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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

Jonathan Corbett,

Plaintiff,

v.

Insomniac Holdings, LLC, Speedway Motorsports, Inc.,

Defendants.

Case No. 2:16-cv-03604-PSG-JEM

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

Judge: Hon. Philip S. Gutierrez
Hearing Date: January 23, 2017
Hearing Time: 1:30 p.m.
Courtroom: 880

Trial Date: July 18, 2017
Action Filed: May 24, 2016

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I. INTRODUCTION

Plaintiff Jonathan Corbett's ("Plaintiff") opposition confirms that his case is wholly without merit and Defendants' Insomniac Holdings, LLC ("Insomniac") and Speedway Motorsports, Inc. ("SMI") (collectively, "Defendants") motion should be granted in its entirety. Plaintiff has brought this lawsuit seeking modification of a policy that was in effect for a specific event that took place many months ago *and which he did not attend*. Similarly, Plaintiff has failed to put forward any evidence that he is disabled or how the alleged policy denied him access. Instead, this entire lawsuit appears to be motivated by a desire to make it easier for him to smuggle illegal drugs into future music festivals. Plaintiff's opposition is bereft of any facts that create a genuine dispute of fact sufficient to survive summary judgment for several, independent reasons.

First, as a threshold matter, SMI is not subject to personal jurisdiction in California. Plaintiff has failed to meet his burden to come forward with facts to support his contention that SMI is subject to jurisdiction. Therefore, SMI must be dismissed from this lawsuit.

Second, Plaintiff lacks standing to sue. It is undisputed that Plaintiff did not attend the 2016 EDC in Las Vegas, Nevada and it is further undisputed that Plaintiff has never encountered the actual policy he complains of. Plaintiff has put forward no evidence of his disability, how the policy impacted him, or demonstrated how Insomniac's policy concerning OTC and prescription medications would have affected him. Therefore, any "injury" is entirely speculative and hypothetical.

Third, Plaintiff's claims for injunctive relief are moot. The only remedy under the Americans with Disabilities Act ("ADA") is injunctive relief - *i.e.* prospective relief. Plaintiff concedes that the "injury" he claims in this action is moot because the event in Plaintiff's complaint already occurred.

Fourth, in a bid to save his claim, Plaintiff has moved to amend his complaint, after the Court-imposed deadline to do so, to include injunctive relief as

to "future" EDC events. However, no finalized policy or procedures have yet been developed for any future EDC events in Las Vegas. Therefore, Plaintiff's claims as to future EDC events are not yet ripe for adjudication. It is entirely speculative whether Plaintiff will complain about future policies and/or whether Plaintiff will be denied a reasonable accommodation.

Fifth, Plaintiff did not request a modification of Insomniac's policy before he filed this lawsuit. Plaintiff argues he did, but he fails to produce any admissible evidence to refute Defendants' claim. Just as Plaintiff has not identified *how* Insomniac should modify its policy, he has likewise failed to submit any evidence on how any proposed modification is necessary and reasonable.

Sixth, the Unruh Act does not apply to this action as any alleged discrimination would have occurred outside of California. California law does not permit plaintiffs to sue for out-of-state acts.

Finally, to the extent the Court dismisses the ADA cause of action, it should decline to exercise supplemental jurisdiction over Plaintiff's state-law claims.

II. ARGUMENT

A. SMI Is Not Subject To Personal Jurisdiction In California.

Plaintiff fundamentally misunderstands the personal jurisdiction doctrine. Plaintiff's argument relies on the venue doctrine – which only comes into play *after* the threshold Constitutional requirements of subject matter and personal jurisdiction have been satisfied. (Dkt. 55 at 10).

It is black letter law that federal courts do not have nationwide personal jurisdiction. They have no broader power over persons (and companies) located outside the state in which they sit than the local state court. *Omni Capital Int'l, Ltd. v. Rudolph Wolff & Co., Ltd.*, 484 U.S. 97, 104-05 (1987); *see also* Rudder Group Practice Guide: Federal Civil Procedure Before Trial, Calif. & 9th Cir. Ed., § 3:23 (March 2016 update). In other words, federal district courts cannot assert jurisdiction over defendants who lack sufficient "minimum contacts" with the forum

state. Rudder Group § 3:25; *see also Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015) ("Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons.") (citations omitted).

