| **Andrews v Exceeding Expectations, Inc.** |
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| 2018 NY Slip Op 33432(U) |
| December 11, 2018 |
| Supreme Court, Kings County |
| Docket Number: 513301/2017 |
| Judge: Devin P. Cohen |
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**Supreme Court of the State of New York**
**County of Kings**

Part 91

VICTOR ANDREWS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

against

EXCEEDING EXPECTATIONS, INC.,

Defendant.

**Index Number** 513301/2017
SEQ # 005, 003

# DECISION/ORDER

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

| Papers Numbered | |
|---|---|
| Notice of Motion and Affidavits Annexed..... | 1 |
| Order to Show Cause and Affidavits Annexed... | |
| Answering Affidavits..... | |
| Replying Affidavits..... | |
| Exhibits..... | |
| Other ..... | |

Upon review of the foregoing papers, plaintiff's motion for sanctions and defendant's motion to reargue are decided as follows:

Plaintiff brings this action against defendant for purported violations of state and federal human rights laws because defendant's website is not sufficiently accessible to blind people, such as plaintiff. Defendant previously moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and 3211(a)(7). By order, dated April 18, 2018, this court denied the motion on the basis that there appeared to be no dispute that plaintiff stated causes of action for violations of human rights laws, and because defendants relied upon information that was not the type of documentary evidence permitted by CPLR 3211(a)(1) (*VIT Acupuncture P.C. v State Farm Auto. Ins. Co.*, 28 Misc 3d 1230[A], 2010 NY Slip Op 51560[U], *1 [Civ Ct, Kings County 2010]).

In response to the court's prior order, plaintiff now moves for sanctions pursuant to 22 NYCRR Part 130-1.1. Part 130-1.1(a) states that the court has discretion to "award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable

attorney's fees, resulting from frivolous conduct as defined in this Part." Pursuant to subpart (c), conduct is considered "frivolous" when "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false."

Though the court determined that the complaint should not be dismissed based on defendant's arguments, those arguments are not frivolous as defined by Part 130-1.1. Accordingly, plaintiff's motion is denied.

Turning to defendant's motion to reargue, defendant must show that there was a point of law or fact that was overlooked by the court, and such motion cannot be based on arguments different from those originally stated (*NYCTL 1998-1 Tr. v Rodriguez*, 154 AD3d 865, 865 [2d Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964, 966–67 [2d Dept 2016]).

Defendant moved to dismiss pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7). Defendant does not appear to argue that the court overlooked anything with respect to its motion to dismiss pursuant to CPLR 3211(a)(7), but restricts reargument to the CPLR 3211(a)(1) portion of its motion.

CPLR 3211(a)(1) authorizes dismissal of a complaint based on documentary evidence. Because the action is dismissed early, at the pleading stage, the documentary evidence "must resolve all factual issues as a matter of law, and conclusively dispose of the plaintiff's claim" and they must be "unambiguous and of undisputed authenticity" (*VIT Acupuncture*, 28 Misc 3d 1230[A], 2010 NY Slip Op 51560[U], *1, quoting *Teitler v Max J. Pollack & Sons*, 288 AD2d 302, 302 [2d Dept 2001]).

As the Second Department recognized in *Fontanetta v Doe* (73 AD3d 78, 84 [2d Dept 2010]), such indisputable documents are judicial records, mortgages, deeds, and contracts. By contrast, affidavits are akin to testimony. Testimony is neither unambiguous nor of undisputed authenticity, but simply offers the view of the affiant and depends heavily on the credibility of the affiant (*VIT Acupuncture*, 28 Misc 3d 1230[A], 2010 NY Slip Op 51560[U], *1).

Here, defendant argues in its prior motion, and in favor of its current motion to reargue, that the text and formatting of its website is the type of documentary evidence contemplated by CPLR 3211(a)(1). Defendant further argues that the website does not violate human rights laws because it complies with the Web Content Accessibility Guidelines 2.0 ("WCAG 2.0"). However, in making this argument, defendant also relies on the affidavit of Sara Mannix, the owner of the company that designed defendant's website. In her affidavit, Ms. Mannix explains over several pages how the website complies with WCAG 2.0. Likewise, plaintiff submits the affidavit of Michael McCaffrey as an expert on website design and disability compliance to rebut Ms. Mannix's affidavit. Accordingly, even assuming defendant's website is properly considered documentary evidence, the affidavits are not. For that reason, the court correctly held that the complaint should not be dismissed pursuant to CPLR 3211(a)(1).[1]

Defendant also argues that the court should reconsider its prior order in light of a recent letter from the United States Department of Justice. Submission of new evidence is not proper on a motion to reargue (*NYCTL 1998-1 Tr. v Rodriguez*, 154 AD3d 865, 865 [2d Dept 2017]). That said, the court may treat this portion of defendant's motion as a motion to renew

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[1] In its motion to reargue, defendant noticeably ignores Ms. Mannix's affidavit, and argues that the court need only review its website in order to decide the motion. Defendant's argument is belied by their own prior motion papers, which heavily relied upon Ms. Mannix's description of defendant's website and claimed compliance with WCAG 2.0.

(*Friedlander Org., LLC v Ayorinde*, 119 AD3d 894, 895 [2d Dept 2014]). A motion to renew must be based on new facts or law that would change the prior determination, which were unknown to the movant and therefore were not brought to the court's attention (*Semenov v Semenov*, 98 AD3d 962, 963 [2d Dept 2012]). Petitioner must offer a reasonable justification for its failure to present such facts on the prior motion (*id.*).

The letter is dated September 18, 2018, which is several months after this court's prior order. The letter is from Stephen E. Boyd, Assistant Attorney General, to Congressperson Tedd Budd. The letter states that the Justice Department has not yet decided to adopt regulations concerning the compliance of websites with the Americans with Disabilities Act. The letter further states that noncompliance with technical standards does not ***necessarily*** equate to noncompliance with the ADA. Defendant argues that this letter requires plaintiff to plead an actual inability to access defendant's website.

First, defendant references no legal authority that an opinion letter from the Justice Department is governing authority over this court. Second, and contrary to defendant's interpretation, the letter does not explicitly or implicitly set forth any required elements of an ADA claim. Third, the letter is restricted to the ADA, while plaintiff's complaint asserts claims under New York State law and Section 508 of the Rehabilitation Act. Accordingly, although the letter may be new evidence, it does not affect the court's prior determination.

For the foregoing reasons, defendant's motion to reargue is denied in its entirety. As stated above, plaintiff's motion is also denied.

This constitutes the decision and order of the court.

December 11, 2018
**DATE**

**DEVIN P. COHEN**
Acting Justice, Supreme Court