UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

CHRISTOPHER BROWN,

Plaintiff,

-against-

ST. JOHN'S UNIVERSITY, et al.,

Defendants.

----------X
ST. JOHN'S UNIVERSITY,

Third-Party Plaintiff,

-against-

GCA SERVICES GROUP, INC., and
BUTLER ROGERS BASKETT,

Third-Party Defendants.

----------X
BUTLER ROGERS BASKETT,

Fourth-Party Plaintiff,

-against-

HM WHITE SITE ARCHITECTS, SKANSKA USA BUILDING, INC. and LANGAN ENGINEERING AND ENVIRONMENTAL SERVICES, INC.,

Fourth-Party Defendants.
----------X

08-CV-2218 (ARR)(VLP)

NOT FOR PRINT
OR ELECTRONIC
PUBLICATION

OPINION AND ORDER

ROSS, United States District Judge:

Plaintiff Christopher Brown commenced the instant action on June 2, 2008. Plaintiff's Second Amended Complaint, dated March 5, 2010, asserts four causes of action: violation of

Title III of the American with Disabilities Act ("ADA") against defendant St. John's University ("St. John's"), violation of New York Civil Rights laws by all defendants, negligence by all defendants, and violation of the Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 *et seq* ("Rehabilitation Act") by St. John's. Defendant St. John's moves to dismiss plaintiff's claims under the ADA and Rehabilitation Act, and moves for summary judgment on plaintiff's ADA claim. All defendants move to dismiss plaintiff's claim under New York Civil Rights Law § 40-c and § 40-d. For the following reasons, defendants' motions are granted in part and denied in part.

BACKGROUND

Plaintiff, Christopher Brown, suffers from Arthrogryposis, which causes him to be confined to a wheelchair. (Second Amended Compl. ("Compl.") ¶ 4, Dkt No. 130.) Plaintiff was a student at St. John's University between 1999 and 2003. (Compl. ¶ 24.) Plaintiff claims that he continues to regularly visit the University's Queens campus as an alumnus to use the library, attend various campus events and activities, and to see friends. (Compl. ¶¶ 12, 24.) Plaintiff states that on May 23, 2007, he visited St. John's to use the library and meet with friends. (Compl. ¶ 25.) Plaintiff claims that while travelling in his wheelchair between two buildings on the campus, he was forced to use the road because the sidewalk has an excessive slope and cross slope, and lacks accessible curb cuts on both sides. (Compl. ¶ 26.) He also claims that the accessibility of the sidewalks was further reduced by security vehicles parked on the sidewalk. (Compl. ¶ 26.) Plaintiff claims that while on the roadway, his wheelchair hit a severe crack in the asphalt and he fell to the ground. (Compl. ¶ 27.) Plaintiff states that he

suffered several cuts and bruises and severely injured his right wrist, requiring surgery to repair. (Compl. ¶ 28.)

Plaintiff further states that between May 1999 and the present, he has visited St. John's "hundreds of times," and during these visits has experienced and continues to experience serious difficulty accessing the campus' facilities, goods and services due to barriers at numerous campus locations, including inaccessible ramps, routes, parking, restrooms, entrances, counters, elevators, water fountains, offices, and seating. (Compl. ¶¶ 35-40.) Plaintiff claims that he intends to and will visit the campus in the near future, but fears that he will face the same barriers to access. (Compl. ¶ 39.)

A. St. John's University

According to the Mission Statement of St. John's University, last revised in March 2008,

> St. John's is a Catholic university, founded in 1870 in response to an invitation of the first Bishop of Brooklyn, John Loughlin, to provide the youth of the city with an intellectual and moral education. We embrace the Judeo-Christian ideals of respect for the rights of dignity of every person and each individual's responsibility for the world in which we live. We commit ourselves to create a climate patterned on the life and teaching of Jesus Christ as embodied in the traditions and practices of the Roman Catholic Church. Our community, which comprises members of many faiths, strives for an openness which is 'wholly directed to all that his true, all that deserves respect, all that is honest, pure, admirable, decent, virtuous, or worthy of praise" (Philippians 4:8). Thus, the university is a place where the Church reflects upon itself and the world as it engages in dialogue with other religious traditions.

(Mission Statement, Decl. of Edward O'Toole, Mar. 26, 2010, ("Toole Decl."), Ex. B.)

Additionally, the mission statement asserts that:

> St. John's is a Vincentian university, inspired by St. Vincent de Paul's compassion and zeal for service. We strive to provide excellent education for all people, especially those lacking economic, physical, or social advantages. . . . In the Vincentian tradition, we seek to foster a world view and to further efforts toward global harmony and development, by creating an atmosphere in which all may imbibe and embody the spirit of compassionate concern for others so characteristic of Vincent."

(Toole Decl., Ex. B.) Finally, the mission statement sets forth that St. John's is a "metropolitan university," which benefits from "New York City's cultural diversity, its intellectual and artistic resources, and the unique professional educational opportunities offered by New York . . . ." (Toole Decl., Ex. B.)

According the University's by-laws, the Board of Trustees of the University "shall consist of no fewer than five (5) nor more than thirty (30) members. At least one-third (1/3) of the Board shall be members of the Congregation of the Mission or Daughters of Charity."[1] (Toole Decl., Ex. C, at 1-1.) To fill vacancies on the Board, members of current Board nominate individuals who are voted on by the full Board. (Shea-Byrnes Dep., Toole Decl., Ex. E, at 51.) Neither the Archdiocese of Brooklyn nor Catholic leaders at the Vatican can hire and fire trustees or administration officials. (Shea-Byrnes Dep., Toole Decl., Ex. E, at 59-60.) The Board of Trustees can remove the President of the University and other administration officials (Shea-Byrnes Dep., Toole Decl., Ex. E, at 53.)

