UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-cv-60282-DIMITROULEAS-SNOW

JUAN CARLOS GIL,

Plaintiff,

vs.

BROWARD COUNTY, a political subdivision of the State of Florida,

Defendant.
_____/

BROWARD COUNTY'S REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO BROWARD COUNTY'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Broward County ("County") hereby files its Reply to Plaintiff's Response in Opposition to Broward County's Motion to Dismiss Plaintiff's Complaint with Prejudice (D.E. 19). In support, the County states as follows:

I. BACKGROUND

1. On February 8, 2018, Plaintiff filed a complaint for injunctive and declaratory relief, as well as damages, under Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act (D.E. 1).

2. On March 5, 2018, County filed a 12(b)(6) Motion to Dismiss Plaintiff's Complaint with prejudice. (D.E. 12). Due to the dearth of Title II website/document accessibility case law, the County relied on available case law dealing, primarily, with Title III website accessibility.

3. After a request for an extension of time, on April 2, 2018, Plaintiff filed its Response in Opposition to the County's Motion ("Response") (D.E. 19). In its Response, Plaintiff

is quick to dismiss every case on which the County relies but is unable to provide a single rule, regulation, binding authority, or case that governs this Title II matter.

For the reasons more fully set forth below, Plaintiff's Response fails to establish that Plaintiff has properly pled a claim for which relief may be granted, and the County's Motion to Dismiss should thus be granted.

II. ARGUMENT

While Plaintiff argues that, through the use of Portable Document Format ("PDF") documents, the County is denying Plaintiff access to a service, program, or activity of a public governmental entity, the Plaintiff is unable to a cite to a single authority suggesting that PDF documents published in a website are a service, program, or activity of a local body. Again, no Title II case law exists on this point, and the circular (Response at p. 8) in which Plaintiff appears to rely (of which it does not provide a citation or link) is neither a rule nor a regulation that is binding on any entity. Surely, if the Department of Justice ("Department") wanted to impose the standards to which Plaintiff alleges the County is subject to, the Department would have enacted regulations to that effect pursuant to its rulemaking power. But, to the contrary, the Department has chosen to stop any rulemaking on this subject. *See* Notice of Withdrawal of Four Previously Announced Rulemaking Actions; Federal Register, https://www.federalregister.gov/documents/2017/12/26/2017-27510/nondiscrimination-on-the-basis-of-disability-notice-of-withdrawal-of-four-previously-announced (last viewed Feb. 27, 2018).

What remains true is that when dealing with website accessibility, the courts have found that lack of access to website content (PDF documents published on a website are indisputably website content) must prevent the plaintiff's access to a "specific, physical, concrete space." *See*

Kidwell v. Fla. Comm'n on Human Relations, No. 2:16-CV-403-FTM-99CM, 2017 WL 176897 at *5 (M.D. Fla. Jan. 17, 2017). While *Kidwell* is indeed a Title III case, and notwithstanding how "convoluted" Plaintiff alleges the *Kidwell* complaint was, it still remains that the court found that dismissal was appropriate where plaintiff was unable to show that his inability to view the website content prevented his access to a "specific, physical, concrete space," in that case Busch Gardens and SeaWorld. Similarly, here, the Plaintiff has not and cannot allege that his alleged inability to access the PDF documents has prevented him from participating in the County Commission meetings, or accessing the County's parks, or riding the County's public transportation, or visiting any other County facility.

This Court agreed with this principle in *Gomez v. La Carreta*, where it held that mere inability to access website information does not constitute a violation under the ADA. *Gomez v. La Carreta*, 2017 U.S. Dist. LEXIS 202662 at *10 (Dimitrouleas, J.). Notwithstanding the fact that Plaintiff admits that the County's site is merely informational (paragraph 3 of the Complaint describes the website as an "informational portal"), Plaintiff argues that reliance on this case is inapposite because "different standards apply under Title II." Response at p. 9. Plaintiff, however, fails to provide any support for this proposition, which is not surprising given that, again, there are no regulations or cases suggesting that a different standard should apply to websites under Title II and Title III—a website is a website.

