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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SALLIE FRAINIER et al.,

Plaintiffs and Appellants,

v.

PRICELINE.COM, INC.,

Defendant and Respondent.

B225920

(Los Angeles County
Super. Ct. No. BC342897

APPEAL from a judgment of the Superior Court of Los Angeles County,
Carolyn Kuhl, Judge. Affirmed.

Kalcheim Law Group and Mitch Kalcheim; Shalov Stone Bonner & Rocco,
James P. Bonner and Susan M. Davies, for Plaintiffs and Appellants.

Sedgwick, Detert, Moran & Arnold, Christina J. Imre, Jacqueline Jauregui and
Karen White for Defendant and Respondent.

INTRODUCTION

Plaintiffs Sallie Frainier, George Salah, and Bruce Parnas appeal from a judgment entered after the trial court granted the summary judgment motion of defendant Priceline.com, Inc. (Priceline). Plaintiffs were customers of Priceline's on-line hotel booking service and reserved hotel rooms for a price quoted to them on Priceline.com. The hotels, however, charged a per-night "resort fee," which increased the price of the hotel rooms above the price Priceline.com had quoted to each plaintiff. Plaintiffs sued Priceline for breach of contract, violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq. (the UCL) and the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq. (the CLRA), fraudulent inducement, and negligent misrepresentation.

The main issue in this appeal is whether Priceline's quotation of a price for "total charges" misrepresented the amount each plaintiff would pay for their hotel room by failing to include the resort fees charged by the hotels. We find that Priceline clearly disclosed that resort fees charged by hotels were not included in the "total charges" quoted by Priceline to each plaintiff, and therefore the "total charges" for room reservations plaintiffs made through Priceline.com was not a misrepresentation. We affirm the judgment for defendant Priceline.

FACTUAL AND PROCEDURAL HISTORY

Priceline operates a computer-based on-line hotel booking service featuring a "Name Your Own Price" (NYOP) system. A customer making an NYOP hotel booking on the Priceline website requests a hotel by selecting the dates of stay, the neighborhood or "zone" where the hotel will be located, and the quality or "star rating" of the hotel. The customer then names the price he or she is willing to pay for a hotel that fits the selected requirements. At this stage the customer gives no credit card information and makes no commitment.

The customer is then shown a page titled “Please Review Your Request” (the contract page). The contract page displays details of the customer’s request (dates, zone, hotel quality rating), the amount of the customer’s offer times the number of nights requested, and an amount designated “Total Charges.” The “Total Charges” is the sum of the offer price per room times the number of nights, plus “Taxes and Services Fees.”

By clicking on hyperlinks for “charges” and for “taxes and services fees,” the customer can open a second electronic document stating: “Depending on the property you stay at, you may also be charged (i) certain per person, per room or percentage based mandatory hotel specific service fees, for example, resort fees (which typically [apply] to resort type destinations and, if applicable, may range from \$10 to \$40 per day), energy surcharges, newspaper delivery fees, in-room safe fees, tourism fees, or housekeeping fees and/or (ii) certain optional incidental fees, for example, parking charges, minibar charges, phone calls, room service and movie rentals, etc. These charges, if applicable, will be payable by you to the hotel directly at checkout and are not included in your offer price. Please contact the hotel directly as to whether and which charges and service fees apply.”

Below amount quoted as “Total Charges,” the contract page contains a heading “Important Information,” whose third paragraph states: “If Priceline accepts your price, Priceline will book your reservation in a property with an equal or higher star level than you requested. The hotel that is selected may or may not be one that you have seen during a hotel search on Priceline. Priceline will immediately charge your credit card the total cost of your stay. Rooms purchased through Priceline can not be cancelled, changed or transferred and refunds are not allowed. If your offer is not accepted, your credit card will not be charged.”

The fourth paragraph under “Important Information” states: “The reservation holder must present a valid photo ID and credit card at check-in. The credit card is required for any additional hotel specific service fees or incidental charges or fees that may be charged by the hotel to the customer at checkout. These charges may be

mandatory (e.g., resort fees) or optional (parking, phone calls or minibar charges) and are not included in your offer price.”

