

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ANTHONY LERMA,)	Case No.: 5:11-CV-02161-LHK
)	
Plaintiff,)	ORDER GRANTING IN PART AND
)	DENYING IN PART MOTION TO
v.)	DISMISS FOR LACK OF SUBJECT
)	MATTER JURISDICTION
NTT MCKEE RETAIL CENTER, LLC;)	
WELLS FARGO BANK, N.A., TRUSTEE OF)	
THE ROBERT AND HELEN REEL TRUSTS;)	
RAVINDER N. SHARMA dba STOP N SAVE;)	
DANA N. PHAN dba TAPIOCA EXPRESS,)	
)	
Defendants.)	

Plaintiff Anthony Lerma (“Lerma”) brings this action against various defendants under the Americans with Disabilities Act of 1990, 42 U.S.C. § 1201 *et seq.* (“ADA”), and related California statutes, seeking damages, declaratory and injunctive relief, attorneys’ fees, and costs. Defendant Wells Fargo Bank, N.A., as trustee for the Robert Ellis Reel Trust dated April 20, 1964 (the “Trust”), erroneously sued herein as Wells Fargo Bank, N.A., Trustee of the Robert and Helen Reel Trusts, moves to dismiss for lack of subject matter jurisdiction over Lerma’s claims as to the Trust. *See* Fed. R. Civ. P. 12(b)(1). Pursuant to Local Civil Rule 7-1(b), the Court finds this motion appropriate for determination without oral argument and hereby VACATES the motion hearing scheduled for October 20, 2011. Having considered the parties’ submissions and the relevant law, the Court dismisses Plaintiff’s ADA claim against the Trust for lack of subject matter jurisdiction

1 but exercises supplemental jurisdiction over Plaintiff’s remaining state law claims against the
2 Trust. Accordingly, the motion to dismiss is GRANTED in part and DENIED in part.

3 **I. BACKGROUND**

4 The following factual allegations from Plaintiff’s First Amended Complaint (“FAC”) are
5 accepted as true for purposes of ruling on this motion to dismiss. *See Outdoor Media Group, Inc.*
6 *v. City of Beaumont*, 506 F.3d 895, 899-900 (9th Cir. 2007).

7 Plaintiff Anthony Lerma’s mobility is limited due to chronic non-healing diabetic ulcers on
8 his legs, radiculopathy, and degenerative disc disease on his back, and he requires use of a
9 wheelchair. FAC ¶ 10. Plaintiff alleges that he encountered various access barriers during a visit
10 to Stop N Save, located at 2297 McKee Road, San Jose, California, and to Tapioca Express,
11 located at 2285 McKee Road, San Jose, California. Both retail stores are located in the same
12 shopping center known as the NTT McKee Retail Facility, located at 2285-2299 McKee Road, San
13 Jose, California (“McKee Retail Facility”), whose common areas also presented multiple access
14 barriers. Among other allegations, Plaintiff asserts that the McKeeRetail Facility, Stop N Save,
15 and Tapioca Express all suffer from missing and/or incorrect warning signage in their parking
16 facilities, improperly configured accessible parking spaces, impermissibly steep access ramps, and
17 improperly configured access routes between buildings and other facilities. FAC ¶¶ 15-16, 19-20,
18 23-24.

19 On May 2, 2011, Plaintiff initiated this action against NTT McKee Retail Center LLC
20 (“NTT”), Wells Fargo Bank, N.A., Trustee of the Robert and Helen Reel Trust (the “Trust”),
21 Ravinder N. Sharma dba Stop N Save (“Stop N Save”), and Dana N. Phan dba Tapioca Express
22 (“Tapioca Express”), all of whom are alleged to own, operate, and/or lease the retail facilities in
23 question. FAC ¶¶ 2, 7-9, 11-13. Plaintiff filed a First Amended Complaint on June 21, 2011,
24 alleging four causes of action: (1) violation of the Americans with Disabilities Act (“ADA”), 42
25 U.S.C. § 12101 *et seq.*; (2) violation of the California Disabled Persons Act (“DPA”), Cal. Civ.
26 Code § 54 *et seq.*; (3) violation of the California Unruh Civil Rights Act (“Unruh Act”), Cal. Civ.
27 Code § 51 *et seq.*; and (4) violation of California Health and Safety Code § 19955.

