

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

NIGHT BOX
FILED

00-7381-CIV-MORENO



JUL 18 2002

CLARENCE MADDOX
CLERK, USDC / SDFL / MIA

CORAL SPRINGS ADVOCACY)
COMMITTEE FOR THE HANDICAPPED,)
INC., ROBERT COHEN and)
PATRICIA L. KENNEDY,)
)
Plaintiffs,)
vs.)
)
SAUL STRACHMAN, d/b/a The Gardens Mall,)
)
Defendant.)
_____)

**DEFENDANT'S
EMERGENCY MOTION TO
STRIKE NEW INSPECTION REPORT FILED
BY PLAINTIFFS**

Defendant, SAUL STRACHMAN, moves to strike the new inspection report filed¹ by the plaintiffs' expert, Michael Brennan, on July 18, 2002. This motion is characterized as an emergency because of the shortage of time remaining before trial is resumed on Monday, July 22, 2002.

At trial on July 15, the Court ruled that the plaintiffs' expert, Michael Brennan, could return to The Gardens Mall for an inspection, solely to establish whether alleged barriers in the common areas of the Mall, identified in Brennan's expert witness report dated September 13, 2001 ("the September 2001 Report"), had been removed. The Court did not authorize Brennan -- in the middle of trial -- to re-inspect the premises and prepare a fresh report on barriers. Brennan's new report does not comply with the Court's ruling. The new report is highly

¹ Strachman has not been served with a notice of filing, but assumes that filing occurred pursuant to the Court's order at trial on July 15, 2002.

157
114

prejudicial to Strachman, and should be stricken.

Strachman's expert witness, Jeffery Gross, also prepared a fresh update report on barrier removal at the Mall, and that document was timely filed with the Court and served on the plaintiffs by Strachman on July 18, 2002. In preparing his report, Gross relied entirely on "findings" of barriers as described in Brennan's September 2001 Report. In his new report, Gross addressed each numbered barrier contained in Brennan's September 2001 Report and provided a description of the current status of the "barrier."

Discovery in this case ended long ago. Brennan's September 2001 Report reflects the opinions he testified he was hired to render. Brennan does not have a license – either in the rules, in the law, or from the Court -- to engage in rolling discovery so that he can forage for new "barriers" or rephrase the analysis of barriers at the Mall he prepared in September of last year. Strachman had the opportunity to review Brennan's September 2001 Report and at deposition to challenge Brennan's report. Strachman has no such opportunity here. Even a rough comparison of Brennan's new report with his September 2001 Report shows significant differences. The barriers have been re-numbered. The "findings" contain descriptive material and analysis that did not appear in the September 2001 Report.

The September 2001 Report provided a level playing field for all parties. The Court clearly instructed the parties to have their experts report as to whether the barriers identified in that report still exist.² The new Brennan report does much more. Brennan proposes corrections in scope and detail that are not contained in the September 2001 Report. The new Brennan

² Strachman's expert, of course, will also have an opportunity to provide an opinion as to whether barriers identified in the September 2001 report can properly be identified as barriers, and whether removal of any barriers would be readily achievable. The Court already has been advised that the plaintiffs' expert flatly rejected "readily achievable" as an appropriate standard.

report also addresses “barriers” pertinent to particular tenant spaces (barriers numbered 8, 11, 12 and 13). The tenant spaces are no longer relevant to the case because the Court ruled that the plaintiffs had no standing to raise issues with respect to those spaces.

Most significantly, Brennan’s new report includes cost estimates with respect to particular barriers. The September 2001 Report contained no cost estimates. Here is what Brennan said about costs at his deposition:³

Q. Again you don’t know what the costs would be, and you’re not here to opine on the cost; is that correct?

A. Correct.

(Mar. 18 depo. at 50).

A. I have not been asked to address cost or provide a cost analysis, and I’m not going to do it now.

(Mar. 18 depo. at 36).

Q. Okay. So as I recall from the beginning of your deposition on [March] 5th, you did not factor in any cost for any barrier removal in either one of [your] reports?

A. I was not instructed to provide a cost analysis.

(Mar. 18 depo. at 37).