The President of the University "shall be a Priest or Brother of the Congregation of the Mission." (Toole Decl., Ex. C, at 2-1.) This position is currently held by Father Donald Harrington, CM. (Dep. of Dr. Pamela Shea-Byrnes, Toole Decl., Ex. E, at 29.) Additionally, the position of Executive Vice President for Mission and Branch Campuses "shall be a priest of the Congregation of the Mission . . . and shall be the principal advisor to the President on all matters relating to developing and supporting the Vincentian Mission of the University and for the Branch Campuses of the University." (Toole Decl., Ex. C, at 2-6.) No other positions are required to be held by Catholic or Vincentian individuals. (Shea-Byrnes Dep., Toole Decl., Ex. E, at 31.) While employees of the University can opt into programs such as the "Vincentian

[1] According to defendant, Congregation of the Mission ("CM") is the American form of what it means to be called a Vincentian priest, and the Daughters of Charity are "religious sisters that are part of the Vincentian family as well." (Dep. Of Dr. Pamela Shea-Byrnes, Toole Decl., Ex. E at 23, 27.)

Mission Orientation" and the "Vincentian Mission Certificate Program," there is no contractual requirement that staff or faculty participate. (Shea-Byrnes Dep., Toole Decl., Ex. E, at 26-27.) Other than employees responsible for coordinating religious services, no member of the faculty or staff is required to attend religious services. (Shea-Byrnes Dep., Toole Decl., Ex. E, at 32.) Adjunct faculty and full time faculty sign contracts stating that they will not speak in opposition to the Church's teaching. (Shea-Byrnes Dep., Toole Decl., Ex. E, at 32-33.)

Additionally, the bylaws call for a Board of Governors "to advise the Board of Trustees and the President on the plans, programs, and activities organized to raise funds from corporations, foundations, alumni and friends to support the student, faculty and academic programs at the University." (Toole Decl., Ex. C, at 1-7.) There is no requirement that the Board of Governors have any Catholic or Vincentian representation, nor is there a requirement that funds raised come from only from Catholic or Vincentian sources. (Shea-Byrnes Dep., Toole Decl., Ex. E, at 54-55, 63.)

In order to graduate, all undergraduate students must take three theology courses as part of the core curriculum, including Theology 1000C – currently called "Perspectives on Christianity, A Catholic Approach."[2] According to Dr. Pamela Shea-Byrnes, Vice President for University Ministry and University Events, currently forty-eight percent of the student body is Catholic. (Shea-Byrnes Dep., Toole Decl., Ex. E, at 35.) While the major moments of the academic year are marked with religious celebrations, such as mass, none of the religious events are mandatory for students, faculty or staff. (Shea-Byrnes Dep., Toole Decl., Ex. E, at 34-35.)

[2] In her deposition, Dr. Shea-Byrnes stated that the course was called "Catholic Christianity." (Shea-Byrnes Dep., Toole Decl., Ex. E, at 41.) The Course Bulletin calls the course "Catholic Perspectives on Christianity." (Pl.s' Response, Ex. C.) On St. John's College of Liberal Arts and Science' website, however, it is titled "Perspectives on Christianity, A Catholic Approach." See http://www.stjohns.edu/academics/core/sjc.stj, last visited June 17, 2010.

B. Procedural History

On June 2, 2008, plaintiff filed suit against St. John's University, asserting three claims: violation of Title III of the ADA, violation of New York Civil Rights Law, and negligence. (Dkt. No. 1.) On December 4, 2008, St. John's filed a third-party action for breach of contract and indemnification against its facilities management company GCA Services Group, Inc. ("GCA") and the architects hired for renovations and construction at its Taffner Field House and Carnesecca Arena, Butler Rogers Baskett Architects, P.C. ("BRB"). (Third Party Compl., Dkt. No. 11.) On March 27, 2009, BRB filed a fourth-party action against Langan Engineeering and Environmental Services, Inc. ("Langan Engineering"), Skanska USA Building, Inc. ("Skanska"), and HM White Site Architects ("White Site") seeking indemnity and contribution. (Fourth Party Compl., Dkt. No. 38.)

On July 16, 2009, plaintiff filed an amended complaint to add a direct cause of action against the third and fourth party defendants. (First Amended Compl., Dkt. No. 67.) Defendant Langan Engineering filed a motion to dismiss Count II of plaintiff's First Amended Complaint, which alleged violations of New York Civil Rights Law § 40-c and 40-d. All defendants joined in Langan Engineering's motion and presently seek dismissal of plaintiff's claim on the grounds that corporations are not liable under the state statute.

Following St. John's indication that it sought to move to dismiss plaintiff's ADA claim under the ADA's religious exemption, I ordered the parties to conduct expedited discovery before the Honorable Viktor Pohorelsky, United States Magistrate Judge, limited to the issue of whether St. John's University is exempt from the requirements of Title III of the ADA. (Nov. 24, 2009 Order, Dkt. No. 102.) While this discovery was underway, plaintiff again sought to amend his complaint to add a claim under the Rehabilitation Act against St. John's, which he filed on

March 5, 2010. (Dkt. No. 130.) Defendant St. John's now moves for summary judgment on plaintiff's ADA claim, and to dismiss plaintiff's Rehabilitation Act Claim.

DISCUSSION

II. Plaintiff's Standing Under the ADA and Rehabilitation Act

Defendant St. John's claims that plaintiff lacks standing to seek injunctive relief under the ADA and Rehabilitation Act as he has not been a student of the University since 2003 and has only speculated as to his intent to use the University's facilities as an alumnus. I construe defendant's motion as a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P 12(b)(1). Because standing is challenged on the basis of the pleadings, the court "accept[s] as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Fulton v. Goord, 591 F.3d 37, 41 (2d Cir. 2009) (citing W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP, 549 F.3d 100, 106 (2d Cir. 2008)).