The final sentence on the contract page states: “I have read, accept and agree to abide by Priceline.com’s terms and conditions and privacy policy.” The customer must place his or her initials in a box next to this sentence before proceeding to the next screen page, where the customer enters credit card information and submits the NYOP request. A NYOP customer could not complete a reservation without scrolling down to initial the bottom of the contract page.

Priceline knows which hotels charge mandatory fees in addition to the room rate. Priceline books NYOP requests according to the hotel rate, but does not use resort fees, which hotels charge in addition to the room rate, in determining which hotel to book. Priceline searches for hotels and accesses a third-party distribution system to determine if a room is available at a hotel that meets the customer’s criteria and offer price and Priceline’s margin requirements.

Until the offer is accepted, Priceline and the customer do not know which hotel, if any, will match the customer’s offer. Priceline’s computer program does not use hotel resort fees during the process of matching customer offers to hotels.

Plaintiff Frainier did not personally make the NYOP hotel reservation alleged in the complaint. Her husband made the NYOP reservation, but plaintiff Frainier was present and saw computer screen pages that her husband used to execute the transaction. On January 25, 2009, the Palm Springs Riviera Resort accepted Frainier’s \$90 per night offer price. Priceline’s NYOP system confirmed a reservation at the Palm Springs Riviera Resort for March 12 through March 14, 2009, and Mr. Frainier submitted a credit card to pay “Total Charges” of \$213.63. During her stay at the Palm Springs Riviera Resort, Sallie Frainier was charged and paid a resort fee of \$25 per night.

Plaintiff Bruce Parnas made a hotel reservation on September 24, 2008, and incurred a “hotel services fee” of \$21.56 when he checked out of his hotel. Plaintiff George Salah made a hotel reservation on May 1, 2008, for a hotel stay and incurred a \$19.67 “resort fee,” including tax, when he checked out of his hotel.

On November 11, 2005, plaintiff James Kalcheim (who is not a party to this appeal) filed a class action complaint against Priceline. The operative complaint is a third amended complaint filed on April 15, 2009, which added Frainier, Salah, and Parnas as plaintiffs to the class action. The operative complaint stated that plaintiffs sought to represent a class of California consumers who made hotel reservations through the Priceline.com website from November 14, 2001, through the date of the action.

The complaint alleged that Priceline violated the UCL by providing plaintiffs and class members with false and deceptive information about total charges of hotel reservations made through Priceline.com; failed to correct erroneous disclosures made on Priceline.com despite knowing the disclosures were unlawful, false, misleading, deceptive, and fraudulent; and engaged in these acts to obtain additional profits at the expense of plaintiffs and class members. The complaint alleged that Priceline violated the CLRA by engaging in acts and practices that resulted in the sale of hotel reservations at prices higher than those advertised on Priceline.com and agreed to by plaintiffs and class members. A cause of action for breach of contract alleged that Priceline breached valid contracts which provided that plaintiffs and class members pay specified amounts for hotel reservations provided by Priceline, but that Priceline misrepresented the price of hotel accommodations it would secure. A cause of action for fraudulent inducement alleged that false statements and material omissions of fact on Priceline.com intentionally misrepresented that hotel accommodations would be provided to plaintiffs and class members at specified prices. A cause of action for deceit/negligent misrepresentation alleged that Priceline supplied false material information and made material omissions of fact in statements to plaintiffs and class members concerning the prices they would pay for hotel accommodations.

Plaintiffs filed a motion for class certification, which the trial court denied on June 11, 2010. Plaintiffs have not appealed the order denying class certification.

Priceline filed motions for summary judgment. On June 10, 2010, the trial court granted summary judgment as to Frainier, Salah, and Parnas. Judgment for Priceline was entered on July 12, 2010.

Plaintiffs Frainier, Salah, and Parnas filed a timely notice of appeal on July 16, 2010.