Therefore, this Court only has personal jurisdiction over SMI to the same extent as a California state court. It is Plaintiff's burden to come forward with admissible evidence to establish the existence of personal jurisdiction. *Data Disc. Inc. v. Sys. Tech. Assoc.*, 557 F.2d 1280, 1285 (9th Cir. 1995).

As explained in Defendants' moving papers and the accompanying declaration of William Brooks, SMI does not have the requisite "minimum contacts" with California to establish a basis for personal jurisdiction. Plaintiff has come forward with no evidence to rebut this conclusion.

Plaintiff's discussion about what statutes he wants to apply and his venue choice are utterly irrelevant. For instance, Plaintiff argues that SMI is subject to Nevada law because it allegedly operates the Las Vegas Motor Speedway through a "shell subsidiary." (Dkt. 55 at 11). Putting aside Plaintiff's speculation about SMI's relationship with other entities, none of this has anything to do with SMI's claim that it is not subject to personal jurisdiction *in California*. Therefore, SMI should be dismissed from this case for lack of personal jurisdiction.

B. Plaintiff Has Failed To Establish Standing To Sue.

Plaintiff's opposition similarly fails to establish that he has standing to sue under Article III of the United States Constitution. Plaintiff claims, without any explanation, that he could not attend the EDC because of Insomniac's policies that he gleaned from a review of Insomniac's website. (Dkt. 55 at 12). This is insufficient to confer standing upon him.

A case which Plaintiff ignores, *Resnick v. Magical Cruise Co., Ltd.*, 148 F. Supp. 2d 1298, 1301 (M.D. Fla. 2001), considered and rejected Plaintiff's precise contention. In *Resnick*, the defendant cruise line moved the Court for summary judgment on the grounds that plaintiffs lacked standing to bring the claims because

they had not boarded or attempted to board the cruise ships at issue before the lawsuit was filed. *Id*. Plaintiffs argued that they had standing because they had "reasonable grounds to believe they [were] about suffer discrimination based on knowledge they [had] acquired from [their] review of [defendant's] website and its information regarding the amenities of the ships." *Id*. The Court disagreed with plaintiffs and granted defendant's motion. The Court reasoned that:

> "The alleged 'reasonable belief' based only on review of [defendant's] internet website that [plaintiff] would encounter discrimination if he attempted at some unspecified time in the future to cruise on one of [defendant's] ships does not constitute 'concrete and particularized' injury. Additionally, the alleged injury is merely 'conjectural or hypothetical' rather than 'actual or imminent.'"

Id. at 1301-02. Further, the *Resnick* court rejected Plaintiff's argument that he is not required to actually encounter the discrimination. The Court reasoned: "Plaintiffs have not encountered discrimination; rather, they filed suit after merely reviewing [defendant's] website. A review of this website does not provide Plaintiffs with knowledge of current or imminent discrimination." *Id*. at 1302. Courts in this District have similarly denied standing to prospective ADA plaintiffs who do not personally encounter the alleged discrimination. *E.g. Brooke v. Peterson*, 2016 WL 2851440 (C.D. Cal. May 13, 2016); *Brooke v. Newport Hotel Holding LLC*, Case No. 16-000426-CJC (Order dated April 29, 2016); *Brooke v. The Irvine Company LLC*, Case No. 16-00438-DOC (order dated Oct. 7, 2016).

Plaintiff attempts to distinguish these cases on the grounds that Plaintiff has visited the property in the past. However, the fact Plaintiff has been to prior EDC's in other years and locations makes no difference because his complaint is limited to the medicine policy in effect at EDC 2016.

Instead, Plaintiff claims, without any support, that he would be "turned away" given Insomniac's policies. (Dkt. 55 at 12-13). However, this claim is entirely

speculative, unexplained, and contrary to Insomniac's policies. This kind of hypothetical injury is simply not enough to confer standing on Plaintiff.

