IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOHN NANNI	*	
	*	
v.	*	
	*	Civil Action No. WMN-15-2570
ABERDEEN MARKETPLACE, INC.	*	
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MEMORANDUM

Plaintiff John Nanni seeks declaratory and injunctive relief against Defendant Aberdeen Marketplace, Inc. for alleged violations of Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12181 et seq. Before the Court is Defendant's Motion to Dismiss Plaintiff's First Amended Complaint.[1] ECF No. 7. That motion is ripe. Upon review of the motion and applicable case law, the Court finds that no hearing is necessary, Local Rule 105.6, and that Defendant's Motion to Dismiss will be granted.

Plaintiff, a resident of Middletown, Delaware, is a qualified individual with a disability under the ADA. Plaintiff suffers from Post-Polio Syndrome; he is only able to walk and stand a limited amount each day and is otherwise confined to a wheelchair. Defendant is the owner, lessee, lessor, and/or

[1] On August 31, 2015, Plaintiff filed his original Complaint. ECF No. 1. Defendant filed its first Motion to Dismiss on October 19, 2015. ECF No. 3. Plaintiff filed an Amended Complaint on November 5, 2015, ECF No. 5, mooting Defendant's first Motion to Dismiss.

operator of a public accommodation, allegedly obligated to comply with the ADA, known as Aberdeen Market Place Shopping Center and located at 1010 Beards Hill Road, Aberdeen, Maryland, 21001. The shopping center is near Interstate 95 and Plaintiff travels that corridor "often on his way to Baltimore to attend Baltimore sporting events, to visit with family and relatives in the Baltimore and Washington DC area, and due to traveling to events as a rotary PolioPlus ambassador/District 7630 chair." ECF No. 5 at ¶ 10. Plaintiff has visited the shopping center at least 3-4 times to "stop to rest on drives and to take bathroom breaks" and claims it "provides a perfect place for him." Id.

While visiting the shopping center, Plaintiff experienced difficulty accessing the goods and utilizing the services due to the architectural barriers he encountered and/or observed, including:

> A. inaccessible parking designated for disabled use throughout the property due to excessive slopes, pavement in disrepair and lack of proper access aisles, which caused him difficulty exiting and entering his vehicle because of extra care needed to avoid a fall;
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> B. inaccessible curb ramps due to excessive slopes, steep side flares, failure to provide smooth transitions, and pavement in disrepair, which caused him difficulty due to the extra care needed to traverse the ramps;
>
> C. a dangerous sidewalk ramp due to excessive running slopes which caused him difficulty due to the extra care needed to traverse it; and

> D. inaccessible routes throughout the Property due to excessive slopes and pavement in disrepair, which caused him difficulty due to the extra care needed to maneuver throughout the Property.

ECF No. 5 at ¶ 14. Plaintiff alleges Defendant continues to discriminate against him by failing to make the reasonable modifications necessary for Plaintiff to participate in and benefit from the goods, services, facilities, privileges, advantages, and accommodations offered to the general public. Independent of his intent to return as a patron 2-3 times per year, Plaintiff intends to return as an ADA tester to determine whether the barriers to access stated herein have been remedied.[2]

Defendant has filed a Motion to Dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 7. Based on the record as a whole, the Court is unable to conclude that Plaintiff has suffered a sufficiently particularized injury-in-fact to satisfy the case-or-controversy requirement of Article III, therefore, Defendant's Motion to Dismiss will be granted pursuant to Rule 12(b)(1).

Article III of the Constitution restricts the federal courts to hear only actual "cases" and "controversies." U.S.

[2] In ADA litigation, "a tester is a qualified individual with a disability who is testing an entity's compliance with federal disability statutes." Judy v. Pingue, No. 2:08-CV-859, 2009 WL 4261389, at *5 (S.D. Ohio Nov. 25, 2009).

Const. art. III, § 2. In determining the power of the court to entertain a suit, the "question is whether plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Warth v. Seldin, 422 U.S. 490, 498-499 (1975) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)). To satisfy the constitutional standing requirement, a plaintiff must provide evidence to support the conclusion that 1) the plaintiff suffered an "injury in fact," i.e., a concrete and particularized, actual or imminent invasion of a legally protected interest, 2) which is "fairly traceable" to the challenged action of the defendant; and 3) likely to be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). "Abstract injury is not enough." City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983).

