

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LINDA CARSON,

Plaintiff and Appellant,

v.

MICHAELS STORES, INC.,

Defendant and Respondent.

D055477

(Super. Ct. No. 37-2008-00089773-
CU-BT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Judith F. Hayes, Judge. Affirmed.

California's Song-Beverly Credit Card Act of 1971 (Civ. Code,¹ § 1747 et seq., hereafter the Act) prohibits merchants that accept credit cards in transacting business from requesting and recording "personal identification information" concerning the cardholder. Linda Carson filed a complaint alleging Michaels Stores, Inc. (Michaels) violated the Act and her right to privacy when, as part of her purchase of items from Michaels using a credit card, it requested and recorded her ZIP Code for the purpose of using it and her name to

¹ All further statutory references are to the Civil Code unless otherwise specified.

obtain her address. The court sustained Michaels's demurrer to her complaint, finding as a matter of law, based upon this court's decision in *Party City Corp. v. Superior Court* (2008) 169 Cal.App.4th 497 (*Party City*), ZIP Codes are not "personal identification information" under the Act. The court also sustained Michaels's demurrer to Carson's invasion of privacy claim, finding that requesting her ZIP Code to obtain her address was not an invasion of privacy as such information is not private.

On appeal, Carson asserts the court erred in sustaining Michaels's demurrer because (1) *Party City* is inapplicable as in that case there was no evidence the merchant was using ZIP Codes to obtain home addresses; (2) ZIP Codes fall within the definition of "personal identification information"; and (3) she had a legally protected privacy interest in her home address. We affirm.²

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Complaint*

Because we are reviewing an order sustaining a demurrer, we take the factual background from the properly pleaded material allegations of the complaint. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

² We note that the issue of whether a retailer violates the Act by recording a customer's ZIP Code for the purpose of later using it and the customer's name to obtain the customer's address is currently on review before the California Supreme Court in an opinion by a different panel of this court issued in 2009. (*Pineda v. Williams-Sonoma Stores, Inc.* (2009) 178 Cal.App.4th 714, review granted Feb. 10, 2010, S178241.)

Michaels is a retailer of arts and craft products. In December 2007 Carson went to an unspecified Michaels store. She selected products from the store that she intended to purchase and went to the cashier to pay for the items with a credit card.

After an employee of Michaels informed her of the amount due, Carson handed the employee her credit card. The employee took the card and proceeded to "swipe" the card or "enter and/or record" the credit card number into the electronic cash register. After the cashier accepted and processed her credit card for payment, the cashier asked Carson for her ZIP Code. Carson provided her ZIP Code to the cashier who "typed and recorded [Carson's] [ZIP C]ode into" the electronic cash register. Carson then left the store with her purchased products.

Carson alleges that Michaels thereafter used her ZIP Code and "customized computer software to perform reverse searches from 'data warehousing' or 'data mining' databases [that] contain millions of names, e-mail addresses, residential telephone numbers and residential addresses" to obtain her address and other unspecified "personal identification information."

Carson alleged three causes of action: (1) for violation of the Act; (2) for violation of Business and Professions Code section 17200; and (3) for invasion of privacy.

B. Michaels's Demurrer

Michaels demurred, asserting that a ZIP Code is not "personal identification information" under the Act. Michaels also asserted that it did not violate the Act as it did not condition acceptance of Carson's credit card upon her disclosing her ZIP Code.

Michaels asserted Carson lacked standing to maintain her claim for violation of Business

and Professions Code section 17200 because she did not allege she lost any "money or property." Michaels demurred to the invasion of privacy claim, arguing Carson did not have a reasonable expectation of privacy in her ZIP Code or address, and Michaels's alleged conduct did not constitute a serious invasion of privacy.

Carson opposed the demurrer, asserting the Act prohibited merchants from obtaining any personal identification information that was not set forth on the card, including ZIP Codes. She also argued that the Act did not require a showing that Michaels requested her ZIP Code as a condition of accepting her credit card as payment. Carson conceded that her cause of action for violation of Business and Professions Code section 17200 lacked merit. Carson opposed the demurrer to her claim for invasion of privacy, alleging she did have a legally protected privacy interest in her home address and Michaels's actions constituted a serious invasion of privacy.

C. Court's Ruling

In March 2009 the court sustained Michaels's demurrer without leave to amend. The court sustained Michaels's demurrer to Carson's claim for violation of the Act based upon this court's decision in *Party City, supra*, 169 Cal.App.4th 497, which held ZIP Codes are not personal identification information under the Act. The court granted Michaels's demurrer to the Business and Professions Code section 17200 claim based upon Carson's concession the claim lacked merit. The court sustained the demurrer to the invasion of privacy claim, finding "a [ZIP C]ode, or the information used by [Michaels] is not private, and therefore plaintiff has no privacy interests therein."

