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

Gary Gaylor, *an individual*,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION NO.
North Springs Associates, LLLP, *a Georgia Limited Partnership*,	:	1:13-cv-01551-WCO
Defendant.	:	

ORDER

This matter is before the court on Plaintiff's motion for summary judgment [24].

I. Background

A. Procedural History

Plaintiff, Gary Gaylor, filed suit against Defendant, North Springs Associates, LLLP, on May 7, 2013, seeking declaratory and injunctive relief pursuant to Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181, *et seq.* Plaintiff asserts that the Shopping Center owned by North Springs has certain "architectural barriers" that cause him serious difficulty in utilizing the services of the Shopping Center. Defendant filed a motion to dismiss for lack of subject matter jurisdiction, contending that Plaintiff did not have standing to raise his Title III claims because he had no intent to return to the Shopping

Center. In an order dated November 12, 2013, however, the court found that Plaintiff had sufficiently alleged standing. Plaintiff then filed the instant motion for summary judgment.[1]

B. Facts[2]

Defendant is the owner of the North Springs Shopping Center located at 7300 Roswell Road in Sandy Springs, Georgia. *See* PSMUF, ¶ 4. The Shopping Center was built in 1968. *See* Maslia Decl., ¶ 4. The Property is valued by the Fulton County Tax Assessor's Office at $5,000,000. *See* PSMUF, ¶ 6.[3]

In accordance with the ADA Accessibility Guidelines ("ADAAG") Plaintiff's Americans with Disabilities Act expert, Nicholas Heybeck, identified 74 architectural barriers at the North Springs Shopping Center. *See* PSMUF, ¶ 14; Heybeck Rep., Ex. B.

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[1]Because the court previously determined that Plaintiff had standing to raise his claim under the Americans with Disabilities Act and the parties raise no new information relating to standing in the instant motion for summary judgment, the court does not further address the issue. The court recognizes that Defendant maintains its objections on standing.

[2]The court notes that on January 13, 2014, in accordance with the court's Revised Case Instructions, Plaintiff submitted to chambers his motion to file under seal the report of his financial expert, Jennifer Forsyth, which contained material Defendant deemed to be confidential. Ms. Forsyth's expert report is Exhibit 10 to Plaintiff's motion for summary judgment. The expert report attaches Defendant's tax returns from 2010, 2011, and 2012. Shortly after Plaintiff filed his motion for summary judgment and submitted the motion to seal, the parties engaged in settlement discussions. After those discussions proved unsuccessful, Defendant filed its response to Plaintiff's motion for summary judgment on March 24, 2014. The court notes that in its response, Defendant filed unredacted versions of its relevant tax returns and referred in its brief to the financial figures derived from those tax returns. As such, the court finds that there is no longer any reason for Plaintiff's expert report to be filed under seal. For completeness of the record, the court DIRECTS Plaintiff to file on the docket an unredacted Exhibit 10.

[3]Defendant did not respond to Plaintiff's statement of material undisputed facts, and the court deems them admitted. *See* LR 56.1B(2)(a)(2).

Defendant does not dispute these are architectural barriers. Plaintiff groups these barriers into categories, and the court describes them here for the purposes of identification.

1. Parking

    a. Inadequate number of disabled use spaces (Barrier Nos. 1 and 5)
    b. Excessive long and cross slopes (Barrier Nos. 27, 29, 30, 34, 35, 36, 39, 63, and 64)

2. Ramps

    a. Lack of handrails (Barrier Nos. 11, 15, 20, 24, 43, 46, and 50)
    b. Excessive long slopes (Barrier Nos. 6, 10, 19, 23, 31, 37, 40, and 45)
    c. Excessive slopes on side (Barrier Nos. 7, 32, and 38)
    d. Lack of a level landing (Barrier Nos. 12, 26, and 42)
    e. Excessive cross slopes (Barrier Nos. 13 and 41)
    f. Projecting into vehicular traffic (Barrier No. 48)