Federal jurisdiction is limited by Article III, § 2, of the U.S. Constitution to actual cases and controversies. As a result, the plaintiff's standing to sue "is the threshold question in every federal case, determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498 (1975). To show Article III standing, a plaintiff has the burden of proving: (1) an "injury in fact," meaning "an invasion of a legally protected interest"; (2) "a causal connection between the injury and the conduct complained of"; and (3) that the injury likely will be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

An "injury in fact" is a harm that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Id. at 560 (internal citations omitted). "Past 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." Id. at 563 (quoting Los

Angeles v. Lyons, 461 U.S. at 102 (1983)). The Supreme Court in Lujan found that "'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent injury' that our cases require." Id. The plaintiff must show that he or she "sustained or is immediately in danger of sustaining some direct injury as the result of the challenged . . . conduct and [that] the injury or threat of injury [is] both real and immediate . . . ." City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983) (internal citations omitted).

Title III of the ADA prohibits discrimination in public accommodations and services operated by private entities. It states that, "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 . . . ." 42 U.S.C. § 12182(a). The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a). Because of the breadth of the provisions of these Acts, the Second Circuit has held that the ADA and Rehabilitation Act actions are not subject to any of the prudential limitations on standing that apply in other contexts, rather, that standing is defined as broadly as constitutionally permitted. See Fulton, 591 F.3d at 41.

In this case, plaintiff was a student at St. John's University between 1999 and 2003. (Compl. ¶ 24.) While no longer a student, plaintiff alleges that "[h]e continues to regularly visit the campus as an alumni to use the library, attend various campus events and activities, and to see friends." (Compl. ¶ 24.) In fact, plaintiff alleges he suffered an injury while visiting the

campus on May 23, 2007. (Compl. ¶ 25.) Defendant alleges that plaintiff's allegations are akin to the "some day" intentions expressed by the respondents in Lujan. I disagree, and find that plaintiff has shown a plausible intention to return to the University, and has thus shown sufficient injury in fact for standing purposes.

In Fulton v. Goord, the plaintiff, the wife of an inmate in New York State custody, suffered from Multiple Sclerosis and sought injunctive relief under the ADA and Rehabilitation Act requiring that the New York State Department of Correctional Services ("DOCS") "provide reasonable accommodation [for her] to participate in the [DOCS] visiting program," a program that permitted prisoners to be visited in prison by "friends and relatives." Fulton, 591 F.3d at 41-42. The defendants claimed that plaintiff had no "legally cognizable interest in having her incarcerated spouse transferred to a facility she can more readily visit." Id. The court found the defendants' reading of the plaintiff's claim to be too narrow, stating that she had sought "reasonable accommodation," and not necessarily a transfer. Id. With respect to plaintiff's standing, the court found that:

> The ADA and Rehabilitation Act generously confer the right to be free from disability-based discrimination by public entities and federally funded programs and, in so doing, confer standing for persons claiming such discrimination to enforce that right. Fulton asserts that she was discriminatorily denied a reasonable accommodation for her disability in violation of her rights under the two acts. This is plainly an injury in fact that is sufficient to form the basis for Article III standing.

Id. at 42. This language suggests a broad understanding of standing requirements in the ADA and Rehabilitation Act contexts. However, in Fulton, the defendants did not argue that plaintiff made an improper "some day" claim by failing to properly plead with specificity her intent to visit her husband. Thus, the court in Fulton did not specifically address the specificity needed to sufficiently plead a plausible intent to return to the defendant's facility in the ADA and Rehabilitation Act context.

Courts have found plaintiffs to lack standing in ADA and Rehabilitation Act suits against hospitals, where plaintiffs have not established that they "might return to the hospital in the near future," noting that "[o]ne visit to a hospital does not establish that" plaintiff will again seek treatment at the same facility. See Freydel v. New York Hosp., 2000 WL 10264 at * 3 (S.D.N.Y. 2000). Additionally, one court has found that a mentally and physically disabled plaintiff lacked standing to seek an injunction against a facility for homeless individuals with mental illness on the theory that "should he ever become homeless, he will be denied the opportunity to live" at the facility. Albanese v. Cuomo, 1998 WL 760339 at *2 (E.D.N.Y. 1998). Such cases fit neatly within the bar to "some day" allegations for standing purposes given that the plaintiffs in these cases could not show that they could even avail themselves of the defendants' services without some unknown future condition being fulfilled, such as contracting an illness requiring hospitalization or becoming homeless.

In Pickern v. Holiday Quality Foods Inc., 293 F.3d 1133, 1138 (9th Cir. 2002), however, the Ninth Circuit found an actual or imminent injury sufficient for standing where the plaintiff "visited Holiday's Paradise store in the past and states that he has actual knowledge of the barriers to access at that store. [Plaintiff] also states that he prefers to shop at Holiday markets and that he would stop at the Paradise market if it were accessible." Similarly, in Acces 4 All, Inc. v. Trump International, 458 F. Supp. 2d 160, 168 (S.D.N.Y. 2006), the Southern District of New York found statements in an affidavit sufficient to find that plaintiff had a "plausible intention" to return to the defendant's property and stay at defendant's hotel, and denied defendant's summary judgment motion based on the record before the court. At this motion to dismiss stage, I similarly find the statements in plaintiff's complaint plausible, and cannot find that plaintiff lacks standing based on the pleadings.

