IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JEFFREY JOEL JUDY, **Plaintiff,** **v.** **DDRTC DOUGLASVILLE PAVILION, LLC,** **Defendant.**	**1:10-cv-0432-WSD**

OPINION AND ORDER

This matter is before the Court on Defendant DDRTC Douglasville Pavilion, L.L.C.'s Motion to Dismiss [11].

I. BACKGROUND

Plaintiff Jeffrey Joel Judy ("Plaintiff" or "Judy") is a Florida resident. He is a paraplegic. As a result of his disability, Plaintiff uses a wheelchair as his primary means of mobility. Defendant is the owner and operator of a shopping plaza in Douglasville, Georgia (the "Property").

Plaintiff allegedly visited the Property and encountered certain architectural barriers, including inaccessible parking, sales and service counters, entrances to tenant spaces, routes, ramps, signage, and restrooms. Plaintiff states that "he continues to desire to visit the Property," and "will continue to experience serious

difficulty due to" these architectural barriers, if they are not removed. Plaintiff alleges that he:

> plans to and will visit the property in the near future to utilize the goods and services offered thereon. Mr. Judy enjoys attending Jehovah's Witness Conferences all around the country and will be visiting one in August in Rome, Georgia. During that time, Mr. Judy intends to stay in the Douglasville area to visit friends who reside in Douglasville. Further, Mr. Judy intends to visit his stepson who resides nearby in Senoia, Georgia.

Plaintiff alleges that, "[i]ndependent of his intent to return as a patron to the Property, Plaintiff additionally intends to return to the Property as an ADA tester to determine whether the barriers to access stated herein have been remedied."

On February 16, 2010, Plaintiff filed this action. In his Complaint, Plaintiff requests declaratory and injunctive relief for alleged violations of the Americans With Disabilities Acts ("ADA"), 42 U.S.C. § 12181, *et seq*. On April 15, 2010, Plaintiff filed his Amended Complaint, in response to Defendant's first Motion to Dismiss, and added specific allegations about his intent to return to the Property.

Defendant now moves to dismiss the Amended Complaint. Defendant asserts that dismissal is required under Rule 12(b)(1) of the Federal Rules of Civil Procedure because Plaintiff does not have standing to pursue his ADA claims since he is not likely to suffer any future injury. Defendant argues that dismissal also is required under Rule 12(b)(6) because Plaintiff has failed to state a claim upon

which relief may be granted. Plaintiff finally argues that if the Motion is denied, this action be limited to the specific ADA violations alleged in the Amended Complaint. Plaintiff opposes the Motion.

II. DISCUSSION

A. Motion to Dismiss For Lack of Standing

A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure may be either a "facial" or "factual" attack. Morrison v. Amway Corp., 323 F.3d 920, 924-25 n.5 (11th Cir. 2003). A facial attack challenges subject matter jurisdiction on the basis of the allegations in the complaint, and the Court takes the allegations as true in deciding whether to grant the motion. Id. Factual attacks challenge subject matter jurisdiction in fact, irrespective of the pleadings. Id. When resolving a factual attack, the Court may consider extrinsic evidence such as testimony and affidavits. Id. In a factual attack, the plaintiff has the burden of proving that jurisdiction does, in fact, exist. Brown v. Cranford Transp. Serv., Inc., 244 F. Supp. 2d 1314, 1317 (N.D. Ga. 2002).

Defendant does not state whether it is making a facial or factual attack under Rule 12(b)(1). Defendant's Motion only challenges the allegations in the

Complaint[1] and the Court therefore treats the Motion to Dismiss as a facial attack. Cf. Morrison, 323 F.3d at 924-25 n.5 (finding "motion to dismiss was a factual attack because it relied on extrinsic evidence and did not assert lack of subject matter jurisdiction solely on the basis of the pleadings.").

In reviewing a complaint for a facial attack on subject matter jurisdiction, presumptive truthfulness attaches to Plaintiff's allegations, and the "court is required 'merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction." Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc., 524 F.3d 1229, 1233 (11th Cir. 2008). "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] 'presume that general allegations embrace those specific facts that are necessary to support the claim.'" Mulhall v. Unite Here, Local 355, 618 F.3d 1279, 1286 (11th Cir. 2010) (quoting Lujan v. Defenders of Wildlife, 504

[1] The Court notes that Defendant states in a footnote: "When faced with a motion to dismiss under Fed. R. Civ. P. 12(b)(1), 'the court is given the authority to resolve factual disputes, along with the discretion to devise a method for making a determination with regard to the jurisdictional issue.'" (Mot. 5. n.1.) The Court finds that this statement alone is insufficient to warrant application of the factual attack standard under Rule 12(b)(1). Defendant does not offer any extrinsic evidence to aid the court in resolving any alleged factual dispute. Defendant asks only that the Court take judicial notice of certain facts, such as distances, to avoid going beyond the scope of the pleadings. Defendant did not respond to Plaintiff's argument that applying the factual attack standard was inappropriate, and Defendant did not respond to Plaintiff's Affidavit, which Plaintiff submitted in the event the Court found that Defendant had asserted a factual attack.