3. Walking Routes

    a. Change in level (Barrier No. 2)
    b. Excessive cross slopes (Barrier No. 25)
    c. Disrepair (Barrier No. 33)

4. Tenant Entrances

    a. Uneven Surfaces (Barrier Nos. 4, 8, 18, and 44)
    b. Excessive Slopes (Barrier Nos. 17, 21, and 26)

5. Service Counters

    a. Excessive height (Barrier Nos. 9, 51, 54, 62, and 66)

6. Restrooms

a. Sink Pipes: Lack of insulation (Barrier Nos. 52 and 68)
b. Mirrors: Excessive height (Barrier Nos. 53, 57, and 71)
c. Grab Bars: Excessive height or missing (Barrier Nos. 59, 73, and 74)
d. Flush Control (Barrier No. 60)
e. Signage (Barrier Nos. 56 and 67)
f. Toilet (Barrier No. 58)
g. Water Closet (Barrier Nos. 69-70)
h. Water Fountain (Barrier No. 55)

See generally Heybeck Report.

In his expert report, Mr. Heybeck individually identified recommended corrections to (or removal of) the architectural barriers and an individual cost estimate to correct each violation. *See* Heybeck Rep. Ex. B. Mr. Heybeck reports the total cost to fix all 74 architectural barriers would be $137,395.15. *Id.* at 62.

Plaintiff's financial expert, Jennifer Forsyth, Director of Valuation for US Credit Flow at USB, testified that an expense of $137,395 would not cause Defendant an undue financial burden or have a significant negative impact on its operating earnings. *See* Forsyth Report. Ms. Forsyth determined that in 2012 Defendant had an operating income of $254,898 and in 2010 an operating income of $431,683. *Id.*, Ex. B. In the year ending 2010, Defendant distributed $368,586 and in 2012 $880,563. *Id.* She determined that the value of the asset of the Shopping Center was $2,900,000. *Id.*

Donald Goodman, manager of the North Springs Shopping Center, testified by declaration that he handles all maintenance for the shopping center, collects rent from the

tenants, provides financial analysis to the owners, and over the past three years has participated in discussions with prospective buyers/lessees, including Wal-Mart, Kroger, QT, Starbucks, and McDonalds. *See* Goodman Decl., ¶¶ 5-6. Mr. Goodman also prepared financial analysis and consulted with the owners in negotiations with A&P, the original anchor in the Shopping Center, to terminate its lease. *Id.*, ¶ 7. A&P demanded approximately $1,000,000 from Defendant to terminate the lease early so that Defendant could attempt to redevelop the property sooner.[4] *Id.* In order to terminate A&P's long term lease, which included three or four additional five-year lease extension options, Defendant agreed to give Big Lots a five year lease until December 31, 2015. *Id.*

Mr. Goodman has had discussions with QT and McDonalds about leasing a one acre out-parcel on the property. *Id.*, ¶ 8. He has also had discussions with an Atlanta-area hospital about constructing an outpatient center on another four acres of the property. *Id.*

Due to his role as manager, Mr. Goodman is familiar with the tenants of the Shopping Center. *Id.*, ¶ 9. There are 24 empty stores in the North Spring Shopping Center, including a theater that has been vacant for over five years. *Id.*, ¶ 12. There are five tenants in the

[4]Plaintiff objects that Mr. Goodman's testimony on the $1,000,000 demand is "hearsay." On summary judgment, the court may consider a matter of hearsay so long as it could be reduced to admissible evidence at trial. *See Mecuba v. Deboer*, 193 F.3d 1316 (11th Cir. 1999). Assuming arguendo that Mr. Goodman's statement as crafted is hearsay, the court notes that Mr. Goodman is available to testify and presumably could state that Defendant made a $1,000,000 payment to A&P. Plaintiff also appears to assert that Mr. Goodman would not have personal knowledge of this fact, but there is nothing in the record that would suggest that to be the case. Mr. Goodman testified that he prepared the financial analysis and consulted with the owners in their negotiations with A&P. This is sufficient foundation for his personal knowledge as to what took place in those negotiations.