St. John's points to Filardi v. Loyola University, 1998 WL 111683 (N.D. Ill. 1998) in support of its challenge to plaintiff's standing. In Filardi, a disabled alumna of Loyola University sought injunctive relief that would require the University to make its facilities accessible to individuals with disabilities. The plaintiff sought such relief claiming that "she was injured by the defendant's failure to make its facilities accessible to her while she was a student there." Filardi, 1998 WL 11683 at * 3. When defendant moved to dismiss for lack of subject matter jurisdiction on standing grounds, plaintiff wrote in reply papers that "she intends to return to the University to take advantage of the services to alumni of the University." Id. The court, however, found that the plaintiff "has not alleged any facts to support this new claim of imminent and future injury and the court will not infer such an injury from the facts alleged in the complaint." Id. The court found plaintiff's claim to be mere speculation, and found plaintiff to lack standing under Lujan. Id. at *4.

In this case, however, plaintiff has not only stated an intention to return to St. John's as an alumnus to use its services and visit friends, but has pled that "he continues to regularly visit the campus" as an alumnus, and has pled that he has actually used the campus in his alumnus capacity, visiting the campus in 2007 to use the library and visit friends. (Compl. ¶ 24.) Thus, this case is thus distinguishable from Filardi, and I find that based on the pleadings, plaintiff has made a plausible showing of his intent to return to St. John's.

Accordingly, defendant St. John's motion with respect to plaintiff's standing to seek injunctive relief is denied.[3]

[3] Defendant St. John's also moves to dismiss plaintiff's Rehabilitation Act claim on the grounds that plaintiff is not a "qualified individual" under the statute. St. John's claim is addressed below in Part II.C.

III. Defendants' Motions to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)

A. Standard of Review

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss an action for failure to state a claim upon which relief may be granted. When considering a Rule 12(b)(6) motion, a court should construe the complaint liberally, "accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002). However, to "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A complaint must contain factual "content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949. A claim is plausible on its face if it demonstrates "more than a sheer possibility that a defendant has acted unlawfully." Id. The plaintiff's factual allegations need not be "detailed," but they must include more than "labels and conclusions" in order to "give the defendant fair notice of what ... the claim is and the grounds upon which it rests." Twombly, 550 U.S. at 555 (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80(1957) (internal quotation marks omitted).

B. Plaintiff's Claim Under New York Civil Rights Law § 40-c and § 40-d

Count II of plaintiff's complaint alleges that defendants are liable under N.Y. Civil Rights Law § 40-d ("Section 40-d") for a violation of N.Y. Civil Rights Law § 40-c ("Section 40-c"). New York Civil Rights Law § 40-c states in relevant part that "[n]o person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation or disability, . . . be subjected to any discrimination in his or her civil rights, or to any harassment . . . by any

other person or by any firm, corporation or institution . . . ." New York Civ. Rights Law § 40-c(2). Section 40-d, the enforcement provision, provides in relevant part:

> Any person who shall violate any of the provisions of the foregoing section . . . or who shall aid or incite the violation of any of said provisions shall for each and every violation thereof be liable to a penalty of not less than one hundred dollars nor more than five hundred dollars, to be recovered by the person aggrieved thereby in any court of competent jurisdiction in the county in which the defendant shall reside. In addition, any person who shall violate any of the provisions of the foregoing section shall be deemed guilty of a class A misdemeanor. At or before the commencement of any action under this section, notice thereof shall be served upon the attorney general.

New York Civ. Rights Law § 40-d. Defendants claim (1) that plaintiff has not sufficiently alleged "intentional" discrimination as required under New York Civil Rights Law §§ 40-c and 40-d, and (2) that Section 40-d does not provide a cause of action against corporations.

With respect to defendant's first argument, the plain language of Section 40-c states that "[n]o person shall, *because of* race, creed, color, national origin, sex, marital status, sexual orientation or disability, . . . *be subjected to* any discrimination . . . ." N.Y. Civ. Rights Law § 40-c(2) (emphasis added). The use of "because of" and "be subjected to" in the statute signals a requirement that the defendants' alleged conduct rise to the level of intentional or purposeful discrimination, not merely that defendants' conduct have the effect of discriminating against plaintiff.

When enforced criminally by the State of New York, Section 40-c "requires proof, not merely of the intent to harass, annoy or alarm, but also that defendant's acts were committed because of the complainant's race, creed, color, national origin, sex, marital status or disability, as perceived by defendant, and an *intent to discriminate* against complainant in the exercise of his civil rights." People v. Dieppa, 601 N.Y.S. 2d 786, 788 (N.Y. Sup. Ct. 1993) (emphasis added). The Southern District of New York has found a similar intent requirement in the civil context. In Beckles v. Bennet, 2008 WL 821827, at *18 (S.D.N.Y. 2008), the court granted

defendants summary judgment on plaintiff's Section 40-c claim that his civil rights were violated during his period of incarceration. The court found that "[t]he principal provision . . . N.Y. Civil Rights L. § 40-c . . . guarantees all persons within the state a right to 'equal protection,' but Plaintiff has failed to produce any probative evidence capable of sustaining a claim that he was treated differently than others similarly situated as a result of intentional or purposeful discrimination." (Beckles, 2008 WL 821827, at *18. (citing Daniel v. Safir, 175 F.Supp.2d 474, 481-82 (E.D.N.Y. 2001)).