The Ninth Circuit has held that, in order to be entitled to injunctive relief, an ADA plaintiff must *prove* that he faces a threat of real and immediate harm. *Midgett v. Tri-County Met. Transp. Dist. of Oregon*, 254 F. 3d 846, 850 (9th Cir. 2001). Instead, Plaintiff disavows his burden and dooms his claim. (Dkt. 55 at 14).

First, Plaintiff has come forward with no evidence, or even a description, of his claimed disability. In the Ninth Circuit, only a person with a disability can bring a discrimination claim under Title III of the ADA. *Goddarad v. Harkins Amusement Enters., Inc.*, 603 F.3d 666, 670 (9th Cir. 2010). Plaintiff must also adduce evidence of his disability and link the alleged barrier to it. *Chapman v. Pier 1 Imports*, 631 F.3d 939, 944 (9th Cir. 2011) (limiting injunctive relief to barriers related to a person's particular disability). Plaintiff's declaration contains no information as to what medication he needs that would otherwise be unavailable to him or even any disability that would be affected by the policy.

Second, Plaintiff has failed to explain why he would be "turned away" on account of his disability. As detailed in the declaration of Maren Steiner, the policy at issue merely would have required Plaintiff to disclose any prescription medication upon arrival at EDC and leave behind any over-the-counter medications (available for free inside the festival). He would not be turned away. Moreover, as discussed below, the record is entirely speculative as to whether Insomniac would have made a reasonable accommodation to him, if necessary under the circumstances.

Third, Plaintiff cannot establish that he faces a real and immediate threat of future harm because any relevant policies concerning over-the-counter and/or prescription medication for any future EDC festivals in Nevada have yet to be developed. Isolated, past incidents do not support an inference that a plaintiff faces a real and immediate threat of future harm. *Luu v. Ramparts, Inc.*, 926 F. Supp. 2d 1178, 1182 (D. Nev. 2013); *Stan v. Wal-Mart Stores, Inc.*, 111 F. Supp. 2d 119

(N.D.N.Y. 2000); *Dorsett v. Southeastern Transp. Auth.*, 2005 WL 2077252 (E.D. Penn. Aug. 28, 2005); *Salinas v. Edwards Theatres*, Case No. 2:15-cv-07698-BRO-PJW at 16, fn. 6 (C.D. Cal. Aug. 24, 2016) (Exh. A to Leimkuhler Decl.).

Therefore, Plaintiff's claimed injury is "conjectural and hypothetical" and insufficient to confer standing.

C. Plaintiff Concedes His Claims Are Moot.

Plaintiff concedes that the claims in his operative Complaint are moot because the event already took place. (Dkt. 55 at 17).

Oliver v. Ralphs Grocery, 654 F.3d 903, 909 (9th Cir. 2011), requires that all ADA barriers must be plead in the complaint for Defendants to have fair notice of the claims. Instead, Plaintiff attempts to save his claim by filing a motion to amend his complaint to include "future" Insomniac events.[1] Plaintiff's argument should be denied. Defendants informed Plaintiff of their intention to move for summary judgment on November 1, 2016, as part of the meet and confer process and promptly filed their motion on November 14, 2016. Plaintiff then waited until December 3, 2016 to file his motion to amend.[2]

Plaintiff's bad faith tactics should not be condoned. First, Plaintiff delayed for months before seeking to amend his complaint. The EDC took place in June 2016, after which point Plaintiff concedes that his claim was moot. Defendants are prejudiced by Plaintiff's belated attempts to revive his lawsuit by setting forth a new legal theory. *Jackson v. Bank of Hawaii*, 902 F. 2d 1385, 1388 (9th Cir. 1990)

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[1] As discussed in section II(D) below, Plaintiff has even more standing problems with this claim. Courts have repeatedly rejected attempts to expand ADA claims to properties that plaintiffs have never visited.

[2] The Court set a deadline of November 28, 2016 for all motions to amend to be filed. (Dkt. 46). Plaintiff delayed until November 26, 2016 to file his first motion to amend – almost two weeks after Defendants filed their motion. However, given Plaintiff's failure to comply with this Court's rules for setting his motion for hearing, the Court struck Plaintiff's motion. (Dkt. 52).

