

<b>Perdum v Forest City Ratner Cos.</b>
2021 NY Slip Op 31067(U)
March 23, 2021
Supreme Court, Kings County
Docket Number: 3739/2016
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 23<sup>rd</sup> day of March 2021.

PRESENT:

HON. LARA J. GENOVESI,  
J.S.C.

-----X

JEROME K. PERDUM, SR.,

Index No.: 3739/2016

Plaintiffs,

DECISION & ORDER

-against-

FOREST CITY RATNER COMPANIES, FIRST  
NEW YORK PARTNERS MANAGEMENT, LLC  
and ATLANTIC CENTER FORT GREENE  
ASSOCIATES,

Defendants.

-----X

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

KINGS COUNTY CLERK  
FILED  
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NYSCEF Doc. No.: <sup>1</sup>

Notice of Motion/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

8-11

Opposing Affidavits (Affirmations) \_\_\_\_\_

12

Reply Affidavits (Affirmations) \_\_\_\_\_

2

<sup>1</sup> This Court notes that the matter was converted to NYSCEF on or about May 15, 2020 and the exhibits were e-filed out of order.

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005 - pending - 47

### ***Introduction***

Defendants, Forest City Ratner Companies LLC s/h/a Forest City Ratner Companies, First New Partners Management, LLC and Atlantic Center Fort Greene Associates L.P., s/h/a Atlantic Center Fort Greene Associates, move by notice of motion, sequence number five, pursuant to CPLR § 3212 for summary judgment, dismissing the complaint in its entirety and for such other and further relief as the court deems just and proper. Plaintiff, Jerome K. Perdum, Sr., opposes this application.

### ***Background & Procedural History***

Plaintiff commenced the instant action alleging discrimination on the basis of disability. It is undisputed that plaintiff has a congenital hip condition and severe arthritis. Plaintiff does not use a wheelchair but has New York City designated handicapped parking placards for his private vehicles. Plaintiff, a frequent patron of Atlantic Center Mall, in Brooklyn, New York, alleges that defendants discriminated against him on the basis of disability when they did not “allow[] him to access to park in the previously designated handicap area” on Fort Green Place, in Brooklyn New York, outside of Atlantic Center Mall to enter the Pathmark store located therein.

Defendant, Atlantic Center Fort Greene Associates L.P., s/h/a Atlantic Center Fort Greene Associates (ACFG), owns Atlantic Center Mall, located on Atlantic Avenue, between Fort Greene Place and S. Elliot Place in Brooklyn New York. The mall was developed by defendant Forest City Ratner Companies LLC s/h/a Forest City Ratner

Companies (FCRC). Defendant First New York Partners (FNYP) is the managing agent for certain properties developed by FCRC, including Atlantic Center Mall. Defendants maintain that “Fort Greene Place was a private street that was demapped and discontinued by the City of New York” (NYSCEF Doc. # 9 at ¶ 10). A ground lease was executed on August 15, 1995, between the City of New York and ACFG, whereby ACFG, as tenant, was granted a right of way over the street for the purpose of providing patrons vehicular access to the shopping center, which remains in full force and effect (*see* NYSCEF Doc. # 10, Lease at Article 2.1; *see also id.*, Affidavit of Rachel Harari at ¶ 9).<sup>2</sup>

Plaintiff testified at an examination before trial (EBT) on April 9, 2019 (*see* NYSCEF Doc. # 11, Exhibit I). He maintains that Fort Greene Place previously contained handicapped designated parking, initiated in the 1970’s by City Planning (*see id.* at 61). Plaintiff often parked his personal vehicles in that area, with his handicapped placard displayed in order to enter Atlantic Mall (*see id.* 59-62). When asked if the handicapped parking insignia remained in 2011-2013, plaintiff stated that “[s]o many things have happened, I really can’t recall”, but stated that it was removed at some point (*id.* at 61-62). Later, when asked if at some point “the two handicapped parking spots” were “removed from Fort Greene Place”, plaintiff testified “[n]o. prior to the removal of

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<sup>2</sup> This Court notes that when the moving papers were e-filed, exhibits A-F were filed together as NYSCEF Doc. # 10, and exhibits G-K were filed together as NYSCEF Doc. # 11).

the spots from Fort Greene Place, the guards were put there, placed there and they were telling people not to park there and that – it went through different phases” (*id.* at 71-72).

Plaintiff further stated that he stopped parking on Fort Greene Place when “it began to be a hassle and I just didn’t’ want to go through the hassle any more [*sic*] and that’s what prompted me to put in the lawsuit. I don’t think anyone should be harassed in that manner” (*id.* at 61). He could not recall the incidents in question specifically, but testified to experiencing harassing behavior when he attempted to park on Fort Greene Place, and he was told by security guards to move his car. When he would not move his car, the security guards threatened to call a tow truck (*see id.* at 76). The car was not towed, and he was issued a parking ticket and a trespassing ticket, both of which were dismissed (*see id.* at 79).