1 The ADA provides that “[n]o individual shall be discriminated against on the basis of
2 disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages,
3 or accommodations of any place of public accommodation by any person who owns, leases (or
4 leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a). Plaintiff alleges
5 that Defendants violated various provisions of the ADA by failing to design and construct
6 accessible facilities, remove architectural barriers, make an altered facility accessible, or modify
7 existing policies and practices necessary to make the facilities accessible. *See id.* §§ 12182(b),
8 12183(a). Plaintiff seeks declaratory and injunctive relief, attorneys’ fees, and costs pursuant to 42
9 U.S.C. § 12205. FAC ¶¶ 42-43.

10 The DPA incorporates by reference an individual’s rights under the ADA. *See* Cal. Civ.
11 Code §§ 54(c), 54.1(d). The DPA provides that a plaintiff whose ADA rights are violated may
12 seek treble damages against “[a]ny person or persons, firm or corporation who denies or interferes
13 with admittance to or enjoyment of the public facilities . . . or otherwise interferes with the rights of
14 an individual with a disability,” and provides for a statutory minimum recovery of \$1,000 for each
15 offense. *Id.* § 54.3(a); *see id.* §§ 54(c), 54.1(d). In addition to declaratory and injunctive relief,
16 Plaintiff seeks actual damages, both general and special, pursuant to § 54.3(a). *See* FAC ¶¶ 50-51.

17 The Unruh Act also incorporates by reference an individual’s rights under the ADA and
18 provides for the recovery of statutory damages upon proof that an individual’s rights under the
19 ADA have been violated. Cal. Civ. Code §§ 51(f), 52(a). Plaintiff seeks statutory minimum
20 damages of \$4,000 for each offense, as provided for under the Unruh Act. *See id.* § 52(a); FAC ¶
21 58.

22 Finally, Plaintiff seeks injunctive relief and attorneys’ fees pursuant to California Health
23 and Safety Code § 19953.

24 In resolving a factual attack on jurisdiction on a Rule 12(b)(1) motion to dismiss, the Court
25 may review evidence beyond the complaint without converting the motion to dismiss into a motion
26 for summary judgment. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)
27 (citing *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)). The Court
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1 therefore takes notice of the following additional factual allegations submitted by Plaintiff and
2 Defendant in the course of briefing this motion, solely for purposes of resolving the instant motion.

3 The Trust owned the McKee Retail Center that is the subject of this action until January 24,
4 2011, at which time ownership transferred to NTT McKee Retail Center LLC, the present owner.
5 See Br., Ex. A. ECF No. 19-2. Plaintiff does not object to or dispute this fact. See Reply Br. at 3.
6 Plaintiff alleges that he visited Tapioca Express on April 22, 2010, Stop N Save on April 24, 2010,
7 and Tapioca Express again on March 21, 2011, Opp'n Br., Lerma Decl., ECF No. 24-2, and
8 appears to concede that the Trust no longer owned the property in question by the time of his third
9 visit in March 2011, see Opp'n Br. at 3.

10 II. LEGAL STANDARD

11 Rule 12(b)(1) of the Federal Rules of Civil Procedure requires dismissal of a complaint if
12 the court lacks subject matter jurisdiction. On a motion to dismiss for lack of subject matter
13 jurisdiction pursuant to Rule 12(b)(1), the party asserting jurisdiction has the burden of establishing
14 that subject matter jurisdiction is proper. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377
15 (1994).

16 III. ANALYSIS

17 The only remedy available to a private litigant under Title III is injunctive relief. 42 U.S.C.
18 § 12188(a); see *Wander v. Kaus*, 304 F.3d 856, 858 (9th Cir. 2002) (“Damages are not recoverable
19 under Title III of the ADA—only injunctive relief is available for violations of Title III.”).

20 Defendant argues that because the Trust no longer has ownership or control over the McKee Retail
21 Facility, Plaintiff cannot seek an injunction against the Trust and thereby lacks standing to assert
22 his ADA claim against it. Defendant argues that the Court therefore lacks subject matter
23 jurisdiction over Plaintiff’s ADA claims against the Trust and should dismiss Plaintiff’s remaining
24 state law claims against it. Br. at 3; see also *Wander*, 304 F.3d at 858 (holding that there is no
25 federal-question jurisdiction over a lawsuit for damages brought solely under California’s Disabled
26 Persons Act, even though violation of the federal ADA is an element of the state-law claim).

