Fontanez v K2 Sports, LLC
2025 NY Slip Op 30704(U)
February 28, 2025
Supreme Court, New York County
Docket Number: Index No. 159334/2023
Judge: Richard G. Latin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT:	**HON. RICHARD G. LATIN** *Justice*	**PART**	**46M**

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RAMON FONTANEZ

Plaintiff,

\- v -

K2 SPORTS, LLC,

Defendant.

---X

INDEX NO. 159334/2023

MOTION DATE 04/22/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is determined that the motion of defendant K2 Sports, LLC ("K2") to dismiss the amended complaint (AC [NYSCEF Doc No. 20]) of plaintiff Ramon Fontanez is granted in all respects.

Fontanez alleges that he is a resident of Manhattan and a "blind, visually impaired, handicapped person," as defined by the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Law (NYCHRL) (AC ¶ 12). Fontanez further alleges that K2 is an Indiana corporation and an on-line retailer which "owns and/or operates K2Snow.com" (the Website), "which is a place of public accommodation. . . under the NYSHRL, New York State Civil Rights Laws (NYSCRL), and NYCHRL," through which it sells winter sporting goods and clothing, including sweatpants, in New York City (*id.* ¶ 3, 13). Fontanez alleges that the Website "contained access barriers that prevented [him], and other visually impaired and/or legally blind individuals like him, from purchasing products thereon" (*id.* ¶ 1).

Fontanez asserts five causes of action based upon Executive Law § 296 of the NYSHRL, § 40 *et seq,* of the NYSCRL, and provisions of the NYCHRL, found in § 8-107 of New York

City's Administrative Code. Fontanez seeks compensatory, statutory, and punitive damages, a preliminary injunction and a permanent injunction compelling K2 to comply with the NYSHRL, the NYSCRL, and the NYCHRL, and a declaration that K2 has operated its Website in a fashion that discriminated against the blind and visually impaired (*id.* Prayer for Relief).

K2 filed its motion to dismiss the AC on March 5, 2024, for failing to state a cause of action under CPLR 3211 (a) (7) (*see* notice of motion [NYSCEF Doc No. 14]). Fontanez opposes K2's motion.

Background

Fontanez alleges that he visited the Website on September 13, September 16, and December 10, 2023, where he "browsed and attempted to transact business," using the free NonVisual Desktop Access (NVDA) screen reader (AC, ¶ 32).[1] Fontanez asserts that he "found it difficult, if not impossible" to buy K2's "CHAIN LOGO SWEATPANTS," as he had wished, because the Website would not allow him to complete his purchase, "as a result of the access barriers that exist" (*id.* ¶¶ 32-34). For example, Fontanez alleges the Website was "not properly coded to relay all information for products" on the Website, was "not properly coded" to allow him "to add an item to the cart," and was "not properly coded to describe the payment options available to the customer" (*id.* ¶ 34 [a], [b] and [c]).

A case search for the party name "Ramon Fontanez" in the NYSCEF system (https://iapps.courts.state.ny.us/nyscef/CaseSearch?TAB=name) returns a list of 43 other actions that name him as plaintiff which were filed between 2022 and 2024, principally in New York County Supreme Court, against website owners and operators based on the same grounds,

[1] "A screen reader vocalizes the visual information on a website and is an important means for visually impaired individuals to navigate the internet" (*Rodriguez v Bitchin' Inc.*, 2024 NY Slip Op 31560 [U], n 1 [Sup Ct, NY County 2024]).

including five others filed the very same day as this case, using virtually identical complaints (*see* [i] NYSCEF Doc No. 1, complaint in *Fontanez v SafeDNS, Inc.*, Index No. 159332/2023; [ii] NYSCEF Doc No. 1, complaint in *Fontanez v Firewalls.com Inc.*, Index No. 159333/2023; [iii] NYSCEF Doc No. 1, complaint in *Fontanez v Star Design Concepts LLC*, Index No. 159335/2023; [iv] NYSCEF Doc No. 1, complaint in *Fontanez v American Fireglass*, Index No. 159337/2023; and [v] NYSCEF Doc No. 1, complaint in *Fontanez v Flyte LLC*, Index No. 159338/2023). Each of these September 22, 2023 filings were made by Fontanez's counsel in this matter (*cf. Rodriguez*, *supra*, 2024 NY Slip Op 31560 [U], *2 [noting plaintiff filed 43 complaints in 2023 against website owners and operators, "including two filed the very same day using virtually identical complaints," leading defendant in that case to contend that "plaintiff is a serial litigator who did not visit its website, or these others, to purchase consumer products but to 'shakedown' individual businesses").

Discussion

"On a motion to dismiss a complaint pursuant to CPLR 3211, we must liberally construe the pleading and 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175, *rearg denied*, 37 NY3d 1020 [2021], *quoting Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). "Modern pleading rules are designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one" (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976] [internal quotation marks and citations omitted]).

"Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009] [citation omitted]). "Dismissal under CPLR 3211 (a) (7) is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Himmelstein*, 27 NY3d at 175 [internal quotation marks and citation omitted]).

Reasonable Accommodation Discrimination

In its motion to dismiss, K2 argues, among other things, that Fontanez cannot maintain a cause of action for failure to accommodate under NYSHRL Exec Law § 296 (2)(c)[2] and NYCHRL Admin Code § 8-107 (15)[3] because Fontanez did not plead that he had made a request for a reasonable accommodation that had been refused (*citing Sullivan v BDG Media, Inc.*, 71 Misc 3d 863, 871 [Sup Ct, NY County 2021]). Tacitly conceding this point, Fontanez contends that he only asserted claims for discrimination under the theories of disparate impact and disparate treatment, and not a claim for reasonable accommodation discrimination. To the extent that Fontanez may be said to have asserted a cause of action for failure to accommodate, that cause of action is dismissed as withdrawn.

[2] Exec Law § 292 (2) (c) (i) defines a "discriminatory practice" to include "refusal to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford facilities, privileges, advantages or accommodations to individuals with disabilities . . .."

[3] Admin Code § 8-107 (15) provides that "]t is an unlawful discriminatory practice for any person prohibited by the provisions of this section from discriminating on the basis of disability not to provide a 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 thee covered entity."

Disparate Treatment Discrimination

NYSHRL Exec Law § 296 (2) provides, "(a) It shall be an unlawful discriminatory practice for any person, being the owner ... of any place of public accommodation, 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." New York City's Administrative Code defines discrimination in public accommodations nearly identically:

> (4) It shall be an unlawful discriminatory practice for any owner or operator of any public accommodation (1) *because of* any person's actual or perceived... disability... (a) to refuse, withhold from or deny such person the full and the equal enjoyment, on equal terms and conditions, of any of the advantages, services, facilities, or privileges of its place of public accommodation

(Admin Code § 8-107 [4] [1] [a] [emphasis added]).

"'Disparate treatment is the most easily understood type of discrimination. The defendant simply treats some people less favorably than others because of their race, color, religion or other protected characteristics. Proof of a discriminatory motive is critical'" (*Brooklyn Ctr. for Psychotherapy*, *Inc. v Philadelphia Indem. Ins. Co.*, 955 F 3d 305, 311 [2d Cir. 2020], *quoting Hazen Paper Co. v Baggins*, 507 US 604, 609 [1993] [alteration omitted]).

Here, Fontanez's AC fails to allege any facts that could plausibly support an inference of K2's discriminatory motive when it allegedly denied him access to their website. Fontanez admits that he did not request a reasonable accommodation from K2 to allow him to access their website or otherwise sought to contact K2 before filing suit (*see* plaintiff's memorandum of law in opposition to dismissal, at 1 [NYSCEF Doc No. 22]). In this context, where the public accommodation is a website instead of a physical public accommodation, Fontanez has not shown that K2 knew of his visual impairment, let alone discriminated against him on that basis.

As Fontanez cannot plead that K2 discriminated against him "because of" his disability, he cannot not properly allege injury under a disparate treatment theory. Fontanez attempts to distinguish his pleading from the pleading in *Roberman v Alamo Draft House* (*citing* 67 Misc 3d 182, 185-88 [Sup Ct, Kings County 2020]), on the ground that the plaintiff in *Roberman* filed her complaint under Admin Code § 8-107 (15) (a), which govern reasonable accommodation discrimination, as well as §§ 8-107 (4) and (17) (a), which govern disparate treatment and disparate impact, respectively. Yet the difference between which statutes were cited in the two complaints is ultimately meaningless as the *Roberman* court addressed plaintiff's claims under all three theories (*see Brooklyn Ctr. for Psychotherapy*, 955 F.3d at 311 [recognizing three types of disability discrimination: intention discrimination (disparate treatment), disparate impact, and failure to make reasonable accommodations]).

The plaintiff in *Roberman* was a theatre patron with a hearing impairment who wished to view a film being shown by the defendant theatre with open screen captions, but the open screen caption version of the film was not being presented at that showing, and so she was provided an external closed captioning device instead, which turned out to be faulty (*id.* at 183).[4] The court found that Ms. Roberman's failure to complain about the faulty device and her failure to request a different accommodation was not only fatal to her accommodation claim, but to her disparate treatment claim as well (*id.* at 187 ["In light of the Court's finding that plaintiff failed to establish that Defendant did not reasonably provide her with an accommodation, her NYCHRL claim under the disparate treatment theory fails"]). Fontanez's other disparate treatment arguments are also unavailing.

[4] The Disabilities, Opportunities, Internetworking, and Technology Center based at the University of Washington, states that, in films and videos, "[c]aptions are either *open* or *closed*. Open captions are always in view and cannot be turned off, whereas closed captions can be turned off and on by the viewer" (https://www.washington.edu/doit/what-difference-between-open-and-closed-captioning) (emphasis in original).

