

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

KATHERINE SAVAGE, et al.,

*

Plaintiffs,

*

vs.

*

Civil No. 240306

CITY PLACE LIMITED
PARTNERSHIP, et al.,

*

*

Defendants.

OPINION

The Plaintiffs Katherine Savage and the Disability Rights Council, filed an Amended Complaint against the Defendants Dierman Realty Group, Marshalls MA, Inc., City Place Limited Partnership and DRG Property Managers, for negligence, false imprisonment, and various violations of the Americans with Disabilities Act (ADA) on May 3, 2004. The Plaintiffs are seeking damages against all of the Defendants as well as preliminary and permanent injunctive relief against Marshalls.

On December 3, 2004, this Court held a hearing on Defendant's Motion for Summary Judgment (DE#105) and Plaintiff's Motion for Partial Summary Judgment (DE#106). The matter was taken under advisement and the following opinion is rendered.

Statement of Facts

On September 3, 2002, Ms. Savage, a non-ambulatory individual with juvenile rheumatoid arthritis whose mobility impairment requires her to use a wheelchair, was shopping in Marshalls in the City Place Mall in Silver Spring, Maryland. On that date, a fire alarm was activated and customers were told to evacuate the store, which is located on the second floor of the Mall. Ms. Savage was evacuated into the Mall with the rest of

ENTERED

DEC 28 2004

Clerk of the Circuit Court
Montgomery County, Md.

the customers. However, the Mall's elevators were inoperable due to the emergency. As a result, Ms. Savage was unable to escape the Mall until after the emergency was over.

The Plaintiffs Katherine Savage and the Disability Rights Council and Defendant Marshalls have each brought cross-motions for summary judgment before this Court. The Defendant has asked for summary judgment on the Plaintiffs' claims for false imprisonment, negligence and two ADA claims. The Plaintiff has asked for summary judgment on the two ADA claims.

False Imprisonment

The Plaintiff alleges in her Amended Complaint that she was falsely imprisoned by Marshalls when she was evacuated from the store into an area of the Mall that did not have working elevators or a proper means of egress for the disabled. (Docket Entry #76) Plaintiff acknowledges that under Maryland law, false imprisonment is an intentional act that results in "(1) the deprivation of the liberty of another, (2) without his consent, and (3) without legal justification." *The Great Atl. & Pac. Tea Co. v. Paul*, 256 Md. 643, 654 (1970).

The Plaintiff correctly states that she did not consent to the alleged deprivation of liberty. However, for this cause of action to survive summary judgment, there must be some evidence in the record supporting the Plaintiff's contention that the deprivation was intentional. The Plaintiff relies on *Rite Aid Corp. v. Hagley*, 374 Md. 665, 684 (2003), in support of her argument that Marshall's "deliberate indifference and reckless disregard for the safety of its customers" resulted in her false imprisonment, and at the very least raises an issue of fact to be determined by a jury.

The *Rite Aid* case involved the alleged false imprisonment by the authorities of a man suspected of child abuse. The Court of Appeals stated in the case that, “determinations of good faith which involve intent and motive ‘ordinarily’ are not resolvable on a motion for summary judgment.” In the case at hand, however, the Plaintiff has attempted to characterize the Defendant’s alleged indifference to its obligations under the ADA as an intentional act that directly resulted in the false imprisonment of Ms. Savage. Even though the Plaintiff has set forth evidence of the Defendant’s alleged disregard of this ADA obligation and its failure to warn or rescue Ms. Savage, that evidence seems to support a claim for negligence, and not a claim for an intentional tort such as false imprisonment.

The Defendant cites to *Filardi v. Loyola Univ.*, No. 97 C 1814, 1998 WL 111683 (N.D. Ill. Mar. 12, 1998), in support of its assertion that the Plaintiff’s false imprisonment claim more closely resembles a claim for negligence. In *Filardi*, a disabled Plaintiff claimed that she was falsely imprisoned in the Defendant’s restroom facilities and other facilities during the 1995 fall semester, because the facilities were allegedly noncompliant with ADA Title III regulations. The Court in *Filardi* stated that in order to recover for a claim of false imprisonment, actual or legal intent must be shown. The Court opined, “(i)f a reasonable person in the actor’s position would have known that the consequence of his act was substantially certain to occur, then the actor has been negligent even though he did not know that the consequence would occur.” *Id.* at 5. While *Filardi* relies on Illinois law, the Maryland Court of Appeals in *Rite Aid*, also stated that, “...the possibility, even probability, that the situation might have, or should

ENTERED

DEC 28 2004

Clerk of the Circuit Court
Montgomery County, Md.

have, been handled more effectively...while perhaps suggesting negligence, does not equate to bad faith or a lack of good faith.” *Rite Aid*, 374 Md. at 687.

