

TRE Legal Practice
Attn: Elder, Timothy
4226 Castanos St
Fremont, CA 94536

Kokanovich, Mark S.
1 E. Washington St.
#2300
Phoenix, CA 85003

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Bashin <p style="text-align: center;">Plaintiff/Petitioner(s)</p> VS. Conduent, Inc. <p style="text-align: center;">Defendant/Respondent(s) (Abbreviated Title)</p>	No. <u>RG18888208</u> Order Demurrer to Complaint Overruled
--	--

The Demurrer to Complaint was set for hearing on 11/05/2019 at 03:00 PM in Department 23 before the Honorable Brad Seligman. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: Defendants Conduent Incorporated and Conduent State & Local Solutions, Inc.'s (collectively, "Defendants") Motion to Strike the Second Amended Complaint is DENIED. Defendants' Demurrer to Plaintiff's Second Amended Complaint ("SAC") is OVERRULED. IT IS ORDERED THAT Defendants shall file an answer no later than November 26, 2019.

MOTION TO STRIKE

"A party may amend its pleading once without leave of the court at any time before the answer, demurrer, or motion to strike is filed, or after a demurrer or motion to strike is filed but before the demurrer or motion to strike is heard if the amended pleading is filed and served no later than the date for filing an opposition to the demurrer or motion to strike." (CCP § 472(a).) "A party may amend the pleading after the date for filing an opposition to the demurrer or motion to strike, upon stipulation by the parties." (Id.)

Plaintiff filed this action on January 8, 2018. Plaintiff then filed a First Amended Complaint on May 3, 2019. Defendants demurred to the First Amended Complaint, and Plaintiff filed a Second Amended Complaint on July 10, 2019. Plaintiff argues that since no demurrer was filed to challenge the original complaint, section 472 should be interpreted to permit Plaintiff to amend the complaint once before the opposition of the first demurrer in an action is due. As Plaintiff points out, "the purpose of the statute permitting amendments as of right before an answer is filed or a demurrer is ruled upon is to promote judicial efficiency and reduce the costs of litigation." (Barton v. Khan (2007) 157 Cal. App. 4th 1216, 1221.) "If a defect in a pleading can be cured before the defendant has answered or the court has heard a demurrer, both judicial resources and attorney time will be saved in the process." (Id.; Hedwall v. PCMV, LLC (2018) 22 Cal. App. 5th 564, 575 ["[A]fter a demurrer is sustained to the original complaint or cross-complaint with leave to amend, the proponent of that pleading loses the statutory entitlement to file an amended pleading as a matter of right."].) The Court finds that under these circumstances, judicial efficiency and the purpose of section 472 are better served by allowing the Second Amended Complaint. Defendants make no showing of prejudice. They had a full opportunity to brief the demurrer to the SAC. Thus, the Motion to Strike is DENIED.

DEMURRER

This qui tam action was filed by Plaintiff against Defendants to recover damages, civil penalties, and attorneys' fees and costs on behalf of California for Defendants' alleged violation of the California False Claims Act ("False Claims Act"), Government Code sections 12650(a)(1), (a)(2), and (a)(8), in connection with a contract with the State of California Department of Parks and Recreation ("DPR") to design, test, and maintain ReserveCalifornia.com, a public-facing website for visitors to book campgrounds and lodging in California State Parks. Plaintiff alleges that the website delivered by Defendants are not accessible to users who are blind or have limited vision or manual dexterity. Plaintiff Bryan Bashin ("Bashin") in his individual capacity also alleges violations of the California Unruh Civil Rights Act ("Unruh Act") and seeks declaratory relief.

STANDARD OF LAW

"A demurrer tests the legal sufficiency of the factual allegations in a complaint." (Redfearn v. Trader Joe's Co. (2018) 20 Cal. App. 5th 989, 996.) The Court must determine "whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense." (Id.) The Court assumes "the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken." (Id.) "As a general rule in testing a pleading against a demurrer the facts alleged in the pleading are deemed to be true, however improbable they may be," unless the "complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed." (Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal. App. 3d 593, 604.) "The court does not, however, assume the truth of contentions, deductions or conclusions of law." (Aubry v. Tri-City Hosp. Dist. (1992) 2 Cal. 4th 962, 967.) Courts "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (Goncharov v. Uber Techs., Inc. (2018) 19 Cal. App. 5th 1157, 1165.) Courts "construe the complaint 'liberally ... with a view to substantial justice between the parties[.]'" (Id.)

"[I]f a plaintiff pleads a claim that fails to state a cause of action, a demurrer is properly sustained[.]" (Boxer v. City of Beverly Hills (2016) 246 Cal. App. 4th 1212, 1225.) "Where the complaint is defective, '[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint.'" (Redfearn, 20 Cal. App. 5th at 996.) "[L]eave to amend should not be granted where ... amendment would be futile." (Id. at 997.)

