Case Number: 23STCV28359   Hearing Date: April 3, 2024   Dept: 14

Levings v. Choice Hotels

Case Background

Plaintiff alleges that Defendant has improperly used "pen register" software to track his internet activity.

On November 20, 2023, Plaintiff filed his Complaint for Violation of Penal Code § 638.51 against Defendants Choice Hotels International, Inc. dba www.choicehotels.com ("Choice Hotels").

No trial date has yet been set.

(1) Demurrer

Defendant Choice Hotels now demurs to the TAC on the grounds that it fails to state facts sufficient to support the cause of action.

Decision

Plaintiff's Request for Judicial Notice is DENIED. Exhibits A-B do not appear to be relevant to the dispute at hand. Exhibit C is a trial court ruling from a different department. Trial court rulings in other cases are not relevant to the facts of this case and cannot be cited as precedent. See Budrow v. Dave & Buster's of California, Inc. (2009) 171 Cal.App.4th 875, 884-885.

The demurrer is OVERRULED.

Discussion

Penal Code § 638.51 provides as follows:

"(a) Except as provided in subdivision (b), a person may not install or use a pen register or a trap and trace device without first obtaining a court order pursuant to Section 638.52 or 638.53.

(b) A provider of electronic or wire communication service may use a pen register or a trap and trace device for any of the following purposes:

(1) To operate, maintain, and test a wire or electronic communication service.

(2) To protect the rights or property of the provider.

(3) To protect users of the service from abuse of service or unlawful use of service.

(4) To record the fact that a wire or electronic communication was initiated or completed to protect the provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful, or abusive use of service.

(5) If the consent of the user of that service has been obtained.

(c) A violation of this section is punishable by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170, or by both that fine and imprisonment.

(d) A good faith reliance on an order issued pursuant to Section 638.52, or an authorization made pursuant to Section 638.53, is a complete defense to a civil or criminal action brought under this section or under this chapter."

Penal Code § 638.50(b) defines a "pen register" as follows:

"(b) "Pen register" means a device or process that records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, but not the contents of a communication. "Pen register" does not include a device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider, or a device or process used by a provider or customer of a wire communication service for cost accounting or other similar purposes in the ordinary course of its business."

Pursuant to Penal Code § 637.2, a victim may bring a civil suit against a violator and seek the following remedies: (1) the greater of $5000 or treble actual damages, and/or (2) an injunction. Pursuant to Penal Code § 637.2(c) permits a plaintiff to bring such a suit even if they have no "actual damages."

Defense challenges the pleading here on two separate grounds. First, they argue that Plaintiff has not alleged any facts to show that Defendant actually used a pen register. Second, they contend that Plaintiff consented to the use of a pen register. Neither argument can succeed at this stage.

On the first point, Plaintiff has pled (at paragraphs 16-17 of his complaint) that Defendant "deployed a software device and process" which first recorded the information being transmitted by Plaintiff's device, and then used that information to install tracking code on Plaintiff's device. That is sufficient to describe a pen register as defined in Section 638.50(b), and the illegal use of such a pen register as prohibited in Section 638.51(a). Plaintiff is only obliged to plead these ultimate facts; a detailed description of the software and the precise mechanism it employs are evidentiary facts which need not be included. C.W. Johnson & Sons, Inc. v. Carpenter (2020) 53 Cal.App.5th 165, 169.

On the second point, the various exceptions contained in Section 638.51(b) create possible affirmative defenses. Plaintiff is not necessarily required to plead their absence. In any event, Defense's argument appears to be that Plaintiff gave consent simply by visiting the website. Accepting this argument would allow the exception to swallow the rule whole. If merely visiting a website constitutes consent to the use of a pen register, then Section 638.51(a) would be a dead letter. It could never be violated. That is not an acceptable consequence.

Conclusion

Plaintiff has properly pled the ultimate facts necessary to this cause of action. Resolution of the issues raised requires discovery and the introduction of evidence. Therefore, the demurrer is OVERRULED.