ISSUES

Plaintiffs claim on appeal that:

1. The trial court erroneously found there were no triable issues of fact as to whether Priceline's statements regarding "Total Charges" to plaintiffs were misrepresentations;
2. There are triable issues of material fact as to whether Priceline engaged in acts of unfair competition;
3. The trial court erroneously found there were no triable issues of fact as to whether the terms of plaintiffs' contracts with Priceline provided that plaintiffs would pay hotel fees in addition to "Total Charges."

STANDARD OF REVIEW

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action' [Citations.]" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

DISCUSSION

1. *Misrepresentation*

Each plaintiff paid “resort fees” to the hotel in addition to the “Total Charges” represented on Priceline.com. Plaintiffs claim that the trial court erroneously concluded that the “Total Charges” represented on Priceline.com were not misrepresentations.

A. *Summary Judgment Was Properly Granted on the UCL Cause of Action*

The UCL makes it unlawful for a defendant to engage in “any unlawful, unfair or fraudulent business act or practice.” (Bus. & Prof. Code, § 17200.) Any business practice forbidden by law comes within the UCL. “Section 17200 ‘borrows’ violations from other laws by making them independently actionable as unfair competitive practices.” (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) Plaintiffs’ unfair competition cause of action alleged that Priceline provided false and deceptive information about total charges for hotel reservations plaintiffs made through Priceline.com; failed to correct erroneous disclosures made on Priceline.com despite knowing the disclosures were false and deceptive; and engaged in these acts to obtain additional profits at plaintiffs’ expense. As a result of Priceline’s acts of unfair competition, the complaint alleged that plaintiffs had to pay additional hidden fees which plaintiffs had not agreed to pay, which payments unjustly enriched Priceline.

Plaintiffs’ unfair competition cause of action “borrows” from the Federal Trade Commission Act (15 U.S.C. § 45). Plaintiffs assert that Priceline’s misrepresentation of total charges for hotel stays violates title 15 United States Code section 45(a)(1) which states: “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” Plaintiffs argue that Priceline’s exclusion of mandatory hotel fees from “Total Charges” which Priceline represented to consumers, and purporting to disclose those mandatory fees elsewhere on its website, was likely to mislead consumers and was therefore unlawful under title 15 United States Code section 45(a)(1). We disagree.

The contract page of Priceline’s website quoted an offer price per room, per night, multiplied this figure by the number of nights, to equal a subtotal. To the subtotal was added an amount for “Taxes and Services Fees,” which produced an amount of “Total Charges.” Below the customer was offered the opportunity to purchase “Trip Cancellation/Interruption Insurance.” Next a caption stated “Important Information,” with these signaling words prominently placed, bold-faced, and in large type. There followed five paragraphs, each separated by a space and set off by bullet points. The language of the paragraphs is readable, and none of the paragraphs have more than four sentences. The fourth paragraph stated: “The reservation holder must present a valid photo ID and credit card at check-in. The credit card is required for any additional hotel specific service fees or incidental charges or fees that may be charged by the hotel to the customer at checkout. *These charges may be mandatory (e.g., resort fees) or optional (parking, phone calls or minibar charges) and are not included in your offer price.*” (Italics added.) This disclosure clearly stated that the offer price did not include mandatory resort fees charged by the hotel to the customer at checkout. Priceline did not represent to customers that they would pay nothing in addition to the “Total Charges.” Instead it expressly stated that hotels might make additional charges, some of which might be mandatory (such as resort fees) and some of which might be optional (parking, phone calls, or minibar charges). These additional charges, Priceline specified, “are not included in your offer price,” the price the consumer would pay to Priceline. Therefore the practice of excluding mandatory fees from “Total Charges” which Priceline represented to consumers was not likely to mislead consumers.

The disclosure appeared on the lower part of the screen which contained “Total Charges.” Before proceeding to the next page, the customer was required to scroll down to the bottom of the computer screen and to initial a box next to a sentence stating: “I have read, accept and agree to abide by priceline.com’s terms and conditions and privacy policy.”