27 Plaintiff concedes that he has no justiciable federal claim against the Trust but asks the Court to
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1 exercise supplemental jurisdiction over his state law claims, which provide for recovery of money
2 damages. Opp'n Br. at 3; *see* Cal. Civ. Code §§ 52(a), 54.3(a). Accordingly, the Court GRANTS
3 Defendant's motion to dismiss Plaintiff's first cause of action under the ADA against the Trust
4 without further discussion and turns now to the question of supplemental jurisdiction over
5 Plaintiff's remaining state law claims against the Trust.

6 **A. Same Case or Controversy**

7 Where a federal court has original jurisdiction over a claim, the court has supplemental
8 jurisdiction over "all other claims that are so related to claims in the action within [the court's]
9 original jurisdiction that they form part of the same case or controversy under Article III of the
10 United States Constitution." 28 U.S.C. § 1367(a); *see also* *Trs. of the Constr. Indus. and Laborers*
11 *Health and Welfare Trust v. Desert Valley Landscape & Maint., Inc.*, 333 F.3d 923, 925 (9th Cir.
12 2003) (upholding the constitutionality of supplemental jurisdiction). Nonfederal claims are part of
13 the same "case" as federal claims when they "'derive from a common nucleus of operative fact'
14 and are such that a plaintiff 'would ordinarily be expected to try them in one judicial proceeding.'"
15 *Finley v. United States*, 490 U.S. 545, 549 (1989) (quoting *United Mine Workers of Am. v. Gibbs*,
16 383 U.S. 715, 725 (1966)); *accord* *Trs. of the Constr. Indus.*, 333 F.3d at 925; *Mendoza v. Zirkle*
17 *Fruit Co.*, 301 F.3d 1163, 1174 (9th Cir. 2002); *Hoeck v. City of Portland*, 57 F.3d 781, 785 (9th
18 Cir. 1995). The Court's supplemental jurisdiction under 28 U.S.C. § 12367(a) "shall include
19 claims that involve the joinder or intervention of additional parties." 28 U.S.C. § 1367(a); *see also*
20 *Mendoza*, 301 F.3d at 1173-74 (upholding the constitutionality of pendent party jurisdiction, so
21 long as the claims form "but one constitutional case" and "derive from a common nucleus of
22 operative fact" (internal quotation marks omitted)).

23 Plaintiff has clearly stated a claim arising under federal law against Defendants NTT, Stop
24 N Save, and Tapioca Express, and the Trust does not challenge the Court's original jurisdiction
25 over Plaintiff's ADA claims with respect to these defendants. Because it is undisputed that the
26 Court has original jurisdiction over at least one of Plaintiff's claims, the sole question presented
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1 here is whether Plaintiff’s ADA and state-law claims derive from a common nucleus of operative
2 fact.

3 Defendant argues that “Plaintiff’s ADA claims against NTT truly have very little to do with
4 his damage claims against the Trust. . . . Plaintiff’s claims against NTT [] involve the present
5 condition of the Subject Property and what injunctive relief requiring disabled access remediation
6 is appropriate—Plaintiff’s claims against the Trust, on the other hand, are premised on whether the
7 Plaintiff encountered disabled access barriers at the Subject Property more than a year ago.” Reply
8 Br. at 2-3. Defendant argues that, because Plaintiff will have to prove different facts to support
9 each of its claims and will be subject to different defenses, Plaintiff’s ADA and state-law claims do
10 not derive from a common nucleus of operative fact.

11 The Court is not persuaded. Plaintiff’s state-law claims against all defendants are closely
12 intertwined with its ADA claims. Indeed, Plaintiff seeks a declaration from this Court that
13 Defendants violated the ADA as a predicate basis for seeking damages under the Unruh Act and
14 the DPA. *See* FAC ¶ 43; *see also* FAC ¶¶ 49, 57. Regardless of the possibility that Plaintiff may
15 have to make an additional showing, if defendants raise a mootness challenge to his claim for
16 injunction, that the conditions he experienced during his past visits to the retail facilities in question
17 continue to persist, it is undisputed that Lerma’s April 2010 visits to the McKee Retail Facility
18 form the basis for his First Amended Complaint and for all allegations therein. Plaintiff’s ADA
19 and state-law claims therefore all clearly arise from the same common nucleus of operative facts.

