APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 17-3709

CANER DEMIRAYAK,

Plaintiff-Appellant,

v.

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, LISETTE CAMILO, RICK CHANDLER, PE, IRA GLUCKMAN, RA, NEW YORK CITY DEPARTMENT OF BUILDINGS, STATE OF NEW YORK, OFFICE OF COURT ADMINISTRATION, AND BARRY CLARKE,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York. William F. Kuntz, II, District Judge. 17-cv-5205-WFK-RER

ARGUED: June 7, 2018
Decided: August 24, 2018

SUMMARY ORDER

Counsel: CANER DEMIRAYAK, PLAINTIFF-APPELLANT, *Pro se*, Massapequa, New York.

FOR MUNICIPAL DEFENDANTS-APPELLEES: DANIEL MATZA-BROWN (Jane L. Gordon on the brief), for Zachary W. Carter, Corporation Counsel of the City of New York, New York, NY.

FOR STATE DEFENDANTS-APPELLEES: SCOTT EISMAN, Assistant Solicitor General of Counsel (Steven C. Wu, Deputy Solicitor General, on the brief), for Barbara D. Underwood, Attorney General for the State of New York, New York, NY.

Judges: PRESENT: JOSE A CABRANES, GERARD E. LYNCH, SUSAN L. CARNEY, Circuit Judges.

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the November 2, 2017 order of the District Court be and hereby is **AFFIRMED.**

Plaintiff-appellant Caner Demirayak ("plaintiff") appeals from the District Court's order denying his request for a preliminary injunction against the municipal and state Appellees ("defendants") alleging violations of, *inter alia*, the Americans with Disabilities Act ("ADA") and the Rehabilitation Act ("RA"). Plaintiff alleged that defendants violated the Acts by failing to provide reliable access in the New York State Supreme Court courthouse where plaintiff, who relies on a wheelchair for mobility, frequently practices law. He contends that various courtrooms, chambers, and

restrooms within the courthouse are not ADA-compliant. Soon after filing an amended complaint, plaintiff moved for a preliminary injunction requiring defendants to (1) remove all inaccurate accessibility signs and install new, correct signs; (2) keep the courthouses handicap-accessible bathrooms in working order; (3) purchase and install temporary portable ramps and lifts for use in the courthouse jury coordinating part, law library, and fourth and fifth floor staircases; (4) submit a plan for removing all architectural barriers; and (5) prevent any government actor from retaliating against plaintiff including, by, but not limited to, circumventing the random assignment of judges or issuing unfavorable rulings or decisions.

The District Court denied plaintiff's motion for a preliminary injunction on November 2, 2017. Plaintiff then moved for an "emergency" injunction pending appeal of the District Court's denial of a preliminary injunction and for an expedited appeal. We denied plaintiff's motion for an emergency injunction in its entirety on December 7, 2017. Dkt. No. 68. We now consider plaintiff's merits appeal of the District Court's order of November 2, 2017, denying a preliminary injunction.

At oral argument, plaintiff withdrew two of his demands for relief (for the submission of architectural plans and the prohibition of retaliation) and conceded that a third (the correction of the signage) was moot. Accordingly, we need not further address these issues. We thus focus on the plaintiff's remaining requests for injunctive relief: (1) the maintenance of the

courthouse's three accessible bathrooms in working order; and (2) the installation of ramps and lifts throughout the courthouse.

DISCUSSION

We review the denial of a preliminary injunction for abuse of discretion. *E.G.*, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 238 (2d Cir. 2016). "A district court abuses its discretion when its decision rests on an error of law or clearly erroneous finding of fact." *Id*.