Disparate Impact Discrimination

To plead a cause of action under a disparate impact theory, Fontanez must allege facts sufficient to show that K2 maintained a facially neutral policy or practice that "falls more harshly on" or results in a disparate impact to a group protected by the statute (*Mete v New York State Off. of Mental Retardation & Dev. Disabilities*, 21 AD3d 288, 296-97 [1st Dept 2005]). Here, K2 argues that the alleged technical issues and/or design flaws preventing those with visual impairments from accessing its website are neither a "policy" nor "practice" that can be the subject of a disparate impact claim (*citing Roberman*, 67 Misc 3d at 187).

Fontanez cites an online dictionary to assert that the definition of "practice" is a "habitual or customary performance; operation," and, as such, K2's maintenance of its website constitutes a "practice" that can result in a disparate impact on members of a protected class. At its core, however, Fontanez's argument requires the Website be viewed as both "the place of public accommodation" (*see Sullivan*, 71 Misc 3d at 869-70) and the facially neutral "practice" that the public accommodation employs that has a discriminatory impact on protected class members.

In its publication, *Legal Enforcement Guidance on Discrimination on the Basis of Disability* (NYC Commission on Human Rights, Legal Enforcement Guide, at 30-31, available at https://www.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.2.pdf [accessed February 14, 2025]), New York City's Commission on Human Rights cites two examples of neutral policies with disparate impacts, both of which presuppose a distinction between the "public accommodation" and the "policy" or "practice" in question: "No outside food" policies that may exclude individuals who have diabetes, and "No motorized devices" policies that affect people who use wheelchairs and electric scooters to move around. With respect to K2's

website, Fontanez failed to identify a particular policy or practice that has a discriminatory impact on individuals with disabilities.

Further, Fontanez's argument that a website owner may be subject to disparate impact claims by virtue of its site containing alleged technical/design flaws that create "access barriers" represents a novel expansion of disability discrimination under the NYCHRL – an expansion that undermines the traditional approach of requiring a plaintiff to request a reasonable accommodation for their disability before commencing suit. Even considering the liberal interpretation afforded to the NYCHRL, this interpretation has yet to be adopted by an Appellate Division in any of our four Departments. In the absence of Court of Appeals or Appellate Division precedent suggesting that the operation of a website, in and of itself, may be the subject of a disparate impact claim, the Court finds that Fontanez has not adequately pled an injury arising from a "policy" or "practice" adopted by K2.

Accordingly, as Fontanez has failed to plead a cause of action under disparate treatment, disparate impact, or failure to provide reasonable accommodations theories, under Exec Law § 296 or Admin Code § 8-107, these causes of action are dismissed.

Fontanez concludes his arguments in opposition by making the conclusory assertion that, because the facts presented on his behalf on this motion would also support his claims under Sections 40 and 40-c of the NYSCRL, K2 should also be held liable for disability discrimination under NYSCRL Sections 40 and 40-c. By the same logic, as his claims for disparate treatment and disparate impact discrimination fail, his NYSCRL Sections 40 and 40-c fail as well.

Conclusion

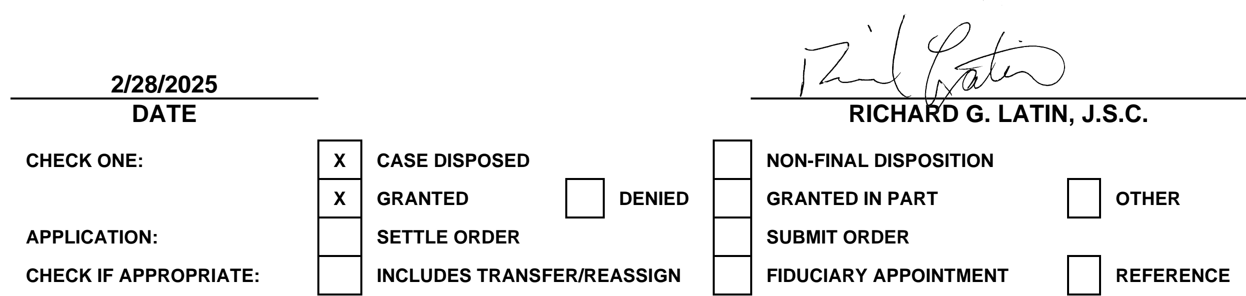
For the foregoing reasons, it is hereby

ORDERED that defendant K2 Sports, LLC's motion for dismiss plaintiff Ramon Fontanez's amended complaint, pursuant to CPLR 3211 (a)(7) is granted and the amended complaint is hereby dismissed, in its entirety; and it is further

ORDERED that counsel for defendant K2 Sports, LLC shall serve a copy of this order, along with notice of entry, on counsel for plaintiff Ramon Fontanez within twenty (20) days of entry; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the decision and order of the Court.



2/28/2025
DATE

RICHARD G. LATIN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED	☐ DENIED		GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE