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November 20, 2019

Ms. Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D. C. 20423

ENTERED
Office of Proceedings
November 20, 2019
Part of
Public Record

Re: Docket No. 42166, *Alonzo Benton v. CSX Transportation, Inc.*

Dear Ms. Brown:

I have enclosed for efilng CSX Transportation, Inc.'s Reply to Mr. Benton's second request for stay.

Thank you for your assistance. Please contact me if you have any questions.

Very Truly Yours,

/s/ *Louis E. Gitomer*

Louis E. Gitomer

Enclosure

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. 42166

ALONZO BENTON v. CSX TRANSPORTATION, INC.

CSX TRANSPORTATION, INC.'S CLARIFICATION

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Attorneys for: CSX TRANSPORTATION,
INC.

Dated: November 20, 2019

BEFORE THE
SURFACE TRANSPORTATION BOARD

Docket No. 42166

ALONZO BENTON v. CSX TRANSPORTATION, INC.

CSX TRANSPORTATION, INC.'S CLARIFICATION

CSX Transportation, Inc. ("CSXT") responds to the letter filed on November 1, 2019 (the "Letter") with the Surface Transportation Board (the "Board") by Alonzo Benton ("Plaintiff") renewing his request to hold this matter in abeyance in lieu of ruling on CSXT's Motion to Dismiss filed on September 11, 2019.

Mr. Benton filed a Complaint and Petition for Relief (the "Complaint") under 49 U.S.C.S. §10101(8) with the Board on August 22, 2109 in which he demanded "judgment against [CSXT], for compensatory and incidental damages in excess of \$300,000 plus interest, attorney's fees and costs, and such other relief as this Honorable Board deems just and proper" as a result of Mr. Benton falling while crossing CSXT's track near the intersection of 58th Street and Woodland Avenue in Philadelphia, PA. Complaint at page 10. On page 2 of the Complaint, Mr. Benton requested the Board to "hold this Complaint in abeyance pending the outcome of litigation in the Federal District Court, which should be dispositive of this claim. A separate motion to hold the matter in abeyance will be filed by [Mr. Benton] shortly."¹

On September 11, 2019, CSXT Answered the Complaint and filed a Motion to Dismiss. Mr. Benton responded to the Motion to Dismiss on October 1, 2019 (the "Response"). In the Response, at 3, Mr. Benton again requested "the Board to stay this matter until such time the

¹ CSXT notes that it has not been served such a motion, nor has it seen such a motion on the Board's web site.

Federal Circuit Court determines the appropriate forum for [Mr. Benton's] claims." In ruling on a Motion to Dismiss filed by CSXT, at pages 3-7, the Court found that the Interstate Commerce Commission Act of 1995 ("ICCTA") does not preempt Mr. Benton's negligence or Philadelphia Property Maintenance Code claims or impose an undue burden on CSXT's operations.²

RESPONSE TO THE LETTER

The Letter asks the Board to "stay this matter until final resolution of the Federal District Court matter to ensure a proper adjudication of [Mr. Benton's] rights." However, Mr. Benton has not even attempted to meet the Board's criteria for a stay.

Under 49 U.S.C. § 1321(b)(4), the Board may issue an appropriate order, such as a stay, when necessary to prevent irreparable harm. A party seeking a stay must establish that (1) there is a likelihood that it will prevail on the merits of any challenge to the action sought to be stayed, (2) it will suffer irreparable harm in the absence of a stay, (3) other interested parties will not be substantially harmed, and (4) the public interest supports the granting of the stay. *See, e.g., Ind. Harbor Belt R.R.—Trackage Rights—Consol. Rail Corp.*, FD 36099 et al., slip op. at 4 (STB served Mar. 14, 2017); *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

Savage Davenport Railroad Company-Discontinuance of Service Exemption-in Scott County, Iowa, Docket No. AB 1277X, served October 29, 2019. For that reason alone, CSXT respectfully requests the Board to deny Mr. Benton's request for stay.

² Opinion attached.

CSXT reiterates that Mr. Benton has failed to demonstrate that CSXT is in “violation of this part” as has been interpreted by the Eight Circuit to mean a violation of ICCTA’s substantive provisions or accompanying regulations. *Griffioen v. Cedar Rapids and Iowa City Ry. Co.*, 785 F.3d 1182, 1191 (8th Cir. 2015). Therefore, CSXT again requests that the Board dismiss the Complaint and not hold this proceeding in abeyance for an indefinite period.

