UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	§	
	§	CIVIL ACTION NO.1:99CV-705
Plaintiff	§	
	§	Hon. Donald C. Nugent
vs.	§	
	§	
CINEMARK USA, INC.,	§	
	§	
Defendant.	§	**PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANT'S REQUEST FOR COSTS AND FEES**
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PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANT'S REQUEST FOR COSTS AND FEES

The United States opposes Defendant Cinemark, USA, Inc.'s ("Cinemark") claim for costs and fees. The United States requests that the Court deny Cinemark's claim because: (1) Cinemark is not entitled to costs and fees under Rule 54(d) of the Federal Rules of Civil

Procedure or 28 U.S.C. § 1920, as the United States may only be found liable for costs and fees under the applicable ADA standard set forth in 42 U.S.C. § 12205; and, (2) the prerequisites for an award for prevailing defendants under the applicable ADA standard have not been met: the United States was not frivolous, unreasonable, or without foundation in its action against Cinemark.

I. FACTUAL AND PROCEDURAL HISTORY

This action began in March 1999 when the United States filed a complaint alleging that Cinemark engaged in a pattern or practice of violating title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181-12190, in the design, construction, and operation of movie theaters with stadium-style seating. See Complaint for Declaratory and Injunctive Relief, Compensatory Damages, and Civil Penalties. (Docket #1).

In June 1999, Cinemark filed a motion to dismiss, to transfer case to the Northern District of Texas or for a stay of proceedings. (Docket #5). Cinemark alleged that the case should be dismissed for improper venue and because a suit filed by Cinemark in the Northern District of Texas involved the same parties and issues. On August 31, 1999, this Court denied Cinemark's motion to dismiss ruling that: (1) venue was proper in the Northern District of Ohio; and (2) the two lawsuits were not duplicative and did not raise identical facts or legal issues. This Court also denied Cinemark's motion to transfer and motion to stay proceedings. (Docket # # 15,16).

In September 1999, Cinemark filed its answer and counterclaims against the United States. (Docket # 17). In its counterclaims, Cinemark alleged that the United States violated the Administrative Procedure Act by improperly issuing a new rule without notice and comment rulemaking. On January 10, 2000, Cinemark filed a motion for summary judgment based upon

the allegations in its counterclaims. (Docket # 28). The United States moved to dismiss Cinemark's counterclaims and opposed the summary judgment motion, arguing that Cinemark had not demonstrated factually that the United States has engaged in improper rulemaking under the APA. (Docket # 34).

On March 22, 2000, this Court granted the United States' motion to dismiss Cinemark's counterclaims, and denied Cinemark's motion for summary judgment. (Docket ## 47, 48). The Court held that the actions taken by the United States -- the filing of amicus briefs and complaints and the issuance of correspondence discussing alleged violations of the ADA, possible litigation, and settlement of our claims -- were not actions that are subject to the requirements of the APA. Thus, the Court found that the APA waiver of sovereign immunity did not apply and therefore there was no jurisdiction for the Court to hear the claims. The Court also concluded that the other statutory and constitutional claims were similarly without jurisdiction, and dismissed those as well.

In December 2000, Cinemark filed a second motion for summary judgment. (Docket # 70). In its motion, Cinemark argued that its theaters comply with Section 4.33.3. The United States opposed Cinemark's second motion for summary judgment and filed a cross motion for partial summary judgment. (Docket ## 76, 79). The United States argued that Cinemark violated title III of the ADA by failing to integrate wheelchair seating into the stadium section of its auditoriums; failing to provide persons who use wheelchairs with lines of sight comparable to those provided to members of the general public; and failing to provide persons who use wheelchairs with an opportunity to enjoy the benefits of stadium seating that is equal to the opportunity offered to the non-disabled public.

On November 19, 2001, this Court granted Cinemark's second motion for summary judgment and denied the United State's cross motion for partial summary judgment. (Docket # 107). In finding for Cinemark, this Court relied on Lara v. Cinemark, 207 F.3d 783 (5th Cir.), cert. denied, 531 U.S. 944 (2000), which held that Standard 4.33.3 requires only that persons who use wheelchairs be provided an unobstructed view of the screen. A final judgment was issued on November 19, 2001. (Docket #108).