DISCUSSION

I. CLAIM FOR VIOLATION OF ACT

A. Standard of Review

We review an order sustaining a demurrer without leave to amend de novo (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318), assuming the truth of all properly pleaded facts as well as facts inferred from the pleadings, and give the complaint a reasonable interpretation by reading it as a whole and its parts in context. (*Palacin v. Allstate Ins. Co.* (2004) 119 Cal.App.4th 855, 861.) However, we give no credit to allegations that merely set forth contentions or legal conclusions. (*Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 768-769.) A complaint will be construed "liberally . . . with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) If the complaint states a cause of action on any possible legal theory, we must reverse the trial court's order sustaining the demurrer. (*Palestini v. General Dynamics Corp.* (2002) 99 Cal.App.4th 80, 86.)

B. Overview of the Act³

The Act prohibits merchants that accept credit cards in transacting business from making requests that the cardholder provide "personal identification information" and from recording that information. (§ 1747.08, subd. (a)(2).) "[P]ersonal identification information[]" means information concerning the cardholder, other than information set forth

³ Michaels has filed an unopposed request for judicial notice, requesting that we take judicial notice of portions of the legislative history of the Act. We grant Michaels's request for judicial notice.

on the credit card, and including, but not limited to, the cardholder's address and telephone number." (§ 1747.08, subd. (b).)

The Act also imposes mandatory statutory penalties on any person who violates the Act. (§ 1747.08, subd. (e) ["Any person who violates this section shall be subject to a civil penalty not to exceed two hundred fifty dollars (\$250) for the first violation and one thousand dollars (\$1,000) for each subsequent violation"]; see also *The TJX Companies, Inc. v. Superior Court* (2008) 163 Cal.App.4th 80, 85-86.) Because the Act imposes mandatory and potentially significant civil penalties, it must be strictly construed against a finding of liability. (*Party City, supra*, 169 Cal.App.4th at p. 511.)

C. Analysis

In *Party City*, this court concluded, as a matter of law, that a ZIP Code is not personal identification information within the meaning of section 1747.08, subdivision (b) because a ZIP Code is not facially individualized information. (*Party City, supra*, 169 Cal.App.4th at pp. 506, 518.) In doing so, we stated that "[i]f the Legislature intended 'personal identification information' to include all components of an address, not just specific ones, it would not have specified in subdivision (b) of section 1747.08 that the protected information (address and telephone number) is of the kind that pertains to individuals, not groups of ZIP Code inhabitants. The canon of *ejusdem generis* supports a construction of the phrase in section 1747.08, subdivision (b), 'personal identification information,' or 'information concerning the cardholder, other than information set forth on the credit card,' as meaning that the enumerated items (address and telephone number) were intended to be specific in nature regarding an individual, rather than a group identifier such as a ZIP Code. If the

Legislature had intended 'address' to be used in its unrestricted sense, it would not also have mentioned a specific item such as a telephone number in this context." (*Party City, supra*, 169 Cal.App.4th at p. 520.)

Carson asserts that *Party City* is distinguishable because there was no evidence presented in that case that the defendant used the collected ZIP Codes to obtain its customers' addresses. This contention is unavailing.

The Act only prohibits certain information from being collected, not what a merchant thereafter uses that information for. If the information is not covered by the Act, as we have so held, it matters not that Carson alleges that Michaels later used her ZIP Code to obtain her address. There is nothing in the Act that states that the intent of the merchant in collecting the information determines a merchant's liability. Carson asks that we rewrite the Act to add to it language that would make it a violation to collect information that is not personal identification information if that information is later used to discover information that is. When construing or interpreting a statute, we may not "imply additional language in order to accomplish some supposed legislative purpose." (*Gray v. Superior Court* (2002) 95 Cal.App.4th 322, 327.) This is especially true as the Act imposes mandatory and potentially significant civil penalties and must be strictly construed against a finding of liability. (*Party City, supra*, 169 Cal.App.4th at p. 511.) Carson's assertion that we hold it a violation of the Act for a merchant to use ZIP Codes to obtain addresses is best addressed to the Legislature.

Carson also argues *Party City* is distinguishable because it was decided after a factual record was developed at summary judgment. Carson claims to allege a

"substantially different factual record." However, as we have already explained, *ante*, *Party City* held a ZIP Code was not personal identification information *as a matter of law*. Thus, it matters not that the court decided this case at the demurrer stage.

The issue in *Party City* was whether the trial court in that case properly interpreted the statutory definition of personal identification information to include ZIP Codes. (See, e.g., *Party City, supra*, 169 Cal.App.4th at p. 506 ["The trial court was presented with only legal questions on undisputed facts on the statutory interpretation of the terminology of the statute, and therefore this summary judgment ruling may be appropriately addressed likewise, on a de novo basis, in this writ proceeding."]; *id.* at p. 502 [noting that the trial court's error was in its interpretation of "the definitional portions of section 1747.08"].)

Thus, the factual record was irrelevant to the threshold question of the definitional scope of the Act. (*Party City, supra*, 169 Cal.App.4th at p. 502 ["Petitioner is entitled to summary judgment on the complaint on the threshold definitional issue presented in the pleadings."]; *id.* at p. 503 [noting the defendant moved for summary judgment on the grounds that "as a matter of law" a ZIP Code is not personal identification information]; *id.* at p. 518 [stating review was limited "to the issue of whether the Act's statutory definition, as a matter of law, supports the allegations made by plaintiff"].) The court specifically declined to adjudicate matters dependent on factual nuances of the case because, like here, the "threshold issue [was] whether plaintiff's complaint falls within the statutory scope of the Act." (*Id.* at p. 503, fn. 3.)

