine
17 issue and that his opponent is not entitled to judgment as a
18 matter of law." Id.
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21 Here, Plaintiff has been given adequate notice and a
22 reasonable opportunity to present an opposition. As stated
23 above, Plaintiff has not provided any admissible evidence before
24 the Court to demonstrate Defendants violated the ADA. Plaintiff
25 has not disclosed an ADA expert nor has he demonstrated any
26 personal knowledge in his declaration submitted to the Court.
27
28 In addition, Plaintiff cannot remedy the defect of failing to

1 disclose an expert because the deadline for expert disclosure
2 has passed. See Court's Scheduling Order, Doc. # 14 at 3:8-12.
3 Given Plaintiff's failure to provide competent evidence
4 supporting his claims coupled with the fact that Plaintiff
5 failed to file a reply brief, it appears to the Court that
6 Plaintiff cannot present a prima facie case for an ADA violation
7 and that the overwhelming weight of authority supports granting
8 summary judgment *sua sponte* to the Defendants. Kassbaum, 236
9 F.3d at 494-495. The record is fully developed and the
10 Plaintiff has been given adequate opportunity to present his
11 case. His failure to do so leaves this Court with no choice but
12 to grant summary judgment *sua sponte* in favor of Defendants.
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16 III. ORDER

17 For the reasons set forth above, Plaintiff's motion for
18 summary judgment is DENIED, and Defendants are GRANTED summary
19 judgment *sua sponte*.
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21 IT IS SO ORDERED.

22 Dated: January 26, 2009

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24 JOHN A. MENDEZ,
25 UNITED STATES DISTRICT JUDGE
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