Respectfully submitted,

/s/ *Louis E. Gitomer*

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Attorneys for: CSX TRANSPORTATION,
INC.

Dated: November 20, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon counsel for

Alonzo Benton:

John Leonard, Esq.
Two Penn Center, Suite 1910
1500 JFK Boulevard
Philadelphia, PA 19102

/s/ *Louis E. Gitomer*

Louis E. Gitomer
November 20, 2019

ATTACHMENT

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ALONZO BENTON,	:	
	:	
Plaintiff,	:	CIVIL ACTION
v.	:	
	:	NO. 19-0109
CSX TRANSPORTATION,	:	
	:	
Defendant.	:	

ORDER

AND NOW, this __24th__ day of October, 2019, upon consideration of Defendant's Motion to Dismiss ("Motion") (Doc. 9) and Plaintiff's Reply in Opposition (Doc. 11) **IT IS HEREBY ORDERED AND DECREED** that Defendant's Motion is **DENIED IN PART** and **GRANTED IN PART**.ⁱ

IT IS FURTHER ORDERED that Plaintiff amend the Complaint (Doc. 6) to reflect the accurate provision of the Philadelphia Property Maintenance Code.

BY THE COURT:

/s/ **Petrese B. Tucker**

Hon. Petrese B. Tucker, U.S.D.J.

ⁱ Presently before the Court is Defendant CSX Transportation, Inc.'s ("CSXT") Motion to Dismiss Plaintiff's Amended Complaint (Doc. 9) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the foregoing reasons, the Motion to Dismiss is **DENIED IN PART** and **GRANTED IN PART**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Since the Court is writing primarily for the Parties, who are familiar with this case, the Court need not set forth the factual or procedural background except insofar as it may be helpful in the Court's brief discussion.

On December 10, 2018, Plaintiff Alonzo Benton ("Plaintiff") commenced this action against Defendant CSX Transportation, Inc. ("Defendant") in the Philadelphia County Court of Common Pleas. Def.'s Not. of Rem. 1, Doc. 1. Defendant moved to dismiss the Complaint (Doc. 4). Thereafter, Plaintiff filed a First Amended Complaint on January 1, 2019. Am. Compl., Doc. 6. Defendant then moved to dismiss the Amended Complaint, which is now before this Court. Mot. Dismiss. Doc. 9.

On August 27, 2017, Plaintiff fell on railway tracks while walking home from the grocery store. Am. Compl. ¶ 17. The tracks were slippery due to rain that occurred earlier that day. Am. Compl. ¶¶ 18–19. Plaintiff sustained "a severely comminuted left distal clavicle fracture with apex angulation." Am. Compl. ¶ 20. As a result of the fall, Plaintiff has undergone two surgeries and anticipates the need for continued and extensive medical treatment. Am. Compl. ¶ 21.

Plaintiff advances three causes of action in his Amended Complaint. First, Plaintiff alleges violation of the Interstate Commerce Commission Termination Act ("ICCTA"). Am. Compl., 5. Second, Plaintiff alleges violation of the Americans with Disabilities Act ("ADA"). Am. Compl. ¶ 38(k). Third, Plaintiff alleges violations of Philadelphia statutory and state law on the theory that his injury was the direct and proximate result of Defendant's negligence. Am. Compl. ¶ 42.

II. STANDARD OF REVIEW

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must “accept all factual allegations as true [] [and] construe the complaint in the light most favorable to the plaintiff.” *Argueta v. U.S. Immigration & Customs Enf’t*, 643 F.3d 60, 74 (3d Cir. 2011). However, the Court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). Ultimately, “[a] court may dismiss a complaint for failure to state a cause of action only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Gupta v. Albright Coll.*, 2006 U.S. Dist. LEXIS 2126 at *2 (E.D. Pa. Jan. 19, 2006) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)).

