IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03-WY-0034-AJ (MJW)

COLORADO CROSS-DISABILITY COALITION, a Colorado corporation,
JEREMY HUDSON, and
JAMES HUDSON,

Plaintiffs,

v.

COLORADO ROCKIES BASEBALL CLUB, LTD., a Colorado limited partnership,

Defendant.

CARRIE ANN LUCAS, for herself and as next friend of
HEATHER REBEKAH LUCAS,
SHERWOOD OWENS, for himself and as next friend of
NICHOLAS OWENS,
KYLE STUBBS,
ROANNE KUENZLER, and
EVAN STUTMAN,

Plaintiffs,

v.

COLORADO ROCKIES BASEBALL CLUB, LTD., a Colorado limited partnership,

Defendant.

PLAINTIFFS' SURREPLY BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs, by and through their counsel, hereby submit their Surreply Brief in Opposition to Defendant's Motion for Partial Summary Judgment.

Defendant's cut and paste approach to Section 4.33.3 is inconsistent with the way that provision has been interpreted and applied by courts, the Department of Justice and the Access

Board. In its Opening Brief, Defendant asked this court to interpret the Bleacher/Balcony Exception to Section 4.33.3[1] in isolation from the remainder of that section and the statute it implements. In that brief, Defendant relied on -- and attached -- the ADAAG Manual's interpretation of that exception.[2] In response, Plaintiffs quoted the ADAAG Manual's language expressly stating that the Bleacher/Balcony Exception does not excuse compliance with other provisions of Section 4.33.3, and explained why Coors Field does not comply with these provisions. Defendant's Reply Brief is devoted to asking this Court to ignore the explicit language of the authority on which it originally relied.

In its motion, Defendant made two separate arguments: (1) that the Bleacher/Balcony Exception applied to the Lower Level Box seating areas at Coors Field; and (2) that the effect of that exception was to permit Defendant to cluster seats at the back of all of the Lower Level Box seating areas. Plaintiff addressed both of those arguments and provided authority rebutting both. In its Reply Brief, Defendant significantly misrepresents the content of Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment ("Pls.' Opp." or "Opposition Brief").

For these reasons, Plaintiffs submit this Surreply.

Section 4.33.3

For the Court's reference, Section 4.33.3 of the Department of Justice Standards for Accessible Design ("Standards"), 28 C.F.R. pt. 36, app. A, § 4.33.3, reads in relevant part:

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[1] 28 C.F.R. pt. 36, app. A, § 4.33.3.

[2] ADAAG Manual: a guide to the Americans with Disabilities Act Accessibility Guidelines ("ADAAG Manual") at 117 (Architectural and Transportation Barriers Compliance Board, 1998) (Def.'s Mot. for Partial Summ. J. ("Def.'s Mot." or "Opening Brief"), Attach. B.)

> [w]heelchair areas shall be an integral part of any fixed seating plan and shall be provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public. . . . At least one companion fixed seat shall be provided next to each wheelchair seating area. When the seating capacity exceeds 300, wheelchair spaces shall be provided in more than one location. . . .
>
> EXCEPTION: Accessible viewing positions may be clustered for bleachers, balconies and other areas having sight lines that require slopes of greater than 5 percent. Equivalent accessible viewing positions may be located on levels having accessible egress.

The second paragraph will be referred to herein as the "Bleacher/Balcony Exception."

1. The Bleacher/Balcony Exception Does Not Apply to the Lower Level Box Seating Areas at Coors Field.

The Bleacher/Balcony Exception does not apply to sections 110 through 150 (the "Lower Level Box seating areas") at Coors Field,[3] and Plaintiffs cited authority to support that conclusion in their Opposition Brief. (See id. at 20 n.14.) Plaintiffs were willing to assume it applied because it is clear that -- even if it did -- the conclusion Defendant draws therefrom is incorrect. (See id. at 19-29.) The fact that Defendant labels Plaintiffs' assumption a concession does not make it so. (See Reply Brief at 4.)

As Plaintiffs explained in their Opposition Brief, the ADAAG Manual -- on which Defendant relied in its Opening Brief -- makes clear that the Bleacher/Balcony Exception applies "only [in] discrete parts of an assembly seating area" often "situated high above the performing area." ADAAG Manual at 117. The Department of Justice ("DOJ") concurs:

> The government . . . asserts that the clustering exception is intended to have very limited application to discrete parts of assembly areas, such as balconies, bleachers, and the like. These seating areas are unique, it says, in that they are almost always situated high above

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[3] See Robertson Decl. Ex. 1 (seating chart).

the spectacle to be observed (i.e., where the sight lines almost always exceed five percent).

