UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RICHARD FRAME, et al., Plaintiffs,	§ §	
v.	§	CIVIL ACTION NO. 4:05-CV-0470-Y
THE CITY OF ARLINGTON, TEXAS, Defendant.	§ §	

DEFENDANT'S REPLY TO PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S THIRD RENEWED MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant City of Arlington, Texas ("Defendant"), under the Court's Order Granting Motion for Leave to File Fourth-Amended Complaint, dated August 9, 2007 ("Order"), and the Court's Local Rule 7.1(f), submits this reply to Plaintiffs' Brief in Response to Defendant's Third Renewed Motion to Dismiss, filed September 4, 2007 ("Plaintiffs' Response"):

I. INTRODUCTION

When Defendant City of Arlington's Third Renewed Rule 12(b)(6) Motion to Dismiss Plaintiffs' Claims ("Defendant's Motion") and Defendant's Brief in Support of Its Third Renewed Rule 12(b)(6) Motion to Dismiss Plaintiffs' Claims ("Defendant's Brief") were filed on April 30, 2007, Plaintiffs' live pleading was their Third Amended Complaint. *See* Court's Docket. The Court's Order, in granting Plaintiffs' motion to amend their pleadings, found that no changes exist in the legal claims asserted in the Fourth Amended Complaint, when compared to the Third Amended Complaint, except for the addition of three (3) plaintiffs. Order, p. 2. As a result, Defendant respectfully requests that Defendant's Motion and Brief be considered by the Court as being directed to Plaintiffs' Fourth Amended Complaint and its identical deficiencies as exist in the Third Amended Complaint (albeit paragraph numbers have changed).

This is not a class action case. Plaintiffs' Response, at pp. 3-4, nonetheless confirms that Plaintiffs' goal is for the City to remediate its entire streets, sidewalks and public right-of-

way system, even in residential areas of the City. Plaintiffs' attempted imposition of technical ADAAG standards on sidewalks and other structures in the public rights-of-way, where no City programs, services or activities are offered, is not authorized by the ADA or Rehabilitation Act. Plaintiffs' allegations fail to state a plausible claim of discrimination and should be dismissed.

II. ARGUMENT AND AUTHORITIES

A. The Legal Standard for Motions to Dismiss Under Rule 12

While Plaintiffs' Response does not materially dispute this section of Defendant's Motion and Brief, it also completely fails to address the recent United States Supreme Court decision in *Bell Atlantic Corp. v. Twombly,* ___ U.S. ___, 127 S.Ct. 1955 (2007)(decided on May 21, 2007, after Defendant's Motion and Brief were filed on April 30, 2007). In *Bell Atlantic,* the Supreme Court abrogated *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), and instead imposed a revised standard for a plaintiff to survive a Rule 12(b)(6) motion to dismiss: plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic*, 127 S.Ct. at 1974. More important to this case, "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic*, 127 S.Ct. at 1965. Both the Fifth Circuit and this Court have recognized and applied the *Bell Atlantic* standard. *See In re Katrina Canal Breaches Litig.*, __ F.3d __, 2007 WL 2200004, at *10 (5th Cir. Aug. 2, 2007); and *Garcia v. Boyar & Miller, P.C.*, 2007 WL 2428572, at *2 (N.D. Tex. Aug. 28, 2007)(slip. op.).

In this case, Plaintiffs have not pleaded a plausible claim of discrimination under the ADA or the Rehabilitation Act beyond the purely speculative level. The only program Plaintiffs allege they were denied access to is the putative "program" of "sidewalks" (and connecting curb ramps). Plaintiffs do not allege that they were excluded from or denied a City program, activity or service, such as the ability to vote, serve on a jury, attend a City Council meeting, or similar program, activity or service. *See Tennessee v. Lane,* 541 U.S. 509, 524-25 (2004). Plaintiffs' alleged dates of harm are also vague. Plaintiffs' have had five opportunities to allege their purported discrimination cause of action, and have increasingly focused their claims not on

program exclusion but instead on purported technical violations of 28 C.F.R. §§ 35.149 - 35.151.[1] For example, Plaintiff Frame says he voted at the community center within the last two years even though he alleges it lacks sufficient handicap accessible parking. Plaintiffs' Fourth Amended Complaint, ¶ 50. That does not state a plausible claim of program access denial.

