UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ELEANOR SMITH, et al.,

Plaintiffs,

vs. **Case No. 8:07-CV-333-T-27TBM**

LOWRY PARK ZOOLOGICAL SOCIETY OF TAMPA, INC., et al.,

Defendants.
_____/

ORDER

BEFORE THE COURT is Plaintiffs' Dispositive Motion for Summary Judgment or in the Alternative Motion for Partial Summary Judgment (Dkt. 37) and Defendant, Lowry Park Zoological Society of Tampa, Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Standing or in the Alternative Motion for Summary Judgment (Dkt. 41). Defendant City of Tampa has joined Defendant Lowry Park's motion. (Dkt. 46). Upon consideration, both motions are GRANTED in part and DENIED in part.

Background

Plaintiff Travis Smith suffered a stem injury which left him confined to a wheelchair. (Eleanor Smith Depo. 4:19). Travis' brother Donald accompanied Travis to the Lowry Park Zoo (hereinafter "the Zoo") on two occasions, once at the end of 2006 and once in March 2007. (Donald Smith Depo. 5:16-6:4; 8:17-9:3). In February 2007, subsequent to Travis' first visit to the Zoo, Plaintiffs filed their lawsuit against the Zoo, alleging violations of Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12181, *et seq*. (Dkt. 1). In May 2007, Plaintiffs amended their

complaint to add the City of Tampa as a defendant, alleging that the City violated Title II of the ADA. Plaintiffs seek injunctive and declaratory relief. (Dkt. 9).

Standard

Summary judgment is proper if following discovery, the pleadings, depositions, answers to interrogatories, affidavits and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56. "An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case." *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004) (internal citations omitted). "An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Id.* at 1260. All the evidence and factual inferences reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1280 (11th Cir. 2004).

Once a party properly makes a summary judgment motion by demonstrating the absence of a genuine issue of material fact, whether or not accompanied by affidavits, the nonmoving party must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories and admissions on file, and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 323-24. Plaintiff's evidence must be significantly probative to support the claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The Court will not weigh the evidence or make findings of fact. *Anderson*, 477 U.S. at 249; *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003). Rather, the Court's role is limited to deciding whether there is sufficient evidence upon which a reasonable juror could find for the non-moving party. *Id.*

Discussion

Plaintiffs bring their claims against the Zoo pursuant to Title III of the ADA, which provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Plaintiffs bring their claims against the City of Tampa pursuant to Title II of the ADA, which provides:

> 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 the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Defendants do not dispute that Travis Smith has a disability within the meaning of the ADA or that the Zoo is a place of public accommodation. (Dkt. 41, pp.2-3, Dkt. 51, p. 5). Defendants also do not argue that the City of Tampa, which owns the property where the Zoo is located, is not a public entity.

Plaintiffs' expert, Michael Clark, conducted an inspection of the Zoo on December 13, 2007 and submitted a report identifying 174 architectural barriers present at the Zoo. (Dkt. 38-7). Defendants' expert, Jack Humburg, also conducted an inspection and submitted a report. (Dkt. 38-8). Plaintiffs contend that "[a] comparison of these two reports demonstrate that both Plaintiff and Defense experts agree on 134 of the 174 issues delineated in Clark's report -- 77% agreement on the issues." (Dkt. 37, p. 5). Defendants do not dispute that Zoo is not ADA compliant, but contend that Plaintiffs lack standing to sue and that their claims are moot. Defendants also contend that Plaintiffs have failed to demonstrate that removal of alleged barriers at the Zoo is readily achievable, a required element in a case alleging discrimination due to an architectural barrier. *Access Now, Inc. v. S. Fla. Stadium Corp.*, 161 F. Supp. 2d 1357, 1363 (S.D. Fla. 2001).

