U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

April 25, 2018

BY ECF
The Honorable Edgardo Ramos
United States District Judge
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *Bronx Independent Living Services, et al., v. Metropolitan Transit Authority, et al.*, 16 Civ. 05023 (ER)

Dear Judge Ramos:

We write on behalf of the United States in support of Plaintiffs' motion for partial summary judgment in the above-referenced lawsuit filed against the Metropolitan Transit Authority ("MTA") and the New York City Transit Authority ("NYCTA," and together with MTA, "Defendants") to remedy violations of Title II of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12131-12134.

A. Plaintiffs' Motion Is Ripe for Adjudication

On April 24, 2018, Plaintiffs filed a motion for partial summary judgment seeking a ruling that the replacement of the staircases at the Middletown Road subway station triggered the Defendants' obligation to provide readily accessible vertical access to the station to the maximum extent feasible, as required by 49 C.F.R. § 37.43(a)(1). *See* Dkt. No. 80. Prior to the filing of the motion, and after a pre-motion conference during which Defendants objected to the motion, Defendants submitted a letter stating that "[t]o avoid having to expend resources opposing Plaintiffs' motion, which will not determine the outcome of the case, Defendants will not contest the applicability of [49 C.F.R. § 37.43(a)(1)] to the scope of the renewal work at the Middletown Road Station," but "[without] prejudice [to] Defendants' position in any other case[.]" Dkt. No. 76 at 1. The Court should reject Defendants' attempt to avoid a ruling on this issue, for two reasons.

First, the outcome of this motion is vital to this case. If 49 C.F.R. § 37.43(a)(1) applies to the renovation of the stairs – as the United States and Plaintiffs argue – then the burden shifts to Defendants to demonstrate that installing an elevator was technically infeasible. *See* 49 C.F.R. § 37.42(b); 2010 Standards Section 106.5.[1] This is a high bar. *See, e.g.*, *Roberts v. Royal Atl. Corp.*, 542 F.3d 363, 371 (2d Cir. 2008) (holding that a defendant must establish that the requested

[1] As a result, Plaintiffs' motion does not seek a ruling on whether the installation of an elevator was technically feasible at the time of the renovation. *See* Dkt. No. 80. That would be the subject of expert discovery.

alteration would be "virtually impossible" in light of the "nature of an existing facility") (quotation marks and citation omitted). If, on the other hand, 49 C.F.R. § 37.43(a)(2) applies to the renovations of the stairs – as Defendants previously argued to the Federal Transit Administration ("FTA"), *see* Dkt. No. 81-14 (December 15, 2014, Letter from MTA to FTA) – then Defendants could argue that installing an elevator would have cost more than 20% of the total station renovation costs. *See* 49 C.F.R. § 37.43(e)(1). Thus, the resolution of this motion determines whether or not a cost defense is available to MTA and NYCTA.

Second, Defendants cannot avoid a court ruling on this issue by "not contest[ing]" a motion for summary judgment. Federal Rule of Civil Procedure 56 provides that if a non-moving party fails to oppose a summary judgment motion, then "summary judgment, if appropriate, shall be entered against" that party. Fed. R. Civ. P. 56(e). The Second Circuit "has made clear, however, that where the non-moving party 'chooses the perilous path of failing to submit a response to a summary judgment motion, the district court may not grant the motion without first examining the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial.'" *Vermont Teddy Bear Co. v. 1-800 Beargram Co*., 373 F.3d 241, 244 (2d Cir. 2004) (citing *Amaker v. Foley*, 274 F.3d 677, 681 (2d Cir. 2001)). Thus, if "the evidence submitted in support of the summary judgment motion does not meet the movant's burden of production, then 'summary judgment must be denied even if no opposing evidentiary matter is presented.'" *Id.* (citations omitted). The Second Circuit has therefore directed district courts to "assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law," *id.*, even where, as here, the non-moving party does "not contest" the motion, Dkt. No. 76 at 1. *See also Amaker*, 274 F.3d at 679 (holding that granting summary judgment "solely on the basis that plaintiff had failed to submit any papers" "inappropriately relieved defendants of their initial burden under Fed. R. Civ. P. 56"); *Onecall Ltd. v. iYogi, Inc*., No. 16-CV-766 (KBF), 2016 WL 6068198, at *2 (S.D.N.Y. Oct. 14, 2016) (reviewing summary judgment motion where defendant "did not oppose" it); *Franco v. Jubilee First Ave. Corp.*, No. 14-CV-07729 (SN), 2016 WL 4487788, at *12-13 (S.D.N.Y. Aug. 25, 2016) (reviewing sufficiency of evidence and granting plaintiffs' motion for summary judgment on issue defendants "d[id] not contest").

Accordingly, deciding whether 49 C.F.R. § 37.43(a)(1) or 49 C.F.R. § 37.43(a)(2) applies to the renovation of the stairs at the Middletown Road Station is central to this case, and the Court should review this unopposed motion for summary judgment.

B. The Court Should Grant Plaintiffs' Motion

There is no genuine issue of material fact that when MTA and NYCTA renovated the Middletown Road station, Defendants were required to ensure that any alterations were readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, to the maximum extent feasible, pursuant to 42 U.S.C. § 12147 and 49 C.F.R. § 37.43(a)(1).