In addition, when a plaintiff requests injunctive relief, he "must allege and prove that there is a 'real and immediate threat' that he will be wronged again."[3] Daniels v. Arcade, 477

[3] "[T]he standing requirements for declaratory and injunctive relief are essentially the same." Gardner v. Montgomery Cty. Teachers Fed. Credit Union, 864 F. Supp. 2d 410, 421 (D. Md. 2012); see, e.g., Nat'l All. for Accessibility, Inc. v. Millbank Hotel Partners, Civil No. RDB-12-3223, 2013 WL 653955, at *6 (D. Md. Feb. 20, 2013) ("Plaintiffs have failed to show anything more than a mere possibility of future harm. Therefore, they

Fed. App'x 125, 129 (4th Cir. 2012) (citing Bryant v. Cheney, 924 F.2d 525, 529 (4th Cir. 1991)). This requirement means a plaintiff must "state a plausible allegation that there is a likelihood that he will suffer future harm," Daniels, 477 Fed. App'x at 130, and that likelihood must be greater than a "mere possibility." Nat'l All. for Accessibility, Inc. v. CMG Bethesda Owner LLC, Civil No. JFM-12-1864, 2012 WL 6108244, at *4 (D. Md. Dec. 7, 2012). Prior injury constitutes probative "evidence bearing on whether there is a real and immediate threat of repeated injury." Lyons, 461 U.S. at 102. But prior injury itself is insufficient; the complaint must 1) "describe [plaintiff's] concrete, specific plans to return to the locus of the injury" and 2) "indicate that the plaintiff is likely to suffer the same injuries upon return." Lujan, 504 U.S. at 564; see also Millbank Hotel Partners, 2013 WL 653955, at *4.

Challenging only the first element of Lujan, "injury in fact," Defendant maintains that Plaintiff has not demonstrated a plausible intent to return or a sufficient likelihood of future injury as necessary to permit this suit for declaratory and injunctive relief to go forward. ECF No. 7-1 at 5-8. As stated previously, Plaintiff alleges he plans "to visit the Property

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have failed to demonstrate standing for both injunctive relief and a declaratory judgment.").

again in December[4] on his way to Baltimore and expects to go to the Property 2-3 times a year after that." ECF No. 5 ¶ 10. Plaintiff "additionally plans to return as an ADA tester." Id. at ¶ 19. Plaintiff clearly stated his intent to return while traveling on Interstate 95 and the Court has no reason to doubt the veracity of his claim at this stage in the proceeding. See Daniels, 477 Fed. App'x at 130 ("We must accept this allegation as true for purposes of the motion to dismiss."). Thus, Plaintiff's plan to return to the locus of the injury satisfies the first element for injunctive relief.

The second element Plaintiff must establish is his likelihood of suffering future harm at the shopping center. Lujan, 504 U.S. at 564. In Plaintiff's Complaint, he lists four barriers encountered at the shopping center that caused him difficulty and states he fears he will encounter these barriers again upon return. ECF No. 5 ¶ 14. The Complaint does not contain specific facts regarding Plaintiff's injury, but rather alleges that he "personally encountered and/or observed" the barriers and that the barriers "still exist and have not been remedied". ECF No. 5 at ¶¶ 14, 16. In reviewing the

[4] In analyzing Plaintiff's plan to return, the Court need not consider Plaintiff's allegation that he "plans to visit the Property again in December," ECF No. 5 at ¶ 2, as that date "has now come and gone," and so has the Plaintiff's immediate threat of future harm as to that particular visit. See CMG Bethesda Owner LLC, 2012 WL 6108244, at *5.

plausibility of a plaintiff's threat of future injury, this Court, in CMG Bethesda Owner LLC, observed the plaintiff's allegations of personal encounters with "architectural barriers" were too broad, and that the complaint did not sufficiently describe which violations would cause harm to the plaintiff during her next visit to the hotel. 2012 WL 6108244, at *4. Further, in Millbank Hotel Partners, this Court found that without specific facts surrounding the plaintiff's encounter with noncompliant facilities, "and armed only with boilerplate statements that certain violations of the ADA exist," a complaint will fail to demonstrate more than a mere possibility of future harm. 2013 WL 653955, at *5. Plaintiff's Amended Complaint is similar to the complaints in CMG Bethesda Owner LLC and Millbank Hotel Partners, leaving the Court no choice but to speculate as to the type of harm Plaintiff is likely to face on his return to the shopping center.