The trial court properly followed *Party City* in sustaining without leave to amend Michaels's demurrer to Carson's claim for violation of the Act.⁴

II. *INVASION OF PRIVACY CLAIM*

Carson asserts that her invasion of privacy claim has merit separate from her claim under the Act because Michaels used her name, credit card number and ZIP Code to obtain her home address without her knowledge or consent. This contention is unavailing.

To establish a claim for invasion of privacy under the California Constitution, a plaintiff must show: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy; and (3) a serious invasion of that right. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40 (*Hill*)). The three "threshold elements" set out in *Hill* allow courts to weed out claims that involve insignificant or de minimis intrusions not requiring explanation or justification. (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 893.) Whether a legally protected privacy interest exists is a question of law. (*Hill, supra*, at p. 40.) The second and third elements of the privacy claim involve mixed questions of law and fact. (*Ibid.*) However, "[i]f the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law." (*Ibid.*)

Carson contends that individuals have a legally protected privacy interest and a reasonable expectation of privacy in their home addresses, including the right to control

⁴ Accordingly, we need not address Michaels's alternative theory that Carson's claim under the Act was barred because Michaels did not condition acceptance of Carson's credit card for payment on her providing Michaels with her ZIP Code.

dissemination of that information. We conclude under the facts alleged in her complaint that Carson has no reasonable expectation of privacy in her address information.

Carson has not alleged in her complaint, or in her arguments in opposition to Michaels's demurrer, that she has taken any steps to keep her address information private or that such information is not a matter of public record. Carson has no reasonable expectation of privacy in her address as she alleges in the complaint the information was obtained from *public* databases available on the internet. (See, e.g., *Melvin v. Reid* (1931) 112 Cal.App. 285, 290 ["[t]here can be no privacy in that which is already public"], cited approvingly in *Hill, supra*, 7 Cal.4th at p. 26; *Sipple v. Chronicle Publishing Co.* (1984) 154 Cal.App.3d 1040, 1047 ["there can be no privacy with respect to a matter which is already public [citation] or which has previously become part of the 'public domain' "].) According to Carson there are "numerous" public databases with "hundreds of millions" of consumer profiles. As Carson alleges in her opposition to Michael's demurrer that obtaining address information from these databases is very simple: "A simple search . . . using only . . . names and [ZIP C]odes, reveals the current home address" Indeed, Carson acknowledges in her opening brief that "anyone with access to the internet can look up a person's home address and telephone number using only the person's name and [ZIP C]ode on 411.com"

Thus, the fact Carson's address is easily obtained from a number of sources available to the public on the Internet undermines any reasonable expectation of privacy she has in such information. (*Four Navy Seals v. Associated Press* (S.D. Cal. 2005) 413 F.Supp.2d 1136, 1142-1143 [claim for invasion of privacy under the California

constitution dismissed on the pleadings because there was no reasonable expectation of privacy in photographs publicly accessible on the Internet]; cf. *Alarcon v. Murphy* (1988) 201 Cal.App.3d 1, 7 [no reasonable expectation of privacy in disclosure of facts from a public record].)

Indeed, California courts have recognized that an address "is not particularly sensitive, as it is merely contact information." (See, e.g., *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1253; cf. *People v. Herrera* (1981) 124 Cal.App.3d 386, 389 ["Information contained on a driver's license does not give rise to a person's reasonable expectation of privacy."].) It is not the type of information deemed private such as "medical or financial details, political affiliations, sexual relationships, or personnel information." (*Puerto, supra*, 158 Cal.App.4th at pp. 1253-1254.)

Further, even assuming Carson adequately alleged a reasonable expectation in her address information, her claim fails because she cannot allege a serious invasion of that privacy right.

To be actionable, invasions of privacy "must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Hill, supra*, 7 Cal.4th at p. 37.) Obtaining an address that is otherwise publicly available does not amount to "an egregious breach of the social norms underlying the privacy right." (*Hill, supra*, 7 Cal.4th at p. 37; see, e.g., *Jeffrey H. v. Imai, Tadlock & Keeney* (2000) 85 Cal.App.4th 345, 355 [law firm's disclosure of the irrelevant HIV status of a litigant in an automobile accident case sufficient to allege egregious conduct invading privacy], disapproved of on other grounds in *Jacob B. v. County of Shasta* (2007)

40 Cal.4th 948, 962; *Egan v. Schmock* (N.D.Cal. 2000) 93 F.Supp.2d 1090, 1095 [stalking and filming of neighbors in their home sufficient to allege invasion of privacy].)

"[T]he extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." (*Hill, supra*, 7 Cal.4th at p. 37.) Although Carson seeks damages for the alleged invasion of her privacy, the complaint contains no allegations showing the extent and gravity of the alleged invasion of privacy. Under the facts alleged, the obtaining of Carson's address did not amount to a "serious" invasion of her alleged privacy interest.

DISPOSITION

The judgment is affirmed. Michaels shall recover its costs on appeal.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.