Jon Paul Esemplare, a property manager assigned to Atlantic Mall, testified at an examination before trial (EBT) on June 11, 2019 (*see* NYSCEF Doc. # 11, Exhibit J). Defendants maintain that they did not remove the handicapped parking from Fort Greene Place. Esemplare testified that Fort Greene place is a no parking area. People “wait for a relative or someone come out with goods from either Stop & Shop right now, currently, and Target... We usually give them a couple of minutes. They pick up their goods and they go on their way. But predominantly, it’s a taxi location and fire zones for emergency vehicles – fire trucks, EMS and all that, but outside, no one parks their car” (*id.* at 26). There is a security “foot post that patrols the street, so with [*sic*] – assist with

deliveries, open up loading docks”, who will ask people waiting in their vehicles to move after ten minutes or so (*id.* at 27).

Eemplare testified that in 2011, someone filed a complaint with the City of New York against Atlantic Mall regarding lack of handicapped parking spots available, specifically citing Fort Greene Place. Eemplare personally escorted the city investigator to Fort Greene Place and to the shopping center’s two-level parking garage located beneath the mall. Of the 650 parking spaces available, there are a total of 30 handicap designated parking spaces, located near the three elevator banks, that provide direct access into the mall (*see id.* at p 23-24). Eemplare testified that to the best of his knowledge, the complaint was “unfounded and closed out” in early 2012 (*see id.* at 24).<sup>3</sup>

As plaintiff testified to using private vehicles, it is undisputed that there is no issue as to his physical access to the handicapped spaces in the parking lot. The vehicle clearance to enter the parking garage is six feet and seven inches (*see id.* at 34). Plaintiff testified to having multiple personal vehicles. At the time of the incidents, he believes that he was driving a Dodge Ram, however he also had a Chrysler Town and Country and a Ford Focus (*see* NYSCEF Doc. # 11, Plaintiff EBT at 80, 92). His testimony with respect to entering the garage is contradictory. He first testified that when he attempted to park in the garage, it was too low for his personal vehicles (*see id.* at 81). However, he later stated that the antenna of the Dodge Ram scraped the ceiling of the garage, but he

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<sup>3</sup> This Court notes that a copy of this complaint or any records associated with it were not provided herein.

did not sustain any damage to his vehicle (*see id.* at 82). Then he testified that “if my nose could enter, that’s all that could enter. That’ll that could enter the parking garage. If the sign says 6’6 and my van is seven feet, if I Go any deeper, I get stuck” (*see id.* at 90). Then he testified that the entire body of his vehicle was under the garage, but it was scraping the top” (*see id.* at 91). He has since donated that vehicle but does not recall whether it was prior to 2010 (*see id.* at 86). Plaintiff’s personal vehicles are not equipped with any additional equipment (*see id.* at 87).

The dates of alleged discrimination, listed in the complaint are October 5, 2010, October 30, 2010, November 11, 2010 and November 26, 2010 (*see* Complaint at ¶¶ 6-9). This Court notes that plaintiff alleges that on each of the four dates he “arrived and parked on the handicap insignia in front of Pathmark grocery store located on Fort Greene Place” (*id.*). However in paragraph 10, plaintiff states that, “[o]n the same dates mentioned above, Defendant’s [sic] violated Plaintiff’s rights by not allowing him access to park in the previously designated handicap area in violation of New York State and New York City Human Rights Law” (*id.*).

In the bill of particulars, plaintiff specified that the alleged discrimination is regarding public accommodations (NYSCEF Doc. # 11, Exhibit H). The bill of particulars further provides,

Plaintiff's car has a plaque allowing him to park in designated handicapped parking. There were signs saying no parking except trucks for loading and unloading, no parking between certain hours. There were two designated handicapped parking spots. With the plaque, plaintiff is able to park in

those spots. Every time he got ready to park, there were security guards that said he was not able to park there.

625 Hanson Place Brooklyn, NY 11201 in the handicapped parking spots. Handicapped parking spots were scratched off to become a livery cab service for monetary gains, as plaintiff should have been able to park in those spots.

October & November 2010 - Soon after parking in designated parking for handicapped persons, plaintiff was told he could not park there.

March 15, 2011- Received parking ticket for parking in designated parking for handicapped persons.

April 4, 2012 Received trespassing summons after plaintiff affirmed his right to public accommodation.

(*id.*).

As a result of this incident, plaintiff commenced an action in United States District Court, on or about January 20, 2011, alleging violation of the Americans with Disabilities Act, and “various state and local laws” (NYSCEF Doc. # 10, Exhibit E). In a memorandum and order dated March 28, 2016, The Hon. Pamela K. Chen granted summary judgment and dismissed plaintiff’s federal claims, with prejudice. Judge Chen declined to exercise supplemental jurisdiction over the state law claims, and dismissed them, without prejudice (*see id.*).<sup>4</sup>

Thereafter, plaintiff commenced the instant action by filing a summons with notice on or about May 6, 2016. Defendants appeared on May 17, 2016, by filing a notice of

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<sup>4</sup> This decision was affirmed by the Second Circuit, on February 18, 2017.

appearance and demand for complaint. Plaintiff's verified complaint, dated June 15, 2016, sets forth three causes of action: the first for discrimination in violation of NYSHRL the second for discrimination in violation of NYCHRL, and the third for injunctive relief. Issue was joined by service of an answer on or about June 28, 2016. Plaintiff filed the note of issue and certificate of readiness for trial on November 19, 2019.