Similarly, in this case, when viewed in a light most favorable to the Plaintiff, whether the Defendant intentionally *ignored* the ADA regulation does not affect whether the Defendant knew or should have known that its alleged failure to comply with the ADA regulation would falsely imprison the Plaintiff due to the Mall’s inactive elevators. That is at best an issue of negligence and not an intentional tort. As such, the DEFENDANT’S MOTION FOR SUMMARY JUDGMENT ON THE PLAINTIFF’S CLAIM FOR FALSE IMPRISONMENT IS, HEREBY, GRANTED.

Negligence

The Plaintiff also alleges in her Amended Complaint that the Defendant Marshalls was negligent in evacuating her from the store into an area of the Mall that did not have working elevators or a proper means of egress for the disabled. (Docket Entry #76) The Plaintiff states that Marshalls had a duty to protect the Plaintiff from injury, breached that duty and as a result, caused injury to the Plaintiff. Maryland case law supports the assertion that a business owes an invitee “a duty to use reasonable and ordinary care to keep the premises safe and to protect the invitee from injury caused by an unreasonable risk which the invitee, by exercising ordinary care for his own safety, will not discover.” *Southland Corp. v. Griffith*, 633 A.2d 84, 89 (1993). The Defendant concedes that there is arguably also a heightened duty to aid and protect a business invitee “who is in danger while on the business’s premises, provided the employee has knowledge of the injured invitee and the employee is not in the path of danger.” *Id.* at 91.

ENTERED

DEC 28 2004

Clerk of the Circuit Court
Montgomery County, Md.

The Defendant argues that Marshalls did not have this heightened duty, or any duty, because it could not have known while Ms. Savage was in Marshalls that she would later be unable to exit the mall after being evacuated from Marshalls. The Defendant adds that no Marshalls employees could have known that the elevators in the mall would be inoperable during an emergency. The Defendant cites to a case supporting this proposition in which J.C. Penneys was sued for negligence after two of its customers were attacked in a mall outside its store. The Plaintiffs in the case argued that the store was negligent because it failed to warn the mall of certain safety concerns. The court found that J.C. Penneys was not negligent because it had no duty to protect its customers in areas of the mall that it neither owned nor possessed. *Funk v. Taubman Co., Ltd.*, 102 F.Supp.2d 308 (D. Md. 2000).

However, the facts in *Funk* differ from the facts in this case because the events that led to the attack all occurred outside of J.C. Penneys. Maryland case law suggests that the necessary trigger for a store employee's duty to aid is "knowledge of the injured invitee." *Southland Corp.*, 332 Md. at 719. Since Ms. Savage was shopping in Marshalls when the evacuation and danger presented itself, it is arguable that Marshalls had knowledge or should have had knowledge of Ms. Savage and therefore, a duty to help her. As such, the question of negligence in this case presents factual issues as to causation and what exactly Marshalls' standard of care should have been. Whether or not the Defendant knew or should have known that Ms. Savage would be unable to exit the mall after the evacuation because of the mall's inoperable elevators is a question of fact that should be answered by a jury. Therefore, the DEFENDANT'S MOTION FOR

ENTERED

DEC 28 2004

Clerk of the Circuit Court
Montgomery County, Md.

SUMMARY JUDGMENT ON THE PLAINTIFF'S CLAIM FOR NEGLIGENCE IS,
HEREBY, DENIED.

Violations of the ADA

Plaintiff and Defendant have both filed motions for summary judgment on Count I and IV of the Plaintiff's Amended Complaint. Count I alleges that the Defendant Marshalls failed to design evacuation procedures that comply with Title III of the ADA. Count IV alleges that Marshalls failed to remove architectural barriers in its City Place Mall store. The Defendant first alleges in its motion that neither Ms. Savage nor the Disability Rights Council has standing to bring their Title III claims.

Standing- Katie Savage

The Defendant states that to establish standing for her Title III claims the Plaintiff must show that (i) she will suffer an injury in fact that is concrete and imminent, (ii) that the alleged injury is traceable to the alleged bad conduct, (iii) and that it is likely and not speculative that the alleged injury will be redressed by a favorable decision. *Gregory v. OTAC, Inc.*, 247 F.Supp.2d 764, 771 (D. Md. 2003).

The Defendant argues that Ms. Savage cannot establish an injury in fact under Title III that was caused by Marshalls' evacuation plan. In addition, Ms. Savage cannot establish an injury in fact regarding the alleged failure to remove architectural barriers in the women's handicapped dressing room because she has offered no evidence that she ever used or tried to use the fitting room. Marshalls also argues that Ms. Savage failed to show a likelihood of future harm with respect to the other 672 Marshalls stores because she has admitted that she has not visited those stores and has not provided evidence that she will visit those stores.