(affirming grant of summary judgment and denial of leave to amend due to undue prejudice to defendant and undue delay by plaintiffs in amending pleading when aware of requisite facts for months); *Parker v. Joe Lujan Enterprises, Inc.*, 848 F.2d 118, 120-121 (9th Cir. 1988); *Priddy v. Edelman*, 883 F.3d 438, 447 (6th Cir. 1989) ("Putting the defendants through the time and expense of continued litigation on a new theory, with the possibility of additional discovery, would be manifestly unfair and unduly prejudicial."); *Foman v. Davis*, 371 U.S. 178, 182 (1962) (leave to amend inappropriate where there is alone, or in combination, "undue delay, bad faith or dilatory motive on the part of movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of the amendment, etc.").

Therefore, as Plaintiff concedes his claims for injunctive relief are moot as to the 2016 EDC in Las Vegas, this Court should dismiss for lack of jurisdiction.

D. Plaintiff's Claims As To Future EDCs Are Not Yet Ripe.

Even if Plaintiff could assert a claim as to a future EDC, his claims are not yet ripe. Insomniac develops policies and procedures for each event separately. As explained in Defendants' moving papers, Insomniac has not finalized any relevant policies for over-the-counter and prescription medication for any future events in Nevada. (Dkt. at 48-1 at 19-20). Therefore, Plaintiff's claims are not yet ripe.

In a bid to avoid the ripeness doctrine, Plaintiff first claims that discovery "may" reveal that Insomniac is planning to implement the same policy next year. Even assuming Plaintiff's unsupported theories are correct, circumstances may change leading the Court to make an advisory opinion – which is contrary to the requirements of Article III jurisdiction.

In the alternative, Plaintiff claims that Insomniac utilized a "similar" policy for other Insomniac-produced events. (Dkt. 55 at 17). However, Plaintiff's argument fails for two reasons. First, Plaintiff's case is limited to the EDC in Las Vegas in 2016. In ADA cases, claims are limited to individual locations where the

plaintiff had actually visited and encountered barriers. *See Small v. General Nutrition Companies, Inc.*, 388 F. Supp. 2d 83 (E.D.N.Y. 2005) (rejecting ADA plaintiff's attempt to expand standing to stores he had never visited); *Moreno v. G&M Oil Co.*, 88 F. Supp. 2d 1116 (C.D. Cal. 2000) (concluding standing was "site specific" and did not extend to locations where plaintiff had not personally suffered discrimination); *Clark v. McDonald's Corp.*, 213 F.R.D. 198 (D. N.J. 2003) (same). Put simply, Plaintiff indisputably has no standing to challenge the policies for events he has never attended and has no intentions of attending.

Second, Plaintiff fundamentally misses the point. Plaintiff, by virtue of not attending EDC or requesting a reasonable modification to Defendants' policies, has left a record devoid of any possible analysis by this Court. There is no facts by which this Court can evaluate how Insomniac's purported "discriminatory" policy was applied to Plaintiff and how that denied him access. *E.g. Calloway v. Thomas*, 2009 WL 1925225 (D. Or. 2009) (challenge to policy not yet ripe as the rules had not been applied to petitioner in concrete and particularized way); *Thompson v. Smith*, 2008 WL 1734495, *4 (E.D. Cal. 2008), *adopted in full*, 2008 WL 1970318 (E.D. Cal. 2008); *Aguilar v. Woodring*, 2008 WL 4375757, *3-4 (C.D. Cal. 2008); *Artway v. Attorney General of State of N.J.*, 81 F.3d 1235, 1246-52 (3d Cir. 1996). Plaintiff does not bother to address this case law at all.

As discussed below, this is why the case law *requires* an ADA plaintiff who seeks a policy modification to request that modification from Defendants and permit them an opportunity to modify the request if reasonable and necessary to do so prior to filing a lawsuit.

E. Plaintiff Did Not Request A Reasonable Modification Before Filing This Lawsuit.

Plaintiff contends that he was not required to request a modification to Defendant's policies in order to obtain injunctive relief under the ADA. This is simply wrong. Plaintiff cites no authority for his contentions and misunderstands how the ADA operates and the case law.

Plaintiff first cites to the general prohibition on discrimination under the ADA. 42 U.S.C. § 12182(b)(1)(A)(i) (defining "general" prohibition of discrimination on account of disability). However, what constitutes discrimination is defined by subsection 12182(b)(2)(A) ("For purposes of subsection (a) of this section, discrimination includes. . .").

Therefore, the question is what specific prohibition does Plaintiff contend Defendants are violating. Plaintiff's complaint is unclear, so he contends in his opposition that Defendants have violated subsection 12182(b)(2)(A)(i), which prohibits the "imposition of application of eligibility criteria that screen out … an individual with a disability." However, Plaintiff's contention in this lawsuit is that Insomniac's alleged policy concerning OTC and prescription medication violates the ADA. It is *not* an eligibility criteria. To illustrate, the Department of Justice Technical Assistance manual for Title III claims provides examples such as (1) a parking garage that prevents vans from parking there to save space even though that prevents persons with mobility disabilities from parking there or (2) a cruise ship's policy that denies a wheelchair user from boarding the ship without a travel companion. *See* § III-4.1100. Insomniac did not "screen out" individuals with disabilities and its policy did not require Plaintiff, or anyone else, to disclose their disability – it just confirmed the prescription matched the owner. (Dkt. 48-4 at ¶ 9).

Plaintiff's demands that Insomniac modify its policy concerning OTC and prescription medications are more properly understood as a request to make a reasonable modification. Case law is uniform in requiring Plaintiff to make the request *before* filing a lawsuit and, if denied, Plaintiff bears the burden of proving that the request is reasonable and necessary. *Mannick v. Kaiser Foundation Health Plan*, 2006 WL 2168877, *2 (N.D. Cal. 2006); *Johnson v. Gambrinus Co./Spoetzl Brewery*, 116 F.3d 1052 (5th Cir. 1997). This rule has been recently applied in the Central District of California in *Salinas v. Edwards Theatres, Inc.*, Case No. CV 15-07698-BRO, *14-16 (C.D. Cal. Aug. 24, 2016) (granting summary judgment to

defendants where plaintiff failed to request modification).

Plaintiff wrongly cites to an architectural barrier case (*Molski v. Arby's*, 359 F. Supp. 2d 938 (C.D. Cal. 2005) involving a construction-related accessibility claim that is entirely inapposite here.

To the extent Plaintiff contends that Insomniac's policy denied him access, Plaintiff was required to provide Defendants with an opportunity to accommodate him in advance of filing suit. Plaintiff's declaration fails to identify, in any manner, how the policy denied him access. Indeed, most of Plaintiff's grievances, such as his allegation that he does not want to "explain" his prescription medication (Dkt. 1 at ¶ 23), are simply irrelevant and not consistent with Insomniac's actual policy.

In a last ditch effort to save his claim, Plaintiff pretends that he did, in fact, make a pre-suit request for accommodation, but he fails to provide the Court with any *evidence* that he ever did so. Plaintiff has further failed to provide the Court with any evidence to establish that the modification sought was necessary and reasonable – further dooming his claim. *Alumni Cruises, LLC v. Carnival Corp.*, 987 F. Supp. 2d 1290 (S.D. Fla. 2013) (granting summary judgment where plaintiff adduced no evidence on reasonableness of proposed policy modifications).

F. <u>The Alleged Discrimination Took Place In Nevada.</u>

Plaintiff's claim under the Unruh Act should separately fail because the alleged discrimination, if it had occurred, took place in Nevada where the event actually took place (i.e. where Plaintiff would have been denied access). Plaintiff first argues that the Unruh Act nevertheless applies because Insomniac's officers are alleged to have instituted the policy from California. (Dkt. 55 at 19). This argument has been rejected. *Tat Tohumculuk, A.S. v. H.J. Heinz Co.*, 2013 WL 6070483, *7 (E.D. Cal. Nov. 14, 2013) (rejecting claim that Unruh Act applied because alleged discrimination approved by corporate officers in California).