A party seeking a preliminary injunction must ordinarily establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v NRDC, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d. 249 (2008). Irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Bell & Howell: Mamiya Co. v. Masel Supply Co. Corp.*, 719 F.2d 42, 45 (2d Cir. 1983). A heighted standard applies when a movant seeks a preliminary injunction that either alters the status quo or would provide the ultimate relief sought in the underlying action. *Tom Doherty Assocs., Inc. v Saban Entm't, Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995). Under this heightened standard, plaintiff must make a clear showing that he is entitled to the relief requested, or that "extreme or very serious damage" will result from denial of preliminary relief. *Nicholson v. Scoppetta*, 344 F.3d 154, 165 (2d Cir. 2003).

I.

Plaintiff has failed to show that the current condition of the courthouse bathrooms results in extreme or serious harm. Although plaintiff alleged that the three accessible bathrooms in the Courthouse were not kept in working order, his motion and affidavit did not contain sufficient facts regarding how frequently accessible bathrooms were closed or in disrepair. Although the lack of *any* accessible bathroom would likely suffice to show actual and imminent harm, plaintiff did not allege any day where all three accessible bathrooms were inoperable. The fact that one or two of the bathrooms might be out of order at different times over the course of a year, while inconvenient, does not present an actual, imminent threat of extreme or very serious damage.

The evidence presented by plaintiff also does not establish that extreme or serious damage would result without the ramps and lifts that plaintiff has requested. The only specific allegation that plaintiff makes as to the damage caused to him by the lack of ramps and lifts is his inability to observe a single trial on August 16, 2017. As defendants note, plaintiff has otherwise been provided full access to an ADA-accessible courtroom when he practices in the courthouse. The record thus falls short of the clear showing of extreme and serious damage that is required.

II.

Plaintiff has also not established a clear likelihood of success on the merits. To establish an ADA or RA violation, plaintiff must establish: (1) that he was a qualified individual with a disability; (2) that the defendants are subject to the Acts they are alleged to have violated; and (3) that he was "denied the opportunity to participate in or benefit from the defendant[s'] services, programs, or activities, or was otherwise discriminated against by the defendant[s] because of his disability." *Disabled in Action v. Bd. Of Elections*, 752 F.3d 189, 196—97 (2d Cir. 2014) (quoting *McElwee v Cnty. of Orange*, 700 F.3d 635, 640 (2d Cir. 2012)).

Because plaintiff has not established that he was denied access to all available bathrooms at any given time, the availability of one or more functioning accessible bathrooms could qualify under the ADA as an "alternate accessible" bathroom, 28 CFR 35.150(b)(1). Because defendants can avoid liability under the ADA by providing alternate accessible accommodations, defendant [so in original] has failed to establish a clear likelihood of success on the merits.

Relatedly, plaintiff has not established a clear likelihood of success on the merits with regard to his claim for construction and installation of ramps and stair lifts. His motion papers did not acknowledge the accommodations defendants had previously provided and are currently willing to provide, including the use

of alternate accessible and fully ADA-compliant courtrooms in the very same courthouse.

III.

Plaintiff also argues that he was entitled to a hearing to resolve factual disputes. That argument is unavailing, however, as there were no facts in dispute as to plaintiff's access to the courthouse. Rather, the District Court accepted plaintiff's allegations as true for the purposes of the motion before it. *See In re Rationis Enters., Inc. of Panama*, 261 F.3d 264, 269 (2d Cir. 2001) ("On a motion for an injunction, '[w]here . . . essential facts are in dispute, there must be a hearing and appropriate findings of fact must be made,'" (quoting *Visual Sciences, Inc. v Integrated Communications, Inc.*, 660 F.2d 56, 58 (2d Cir. 1981))).

CONCLUSION

We have considered plaintiff's remaining arguments and find them to be without merit.[1] Accordingly, we **AFFIRM** the order of the District Court.

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[1] Our decision on this appeal of a denial of a preliminary injunction does not, of course, reflect a view about what the ultimate merits of plaintiff's suit will prove to be after a more complete development of the factual record.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 17-cv-5205 (WFK) (RER)

CANER DEMIRAYAK,

Plaintiff,

v.

CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES; LISETTE CAMILO; RICK D. CHANDER; IRA GLUCKMAN; NEW YORK CITY DEPARTMENT OF BUILDINGS; STATE OF NEW YORK; OFFICE OF COURT ADMINISTRATION; and HON. RONALD YOUNKINS,

Defendants.

Filed: November 2, 2017

MEMORANDUM AND ORDER

WILLIAM F. KUNTZ, II, United States District Judge:

Caner Demirayak, Esq. ("Plaintiff"), proceeding *pro se*, brings this action against the State of New York, the City of New York, and several State and City agencies and employees (collective, "Defendants"), alleging violations of the Americans with Disabilities Act

("ADA"), 42 U.S.C. 12182; section 504 of the Rehabilitation Act, 29 U.S.C. 794; the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; the New York Human Rights Law ("NYHRL"), N.Y. Exec. Law 296(2)(a); and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code 8-107(4)(a), as well as several violations of New York common law. *See generally* Am. Compl., ECF No. 14. Plaintiff seeks, *inter alia*, compensatory damages in an amount exceeding $1,000,000.00 and injunctive relief requiring Defendants to remove structural and architectural barriers at, and otherwise make wheelchair accessible, the state courthouse located at 360 Adams Street in Brooklyn, New York. *See id*.

On October 30, 2017, over a month before the deadline for Defendants to file an Answer or other responsive pleading, Plaintiff petitioned this Court for a temporary restraining order and preliminary injunction requiring Defendants to (1) "remove all false accessibility signs and to install new, correct signage"; (2) "keep the only 3 barely accessible bathrooms on the second, fifth, and seventh floor in working order"; (3) "purchase and install temporary portable ramps and lifts for use in the jury coordinating part, law library, and fourth and fifth floor staircases"; and (4) "submit a plan/design for removing all architectural barriers, as stated herein, within 120 days," and restraining Defendants from "taking any retaliatory action against the plaintiff in response to his filing of this suit, including but not limited to, any attempts to circumvent the random assignment of judges, or issuing unfavorable

rulings/decisions in an attempt to discriminate on the basis of disability," Mot. for Prelim. Inj., ECF No. 15; *see also* Demirayak Aff., ECF No. 15-1; Memo. of Law, ECF No. 15-3. On October 31, 2017, this Court denied Plaintiff's motion because it prematurely sought final relief beyond the proper scope of a preliminary injunction, as explained further below.

"A party seeking injunctive relief ordinarily must show: (a) that it will suffer irreparable harm in the absence of an injunction and (b) either (i) a likelihood of success on the merits or (ii) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor." *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 33 (2d Cir. 1995). In this Circuit, however, the movant is required to "meet a higher standard where: (i) an injunction will alter, rather than maintain, the status quo, or (ii) an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Id*. At 33-34. This is because "[t]he purpose of a preliminary injunction is not to give the plaintiff the ultimate relief it seeks. It is 'to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits,' 'to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began.'" *WarnerVision Entm't Inc. v. Empire of Carolina, Inc.*, 101 F.3d 259, 261-62 (2d Cir. 1996) (citations omitted) (quoting, respectively, *Meis v. Sanitas Serv. Corp.*, 511 F.2d 655,

656 (5th Cir. 1975), and *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953))). "As a general rule, therefore, a temporary injunction 'ought not to be used to give final relief before trial.' Neither should it 'permit[] one party to obtain an advantage by acting, while the hands of the adverse party are tied by the writ.'" *Id.* At 262 (citations omitted) (quoting, respectively, *United States v. Adler's Creamery, Inc.*, 107 F.2d 987, 990 (2d Cir. 1939), and *Corica v. Ragen*, 140 F.2d 496, 499 (7th Cir. 1944)); *see also Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 114 (2d Cir. 2006) ("A preliminary injunction is usually prohibitory and seeks generally only to maintain the status quo pending a trial on the merits. A prohibitory injunction is one that 'forbids or restrains an act.'").