ENTERED

DEC 28 2004

Clerk of the Circuit Court
Montgomery County, Md.

First, this Court already denied Marshalls' Motion to Strike Plaintiffs' Second Amended Complaint, which, among other things, argued for dismissal based on Ms. Savage's lack of standing. Second, as stated earlier in the opinion, whether or not Ms. Savage's injuries were caused by Marshalls is a question of fact appropriate for a jury. In addition, even though the Plaintiff has not used and may not use the woman's handicapped dressing room in Marshalls, the 8th Circuit has stated that a Plaintiff need not encounter every barrier in a store to bring a claim for all of the store's ADA violations. *Steger v. Franco*, 228 F.3d 889, 894 (8th Cir. 2000). Consequently, the fact that Ms. Savage may have been injured by Marshalls' evacuation policy allows her to seek relief for any of Marshalls' alleged ADA violations in the store.

As for the likelihood of future harm, the Ninth Circuit has stated that "[w]here the harm alleged is directly traceable to a written policy...there is an implicit likelihood of its repetition in the immediate future." *Fortyune v. AMC*, 364 F.3d 1075, 1081 (9th Cir. 2004). Since this case involves the validity of Marshalls' written evacuation policy as it pertains to the disabled, *Fortyune* suggests that the future harm element has been met. Therefore, with all of the standing elements having been met, and this Court's previous ruling on the matter, MS. SAVAGE DOES IN FACT HAVE STANDING TO BRING HER TITLE III CLAIMS.

Standing- Disability Rights Council

Marshalls also argues that the Disability Rights Council (DRC) lacks both organizational and representational standing to bring suit in this case. Marshalls states that the DRC's only demonstrable injury claimed that would warrant its organizational standing is that it has had to "divert resources" to deal with Marshalls' violations of Title

ENTERED

DEC 28 2004

Clerk of the Circuit Court
Montgomery County, Md.

III by meeting and helping people concerned with the discriminatory evacuation policies. Marshalls contends that this is not enough to give the DRC organizational standing. The Defendant claims that the DRC does not have representative standing because Ms. Savage does not have standing and because it has failed to identify its other members that have been affected by Marshalls' alleged discriminatory policies.

The DRC filed an Amicus Brief in the case addressing, among other things, the issue of standing. Under Maryland law, as long as a Plaintiff has standing to assert a claim, courts will assume that an organization on the same side as the Plaintiff also has standing to bring the claim. *Maryland Ass'n of HMO's v. Health Servs. Cost Review Comm'n*, 741 A.2d 483, 487 (1999). Since this Court has already ruled that the Plaintiff has standing to bring this action, the DISABILITY RIGHTS COUNCIL WILL ENJOY THE SAME STANDING.

Count I

Both the Plaintiff and Defendant have asked for summary judgment on Count 1 (Violation of Title III of the ADA). According to the Defendant, in order for the Plaintiff to prevail on a Title III claim, she must show that she is (i) disabled; (ii) that the Defendant is a place of public accommodation; and (iii) that she was denied full and equal access of the facilities or privileges offered by the Defendant as a result of her disability. *See, e.g., Larsen v. Carnival Corp.*, 242 F. Supp. 2d 1333, 1342 (S.D. Fla. 2003). In addition, section 302(b)(2)(A)(ii) makes it illegal for such an entity to "fail to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can

ENTERED

DEC 28 2004

Clerk of the Circuit Court
Montgomery County, Md.

demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations.” 42 U.S.C.

§12182(b)(2)(A)(ii). Case law suggests that requested modification must be reasonable.

Johnson v. Gambrinus Co./Spoetzl Brewery, 116 F.3d 1052, 1059 (5th Cir. 1997).

The Defendant’s main argument is that Marshall’s emergency evacuation plan does not violate Title III because there are no specific Title III rules concerning the contents of a public accommodation’s emergency evacuation plan. The Defendant relies on *Caruso v. Blockbuster-Sony Music Enter. Centre*, 968 F.Supp 210 (D.N.J. 1997), for its argument that Title III liability will not fall absent a violation of an applicable regulation.