Shopping Center: (1) Big Lots, (2) Nyonya Asian Cuisine, (3) Roswell Upholstery, (4) Prestige Dry Cleaners, and (5) a barber shop leasing a one-half space. A one-man personal trainer shop and an emissions testing outlet are also on the property. *Id.* There has been no "active leasing" of the Shopping Center for three years. *Id.*, ¶ 13. Almost all of the vacant locations have no HVAC units, and those with units are not functioning. *Id.*, ¶ 14. It would cost $170,000 to replace the HVAC units. *Id.*[5] All remaining tenants have leases that will terminate on December 15, 2015, at the latest. *Id.*, ¶ 15.[6]

Within the past five years, Defendant put a new roof on the Big Lots space and did re-striping and re-paving work in the parking lot. *See* Goodman Depo., at 17-18. Mr. Goodman views the Shopping Center as a "redevelopment opportunity" within the next two years when the leases expire. *Id.* at 35. On its tax returns, Defendant has estimated the worth of the property to be between $1,819,491 and $2,407,625. *See* Def.'s Exs. 20-22.

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[5]Plaintiff objects to Mr. Goodman's testimony that replacing the HVAC units in the Shopping Center would cost $170,000. Plaintiff contends that Mr. Goodman "lacks personal knowledge on this point and is not competent to testify as to the pricing of HVAC systems." *See* Docket Entry [29], at 27. The court disagrees. Again, Mr. Goodman manages the property and testified that he handles all maintenance for the shopping center, as well as providing financial analysis to the owners and discussions with prospective lessees. The court finds this is sufficient foundation for Mr. Goodman to be aware of the current state of repair of the HVAC units in the Shopping Center and knowledge of what it would take to get them up and running.

[6]Under the instructions of *Mecuba v. Deboer*, 193 F.3d 1316 (11th Cir. 1999), the court will consider Mr. Goodman's statement on summary judgment in spite of Plaintiff's contention that it violates the "Best Evidence Rule." There is nothing in the record to suggest that the actual leases would not be available for admission at trial.

C. Contentions

Plaintiff contends he is entitled to summary judgment because he is a disabled individual, there are numerous architectural barriers at the shopping center, and Defendant cannot show that making the changes necessary to remove these barriers is not "readily achievable."

Defendant responds that the Shopping Center is substantially vacant and the owners have stopped attempting to actively lease any space in the property. Defendant is waiting for the last large scale lease to expire in December 2015 before either undertaking redevelopment or sale of the property. Because of these circumstances, Defendant argues that removal of the architectural barriers would not be "readily achievable" at this time.

II. Discussion

Title III of the Americans with Disabilities Act prohibits discrimination by private entities in public accommodation. It 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). Title III incorporates the remedies available under Title II of the Civil Rights Act of 1964. 42 U.S.C. § 12188(a)(1). A court may order injunctive relief, including an order to make a facility "readily accessible." *Id.*, § 12188(a)(2).

Defendant admits that the North Springs Shopping Center is a place of public accommodation, Plaintiff is "disabled," and Plaintiff has identified 74 architectural barriers. The parties' dispute rests on whether removal of these barriers is "readily achievable."

Congress enacted the Americans with Disabilities Act on January 25, 1993. For facilities that existed prior to that date, the Americans with Disabilities Act defines discrimination to include a private entity's "failure to remove architectural barriers . . . where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv).[7] The Americans with Disabilities Act defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense." *Id.*, § 12181(9).

In *Gathright-Dietrich v. Atlanta Landmarks, Inc.*, 452 F.3d 1269 (11th Cir. 2006), the Eleventh Circuit illuminated this definition by reference to ten factors cited by Congress to be considered in "evaluating whether removal of a barrier is 'readily achievable,'" including:

> (1) nature and cost of the action; (2) overall financial resources of the facility or facilities involved; (3) number of persons employed at such facility; (4) effect on expenses and resources; (5) impact of such action upon the operation of the facility; (6) overall financial resources of the covered entity; (7) overall size of the business of the covered entity; (8) the number, type, and location of its facilities; (9) type and operation or operations of the covered entity, including composition, structure, and functions of the workforce of such

[7]The Act goes on to provide that where removal is not "readily achievable," failure of the private entity to make goods, services, and facilities "available through alternative methods if such methods are readily achievable" may be discriminatory. *Id.*, § 12182(b)(2)(A)(v). No party here has made arguments concerning such "alternative methods."