B. Any Violation of the ADA or Rehabilitation Act Prior to July 22, 2003, is Barred by the Statute of Limitations

The applicable limitations period for an ADA case in Texas is two years, and to the extent Plaintiffs' claims concern alterations occurring prior to July 22, 2003 (two years prior to the date this lawsuit was filed), the two year statute of limitations bars Plaintiffs' claims. Defendant's Brief, pp. 3-6. Plaintiffs' Response does not dispute that law, but instead argues that no limitations period applies because Plaintiffs seek only "equitable" relief. Plaintiffs' Response, pp. 5-6. The cases Plaintiffs cite, however, stand for the proposition that the equitable tolling doctrine applies to defeat a limitations defense under circumstances where a defendant causes a plaintiff to not pursue his rights. *See, e.g., Holmberg v. Armbrecht,* 327 U.S. 396 (1946). The equitable tolling doctrine has no applicability here. Plaintiffs' Fourth Amended Complaint does not allege fraud or any other action by the City that caused Plaintiffs to be delayed in asserting their claims.

Plaintiffs' Response otherwise does not address the well-established Fifth Circuit authorities concerning the statute of limitations defense, or adequately differentiate the holding in *Deck v. City of Toledo,* 56 F. Supp. 2d 886, 891 (N.D. Ohio 1999) that held that the two year Ohio statute of limitations did indeed apply to the *Deck* Plaintiffs' ADA claims. *See* Plaintiffs' Response, p. 7. The difference between this case and *Deck* is that those plaintiffs alleged specific dates of alteration and the complete failure to install curb ramps. Plaintiffs here do not allege one single specific alteration that was made within the two year limitations that did not

[1] *See* Court's Order Denying as Moot Motion to Dismiss and Directing Amended Complaint, dated July 31, 2006.

result in the installation of a curb ramp (the only specific regulation that was enforced in *Deck*). Plaintiffs' allegations, therefore, fail to state a plausible claim for relief.

As predicted, Plaintiffs assert a "continuing violation" theory to avoid the application of the two year statue of limitations. Plaintiffs' Response, pp. 6-9. There is no continuing violation if Plaintiffs cannot point to a specific violation occurring within limitations (indicating a failure on Plaintiffs' part to conduct adequate pre-filing inquiry under Rule 11). In *Deck*, for example, there were numerous specific violations within the limitations period. *Deck*, 56 F.Supp.2d at 892-94. Plaintiffs' allegations here, that curb ramps are constructed on a continual basis in the City, do **not** allege a **violation** of Title II but instead are allegations of **compliance with Title II**.

Plaintiffs' Response nonetheless argues that Plaintiffs can bring claims for sidewalks that are allegedly currently out of technical compliance without showing whether they were constructed or altered in compliance with then-existing regulations. Plaintiffs' alleged duty of perpetual maintenance, and the other issues raised in this case, are important questions of first impression both in this Court and in the Fifth Circuit warranting certification for immediate appeal of these critical issues under 28 U.S.C. § 1292(b).[2]

C. <u>Plaintiffs Lack Legal Standing to Bring This Action</u>

Plaintiffs' Response asserts that Plaintiffs have standing to enforce the technical requirements set forth in the ADA regulations issued by the Department of Justice. Plaintiffs' Response, pp. 11-15. Such an assertion is erroneous. Since the Plaintiffs are not the Department of Justice ("DOJ"), they do not stand in the shoes of the Department of Justice. The ADA applies to the City because the City is a "public entity" as defined under Title II. *See* 42 U.S.C. § 12131(1)(a). The DOJ is authorized to provide technical assistance to the City

[2] The City has previously expressed its desire to pursue certification for appeal under § 1292(b), and Plaintiffs have not objected to certification. *Compare* Defendant's Motion, p. 6, *with* Plaintiffs' Response. The answer to these scope-of-the-case questions will also control the scope of discovery, the scope of any settlement discussions and prospects, the nature of any further motions (dispositive or otherwise), and (if necessary) trial. Certification for appeal under 28 U.S.C. § 1292(b) is not unusual in ADA litigation. *See Deck v. City of Toledo*, 76 F.Supp.2d 816, 817 (N.D. Ohio 1999)(certifying issues to Sixth Circuit under § 1292(b)). Apparently *Deck* settled, however, so that there is no Sixth Circuit opinion.

pursuant to Section 506 of the ADA. *See* 42 U.S.C. § 12206. The DOJ is also authorized, under 28 C.F.R. Part 35, subpart F, to determine the City's compliance with Title II and the DOJ's implementing regulations, to issue findings, and where appropriate, to negotiate and secure voluntary compliance agreements. The United States Attorney General is further authorized, under 42 U.S.C. § 12133, to bring a civil action to enforce Title II of the ADA, should the DOJ fail to secure voluntary compliance pursuant to subpart F.

