

Examining New York Court Decisions on Website Accessibility Claims, 12/13/24, New York Law Journal, by Jennifer E. Sherven, Esq. and Megan Beloff (attorney bar admission pending)

In New York, federal courts have dismissed cases for failure to meet all elements of a Title III Americans with Disabilities Act (ADA) claim, specifically “that defendants own, lease, or operate a place of public accommodation,” and for lack of subject matter jurisdiction. New York State courts dismissed cases due to plaintiffs’ inability to prove all elements of a disparate impact or disparate treatment claim.

In the article below, Jennifer E. Sherven and Megan Beloff of Kaufman Dolowich LLP offer a deeper look into some of these cases and some of the key defenses taken by public accommodations in NY federal and state courts.

New York has witnessed a significant increase in website accessibility lawsuits at both the federal and state levels. Recent developments in case law could change the landscape regarding how public accommodations—businesses offering goods and services to the general public—litigate these cases. In New York, federal courts have dismissed cases for failure to meet all elements of a Title III Americans with Disabilities Act (ADA) claim, specifically “that defendants own, lease, or operate a place of public accommodation,” and for lack of subject matter jurisdiction. New York State courts dismissed cases due to plaintiffs’ inability to prove all elements of a disparate impact or disparate treatment claim. These defenses can serve as a vital tool for defendants of such claims when navigating this evolving area of law.

In a recent lawsuit filed in the Southern District of New York, AI use in website remediation came into question. Plaintiffs filed a lawsuit against accessiBe(tm), a company that markets a widget/overlay that uses artificial intelligence to allegedly repair the underlying code of websites to comply with the World Wide Web Consortium’s Web Content Accessibility Guidelines (WCAG). In the accessiBe(tm) lawsuit, plaintiffs allege, inter alia, that accessiBe(tm) engaged in “misleading and false representations in its advertising, its direct marketing, its standard form correspondence with customers, and in its terms of service regarding its ‘overlay’ products.” See *Parikh v. Accessibe*, 24-cv-4848. AccessiBe(tm) sought leave to file a motion to dismiss, which will likely be briefed in 2025. It remains to be seen whether this lawsuit will have any impact concerning the way public accommodations choose to remediate websites, but the case serves as another example of nuanced website accessibility matters popping up in court.

One reason courts are dismissing cases is due to the failure of plaintiffs to state a claim according to the Federal Rule of Civil Procedure 12(b)(6). On Sept. 30, 2024, Chief U.S. District Court Judge Laura Taylor Swain in the Southern District of New York evaluated the caselaw and text of the ADA concerning whether a standalone website without a connection to a physical brick and mortar location can be considered a “place of public accommodation.” In *Mejia v. High Brew Coffee*, the district court held that “a stand-alone website is not a place of public accommodation under Title III of the ADA. The plaintiff thus fails to state a claim on which relief may be granted under the ADA.” (*Mejia v. High Brew Coffee*, S.D.N.Y. Sept. 30, 2024).

Similarly, on Oct. 16, 2024, relying in part on *Mejia*, U.S. District Judge Gregory Woods held in *Sookul v. Fresh Clean Threads*, that “under the ADA’s plain text, only physical places are subject to suit under Title III. The defendant is an online-only retailer that has no physical business open to the public. Accordingly, the defendant’s motion to dismiss plaintiff’s ADA claim under Rule 12(b)(6) is granted.” (*Sookul v. Fresh Clean Threads*, S.D.N.Y. Oct. 16, 2024).

Courts are also dismissing website accessibility cases for lack of subject matter jurisdiction according to the Federal Rule of Civil Procedure 12(b)(1). In *Suris v. Crutchfield*, the plaintiff alleged he was unable to watch video reviews of the defendant’s product on its website because he is hearing impaired and the videos lacked closed captioning. The district court granted the defendant’s motion to dismiss and held that the plaintiff lacked standing due to his inability to prove that he would return to the defendant’s website. The District Court specifically noted that “the plaintiff has failed to establish an injury in fact under the ADA because he does not offer any ‘nonconclusory factual allegations’ that demonstrate a plausible intention to return to the defendant’s website but for the barriers to access.” (*Suris v. Crutchfield New Media*, E.D.N.Y. June 2, 2023). The district court further noted that, in order to establish standing, the plaintiff must have a more “concrete plan” or “specification of when the ‘some day’ he plans on returning will be.” In *Suris*, the district court went on to also grant dismissal on the basis that the plaintiff’s claims were moot because the defendant “has made a credible showing that further closed captioning issues on their videos are not reasonably expected to recur.”

