UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:18-cv-03232-SVW-AS	Date	December 17, 2018
Title	*Daniel Lopez v. Catalina Channel Express, Inc.*		

JS-6

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [18] AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [20]

I. Introduction

On April 17, 2018, Plaintiff Daniel Lopez filed this civil action against Defendant Catalina Channel Express, Inc., seeking relief for alleged violations of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101, *et seq.* and the Unruh Civil Rights Act ("Unruh Act"), Cal. Civ. Code § 51-53. Dkt. 1 ("Compl."). On August 8, 2018, the Court bifurcated the ADA claim and the state law claim. Dkt. 14. On October 26, 2018, Defendant filed a Motion for Summary Judgment ("D. Mot."). Dkt. 18. On October 29, 2018, Plaintiff filed a Motion for Summary Judgment ("P. Mot."). Dkt. 20.

II. Factual Background

Plaintiff is a paraplegic who uses a wheelchair for mobility. Plaintiff's Statement of Uncontroverted Facts ("PSUF"), Dkt. 21-1, ¶ 1. Defendant is the owner and operator of the Catalina Express, which is a business that transports passengers between Long Beach and Catalina Island. *Id.* ¶¶ 3, 6. The Catalina Express' boat, the Jet Cat Express, offers restrooms to its passengers. *Id.* ¶ 5. In April 2016, Plaintiff boarded the Jet Cat Express. *Id.* ¶¶ 6-7. Plaintiff discovered that there were restrooms provided to the passengers, but was not able to use them because the width of the restroom door did not

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accommodate his wheelchair. *Id.* ¶¶ 7-8.[1] As a result, Plaintiff soiled himself. *Id.* ¶ 9.

On May 20, 2018, Plaintiff's investigator conducted an inspection of the Jet Cat Express. *Id.* ¶ 11. He found that the designated accessible restrooms had a sliding door that opens only 25 inches in width. *Id.* ¶ 13. He stated that "the door to the accessible restrooms could have opened 34 inches, if not blocked by [a] metal pin, located on the top of the sliding door." *Id.* ¶ 14. Defendant offers a declaration of its Vice President of Vessel Engineering, Tony Ross, who states that Catalina Express has evaluated whether a modification can be made to the doorway that would involving installing a different type of handle. Dkt. 18-5, at ¶ 10. According to Ross, this modification would raise serious safety concerns, as any handle located on the outer edge of the door may make it more likely that passengers' hands would be injured when closing the door due to the constant movement of the vessel. *Id.* In addition, according to Ross, Catalina Express cannot structurally alter the restroom without negatively impacting the stability of the vessel, and loss of stability is a threat to the safety of navigation. *Id.* ¶ 11.

III. Legal Standard

Summary judgment should be granted where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of . . . [the factual record that] demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party satisfies its initial burden, the non-moving party must demonstrate with admissible evidence that genuine issues of material fact exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986) ("When the moving party has carried its burden under Rule 56 . . . its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.").

A material fact for purposes of summary judgment is one that "might affect the outcome of the suit" under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists where "the evidence is such that a reasonable jury could return a verdict for

[1] There is a factual dispute regarding whether this incident took place on the journey to or from Catalina Island, but this dispute is not material. *Id.* ¶¶ 7-8.

the nonmoving party." *Id.* A court must draw all inferences from the facts in the non-movant's favor, *id.* at 255, but when the non-moving party's version of the facts is "blatantly contradicted by the record, so that no reasonable jury could believe it, [the] court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

IV. Analysis

A. Elements of an ADA Claim

To succeed on an ADA claim, a plaintiff must establish: "(1) that [the plaintiff] is disabled within the meaning of the ADA; (2) that the defendants own, lease, or operate a place of public accommodation; and (3) that the defendants discriminated against the plaintiff within the meaning of the ADA." *Roberts v. Royal Atlantic Corp.*, 542 F.3d 363, 368 (2d Cir. 2008). "Title III defines 'discrimination' as, among other things, a failure to remove 'barriers . . . where such removal is readily achievable.'" *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1135 (9th Cir. 2002) (quoting 42 U.S.C. § 12182(b)(2)(A)(iv)). "If removal of a barrier is not 'readily achievable,' a public accommodation must make its facilities available through 'alternative methods if such methods are readily achievable.'" *Pickern*, 293 F.3d at 1135 (quoting 42 U.S.C. § 12182(b)(2)(A)(v)). The ADA defines the phrase "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181.

B. Application of the Law

One issue raised by Defendant in its motion for summary judgment is whether removing the alleged barrier in the Jet Cat Express is readily achievable. A crucial—and, as it turns out here, dispositive—threshold issue is determining which party bears the burden of establishing that removal of barriers is readily achievable. In its opposition brief, Plaintiff argues that, under *Molski v. Foley Estates Vineyard and Winery, LLC*, 531 F.3d 1043 (9th Cir. 2008), Defendant bears the burden. By contrast, Defendant argues that *Molski* is distinguishable and that the relevant case law offers clear authority that Plaintiff bears the burden.

Defendant is correct that *Molski* is distinguishable and thus does not govern the Court's analysis

in this case. In the context of historic facilities, the Ninth Circuit held that defendants bear the burden of production. *Molski*, 531 F.3d at 1049. However, the holding was clearly cabined to apply only to historic facilities. *Id.* at 1048-49 (referring to the "inquiry into who bears the burden of production for the ready achievability of barrier removal *in historic facilities*" and repeatedly relying on § 4.1.7, a provision relating specifically to historic buildings) (emphasis added). Because the instant case does not involve a historic facility, *Molski* is inapposite.