### *Discussion*

#### *NYSHRL*

Defendants move for summary judgment, to dismiss plaintiffs first cause of action for discrimination based on disability under the NYSHRL. Executive Law § 296 provides that “[i]t shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement ... because of the ... disability ... of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof...” (Executive Law § 296[2][a]).

The term “place of public accommodation, resort or amusement” shall include, regardless of whether the owner or operator of such place is a state or local government entity or a private individual or entity, except as hereinafter specified, all places included in the meaning of such terms as: inns, taverns, road houses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health, recreation or rest, or restaurants, or eating houses, or any place where food is sold

for consumption on the premises; buffets, saloons, barrooms, or any store, park or enclosure where spirituous or malt liquors are sold; ice cream parlors, confectionaries, soda fountains, and all stores where ice cream, ice and fruit preparations or their derivatives, or where beverages of any kind are retailed for consumption on the premises; wholesale and retail stores and establishments dealing with goods or services of any kind, dispensaries, clinics, hospitals, bath-houses, swimming pools, laundries and all other cleaning establishments, barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks, amusement and recreation parks, trailer camps, resort camps, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool parlors; garages, all public conveyances operated on land or water or in the air, as well as the stations and terminals thereof; travel or tour advisory services, agencies or bureaus; public halls, public rooms, public elevators, and any public areas of any building or structure.

(Executive Law § 292).

In the instant case, the “public accommodation” is Atlantic Center Mall. It is undisputed that plaintiff was never denied access to the shopping center. It is also undisputed that there are handicap parking spaces available within the parking garage. Although his testimony is contradictory as to whether he was driving a Dodge Ram, and whether the Dodge Ram could fit within the garage without the antenna scraping the roof, it is undisputed that he had multiple personal vehicles. Plaintiff alleges that defendants discriminated against him by removing the handicapped parking which allegedly existed on Fort Greene Place, the street, adjacent to the shopping center. Street parking is not a “public accommodation” within the meaning of the statute. Further, even assuming, arguendo, that plaintiff is correct that defendant FCRC could be considered a “manager”

or “agent” within the meaning of Executive Law because they developed the shopping center, their authority would not extend to the streets outside.

Accordingly, defendant established entitlement to summary judgment to dismiss plaintiff’s first cause of action for discrimination based on disability under the NYSHRL. In opposition, plaintiff failed to raise a triable issue of fact. This Court notes that the arguments set forth by plaintiff, in opposition, relate to the Americans with Disabilities Act. The Federal Court action was dismissed, and the instant action deals only with NYSHRL and NYCHRL. Further, to the extent that plaintiff’s argument that the clearance to the parking garage violates the city and state Human Rights Laws, they are without merit, as plaintiff testified that he attempted to park his personal vehicles at Atlantic Center Mall, with no extra equipment, not a handicapped accessibility van.

### ***NYCHRL***

Defendants move for summary judgment, to dismiss plaintiffs second cause of action for discrimination based on disability under the NYCHRL.

New York City Administrative Code § 8-107 provides that,

It shall be an unlawful discriminatory practice for any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation:

1. Because of any person's actual or perceived ... disability ... directly or indirectly:

(a) To refuse, withhold from or deny to such person the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation; or

(b) To represent to any person that any accommodation, advantage, facility or privilege of any such place or provider of public accommodation is not available when in fact it is available...

(NYC Admin. Code § 8-107[4][a][1]).

NYCHRL defines “[t]he term ‘place or provider of public accommodation’ includes providers, whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available (NYC Admin Code § 8-102). “It requires that ‘any person prohibited by the [law] from discriminating on the basis of disability shall make reasonable accommodation to enable a person with a disability to ... enjoy the right or rights in question provided that the disability is known or should have been known by the covered entity’” (*Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381 [EDNY, 2017], citing NYC Admin. Code § 8-107[15][a]).

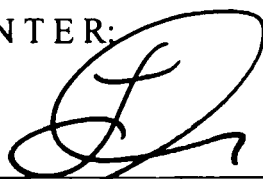
Here, for the same reasons as stated above, defendants met their burden and established entitlement to summary judgment as a matter of law, dismissing plaintiff’s second cause of action for harassment under NYCHRL based on disability. While defendant is a provider of goods and services, the public accommodation is limited to the mall, and the parking garage, not the adjacent streets. Defendants made reasonable accommodation to enable plaintiff to use the mall by providing numerous handicapped parking spots within the parking garage. Plaintiff chose to continue to park on Fort

Greene Place, when there were no longer handicap designated parking spaces available there. In opposition, plaintiff failed to raise a triable issue of fact.

**Conclusion**

Accordingly, the defendants' motion for summary judgment is granted. The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi  
J.S.C.

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