On December 27, 2001, Cinemark filed a request for costs and fees with this Court. Cinemark seeks $3,395.93 in photocopying costs and expert witness fees. (Docket # 109).

On January 16, 2001, the United States filed a notice of appeal of the final judgment to the United States Court of Appeals for the Sixth Circuit.

II. ARGUMENT

A. Section 12205 of the ADA Governs Cinemark's Request for Costs and Fees.

Cinemark relies on Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920 as authority for its request for costs and fees.[1] (Cinemark Request at 1-2).[2] Cinemark is not entitled to costs and fees under

[1] The two unpublished Sixth Circuit opinions cited by Cinemark in support of its request for costs and fees are of no precedential value. See 6th Cir. Rule 28(g); Salamalekis v. Comm'r of Soc. Sec., 221 F.3d 828, 833 (6th Cir.2000) (unpublished decisions are not binding precedent). In any event, these unpublished opinions do not involve the award of costs and fees in an ADA suit. In Jordan v. Vercoe, 1992 WL 96348 *1 (6th Cir. May 7, 1992), the Sixth Circuit addressed the issue of whether the district court abused its discretion in awarding costs against an in forma pauperis plaintiff, a pro se prisoner, in a civil rights action. In Farmer v. Ottawa County, 2000 WL 420698 * 7 (6th Cir. April 13, 2000), costs were awarded to plaintiff under the Fair Labor Standards Act ("FLSA"). Under the FLSA, an award of attorney fees and costs is mandatory when the court enters a judgment for plaintiff. Id. In accordance with 6th Cir. Rule 28(g), we have attached copies of the unpublished decisions to this motion. (See Exhibits 1, 2).

[2] "Cinemark Request" refers to "Defendant's Request for Costs and Supporting Memorandum," dated December 27, 2001.

Rule 54(d) or 28 U.S.C. § 1920, as the United States may only be found liable for costs and fees in appropriate cases under the applicable ADA standard. 42 U.S.C. § 12205.

Rule 54(d) provides that costs shall be awarded to the prevailing party "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules ..." Fed. R. Civ. P. 54(d). Section 12205 of the ADA provides courts with the discretionary authority to award "a reasonable attorney's fee, including litigation expenses, and costs" to private parties that prevail in ADA actions. Thus, it is Section 12205 of the ADA – rather than the federal rules – which governs requests for costs by defendants who prevail in ADA-based litigation. Brown v. Lucky Stores, Inc., 246 F.3d 1182, 1190 (9th Cir. 2001); see also Shepard v. Honda of America, Mfg., Inc., 160 F. Supp. 2d 860, 975 (S.D. Ohio 2001) (ADA provision awarding costs to prevailing party controls over Rule 54(d)). Similarly, a prevailing defendant must meet the requirements of Section 12205 of the ADA to recover taxable costs set forth in 28 U.S.C. § 1920. Brown, 246 F.3d 1182, 1190 (ADA provision governs recovery of costs by prevailing defendant); see also Fite v. Digital Equip. Corp., 66 F. Supp.2d 232, 233-234 (D. Mass. 1999)(same); Red Cloud-Owen v. Albany Steel, Inc., 958 F. Supp. 94, 97 (N.D.N.Y 1997)(same); Rath v. Village of Lombard, Illinois, 1996 WL 431828* 6 (N.D. Ill, July 23, 1996)(same).

1. The Christiansburg Standard Applies to a Request for Costs and Fees by Prevailing Defendant in an ADA Suit

Section 12205 of the ADA permits prevailing parties to recover attorneys' fees and costs and provides that "the United States shall be liable for [such fees and costs] the same as a private individual." 42 U.S.C. § 12205. The language of the ADA's fee-shifting statute is substantially

similar to the fee-shifting statute found in title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(k)), and courts have held that fees should be awarded in the same or similar circumstances under both provisions. Tarter v. Raybuck, 742 F.2d 977, 987 (6th Cir. 1984); see also Bruce v. Gainesville, 177 F.3d 949, 951 (11th Cir. 1999); No Barriers, Inc., v. Brinker Chili's Texas, Inc., 262 F.3d 496, 498 (5th Cir. 2001); Parker v. Sony Pictures Entertainment, Inc., 260 F.3d 100, 110 (2d Cir. 2001); Bercovitch v. Baldwin School, Inc., 191 F.3d 8, 11 (1st Cir. 1999).