U.S. 555 (1988). "It is extremely difficult to dismiss a claim for lack of subject matter jurisdiction. '[T]he test is whether the cause of action alleged is so patently without merit as to justify . . . the court's dismissal for want of jurisdiction.'" Simanonok v. Simanonok, 787 F.2d 1517, 1519 (11th Cir. 1986) (quoting Duke Power Co. v. Carolina Envtl. Study Grp., 438 U.S. 59, 70 (1978)).

To satisfy the standing requirements of Article III, a plaintiff must demonstrate that he has "alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Watts v. Boyd Properties, 758 F.2d 1482, 1484 (11th Cir. 1985) (quoting Warth v. Seldin, 422 U.S. 490, 499-500 (1975)) (emphasis original). Plaintiff must allege, and ultimately prove, three elements to establish standing under Article III: "First, he must show that he has suffered an injury-in-fact. Second, the plaintiff must demonstrate a causal connection between the asserted injury-in-fact and the challenged action of the defendant. Third, the plaintiff must show that the injury will be redressed by a favorable decision." Shotz v. Cates, 256 F.3d 1077, 1081 (11th Cir. 2001) (quoting Lujan, 504 U.S. at 560-61) (internal citations and quotations omitted). "These requirements are the 'irreducible minimum' required by the Constitution for a plaintiff to proceed in federal court." Shotz, 256 F.3d at 1081 (quoting

Northeastern Fla. Chapter, Associated Gen. Contractors of America v. City of Jacksonville, 508 U.S. 656, 664 (1993)) (internal quotations omitted).

Where a party seeks injunctive relief, a party establishes standing "'only if the party alleges . . . a real and immediate – as opposed to a merely conjectural or hypothetical – threat of future injury.'" Shotz, 256 F.3d at 1081 (quoting Wooden v. Bd. of Regents of the Univ. Sys., 247 F.3d 1262, 1284 (11th Cir. 2001) (emphasis original). This is because injunctions regulate future conduct. Shotz, 256 F.3d at 1081. As the Supreme Court has stated, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." Lujan, 504 U.S. at 561 (quoting Lyons, 504 U.S. at 564).

Plaintiff has asserted a claim for injunctive and declaratory relief under Title III of the ADA, and thus he must allege an injury-in-fact and facts that give rise to an inference that he will suffer future discrimination. See Shotz, 256 F.3d at 1081. This requires, at a minimum, that Plaintiff plead that he is likely to return to the Property. See Lujan, 504 U.S. at 564 (holding that a plaintiff's intent to return to the place of injury 'some day' was insufficient to confer standing). A complaint that only alleges past incidents of discrimination is insufficient. Shotz, 256 F.3d at 1082. Dismissal is also appropriate where the future plan is speculative or

conjectural. See Equal Access For All v. Hughes Resort., Inc., 2005 WL 2001740, at *6 (N.D. Fla. Aug. 10, 2004) (dismissing action on facial attack where plaintiff "alleged no concrete travel plans to defendants' hotels or motels of any sort but rather merely asserts vague 'some day' intentions"); Access for Disabled, Inc. v. Rosof, 2005 WL 3556046, at *2 (M.D. Fla. Dec. 28, 2005) (dismissing action on facial attack where plaintiff's only connection to area was as a "frequent visitor" and where plaintiff alleged an intention to return to the property at issue to "verify its compliance or non-compliance with the ADA"); Rosenkrantz v. Markopoulos, 254 F. Supp. 2d 1250, 1252 (M.D. Fla. 2003) (dismissing action on factual attack where "[p]laintiff's future travel plans are just 'some day' intentions and lack any description of concrete plans or anything more definite than that he will travel to [defendant's motel's] area in the next year or two probably").