Second, Plaintiff argues that he experienced the discrimination in California because, he claims, he was present in California when he attempted to book flights

to the festival. Plaintiff cites no authority for this unprecedented expansion of the Unruh Act. Under Plaintiff's theory, a person residing in California could sit at his or her computer screen and sue under the Unruh Act for an alleged discriminatory act anywhere in the world. Such a construction is nonsense. Further, California's Supreme Court has indicated a strong presumption against the extra-territorial application of California law. *Sullivan v. Oracle Corp.*, 51 Cal. 4th 1191 (2011). Therefore, Plaintiff's Unruh Act claim should be dismissed.[3]

G. Plaintiff Is Not Entitled To Rule 56(d) Relief.

Much of Plaintiff's opposition is devoted to his allegation that he has not had sufficient time to conduct discovery in this matter. In order to be granted relief under Rule 56(d), Plaintiff must submit a declaration with his opposition showing the following: (1) facts indicating a likelihood that controverting evidence exists as to a material fact; (2) specific reasons why such evidence was not discovered or obtained earlier; (3) the steps or procedures by which the opposing party proposes to obtain such evidence; and (4) an explanation of how those facts will suffice to defeat the summary judgment motion. *Tatum v. City & Cty. of San Francisco*, 441 F.3d 1090, 1101 (9th Cir. 2006); *Everson v. Leis*, 556 F.3d 484, 493 (6th Cir. 2009) (vague assertions insufficient). Even when required materials are submitted, the district court may deny a Rule 56(d) motion "if it concludes that the party opposing summary judgment is unlikely to garner useful evidence from supplemental discovery." *Hicks v. Johnson*, 755 F.3d 738, 743 (1st Cir. 2014). Plaintiff has failed to meet his burden.

Here, no additional discovery is required for the Court to rule on Defendants' summary judgment motion. Plaintiff's lack of standing is established by his failure to personally encounter Insomniac's policy. Plaintiff's claim for injunctive relief is

[3] Plaintiff also misstates Florida law. Under Florida law, a private plaintiff may only sue for damages after the plaintiff has exhausted an administrative claim under the Florida Human Rights Commission. Fla. Sta. 760.11(1)-(15); Fla. Stat. 760.07.

moot because he has conceded that the EDC event discussed in his complaint occurred last year. Plaintiff's claim is not yet ripe because he has not established how any future unspecified EDC policy would be applied to him in a discriminatory fashion. Finally, Plaintiff's failure to request a reasonable modification, or indeed provide any evidence on why a modification was reasonable or necessary, is based on information entirely within Plaintiff's possession. Moreover, none of Plaintiff's discovery aimed at SMI to date has anything to do with its arguments concerning personal jurisdiction. Plaintiff has failed to show how any of the requested discovery is relevant to the material facts at issue in Defendants' motion.

Further, Plaintiff's declaration misrepresents the factual record. Defendants filed their motion papers on November 14, 2016. Plaintiff filed his opposition to Defendants' motion for summary judgment on December 11, 2016 – almost three weeks before it was due. Insomniac served supplemental discovery responses on December 19, 2016. Leimkuhler Decl. ¶ 3. Plaintiff had months to confer with Defendants concerning their discovery responses and objections. Instead, Plaintiff chose to file his opposition early and make outlandish requests such as demanding that Insomniac's Chief Executive Officer appear for deposition.

H. To The Extent The Court Does Not Dismiss Plaintiff's State-Law Claims With Prejudice, It Should Dismiss For Lack Of Supplemental Jurisdiction.

Plaintiff has not established any exceptional circumstances that would warrant this Court retaining jurisdiction. The Ninth Circuit has repeatedly held that district courts should decline supplemental jurisdiction over state-law disability access claims once the ADA claims is dismissed. *E.g. Oliver*, 654 F.3d at 911; *Rodriguez v. Ralphs Grocery*, 2009 WL 1101550 (9th Cir. 2009) (if federal claim dismissed for lack of subject matter jurisdiction, district court must dismiss state law claims).

III. CONCLUSION.

For all of the foregoing reasons, Defendants respectfully request that the Court grant their motion.

Dated: January 9, 2017

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