Hope for Business Operators With Website Accessibility Cases In New York?

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A decision from Judge Preska in the Southern District of New York may change the trajectory of website accommodation cases in New York.

Website Accessibility Cases in New York Prior To This Decision

In 2017, Judge Weinstein in the Eastern District of New York denied the motion to dismiss in *Blick Art*, issuing a thirty-seven page opinion on why the plaintiff stated a valid claim under the Americans with Disabilities Act (ADA).

In 2018, at least 2,200 Title III website accessibility cases were filed in Federal Court, more than nearly tripling the over 800 cases filed in 2017. New York became the venue of choice for most of those cases, with over 1,500 cases filed in New York Federal Courts in 2018. The surge in ADA website cases filed in New York in 2018 is likely due to the decision in *Blick Art*.

The *Apple* Decision

Plaintiffs filing website accessibility cases in New York may have a new hurdle to face now. On March 28, 2019, Judge Preska granted Apple's motion to dismiss in the matter *Mendez v. Apple*. In her ten-page decision, Judge Preska found that plaintiff had not pleaded an injury in fact because "the purported injuries described lack all the requisite specificity."

Judge Preska explained: "Plaintiff does not give a date that she tried to access the physical store or what good or service she was prevented from purchasing. She does not identify sections of the website she tried to access but could not. Finally, while general barriers are listed, she does not allege which one of them prevented her from accessing the store."

Judge Preska then compares Ms. Mendez to the plaintiffs in *Lawrence Feltzin*, *Lowell*, *PGA Tour*, *Gathers*, *Bernstein*, and *Kreisler*, distinguishing Ms. Mendez's vague pleadings with those of the other plaintiffs who sufficiently pleaded an injury in fact. Although Ms. Mendez cited to *Blick Art* in her opposition briefing, the case is notably absent from Judge Preska's opinion.

Finding Ms. Mendez most similar to the plaintiff in *Lawrence Feltzin*, where plaintiff provided "no details at all concerning any instance in which he allegedly encountered a violation," Judge Preska concluded that plaintiff's federal claims be dismissed for lack of standing.

Consequently, Judge Preska held that because Ms. Mendez's New York State and New York City claims are governed by the same pleading requirements as the ADA, her entire complaint was dismissed for lack of standing.

In her concluding paragraph, Judge Preska issued a warning to serial filers like plaintiff's counsel: "There is nothing inherently wrong with filing duplicative lawsuits against multiple defendants if the harms to be remedied do exist and are indeed identical. But those who live by the photocopier shall die by the photocopier. By failing specifically to assert any concrete injury, Plaintiff's claims fail as a matter of law."

Ms. Mendez's lawsuit against Apple was filed by Joseph Mizrahi. Mr. Mizrahi has filed over 800 federal website accommodation cases since 2017.

What does this mean for the future of website accessibility cases?

It is too early to determine the full impact of the *Apple* decision in New York however, Judge Preska has left the door open for owners and operators of websites to attack these complaints through a motion to dismiss when faced with a vague, duplicative claim where a specified injury is not pled.

As we've predicted before, these types of cases are likely to continue despite Judge Preska's favorable ruling in the Southern District of New York. If you aren't sure whether the ADA applies to your site or whether it's accessible to the blind, now may be the time to find out. Getting a sense of whether your site can be navigated using a screen reader will provide a better sense of whether the site could be considered a "low hanging fruit" for plaintiffs to find.