In *Winegard v. Golftec*, the plaintiff alleged that he was unable to watch online instructional golf videos because he is hearing impaired and the videos lack closed captioning. In a scathing decision, the district court held that the description of the plaintiff’s intention to return to the website was deficient stating, “The court is not going to suggest what would be adequate allegations, but he could have set forth his golfing experience or what inspired him to start learning now; named other golf instruction websites that he has successfully visited or noted prior golf lessons he has taken; listed some of the courses he has played; or any other facts that show he is, or, perhaps, wants to

be a golfer.” (Winegard v. Golftec Intellectual Property, E.D.N.Y. 2023). The district court also noted that “to find standing on the paltry allegations here would allow any sensory-impaired person to sit down at their computer, visit 50 websites (possibly after being referred to them by their non-sensory-impaired lawyer), and bring 50 lawsuits. Standing requires more.” In addition, the district court cautioned that “this kind of ADA litigation saps judicial resources, wastes attorney’s and litigants’ time, and ultimately mocks the statute’s mission.”

Public accommodations should be aware that there is a litany of cases in which defendants have argued that widgets or overlays moot an ADA claim and the district courts have held that the defendants failed to meet their necessary burden to demonstrate mootness. In one such case, *Angeles v. Grace Products*, the defendant engaged accessiBe(tm) to bring its website into compliance. The district court held that the plaintiff’s countervailing evidence (an expert report) did “not meet its formidable burden of demonstrating that it is absolutely clear that the website has been brought into compliance and will remain so.” (*Angeles v. Grace Products*, S.D.N.Y. Sept. 23, 2021). Similarly, in *Quezada v. U.S. Wings*, the defendant engaged accessiBe(tm) to bring its website into compliance. The district court held that it agreed with the plaintiff that the defendant “fails to meet the necessary burden to demonstrate ADA mootness” and concluded that the defendant “has not shown that they have undoubtedly fixed accessibility issues on their website as multiple barriers still allegedly exist.” (*Quezada v. U.S. Wings*, S.D.N.Y. Dec. 7, 2021).

In New York state courts, companies being sued for website accommodation violations are utilizing two important defenses arising from the 2024 decision in *Rodriguez v. Bitchin*. On May 3, 2024, the Supreme Court of the State of New York, New York County, held that the plaintiff, a visually impaired individual, failed on both his disparate treatment claim and disparate impact claim brought under the New York State Human Rights Law and the New York City Human Rights Law. The court noted that:

For disparate treatment claims, proof of a discriminatory motive is critical. Here, the plaintiff’s complaint fails to provide any facts that could plausibly support an inference of defendant’s discriminatory motive when it allegedly denied him access to their website. The plaintiff admits that he did not request from the defendant a reasonable accommodation to allow him access to their website or otherwise contact defendant’s business before filing suit. In this context, where the public accommodation is a website instead of a physical public accommodation, the plaintiff has not shown that the defendant knew of his visual impairment let alone discriminated on said basis. As such, since plaintiff cannot plead that defendant discriminated against him ‘because of his’ disability, he cannot properly allege injury under a disparate treatment theory.

In regard to the plaintiff’s disparate impact claim, the plaintiff attempted to argue that the defendant’s website was a “policy” or “practice” that “falls more harshly on” or results in a disparate impact on a protected group of individuals. The Supreme Court found that the plaintiff did not adequately plead an injury based on “policy” or “practice,” noting that “plaintiff’s argument requires the website to be both ‘the place of public accommodation’ and the facially neutral ‘practice’ that the public accommodation employs but which has a discriminatory impact on members of a protected group.” It is important to note that, although *Rodriguez*’ counsel originally filed a notice of appeal, on Nov. 5, 2024, the notice of appeal was withdrawn, thereby depriving the New York Appellate Division, First Department, with the ability to review the decision and order.

The cases outlined in this article reflect many of the defenses taken by public accommodations in New York federal and state courts and demonstrate their current effectiveness in achieving dismissals of website accommodation cases. Public accommodations and their counsel would be well advised to continue monitoring such decisions rendered in New York courts as they provide evidentiary support regarding the future plausibility of such claims.

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