CONDUENT INCORPORATED'S LIABILITY

Defendants demur to the entire cause of action to the extent claims are asserted against Conduent Incorporated on the grounds that Conduent Incorporated is purportedly a mere holding company, which they assert would not be liable for the allegedly fraudulent or injurious conduct as a matter of law. Defendants contend that the only specific allegations are against Conduent State & Local Solutions, Inc., and not Conduent Incorporated, which has no business lines or individual employees.

However, Defendants provide no case law stating that holding companies as a matter of law are never liable for the types of claims asserted in this action. Indeed, in the case cited by Defendants, the issue was whether a court had jurisdiction over a foreign investor corporation and the holding turned specifically on the nature of that corporation's involvement in the conduct at issue. (Sonora Diamond Corp. v. Superior Court (2000) 83 Cal. App. 4th 523, 545 [holding that a "parent's status as a mere holding company with no business operations other than the investment in the subsidiaries" is insufficient "to make out a prima facie case that the subsidiaries were doing business in the forum state as the agents of the parent"].) Here, the Court must accept the allegations in the SAC as true for purposes of a demurrer, and there are no facts in the SAC or any judicially noticeable facts that would render Conduent Incorporated immune from liability as a matter of law. As Plaintiff states, his theories of liability turn on the alter ego, agency and availment doctrines, which are fact-specific inquiries that should not be determined on demurrer. Plaintiff alleges unity of operations, agency, and injustice. (SAC ¶¶ 107-110) Further, the SAC asserts that Conduent Incorporated assumed the liabilities of Xerox State & Local Solutions ("Xerox") pursuant to a Separation and Distribution Agreement dated December 30, 2016. (SAC ¶ 22.) Thus, the Court OVERRULES Defendants' Demurrer to the entire SAC on this ground.

FIRST CAUSE OF ACTION - FALSE CLAIMS ACT & THIRD CAUSE OF ACTION - DECLARATORY RELIEF

Defendants demur to the first and third causes of action in the SAC on the grounds that Plaintiff purportedly: (1) failed to plead a false or fraudulent claim submitted by Defendants; (2) failed to plead that Defendants knew that a claim was false or fraudulent; and (3) failed to plead that a false claim was material to DPR's payment decision.

As pertinent here, one who "[k]nowingly presents or causes to be presented a false or fraudulent claim for payment or approval" is in violation of the False Claims Act. (Cal. Gov't Code § 12651(a)(1).) "The elements of fraud . . . are: a representation, usually of fact, which is false, knowledge of its falsity, intent to defraud, justifiable reliance upon the misrepresentation, and damage resulting from that justifiable reliance." (Stansfield v. Starkey (1990) 220 Cal. App. 3d 59, 72-73.) "Every element of the cause of action for fraud must be alleged in the proper manner and the facts constituting the fraud must be alleged with sufficient specificity to allow defendant to understand fully the nature of the charge made." (Id. at 73.) This "strict requirement" of pleading "necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" (Id.) "The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (Tarmann v. State Farm Mut. Auto. Ins. Co. (1991) 2 Cal. App. 4th 153, 157.) However, "the requirement of specificity is relaxed when the allegations indicate that 'the defendant must necessarily possess full information concerning the facts of the controversy' . . . or when the facts lie more in the knowledge of the opposite party." (Id. at 158.)

Plaintiff alleges the following: DPR published a request for proposal in January 2015 for an accessibility-compliant website. (SAC ¶ 10.) Defendants, then doing business as Xerox, responded with a proposal on August 12, 2015, and promised DPR that they would deliver an accessibility-compliant website that could be used by visitors with disabilities, including blindness. (SAC ¶¶ 2, 11.) Xerox submitted bid documents, statements and records upon which they knew DPR would rely in awarding the contract, knowing that they did not intend to conduct the design and testing activities necessary to ensure that the website was accessible. (Id. ¶ 12.) DPR awarded Defendant the contract on March 30, 2016. (Id. ¶¶ 11, 50-51.) Defendants knowingly made further false representations in their Web Design Plan and Master Testing Plan-identifying Xerox's employees, Ginger Salone and Kim Anderson-including purportedly knowingly false claims that automated testers were sufficient to test for accessibility issues. (Id. ¶¶ 13, 52-55, 57-61.) Defendants' failure to use human testers and proper automated testing tools was likely to result in a non-compliant website. (Id. ¶ 62.) DPR relied on Defendants' false representations in awarding the contract, granting approval for the project to move forward, publishing the website, and later to pay the purportedly false claim. (Id. ¶¶ 11-13.) As of the go-live date of August 1, 2017 and to the present, the delivered website has been inaccessible to blind users like Bashin. (Id. ¶ 3.)