> entity; and (10) geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.

Id. at 1273.

In *Gathright-Dietrich*, the court also established a burden-shifting framework whereby the plaintiff has the initial burden of showing that (1) an architectural barrier exists and (2) that the proposed method of removing the barrier is "readily achievable." 452 F.3d at 1273-74. If the plaintiff satisfies this burden, "the defendant bears the ultimate burden of persuasion that barrier removal is not 'readily achievable.'" *Id.*[8]

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[8]In his reply brief, Plaintiff also appears to contend that because Defendant undertook some improvements to the parking lot and replaced the Big Lots roof, those areas would be covered by the "alterations" portions of the Americans with Disabilities Act and not the provisions covering places that were in existence at the time the Act was passed. "Alterations" are defined in the regulations as "a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the building or facility or any part thereof." 28 C.F.R. § 36.402. With respect to such alterations, the Act provides that discrimination is a "failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs." 42 U.S.C. § 12183(a)(2). Plaintiff contends that Barrier Nos. 1-3, 5-7, 27-39, 48-49, and 63-64 (parking lot barriers and curb ramps serving parking lot) are governed by the "alterations" standard because Defendant did "paving work" and "re-striping" of the parking lot in the past five years. Plaintiff further argues that Barrier Nos. 55-61 (relating to interior Big Lots barriers) are "alterations" due to the new roof on the Big Lots building.

The court will not consider an argument raised for the first time in a reply brief. *See, e.g.*, *United States v. Whitesell*, 314 F.3d 1251, 1256 (11th Cir. 2002) (court need not address issue raised for first time in reply brief). There is precious little in the record concerning what type of paving and re-striping Defendant did and in what portions of the Shopping Center. Furthermore, the fact that Defendant installed a new roof on the Big Lots store does not mean any alterations were made to the interior of the Big Lots. In addition to the fact that Plaintiff did not raise this argument in his motion for summary judgment, the court is not able to make any determination about these "alterations" and their impact on the architectural barriers identified by Plaintiff without a more detailed factual record.

Defendant has admitted the existence of the architectural barriers. Furthermore, the court finds that through the detailed report of Mr. Heybeck, Plaintiff has presented "sufficient evidence so that a defendant can evaluate the proposed solution to a barrier, the difficulty of accomplishing it, the cost implementation, and the economic operation of the facility." *Id.* at 1274. Thus, the court finds that Plaintiff has met his burden of production, and the burden of persuasion is now on Defendant to show that the removal of the barriers is not "readily achievable."

The parties have not cited any case discussing the application of the "readily achievable" factors to a situation such as the one found here, and the court has not located any. It seems clear that the goal of the ten factors is to make sure that the greatest good for the greatest number of disabled individuals is achieved in the most economically responsible manner. In addressing each factor individually, the court notes that the cost of the remedial action determined by Plaintiff's expert here ($137,395) at first glance might not appear to be overwhelming but does represent more than 54% of the business's 2012 net income of $254,898. Furthermore, it is undisputed that many of the un-leased spaces in the Shopping Center have no operational HVAC, and those repairs – costing approximately $170,000 – would have to be made before any additional leasing could take place. Defendant has not actively attempted to lease space in the Shopping Center for the past three years.[9] However,

[9]Plaintiff attempts to dispute this point because Mr. Goodman did not mention it in his deposition. However, Mr. Goodman's declaration speaks to this issue. *See* Goodman Decl., ¶ 13. The fact that there is a lease listing for the property is not evidence that Defendant has been actively seeking tenants. Mr. Goodman's testimony that the business is not actively seeking tenants is undisputed.

while the net income of the business has declined since 2010, it is also true that the business issued distributions of $368,586 in 2010, $192,967, in 2011, and $880,563 in 2012.