Fiedler v. Am. Multi-Cinema, Inc., 871 F. Supp. 35, 38-39 (D.D.C. 1994). Indeed, Defendant concedes this point in its Reply Brief, when it admits that the Bleacher/Balcony Exception was intended to address "facilities . . . 'situated high above the spectacle to be observed.'" (Reply Brief at 7 (quoting Pls.' Opp. at 20).) That would not include the Lower Level Box seating areas -- especially the front rows of those areas -- at Coors Field. These areas are not "high above" the field, but rather immediately adjacent to it. Defendant's expert agrees that the Infield Box seating areas at Coors Field are not bleachers or balconies. (Salmen Dep. at 122-23 (Pls.' Opp. Ex. 27)).

The Bleacher/Balcony Exception simply does not apply in this case.

2. The Bleacher/Balcony Exception Does Not Excuse Defendant from the Requirements of Integration, Comparable Admission Prices and Dispersion.

Even if it applies, the Bleacher/Balcony Exception does not permit Defendant to cluster all wheelchair-accessible seats in the Lower Level Box seating areas at the rear of each section.

In its Reply Brief, Defendant asserts that "Standard 4.33.3 expressly permits clustering at the top of seating sections, and so complaints about 'integration' and 'dispersal' and 'pricing' that flow from clustering cannot be cognizable under the ADA." (Reply Brief at 2.) Defendant describes the violation of the integration, dispersal and line of sight requirements as the "natural and inevitable consequence" of clustering pursuant to the Bleacher/Balcony Exception. (See id. at 8; see also id. at 9 (segregation is a "consequence of the exception").)

This is completely rebutted by the authority attached to Defendant's Opening Brief. The ADAAG Manual -- mention of which is conspicuously absent from Defendant's Reply Brief -- states that the Bleacher/Balcony Exception "is not an exemption from requirements for integrated or companion seating or choice in admission prices. Where dispersion is feasible, it must be achieved." Id. at 117 (Def.'s Mot., Attach. B.)

The Access Board's interpretation in the ADAAG Manual does not, contrary to the Defendant's argument, make the Bleacher/Balcony Exception meaningless. (See Reply Brief at 12.) The exception is of course meaningful in the limited context in which it was intended to apply: bleachers and balconies. Even if it applies outside that context, it would have meaning. Section 4.33.3 requires dispersal of wheelchair-accessible seats "throughout all seating areas."[4] The Bleacher/Balcony Exception excuses dispersal to the middle tiers of stepped seating, and permits it to be clustered "on levels having accessible egress." Standards § 4.33.3 (emphasis added). At Coors Field -- again, assuming counterfactually that the exception applies -- this would excuse the placement of wheelchair-accessible seating in the middle of the Lower Level Box seating areas and require it at the field and concourse levels.[5]

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[4] Department of Justice, "Accessible Stadiums" at 1 (Defs.' Mot., Attach. D).

[5] Defendant continues to rely on Meineker v. Hoyts Cinema Corp., 216 F. Supp. 2d 14, 19 (N.D.N.Y. 2002) and asserts that it permits clustering only at the back. (Reply Brief at 5.) Plaintiffs demonstrated in their opposition brief that the Meineker court in fact endorsed a configuration in which wheelchair-accessible seats were clustered at the front and back of the seating area. (Pls.' Opp. at 24-25.) This suggests that the Bleacher/Balcony Exception works precisely as Plaintiffs argue: it excuses the placement of seats in the middle tiers, and permits clustering at the front and back.

3. Defendant Was Required to Comply with the Standards During the Design and Construction of Coors Field.

Defendant argues that the Standards do not apply to buildings under construction because such buildings cannot be public accommodations and "it makes no sense to think that the exception is about where disabled patrons will be able to sit while a facility is under construction." (Reply Brief at 5.) This argument is not only facially silly -- architectural standards always apply during construction to permit a facility to be used after it is constructed -- it is contradicted by the plain language of the ADA and its implementing regulations.