In 1978, the Supreme Court interpreted title VII's fee-shifting statute, holding that a prevailing defendant should not be awarded attorneys' fees and costs unless plaintiff's actions were "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978). The standard for a prevailing defendant set out in Christiansburg [hereinafter "the Christiansburg standard"], has been subsequently applied to requests for costs and fees in other civil rights cases, including ADA cases. Riddle v. Egensperber, 266 F.3d 542, 547-48 (6th Cir. 2001)(Christiansburg standard applies to defendant's recovery of fees in civil rights case); Muzquiz v. W.A. Foote Memorial Hospital, Inc., 70 F.3d 422, 432-33 (6th Cir. 1995)(Christiansburg standard applies to recovery of costs and fees in civil rights case); Gilmer v. City of Cleveland, 617 F. Supp. 985, 987-88 (N.D. Ohio 1985)(same); see Brown, 246 F.3d at 1190(Christiansburg standard applies to an award of costs and fees to prevailing defendant in ADA).

2. The United States May Not Be Held Liable For Costs and Fees Pursuant to the ADA Because It Did Not Act Frivolously In Litigating This Suit

To be deemed "frivolous" or "meritless" for purposes of assessing a prevailing defendant's attorney's fees, it is not enough that the plaintiff ultimately lost his case. Riddle, 266 F.3d at 551. To determine whether a claim is frivolous, unreasonable or groundless, a court must determine the basis for the filing of the suit. Riddle, 266 F.3d at 548. An action is only frivolous under § 12205 if an action lacks an arguable basis in law or in fact, or plaintiff continues to litigate after it becomes clear that action lacks factual substance. Shutts v. Bentley Nevada Corp., 966 F. Supp. 1549, 1556 (D. Nev. 1997); see also Smith v. Smythe- Cramer Co., 754 F.2d 180, 184-85 (6th Cir. 1985)(there must be an inadequate basis for suit to be deemed frivolous case). The United States easily satisfies the legal standard for bringing and maintaining its action against Cinemark.

First, shortly after the United States filed it complaint, Cinemark filed a motion to dismiss arguing that the present suit and an action filed in the Northern District of Texas were duplicative. This Court held that the Texas suit was an independent suit for judicial review of an agency action, while the present action seeks to enforce the protections guaranteed by the ADA. This Court, therefore, denied Cinemark's motion to dismiss. (Docket ## 15, 16). Because a motion to dismiss tests the legal sufficiency of the allegations in plaintiff's complaint, a court's denial of a motion to dismiss demonstrates that plaintiff's complaint is not frivolous or "groundless at the outset." Riddle, 266 F.3d at 550. Accordingly, this Court's denial of Cinemark's motion to dismiss establishes that the United States' suit against Cinemark was not frivolous.

Second, in January 2000, Cinemark filed counterclaims alleging that the United States violated the Administrative Procedure Act by improperly issuing a new rule without notice and comment rulemaking, violated Cinemark's due process rights, and violated the Federal Register Act. (Docket #17). Based on its counterclaims, Cinemark filed a motion for summary judgment. (Docket #28). This Court dismissed Cinemark's counterclaims against the United States, and subsequently denied Cinemark's motion for summary judgment as moot. (Docket # 48). In dismissing Cinemark's counterclaims, this Court held that:

> The DOJ has reason to believe that Defendant is violating the ADA. As such, it has engaged in settlement negotiations and has threatened, and now instituted, litigation.

(Memorandum Opinion and Order at 8)(Docker #48). Thus, by filing a complaint against Cinemark and litigating this case, the United States was merely fulfilling its mandate to enforce the ADA. 42 U.S.C. § 12188(b)(1)(A)-(B). The dismissal of Cinemark's counterclaims demonstrates that the factual allegations and legal positions of the United States were not frivolous.