Plaintiff next attacks the County's reliance on *Gomez v. Bang & Olufsen* by alleging that this case is not about "website accessibility" but, rather, about the inability to access documents within the website. To say that not being able to access the website's content is not the same as to not being able to access the website is inapposite. Moreover, regardless of whether Plaintiff is accessing the website or its content, Plaintiff has not alleged that his alleged inability to access a

particular document has kept him from any County facility or prevented him from participating at government meetings.

Plaintiff's argument that "Defendant failed to provide its PDF documents in accessible format for blind individuals," (Response at p. 10), ignores the fact Plaintiff could have simply contacted the County to request access to the particular document. The County's website provides information on how to request these documents, which incidentally is the same website where the allegedly inaccessible PDF documents are located.

In *Magide v. Broward*, No. 0:11-cv-62742-WPD (May 23, 2012, Dimitrouleas, J.), this Court ruled that failure to allege that the plaintiff had requested, and Broward County had received, a request for a reasonable accommodation was fatal to plaintiff's complaint. By so ruling, this Court dismissed and put an end to a Title II claim against Broward County. Even though *Magide*'s claim against the County was a Title II claim, Plaintiff still insists this Court should ignore its own ruling because the "case was only concluded after the parties filed a Notice of Settlement." Response at p. 14. In so arguing, Plaintiff misinterprets the proceedings. While the case as to the other parties was concluded upon settlement, this Court's Order granting the County's motion to dismiss put an end to the County's involvement in the Title II case.

Plaintiff's dismissal of *Gaston* is also inappropriate. In *Gaston*, the Eleventh Circuit specifically stated that a plaintiff cannot establish a "claim under the Rehabilitation Act alleging that [a] defendant discriminated against [a plaintiff] by failing to provide a reasonable accommodation unless [the plaintiff] demanded such an accommodation." *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1363 (11th Cir. 1999). Plaintiff is bringing the instant action under the Rehabilitation Act. Therefore, to the extent that Plaintiff is arguing that the County has failed to accommodate visually-impaired individuals by not making its document

accessible, Plaintiff's claim fails because he has not pled that he made a request for any such accommodation to be able to access a document. Similarly, if an individual requests a document in an alternative format such as braille, it could not reasonably be expected that all of the County's documents would already be available in a braille format. Instead, an individual would request an alternative document and the County would accommodate the request in accordance with the ADA. Plaintiff's allegations that every PDF document be fully accessible for a software reader requires the County to be omniscient to every possible request for a document in an alternative format. The ADA does not require the County to do so.

Finally, Plaintiff's argument that "[b]eing required to request each separate document to a help email or phone number does not result in the same experience as an interested person without a vision disability" (Response at p. 12) is flawed. This argument fails to recognize that, no matter what, the Plaintiff will not have the same experience as a person without a vision disability—while the Plaintiff will only be able to hear the words in the document through a reader, a non-visually-impaired individual will be able to read the words and see the colors. Moreover, Plaintiff argues that the website has thousands of documents dating back to 2003. Yet, the very circular on which it relies was not issued until 2008. Notwithstanding, Plaintiff seeks to have the County modify thousands of PDFs that are allegedly deficient even though no rule or case law requires that it do so, and even though the rules that do exist specifically provide that, to the extent the PDF documents are a service or program as alleged by Plaintiff, a public entity "does not have to take any action that it can demonstrate would result in . . . an undue financial and administrative burden." The Americans with Disabilities Act, Title II Technical Assistance Manual, Covering States and Local Governments Programs and Services, *available at* *https://www.ada.gov/taman2.html* (citing 28 CFR 35.149-35.150) (last visited April 10, 2018).

Absent applicable law, using tax payer dollars to engage in remediation of thousands of documents that precede the enactment of any regulation requiring that PDFs comport to any particular standard would impose an undue burden on the County and its taxpayers.

WHEREFORE, for the reasons set forth herein, the County respectfully requests that this Court enter an Order granting the County's Motion to Dismiss Plaintiff's Complaint with Prejudice.

Dated: April 13, 2018

Respectfully submitted;

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing by served by the Court's CM/ECF system on April 13, 2018, on all counsel or parties of record on the Service List below.

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Juan Carlos Gil v. Broward County
Case No. 18-cv-60282-WPD

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