Standing

To have standing under Article III, a plaintiff must show that (1) he has suffered an injury-in-fact, (2) there is a causal connection between the injury-in-fact and the challenged action of the defendant, and (3) that the injury will be redressed by a favorable decision. *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001). In addition, to seek injunctive relief, a plaintiff must allege "a real and immediate - as opposed to a merely conjectural or hypothetical - threat of *futire* injury." *Id.* (quoting *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1284 (11th Cir. 2001).[1] Whether a plaintiff has standing to sue is determined as of the date the lawsuit is commenced. *E.g.*, *Resnick v, Magical Cruise Co., Ltd.*, 148 F. Supp. 2d 1298, 1301 (M.D. Fla. 2001). Defendants argue that Plaintiffs have failed to demonstrate that they suffered an injury-in-fact because, at the time the complaint was filed, they lacked actual knowledge of alleged barriers at the Zoo.

A plaintiff does not have to encounter every barrier in order to have standing to sue, so long as the plaintiff has actual knowledge of each barrier. *S. Fla. Stadium Corp.*, 161 F. Supp. 2d at 1365. A plaintiff may have actual knowledge by either encountering the barrier, personally observing the barrier, or by expert findings prior to the complaint being filed. *Resnick*, 148 F. Supp. 2d at 1302 (citing *Parr v. L&& Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1081 (D. Haw. 2000)).

In this case, the Complaint identifies 22 alleged violations of the ADA:

A. Insufficient number, placement, sizing of disabled parking spaces

B. Improper disabled parking signage

C. Improper accessible route from parking to entry

---

[1]Defendants do not argue that Plaintiffs have failed to allege a threat of future injury for the purposes of establishing standing. It is noted that Plaintiffs have adequately established a threat of future injury given their proximity to the Zoo and stated intention to return. (Donald Smith Depo. 76:19-22). *Connors v. W. Orange Healtchcare Dist.*, No. 605CV647ORL31KRS, 2005 WL 1944593, at *7 (M.D. Fla. Aug. 15, 2005); *cf. Access 4 All v. Oak Spring, Inc.*, No. 504CV75ORLGRJ, 2005 WL 1212663, at *5 (M.D. Fla. May 20, 2005).

D. Improper ramp slopes throughout the facility

E. Improper hand rails near ramps throughout the facility

F. Lack of level landings in front of entrance doors throughout the facility

G. Improper door opening force on doors throughout the facility

H. Designated accessible restroom facilities are not on an accessible route

I. Designated accessible drinking fountains lack sufficient knee clearance

J. Food vendors throughout the facility lack accessible seating and tables

K. Food vendors throughout the facility have inaccessible checkout/payment counters

L. Food vendors throughout the facility are not along an accessible route

M. The photo booths throughout the facility have a step up but fail to provide a booth for wheelchair access

N. Food vendors throughout the facility provide self service condiments and napkins which are inaccessible due to excessive height

O. The gift shops throughout the facility have excessive counter heights

P. The gift shops throughout the facility lack accessible entrances

Q. There are interactive exhibits and rides throughout the facility which are not accessible and cannot be enjoyed by a patron in a wheelchair

R. Designated accessible restroom facilities lack compliance grab bars

S. Designated accessible restroom facilities lack clear floor space under the sinks and use faucets which cannot be easily operated

T. Designated accessible restroom facilities have stalls lacking adequate clear floor space

U. Designated accessible restroom facilities provide amenities outside proper reach ranges

V. Paths of travel throughout the facility are not accessible due to excessive slopes and cross-slopes and improper ramps which lack compliant handrails

(Dkt. 9, ¶¶ 24, 32).

Defendants contend that Donald Smith's testimony when questioned about these alleged barriers is insufficient to establish actual knowledge.[2] While Donald Smith could not testify regarding the technical requirements of the ADA and could not recall the intricacies of the design of the facility, his testimony clearly reflects that he experienced difficulty navigating the Zoo with his disabled brother. The fact that he could not recall every detail of every difficulty he experienced throughout a facility as large as the Zoo does not compromise his standing.

Defendants' argument that Donald Smith lacks associational standing is also rejected. The ADA and regulations confer an individual right of action upon a companion of a disabled person who is discriminated against based on his relationship or association with a disabled individual. 42 U.S.C. § 12182(b)(1)(E); 28 C.F.R. § 35.130(g); *see also Johanson v. Huizenga Holdings, Inc.*, 963 F.Supp. 1175, 1176 (S.D. Fla. 1997); *Tugg v. Towey*, 864 F.Supp. 1201, 1208 (S.D. Fla. 1994).[3]

---

[2]The record does not contain testimony of Travis Smith, as the parties have stipulated that he will not testify at trial. (Dkt. 42-4).