Finally, the fact that this Court granted Cinemark's second summary judgment motion does not support a holding that the United States' claims were frivolous. (Docket #107). If a plaintiff continues to litigate a case after discovery has concluded, and proceeds to summary judgment, a favorable ruling for defendant on the motion for summary judgment does not support conclusion that plaintiff's claims were frivolous. Riddle, 266 F.3d at 550. In fact, even if claims lack sufficient evidence to go forward, or are determined to be precluded by legal precedent in this circuit or under state law, those claims are not necessarily completely without foundation. Muzquiz, 70 F.3d at 433.

Although the Fifth Circuit in Lara v. Cinemark, 207 F.3d 783 (5th Cir.), cert. denied, 531 U.S. 944 (2000) held that Standard 4.33.3 requires only an unobstructed view to wheelchair patrons in stadium style theaters, there was no controlling legal precedent preventing the United States from arguing that Cinemark violated the ADA by failing to comply with Standard 4.33.3. See Smith v. Detroit Federation of Teachers, Local 321, 829 F.2d 1370, 1376-77 (6th Cir. 1987)(existing precedent did not establish that civil rights action was frivolous). On January 16, 2001, the United States filed a notice of appeal with the United States Court of Appeals for the Sixth Circuit. The issue of whether stadium style theaters violate the ADA is an emerging and developing area of disability law.

In an analogous case, United States v. AMC Entertainment, Inc., No. CV-99-01034 FMC(SHx)(C.D. Cal. January 9, 2002), a court denied prevailing defendant's request for fees because the United States was litigating an open question regarding the interpretation of the ADA.[3] In the AMC litigation, the United States sued defendant, the architects who allegedly designed and constructed some of the stadium style theaters, for violating the ADA. Subsequently, the Ninth Circuit issued its decision in Lonberg v. Sanborn Theaters, Inc., 239 F.3d 1029 (9th Cir. 2001), amended on other grounds, 271 F.3d 954 (2001). In Lonberg, the Ninth Circuit held that "only an owner, lessee, lessor, or operator of a noncompliant public accommodation can be liable under Title III of the ADA for the 'design and construct' discrimination described in § 12183(a)." Lonberg, 259 F.3d at 1036. Thus, before Lonberg was decided, it was an open question in the Ninth Circuit whether the United States could pursue a claim against designing architects. Because the United States ceased pursuing its claim against

[3] For the convenience of the court, attached is a copy of the order in United States v. AMC Entertainment, Inc., No. CV-99-01034 FMC(SHx)(C.D. Cal. filed January 9, 2002). (See Exhibit 3).

defendant once the Lonberg decision was issued, the court held that the United States' claim against defendant was not frivolous or without foundation. AMC, No. CV-99-01034 FMC(SHx), slip op. at 3.

In sum, the United States' initiation and litigation of the case against Cinemark was reasonable and with substantial legal merit. Because of the danger that assessing costs and fees against unsuccessful plaintiffs will discourage plaintiffs from asserting their civil rights, it is rarely appropriate to do so. Riddle, 266 F.3d at 547-48 (award of fees to prevailing defendant is limited to truly egregious cases of misconduct by plaintiff). It is beyond cavil that this case does not involve the type of egregious misconduct that warrants an award of costs and fees. As such, Cinemark cannot demonstrate that the United States' actions were frivolous, unreasonable, or without foundation. Therefore, Cinemark may not recover costs and fees incurred in litigating this case.

III. CONCLUSION

Cinemark is not eligible for costs and fees pursuant to Rule 54(d) or 28 U.S.C. § 1920 as the United States may only be found liable for costs and fees in appropriate cases under the applicable ADA standard. 42 U.S.C. § 12205. Nor has Cinemark met its burden of showing it is entitled to costs and fees based on the fee-shifting standard applicable to the ADA, which requires that Cinemark prove that the United States' actions were frivolous, unreasonable, or without foundation. Cinemark is not entitled to costs and fees because the United States was substantially justified in bringing and maintaining an action against Cinemark For the foregoing reasons, Cinemark's motion for costs and fees should be denied.

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DATED: January 23, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 23 rd day of JANUARY, 2002, a true and correct copy of **Plaintiff United States' Opposition to Defendant's Request for Costs and Fees** was served by via first class mail to:

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