

NEW YORK DISTRICT COURT ADDRESSES MOOTNESS ARGUMENT IN WEBSITE ACCESSIBILITY CASE

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As businesses continue to face lawsuits and demand letters alleging that their websites are inaccessible to blind and deaf patrons in violation of the Americans with Disabilities Act (“ADA”), courts across the country continue to weigh in on the issue. On Tuesday, June 4, 2019, the United States District Court for the Southern District of New York issued a decision in *Diaz v. The Kroger Co.* – holding that the Court lacked both subject matter and personal jurisdiction over the case because the complaint had been rendered moot by modifications defendant made to the website and because the defendant did not sell goods or services in New York. *Diaz v. The Kroger Co.*, Case No. 18-cv-07953, Opinion and Order [Dkt. No. 35].

In *Diaz*, the plaintiff, a visually-impaired and legally blind individual who resides in the Bronx, New York, alleged that the website of defendant Kroger, a supermarket chain with its principal place of business in Cincinnati, Ohio, denied equal access to blind customers. Kroger moved to dismiss the complaint on two grounds: (1) for lack of subject matter jurisdiction because it remedied the barriers to access to its website, and (2) for lack of personal jurisdiction because it does not conduct business in New York. The Court granted Kroger’s motion to dismiss on both grounds.

In granting Kroger’s motion to dismiss for lack of subject matter jurisdiction, the Court noted that the facts of the case were different from other cases where courts found, “on the facts of those cases, that the defendants had failed to establish mootness.” Opinion at 7. One case mentioned by the Court was *Haynes v. Hooters of America*, [which we previously reported on](#), where the Eleventh Circuit had rejected the defendants’ mootness argument based on a remediation plan entered into in a prior and unrelated litigation. See Opinion at 8. In distinguishing the case from those other cases, the Court appeared to give significant weight to an affidavit submitted by Kroger’s Group Product Design Manager:

Significantly, Mr. Whiting does not present some future plan for remediation of the Website, or some conclusory assertion that the Website is today compliant with the ADA. Instead, Mr. Whiting avers specifically that (i) Defendant undertook compliance with the WCAG standards before the lawsuit was filed; (ii) the Website is today compliant with those standards; (iii) he personally confirmed that the specific barriers to access identified in Plaintiff’s initial and amended

complaints have been remedied and that no such barriers to access, as alleged, still exist with the website; (iv) Defendant has no intention of undoing those changes or regressing to non-compliance with the ADA; and (v) Defendant commits to keep its website up to date and compliant with all applicable standards to make the website as accessible to all as possible.

Opinion at 8 (internal citations and quotations omitted). And, while the Court agreed with the plaintiff that “mere plans do not moot an ADA case” it found that argument to be “irrelevant ... where the modifications are not merely proposed, but completed.” Opinion at 9.

Notably, the Court refused to adopt plaintiff’s argument that ADA website accessibility cases can never be mooted since websites are continually revised and updated and there is more likelihood of a reoccurrence of a violation in the case of a website. In dismissing this argument, the Court stated: “[I]t cannot be said that an ADA claim involving a website can never be mooted, solely because of the technological characteristics of websites. Such limit is both unnecessary and would insert a brittle, technology-specific exception into the mootness doctrine that would itself become obsolete in an era of rapidly-changing technology.” Opinion at 10-11.

In granting Kroger’s motion to dismiss on personal jurisdiction grounds, the Court found that “Defendant does not sell, through the Website, goods or services to New York residents” and that, as a consequence, “the fact that Plaintiff can access the Website in the Bronx, standing alone, does not amount to Defendants’ transacting business in the state for purposes of New York’s long-arm statute.” Opinion at 17. In so finding, however, the Court also noted that “to confer personal jurisdiction ... Plaintiff must establish a reasonable probability that the website has been actually used to effect commercial transactions with customers in New York.” Opinion at 16 (internal citations and quotations omitted).

It should be noted that the Court’s opinion does not directly address the state law claims brought by the plaintiff – for violation of the New York State Human Rights Law, the New York City Human Rights Law, and the New York Civil Rights Law. Claims under these statutes, or similar statutes in other states, could also be brought by a plaintiff in state court.

With the absence of government regulations governing website accessibility, courts have been continuing to fill the void with a patchwork of conflicting decisions. Bryan Cave Leighton Paisner has extensive experience defending companies against website accessibility claims and regularly offers webinars on the topic to assist our clients in assessing compliance with the ADA.

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