However, Plaintiff points out, and it seems clear, that *Caruso*’s ruling is specifically tailored to architectural design changes. Instead, the Plaintiff believes that *Martin v. PGA Tour*, 532 U.S. 661 (2001), is more apropos to the instant set of facts. In *Martin*, a PGA Tour golfer with a disability sued the PGA Tour for not allowing him to use a golf cart during tournaments. The U.S. Supreme Court ruled that even though there was not a specific Title III violation, Title III does in fact require that any “‘policies, practices, or procedures’ of a public accommodation be reasonably modified for disabled ‘individuals’ as necessary to afford access unless doing so would fundamentally alter what is offered.” *Id.* at 688. Based on the facts of the case, the Court ruled that Title III of the ADA had been violated. *Martin* seems to make it clear that Title III does in fact apply to the policies of a public accommodation. While “policies” is not defined in Title III, a store’s nationwide evacuation procedures would certainly constitute a public

ENTERED

DEC 28 2004

Clerk of the Circuit Court
Montgomery County, Md.

accommodation's "policies." Therefore, Title III of the ADA would apply to the case currently before this court.

In this case the Plaintiff argues, and the Defendant disagrees, that changing Marshalls' emergency evacuation plan would not constitute an unreasonable modification that would "fundamentally alter the nature" of Marshalls' services. Throughout the case, the Plaintiff has made modification suggestions to the Defendant. Marshalls argues that the modifications would not be reasonable because they would impose too many administrative burdens, such as coordinating all of their 673 stores and negotiating new lease terms with 673 landlords. Yet it should be pointed out that the number of Marshalls stores that do not have proper exits for the disabled would be considerably less than 673, which would in turn ease Marshalls' "administrative burden."

While it is certain that Title III of the ADA does apply to this situation, there have been facts set forth by both sides as to whether Marshalls' evacuation plan did in fact violate Title III of the ADA. More importantly, both sides have presented facts as to the reasonableness of modifying Marshalls' current evacuation procedures. The Plaintiff and Defendant both claim that the other has failed to satisfy their respective burdens regarding reasonableness and whether the proposed modification would alter the nature of the public accommodation. The Plaintiff has the burden of proving the reasonableness of the modification while the Defendant has the burden of proving that modification would alter the nature of the public accommodation. *Johnson v. Gambrinus Company/Spoetzl Brewery*, 116 F.3d 1052 (5th Cir. 1997). It seems that both sides have raised issues and evidence that could satisfy their respective burdens. As a result, BOTH

ENTERED

DEC 28 2004

Clerk of the Circuit Court
Montgomery County, Md.

MOTIONS FOR SUMMARY JUDGMENT ARE, HEREBY, DENIED AS TO COUNT I OF THE PLAINTIFF'S AMENDED COMPLAINT.

Count IV

The Plaintiff and Defendant have also asked for summary judgment on Count IV (Marshall's alleged failure to remove architectural barriers in its City Place Mall store.) The Plaintiff included an affidavit in her pleading from a Ms. Virginia Simmons which stated that the City Place store lacks the bench required by ADAAG §4.35.4, and has a door that swings inward in violation of ADAAG §§4.35.2, 4.35.3, & 4.13.6. The Defendant has also provided an expert witness that stated the contrary. At the hearing on the matter, both sides presented pictures allegedly depicting the Marshalls' handicapped women's dressing room. The Defendant's picture shows a dressing room that does have a bench. The Plaintiff's picture, however, shows that there is not a bench. The Plaintiff claimed at the hearing that the dressing room in the Defendant's picture was not the handicapped women's dressing room, but the regular women's dressing room. The Defendant did not dispute that assertion.

The Plaintiff also suggested that the Defendant's expert did nothing more than peek into the dressing room, and therefore could not fully examine if there was a bench or an inward swinging door. It is unclear from the facts whether the Defendant's expert examined the right dressing room, and whether Defendant's picture may have depicted the wrong dressing room. Considering this uncertainty, there are material questions of fact in dispute that require this issue to move forward to a jury. As a result,

PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT AS

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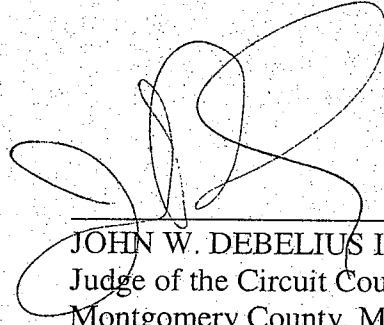
DEC 28 2004

Clerk of the Circuit Court
Montgomery County, Md.

TO COUNT IV OF THE PLAINTIFF'S AMENDED COMPLAINT ARE, HEREBY,
DENIED.

Dated:

12/20/04



JOHN W. DEBELIUS III
Judge of the Circuit Court for
Montgomery County, Maryland

ENTERED

DEC 28 2004
Clerk of the Circuit Court
Montgomery County, Md.

DEC 28 2004