1. The Difference Between Section (a)(1) and Section (a)(2)

42 U.S.C. § 12147 and the United States Department of Transportation's ("DOT") implementing regulation 49 C.F.R. § 37.43 govern alterations of existing transportation facilities by public entities. 49 C.F.R. § 37.43(a)(1) provides that when the alteration:

> affects or could affect the *usability* of the facility or part of the facility, the entity shall make the alterations . . . in such a manner, *to the maximum extent feasible*, that the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs[.]

(Emphases added.)[2] While "usability" is not specifically defined in the regulations, DOT Guidance explains that usability "is broadly defined to include renovations that affect the use of a facility in any way, and not simply changes that relate directly to access." *See* U.S. Dep't of Trans., Fed. Transit Admin., Americans with Disabilities Act (ADA): Guidance, 2015 WL 6037995, at 3.4.2 (Nov. 4, 2015) (General Alterations). The Guidance further references "resurfacing a platform or a stairway" as alterations affecting "usability." *Id.* The Third Circuit has also specifically interpreted alterations affecting usability to include the replacement of a stairway in a transit station. *Disabled in Action of Pennsylvania v. Southeastern Pennsylvania Trans. Auth.,* 635 F.3d 87, 93 (3d Cir. 2011) (hereinafter "*SEPTA*") (examining renovations to public transit stations and holding that "usability" has "an expansive, remedial construction should be broadly defined to include renovations which affect the use of a facility, and not simply changes which relate directly to access"; and finding that "replacing an unusable stairway with a usable one and extensively changing an inoperative escalator so that it operates again surely affects the 'usability' of the locations they service").

49 C.F.R. § 37.43(a)(2) targets the path of travel to and from altered areas. Specifically, Section (a)(2) provides that when the alteration:

> affects or could affect the usability of or access to an area of a facility *containing a primary function*, the entity shall make the alteration in such a manner that, to the maximum extent feasible, *the path of travel* to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area are readily accessible to and usable by individuals with disabilities . . . upon completion of the alterations. Provided, that alterations to the path of travel, drinking fountains, telephones and bathrooms are not required to be made readily accessible . . . if the *cost and scope of doing so would be disproportionate*.

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[2] As noted above, the phrase "'to the maximum extent feasible' applies to the occasional case where the nature of an existing facility makes it impossible to comply fully with applicable accessibility standards through a planned alteration." 49 C.F.R. § 37.43(b). Thus, a public entity must demonstrate that the alteration to make the facility fully accessible would not be technically feasible. *See U.S. Dep't of Trans., Fed. Transit Admin., Americans with Disabilities Act (ADA): Guidance,* 2015 WL 6037995, at 3.4.2 (Nov. 4, 2015).

(Emphases added.)[3] 49 C.F.R. § 37.43(c) defines "primary function" as a "major activity for which the facility is intended[,]" including, but not limited to, "ticket purchase and collection areas, passenger waiting areas, train or bus platforms, baggage checking and return areas and employment areas . . . ." 49 C.F.R. § 37.43(d) defines "path of travel" to include a "continuous, unobstructed way of pedestrian passage by means of which the altered area may be approached, entered, and exited, and which connects the altered area with an exterior approach . . . , an entrance to the facility, and other parts of the facility." Notably, the DOT did not include staircases in its definition of an accessible "path of travel" because a staircase, by definition, can never be made accessible to individuals who use wheelchairs.

2. Section (a)(1) Applies to the Middletown Road Station Renovations

Here, there is no genuine issue of material fact that the renovations to the stairs at Middletown Road Station affected its "usability," triggering Section (a)(1). The renovations were extensive, including demolishing and rebuilding each of the stairways along with the canopies and railings. Plaintiffs' Local Rule 56.1 Statement of Undisputed Facts at ¶ 8 (renovations included repairing "corroded steel throughout the station"; replacing the mezzanine floors, walls, and roof; resurfacing the mezzanine platform; reconstructing the platform edges; replacing the roof and gutters of the platform canopies; performing extensive renovations on the "track through-span" over which trains run; and installing new artwork and lighting throughout the station); *id.* at ¶ 9 (modifying or replacing certain load-bearing structures); *id.* at ¶ 17 (destroying and rebuilding each stairway along with canopies and railings). Indeed, the Third Circuit has found that even a less expansive station renovation affected its usability. *SEPTA,* 635 F.3d at 93. Moreover, DOT's own guidance specifically references "resurfacing a platform or a stairway" as an alteration affecting "usability." U.S. Dep't of Trans., Fed. Transit Admin., Americans with Disabilities Act (ADA): Guidance, 2015 WL 6037995, at 3.4.2 (Nov. 4, 2015) (General Alterations); *see also Guidance*, 2015 WL 6037995, at 3.4.3.

Accordingly, Plaintiffs have met their burden demonstrating that there is no genuine issue of material fact that Defendants were required to comply with Section (a)(1) when renovating Middletown Road Station, entitling Plaintiffs to summary judgment on this issue.

[3] Also as noted above, any alterations to provide an accessible path of travel to the altered area are "disproportionate" when the alterations exceeds 20% of the total cost of the alteration to the primary function area. *See* 49 C.F.R. § 37.43(e)(1).

We thank the Court for its consideration.

Respectfully,

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