Rather than follow that statutory and regulatory scheme, Plaintiffs are attempting to personally enforce violations of technical regulations regarding slope and grade requirements of sidewalks and curb ramps. Such technical regulations go beyond the straightforward requirements of the ADA itself and its non-discrimination requirement. *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006). Allowing individuals to create a federal case from a crack or other deformity in a city sidewalk improperly extends potential ADA liability. Since the basis of Plaintiffs' claims are alleged technical violations of regulations, rather than exclusion from City programs, activities or services, Plaintiffs' allegations should fail. *See, e.g., Carrasquillo v. City of New York*, 324 F.Supp.2d 428, 443 (S.D.N.Y. 2004)(plaintiff's alleged difficulty in attending a prison activity, rather than exclusion from it, found insufficient to state an ADA claim).

Plaintiffs' Response, addressing whether they may file suit alleging a claim that the City's transition plan is defective, is likewise confusing. Plaintiffs' Response, pp. 14-15. While agreeing that no cause of action exists for a plaintiff to bring a claim based upon a violation of the regulation that required the City's transition plan, Plaintiffs' Response nonetheless concludes that "Plaintiffs can point to Arlington's failure to adopt and implement a self-evaluation and transition plan as the reason why the City fails to comply with the ADA." *Id.* Whether that is true as an evidentiary matter is not relevant here; Plaintiffs' Response, therefore, agrees that no cause of action exists to complain about alleged violations of the regulations that required transition plans and self-evaluation plans. *Id*.

D. Plaintiffs Have Failed to Allege Facts Which Show Sufficient Alteration to Trigger a Violation of the ADA or its Accompanying Regulations or a Violation of the Rehabilitation Act

Plaintiffs' lawsuit asserts global allegations and claims concerning the entirety of the City's (misnomered) "rights-of-way program." Plaintiffs' Response, pp. 15-20. Plaintiffs' claims are allegations of first impression for this Court and in this Circuit. Plaintiffs' expansive interpretation of the ADA, suggesting that a duty exists to maintain and construct new sidewalks and curb ramps at every location complained of by Plaintiffs, renders the statute unconstitutional.[3] *See* Section F, below. Rather than defend this position, Plaintiffs' Response states: "Plaintiffs simply request that Arlington make their public rights-of-way readily accessible around areas of public accommodation." Plaintiffs' Response, p. 20. There is nothing "simple" in Plaintiffs' attempt to force the City to spend tens of millions of dollars it receives from taxpayers to make extensive, global sidewalk improvements throughout the City in this non-class action litigation. *See, e.g., Bacon v. City of Richmond*, 475 F.3d 633, 639 (4th Cir. 2007)(in Title II case, court reinforced key liability standards, concluding that specific nature of the violation determines specific scope of remedy).

E. Sidewalks in the Public Rights-of-Way are Not a Program, Activity or Service Under the ADA and There are No Existing Accessibility Standards

Plaintiffs' case is based upon the premise that sidewalks are defined as a "program, service or activity" of the City. Plaintiffs' Response, pp. 16-20. The implementing regulations do not support that premise. In 36 C.F.R. 1191 (Final Rule), the standards for public rights-of-way are listed as "Reserved." The editorial amendments contain several comments on this intentional omission. For example, at comment 14 regarding Public Rights-of-Way, "Section 14 of the interim rule contained new construction provisions which were **not** intended to apply to existing facilities in the public right-of-way. With respect to alterations, section 14 contained less stringent scoping and technical provisions for alterations to established rights-of-way where

[3] Plaintiffs are improperly requesting that sidewalks be built where no sidewalk is currently located. *See, e.g.*, Plaintiffs' Fourth Amended Complaint, ¶¶ 27, 28, 30, 48, 53 and 54.