The disclosure in “Important Information” specifically excluded resort fees charged by the hotel to the customer at checkout from the “Total Charges,” and was

clearly written and conspicuously placed on the same screen page. Thus there was no triable issue of fact that consumers were likely to be misled by the “Total Charges” amount. Summary judgment was properly granted on the UCL cause of action.

B. Summary Judgment Was Properly Granted on the CLRA Cause of Action

The complaint alleged that Priceline violated provisions Civil Code section 1770¹ of the CLRA. The complaint alleged that Priceline violated provisions of subdivision (a)(9) by engaging in acts and practices that resulted in the sale of hotel reservations at prices higher than those advertised on Priceline.com and agreed to by plaintiffs. The complaint alleged that Priceline violated subdivision (a)(14) by falsely representing that reservations plaintiffs made on Priceline.com gave them the right to stay in reserved accommodations for prices they pre-paid to Priceline, when in fact the reservations did not confer this right because the hotels required payment of hidden fees. The complaint alleged that Priceline violated subdivision (a)(16) by falsely representing to plaintiffs that Priceline had secured their hotel reservations for the total charges agreed upon. The complaint alleged that Priceline violated subdivision (a)(18) by falsely representing that it secured reservations for plaintiffs at specified rates when in fact Priceline’s hotel partners charged consumers hidden fees and changed the terms secured by Priceline by increasing the price of hotel rooms booked through Priceline.com.

¹ Civil Code section 1770, subdivision (a) make unlawful unfair methods of competition and unfair or deceptive acts or practices undertaken by a person in a transaction intended to result or which results in the sale of goods or services to a consumer. The complaint alleges violations of the following subdivisions of Civil Code section 1770, subdivision (a):

“(9) Advertising goods or services with intent not to sell them as advertised.”

“(14) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.”

“(16) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.”

“(18) Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer.”

The claim of the CLRA violations is the same as the UCL violation, which is that the “Total Charges” misrepresented the price plaintiffs would pay for hotel reservations, because plaintiffs had to pay an additional amount to the hotels for resort fees which were not included in the “Total Charges” stated by Priceline. We have rejected this argument. Because the disclosure in “Important Information” specifically excluded resort fees charged by the hotel to the customer at checkout from the “Total Charges,” there was no triable issue of fact that consumers were likely to be misled by the “Total Charges” amount.

C. Fraudulent Inducement

In its fraudulent inducement cause of action, the complaint alleged that Priceline used false statements and material omissions of fact to intentionally misrepresent that hotel accommodations would be provided to plaintiffs at specified prices. Specifically, the complaint alleged that Priceline.com misrepresented the price of hotel rooms that it would secure by providing a “Total Cost” which did not include hidden fees that Priceline’s hotel partners would collect from plaintiffs, and failed to disclose those hidden fees.

The elements of fraud are (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of its falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting damage. Fraud in the inducement, a subset of the tort of fraud, occurs when the promisor knows what he is signing but his consent is induced by fraud. Although mutual assent is present and a contract is formed, it is voidable by reason of the fraud. (*Hinesley v. Oakshade Town Center* (2005) 135 Cal.App.4th 289, 294-295.)

Plaintiffs allege that the “Total Cost” of accommodations quoted to them on the Priceline.com website was a misrepresentation. We have determined that the disclosure in “Important Information” specifically excluded resort fees charged by the hotel to the customer at checkout from “Total Charges.” Therefore there was no false representation, concealment, or nondisclosure because of the “Total Charges” amount. Summary judgment was correctly granted as to the fraudulent inducement cause of action.

D. *Negligent Misrepresentation*

In its cause of action for negligent misrepresentation, the complaint alleged that Priceline supplied false material information and made material omissions to plaintiffs concerning prices plaintiffs would pay for hotel accommodations. The complaint alleged that the representations and omissions were material, in that there was a substantial likelihood that a reasonable consumer would have considered them important and would have relied on them in deciding whether to enter into a reservation agreement with Priceline. The complaint alleged that Priceline made these misrepresentations and omissions of fact without reasonable grounds for believing them to be true and failed to exercise the reasonable care and competence necessary to provide plaintiffs with accurate information about the price of hotel accommodations reserved through Priceline, including hidden fees.