Here, Plaintiff seeks far more than merely prohibitory relief or to maintain the status quo. Rather, as noted above, he asks the Court to order Defendants to undertake several affirmative acts, including the installation of new signs and ramps and the production of architectural plans, all of which would require the expenditure of financial and other resources, well before discovery has even commended in this action. Although the ADA and the Rehabilitation Act do provide for such permanent, prospective relief, it is typically available only as a remedy after a finding of liability. If the Court granted Plaintiff's request at this juncture, it would be giving him the ultimate, final relief he seeks without requiring him to prove the merits of his case at trial. This is not the appropriate purpose of a preliminary injunction. *See WarnerVision*, 101 F.3d at

261-62. Moreover, Plaintiff has not even attempted to meet the heightened standard required to justify the extraordinary prospective relief he seeks. *Cf. Tom Doherty*, 60 F.3d at 34 (noting that preliminary injunctions that would alter the status quo or provide final relief require a "clear" or "substantial" showing, which "alters the traditional formula by requiring that the movant demonstrate a greater likelihood of success"). Accordingly, Plaintiff's motion for a temporary restraining order and preliminary injunction, ECF No. 15, must be DENIED at this time, without prejudice to his seeking appropriate permanent injunctive relief after further development of the record and/or a finding of liability on the merits.

SO ORDERED.

s/ WFK
WILLIAM F. KUNTZ, II
UNITED STATES
DISTRICT JUDGE

Dated: November 2, 2017
Brooklyn, New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 17-3709

CANER DEMIRAYAK,

Plaintiff-Appellant,

v.

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, LISETTE CAMILO, RICK CHANDLER, PE, IRA GLUCKMAN, RA, NEW YORK CITY DEPARTMENT OF BUILDINGS, STATE OF NEW YORK, OFFICE OF COURT ADMINISTRATION, AND BARRY CLARKE,

Defendants-Appellees.

ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of November two thousand eighteen.

Appellant, Caner Demirayak, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active

members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 42 U.S.C. 12132 provides:

Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity, or be subjected to discrimination by any such entity.

2. 42 U.S.C. 12134 provides:

Regulations

(a) In General

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part.

3. 29 U.S.C. 794 provides:

(a) **Promulgation of Rules and Regulations**

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

4. 28 C.F.R. 35.103 in relevant part, provides:

Relationship to other laws.

(a) **Rule of interpretation.** Except as otherwise provided in this part, this part shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued . . . pursuant to that title.

5. 28 C.F.R. 35.130 in relevant part, provides:

General prohibitions against discrimination

(a) No qualified individual with a disability, on the basis of disability, shall be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not . . . on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit of service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid,

benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others

* * *

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit or service.

* * *

(7)(i)

A public entity shall make reasonable modifications in policies, practices or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.

* * *

(d) A public entity shall administer services, programs, and activities in the most

integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

6. 28 C.F.R. 35.133 in relevant part, provides:

Maintenance of accessible features

(a) A public entity shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and useable by persons with disabilities by the Act or this part.

(b) This section does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs.

7. 28 C.F.R. 35.149 in relevant part, provides:

Discrimination prohibited.

Except as otherwise provided in section 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity,

or be subjected to discrimination by any public entity.

8. 28 C.F.R. 35.150 in relevant part, provides:

Existing facilities

(a) **General.** A public entity shall operate each service, program, or activity so that the service, program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

* * *

(3) Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program or activity or in undue financial and administrative burdens[2]

* * *

a public entity has the burden of proving that compliance with 35.150(a) of this part would result in such alteration or burdens

(b) **Methods**

(1) **General.** A public entity may comply with the requirements of this section through such means as redesign or acquisition of equipment, reassignment of services to accessible

[2] So in original. Should be incur.

buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section.

* * *

In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

* * *