



ALERT

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A GLIMMER OF HOPE? NY COURT AGREES ACCESSIBLE ENTRANCE WOULD BE STRUCTURALLY INFEASIBLE

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A New York appellate court has upheld a property owner's claim of "structural infeasibility" in refusing to construct an accessible entrance, effectively breathing new life into a defense that owners and tenants often rely on when conditions prevent them from satisfying the stringent accessibility standards in federal, state and local anti-discrimination laws.

In its March 30, 2016, decision in *Matter of Marine Holdings, LLC v. New York City Commission on Human Rights*, the New York State Appellate Division, Second Department, upheld a property owner's assertion that it would be structurally infeasible to install an accessible entrance at a tenant's apartment.

The decision is significant because it demonstrates that this important defense is viable and that full compliance with the accessibility standards is not always attainable.

The tenant at issue in *Matter of Marine Holdings, LLC* lives in a housing complex and uses a wheelchair due to a spinal cord injury that left her paralyzed. She claimed the property owner discriminated against her in violation of the New York City Human Rights Law by denying her request a ramp to provide wheelchair access to her apartment (her unit is located five steps above the ground floor).

Legal Principles, Procedural History and Reasoning

Under the Human Rights Law, a housing provider (or other place of public accommodation) may not discriminate against a person because of his or her disability, and is required to make a reasonable accommodation to enable that person to enjoy the right in question. As a general matter, the installation of a ramp (or other accessibility improvement) may be a reasonable accommodation unless it would cause an undue hardship to the housing provider (or other place of public accommodation).

The New York City Commission on Human Rights—the agency charged with enforcing the Human Rights Law—has cited architectural infeasibility as a means of establishing the undue hardship defense. A substantially similar defense of structural impracticability may be asserted under the related federal law—the Americans with Disabilities Act—applicable to places of public accommodation like restaurants and retail stores, among other types of facilities.

In *Matter of Marine Holdings, LLC*, the Commission initially held a hearing before an administrative law judge where both the Commission and the property owner presented evidence. During the hearing, the ALJ considered expert testimony from both parties

regarding the feasibility of converting the tenant's kitchen window into a rear door and locating a ramp there. The proposed work would involve cutting into the load bearing exterior wall of the building, making the opening longer and wider to accommodate an accessible door, and installing an exterior ramp.

The property owner's structural engineer opined that the proposed ramp was structurally infeasible due to the weak structural material of the cinder block building, the need for complicated pin shoring, and the risk of sinkage. Further, the structural engineer concluded that the proposed project was potentially hazardous due to the gas lines in the basement directly beneath the tenant's unit. The Commission's expert, an architect, disputed the findings of the property owner's structural engineer.

The ALJ ultimately found the property owner's structural engineer to be more credible and compelling than the Commission's architect. Accordingly, the ALJ determined that the property owner had established that it was structurally infeasible to create an accessible entrance by cutting through the building's load bearing exterior wall. Therefore, the ALJ concluded that the tenant's requested accommodation was not reasonable because it would impose an undue hardship upon the property owner, and the ALJ recommended that the tenant's complaint be dismissed.

The Commission rejected the ALJ's report and recommendation, awarded the tenant \$75,000 in damages for mental anguish, imposed a \$125,000 penalty upon the property owner for failing to install the proposed accessible ramp, and ordered the property owner to install the ramp. The property owner then challenged the Commission's decision and order by filing an Article 78 petition with the New York State Supreme Court, Queens County.

The Supreme Court upheld the Commission's determination, except for making a \$15,000 reduction to the tenant's damages award.

The property owner subsequently appealed the Supreme Court decision to the Appellate Division. The Appellate Division reversed the Supreme Court's decision, finding that there was no substantial evidence in the record to rebut the property owner's showing that it would be structurally infeasible to install an accessible entrance to the tenant's apartment. Accordingly, given the Appellate Division's decision, the property owner is not required to install the proposed accessible ramp or to pay any damages or penalties.

Implications for Places of Public Accommodation

This decision is a victory for all places of public accommodation, particularly restaurants and retail stores in New York City, because disabled plaintiffs filing accessibility complaints frequently challenge the accessibility of these establishments' public entrances. Often, such plaintiffs demand permanent solutions that involve the installation of a ramp or platform lift regardless if the desired solutions may be achieved from a structural standpoint. Similar to the undue burden defense contained within the Human Rights Law, full compliance with the accessibility requirements set forth in the ADA Standards for Accessible Design is not required if an entity demonstrates that it is structurally impracticable to meet those requirements.

To that end, the Appellate Division's decision is noteworthy because there is limited case law considering the defense of structural impracticability due to the fact that the significant majority of these types of cases are resolved prior to judicial decision.

While the Appellate Division's decision breathes new life into the concept of structural



impracticability and is important from a legal perspective, practitioners and places of public accommodation should exercise caution. The decision is not necessarily binding upon a federal court, and it did not involve the interpretation of the ADA and the applicable ADA Standards for Accessible Design. Nonetheless, the applicable state and local laws are construed similarly to (if not more broadly than) the ADA, and, therefore, the decision is persuasive authority.

Additionally, the decision is significant from a practical perspective because it demonstrates how critical expert witnesses are to the determination of claims at issue in accessibility discrimination cases.

With ADA Title III lawsuits on the rise and New York having the third greatest number of these cases on the docket, restaurants and retailers in New York City should expect continued targeting by plaintiffs who demand the installation of permanent ramps or platform lifts, among other changes, to their premises.

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