there is site infeasibility. . . . The guidelines contained in section 14 of the interim rule have been adopted by the State of Alabama and are being used to guide policies on pedestrian accessibility in the States of California, New Jersey and Florida." 63 Fed. Reg. 2,013 (Jan. 13, 1998)(emphasis added). It is noteworthy that Texas is not included in those standards. The original regulation (at 36 C.F.R. Part 1191, Interim Final Rule) provided, in the definition for "Continuous Passage," the following: "Although public sidewalks are subject to technical provisions similar to those that apply to accessible routes, public sidewalks are not required to meet guidelines for accessible routes **unless** the public sidewalk is used to provide the required accessible route connecting accessible elements **on a site**." (emphasis added).[4]

As a result, contrary to the argument in Plaintiffs' Response, under either the old C.F.R., or the existing one, sidewalks in public rights-of-way are not generally and globally required to be accessible. To circumvent that reality, Plaintiffs cite *City of Sacramento v. Barden,* 292 F.3d 1073 (9th Cir.), *cert. denied,* 539 U.S. 958 (2002) for the argument that streets, sidewalks and curb ramps are themselves "programs and services" of the City. Plaintiffs' Response, pp. 3, 16-17.[5] The Court should review Plaintiffs' allegations in this case with the denial-of-access-to-a-city-program standard in mind, rather than adopting Plaintiffs' global argument that the City's entire streets, sidewalks and curb ramps are "programs and services" (a "right-of-way program") that must be made accessible in their entirety. *City of Sacramento v. Barden*, a class-action case, is plainly and correctly viewed as an anomaly that should not be followed.[6]

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[4] Hence, City sidewalks may not necessarily be "facilities" under 28 C.F.R. §§ 35.104 and 35.150. *See, e.g., Brown v. 1995 Tenet Paraamerica Bicycle Challenge*, 959 F.Supp. 496, 499 n.1 (N.D. Ill. 1997).

[5] Not even all of Plaintiffs' authorities consistently so hold. For example, Plaintiffs cite the case *Parker v. Universidad de Puerto Rico,* 225 F.3d 1, 6 (1st Cir. 2000) for their position that "streets, sidewalks and curb ramps are among the 'programs and services' that must be made accessible under Title II." Plaintiffs' Response, p. 3. Actually, the *Parker* case merely required that a public entity is obligated to ensure that a service, program or activity at a public facility, when viewed in its entirety, is accessible to individuals with disabilities. *Parker,* 225 F.3d at 6 ("Although the University is not required to make every passageway in and out of the Monet Garden accessible, it must provide at least one route that a person in a wheelchair can use to reach the Monet Garden safely, absent a defense that excuses such performance").

[6] Plaintiffs' Response attempts to add credibility to their position (that a few plaintiffs in a non-class action case may assert claims both on behalf of themselves and all other disabled persons in the City to force the City to correct all

Even if this Court were to adopt the expansive definition that sidewalks are "programs," Plaintiffs cannot plausibly show that making all of the streets and sidewalks in the City conform to current ADAAG regulations is a "reasonable accommodation," as is their burden. *See Wright v. Giuliani*, 230 F.3d 543, 548 (2nd Cir. 2000). Instead, Plaintiffs' claims assert a responsibility on the City that amounts to a fundamental or substantial modification that is not appropriate. *See Alexander v. Choate*, 469 U.S. 287 (1985). In *Alexander*, the Supreme Court considered whether the Rehabilitation Act was violated by Tennessee's proposed reduction in the number of in-patient hospital days per year for which state Medicaid would reimburse hospitals on behalf of each recipient. The plaintiffs there argued that the reduction was discriminatory because it would have a disproportionate effect on disabled, lower-income Medicaid recipients. The Supreme Court disagreed. Noting that its previous decisions had struck a balance between the statutory rights of the handicapped to be integrated into society with the legitimate interests of federal grantees in preserving the integrity of their programs, a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped (but may be required to make "reasonable" modifications). *Alexander*, 469 U.S. at 300 (citing *Community College v. Davis*, 442 U.S.397, 412-13 (1979)). As a result, the Court rejected the argument that the Rehabilitation Act guarantees handicapped persons "equal results" from government initiatives. Plaintiffs' claims here are "equal results" claims, and likewise should be rejected.[7]

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sidewalks and curb ramps in the City) by asserting the purported strength of the U.S. Department of Justice's briefing in the *City of Sacramento v. Barden* case before the United States Supreme Court. Plaintiffs' Response, p. 17 n. 7. Plaintiffs' Response boldly asserts that the Supreme Court was so impressed with the DOJ's brief, "it quickly denied Sacramento's petition." *Id.* Besides the obvious observation (*i.e.,* no one knows for sure why the Supreme Court decides to take or to not take a case), it is equally plausible (and, indeed, is the case) that the Supreme Court denied certiorari simply because the *City of Sacramento* case had settled.

