UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RICHARD FRAME, WENDELL DECKER, SCOTT UPDIKE, J.N., a minor by his next friend and mother, GABRIELA CASTRO, MARK HAMMAN and JOEY SALAS, Plaintiffs,	)	
vs.	)	Civil Action No. 4:05-CV-0470-Y
THE CITY OF ARLINGTON, a municipal corporation, Defendant.	)	

PLAINTIFFS' REPLY TO THE DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION TO ALTER AND/OR AMEND JUDGMENT

Plaintiffs, Richard Frame, Wendell Decker, Scott Updike, J.N., a minor, by his next friend and mother, Gabriela Castro, Mark Hamman, and Joey Salas (collectively, the "Plaintiffs"), file this Reply to the Defendant's Response to Plaintiffs' Motion to Alter and/or Amend Judgment (the "Motion").

A. THE MOTION COMPLIED WITH LOCAL RULE 7.1 & 11.1

In its second footnote, Defendant takes Plaintiffs' counsel to task for several alleged failures to comply with Local Rules 7.1 and 11.1. Defendant first asserts that counsel violated Local Rule 7.1 because "the motion, brief and appendix are all contained in one document rather than in three separate documents." Resp. at 2 n.2. Plaintiffs' counsel does not find support for Defendant's view in the Local Rules. Local Rule 7.1(b) provides that a "motion must be accompanied by a brief." The rule does not state that the brief, nor exhibits to the brief, must be in a separately-filed document.

Defendant next complains that Plaintiffs did not submit a proposed order to the Court. However, Local Rule 7.1(c) provides that a proposed order shall be provided only when the motion is "unopposed."

Defendant claims the certificate of service used by Plaintiffs is incorrect. Plaintiffs' counsel fails to see the error in the certificate of service that accompanied the Motion. Plaintiffs' certificate of service is identical to the certificate of service used by the Defendant, except that Defendant's contains the words "in addition to service provided by the Court's ECF procedures." However, the local rules do not appear to require that a certificate of service contain such a phrase.

Lastly, Defendant complains that "the signatures appearing in the signature block and certificate of service are in improper form." Again, the violation alleged is unclear. Local Rule 11.1 sets out the rule regarding electronic signatures. That rule provides that the ECF user under whose login and password the document is submitted can sign the document either by placing a "s/" in the space where the signature would otherwise appear, or attaching a "graphical signature block of the ECF user in the space where the signature would otherwise appear." Undersigned counsel used the latter method in signing the Motion.

Defendant's counsel is correct that Plaintiffs failed to provide this Court with a paper copy of the Motion. Counsel apologies for the oversight, and is rectifying it by providing a paper copy of the Motion and this Reply.

B. THE MOTION ARGUES THAT THIS COURT'S ORDER CONTAINS A MANIFEST ERROR OF LAW

Turning to the merits of the Motion, Defendant argues that the Motion fails to refer the Court to any authority to support Plaintiffs' argument that the date on which the City of Arlington created the barrier "is not when a cause of action accrues." Resp. at 3.

The authority for this argument is the Court's Order. The Order correctly states that "a cause of action accrues when 'the Plaintiff knows or has reason to know of the injury . . . and who has inflicted the injury.'" Order at 6-7.

The Court's Order pivoted from the correct view of the law regarding when a cause of action accrues, to a requirement that the construction occur within two years of the filing of the complaint. But, as this Court held, the cause of action does not accrue when a City improperly builds a sidewalk and/or curb ramp; rather, the cause of action accrues when "the Plaintiff knows or has reason to know of the injury." *Watts v. Graves*, 720 F.2d 1416, 1423 (5th Cir. 1983).

Defendant's argument regarding *Deck v. City of Toledo*, 56 F. Supp. 2d 886 (N.D. Ohio 1999), is merely a recitation that this Court's ruling was correct. Defendant makes no attempt to rebut Plaintiffs' arguments with regards to *Deck*. In particular, Defendant ignores the judge's response in *Deck* to plaintiffs' concerns about having to be ever vigilant for new construction by the City so complaints about improper construction would not be time barred. The court noted that the "limitations period is measured beginning only from the time when the plaintiff knew or should have known of the injury." *Deck*, at 892. Defendant also ignores the lengthy discussion in *Deck* about the continuing violation theory, and policy of discriminatory action, and their effect on the statute of limitations.

Moreover, Defendant makes no attempt to explain why the City of Arlington should remain inaccessible to veterans disabled during the Iraq War, to new residents of the City of Arlington, and even to disabled persons as yet unborn, or even not yet disabled. Defendant never addresses the fundamental unfairness of applying the

statute of limitations as a "gotcha" against disabled persons who did not sit on their rights as the limitations period expired.

Rather than discuss *Deck*, Defendant chooses instead to raise an inconsequential argument about the proper pleading standard. Defendant claims that Plaintiffs' reliance on *Conley* v. Gibson, 355 U.S. 41 (1957), is misplaced because *Conley* was "abrogated" by *Bell Atlantic Corp. v. Twombley*, ____ U.S. ____, 127 S. Ct. 1955 (2007). First, *Bell Atlantic* did no such thing. The Supreme Court's discussion about the pleading requirements to comply with Rule 8(a) relies extensively on *Conley*. There is no discussion in *Bell Atlantic* about abrogating *Conley*. And no reason to do so; the two opinions are complementary. Second, Plaintiffs' Motion does not depend on the pleading standard applied by the Court.

Contrary to Defendant's claim, Plaintiffs' Motion is hardly an attempt to "rehash the pleadings, legal theories and arguments that were already raised before the entry of final judgment." Rather, the Motion relies on one critical error in the Court's Order. The Court correctly defined when a cause of action accrues (*i.e.*, when the Plaintiff knows or has reason to know of the injury); nevertheless, it dismissed Plaintiffs' complaint because the dates of construction were more than two years prior to the filing of the complaint, with no reference to when the Plaintiff "knew or had reason to know" of the injury. This argument neither rehashes the motion to dismiss nor relies on any pleading standards.

C. THE AFFIDAVIT OF RICHARD FRAME WAS NOT INTENDED TO ADDRESS THE LIMITATIONS PERIOD RULING

Defendant addresses the affidavit of Richard Frame by noting that the affidavit "completely omits any pre-litigation attempts to contact and resolve potential disputes with the numerous companies he sued prior to filing suit." Defendant's observation is both correct and irrelevant. First, this Court's footnote 1 made no reference to whether

Mr. Frame had made any pre-litigation attempts to resolve his complaints. If it had, Mr. Frame's affidavit would have detailed those efforts. Second, there is no such requirement. *Skaff v. Meridien North America Beverly Hills, LLC* , 506 F.3d 832, 845 (9th Cir. 2007) ("ADA plaintiffs are not required to provide pre-suit notice to defendants"); *Association of Disabled Americans v. Neptune Designs, Inc.,* 469 F.3d 1357, 1360 (11th Cir. 2006) ("We stress that pre-suit notice is not required to commence suit under the ADA.").

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document was served this day on all counsel of record and pro se parties identified on the attached Service List either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized matter for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

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