Defendant has not presented any information that remedial action would have an impact on the operation of the Shopping Center, such as it is at 70% vacancy rate.[10] The fact that only five businesses remain at the shopping center puts the number of persons employed and the overall size of the business, as well as the number, type, and location of its facilities, at a low value. The low occupancy of the Shopping Center and the fact that all of the remaining few leases expire at the end of 2015 impact at least half of the factors the court must apply to determine whether removal of an architectural barrier is "readily achievable."[11]

Given these unique circumstances, the court takes particular notice of Plaintiff's admission that Barrier Nos. 1-7, 30-32, 34-39, 48-53, and 55-61 apply to "exterior areas

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[10]Plaintiff argues that the 70% vacancy rate is not accurate because it is not an assessment of the number of square feet leased but rather a straight five of 24 stores. Whether the court considers square footage or number of stores, there is no question that this shopping center is substantially vacant.

[11]Plaintiff complains that Defendant has not attempted to show "readily achievable" with respect to each individual architectural barrier. It is not clear that the law requires such. Plaintiff cites to *Harty v. Mal-Motels, Inc.*, Civil Action No. 6:10-CV-1333, 2012 WL 2885991 (M.D. Fla. July 13, 2012), to support this proposition. *Harty* says only that the defendant failed to meet its ultimate burden of persuasion because it did "not address the feasiblity of accomplishing the smaller renovations listed by Plaintiff. Rather, it simply argues that the total cost of all of the renovations would well exceed $100,000.00 and that such a sum is not readily achievable. Defendant has failed to carry 'the ultimate burden of persuasion' that renovations listed by Plaintiff would cost $11,675.00 and are not 'readily achievable.'" *Id.* at *3. The court will not find on the basis of *Harty* alone that Defendant must address each individual barrier.

serving occupied buildings or building interiors which Defendant concedes are currently occupied." *See* Reply Brief, Docket Entry [29], at 18 n.6. Plaintiff's expert estimates that the cost of removing these architectural barriers would be $25,513.05. *Id.*

The court finds that the best method of achieving the remedial purposes of the Americans with Disabilities Act and the "readily achievable" removal of architectural barriers is to require Defendant to remove those barriers that directly impact current patrons of the Shopping Center. As such, the court finds that with respect to those barriers which apply to current tenants of the Shopping Center (Barrier Nos. 1-7, 30-32, 34-39, 48-53, and 55-61), Defendant has not carried its burden of showing that barrier removal is not "readily achievable," and the court GRANTS Plaintiff's motion for summary judgment as to those barriers only.

The court finds that given the vacancy of the majority of the Shopping Center, a question of fact remains as to whether removal of the remainder of the architectural barriers is "readily achievable." The court DENIES Plaintiff's motion for summary judgment as to the remaining barriers.

Title III of the Americans with Disabilities Act does not provide for monetary damages or a jury trial when the action is brought by a "person who is being subjected to discrimination." 42 U.S.C. § 12188 (adopting remedies of 42 U.S.C. § 2000a-3). Title III does provide for injunctive relief. Thus, the court ORDERS Defendant to remove architectural Barrier Nos. 1-7, 30-32, 34-39, 48-53, and 55-61 within 90 days from the date of entry of this order.

III. Conclusion

The court GRANTS IN PART AND DENIES IN PART Plaintiff's motion for summary judgment [24].

The parties are DIRECTED to file a pretrial order as to the remaining architectural barriers within 30 days of the date of entry of this order.

The court DIRECTS Plaintiff to file on the docket an unredacted Exhibit 10.

The court ORDERS Defendant to remove architectural Barrier Nos. 1-7, 30-32, 34-39, 48-53, and 55-61 within 90 days from the date of entry of this order.

IT IS SO ORDERED this 9th day of September, 2014.

s/*William C. O'Kelley*
WILLIAM C. O'KELLEY
SENIOR UNITED STATES DISTRICT JUDGE