UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DISABLED IN ACTION OF PENNSYLVANIA	:	CIVIL ACTION NO. 03-CV-1577
v.	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY and THE CITY OF PHILADELPHIA	:	

DEFENDANT SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY'S MOTION TO DISMISS AND MOTION TO STRIKE PORTIONS OF PLAINTIFF'S THIRD AMENDED COMPLAINT

Defendant Southeastern Pennsylvania Transportation Authority ("SEPTA"), by and through its counsel, hereby files this 12 (b)(6) Motion to Dismiss the "Key Station" violation claim in Plaintiff's Third Amended Complaint and 12(f) Motion to Strike the immaterial and impertinent portions of the Plaintiff's Third Amended Complaint. For the reasons and authorities cited in Defendant's attached Memorandum of Law, which is incorporated herein by reference, Defendant respectfully requests that this Court grant Defendant's Motion to Dismiss and Motion to Strike.

Respectfully submitted,

Adam A. DeSipio/s/

BY: _____

SAUL H. KRENZEL, ESQUIRE
ADAM A. DESIPIO, ESQUIRE
SAUL H. KRENZEL & ASSOCIATES
The Robinson Building, Suite 800
42 South 15th Street
Philadelphia, PA 19102
(215) 977-7230

Attorneys for Defendant SEPTA

DATED: July 1, 2004

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DISABLED IN ACTION OF PENNSYLVANIA	:	CIVIL ACTION NO. 03-CV-1577
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SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY and THE CITY OF PHILADELPHIA	:	

DEFENDANT SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS AND MOTION TO STRIKE PORTIONS OF PLAINTIFF'S THIRD AMENDED COMPLAINT

Defendant Southeastern Pennsylvania Transportation Authority ("SEPTA"), by and through its counsel, hereby files this Memorandum of Law in Support of its 12 (b)(6) Motion to Dismiss the "Key Station" violation claim in Plaintiff's Third Amended Complaint and in support of its 12(f) Motion to Strike the immaterial and impertinent portions of the Third Amended Complaint.

I. FACTS

Plaintiff, Disabled in Action of Pennsylvania ("DIA"), filed its Third Amended Complaint against SEPTA and the City of Philadelphia on January 7, 2004.[1] See Plaintiff's Third Amended Complaint attached as Exhibit "A." Plaintiff alleges in its Third Amended Complaint that SEPTA and the City of Philadelphia violated Title II of the Americans with Disabilities Act ("ADA") and §504 of the Rehabilitation Act of 1973 ("§504") by:

[1] Although Plaintiff filed its Third Amended Complaint on January 7, 2004, Plaintiff filed the pleading without a Certificate of Service and never properly served it on Defendant SEPTA. Moreover, Plaintiff never notified Defendant SEPTA that the Third Amended Complaint had been filed with the Court.

> "(A) their failure to provide access to persons with disabilities to the newly renovated entrance to the Market Street elevated services (hereinafter 'Frankford-Market Elevated') at the northwest corner of 15th and Market Streets (hereinafter '15th Street') in Philadelphia and (B) their failure to make accessible Philadelphia's 'Key Station' at City Hall, Broad and Market Streets, to the Broad Street Subway Station and the Frankford-Market Elevated Station (hereinafter the 'Key Station')." (Emphasis added).

See Exhibit "A" at ¶1.

Plaintiff's Third Amended Complaint is essentially the same as Plaintiff's Second Amended Complaint except that it includes allegations that Defendants violated the "Key Station" provisions of Title II of the ADA whereas Plaintiff's Second Amended Complaint does not include such claims.

Plaintiff's Third Amended Complaint is interspersed with allegations that SEPTA agreed to go forward with construction of "Key Station" elevators at City Hall in lieu of constructing an elevator at Suburban Station in the area at the northwest corner of 15th & Market Streets. At a conference before the Court on June 16, 2004, Plaintiff stated that the claims in this case were limited to the legal question of whether there was a violation of either the ADA or §504 in connection with the Suburban Station renovations at the northwest corner of 15th & Market Streets. Plaintiff agreed at the conference that it would *not* pursue any allegations that SEPTA purportedly agreed to construct elevators at City Hall in exchange for its not constructing an elevator at Suburban Station.[2]

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[2] SEPTA is presently in the design phase of a plan to renovate the station at City Hall. These renovations are presently estimated to cost almost $68 million dollars and it is anticipated that, due to the nature of the area below City Hall, unexpected problems will significantly escalate the costs.

