

United States District Court, D. Colorado.
COLORADO CROSS DISABILITY COALITION and
Kevin Williams, Plaintiffs,
v.
HERMANSON FAMILY LIMITED PARTNERSHIP I,
Defendants.
COLORADO CROSS DISABILITY COALITION and
Kevin Williams, for himself and all others similarly
situated, Plaintiffs,
v.
HERMANSON FAMILY LIMITED PARTNERSHIP I,
Defendants.
COLORADO CROSS DISABILITY COALITION and
Kevin Williams, for himself and all others similarly
situated, Plaintiffs,
v.
NINE WEST GROUP, INC. and Hermanson Family
Limited Partnership I, Defendants.
COLORADO CROSS DISABILITY COALITION and
Kevin Williams, Plaintiffs,
v.
HERMANSON FAMILY LIMITED PARTNERSHIP I,
Defendants.
**Nos. Civ.A. 96-WY-2490-A, Civ.A. 96-WY-2491-A,
Civ.A. 96-WY-2492-A, Civ.A. 96-WY-2493-A.**

Aug. 12, 1997.

ORDER DENYING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AS TO THE NINE WEST
STORE

JOHNSON, J.

*1 The plaintiff's Motion for Summary Judgment as to the Nine West Store, and the responses thereto filed by defendants Nine West Group and Hermanson Family Limited Partnership I, came before the Court for consideration. The Court, having considered the motion, the defendants' responses thereto, the parties' submissions, the applicable law, and being fully advised in the premises, FINDS and ORDERS as follows:

Contentions of the Parties

Plaintiff contends he is entitled to summary judgment on his ADA claim as to the Nine West store located at 1439 Larimer Street in Denver, Colorado. Plaintiff asserts that the shop, which has a single five and a half inch tall step at its front entrance and which is the only public entrance to the shop, constitutes a barrier to access by people who are required to use wheelchairs for mobility. Plaintiff contends that under the Americans with Disabilities Act (ADA), defendant is required to remove the barrier by installing a ramp because it is readily achievable to do so, 42 U.S.C. § 12181(b)(2)(A)(iv). Plaintiff asserts that the cost of installing a ramp would be approximately \$6,000 to \$24,865 and that a ramp is readily achievable based on cost, because Nine West had revenues of \$1.6 billion in the last year. Plaintiff contends that the landlord of the building, defendant Hermanson Family Limited Partnership I (Hermanson), had cash flow from its operations of \$313,564 in 1995, and \$291,265 in 1996, constituting only 50% of the cash flow to the owners of Larimer Square, again demonstrating that the ramp is readily achievable based on cost. In 1994, in excess of \$50,000 worth of improvements were made to the Larimer Square Nine West store, and that this expenditure triggered a requirement that defendants provide access to the improved area at a cost of up to 20% of the amount spent on improvements. Plaintiff explains also that the defendants' expert has opined that plaintiff's proposals for providing access to the Nine West store is the "best concept for providing wheelchair access into the store." Because access to the Nine West store was readily achievable and was not provided, plaintiff believes he is entitled to summary judgment on his ADA claim.

Defendant Nine West Group, Inc. (Nine West) argues that the plaintiff's motion for summary judgment as to the Nine West store should be denied because the readily achievable standard is not applicable to the structure leased by Nine West from Hermanson. Nine West states there are issues of material fact regarding the cost of a ramp and that Nine West lacks authority under its lease to alter the structure it leases from Hermanson.

