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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALEXANDRA M. ALVAREZ,

Plaintiff and Appellant,

v.

KMART HOLDING CORPORATION,

Defendant and Respondent.

D056005

(Super. Ct. No. 37-2008-00097746-
CU-NP-CTL)

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

California's Song-Beverly Credit Card Act of 1971 (Civ. Code,¹ § 1747 et seq., hereafter the Act) prohibits merchants from requesting and recording "personal identification information" as part of a credit card transaction. Alexandra Alvarez filed a complaint against Kmart Holding Corporation (Kmart), alleging Kmart violated the Act and her right to privacy under the California Constitution when, as part of her credit card purchase, Kmart

¹ All further statutory references are to the Civil Code.

requested and recorded her ZIP Code for the purpose of using it and her name to obtain her address. Alvarez sought to represent a class of consumers who purchased goods with credit cards at California Kmart stores during the previous two years.

The trial court granted Kmart's motion for judgment on the pleadings. The court relied on our decision in *Party City Corp. v. Superior Court* (2008) 169 Cal.App.4th 497 (*Party City*), which held as a matter of law ZIP Codes are not "personal identification information" within the meaning of the Act. (§ 1747.08.) The court also found Alvarez did not state a constitutional privacy claim.

On appeal, Alvarez challenges the court's ruling only on her statutory claim. She contends *Party City* is not controlling because she alleged facts showing Kmart uses ZIP Codes from customer credit cards to identify a customer's home address through computer technology. We conclude these added allegations do not show a violation of the Act. The Act prohibits the collection of certain information and does not govern the retailer's later use of information properly obtained. Thus, our holding in *Party City* that the Act does not prohibit a retailer from collecting ZIP Code information applies regardless of the manner in which the retailer later uses, or intends to use, the information.²

² This issue is currently on review before the California Supreme Court in an opinion by a different panel of this court. (*Pineda v. Williams-Sonoma Stores, Inc.* (2009) 178 Cal.App.4th 714, review granted Feb. 10, 2010, S178241.)

FACTUAL AND PROCEDURAL BACKGROUND

Because we are reviewing a judgment on the pleadings, we base our factual summary on the allegations of the complaint. (*Buesa v. City of Los Angeles* (2009) 177 Cal.App.4th 1537, 1540.)

Kmart operates numerous retail stores throughout the United States. During 2008, Alvarez went to a San Diego Kmart store, selected products from the store, and approached a Kmart cashier to pay for the items with a credit card. The cashier told Alvarez the amount owed for the products. The employee then instructed Alvarez to swipe her card at the point-of-sale machine, "which also required [Alvarez] to provide" her ZIP Code. Alvarez swiped her credit card and entered her ZIP Code on Kmart's point-of-sale machine. The Kmart employee then asked to see Alvarez's credit card for verification. Alvarez handed the employee her credit card. After this transaction was completed, Alvarez left the store with her purchased products.

In December 2008, Alvarez filed a class action complaint, seeking to represent the class of persons who engaged in credit card transactions and were asked to provide a ZIP Code at a California Kmart store during the prior two years. Alvarez alleged two causes of action: (1) violation of the Act; and (2) invasion of privacy in violation of the California Constitution.

With respect to the statutory violation, Alvarez alleged Kmart has an "Information Capture Policy" under which Kmart cashiers routinely request and record ZIP Codes at the "point-of-sale." Kmart then uses the "customers' zip codes, names and credit card numbers to obtain its customer's residential addresses with the help of third-party vendors

that use sophisticated software with access to proprietary databases containing hundreds of millions of consumers' contact information." Alvarez alleged on information and belief that one of those third party vendors is "Acxiom," which "advertises its 'Shopper Registration' software on its website claiming: 'All you have to do is capture the shopper's name from a check or a third-party credit card at the point of sale and ask for the shopper's zip code . . . and Address Append takes the name, combined with the collected zip code, and matches them to Acxiom's [database]. Acxiom provides a match rate report that tells you how many addresses were matched and appended.'"

Kmart moved for judgment on the pleadings, and the court granted the motion. The court found the statutory claim was barred by this court's decision in *Party City, supra*, 169 Cal.App.4th 497. Quoting *Party City*, the trial court stated that a ZIP Code "is not facially individualized information in the same way that a personal (or, e.g., an individual's work) telephone number is" The court also found Alvarez failed to state an invasion of privacy claim because "there is no reasonable expectation of privacy with regards to a Zip Code nor is the procurement of this information sufficiently severe."