Plaintiff's Amended Complaint is further deficient with regard to future injury because the Court is left to wonder which business within the shopping center is "the perfect place" for Plaintiff to stop and rest while traveling on Interstate 95. In Norkunas v. Park Road Shopping Center, Inc., the court found a plaintiff who merely had "occasion to drive through the region" on Interstate 77 could not credibly demonstrate a likelihood of future harm due to his "tenuous connection" with

that region. 777 F. Supp. 2d 998, 1003-1004 (W.D.N.C. 2011). As a passerby on Interstate 95 seeking to rest, Plaintiff's connection to Defendant's shopping center is tenuous at best, especially in light of the fact that there is another shopping center directly across the street, Beards Hill Marketplace, and numerous other rest stops located on Plaintiff's route. See ECF No. 10 at 3. The Court takes judicial notice that Maryland House Rest Area, located on Interstate 95 in Aberdeen, Maryland, is less than five miles from Defendant's shopping center, and further notes that this facility is in fact a rest area. The Court is unable to find more than a mere possibility of future harm without any indication of the specific goods and services at Defendant's shopping center that Plaintiff seeks out in his travels, or a particular convenience at this center that is more advantageous to Plaintiff than that available at the other centers along his route.

As in Norkunas, this Court recognizes as plausible the allegation that "Plaintiff may leave the [interstate] for the express purpose of returning to Defendant's establishment to confirm its ADA-compliance. However, [] such a purpose is insufficient to satisfy Article III standing." 777 F. Supp. 2d at 1002 n.4. A Title III plaintiff cannot use his "status as a tester to satisfy the standing requirements where she would not have standing otherwise." Id. at 1005; see also Judy, 2009 WL

4261389, at *5 ("Any tester status that [the plaintiff] might possess does not confer standing to seek prospective relief where he cannot show a reasonable likelihood of returning to [the defendant's] property."). While testing an entity's compliance with federal disability statutes is not improper, the Court notes that Plaintiff has filed twelve substantially similar complaints in the United States District Court for the District of Maryland under Title III of the ADA within the last year.[5] The twelve complaints filed by Plaintiff in this Court are not necessarily form templates, yet they are similar enough to call into question the plausibility of Plaintiff's threat of future injury at Defendant's shopping center. Many of the defendant properties are in the vicinity of Interstate 95. While Plaintiff has characterized Aberdeen Market Place Shopping Center, as "a perfect place for him," Plaintiff allegedly patronizes these other properties as well. ECF No. 5 at ¶ 10.

[5] See also, Nanni v. The Avenue at White Marsh Business Trust, GJH-15-2571, (filed August 31, 2015); Nanni v. CH Realty VI/R Bel Air Festival, L.L.C., ELH-15-2573 (filed August 31, 2015); Nanni v. The Shops at Perryville, LLC, RDB-15-2574 (filed August 31, 2015); Nanni v. Ikea Property, Inc., RDB-15-3493, (filed November 17, 2015); Nanni v. White Marsh Mall, LCC, JFM-15-3494, (filed November 17, 2015); Nanni v. 8655 Pulaski Joint Venture LLC, JFM-16-260, (filed January 28, 2016); Nanni v. Edgewater Partnership Limited Partnership, JFM-16-265, (filed January 29, 2016); Nanni v. Gorfine Fiddle & Co., P.A., JKB-16-266, (filed January 29, 2016); Nanni v. Toys "R" Us Property Company II, LLC, JKB-16-727, (filed March 11, 2016); Nanni v. White Marsh Plaza Business Trust, MJG-16-729, (filed March 11, 2016); and Nanni v. Hawthorne, Inc., JKB-16-731, (filed March 11, 2016).

The aforementioned multitude of suits heightens the appearance that the true reason behind Plaintiff's alleged intent to return to Defendant's shopping center is to preserve and cultivate this legal action and secure legal fees, as suggested by Defendant. ECF No. 10 at 2. This Court is not aware of "any authority showing that Title III of the ADA was intended to create such broad rights against individual local businesses by private parties who are not bona fide patrons, and are not likely to be bona fide patrons in the future." Harris v. Stonecrest Care Auto Ctr., LLC, 472 F. Supp. 2d 1208, 1219 (S.D. Cal. 2007). For the above-stated reasons, Defendant's Motion to Dismiss will be granted. A separate order will issue.

_____/s/_____
William M. Nickerson
Senior United States District Judge

DATED: May 4, 2016