II. DISCUSSION

A. 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted

Plaintiff's Third Amended Complaint fails to state a claim for which relief can be granted with regard to its "Key Station" allegations because the station located at City Hall, Broad & Market Streets, Philadelphia, PA is not a "Key Station" under Title II of the ADA. Although a court must accept as true all well pleaded allegations of the complaint in evaluating a motion to dismiss, see *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir.1994), "a court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir.1997) (citations omitted). Plaintiff's unfounded assertions and incorrect legal conclusion that the station at City Hall is a "Key Station" under Title II of the ADA need not be credited by the court especially in light of the fact that the assertions are directly contradicted by the regulations implementing the ADA. Consequently, pursuant to Federal Rule of Civil Procedure 12(b)(6), all claims in Plaintiff's Third Amended Complaint relating to alleged "Key Station" violations by Defendants under the ADA or §504 should be dismissed for failure to state a claim for which relief can be granted.

Under Title II of the ADA and the U.S. Department of Transportation ("DOT") regulations implementing Title II, each commuter authority is required to designate the "Key Stations" in its commuter rail transportation system. 42 U.S.C. §12162(e)(2)(iii); 28 C.F.R. §§37.47, 37.51. Those stations that are identified as "Key Stations" must meet certain accessibility standards which are set forth in the ADA and the DOT regulations implementing the ADA. The DOT regulations

implementing Title II of the ADA specifically provide an exception to SEPTA regarding its identification of "Key Stations" within its system. 28 C.F.R. §37.53.

Pursuant to the following portions of §37.53 of the DOT regulations, the list of "Key Stations" set forth in the Settlement Agreement entered into in the class action, Eastern Paralyzed Veterans Association of Pennsylvania, Inc., et al. v. Sykes, et al, Eastern District of Pa, Civil Action No. 86-6797, is deemed to be in compliance with the ADA "Key Station" designation requirements. A true and correct copy of the Settlement Agreement is attached hereto as Exhibit "B." The relevant provisions of §37.53 are set forth as follows:

> §37.53 Exception for New York and Philadelphia
>
> "(a) The following agreements entered into in New York, New York, and Philadelphia, PA, contain lists of Key Stations for the public entities that are a party to those agreements for those service lines identified in the agreements. The identification of Key Stations under these agreements is deemed to be in compliance with the requirements of this Subpart....
>
> (2) Settlement Agreement by and between Eastern Paralyzed Veterans Association of Pennsylvania, Inc., and James J. Peters, individually; and Dudley R. Sykes, as Commissioner of the Philadelphia Department of Public Property, and his successors in office and the City of Philadelphia (collectively 'the City') and Southeastern Pennsylvania Transportation Authority (June 28, 1989)." (Emphasis added).

28 C.F.R. §37.53.

Under the ADA and the DOT regulations, SEPTA's requirement to identify "Key Stations" is *per se* satisfied by the list of "Key Stations" ***(which does not include the station at City Hall)*** set forth in the above referenced Settlement Agreement entered into in the class action, Eastern Paralyzed Veterans Association of Pennsylvania, Inc., et al. v. Sykes, et al. This Settlement Agreement was approved by a July 28, 1989 Order of the Honorable Clarence C. Newcomer. A true

and correct copy of the Court Order approving the Settlement Agreement is attached hereto as Exhibit "C."