Additionally, the substance of Section § 40-c was initially adopted as Article I, § 11 of the New York State Constitution, which provides:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

N.Y. Const. art. I, § 11. One New York court has found that the sponsor of this legislation, Assemblyman William T. Andrews, originally introduced what later became Section 40-c into the Penal Law in 1941 "in order to better implement the policy expressed in Article I, § 11 of the Constitution by authorizing 'punitive provisions.'" Dieppa, 601 N.Y.S. 2d at 788 (citing Andrews Mem. to Gov. Lehman in Supp. of A. 1277, print 2548, April 18, 1941). When the Penal Law of 1909 was superseded by the Penal Law of 1965, this statute was omitted and moved to its present location as Sections 40-c and 40-d of the Civil Rights Law, effective September 1, 1967. Id. at 788 n. 2. For claims under the New York State Equal Protection clause, New York courts require a showing of "purposeful discrimination." In People v. New York City Transit Authority, 59 N.Y.2d 343 (1983), the New York Court of Appeals upheld the dismissal of a claim filed by the Attorney-General on behalf of women bus drivers employed by the New York City Transit Authority alleging discrimination under the State's Equal Protection

Clause, finding that the complaint alleged no present intent to discriminate. The Court held that "[w]ith respect to the equal protection cause of action, purposeful discrimination is a necessary element . . . . The complaint contains no specific allegation of a present intent to discriminate and is, therefore, insufficient in that respect." New York City Transit Authority, 59 N.Y. 2d at 350 (internal citations omitted).

In the case at hand, plaintiff's complaint states:

> By planning, designing, constructing, operating, and maintaining architectural barriers and policies that discriminate against people with disabilities and through the other actions described herein, all named Defendants have, directly and/or indirectly, refused, withheld from, and denied to Plaintiff . . . because of his disability, the full and equal enjoyment of its facilities.

(Compl. ¶ 56.) This allegation does not provide the factual "content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949. Plaintiff has not made any allegations sufficient to show that defendants' conduct rises to the level of intentional or purposeful discrimination. Plaintiff states in his brief that "[i]t is self evident that when you design and/or construct features that are not accessible, this will inevitably have the effect of discrimination against disabled persons . . . ." (Pl.'s Mem. at 8.) However, plaintiff has not shown that an effects test is sufficient to state a claim under Sections 40-c and 40-d.

Defendants argue that plaintiff attempts to use alleged non-compliance with Title III of the ADA to meet the intent requirement of Sections 40-c and 40-d. (Def.'s Mem. at 11; Compl. ¶ 54-56.) I agree, and find that such an attempt does not satisfy the necessary pleading requirements for New York Civil Rights Law §§ 40-c and 40-d. Title III of the ADA does not have an intent requirement -- the terms of the statute state that certain acts or certain failures to act constitute discrimination. 42 U.S.C. § 12182(b)(2)(A); see also 42 U.S.C. § 12101(a)(5)

("The Congress finds that . . . individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the *discriminatory effects* of architectural, transportation, and communication barriers, overprotective rules and policies, *failure to make modifications* to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities . . . .") (emphasis added); Lentini v. California Center for the Arts, Escondido, 370 F.3d 837, 846-47 (9th Cir. 2004) ("It is undisputed that a plaintiff need not show intentional discrimination in order to make out a violation of the ADA.").

Accordingly, plaintiff's claim under the New York Civil Rights Law is dismissed as to all defendants.[4] Fed. R. Civ. P. 12(b)(6).

C. Plaintiff's Rehabilitation Act Claim

Plaintiff's Second Amended Complaint claims that defendant St. John's violated and continues to violate the Rehabilitation Act, 29 U.S.C. § 794, *et. seq*. The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a). To state a claim under the Rehabilitation Act, a plaintiff must allege: "(1) that he has a disability for purposes of the Rehabilitation Act; (2) that he was 'otherwise qualified' for the benefit that has been denied; (3) that he has been denied the benefits 'solely by reason' of his disability; and (4) that the benefit is part of a 'program or activity receiving Federal financial assistance.'" Doe v. Pfrommer, 148 F.3d 73, 82 (2d Cir. 1998) (citations omitted); see also Fulton v. Goord 591 F.3d 37, 43 (2d Cir. 2009). The

[4] Because plaintiff's claim is dismissed for failure to allege intentional or purposeful discrimination, I need not reach defendants' alternative argument that Sections 40-c and 40-d do not apply to corporations.

Rehabilitation Act parallels language of Title II of the ADA that provides that no qualified individual with a disability shall 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.[5] 42 U.S.C. § 12132; see also Rodriguez v. City of New York, 197 F.3d 611, 618 (2d Cir. 1999) ("Because Section 504 of the Rehabilitation Act and the ADA impose identical requirements, we consider these claims in tandem.") (citing Lincoln Cercpac v. Health & Hosps. Corp., 147 F.3d 165, 167 (2d Cir. 1998)). Defendant St. John's argues that plaintiff, as an alumnus of St. John's University, has not properly alleged that he is a "qualified individual" under the Rehabilitation Act.

A "qualified individual" under the Title II of the ADA is "an individual with a disability who, with or without reasonable modifications to rules, policies or practices . . . meets the essential eligibility requirements for . . . participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). Thus, to sufficiently state a claim under the Rehabilitation Act, plaintiff must show that he "meets the essential eligibility requirements" for participation in defendant's services. See Fulton, 591 F.3d at 43-44 ("With respect to whether Fulton is a qualified individual . . . , we find that she 'meets the essential eligibility requirements' for the program.") (citations omitted). In Fulton, the court found no policy that prevented the plaintiff from visiting her husband in a New York State correctional facility, and thus, plaintiff was a "qualified individual" under the visitation program. Id. at 43-44. Defendant St. John's points to no St. John's policy that would exclude plaintiff from the services he seeks to use, such as visiting the library and attending athletic and other alumni events. (Compl. ¶ 77.) Accordingly, I

[5] Title II of the ADA extends the anti-discrimination requirements of Section 504 of the Rehabilitation Act to all public entities, regardless of their use of federal funds, and provides, at a minimum, the same level of protection. See 28 C.F.R. Part 35, App. A at 477 ("Because title II of the ADA essentially extends the antidiscrimination prohibition embodied in section 504 to all actions of State and local governments, the standards adopted in this part are generally the same as those required under section 504 for federally assisted programs.").

find plaintiff's pleadings sufficient to allege that he is an "otherwise qualified individual" under the Rehabilitation Act, and defendant St. John's motion to dismiss as to this claim is denied.

