

## **Court judge dismisses passholder's suit against MBTA, Keolis**

If you take a Suffolk Superior Court judge's recent decision to its logical conclusion, the MBTA and its rail-service provider Keolis can take a commuter's money yet have no obligation to provide any service whatsoever in return.

So says Melrose attorney Robert Richardson, whose client, Raquel Rodriguez, failed in her bid to recoup the money she says she and other lost when historic snowstorms disrupted commuter rail service between January and March 2015.

"Such a result does not comport with the rule of law," Richardson says. "This should be of grave concern to the citizens of the commonwealth at large and particularly to purchasers of monthly commuter rail passes."

In his decision, Judge Mitchell H. Kaplan opined that "political institutions," rather than the courts, are best equipped to address the MBTA and Keolis' alleged failings during a miserable winter for commuters.

Rodriguez's suit included breach-of-contract and unjust-enrichment claims against the MBTA and Keolis, and also alleged that Keolis had engaged in unfair and deceptive trade practices in violation of G.L.c. 93A.

Assessing Rodriguez's contract claim required Kaplan to examine whether a nearly 150-year-old Supreme Judicial Court opinion, *Sears v. Eastern Railroad Co.*, still had persuasive authority. On that front, Kaplan had "serious doubts": Only 14 published decisions had cited the case, the most recent in 1908.

But even if *Sears* is good law, Kaplan wrote that Rodriguez's case could be distinguished from it. Rather than extreme weather conditions, in *Sears* the company postponed the plaintiff's train due to an "exhibition" — in other words, out of "mere convenience of the company or a portion of their expected passengers."

Another factor in *Sears* was that the train operator's notice of the schedule change — handbills posted in train cars and stations but nothing in the newspapers the plaintiff had consulted to plan his trip — was inadequate.

Kaplan construed the plaintiff's argument as acknowledging that, whatever the terms of the contract between her and MBTA, the agency was not obligated to meet its pre-snow-emergency schedule during the miserable winter.

Rather, the MBTA's failure was in not providing "timely, reliable service," an implied contract term which could not be pinned to anything the MBTA had published in conjunction with its schedule or the terms of its monthly passes, Kaplan wrote.

The MBTA tried to get Rodriguez's contract claim kicked on alternate grounds involving the so-called "filed rate" doctrine, which bars contract claims seeking refunds or damages for unreasonable rates or inadequate service if fares are "determined in a heavily regulated process that is legislatively delegated to a public agency."

But Kaplan said he didn't have to reach that issue, "because the complaint fails to allege an essential element of a breach of contract claim: an agreement between the parties on a material term of the contract at issue."

“Stated differently, the MBTA had no express contractual obligation to provide ‘normal’ or ‘regular’ commuter rail service during and after the record-breaking snow storms in 2015, even though the plaintiff may have expected such rail service,” he wrote.

Richardson says he and his client believe that Kaplan got it wrong in not finding that a legally enforceable contract exists between the defendants and purchasers of monthly commuter rail passes. He notes that Rodriguez and others like her relied on the schedules published by the MBTA when they purchased monthly passes.

“During the time period at issue in this case, neither the MBTA’s published schedules nor its tariff contained exclusionary language disclaiming liability for late or cancelled trains,” Richardson says.

Such language was included in all of the cases the MBTA cited to support its motion to dismiss, he notes.

“Ironically, the same published schedules the MBTA argued are inapplicable to this case are the schedules that set the benchmarks under which the MBTA fined Keolis millions of dollars for rampant late and cancelled commuter rail trains during this same time period,” Richardson says.

By: Kris Olson