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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SCOTT JOHNSON,
Plaintiff,
v.
1082 EL CAMINO REAL, L.P, HANKOOK
CENTER MANAGEMENT COMPANY,
LLC, COCASSIA, INC.,
Defendants.

Case No. [5:17-cv-01391-EJD](#)

**ORDER GRANTING MOTION TO
DISMISS ADA CLAIM FOR LACK OF
SUBJECT MATTER JURISDICTION;
DISMISSING REMAINING STATE
LAW CLAIM PURSUANT TO 28 U.S.C.
§1367**

Re: Dkt. No. 39

I. INTRODUCTION

Defendants Cocassia, Inc., 1082 El. Camino Real, L.P., and Hankook Center Management Company, LLC move to dismiss the complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The Court finds it appropriate to take the motion under submission for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons set forth below, the motion is granted.

II. BACKGROUND

Plaintiff Scott Johnson’s complaint includes the following allegations. Plaintiff is a level C-5 quadriplegic. He cannot walk and has significant manual dexterity impairments. He uses a wheelchair for mobility and has a specially equipped van. Plaintiff has gone to the Hankook Supermarket (“Hankook”) located at 1092 E. El Camino Real, Sunnyvale, California, on a number of occasions between August 2016 and January 2017. Plaintiff went to Hankook to shop.

Plaintiff alleges that “the parking stalls and access aisles for use by persons with disabilities are not level with each other because there is a built up curb ramp that runs into the access aisle and

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1 parking stall. This results in slopes greater than 2.1%.” Complaint at ¶23. Plaintiff alleges that
2 these conditions on the property are “barriers,” which existed during each of his visits to Hankook.
3 Plaintiff further alleges that he is and has been deterred from returning and patronizing Hankook
4 because of the barriers.

5 Plaintiff initiated this action on March 15, 2017, asserting two claims for disability
6 discrimination: violation of the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C.
7 §12101, et seq.; and violation of California’s Unruh Civil Rights Act, Cal. Civ. Code §51-53
8 (“Unruh Act”). A Joint Site Inspection was held on November 29, 2017. Defendants move to
9 dismiss the ADA claim and request that the Court decline to exercise supplemental jurisdiction
10 over the remaining Unruh Act claim pursuant to 28 U.S.C. §1367(c)(1)-(4).

11 III. STANDARDS

12 Rule 12(b)(1), Fed.R.Civ.P., authorizes a motion to dismiss for lack of subject matter
13 jurisdiction. “Mootness . . . pertain[s] to a federal court’s subject-matter jurisdiction under Article
14 III, [so it is] properly raised in a motion to dismiss under Federal Rule of Civil Procedure
15 12(b)(1).” White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000). A Rule 12(b)(1) motion may be
16 either a facial or factual challenge to jurisdiction. Id. When a facial Rule 12(b)(1) motion to
17 dismiss is presented, inquiry is confined to the allegations in the complaint. Wolfe v. Strankman,
18 392 F.3d 358, 362 (9th Cir. 2004). When a factual Rule 12(b)(1) motion is presented, such as the
19 one made by Defendants here, the Court may look beyond the complaint and need not presume the
20 truthfulness of the plaintiff’s allegations. White, 227 F.3d at 1242. Faced with a factual
21 challenge, the party opposing the motion to dismiss must produce affidavits or other evidence
22 necessary to satisfy its burden of establishing subject matter jurisdiction. Safe Air For Everyone
23 v. Meyer, 373 F.3d. 1035, 1039 (9th Cir. 2004).

24 Further, when the jurisdictional issue is intertwined with the merits, a court “must apply
25 the summary judgment standard in deciding the motion to dismiss.” Johnson v. California
26 Welding Supply, Inc., No. 11-1669 WBS, 2011 WL 5118599 (E.D. Cal. Oct. 27, 2011).

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1 Plaintiff's claim in this case and jurisdiction are both premised on the ADA, and so jurisdiction
2 and substance are intertwined. Accordingly, the Court will apply the summary judgment standard
3 to Defendants' motion to dismiss for lack of subject matter jurisdiction.

4 IV. DISCUSSION

5 Defendants contend that the ADA claim is moot. In support of the mootness challenge,
6 Defendants submit an Accessibility Report prepared by a Certified Access Specialist dated April
7 24, 2017, that contains a list of recommended changes to the Hankook property and a second
8 Accessibility Report dated December 26, 2017, verifying that the recommended changes were
9 made.

10 Plaintiff opposes the motion on two grounds. First, Plaintiff contends that the motion is
11 premature because he has not had an opportunity to confirm the findings in the December
12 Accessibility Report nor had an opportunity to depose its author. Dkt. 40, p. 3. To obtain
13 postponement or denial of a motion for summary judgment based on the need for further
14 discovery, a party must submit a declaration showing, among other things, facts indicating a
15 likelihood that controverting evidence exists. See Tatum v. City & County of San Francisco, 441
16 F.3d 1090, 1101 (9th Cir. 2006). Plaintiff has not submitted any declaration showing a likelihood
17 that controverting evidence exists. Therefore, the Court is not required to postpone or deny
18 Defendants' motion.

19 Second, Plaintiff contends that the motion to dismiss is barred by the stay under General
20 Order 56, which imposes a stay on "[a]ll other discovery and proceedings." At least two courts in
21 this district have concluded that General Order 56 does not impose a stay on the filing of a
22 responsive pleading. See Morales v. Whole Foods Market, Inc., 897 F.Supp.2d 987, 993, n.2
23 (N.D. Cal. 2012) (holding that the cited language "plainly refers to discovery issues, and does not
24 bar a defendant from moving to dismiss on res judicata grounds); Che v. San Jose/Evergreen
25 Community College District Foundation, et al., No. 17-381 BLF (N.D. May 26, 2017) (finding the
26 stay imposed by General Order 56 does not clearly encompass the filing of an answer or motion in

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1 response to a complaint). This Court also finds that General Order 56 does not preclude
2 Defendants from bringing the instant motion to dismiss for lack of subject matter jurisdiction.

3 Turning to the merits of the motion, the undisputed evidence shows that Defendants have
4 corrected the sole alleged access barrier alleged in the complaint. The ADA claim is therefore
5 moot and dismissed for lack of subject matter jurisdiction.


6 V. CONCLUSION

7 For the reasons set forth above, Plaintiff's ADA claim is dismissed. Pursuant to 28 U.S.C.
8 §1367(c) (3), the Court declines to exercise supplemental jurisdiction over the remaining Unruh
9 Act claim and dismisses the claim without prejudice.

10 The Clerk shall close the file.

11 **IT IS SO ORDERED.**

12 Dated: February 28, 2018

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15 EDWARD J. DAVILA
16 United States District Judge
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