IV. **Defendant St. John's Motion for Summary Judgment**

A. Summary Judgment Standard

A moving party is entitled to summary judgment if, "upon reviewing the evidence in the light most favorable to the non-movant, the court determines that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." Richardson v. Selsky, 5 F.3d 616, 621 (2d Cir. 1993); see Fed. R. Civ. P. 56(c). An issue of fact is genuine when "a reasonable jury could return a verdict for the nonmoving party," and facts are material to the outcome of the litigation if application of the relevant substantive law requires their determination. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). The moving party has the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." Celotex Corp. v. Cartrett, 477 U.S. 317, 323 (1986). The substantive law determines the facts that are material to the outcome of a particular litigation. See Anderson, 477 U.S. at 250; Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975). In determining whether summary judgment is appropriate, a court must resolve all ambiguities, and draw all reasonable inferences against the moving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

If the moving party meets its burden, the burden then shifts to the non-moving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ.

Proc. 56(e). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson, 477 U.S. at 247-48. Only when it is apparent that no rational finder of fact "could find in favor of the non-moving party because the evidence to support its case is so slight" should summary judgment be granted. Gallo v. Prudential Residential Servs. Ltd. Partnership, 22 F.2d 1219, 1223 (2d Cir. 1994).

B. Title III's Religious Organization Exemption

Title III of the ADA prohibits discrimination in public accommodations and services operated by private entities. It states that, "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 . . . ." 42 U.S.C. § 12182(a). The statutory definition of the phrase "public accommodation" includes private elementary, secondary, undergraduate, or postgraduate schools, or other places of education. See 42 U.S.C. § 12181(7)(J); White v. Denver Seminary, 157 F. Supp. 2d 1171, 1173 (D. Colo. 2001); Powers v. MJB Acquisition Corp., 993 F. Supp. 861, 867 (D.Wyo.1998).

The ADA specifically states that Title III does not apply to "religious organizations or entities controlled by religious organizations, including places of worship." 42 U.S.C. § 12187; PGA Tour, Inc. v. Martin, 531 U.S. 661, 689 n. 51 (2001) (noting that Congress "expressly exempted" religious organizations or entities from Title III's coverage). The Department of Justice's Title III regulations state that:

> The ADA's exemption of religious organizations and religious entities controlled by religious organizations is very broad, encompassing a wide variety of situations. Religious organizations and entities controlled by religious organizations have no obligations under the ADA. Even when a religious organization carries out activities that would otherwise make it a public accommodation, the religious organization is exempt

> from ADA coverage. Thus, if a church itself operates a day care center, a nursing home, a private school, or a diocesan school system, the operations of the center, home, school, or schools would not be subject to the requirements of the ADA or this part. The religious entity would not lose its exemption merely because the services provided were open to the general public. The test is whether the church or other religious organization operates the public accommodation, not which individuals receive the public accommodation's services.
>
> Religious entities that are controlled by religious organizations are also exempt from the ADA's requirements. Many religious organizations in the United States use lay boards and other secular or corporate mechanisms to operate schools and an array of social services. The use of a lay board or other mechanism does not itself remove the ADA's religious exemption. Thus, a parochial school, having religious doctrine in its curriculum and sponsored by a religious order, could be exempt either as a religious organization or as an entity controlled by a religious organization, even if it has a lay board. The test remains a factual one – whether the church or other religious organization controls the operations of the school or of the service or whether the school or service is itself a religious organization.

28 C.F.R. Pt. 36, App. B (2007); see also Denver Seminary, 157 F. Supp. 2d at 1173-74.

Whether St. John's qualifies for the ADA's religious exemption is a mixed question of law and fact. See Doe v. Abington Friends School, 480 F.3d 252, 258 (3d Cir. 2007) ("Whether Abington qualifies for the ADA's religious exemption is a mixed question of law and fact."). Few courts have addressed the applicability of the religious exemption to educational institutions. In White v. Denver Seminary, the District of Colorado found that the Denver Seminary was a "pervasively religious organization," which provided "graduate education founded on and steeped in Biblical teachings." 157 F. Supp. 2d at 1174. The court applied the religious exemption, finding that the Seminary's "sole mission is to train students for Christian ministry" by "teach[ing] 'historic, evangelical faith,'" that it was founded by the Conservative Baptist Association of Colorado, that a majority of its Board of Trustees must be members of the Association, and that faculty and other employees were required to sign a statement of religious beliefs. Id. Additionally, the court noted that students were required to participate in religious curriculum and attend weekly chapel. Id.

In Marshall v. Sisters of the Holy Family of Nazareth, 399 F. Supp. 2d 597, 605-07 (E.D. Pa. 2005), the Eastern District of Pennsylvania found that a private co-educational Catholic school teaching grades one through eight was exempt as a religious organization or entity controlled by a religious organization. In finding that the exemption applied, the court relied on the following facts: (1) the mission of the Academy included spreading "the Kingdom of God's love by finding God in everyday life events," (2) the curriculum included "Bible study classes," and the institution focused "on the acquisition and practice of true Christian principles," (3) the Academy was solely operated and controlled by the Sisters of the Holy Family of Nazareth, a religious community composed of Roman Catholic nuns, and (4) that the Sisters derived their 501(c)3 tax exemption in part from their association with the Roman Catholic Church. 399 F. Supp. 2d at 606. The court, relying on the ADA regulations, rejected the plaintiff's argument that the Academy was not a religious organization because it competed with private, non-parochial schools and provided a fee-based service.