III. DISCUSSION

A. State Law Claims

i. **The Interstate Commerce Commission Termination Act Does Not Preempt Plaintiff’s Negligence Claim Because a Pedestrian Crosswalk is Not Related to the Movement of Passengers or Property**

Congress enacted the ICCTA in 1995, creating the Surface Transportation Board (“the STB”) to enforce it. The STB has exclusive jurisdiction over “transportation by rail carriers” along with exclusive jurisdiction over the “construction,” “operation,” and “facilities” of rail carriers. 49 U.S.C. §10501(b). Furthermore, when the act applies, its remedies “are exclusive and preempt the remedies provided under Federal or State law.” *Id.*

The ICCTA does not preempt all state regulation affecting transportation by rail carrier, it instead preempts “state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” *N.Y. Susquehanna and W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007). The ICCTA defines transportation as including the “property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail” and “services related to that movement.” 49 U.S.C. §10102(9)(A)&(B).

Defendant’s argument that Plaintiff “attempts to avoid preemption by removing all references to a railroad crossing and re-labeling the railroad crossing as a pedestrian walkway” is without merit. (internal quotation marks omitted) Def.’s Mem. Supp. Mot. Dismiss, 6, Doc. 9-1. Defendant describes the area as “not a pedestrian crossing, but the area over which trains travel through the crossing[]” and maintains that Plaintiff’s characterization of the area as a pedestrian crosswalk amounts to an “unsupported labeling or conclusion” (internal quotation marks omitted). *Id.* However, this factual issue cannot be resolved at the motion to dismiss stage. Plaintiff has presented photographs of the area in question to supports his assertion that the area in question is in fact a pedestrian crosswalk. Pl.’s Opp’n Mot. to Dismiss, Ex. A, Doc 11-4. At this juncture, the Court must accept Plaintiff’s allegation as true for the purpose of this motion.

ii. The ICCTA Does Not Preempt Plaintiff’s Claim that Defendant Violated the Philadelphia Property Maintenance Code

The Philadelphia Property Maintenance Code (“PPMC”) “exists to protect public health, safety, and welfare through the regulations on the maintenance of existing structures and properties.” Department of Licenses & Inspection, City of Phila. Codes,

<https://www.phila.gov/li/codesandregulations/Pages/codes.aspx> (last visited Oct. 19, 2019). The PPMC applies to “all existing residential and nonresidential structures and all existing premises and constitute[s] minimum requirements and standards for premises [and] structures.” *See* Phila. Property Maintenance Code, PM 101.2 (Scope).

Defendant argues that Plaintiff cannot bring a claim for negligence under the PPMC because the PPMC isn’t applicable to Defendant’s purported conduct. *See* Def.’s Mem. Supp. Mot. Dismiss, 8. Defendant bases this argument on its assertion that “[the] railroad tracks, crossing, and concrete panels within the crossing that allegedly caused Plaintiff’s injuries” are not “structures” or “premises” within the scope the PPMC. *Id.* However, the PPMC explicitly applies to premises. *See* Phila. Property Maintenance Code, PM 101.2 (Scope). The PPMC defines premises as “[a] lot, plot or parcel of land, easement or *public way*, including any structures thereon.” (emphasis added) *See* Phila. Property Maintenance Code, PM 202 (General Definitions). Plaintiff alleges that “[at] all times material to [the] Complaint, Defendant owned, operated, managed, possessed, and/or controlled the railway tracks and pedestrian walkway.” Pl. Compl. ¶ 13. Accordingly, Plaintiff has pled sufficient factual allegations to state a claim that Defendant violated the PPMC.

a. Plaintiff’s Citation to the Incorrect Provision of the PPMC Does Not Bar Plaintiff’s Claim

Defendant further contends that Plaintiff’s allegations fail under Rule 8(a) because Plaintiff improperly numbered the provision of the PPMC that Defendant violated. Def.’s Mem. Supp. Mot. Dismiss, 13. Defendant relies on *ADT Sec. Services*, for the proposition that Plaintiff “is required to provide CSXT fair notice by identifying...” the specific statute of the PPMC that Defendant violated. *See ADT Sec. Servs., Inc. v. Swenson, ex rel, Estate of Lee*, 687 F. Supp. 2d 884,893 (D. Minn. 2009); Def.’s Mem. Supp. Mot. Dismiss, 13. However, unlike Plaintiff in the

present matter, the counterclaim defendants in *ADT Sec. Services* alleged negligence per se generally and sought to uncover exactly which statute or regulation was violated during discovery. *ADT Sec. Servs., Inc.*, 687 F. Supp. 2d at 893. Notably, the court there did allow defendants the opportunity to file an amended counterclaim. *Id.*