In a post-*Molski* case, the Ninth Circuit acknowledged that it has "yet to decide who has the burden of proving that removal of an architectural barrier is readily achievable." *Moore v. Robinson Oil Corp.*, 588 Fed. Appx. 528, 529-30 (9th Cir. 2014) (quoting *Vogel v. Rite Aid Corp.*, 992 F. Supp. 2d 998, 1010 (C.D. Cal. 2014)). However, "[v]arious district courts throughout the circuit . . . have applied the Tenth Circuit's burden-shifting framework." *Vogel*, 992 F. Supp. 2d at 1010. In *Colorado Cross Disability v. Hermanson Family, Ltd.*, 264 F.3d 999, 1006 (10th Cir. 2001), the Tenth Circuit held that the "[p]laintiff bears the initial burden of production to present evidence that a suggested method of barrier removal is readily achievable." If the plaintiff makes such a showing, then the burden shifts to the defendant, who "bears the ultimate burden of persuasion regarding [his] affirmative defense that a suggested method of barrier removal is not readily achievable." *Id.* This Court follows the lead of "the overwhelming majority of federal courts that apply the burden-shifting framework of" *Colorado Cross*. *Vesecky v. Garick, Inc.*, No. CV 07-1173-PHX-MHM, 2008 WL 4446714, at *3 (D. Ariz. Sept. 30, 2008); *see also, e.g.*, *Lopez v. Macca Corp.*, CV No. 18-2589-RSWL-E, 2018 WL 5310770, at *4 (C.D. Cal. Oct. 22, 2018); *Vogel v. Dolanotto, LLC*, No. 2:16-CV-02488-ODW (KSx), 2018 WL 851304, at *5 (C.D. Cal. Feb. 13, 2018); *Villegas v. Beverly Corner, LLC*, No. 2:16-cv-07651-CAS(SSx), 2017 WL 3605345, at *4 (C.D. Cal. Aug. 18, 2017); *Langer v. Deguzman*, No. 2:15-cv-09493-SVW-JEM, 2016 WL 4500783, at *4 (C.D. Cal. July 28, 2016); *McComb v. Vejar*, No. 2:14-CV-00941-RSWL-E, 2014 WL 5494017, at *6 (C.D. Cal. Oct. 28, 2014).

Here, Plaintiff has failed to meet his burden of establishing that a suggested method of barrier removal is readily achievable. All that Plaintiff argues in his motion is that "[p]roviding and maintaining an accessible door to the restroom is readily achievable" because "this type of action . . . is the type of action identified as likely to be readily achievable" in the Code of Federal Regulations. P. Mot. 7. The only other evidence that Plaintiff could conceivably point to is its expert's conclusion that the door to the accessible restrooms could have opened 34 inches if were not blocked by a metal pin located on the

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top of the sliding door. However, this statement, even if true, only identifies the problem; it does not bear on the question of whether remediating the problem is readily achievable.[2] Furthermore, such a statement is, at best, conclusory. *Moore*, 588 Fed. Appx. at 530 (rejecting, absent "further explanation," the "conclusory testimony" of the plaintiff's expert "that a portable restroom 'could be inserted at the exterior of the [Gas Station]'").

But, contends Plaintiff, even if "full barrier removal" is not readily achievable, readily achievable partial accommodations must still be made. Dkt. 23 at 11-16. This may be so,[3] but partial measures still must be proved to be readily achievable, and the burden is still Plaintiff's. *Kreisler v. Second Ave. Diner Corp.*, No. 10 Civ. 7592(RJS), 2012 WL 3961304, at *9 (S.D.N.Y. Sept. 11, 2012) ("Since these costs would almost certainly exceed the Diner's annual net profits, the Court concludes that modification of the vestibule is not 'readily achievable.' If alternatives to making the vestibule more accessible exist, Plaintiff has not met his burden of presenting them.").

Because Plaintiff has not offered facts establishing that any modification or remediation of the Jet Cat Express is readily achievable, Plaintiff has failed to meet his burden. Because Plaintiff has failed to "establish the existence of an element essential" to his ADA claim, the Court grants summary judgment on that claim. *Celotex*, 477 U.S. at 322 ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

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[2] The ADA enumerates various factors to be considered when assessing whether an action is readily achievable, including "the nature and cost of the action," "the overall financial resources of the facility," "the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility," "the overall financial resources of the covered entity," and the "number, type, and location of its facilities." 42 U.S.C. § 12181(9). Plaintiff offers no evidence whatsoever on any of these factors.

[3] "If . . . the measures required to remove a barrier would not be readily achievable, a public accommodation may take other readily achievable measures to remove the barrier that do not fully comply with the specified requirements. Such measures include, for example, providing a ramp with a steeper slope. . . . No measure shall be taken, however, that poses a significant risk to the health or safety of individuals with disabilities or others." 28 C.F.R. § 36.304(d)(3).

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Furthermore, because it has dismissed all claims over which it has original jurisdiction, the Court declines to exercise supplemental jurisdiction over the remaining claim—the Unruh claim—which does not arise under federal law. *See Love v. Ayoub*, 2016 WL 3671089, at *3-4 (C.D. Cal. June 30, 2016); 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims over which it has original jurisdiction.").

V. Conclusion

For the above reasons, the Court GRANTS Defendant's motion for summary judgment and DENIES Plaintiff's motion for summary judgment.

IT IS SO ORDERED.

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