Title III of the ADA defines prohibited disability discrimination to include "a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a)(1) (emphasis added) (the "New Construction Requirement"). This provision requires compliance with the Standards, including Section 4.33.3. 28 C.F.R. § 36.406(a). The statute could not be clearer: facilities built after January 26, 1993 must be designed and constructed -- not merely evaluated after the fact -- to comply with the Standards.

This is best demonstrated by reference to the only defense to the New Construction Requirement. The only time compliance with the Standards is excused is where it is "structurally impracticable," 42 U.S.C. § 12183(a)(1), that is, "only in those rare circumstances when the unique characteristics of terrain prevent the incorporation of accessibility features." 28 C.F.R. § 36.401(c)(1) (emphasis added), see also Standards § 4.1.1(5)(a) (same). Thus, the only defense to the New Construction Requirement is based exclusively on the condition of the

terrain, that is, the raw ground on which the facility is to be built. There is no defense to having ignored the Standards during the design and construction process.

Defendant wants to rewrite the New Construction Requirement to add an "Oops!" defense, as in "Oops! We forgot to provide accessible egress to the field level of the Lower Level Box seating areas." Coors Field was required to be designed and constructed with accessible egress to the field level in the Lower Level Box seating areas. Section 4.33.3 requires dispersal "throughout all seating areas,"[6] which would require wheelchair-accessible seats "throughout" the Lower Level Box seating areas, including the front of those seating areas. The Standards require that "[a]t least one accessible route . . . shall connect accessible building or facility entrances with all accessible spaces and elements within the building or facility." Standards § 4.1.3(1). That is, because wheelchair-accessible seats were required at field level, they had to be served by an accessible route, unless it was, during construction, structurally impracticable to do so.[7]

In asking the Court to evaluate the Bleacher/Balcony Exception as if accessible egress were only possible at concourse level -- that is, where it currently exists at the rear of the Lower Level Box seating areas -- Defendant is asserting the Oops! defense. It is arguing for the ability to build New Construction out of compliance with the Standards (here, without accessible egress at field level), and then -- in response to litigation challenging this violation -- to measure

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[6] Department of Justice, "Accessible Stadiums" at 1 (Defs.' Mot., Attach. D).

[7] Defendant did not assert or prove the structurally impracticable defense. See Plaintiffs' Motion in Limine to Preclude Defendant from Introducing Evidence Relating to the Question Whether it Would Be Feasible to Provide Wheelchair-Accessible Seating Next to the Field (which is incorporated herein by reference).

compliance by the status quo post-construction, rather than assessing -- as the law requires -- whether the facility was properly designed and constructed in the first place.

There is no Oops! defense to the New Construction Requirement, and to create one where it does not exist would undermine the entire purpose of that requirement: to ensure that facilities built after the ADA are "readily accessible to and usable by" individuals with disabilities. 42 U.S.C. § 12183(a)(1).

4. Section 4.33.3 Must Be Read as a Whole.

It is not sufficient that wheelchair-accessible seating is physically provided at field level in the Coors Clubhouse, when those seats are priced at three to four times the price of most ambulatory seats at field level. Nondisabled patrons can sit in one of 383 front row seats or 1,996 seats in the first five rows of the Lower Level Box seating areas[8] for prices under $38. In order to have a comparable seat -- that is, one next to the field -- patrons with disabilities must pay $100. This violates the requirement that Defendant provide "a choice of admission prices . . . comparable to those for members of the general public." Standards § 4.33.3.

Defendant attempts to justify its price discrimination by arguing that each requirement of Section 4.33.3 should be read in isolation. (Reply Brief at 10-11.) In its view, for example, it is sufficient if Coors Field simply offers a "range of admission prices" for patrons with disabilities. (Id. at 11.) This simply misstates the regulation: Section 4.33.3 requires "a choice of admission prices . . . comparable to those for members of the general public," not merely a "range of admission prices." In addition, given that Section 4.33.3 is implementing the requirement that

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[8] See Robertson Decl. Ex. 32 at 2.

Defendant provide "full and equal enjoyment" of its "goods, services, facilities, privileges, advantages, or accommodations," 42 U.S.C. § 12182(a) (emphasis added), it is clear that it requires Defendant to provide comparable seats at comparable prices. Requiring merely a "range" of prices and reading the requirement in isolation from the requirements of integration, comparable lines of sight and dispersal would produce the absurd result that Coors Field could charge $10 more for each wheelchair-accessible seat than it does for an ambulatory seat in the same section. The prices would still represent a "range," but would not be "comparable to those for members of the general public."