Here, the Court finds that although Plaintiff pointed to the incorrect provision of the PPMC that applies to Plaintiff's claim, Defendant was on notice that the violation was contained within the provisions of the PPMC. Accordingly, the Court will regard PM 302.3 as the provision that forms the basis for Plaintiff's claim that Defendant violated the PPMC. PM 302.3 requires that "all sidewalks, walkways...and similar areas [] be kept in a proper state of repair, and maintained free from hazardous conditions". See Phila. Property Maintenance Code, PM-302.3 (Sidewalks and driveways). The Court asks that Plaintiff amend its Complaint to reflect the accurate provision.

iii. Plaintiff Has Pointed to Sufficient Evidence that Observance of the PPMC Would Not Impose an Undue Burden on Defendant's Operations

Defendant also argues the ICCTA preempts Plaintiff's claim that Defendant violated the PPMC because "if enforced here, [it] would unreasonably regulate CSXT's operations at the crossing." Def.'s Mem. Supp. Mot. Dismiss, 8. The Third Circuit concluded that a state law is not preempted if it passes a two-prong test: "(1) it is not unreasonably burdensome, and (2) it does not discriminate against railroads." *N.Y. Susquehanna and W. Ry. Corp. v.*, 500 F.3d at 252. To pass the unreasonably burdensome prong, the state law "must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion." *Id.*

Plaintiff alleges that Defendant "failed to fix or repair the dangerous and defective conditions as described herein with *inexpensive, readily available, and common knowledge* remedies." (emphasis added) Am. Comp. ¶ 15. The Court finds that Plaintiff has alleged facts

that remedying violations of the sort that caused his injury would not impose an undue burden on Defendant's operations.

iv. Plaintiff's Negligent Hiring Claim Fails for Failure to Plead that Defendant Was on Notice of Its Employee's Propensity for Misconduct

To establish a negligent hiring claim, a plaintiff must establish that the defendant "knew or was on notice that [its][employee] had a propensity for misconduct but still hired him, thereby exposing [plaintiff] to danger." *Scruggs v. Whiting-Turner Contr. Co.*, 2018 U.S. Dist. LEXIS 136044, *9 (E.D. Pa. Aug 10, 2018) (citing *Brezenski v. World Trade Transfer, Inc.*, 755 A.2d 36, 39–40 (Pa. Super. 2000)). A plaintiff must also plead facts establishing common law elements of negligence. *Nelson v. Loftus*, 2019 U.S. Dist. LEXIS 5094, *16, 2019 WL 175127 (E.D. Pa. Jan. 11, 2019).

Under a negligent hiring theory of liability, Plaintiff is required to show that Defendant's "employee's prior bad acts would have put a reasonable employer on notice of the employee's propensity to injure others." *Fusco v. Uber Techs., Inc.*, 2018 U.S. Dist. LEXIS 126428, *11–12 (E.D. Pa. July 27, 2018) (citing *Heller v. Patwil Homes*, 713 A.2d 105, 108 (Pa. Super. Ct. 1998)). Here, the Court discerns no allegation in the Amended Complaint that Defendant was on notice or knew that its employee had deficient qualities or had engaged in prior instances of misconduct. Instead, Plaintiff alleges that Defendant "fail[ed] to . . . hire competent individuals to make the Pedestrian Crosswalk reasonably safe for lawful business licensees" and "negligently hir[ed] others to perform work on the Pedestrian Crosswalk including inspection, maintenance, repair, and remediation of the Pedestrian Crosswalk[.]" Am. Compl. ¶ 38(h), (l). Thus, the Court finds Plaintiff has not pled the necessary elements to make out a negligent hiring claim.

v. Plaintiff's Negligent Supervision Claim Fails for Lack of Evidence that Defendant Was on Notice of Its Employee's Propensity for Misconduct and His Injury Results from Intentional Misconduct