The station at City Hall, Broad & Market Streets, is ***not*** identified in the June 28, 1989 Settlement Agreement referenced in 28 C.F.R. §37.53(a)(2), and is, therefore, ***not*** one of SEPTA's "Key Stations" under Title II of the ADA. See Exhibit "B." Consequently, there are no obligations on SEPTA to provide accessibility, immediately or at a particular time in the future, to the station at City Hall under the "Key Station" provisions of the ADA. In developing its budget and plan to bring its "Key Stations" into compliance with the ADA, SEPTA has relied on the DOT regulations implementing the ADA since they were promulgated in 1991. Therefore, SEPTA has not included the station at City Hall, which is not a "Key Station," in its budget for "Key Station" accessibility.[3] Nevertheless, SEPTA is in the design phase of a plan to renovate the station at City Hall at an estimated cost of approximately $68 million dollars.

Pursuant to the standard for deciding Motions to Dismiss, this Court need not credit Plaintiff's bald assertion and legal conclusion that the City Hall station is a "Key Station" especially when such assertions are specifically contradicted by the regulations implementing the ADA (28 C.F.R. §37.53(a)(2)) and the Settlement Agreement. Consequently, Plaintiff's Third Amended Complaint fails to state a claim against Defendants under the "Key Station" provisions of Title II of the ADA for which relief can be granted.

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[3] It is estimated that SEPTA will spend over $57 million dollars to make approximately 38 of its "Key Stations" accessible. Furthermore, SEPTA has spent and will spend millions of additional dollars to provide accessibility for the disabled to its other "Key Stations" that are major capital improvements where accessibility costs have not been separated out.

In addition to the fact that the Settlement Agreement has been incorporated into the DOT regulations implementing the ADA, both the Plaintiff and the City of Philadelphia are parties to and bound by the Settlement Agreement. In the class action Eastern Paralyzed Veterans Association of Pennsylvania, Inc., et al. v. Sykes, et al., "[t]he Class consists of all mobility-handicapped persons living, working, or traveling in the City and County of Philadelphia and in the Counties of Bucks, Chester, Delaware and Montgomery, Pennsylvania, from any time to the present." See Exhibit "C." The Class, therefore, includes Plaintiff Disabled in Action which filed the present lawsuit on behalf of "anyone who has a disability, including persons with mobility and/or visual impairments." See Exhibit "A" at ¶10.

Furthermore, the City of Philadelphia was a party to both the lawsuit and the Settlement Agreement and the Agreement is signed by the former City Solicitor and a Deputy City Solicitor on behalf of the City. See Exhibit "B."

The Plaintiff's attorney in the present case is fully aware of the Settlement Agreement in Eastern Paralyzed Veterans Association of Pennsylvania, Inc., et al. v. Sykes, et al., and following the June 16, 2004 conference with the Court even admitted that he had previously read the Agreement. In fact, a prior action filed by the Plaintiff's attorney on behalf of the same Plaintiff, Disabled in Action v. Dudley R. Sykes, et al., is referenced in the Settlement Agreement. See Exhibit "B" ¶ 6(b). To the extent that Plaintiff and its attorney contend that they did not know about the Settlement Agreement at the time the Third Amended Complaint was filed, they have a responsibility under the Federal Rules of Civil Procedure to conduct a reasonable inquiry into the facts and law before filing such a pleading. *See Bradgate Assocs. v. Fellows, Read & Associates*, 999 F.2d 745, 751 (3d Cir. 1993). Even a cursory review of the DOT regulations implementing Title

II of the ADA would have led Plaintiff directly to the Settlement Agreement and would have revealed that Plaintiff's "Key Station" allegations are unfounded.

The station at City Hall is not a "Key Station" under Title II of the ADA. Further, Plaintiff and the City of Philadelphia are parties to and bound by the Settlement Agreement which is incorporated into the DOT regulations implementing Title II of the ADA. Consequently, Plaintiff's Third Amended Complaint fails to state a claim for which relief can be granted under the "Key Station" provisions of the ADA and/or §504. Pursuant to the Federal Rules of Civil Procedure such allegations are unfounded and should be dismissed.