On appeal, Alvarez's arguments are directed only to the court's ruling on the statutory claim. Alvarez has thus waived her appellate rights with respect to her invasion of privacy claim. (See *OCM Principal Opportunities Fund v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 839, fn. 3.)

DISCUSSION

A. *Standard of Review*

A motion for judgment on the pleadings should be granted if the complaint does not state facts sufficient to state a cause of action against the defendant. The motion "performs the same function as a general demurrer, and [thus] attacks only defects disclosed on the face of the pleadings or by matters that can be judicially noticed. [Citations.]' [Citation.]" (*Burnett v. Chimney Sweep* (2004) 123 Cal.App.4th 1057, 1064-1065.) The court's task is to determine whether the complaint states a cause of action assuming all of the alleged facts are true. (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (1996) 44 Cal.App.4th 194, 198.) We review the court's ruling de novo. (*Howard Jarvis Taxpayers Assn. v. City of Riverside* (1999) 73 Cal.App.4th 679, 685.)

B. *Overview of the Act*

The Act prohibits merchants from requesting, in a credit card transaction, that the cardholder provide "personal identification information" and recording that information. (§ 1747.08, subd. (a)(2).) "[P]ersonal identification information[]" means information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number." (§ 1747.08, subd. (b).)

The Act imposes monetary penalties for a statutory violation. (§ 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." (*Ibid.*; see *The TJX Companies, Inc. v. Superior*

Court (2008) 163 Cal.App.4th 80, 85-86.) Because of these mandatory and potentially significant civil penalties, the Act must be strictly construed against a finding of liability. (*Party City, supra*, 169 Cal.App.4th at p. 511.) But the courts have also recognized the Act is a consumer protection statute that "is remedial in nature" and thus "is to be liberally construed to the end of fostering its objectives." (*Florez v. Linens 'N Things, Inc.* (2003) 108 Cal.App.4th 447, 450.)

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.) We reasoned 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." (*Id.* at p. 520.)

Alvarez contends *Party City* is distinguishable because there was no evidence presented in that case that the defendant used the collected ZIP Codes to obtain customer addresses. Alvarez argues that her allegation that Kmart uses computer services to locate customer addresses from collected ZIP Codes essentially transmutes a ZIP Code into "personal identification information." Alvarez maintains that because the Act absolutely prohibits Kmart from requesting a customer's residential address, Kmart should be equally precluded from requesting a customer ZIP Code to later obtain this same information.

We agree *Party City* was decided on a record that did not include facts showing the company used or intended to use the ZIP Code information to locate a particular customer's address or phone number. (See *Party City, supra*, 169 Cal.App.4th at pp. 504-505 & p. 505, fns. 5 & 6.) However, the additional allegations in this case do not support a different result.

The Act prohibits only certain information from being collected, and does not govern the purposes for which the merchant later uses properly obtained information. There is nothing in the Act stating that a merchant's liability is dependent on the merchant's intent in collecting the information or the nature of the retailer's subsequent conduct. Under the plain language of the statute, the meaning of "personal identification information" is determined at the time the information is requested, and not based on subsequent events. (§ 1747.08, subd. (a)(1).) Thus, if ZIP Code information is not prohibited by the Act, the statutory provisions do not preclude Kmart from *later* using customer ZIP Codes to obtain addresses.

Moreover, Alvarez's proposed interpretation could render the statute impermissibly vague as to the precise conduct that is being prohibited. For example, if

statutory liability is triggered by the retailer's later *use* of the information, retailers would be required to predict the capabilities of new technology when deciding whether it is lawful to ask for certain identification information. This could not have been the legislative intent when enacting the statute.

Alvarez argues that we should hold that a merchant violates the Act if it intends to use customer ZIP Codes to obtain personal information because this holding would align the current state of computer technology with the legislative intent underlying the Act, which sought to protect consumer privacy and prevent retailers from requesting information unnecessary to completing the transaction. (See *Florez v. Linens 'N Things, Inc.*, *supra*, 108 Cal.App.4th at p. 452.) However, 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. (*Party City, supra*, 169 Cal.App.4th at p. 511.)

It is the Legislature's task, and not the role of the judiciary, to consider whether to modify laws in the light of technological changes. Because of the multiple conflicting interests involved in the discovery of personal consumer information and the evolving state of computer technology, the Legislature is uniquely suited to formulate rules that balance the privacy concerns with legitimate business needs in this area. If the Legislature wishes to prohibit merchants from using collected information in a particular manner, it can enact legislation to achieve this objective.

The trial court properly granted Kmart's motion for judgment on the pleadings.

DISPOSITION

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

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.