To establish a claim of negligent supervision, a plaintiff must establish that “an employer failed to exercise ordinary care to prevent intentional harm to a third party when that harm was (i) committed on the employer’s premises, (ii) committed by an employee acting outside the scope of his or her employment, and (iii) was reasonably foreseeable.” *Elena Myers Court v. Loews Phila. Hotel, Inc.*, 2017 U.S. Dist. LEXIS 19720, *11 (E.D. Pa, February 13, 2017) (citing *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 487–88 (3d Cir. 2013)). An employer is only liable for negligent supervision if it knew or should have known that an employee had dangerous tendencies that could harm a third party. *Id.*

Similar to the deficiencies in Plaintiff’s negligent hiring claim, Plaintiff has failed to state a claim that Defendant knew or should have known that one of its employees had dangerous propensities that would require Defendant’s supervision. Additionally, Plaintiff has failed to demonstrate that his injuries are the result of an intentional harm by Defendant’s employee.

B. Federal Claims

i. The ICCTA’s Administrative Remedies Do Not Provide Plaintiff with a Cause of Action for Personal Injury

The ICCTA provides that “[a] person may . . . bring a civil action . . . to enforce liability against a rail carrier providing transportation subject to the jurisdiction of the Board.” 49 U.S.C.S. § 11704(c)(1). The ICCTA further provides that “[a] rail carrier providing transportation subject to the jurisdiction of the Board . . . is liable for damages sustained by a person as a result of an act or omission of the carrier” U.S.C. § 11704(b). The Court agrees with Defendant that § 11704 does not provide a right of action for any person who has sustained injuries by a rail carrier to file a claim for any reason. Def.’s Mem. Supp. Mot. Dismiss, 10.

Instead, the Court is compelled by the Eight Circuit’s observation that the causes of action under § 11704 are limited to “violations of the substantive provisions or accompanying regulations” of the ICCTA. *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1191 (8th Cir. 2015). “Section 11704 does not stand on its own, but must be coupled with a deprivation or violation of rights, duties, or obligations established by statute in the ICCTA or by regulations issued pursuant to the ICCTA.” *Id.*

Plaintiff has failed to point to any substantive portion of the ICCTA that Defendant violated. Plaintiff alleges that he “sustained damages as a result of CSX’s failure to inspect, repair, remediate and/or maintain the safety of its Pedestrian Crosswalk” Am. Compl. ¶ 33. Such allegation is not actionable under the substantive provisions of the ICCA, which are primarily focused on the “regulation of competition, rates, licensing, finance, and the economic relationship between shippers and carriers.” *Grioffioen*, 785 F.3d at 1191.

ii. Plaintiff’s ADA Claim Fails for Failure to Identify Defendant’s Specific Violations of the ADA

The ADA is a civil rights law that prohibits discrimination against persons on the basis of their disability. *See* 42 U.S.C. §12101 *et seq.* To successfully plead a claim, a plaintiff must comply with Federal Rule 8 of Civil Procedure. Under Rule 8, a plaintiff must provide “a short and plain statement of the claim showing that the pleader is entitled to relief”, however the statement must “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Fed. R. Civ. P. 8(b); *Kpakah v. CSX Transp. (In re J.K.)*, 2014 U.S. Dist. LEXIS 129959, *11–12 (E.D. Pa. September 16, 2014) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002)). It is not sufficient for a plaintiff to point to a general violation of a body of law without alleging “specific statutes or [] a general statutory scheme” that a defendant violated. *Kpakah*, 2014 U.S. Dist. LEXIS at *12.

Here, Plaintiff has not directed the Court to any portion of the ADA that Defendant violated, but instead alleges that Defendant “fail[ed] to properly and adequately maintain the Pedestrian Crosswalk in accordance with the Americans with Disabilities Act, 42 U.S.C. §12101 *et seq*[.]” Am. Compl. ¶ 38(k). Thus, the Court finds that Plaintiff has not pled the necessary elements to make out a claim under the ADA.

IV. CONCLUSION

For the foregoing reasons, Defendant’s Motion is DENIED IN PART AND GRANTED IN PART. Plaintiff’s claims of ADA and ICCTA violations, negligent hiring, and negligent supervision are DISMISSED. Claims of negligence and violation of the PPMC remain.