UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No.	EDCV 14-1517 DSF (PJWx)	Date	5/12/15
Title	Alice Whytock v. PDS Palm Canyon, LLC, et al.		

Present: The Honorable	DALE S. FISCHER, United States District Judge

Debra Plato	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (In Chambers) Order GRANTING Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 22)

Plaintiff Alice Whytock has brought this action under the Americans With Disabilities Act and the Unruh Act. She now moves for partial summary judgment as to liability regarding an accessibility barrier caused by a toilet seat that was too low, injunctive relief, and statutory damages. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. The hearing set for May 18, 2015 is removed from the Court's calendar.

I. UNDISPUTED FACTS

On February 20, 2014, Plaintiff, an elderly woman with mobility issues, was a patron of Defendant PSLCT, Inc.'s Las Casuelas Terraza restaurant in Palm Springs. (SUF ¶¶ 1-8.) The restaurant has two restrooms – one inside the restaurant itself ("Restaurant Restroom") and another on the restaurant's patio ("Patio Restroom"). (SUF ¶ 12.) While she was at the restaurant, Plaintiff attempted to use the Restaurant Restroom. However, the toilet seat in the Restaurant Restroom was 14.88 inches high, which was too low for Plaintiff to lift herself off of the seat using the grab bars provided. (SUF ¶¶ 16-18.) While attempting to get off of the seat, Plaintiff injured her foot. (SUF ¶ 19.) Eventually, Plaintiff asked her granddaughter to climb under the stall door to lift Plaintiff off of the seat. (SUF ¶¶ 21-22.) In addition to the direct injury to her foot, the entire episode caused Plaintiff significant embarrassment. (SUF ¶ 23.) Plaintiff has been to the restaurant approximately 20 times in the past and would like to return, but she is

deterred from doing so by her inability to safely use the Restaurant Restroom. (SUF ¶¶ 27-29.)

II. LEGAL STANDARD

"A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment if 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 need not disprove the opposing party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Rather, if the moving party satisfies this burden, the party opposing the motion must set forth specific facts, through affidavits or admissible discovery materials, showing that there exists a genuine issue for trial. Id. at 323-24; Fed. R. Civ. P. 56(c)(1). "This burden is not a light one." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010). If the moving party's showing is insufficient, no defense is required. Harper v. Wallingford, 877 F.2d 728, 731 (9th Cir. 1989).

The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). An issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. Id. at 250-51. "[M]ere disagreement or the bald assertion that a genuine issue of material fact exists" does not preclude summary judgment. Harper, 877 F.2d at 731. "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury . . . could find by a preponderance of the evidence that the [non-movant] is entitled to a verdict . . . ." Anderson, 477 U.S. at 252. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders the claim implausible. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

"[A] district court is not entitled to weigh the evidence and resolve disputed underlying factual issues." Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1161 (9th Cir. 1992). Rather, "the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." Matsushita, 475 U.S. at 587-88 (internal quotation marks and ellipsis omitted).

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III. ANALYSIS

The ADA provides[1] that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). "Discrimination" under the statute is defined to include "a failure to remove architectural barriers . . . where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(iv).

There is no dispute that the Restaurant Restroom contained a barrier, as defined by the 1991 ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG"), 28 C.F.R. Pt. 36, App. D. See ADAAG § 4.16.3 (requiring toilet seat height between 17 and 19 inches). In fact, the raising of toilet seats is cited in 28 C.F.R. § 36.304(b) as a step to the removal of barriers in existing facilities. Plaintiff contends that the removal of that barrier was readily achievable through use of an inexpensive thicker toilet seat, and the Appendix to the ADAAG also specifically advocates installation of a "thick seat" adapted to a standard fixture as a manner of removing access barriers. See ADAAG App. § A4.16.3. Defendants even appear to own such a seat but have not installed it. (See Service Decl. ¶ 9.) Defendants nevertheless argue that elimination of the barrier was not readily achievable because, in their experience, such toilet seats can break. This argument is completely unpersuasive. First, while the Appendix to the ADAAG is "material[] of an advisory nature," the Court has some doubt that even competent testimony about breakage of raised toilet seats could overcome the specific agency guidance advocating the use of such seats.[2] It is especially unlikely here given that the objection to the toilet seat is a general one and not something specific to the particular situation that might not have been contemplated when the regulations were drafted. But even if specific evidence could overcome the regulatory guidance, Defendants have provided no such competent evidence here. Instead, the Court is only given a declaration from the general manager of the restaurant who states, with unknown foundation, that "those raised toilet seats break and could cause personal injury." (Service Decl. ¶ 9.) This is clearly not enough to demonstrate that installation of the raised seat was not readily achievable.

[1] A violation of the ADA is also a violation of the Unruh Act. Cal. Civ. Code § 51(f).

[2] While "advisory," the Appendix is also specifically noted to provide guidance for meeting the *minimum* requirements of the ADAAG. ADAAG App. Preamble.

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Defendants also argue that the presence of the alternative Patio Restroom on the premises excuses the barrier in the Restaurant Restroom. Both the statute and the regulations say otherwise. Both the ADA statute and the regulations require removal of architectural barriers in existing facilities where such removal is readily achievable. 42 U.S.C. § 12182(b)(2)(iv); 28 C.F.R. § 36.304(a). " Because the ADAAG establishes the technical standards required for a 'full and equal enjoyment,' if a barrier violating these standards relates to a plaintiff's disability, it will impair the plaintiff's full and equal access, which constitutes 'discrimination' under the ADA." Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 947 (9th Cir. 2011). The 1991 ADAAG rejected the position that the existence of an accessible restroom excuses barriers in other restrooms within a facility. It instead required all new construction to make all restrooms compliant with the requirements of the ADAAG. ADAAG § 4.1.2(6). Therefore, the low toilet seat in the Restaurant Restroom was an actionable barrier for the purposes of the ADA even if there was another compliant restroom that Plaintiff could have used. Defendants' opposition on this point completely ignores the statutes and regulations cited by Plaintiff. They instead rest their argument on a reading of 42 U.S.C. § 12182(a) without consideration of any of the rest of that section or the extremely detailed regulations that implement it. The one regulation they do focus on does not show what they seem to think it does. The signage regulation portion of the ADAAG does contemplate toilet facilities that are inaccessible. That is because some toilet facilities are permitted by statute and regulation to be inaccessible, usually because making them accessible would not be readily achievable. The existence of some toilet facilities that are allowed to be inaccessible says nothing about whether the toilet height barrier at the particular toilet facility at issue in this case must be remedied.

The dispute over statutory damages is also easily resolved in Plaintiff's favor. The Unruh Act allows for statutory damages in construction-related accessibility claims against places of public accommodations where, among other things, "the plaintiff experienced difficulty, discomfort, or embarrassment because of the violation." Cal. Civ. Code § 55.56(c). Defendants' opposition does not contest that Plaintiff suffered difficulty, discomfort, and embarrassment when she could not get up from the inaccessible toilet. Instead, they oppose statutory damages on the basis that Plaintiff should have used the Patio Restroom instead. But this is just repetition of Defendants' liability argument, which has been rejected. The toilet in the Restaurant Restroom was too low, that barrier was easily removable, and, by uncontroverted testimony, the barrier caused Plaintiff difficulty, discomfort, and embarrassment.

Plaintiff is also entitled at the time of final judgment to injunctive relief ordering the toilet seat to be raised. See 42 U.S.C. § 12188(a). If Plaintiff believes such relief

should be granted at this time, Plaintiff should provide a proposed order.

IV. CONCLUSION

The motion for partial summary judgment is GRANTED.

IT IS SO ORDERED.