To avoid such absurd results, courts have properly read Section 4.33.3 as a whole and in light of the general anti-discrimination mandate of the ADA. One court has held, for example, that dispersal requires that "'wheelchair seating locations . . . be provided in a number equal to approximately one percent of the seats in each price range, level of amenities, and viewing angle.'" Indep. Living Res. v. Oregon Arena Corp., 982 F. Supp. 698, 709 & n.9 (D. Or. 1997) (citations omitted; emphasis added). That court went on to explain:

> I agree that wheelchair spaces ordinarily must be available in each ticket price category. However, that by itself will not always be enough to completely satisfy the requirement in Standard 4.33.3 that in large assembly areas wheelchair spaces must be an integral part of the seating plan and be dispersed so as to provide wheelchair users with a choice of sightlines and ticket prices comparable to those available to the general public.

Id. at 709; see also Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs., P.C., 950 F. Supp. 393, 404 (D.D.C. 1996) ("Dispersal requires a choice of various seating areas, good and bad, expensive and inexpensive, which generally matches those of ambulatory spectators."). That is, the dispersal requirement must be interpreted with reference to the requirement for

comparable prices and viewing angles. Ultimately, Section 4.33.3 is "intended to assure disabled patrons seats of 'comparable' quality to those provided for members of the general public," United States v. Cinemark USA, Inc., 348 F.3d 569, 576 (6th Cir. 2003), petition for cert. filed, No. 03-1131 (U.S. Feb. 4, 2004). The concept of "quality" in seating naturally embraces all of the relevant factors.

Reading Section 4.33.3 as a whole does not make any of its requirements "meaningless or superfluous." (See Reply Brief at 11.) Rather, read together, the requirements of Section 4.33.3 effectuate the language of the statute they implement: to ensure "full and equal enjoyment" of the "goods, services, facilities, privileges, advantages, [and] accommodations" of Coors Field. 42 U.S.C. § 12182(a); see Cinemark, 348 F.3d at 576 (interpreting Section 4.33.3 in light of the "full and equal enjoyment" requirement); United States v. Hoyts Cinemas Corp., 256 F. Supp. 2d 73, 90 (D. Mass. 2003) (noting the "rule that regulations be interpreted in a manner consistent with the principles of the underlying statute" and interpreting Section 4.33.3 in light of the statutory requirements for integration and equality.)

5. The Drawing on Page 4 of Defendant's Brief Illustrates Lines of Sight Over Standing Spectators, not the Bleacher/Balcony Exception.

Defendant cut and pasted the illustration from page two of the Department of Justice's "Accessible Stadiums" document into its Opening Brief without its caption or surrounding text. (See Def.'s Mot. at 4.) This has enabled Defendant to misrepresent the purpose of the illustration. In several places in its Reply Brief, Defendant asserts that this illustration demonstrates "clustering." (See, e.g., Reply Brief at 5 (the DOJ "illustration showing the effect of the exception"), 8 ("The DOJ illustration of the effect of vertical clustering . . .").) This is

simply wrong. The illustration in question -- when viewed in its original context -- appears immediately below a discussion of how to provide lines of sight over standing spectators, and is captioned accordingly. "Accessible Stadiums," at 2 (Defs.' Mot. Attach D). It is unrelated to the Bleacher/Balcony Exception or clustering, concepts which are not addressed in the "Accessible Stadiums" document.[9]

6. Providing Wheelchair-Accessible Seating at the Back of the Lower Level Box Seating Areas Does Not Violate the ADA. Providing Wheelchair-Accessible Seating Only at the Back of the Lower Level Box Seating Areas Does Violate the ADA.

Defendant defends the presence of wheelchair-accessible seating at the back of the Lower Level Box seating areas by stating that it is required to place such seats there. (Reply Brief at 9.) Plaintiffs do not ask for the removal of these wheelchair-accessible seats. Rather, because the only seats in the Lower Level Box seating areas are in the back, Defendant is required to provide additional wheelchair-accessible seating in the front of those seating areas.

[9] See also Pls.' Opp. at 26-28 (demonstrating that the Bleacher/Balcony Exception is unrelated to the question of lines of sight over standing spectators).

Conclusion

For the reasons set forth above and in Plaintiffs' Opposition Brief, Plaintiffs respectfully request that Defendant's Motion for Partial Summary Judgment be denied.

Respectfully submitted,

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