Rule 26 (a) (2) (B), Federal Rules of Civil Procedure, provides that the mandatory written report prepared by an expert witness “shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore” Brennan provided not one, but two, expert reports within the discovery period. In neither did he address cost in any manner. It would be a


³ The relevant excerpts of Brennan’s deposition are attached hereto as Exhibit “A.”

travesty if he should be allowed to give opinion testimony as to cost estimates he derived in the middle of a trial.⁴

The new Brennan report should be stricken.


Respectfully submitted,

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By: 
Roslyn L. Stevenson
Florida Bar no. 829803

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Defendant's Emergency Motion to Strike was served by fax and mail on William N. Charouhis, Esq., Suite 1200, 169 East Flagler Street, Miami, FL 33131 on this 18th day of July 2002.


Roslyn Stevenson

⁴ In a pending motion, Strachman has urged that Brennan's testimony be disallowed because he did not address costs in his reports. Costs are an essential element in the plaintiffs' burden to make a prima facie case under the readily achievable standard, and neither Brennan nor any other listed witness can testify as to costs.

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CORAL SPRINGS ADVOCACY
COMMITTEE FOR THE HANDICAPPED,
INC., ROBERT COHEN and
PATRICIA L. KENNEDY,

Plaintiffs,

vs.

E X C E R P T
* * * * *

SAUL STRACHMAN,
d/b/a The Gardens Mall,

Defendant.

-----/

4000 Hollywood Boulevard
Hollywood, Florida 33021
March 18, 2002
Monday, 10:15 - 3:05 p.m.

DEPOSITION OF MICHAEL BRENNAN

taken before Angela Waldie, Notary Public in and for
the State of Florida at Large, pursuant to Notice
of Taking Deposition filed in the above cause.

DEFENDANT'S
EXHIBIT 99

ORIGINAL

1 A From the emergency egress out of the
2 emergency egress route.

3 Q And my question specifically is how do you
4 propose to establish that accessible route?

5 A I have given one proposed correction. It
6 doesn't mean that's the only one there is. Whatever
7 one you want to employ you can as long as you have an
8 accessible route.

9 Q If that route is technically infeasible,
10 what is an alternate route?

11 MS. BARKUS: Object to form.

12 THE WITNESS: I have not been told it's
13 not.

14 BY MS. STEVENSON:

15 Q Assume for purposes of this question --

16 A Then I can't answer your question without
17 looking at the site again.

18 Q Do you know what the cost would be?

19 A I have not been asked to address cost or
20 provide a cost analysis, and I am not going to do it
21 now.

22 Q So --

23 A I can't make a determination as to cost
24 unless I know what the limitations are and the
25 proposed method of the accessible route would be.

1 You can make a ramp of gold for all I
2 care. So is the cost going to be a lot? Yeah. You
3 can make it of asphalt if that's your choice. I
4 can't give you a cost analysis without knowing if
5 there are actually constraints and what those
6 constraints are.

7 Q Okay. So as I recall from the beginning of
8 your deposition on the 5th, you did not factor in any
9 cost for any barrier removal in either one of these
10 reports?

11 MS. BARKUS: Object to form.

12 THE WITNESS: I was not instructed to
13 provide a cost analysis.

14 BY MS. STEVENSON:

15 Q Okay. Would it change your proposed
16 solution for barrier removal with respect to the
17 steep threshold at what you determine to be the
18 emergency egress doors if building a ramp would put
19 people in the path of traffic in the alleyway?

20 MS. BARKUS: Object to form.

21 THE WITNESS: I can't address those
22 issues without the specifics. I need to
23 know what technical problems you're claiming
24 that are there, and whether or not they
25 actually are.

1 achievable means to achieve accessibility if a wall
2 needs to be broken down or another wall needs to be
3 added?

4 A It's entirely dependent upon the
5 circumstances.

6 Q There would be circumstances under a
7 readily achievable standard that would give rise to
8 reconfiguring walls?

9 A Yes.

10 MS. BARKUS: Object to form.

11 BY MS. STEVENSON:

12 Q Okay. Could you give me an example?

13 A I did already.

14 Q You gave me an example of a large space
15 that would require something. I'm asking in that
16 space --

17 A You asked me for an example. I gave you an
18 example.

19 Q That's the example?

20 A Yes.

21 Q And again you don't know what the cost
22 would be, and you're not here to opine on the cost;
23 is that correct?

24 MS. BARKUS: Object to form.

25 THE WITNESS: Correct.