Defendant claims that Plaintiff cannot satisfy his burden of showing future harm because it is unlikely that Plaintiff intends to return to the property. Defendant states:

> "the Court must determine whether the plaintiff is likely to return to the defendant's business by examining several factors: including: '(1) the proximity of the defendant's business to the plaintiff's residence, (2) the plaintiff's past patronage of the defendant's business, (3) the definitiveness of the plaintiff's plans to return, and (3) the plaintiff's frequency of travel near the defendant."

(Mot. 5 (citing Access 4 All, Inv. v. Wintergreen Comm'r P'shp, LTD, 2005 WL 2989307, at *3 (N.D. Tex. 2005), Judy v. Pinhgue, 2009 WL 4261389, at *2 (S.D. Ohio 2009)).) The cases cited by Defendant are not from this Circuit and are not binding on this Court. Courts in this Circuit have held plaintiffs to a less burdensome standard to survive a facial challenge to standing. In this Circuit, a plaintiff seeking injunctive relief for alleged ADA violations is not required to go beyond "general factual allegations of injury resulting from the defendant's conduct," so long as he "alleges facts giving rise to a plausible inference that he will suffer future disability discrimination by the defendant." Equal Access For All v. Hughes Resort., Inc., 2005 WL 2001740, at *6 (N.D. Fla. Aug. 10, 2004).

Stevens v. Premier Cruises, Inc., 215 F.3d 1237 (11th Cir. 2000), is instructive here. In Stevens, the plaintiff sought injunctive relief for alleged ADA accessibility violations aboard Defendant's cruise ship. 215 F.3d at 1238. The plaintiff, however, did not allege in her original complaint a threat of future injury. Id. at 1238-39. The district dismissed the action, and plaintiff, in response, submitted a proposed amended complaint, in which she "alleged that, in the near future, she would take another cruise aboard Defendant's ship." Id. at 1239. The district court denied plaintiff leave to amend the complaint. Id. The Eleventh Circuit vacated the dismissal, stating, "we are satisfied that Plaintiff's proferred

amended complaint would have cured the defect about standing in the original complaint." Id.

Taking Plaintiff's allegations as true, the Amended Complaint adequately alleges a likelihood of future harm sufficient for Plaintiff to have standing to bring his claims for declaratory and injunctive relief. Plaintiff's amended Complaint states he will visit Georgia in August 2010, to attend a Jehovah's Witness conference. Plaintiff alleges that he intends to visit the Property during this visit, while he stays at a friend's residence located in Douglasville. Plaintiff also alleges that he visits the area frequently to see his step-son who lives nearby. Plaintiff has therefore alleged a concrete and immediate threat of future injury based on the alleged ADA violations, and Defendant's Motion to Dismiss for lack of standing is required to be denied. Shotz, 256 F.3d at 1081.[2, 3]

[2] While the Court finds it unnecessary to apply the factual attack standard of Rule 12(b)(1), the Court notes that even if this standard was applied, the Court would reach the same conclusion that Plaintiff has standing to bring this suit. Plaintiff submitted an affidavit along with his Response which identified two distinct instances in the immediate future when he planned on returning to the Property in Douglasville. Plaintiff also submitted evidence which demonstrates that he regularly travels to the Douglasville area. Defendant did not respond to this affidavit or submit any evidence which disproves or calls into question the credibility of Plaintiff's testimony. For purposes of this Motion, Plaintiff has demonstrated by a preponderance of the evidence a "real and immediate – as opposed to merely conjectural or hypothetical – threat of future injury" and Defendant's Motion to Dismiss is required to be denied. See Rosenkrantz v. Markopoulos, 254 F. Supp. 2d 1250, 1252 (M.D. Fla. 2003) (stating "[w]hen

B. Motion to Dismiss For Failure to State a Claim Upon Which Relief Can Be Granted

Defendant also alleges that "Plaintiff has not pled the First Amended Complaint with the level of specificity required by Twombly." Defendant contends that Plaintiff "alleges, in a conclusory fashion, that he 'has visited the property,' he has been discrimination against by being denied access to the facility, and that he 'plans' and 'desires' to return to the facility."

In Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007), the Supreme Court stated that a complaint is required to contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007).[4] To state a claim to relief that is plausible, the plaintiff must plead factual content that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937,

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standing is challenged on a factual basis, the plaintiff must demonstrate that standing exists by a preponderance of the evidence.") (emphasis in original) (internal punctuation omitted).

[3] Because the Court finds that Plaintiff has standing to pursue his claims, it does not independently evaluate whether Plaintiff has standing to pursue his ADA claims on the basis that he is a "tester."