In contrast, the District Court for the Eastern District of Missouri in Woods v. Wills, 400 F. Supp. 2d 1145, 1159-62 (E.D. Mo. 2005), declined to extend the Title III religious exemption to boarding school operators. Although it found that it did not need to determine whether the defendants were a religious organization under Title III based on deficiencies in plaintiff's claim, the court in Woods noted that cases such as White were distinguishable, because in Woods the defendants were named as individuals, not as a secondary private school. Additionally, while there was evidence that the defendant boarding school's curriculum included religious instruction and was based on religious principles, there was no evidence that the institution was affiliated with or belonged to a recognized religious organization or was recognized by any authority as a religious institution. 400 F. Supp. 2d at 1162.

Courts have examined whether universities are eligible for religious exemptions in the Title VII context as well. Title VII of the Civil Rights Act permits an educational institution to employ persons of a particular religion if the institution is "in whole or in substantial part, owned, supported, controlled, or managed . . . by a particular religion or by a particular religious corporation, association, or society." 42 U.S.C. § 2000e-2(e)(2). In Pime v. Loyola University of Chicago, 803 F.2d 351, 357 (7th Cir. 1986), Judge Posner in his concurrence questioned whether Loyola University would qualify for the "religious employer" defense. He noted:

> . . . for many years now Loyola has not been owned by the Jesuit order. It is incorporated not as a religious corporation but as an ordinary nonprofit corporation, and financial contributions from the Jesuit order provide only one-third of one percent of the university's income. Although three-fourths of the students are Catholic, the university does not require students to take any courses in Catholic theology (it does require each student to take three courses in theology, however), does not have a seminary (though it has a theology department), and offers a full range of secular instruction. It is no longer a religious or sectarian school in the narrow sense. All this would matter not at all if it were clear that the board of trustees was controlled by Jesuits, for control in whole or substantial part is all the statute requires. But only a minority of the board are Jesuits. The university's by-laws require that at least one-third plus one of the trustees be Jesuits (in fact 40 percent of the trustees are Jesuits)-enough to block amendments to the by-laws, since such amendments require the approval of two-thirds of the board-and that the president of the university, who has the normal powers of a chief executive officer (the by-laws describe him as the university's "principal executive officer"), be a Jesuit.

Pime, 803 F.2d at 357. Judge Posner inquired whether "the combination of a Jesuit president and nine Jesuit directors out of 22 [is] enough to constitute substantial control or management by the Jesuit order," and asked "at what point does the relation between the religious body and the school become so attenuated that the exemption ceases to be available," but found no answer to these questions on the record before the court. Id. at 357, 358. However, in Seigel v. Truett-McConnell College, Inc., 13 F. Supp. 2d 1335, 1343 (N.D. Ga. 1994), the Northern District of Georgia found that the Georgia Baptist Convention "controls" Truett-McConnell College under the language of 42 U.S.C. § 2000e-2(e)(2) because the Convention elected and could replace the

trustees of the College who were in turn empowered to hire and fire members of the administration, and this accountability was secured within the corporate charter and bylaws.

While the language and legislative history of the Title VII exemption differs from the exemption under Title III of the ADA, the above cases in both statutory contexts show that courts have examined a number of factors in determining the applicability of the exemption, including: (1) the institution's mission, (2) its curriculum and student requirements, (3) the make-up of the institution's Board of Trustees and requirements of employees, and (4) the operation of the institution.

Applying these factors to the case at hand, I find that defendant has not shown the absence of a genuine issue of material fact and that the record does not establish that St. John's is entitled to the religious exemption under Title III as a matter of law. The University's mission statement does include that it is a Catholic and Vincentian university, but the mission statement begins by explaining that "[a]s a university, we commit ourselves to academic excellence and the pursuit of wisdom, which flows from free inquiry, religious values, and human experience." (Mission Statement, Toole Decl., Ex. B, at 9.) The mission statement also sets forth that "[o]ur core curriculum in the liberal arts and sciences aims to enrich lives as well as professions and serves to unify the undergraduate experience." The College of Liberal Arts and Sciences' core curriculum "flows from" it's Catholic, Vincentian, and metropolitan mission, but only requires "Perspectives on Christianity, A Catholic Approach" as one of its three required theology courses, the other two being chosen from a variety of options. While campus ministry is certainly an important part of many students' lives, and preparation for theological studies is an option for students, there is no requirement that students attend or take part in religious services, and less than half of the current student body is estimated to be Catholic. Employees, other than

the President and Executive Vice President for Mission and Branch Campuses, and those hired for the purpose of taking part in religious services, are not required to be of a certain faith, attend services, or participate in the Vincentian Mission Orientation. Unlike the institution at issue in Woods, only one-third, not a majority, of the Board of Trustees are required to be members of the Congregation of the Mission or Daughters of Charity, and there is no evidence that the Catholic Church or Congregation of the Mission has the power to hire and fire trustees or administration officials. The record shows that the Vincentian priests have donated to the University, both financially and in services, (Shea-Byrnes Dep., Toole Decl., Ex. E, at 62-63), but there is no evidence in the current record that the Congregation of the Mission or the Catholic Church provide substantial funds, donations, or real estate to the University, or otherwise has "control" of the University's operations.

Defendant St. John's points to Scheiber v. St. John's University, 84 N.Y.2d 120 (1994), for support that the University is in fact a religious organization. In Scheiber, a Jewish vice president of student life brought an action against St. John's for breach of contract and unlawful dismissal from employment. 84 N.Y.2d at 123. The New York Court of Appeals found that St. John's qualified for a religious exemption under New York Executive Law § 296(11), which reads:

> Nothing contained in this section shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by *or in connection with a religious organization*, from limiting employment or sales or rental of housing accommodations or admission to or giving preference to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.