B. 12(f) Motion to Strike Immaterial and Impertinent Matter

At a conference before the Court on June 16, 2004, Plaintiff stated that his case will turn solely on the legal question of whether there is a violation of Title II of the ADA or §504 of the Rehabilitation Act of 1973. Further, Plaintiff agreed at the conference that he would not pursue any allegations that SEPTA allegedly agreed to construct elevators at City Hall in exchange for its not constructing a Suburban Station elevator at the northwest corner of 15th & Market Streets. Plaintiff's Third Amended Complaint, however, is interspersed with such immaterial and impertinent allegations.

F.R.C.P. 12(f) provides, in part, that "[u]pon motion made by a party before responding to a pleading...the court may order stricken from any pleading any...immaterial, impertinent or scandalous matter." The purpose of a motion to strike is to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters. *McInerney v. Moyer Lumber & Hardware, Inc.*, 244 F.Supp.2d 393, 402 (E.D. Pa. 2002) citing, *Garlanger v. Verbeke*, 223 F.Supp.2d 596, 609 (D.N.J.2002). As a consequence of Plaintiff's agreement not to pursue the

aforementioned allegations, such allegations should be stricken to "streamline [the] litigation, and avoid unnecessary forays into immaterial matters." *Id*. The issue that will remain in the pleadings, therefore, is the legal question that is to be decided by the Court and, that is, whether the Defendants violated Title II of the ADA or §504 of the Rehabilitation Act of 1973 when it performed work to the area of Suburban Station at the northwest corner of 15th & Market Streets without constructing an elevator.

This case does *not* involve claims that there was an agreement that City Hall elevators would be constructed in lieu of an elevator at 15th Street, therefore, such allegations bear no possible relation to the parties' dispute and are unnecessary to the issues in dispute. The issue in this case is limited strictly to the legal question of whether SEPTA's Suburban Station renovations violate Title II of the ADA and § 504 or the Rehabilitation Act of 1973.

Since evidence regarding the alleged agreement for the City Hall elevators is irrelevant and, therefore, inadmissible at the final hearing as to the question of a violation of the ADA and § 504, such allegations in the Third Amended Complaint are immaterial and impertinent under F.R.C.P. 12(f). Consequently, such allegations should be stricken from Plaintiff's Third Amended Complaint.

III. CONCLUSION

For the foregoing reasons and authorities cited, Defendant SEPTA respectfully requests that this Court grant Defendant's Motion to Dismiss and Motion to Strike Plaintiff's Third Amended Complaint. Plaintiff's Third Amended Complaint should be dismissed in its entirety and Plaintiff should be granted leave to file an Amended Complaint consistent with this Court's Order granting Defendant's Motions dismissing the "Key Station" claims and striking the immaterial and impertinent matter.

Adam A. DeSipio/s/

BY: _____

SAUL H. KRENZEL, ESQUIRE
ADAM A. DESIPIO, ESQUIRE
SAUL H. KRENZEL & ASSOCIATES
The Robinson Building, Suite 800
42 South 15th Street
Philadelphia, PA 19102
(215) 977-7230

Attorneys for Defendant SEPTA

DATED: July 1, 2004

CERTIFICATE OF SERVICE

I, ADAM A. DESIPIO, ESQUIRE hereby certify that a true and correct copy of Defendant SEPTA's Motion to Dismiss and Strike Plaintiff's Third Amended Complaint and Memorandum of Law in Support thereof was served via hand delivery upon:

Stephen F. Gold, Esquire
125 South Ninth Street
Suite 700
Philadelphia, PA 19107

Rocco J. Iacullo, Esquire
Disabilities Law Project
1315 Walnut Street, Suite 400
Philadelphia, PA 19107

Mark R. Zecca, Esquire
City of Philadelphia Law Department
One Parkway, 1515 Arch Street, 17th Floor
Philadelphia, PA 19102-1595

Adam A. DeSipio/s/

SAUL H. KRENZEL, ESQUIRE
ADAM A. DESIPIO, ESQUIRE
SAUL H. KRENZEL & ASSOCIATES
The Robinson Building
42 South 15th Street, Suite 800
Philadelphia, PA 19102
(215) 977-7230

Attorneys for Defendant SEPTA

DATED: July 1, 2004