[4] The Supreme Court explicitly rejected its earlier formulation for the Rule 12(b)(6) pleading standard: "'[T]he accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Twombly, 127 S. Ct. at 1968 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The Court decided that "this famous observation has earned its retirement." Id. at 1969.

1949 (2009). "Plausibility" requires more than a "sheer possibility that a defendant has acted unlawfully," and a complaint that alleges facts that are "merely consistent with" liability "stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. (citing Twombly, 550 U.S. at 557).[5]

To prevail under Title III of the ADA, a plaintiff generally must establish (1) that he is an individual with a disability; (2) that the defendant is a place of public accommodation; and (3) that the defendant denied him full and equal enjoyment of the goods, services, facilities, or privileges offered by the defendant; (4) on the basis of his disability. See Schiavo v. Schiavo, 403 F.3d 1289, 1299 (11th Cir. 2005). Taking the allegations of the Amended Complaint as true, the court is satisfied that Plaintiff has adequately stated a claim for relief. Plaintiff has provided sufficient allegations to establish that Plaintiff is disabled within the meaning of the ADA. Plaintiff's allegations also adequately establish that the Property is a place of public accommodation. The Amended Complaint adequately alleges that Defendant denied Plaintiff, on the basis of his disability, full and equal enjoyment of their goods, services, facilities, or privileges by failing to remove

[5] Federal Rule of Civil Procedure 8(a)(2) requires the plaintiff to state "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In Twombly, the Supreme Court recognized the liberal minimal standards imposed by Federal Rule 8(a)(2) but also acknowledged that "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." Twombly, 127 S. Ct. at 1965.

architectural barriers to accessibility where such removal was readily achievable or to make the Property readily accessible and usable to him. See Shotz, 256 F.3d at 1080 (finding in Title II ADA action that plaintiff need not allege complete inability to enjoy service, program, or activity but rather must only allege that the service, program, or activity was not "readily accessible"). Plaintiff's allegations provide fair notice to Defendant of the claims asserted against it and the grounds on which those claims rest. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512-13 (2002). Plaintiff's Amended Complaint contains allegations which, if established by proof, could entitle Plaintiff to relief. Scheuer v. Rhodes, 416 U.S. 232, 236-37 (1974) (abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982)). Insofar as Defendant seeks dismissal of the Amended Complaint for failure to state a claim, the Motion is denied.

C. Limiting Lawsuit to Claims Asserted In the Complaint

Finally, Defendant argues, "in the event that the Court determines Plaintiff has standing and that the First Amended Complaint sufficient states a claim upon which relief can be granted, Plaintiff should be limited to the specific claims in the Complaint and only those related to his disability." (Mot. 18-19.) The Court agrees. "Plaintiffs do not have standing to complain about alleged barriers which they were unaware of at the filing of their complaint." Brother v. CPL

Investments, Inc., 317 F.Supp.2d 1358, 1368 (S.D.Fla. 2004) (citing Access Now, Inc. v. South Florida Stadium Corp., 161 F.Supp.2d 1357, 1365-66 (S.D. Fla. 2001)). Moreover, "[p]laintiffs do not have standing to complain about alleged barriers which are not related to their respective disabilities." Id. As one court stated, "Plaintiff's entry into [a property] does not automatically confer upon him a presumption that he was injured by any and all architectural barriers therein; his entitlement to relief depends on his showing that he was in fact injured, or subject to discrimination, as a result of the alleged violations." Access Now, Inc. v. South Florida Stadium Corp., 161 F.Supp.2d at 1365. Plaintiff's claim shall be limited to those barriers identified in the Complaint which he alleges caused him a specific injury.[6]

[6] Plaintiff did not respond to Defendant's argument on this issue, and the Court also finds Plaintiff's request to inspect the facility to determine all areas of non-compliance abandoned. See, e.g., Wilkerson v. Grinnell Corp., 270 F.3d 1314, 1322 (11th Cir. 2001) (finding claim abandoned when argument not presented in initial response to motion for summary judgment); Bute v. Schuller Int'l, Inc., 998 F. Supp. 1473, 1477 (N.D. Ga. 1998) (finding unaddressed claim abandoned).

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that DDRTC Douglasville Pavilion, L.L.C.'s Motion to Dismiss [11] is **DENIED**.

SO ORDERED this 19th day of November, 2010.

WILLIAM S. DUFFEY, JR.
UNITED STATES DISTRICT JUDGE