McKinney's Executive Law § 296(11) (emphasis added). The plaintiff in Scheiber argued that St. John's was not a religious organization entitled to the exemption. The Court stated:

> Plaintiff contends that only an entity organized pursuant to the Religious Corporations Law can claim status as a religious organization under the Human Rights Law, but our statutory exemption, broadly drafted, contains no such limitation. As an educational organization operated in connection with the Vincentian order -- a religious institution or organization -- SJU is itself a "religious institution" within the language of Executive Law § 296 (11). Although conceived with the intent of fulfilling a secular educational role, SJU has not abandoned its religious heritage and plainly falls within the exemption for entities that are "operated, supervised or controlled by or in connection with a religious organization."

Scheiber, 84 N.Y.2d at 126. Thus, the Court relied on the "in connection with" language in the State statute, language that does not appear in the exemption provided under Title III of the ADA. The ADA requires something more – that the entity either be a religious organization or controlled by one, and there is no language that would allow connection, association, affiliation, or close alignment to warrant an exemption.

St. John's also points to the "breadth" of the exemption as stated by the implementing DOJ regulation. See 28 C.F.R. Pt. 36, App. B (2007) ("The ADA's exemption of religious organizations and religious entities controlled by religious organizations is very broad, encompassing a wide variety of situations."). However, this breadth refers the fact that once found to be a religious organization or controlled by a religious organization, the *type* of activity conducted by the organization does not affect its ability to invoke the statutory religious exemption. Id. ("Even when a religious organization carries out activities that would otherwise make it a public accommodation, the religious organization is exempt from ADA coverage.") Though the regulation discusses the fact that a "lay board" should not prevent a finding of control by a religious organization or that the organization itself is a religious organization, I do not find the other evidence in the record before me sufficient to show that as a matter of law the Catholic Church or Congregation of the Mission controls the University or that St. John's University is itself a religious organization.

Given the factors discussed above, and the language of the statute, I cannot find based on the current record that St. John's is entitled to the religious exemption set forth in 42 U.S.C. § 12187 as a matter of law. Accordingly, St. John's University's motion for summary judgment is denied.

V. Plaintiff's Litigation History

Defendants claim that plaintiff is a vexatious litigant and should be enjoined as a prudential matter from continuing this action. (St. John's University's Mem. at 19.) Defendants have submitted docket reports showing that plaintiff has filed nearly fifty ADA complaints in the Southern and Eastern District of New York through his current counsel.[6] Defendants argue that the fact plaintiff has not even been deposed in any of his cases suggests that he is a "hit and run" filer who seeks to pressure defendants into early settlements.

Courts have noted that the ADA's private right of action and attorneys fees provision have resulted in an explosion of private ADA-related litigation, creating a "cottage industry" for plaintiffs and attorneys. Rodriguez v. Investco, LLC, 305 F. Supp. 2d 1278, 1281 (M.D. Fla. 2004) (plaintiff involved in approximately 200 ADA cases). In Molski v. Mandarin Touch Restaurant, 347 F. Supp. 2d 860, 861 n. 2 (C.D. Cal. 2004), the Central District of California declared the plaintiff a vexations litigant where he had filed approximately 400 suits, the vast majority of which were settled. The court, relying on plaintiff's history of litigation, plaintiff's motive, his representation, his use of the court's resources, and the appropriateness of sanctions, noted that most importantly, "the allegations contained in Plaintiff's complaints are contrived

[6] For a sample of recent cases filed in this district, see, e.g., Brown v. Dupont Associates, Inc., No. 08-cv-206 (JG)(RLM); Brown v. Alexander's Kings' Plaza, LLC, et al., No. 09-cv-348 (TCP)(MLO); Brown v. 25 Cutter Mill Road Realty Corp., No. 09-cv-349 (ADS)(ARL); Brown v. Prince et al.. No. 08-cv-714 (JS)(WDW); Brown v. Public Storage, No. 09-cv-2495 (DLI)(RER).

and not credible." Molski, 347 F. Supp. 2d at 864. The court found that in numerous complaints, plaintiff alleged he suffered the same injury in the same manner on the same day at various establishments. Noting the implausibility of this occurrence, the court found that the plaintiff had a history of vexatious litigation, and used this determination in part to find that a pre-filing order was warranted. Id. at 865.

However, in Acces 4 All, Inc. v. Trump International, the Southern District of New York found that despite filing 427 different ADA related lawsuits and making "bare-bones claims," plaintiff "produced sufficient facts, at this stage, to allege ADA violations . . . and injury from those alleged violations." 458 F. Supp. 2d at 175. The court also held that "[w]hether discovery and trial will expose Plaintiff's case as something less than genuine remains to be seen." Id. at 176. In this case, plaintiff has pled facts that he in fact visited the campus and intends to return. Plaintiff has filed far fewer cases in the Eastern and Southern Districts than plaintiffs found to be vexatious ADA litigants in other jurisdictions, and defendants do not point to any claims made in the various complaints filed that would rise to the level of implausibility found in Molski.

Accordingly, based on the pleadings, I decline to find that plaintiff is a vexatious litigant, and decline to dismiss his case on such grounds.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss plaintiff's New York Civil Rights claim is granted, and defendant St. John's motion to dismiss plaintiff's ADA and Rehabilitation Act claims is denied. Defendant St. John's motion for summary judgment as to plaintiff's ADA claim is also denied.

SO ORDERED.

s/ ARR

Allyne R. Ross
United States District Judge

Dated: June 28, 2010
Brooklyn, New York