20 Defendant’s logic would impose a rule precluding federal courts from ever being able to
21 exercise supplemental jurisdiction over a plaintiff’s state law claim for damages related to a
22 properly pled ADA claim, even if the federal and state claims were asserted against the same party,
23 because the state law claim would necessarily be retrospective while injunctive relief would
24 invariably be prospective. Such a rule would serve neither the interests of judicial economy nor
25 convenience and fairness to litigants that motivate 28 U.S.C. § 1367. *See Gibbs*, 383 U.S. at 726
26 (explaining that these factors justify supplemental jurisdiction). Numerous courts have already
27 found the exercise of supplemental jurisdiction over state law claims related to an ADA claim
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1 proper, emphasizing that the burdens of proof and standards of liability are identical for ADA and
2 Unruh Act claims. *See, e.g., Chapman v. Pier 1 Imports (U.S.), Inc.*, 2011 WL 3667510 at *8
3 (E.D. Cal. Aug. 22, 2011); *Johnson v. United Rental Nw., Inc.*, No. 2:11-cv-00204-JAM-EFB,
4 2011 WL 2746110 at *4 (E.D. Cal. July 13, 2011); *Johnson v. Makinen*, No. 2:09-cv-796-FCD-
5 KJM, 2009 WL 2137130 at *3 (E.D. Cal. July 15, 2009); *cf. Lentini v. Cal. Center for the Arts,*
6 *Escondido*, 370 F.3d 837 (9th Cir. 2004) (upholding district court’s award under the Unruh Act
7 without discussion of subject matter jurisdiction). This Court agrees. The state law claims asserted
8 here arise from the same common nucleus of operative facts and are so related to Plaintiff’s ADA
9 claim as to form part of the same constitutional case. *See Gibbs*, 383 U.S. at 725. The Court
10 therefore may exercise supplemental jurisdiction over Plaintiff’s state-law claims against the Trust.

11 **B. Discretionary Factors**

12 Although the Court concludes that it may constitutionally exercise pendent party
13 jurisdiction over Plaintiff’s state law claims against the Trust, the Court may, in its discretion,
14 decline to exercise supplemental jurisdiction where: (1) the claim raises a novel or complex issue
15 of state law; (2) the claim substantially predominates over the claim or claims over which the Court
16 has original jurisdiction; (3) the Court has dismissed all claims over which it has original
17 jurisdiction; or (4) “in exceptional circumstances, there are other compelling reasons for declining
18 jurisdiction.” 28 U.S.C. § 1367(c).

19 None of these exceptions applies here. Plaintiff’s DPA and Unruh Acts do not raise a novel
20 or complex issue. To the contrary, they directly incorporate the federal ADA by reference.
21 Although there was a period of time when it was unclear whether a claim for damages under the
22 Unruh Act required as an additional element proof of intentional discrimination, *see Munson v.*
23 *Del. Daco, Inc.*, 522 F.3d 997 (9th Cir. 2008) (certifying question to the California Supreme
24 Court); *cf. Paulick v. Bavarian Lion Vineyard Dev., LLC*, 2009 WL 691123 at *2-3 (N.D. Cal.
25 Mar. 10, 2009) (Wilken, J.) (acknowledging conflicting authority but exercising supplemental
26 jurisdiction over plaintiff’s Unruh Act claims nonetheless in the interest of judicial economy,
27 convenience, fairness, and comity), the California Supreme Court has since clarified that “[a]
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1 plaintiff who establishes a violation of the ADA . . . need not prove intentional discrimination in
2 order to obtain damages under [California Civil Code § 52],” *Munson v. Del Taco, Inc.*, 46 Cal. 4th
3 661, 665 (2009). Thus, the burdens of proof are identical for Plaintiff’s ADA, DPA, and Unruh
4 Act claims.