[7] Some of Plaintiffs' claims actually seek better-than-equal results, *e.g.*, seeking remediation of sidewalks that stop abruptly or are non-contiguous. Plaintiffs' Fourth Amended Complaint, ¶¶ 27, 28, 30, 48, 53 and 54.

F. Alternatively, an Interpretation that the ADA or the Rehabilitation Act Requires Construction, Maintenance and Retrofitting Sidewalks is Unconstitutional

Plaintiffs' Response confirms that this lawsuit seeks to impose a broad and expansive readily accessible standard on all City rights-of-way, at commercial and residential areas. Plaintiffs avoid addressing the City's constitutional argument and assert that Title II is constitutional, citing *City of Boerne v. Flores,* 521 U.S. 507 (1997). Plaintiffs' Response, p. 20. Nonetheless, Plaintiffs' attempt to apply the ADA and the Rehabilitation Act in the broad manner they propose renders the statutes unconstitutional. *See, e.g., McCarthy ex rel. Travis v. Hawkins,* 381 F.3d 407, 417-33 (5th Cir. 2004) (Garza, J., dissenting from the court's Eleventh Amendment immunity finding, analyzed the ADA and determined it to be unconstitutional under the Commerce Clause, and under § 5 of the Fourteenth Amendment, in an as-applied review).

G. There is No ADA or Rehabilitation Act Claim for Paratransit Waivers and Releases

Plaintiffs' Response attempts to interject a subjective standard into the Court's review of whether the City's requirement (for all persons using its paratransit services to sign waivers and releases) amounts to a denial of "meaningful" access to Arlington's paratransit services. Plaintiffs' Response, p. 22. Plaintiffs' "meaningful access" standard is novel and unique, and is irrelevant. Plaintiffs' Fourth Amended Complaint does not allege denial of access to the paratransit service. *See* Plaintiffs' Fourth Amended Complaint, ¶ 60; and *Carrasquillo*, 324 F.Supp.2d at 443. Likewise, Plaintiffs further erroneously assert:

> Arlington's other argument, that ADA or Rehabilitation Act claims do not trigger reasonable modifications, misses the mark. Arlington's motion conspicuously fails to mention whether the City's fixed route system requires patrons to sign liability waivers. In addition to applying the meaningful access standard, Plaintiffs could challenge the liability waiver on the basis that Arlington is requiring more from its paratransit disabled patrons than it requires from non disabled (sic) patrons on fixed route systems.

Plaintiffs' Response, p. 22. No factual basis for this argument exists simply because **Arlington does not operate a fixed route transit system in the City.** Hence, the City could not make

such a comparative argument.[8] The City's paratransit system is over and above what it provides to its non-disabled citizens. As a result, Defendant's Motion should be granted because Plaintiffs fail to state a viable claim concerning access to the City's paratransit services.

WHEREFORE, PREMISES CONSIDERED, Defendant City of Arlington, Texas, prays that the Court grant its motion and dismiss Plaintiffs' claims against it, and Defendant prays for such other and further relief to which it is justly entitled.

Respectfully submitted,

By: /s/ Edwin P. Voss, Jr.

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[8] This is indicative of Plaintiffs' repeated failure to conduct reasonable, pre-filing inquiry under Rule 11 of the Federal Rules of Civil Procedure.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this document was served by certified mail, return receipt requested, upon Mr. John M. Nevins, Moseley Law PC, 3878 Oak Lawn Avenue, Suite 400, Dallas, Texas 75219-4469, and upon Messrs. Miguel M. de la O and Charles D. Ferguson, De la O, Marko, Magolnick & Leyton, 3001 S.W. 3rd Avenue, Miami, Florida 33129, counsel for Plaintiffs, in addition to service by the Court's ECF System, on the 19th day of September, 2007.

By: /s/ Edwin P. Voss, Jr.

Edwin P. Voss, Jr.