[3]42 U.S.C. § 12182(b)(1)(E) provides:

> It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

28 C.F.R. § 35.130(g) provides:

A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

Though a close question, Donald Smith has presented evidence that he was subjected to discrimination sufficient to confer standing. (Donald Smith Depo.)[4]

Plaintiffs' expert report, submitted by Michael Clark, identities 174 specific areas within the Zoo which he contends are not ADA compliant. (Dkt. 38-7). Clark conducted his inspection in December 2007, ten months after the lawsuit was commenced. (Clark Aff. ¶ 8). The majority of the violations identified in Clark's report are encompassed by the alleged barriers identified in the complaint; however, a number of them are outside the scope of the barriers complained of by Plaintiffs. While actual knowledge can be obtained by learning of an expert's findings, only actual knowledge obtained prior to the commencement of the lawsuit can be considered for the purposes of establishing standing. *S. Fla. Stadium Corp.*, 161 F. Supp. 2d at 1366; *Fox v. Morris Jupiter Assocs.*, No. 05-80689-CIV, 2001 WL 2819522, at *6 (S.D. Fla. Sept. 25, 2007). Accordingly, Plaintiffs do not have standing to complain of barriers identified in the expert report that they neither encountered nor personally observed. The barriers which Plaintiffs lack standing to complain of include Items 8, 13, 16, 30, 40, 42, 43, 44, 45, 89, 91, 92, 97, 111, 112, 113, 114, 122, 123, 124, 125, 126, 127, 128, 129, 130, 135 and 174 in Clark's report.[5] (Dkt. 38-7). In addition, Plaintiffs' standing is limited only to barriers affecting Travis Smith's disability. *E.g., Brother v. CPL Investments, Inc.*, 317 F. Supp. 2d 1358, 1368 (S.D. Fla. 2004). While the barriers identified in Items 11, 41, 45, 46, 89, 91, 129 and 135 may constitute ADA violations, because they do not affect a person with Travis Smith's disability, limited mobility and confinement to a wheelchair, Plaintiffs lack standing to sue for those alleged violations.

---

[4]Defendants do not separately argue that Eleanor Smith lacks associational standing.

[5]Several of the enumerated items include alleged violations in the women's restrooms. Presumably, Travis and Donald Smith did not encounter or personally observe barriers in the women's restrooms. The Court will not assume that the men's and women's restrooms contain identical barriers. *Brother*, 317 F. Supp. 2d at 1368.

Accordingly, Defendants are entitled to partial summary judgment as to the violations identified in Items 8, 11, 13, 16, 20, 40, 41, 42, 43, 44, 45, 46, 89, 91, 92, 97, 111, 112, 113, 114, 122, 123, 124, 125, 126, 127, 128, 129, 130, 135 and 174 of Clark's report based on Plaintiffs' lack of standing.

Mootness

Defendants argue that Plaintiffs' claims are rendered moot by virtue of the fact that significant modifications have been made which address alleged barriers to access at the Zoo. (Dkt. 43, p.8).

> It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. If it did, the courts would be compelled to leave the defendant free to return to his old ways. In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is *stringent:* A case *might* become moot if subsequent events make it *absolutely clear* that the allegedly wrongful behavior *could not reasonably be expected to recur.*

Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1183-84 (11th Cir. 2007) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). The party asserting mootness carries a heavy burden of persuasion. *Friends of the Earth, Inc.*, 528 U.S. at 189.

In this case, it is undisputed that the Zoo has made substantial modifications to bring the facility into compliance with the ADA, modifications which the Zoo admits are a direct result of Plaintiffs' lawsuit. (Hennig Depo. 6:15-24). However, it is also undisputed that, as of August 2008, much work remained to be completed and solutions remained to be found in order to bring the Zoo into ADA compliance. In addition, there are several areas for which the Zoo has taken the position that no modifications are needed.[6] Accordingly, Defendants' argument that "there is no relief left for

[6]Hennig Depo. 12:5-16, 18:11-19, 18:20-19:9; 19:21-20:5, 22:15-25, 28:14-19:2, 29:3-16; 32:1-3; 32:18-33:4; 33:13-34:3; 35: 8-11; 36:23-37:18; 41:22-42:4; 43:15-24; 45:12-19; 46:19-47:3; 47:11-14; 50:10-22; 51:3-8; 52:19-21; 53:24-54:10; 55:23-56:5; 61:10-25; 64:9-65:2; 66:9-67:20; 68:19-69:4; 70:13-71:1; 72:16-73:1; 73:20-25; 74:20-75:13; 77:20-78:4; 80:13-81:1; 84:11-85:23.

the Court to grant by way of injunction" is rejected.

