

2019 IL App (1st) 180691-U  
No. 1-18-0691  
March 4, 2019

SECOND DIVISION

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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JENNIFER ROTTNER, individually and on	)	Appeal from the Circuit Court
Behalf of all others similarly situated,	)	Of Cook County.
	)	
Plaintiff-Appellant,	)	No. 15 CH 16695
	)	
v.	)	The Honorable
	)	Celia Gamrath,
PALM BEACH TAN, INC., a Texas	)	Judge Presiding.
Corporation, and PBT ACQUISITION I,	)	
LLC, a Texas limited liability company,	)	
	)	
Defendants-Appellees.	)	

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JUSTICE WALKER delivered the judgment of the court.  
Justices Pierce and Griffin concurred in the judgment.

**ORDER**

¶ 1 *Held:* A plaintiff who proves a violation of the Biometric Information Privacy Act may recover liquidated damages without proof of actual damages beyond the violation of the Act.

¶ 2 Jennifer Rottner sued Palm Beach Tan (PBT), alleging that PBT violated the Biometric Information Privacy Act (Act) (740 ILCS 14/1 *et seq.* (West 2014)). The circuit court, following the appellate court's opinion in *Rosenbach v. Six Flags Entertainment Corp.*, 2017

IL App (2d) 170317, dismissed the complaint for lack of standing because Rottner did not sufficiently plead damages resulting from the alleged violation of the Act. After Rottner filed the notice of appeal, our supreme court reversed the decision in *Rosenbach*, 2017 IL App (2d) 170317. See *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186. Following the supreme court's ruling, we reverse the circuit court's decision and remand for further proceedings on the complaint.

¶ 3

### BACKGROUND

¶ 4

Rottner paid for a membership with PBT in 2003. In 2015 she sued PBT, alleging that PBT required her fingerprint each time she sought to use PBT's services. According to the complaint, PBT violated the Act in that it never informed Rottner of its biometric data retention policy, and she never signed a release permitting PBT to collect and store her fingerprints.

¶ 5

Rottner sought relief for herself and the class of all Illinois residents whose fingerprints PBT collected. She claimed that the violation of the Act warranted an award of liquidated damages under section 20 of the Act, which provides:

"Any person aggrieved by a violation of this Act shall have a right of action in a State circuit court \*\*\*. A prevailing party may recover for each violation \*\*\* against a private entity that negligently violates a provision of this Act, liquidated damages of \$1,000 or actual damages, whichever is greater." 740 ILCS 14/20 (West 2014).

¶ 6

PBT filed a motion to dismiss the complaint both under section 2-615 of the Code of Civil Procedure (Code), for failure to state a claim for relief (735 ILCS 5/2-615 (West

2014)), and under section 2-619 of the Code, for lack of standing (735 ILCS 5/2-619 (West 2014)). The circuit court granted PBT's motion in part and denied it in part, finding that Rottner had not sufficiently alleged recoverable damages, but she had standing to seek an injunction.

¶ 7 After the Illinois Appellate Court for the second district decided *Rosenbach*, 2017 IL App (2d) 170317, PBT filed a motion to reconsider the partial denial of its motion to dismiss. The appellate court found that *Rosenbach* lacked standing to sue for a violation of the Act because she had not alleged actual damages resulting from the alleged violation of the Act. Based on *Rosenbach*, the circuit court dismissed Rottner's complaint with prejudice. Rottner appealed.

¶ 8 Our supreme court subsequently overturned the second district's decision in *Rosenbach*, 2017 IL App (2d) 170317. *Rosenbach*, 2019 IL 123186. Rottner filed a motion for summary reversal of the circuit court's decision, contending that the supreme court's opinion in *Rosenbach* resolved all issues on appeal in this case. PBT opposed the motion, contending that the opinion in *Rosenbach* did not resolve the issue of whether the circuit court could award Rottner statutory liquidated damages without a showing that misuse of her biometric data caused her to suffer actual damages apart from the statutory violation. We took Rottner's motion with the case.

¶ 9 ANALYSIS

¶ 10 Our analysis must begin with consideration of *Rosenbach*. In that case, *Rosenbach* alleged that Six Flags collected her son's fingerprints without informing her or her son of the purpose for the data collection, and without any written consent from her or her son. Six

Flags moved to dismiss the complaint under both section 2-615 and 2-619 of the Code, arguing that Rosenbach lacked standing to sue because she had suffered no actual injury. The appellate court held that the alleged violation of the Act, without any other injury, did not suffice to qualify Rosenbach as a person "aggrieved" by the violation, within the meaning of section 20 of the Act, and therefore she lacked standing to sue. *Rosenbach*, 2017 IL App (2d) 170317, ¶ 28. Rosenbach appealed to the Illinois Supreme Court.

¶ 11 Due to the procedural posture of the case, the supreme court found that Six Flags "violated the provisions of section 15 of the Act when it collected [Rosenbach's] son's thumbprint without first following the statutorily prescribed protocol." *Rosenbach*, 2019 IL 123186, ¶ 22. The court held:

"The duties imposed on private entities by section 15 of the Act (740 ILCS 14/15 (West 2016)) regarding the collection, retention, disclosure, and destruction of a person's or customer's biometric identifiers or biometric information define the contours of that statutory right. Accordingly, when a private entity fails to comply with one of section 15's requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach. \*\*\* [S]uch a person or customer would clearly be 'aggrieved' within the meaning of section 20 of the Act (citation) and entitled to seek recovery under that provision. No additional consequences need be pleaded or proved. The violation, in itself, is sufficient to support the individual's or customer's statutory cause of action.

\*\*\* When a private entity fails to adhere to the statutory procedures, as defendants are alleged to have done here, 'the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized.' [Citation.] This is no mere 'technicality.' The injury is real and significant.

\*\*\*

The strategy adopted by the General Assembly through enactment of the Act is to try to head off \*\*\* problems before they occur. It does this in two ways. The first is by imposing safeguards to insure that individuals' and customers' privacy rights in their biometric identifiers and biometric information are properly honored and protected to begin with, before they are or can be compromised. The second is by subjecting private entities who fail to follow the statute's requirements to substantial potential liability, including liquidated damages, injunctions, attorney fees, and litigation expenses 'for each violation' of the law (citation) whether or not actual damages, beyond violation of the law's provisions, can be shown." *Rosenbach*, 2019 IL 123186, ¶¶ 33-36.

¶ 12 In opposing the motion for summary reversal, PBT claims that the supreme court in *Rosenbach* did not resolve the issue of whether a party who claims only a collection of the party's biometric data in violation of the Act, with no further injury, may recover the liquidated damages provided in section 20 of the Act. In effect, PBT suggests that the supreme court was not clear when it said that the Act "subject[s] private entities who fail to follow the statute's requirements to \*\*\* liquidated damages \*\*\* whether or not actual

damages, beyond violation of the law's provisions, can be shown." *Rosenbach*, 2019 IL 123186, ¶ 36. We believe that the supreme court was clear, and we will apply the holding of *Rosenbach*. We find that Rottner, like Rosenbach, has standing to sue and has adequately stated a claim for liquidated damages under section 20 of the Act, even if she has alleged only a violation of the Act and not any actual damages beyond violation of law.

¶ 13

CONCLUSION

¶ 14

Following *Rosenbach*, 2019 IL 123186, we reverse the circuit court's judgment and remand for further proceedings in accord with this order.

¶ 15

Reversed and remanded.