“The elements of negligent misrepresentation are ‘(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.’ ” (*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc.* (2009) 171 Cal.App.4th 35, 50.)

“The tort of negligent misrepresentation does not require scienter or intent to defraud. [Citation.] It encompasses ‘[t]he assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true’ (Civ. Code, § 1710, subd. 2), and ‘[t]he positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true’ (Civ. Code, § 1572, subd. 2[.])” (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173-174.) In the tort of negligent misrepresentation, a misrepresentation may also be established by showing the suppression of a fact by one who is bound to disclose it. (*Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1136.)

We have determined that the disclosure in “Important Information” specifically excluded mandatory resort fees charged by the hotel to the customer at checkout from the amount of “Total Charges.” Therefore Priceline did not misrepresent a past or existing material fact because of the “Total Charges” amount, and did not suppress a fact it was bound to disclose. Summary judgment was properly granted as to the negligent misrepresentation cause of action.

2. *Plaintiffs Have Not Provided Evidence Creating a Triable Issue of Fact as to Whether Priceline Breached the Hotel Reservation Contracts*

The cause of action for breach of contract alleged that plaintiffs’ reservation agreements with Priceline were valid contracts providing that plaintiffs pay specified amounts for hotel reservations, that plaintiffs performed their obligations by paying Priceline for the “Total Charges” specified in those contracts, and that Priceline failed to secure hotel reservations for plaintiffs at the prices specified in those contracts and instead made reservations that required plaintiffs to pay hidden fees imposed by Priceline’s hotel partners.

Plaintiffs claim that under California law, they are not bound by contractual terms of which they did not receive “reasonably conspicuous notice” and to which they did not unambiguously manifest their consent at the time of contracting. Plaintiffs cite *Specht v. Netscape Communications Corp.* (2d Cir. 2002) 306 F.3d 17 (*Specht*), which relied on the rule of California law that “ ‘an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious.’ ” (*Id.* at p. 30, citing *Windsor Mills, Inc. v. Collins & Aikman Corp.* (1972) 25 Cal.App.3d 987, 992.) In *Specht*, by acting on defendants’ invitation to download free software from defendants’ webpage, plaintiffs agreed to be bound by the software’s license terms, even though plaintiffs could not have learned of those license terms unless, before executing the download, they had scrolled down to a screen located below the download button. Because in these circumstances a reasonably prudent Internet user would not have learned of the license terms before responding to defendants’ invitation to download the

free software, defendants did not provide reasonable notice of the license terms, and the act of downloading the software did not manifest plaintiffs' assent to the license terms. (*Specht*, at p. 20.)

The Priceline contract page, by contrast, disclosed in "Important Information" that the reservation holder had to present a credit card at check in, which was "required for any additional hotel specific service fees or incidental charges or fees that may be charged by the hotel to the customer at checkout. *These charges may be mandatory (e.g., resort fees) or optional (parking, phone calls or minibar charges) and are not included in your offer price.*" (Italics added.) The final sentence on the contract page stated: "I have read, accept and agree to abide by Priceline.com's terms and conditions and privacy policy." The customer was required to place his or her initials in a box next to this sentence before proceeding to the next screen page, where the customer entered credit card information and submitted an NYOP request. An NYOP customer could not complete a reservation without scrolling down the contract page and initialing the bottom of that page. Therefore, unlike *Specht*, Priceline provided reasonable notice of contract terms, and plaintiffs could not complete the contract without reading those terms. Even if "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility." (*Specht, supra*, 306 F.3d at p. 35) Priceline provided reasonably conspicuous notice of the contract terms and required the consumer's unambiguous manifestation of assent to those terms before formation of the contract.

Plaintiffs have not provided evidence that created a triable issue of fact as to whether Priceline breached the contract, and the trial court correctly granted summary judgment as to this cause of action.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendant Priceline.com, Inc.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.