Moreover, the Zoo's assertion that it intends to complete the modifications and that it does not intend to remove the improvements that have been made does not render the case moot. "A defendant's assertion that it has no intention of reinstating the challenged practice 'does not suffice to make a case moot' . . . ." *Sheely*, 505 F.3d at 1184 (citations omitted). Factors relevant to whether a case is mooted by a defendant's voluntary cessation include: "(1) whether the challenged conduct was isolated or unintentional, (2) whether the defendant's cessation of the offending conduct was motivated by a change of heart or timed to anticipate suit, and (3) whether, in ceasing the conduct, the defendant has acknowledged liability." *Id.*

In this case, it cannot be said that the challenged conduct was isolated. The record reflects that architectural barriers to access were pervasive throughout the Zoo. Indeed, Defendants' own expert, Jack Humburg, recommended that 75 modifications be made throughout the facility in order to remove barriers under the ADA. (Dkt 38-8). Moreover, the evidence establishes that the Zoo failed to provide training, beyond general customer training, to its employees regarding the requirements of the ADA. (Larsen Depo. 14:9-15:22; 36:8-23; 111:7-112:14).

As to the motivation for the Zoo's modifications, it is undisputed that the modifications began after, and as a direct consequence of, the filing of Plaintiffs' lawsuit. (Larsen Depo. 6:9-7:2). The timing of and motivation for the Zoo's modifications militate against a finding of mootness. *Sheely*, 505 F.3d at1186. Further, Defendants have not, in ceasing the conduct by making modifications to remove barriers, acknowledged liability. Both defendants deny Plaintiffs' allegations that they violated the ADA. (Dkts. 11, 15). Moreover, far from acknowledging liability, Defendants contend that Plaintiffs have not met their burden of proof to establish that removal of the alleged barriers are readily achievable, despite the fact that the Zoo has made modifications to address many of Plaintiffs'

allegations. (Dkt. 43). Accordingly, Defendants are not entitled to dismissal on mootness grounds.

Achievability

In an ADA case brought pursuant to Title II or Title III of the ADA, the plaintiff bears the initial burden of production to show that an architectural barrier exists and that the proposed method of removal of the barrier is readily achievable. *Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269, 1273 (11th Cir. 2006). To meet their burden, Plaintiffs must present sufficient evidence regarding "the proposed solution to a barrier, the difficulty of accomplishing it, the cost implementation, and the economic operation of the facility." *Id.* at 1274. Defendants argue that Plaintiffs are not entitled to summary judgment because they have not demonstrated that removal of alleged barriers is readily achievable. (Dkt. 43, pp. 2-7).

Plaintiffs submit the affidavit and inspection report of ADA expert Michael Clark in support of their motion for summary judgment. (Dkts. 38-5; 38-7). Clark avers that he "has significant experience with the rehabilitation of premises for the purpose of ADA compliance, including all aspects of the ADAAG and the local practices and costs associated with such projects, particularly in Florida." (Clark Aff. ¶ 7). Defendants do not challenge Clark's qualifications as an expert in the area of ADA compliance. For each of the 174 barriers found in Clark's inspection, Clark includes in his report a recommendation as to a method and cost estimate for removal of each barrier. (Dkt. 38-7).

In addition, Plaintiffs submit the Affidavit of Lewis D. Chazan, MBA, who proffers his expert opinion as to the financial feasibility of removal of barriers. (Dkt. 38-11). Chazan's financial feasibility report, which considers the Zoo's overall financial resources and the effect of removal on the Zoo's expenses and resources, concludes that "the combined entities do have sufficient financial resources available to absorb the costs related to this project without causing undue financial

burden." (Dkt. 38-13). Defendants do not challenge Chazan's expert opinion. Plaintiffs have presented sufficient evidence that removal of alleged barriers is readily achievable. *Atlanta Landmarks, Inc.*, 452 F.3d at 1274.