5 Nor do Plaintiff’s DPA and Unruh Act claims for damages “substantially predominate[]”
6 over his ADA claim for injunctive relief. As previously noted, both the DPA and the Unruh Act
7 provide that “violation of the right of an individual under the [ADA]” constitutes a violation of
8 state law. *See* Cal. Civ. Code §§ 54(c), 54.1(d) (DPA); *id.* § 51(f) (Unruh Act). As pleaded in the
9 FAC, Plaintiff’s claims for relief under these state provisions are predicated, in part, on the Court
10 finding that Defendants violated his rights under the ADA. *See* FAC ¶¶ 43, 49, 57. The Court
11 therefore finds that Plaintiff’s ADA claims dominate.

12 Finally, the Court does not find that declining to exercise its supplemental jurisdiction
13 would serve “the objectives of judicial economy, convenience and fairness to the parties, and
14 comity.” *Trs. of the Constr. Indus.*, 333 F.3d at 925 (citing *Exec. Software N. Am., Inc. v. United*
15 *States Dist. Court*, 24 F.3d 1545, 1557 (9th Cir. 1994), *overruled on other grounds by Cal. Dep’t of*
16 *Water Res. v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008)). Plaintiff argues that the interests of
17 judicial economy, convenience, and fairness to the parties all favor retaining jurisdiction over the
18 state law claims because the Trust is a necessary party. A party is necessary if, “(A) in that
19 person’s absence, the court cannot accord complete relief among existing parties; or (B) that person
20 claims an interest relating to the subject of the action and is so situated that disposing of the action
21 in the person’s absence may: (i) as a practical matter impair or impede the person’s ability to
22 protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double,
23 multiple, or otherwise inconsistent obligations because of the interest.” Fed. R. Civ. P. 19(a).
24 Plaintiff argues that the Court cannot accord complete relief as to his damages claims for the visits
25 he made to the McKee Retail Facility in April 2010 unless the Trust remains a party to this suit
26 because the Trust may have discoverable information regarding the liability terms of the purchase
27 and sale of the property, which could affect claims for contribution and indemnification among the
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1 various defendants. Plaintiff further argues that, if he prevails and the Trust is not party to this suit,
2 the remaining defendants could be exposed to substantial risk of incurring inconsistent obligations,
3 contrary to the objectives of Rule 19.

4 For essentially the same reasons it believes the Court lacks supplemental jurisdiction over
5 Lerma's state law claims altogether, Defendant argues the Court should decline to exercise any
6 supplemental jurisdiction it may have because retaining jurisdiction over the Trust would not be
7 efficient and would be unduly prejudicial. The Court again rejects Defendant's arguments and
8 agrees with Plaintiff that retaining jurisdiction over the Trust may be necessary to ensure fair and
9 adequate resolution of ultimate liability issues among all the named defendants. Furthermore,
10 because Plaintiff's state law claims against the other three defendants, over which the Court has
11 uncontested supplemental jurisdiction, involve the same nucleus of operative facts as Plaintiff's
12 state law claims against the Trust, it would be inefficient and a waste of judicial resources to force
13 Plaintiff to bring a separate, nearly identical case in state court alleging the same facts against the
14 Trust as sole defendant. The Court therefore concludes that, in light of its exercise of supplemental
15 jurisdiction over Plaintiff's state law claims against Defendants NTT, Stop N Save, and Tapioca
16 Express, it is in the interests of judicial economy, convenience, and fairness to all parties to retain
17 jurisdiction over Plaintiff's state law claims against the Trust as well.

18 **IV. CONCLUSION**

19 For the foregoing reasons, the Court concludes that the federal and state claims here derive
20 from a common nucleus of operative facts and that it is in the interest of economy, convenience,
21 and fairness for Plaintiff's state and federal claims as to all Defendants to remain in federal court.
22 Accordingly, the Court will exercise supplemental jurisdiction under 28 U.S.C. § 1367 over
23 Plaintiff's state law claims against the Trust. The motion to dismiss Plaintiff's state law claims
24 against the Trust is DENIED. The motion to dismiss Plaintiff's ADA claim against the Trust is
25 GRANTED.

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IT IS SO ORDERED.

Dated: October 18, 2011



LUCY H. KOH
United States District Judge