Plaintiff argues that Conduent State & Local Solutions submitted false claims when it sought payment for the website sixteen times between August 2017 and December 2018. (SAC ¶¶ 69, 74.) Specifically, Plaintiff asserts that the request for payment certified that the website satisfied the contractual accessibility requirements between the State and Defendants. (Id. ¶ 70.) Plaintiff claim that Conduent State & Local Solutions knowingly submitted false claims that it knew were false, or acted in deliberate ignorance of the truth or falsity of the information, or acted in reckless disregard for the truth or falsity of the information. (SAC ¶ 103.) Alternatively, Plaintiff alleges that Defendants failed to timely disclose the falsity of their claims once the falsity was discovered. (Id. ¶ 105.)

Here, Plaintiff has alleged facts concerning the details of false representations purportedly made, by whom and to whom, the knowledge of Defendants of the falsity of their statements, and details regarding the claims for payment by Defendants. The Court finds that the above allegations are pled with sufficient particularity as to each of the elements of the claim to support a claim for violation of the False Claims Act. Thus, the Court OVERRULES Defendants' Demurrer to the First and Third Causes of Action on this ground.

SECOND CAUSE OF ACTION - UNRUH ACT & THIRD CAUSE OF ACTION - DECLARATORY RELIEF

Defendants demur to the second and third causes of action in the SAC on the grounds that Bashin allegedly lacks standing to bring the Unruh Act claim and that he cannot sue Defendants, who are private entities, for alleged Title II violations by a public entity.

Under the Unruh Act, "[a]ll persons within the jurisdiction of [California] are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Cal. Civ. Code § 51(b).) "Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51 [Unruh Act] . . . is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51[.]" (Cal. Civ. Code § 52(a).)

Defendants cite to one federal case, which held that a plaintiff had not been injured when "an agency with an inaccessible Web site may also meet its legal obligations by providing an alternative accessible way for citizens to use the programs or services, such as a staffed telephone information line." (Price v. Town of Longboat Key, Fla., (M.D. Fla. May 20, 2019) No. 819CV00591T02AAS, 2019 WL 2173834, at *5.) In that case, the plaintiff "received the information he sought via thumb drive," and the court concluded that "use of an alternative method of delivery, even if not preferred, hardly constitutes an injury-in-fact." (Id.)

Here, Bashin contends that he has been unable to enjoy the same level of access to state parks enjoyed by people without disabilities because of the inaccessibility of the website, and has had to rely on sighted volunteers to make reservations for him during specific times. (SAC ¶¶ 79-80.) He argues that the alternative customer call center has limited hours from 8 a.m. and 6 p.m., and does not offer access to program activities, benefits, and privileges equal to that available to sighted users twenty-four hours a day through the website. (Id. ¶ 81.) He states that he would use the website independently to book his regular camping trips if the website were accessible. (Id. ¶ 83.) Unlike the plaintiff in Price, who failed to allege that he "has ever been, or plans to be a resident of the Town" for which he sought information, and "apparently not even visited or has concrete plans to visit the Town," Bashin has alleged specific facts regarding his need for access to the information on the website. (Price, 2019 WL 2173834, at *4.) Further, Bashin has alleged that he is unable to obtain the equivalent information through alternative means, such as the call center. Thus, the Court finds that the SAC sufficiently pled an injury-in-fact. (White v. Square, Inc. (2019) 7 Cal. 5th 1019, 1032-33 ["[A] person who visits a business's website with intent to use its services and encounters terms or conditions that exclude the person from full and equal access to its services has standing under the Unruh Civil Rights Act, with no further requirement that the person enter into an agreement or transaction with the business."].)

The Court **OVERRULES** Defendants' Demurrer to the Second and Third Causes of Action on this ground.

Defendants then demur to liability under Title II of the Americans with Disabilities Act ("ADA"), asserting that such a claim may only be asserted against a public entity. Under Title II, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." (42 U.S.C. § 12132.) However, it is also "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by [the ADA]." (42 U.S.C. § 12203(b).) Defendant cites no case holding that an interference claim cannot be brought by a third party. But "we can envision, at least hypothetically, that there could be interference with the rights of a disabled individual by a third party." Binno v. American Bar Association (6th Cir. 2016) 826 F.3d 338, 348. Here the interference alleged is manifest-the very website that is the portal to access to the public benefit, is unavailable to persons with disabilities. Plaintiffs allege that Defendants have interfered with Bashin's rights by interfering with the DPR's ability to serve him. (Opp. at p. 10; SAC ¶¶ 115-116, 122-123.)

The Court **OVERRULES** Defendants' Demurrer to the Second and Third Causes of Action on this ground.

Dated: 11/05/2019

facsimile


Judge Brad Seligman

Order