If, as here, plaintiff meets the initial burden of production, the ultimate burden shifts to the defendant to show that barrier removal is not readily achievable. *Id.* at 1273. Defendants, however, do not argue in their opposition to Plaintiffs' motion for summary judgment that removal of alleged barriers is not readily achievable. To the contrary, the Zoo claims it has already modified or removed substantially all alleged barriers to access and that it has spent approximately $120,000 to do so. (Dkt. 43, pp. 7-8; Dkt. 44-2, pp. 108-112). As discussed above, the Zoo contends that its efforts to bring the facility into ADA compliance are ongoing. The fact that the Zoo has and continues to remove alleged barriers belies a conclusion that removal is not readily achievable.

During her deposition, Elizabeth Hennig, the Zoo's director of administration, testified regarding various barriers which the Zoo intends to remove but for which it has not yet found a feasible solution. The barriers identified by Plaintiffs' expert, Michael Clark, to which a feasible solution has not been agreed upon include Items 12, 22, 25, 26, 27, 50, 51, 52, 83, 84, 85, 86, 87, 88, 95, 96, 101, 102, 157, 158 and 167. Therefore, an issue of disputed fact remains as to whether removal of these barriers is readily achievable, and summary judgment cannot be granted to Plaintiffs as to Items 12, 22, 25, 26, 27, 50, 51, 52, 83, 84, 85, 86, 87, 88, 95, 96, 101, 102, 157, 158 and 167 in Clark's report. (Dkt. 38-7). In addition, there are several areas identified by Clark, the Garden Grill (Item 14), Turtle Pond (Items 150, 151, 153 and 154) and Bengal Exhibit (Item 156), which Hennig testified that the Zoo believes to be in compliance and does not intend to modify. (Hennig Depo. 22:15-23:6; 64:3-65:16). Accordingly, as it is disputed whether an architectural barrier exists in these areas, the question of readible achievability is not reached and summary

judgment may not be granted as to Items 14, 150, 151, 153, 154, 156. *Atlanta Landmarks, Inc.*, 452 F.3d at 1273.

Partial summary judgment is granted to Plaintiffs as to Items 1-10, 15, 17-19, 21, 23, 24, 28-39, 47-49, 53-82, 90, 93-94, 98-100, 103-109, 110, 115-121, 131-134, 136-149, 152, 155, 159-166 and 168-173 in Michael Clark's report. (Dkt. 38-7).

Accordingly, it is **ORDERED AND ADJUDGED** that:

1) Plaintiffs' Dispositive Motion for Summary Judgment or in the Alternative Motion for Partial Summary Judgment (Dkt. 37) is **GRANTED in part** and **DENIED in part**.

2) Defendant, Lowry Park Zoological Society of Tampa, Inc.'s Motion to Dismiss Plaintiffs' First Amended Complaint for Lack of Standing or in the Alternative Motion for Summary Judgment (Dkt. 41) is **GRANTED in part** and **DENIED in part**.

3) Partial summary judgment is granted to Defendants as to the alleged violations contained in Items 8, 11, 13, 16, 20, 30, 40, 41, 42, 43, 44, 45, 46, 59, 67, 68, 89, 91, 92, 94, 97, 104, 109, 111, 112, 113, 114, 122, 123, 124, 125, 126, 127, 128, 129, 130, 135, 155 and 174 of Michael Clark's report. (Dkt. 38-7).

4) Partial summary judgment is granted to Plaintiffs as to (Dkt. 38-7) Items 1-10, 15, 17-19, 21, 23, 24, 28-39, 47-49, 53-82, 90, 93-94, 98-100, 103-109, 110, 115-121, 131-134, 136-149, 152, 155, 159-166 and 168-173 in Michael Clark's report. (Dkt. 38-7).

DONE AND ORDERED in chambers this 14th day of January, 2009.

JAMES D. WHITTEMORE
United States District Judge

Copies to:
Counsel of Record