Defendant Hermanson opposes the plaintiff's motion for summary judgment as to the Nine West Store as well. Hermanson argues the proposed ramps for the Nine West store are not readily achievable and that the cost is too expensive. Hermanson argues that the 1994 alterations to the Nine West store did not trigger a path of travel obligation for either Hermanson or Nine West, as those were expenditures for tenant finish not obligating the expenditure of monies to provide access pursuant to 42

U.S.C. § 12183(a)(2). Hermanson disagrees with plaintiff's contention that the cost of any proposed ramp is not at issue, and argues that any ramp costing \$25,000 to provide access to the 1,800 square foot store is too expensive, and therefore, *per se* not readily achievable. Thus, there are material issues of fact that exist as to whether the proposed ramps are readily achievable. Hermanson asserts that material issues of disputed fact exist concerning whether the proposed ramps will threaten or destroy the historic significance of the Crawford Building (the home of Nine West) or Larimer Square. Herman argues finally that it has not violated C.R.S. § 24-34-601 et seq., the Colorado Anti-Discrimination Act claim, (CADA) and that summary judgment in favor of plaintiff on that claim is likewise improper.

Standard of Review Motions for Summary Judgment

*2 Pursuant to Fed.R.Civ.P. 56(c), summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits on file, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to summary judgment as a matter of law.” The moving party has the burden of showing the absence of a genuine issue concerning any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The moving party's burden may be met by identifying those portions of the record demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In determining whether these burdens have been met, the court is required to examine all evidence in the light most favorable to the non-moving party. *Barber v. General Electric Co.*, 648 F.2d 1272 (10th Cir.1981).

Once the moving party has met its initial burden, the burden shifts to the party resisting the motion. That party must “make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial.” *Manders v. Oklahoma ex rel. Dept. of Mental Health*, 875 F.2d 263, 265 (10th Cir.1989) citing *Celotex*, 477 U.S. at 325.

Discussion

The Court finds that plaintiff's Motion for Summary Judgment as to the Nine West store should be denied in its entirety. There are numerous issues of fact that preclude

entry of summary judgment in favor of plaintiff as to the Nine West store or in favor of either defendant Nine West or defendant Hermanson. Without elaborating at length, the parties' submissions make abundantly clear that there are genuine and material factual disputes about what proposals to eliminate architectural barriers to the Nine West store are readily achievable, as contemplated by the ADA.

It is also clear to the Court that there are genuine issues that are in dispute as to the scope of the defendants' obligations to make the public accommodations that are at issue in this case accessible.

Several standards have been provided for by Congress in the ADA, with each relating to different types of construction or buildings. 42 U.S.C. § 12183(a)(1) governs new construction and requires buildings to be designed and constructed so as to be accessible and usable by individuals with disabilities. 42 U.S.C. 12183(a)(2) concerns alterations to an existing building that affect usability of the facility.

An issue in this case as to the Nine West store concerns whether the improvements made as tenant finish are in fact alterations that affect a primary function, so as to trigger any “path of travel” obligation to spend 20% of the cost of such improvements on providing access to disabled persons. Plaintiff contends that the alterations made for Nine West when it occupied the premises were in excess of \$50,000, and therefore, that at least \$10,000 should be required to be spent on providing access. Defendants disagree and argue that the tenant finish to the Nine West store is not the type of alteration triggering any obligation to create a path of travel that is readily accessible to and usable by individuals with disabilities. The record is not adequate to clearly disclose the amount and nature of the expenditures made upon Nine West's occupancy of the building that would allow a meaningful, informed decision to be made by the Court regarding the parties' path of travel arguments and whether that standard should apply in this case.

*3 The third standard concerns existing buildings and is set forth in 42 U.S.C. § 12182(b)(2)(A)(iv). Under this standard, architectural barriers must be removed where readily achievable to do so. “Readily achievable” is defined in the ADA to mean “easily accomplishable and able to be carried out without much difficulty or expense.”

42 U.S.C. § 12181(9). This inquiry is fact specific. Where, as here, the parties are in obvious disagreement about whether the removal of the architectural barriers at issue in this case is “readily achievable,” as provided by the ADA, summary judgment is not appropriate in favor of any party.

Accordingly, and for the foregoing reasons, it is therefore

ORDERED that plaintiff's Motion for Summary Judgment as to the Nine West Store shall be, and is, DENIED.