

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>KRATZER, et al.,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff</b>	:	
	:	
<b>vs.</b>	:	
	:	
<b>GAMMA MANAGEMENT</b>	:	
<b>GROUP, INC.</b>	:	
<b>Defendants.</b>	:	<b>No. 04-6031</b>

**Memorandum and Order**

Pratter, Gene E.K.

October 12, 2005

Gamma Management Group (“Gamma”), the sole defendant in this action brought pursuant to the Americans with Disabilities Act, moves for the entry of summary judgment in its favor. For the reasons discussed below, the motion will be denied.

**FACTS AND PROCEDURAL BACKGROUND**

Plaintiffs in this case are Jaclyn Kratzer, William Ross and Ralph Trainer, three persons who each claim to be qualified individuals with disabilities pursuant to the Americans with Disabilities Act (“ADA”).<sup>1</sup> Gamma is a Pennsylvania corporation which is the current operator of the Ramada Inn & Conference Center located in Reading, Pennsylvania.

Plaintiffs each allege that they have personally visit the Ramada Inn & Conference Center (the “Center”) and were denied “full, safe and equal access” to it “due to barriers which exist

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<sup>1</sup> Ms. Kratzer has cerebral palsy and requires the use of a motorized wheelchair at all times for mobility. Kratzer Affidavit at ¶ 2. Mr. Trainer has muscular dystrophy and requires the use of a motorized wheelchair at all times for mobility. Trainer Affidavit at ¶ 2. The nature of Mr. Ross’s disability was not disclosed.

and the Defendant's lack of compliance with the ADA." Complaint at ¶¶ 3-5. In the one-count complaint,<sup>2</sup> Plaintiffs set forth numerous and fairly detailed allegations with respect to the ways in which the Center does not meet with ADA requirements, including assessments of the parking lot/main entrance, lobby/common area, lobby toilet rooms and guest rooms. Complaint at ¶ 14. Plaintiffs seek relief pursuant to 42 U.S. C. § 12188 of the ADA, including declaratory relief, an order directing Gamma to alter its facilities to make them accessible to disabled individuals and to evaluate and neutralize its policies, practices and procedures toward persons with disabilities, and an award of reasonable attorney's fees, costs and other expenses of suit.

Before the close of discovery in the case, Gamma filed the present Motion for Summary Judgment.<sup>3</sup> In its Motion for Summary Judgment, Gamma argues that Plaintiffs do not have standing to bring the Amended Complaint because they have never attempted to stay at the hotel and have no current plans to hold a conference at the hotel.<sup>4</sup> Thus, Gamma argues that any harm

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<sup>2</sup> The complaint in question is the Amended Complaint. Plaintiffs amended the defendant named in the complaint from Spiral Realty to Gamma Management Group.

<sup>3</sup> An initial pretrial conference with the parties was held on July 5, 2005, approximately one week after Gamma filed its Motion for Summary Judgment. According to the Scheduling Order that was issued after the conference, discovery is to be completed on or before December 30, 2005. In their opposition to the Motion for Summary Judgment, Plaintiffs repeatedly assert that no discovery has taken place, thus many of the facts asserted by Gamma are disputed. Plaintiffs' Response to Defendant's Statement of Facts at ¶¶ 2, 4, 9. Given these circumstances, the Court observes that perhaps the Motion would have been more appropriately captioned as a motion for judgment on the pleadings.

<sup>4</sup> Gamma additionally states that the fact that Plaintiffs have brought approximately 54 similar actions against various public accommodations is a material fact with respect to this case. Motion for Summary Judgment at ¶ 8. Plaintiffs do not deny this fact. Opposition to Motion for Summary Judgment at 3. While this fact, standing alone and absent any other allegations that Plaintiffs ever visited or intended to visit the Center, may warrant some scrutiny, that is not the case here. Thus, the Court does not consider this to be a fact relevant for consideration in the present motion.

asserted by Plaintiffs is speculative, thereby demonstrating that they have no imminent injury, a requirement for standing to bring a claim.

## **DISCUSSION**

### **A. Standard of Review**

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c). An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party’s initial burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.” Id. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”

Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

## B. **Standing of Plaintiffs**

The concept of standing involves both constitutional limitations on the jurisdiction of federal courts and prudential limitations<sup>5</sup> on the exercise of federal jurisdiction. Warth v. Seldin, 422 U.S. 490, 498 (1975). The Supreme Court has instructed that to establish the “irreducible constitutional minimum” of standing, a plaintiff must demonstrate the following elements: (1) an “injury in fact,” such as “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, no ‘conjectural’ or ‘hypothetical’”; (2) a causal connection between the injury and the conduct complained of; and (3) a “likely” as opposed to “speculative” injury that would be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). When standing is challenged on the basis of the pleadings in a case, a court must “accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party.” Sammon v. New Jersey Board of Medical Examiners, 66 F.3d 639, 643 (3d Cir. 1995) (quoting Pennell v. San Jose, 485 U.S. 1, 7 (1988)). Where a plaintiff asserts an injury as a result of a statutory violation, an analysis of the plaintiff’s standing must focus on whether the plaintiff suffered an actual injury, and not whether the statute was violated. Doe v. Nat’l Board of Medical Examiners, 199 F.3d 146, 153 (3d Cir. 1999).

In this case, Gamma argues that Plaintiffs have not demonstrated an injury in fact because

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<sup>5</sup> Under the prudential rules of standing, a court must consider whether a plaintiff is the proper party to invoke judicial resolution of a particular dispute. Mariana v. Fisher, 338 F.3d 189, 204 (3d Cir. 2003). In this case, the question of constitutional standing is implicated, and prudential standing need not be addressed.

they have not actually visited the Center and, therefore, any purported injury is speculative and hypothetical.<sup>6</sup> Plaintiffs disagree, arguing that their prior visits to the facility provide actual knowledge of the facility shortfalls at the Center, making any effort to schedule a conference there a futile effort.

The remedies available under the ADA are available “to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of Section 12183<sup>7</sup> of this title. 42 U.S.C. § 12188(a)(1). This provision also states that “[n]othing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions.” *Id.*

Neither the Court of Appeals for the Third Circuit nor any other court of appeals appears to have addressed the precise issue presented here – whether a plaintiff who has visited a facility and identified alleged compliance problems may, after a new operator has taken over, assert a claim alleging ADA violations that are grounded on a plaintiff’s intended future use of the newly

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<sup>6</sup> In both its motion and its reply brief, Gamma insists that Plaintiffs can assert no injury against because (1) Plaintiffs’ prior use of the Center predated Gamma’s operation and (2) the prior use was on behalf of Plaintiffs’ employer, Abilities in Motion, and the discontinuance of use was because of “others who are not named as plaintiffs.” Memorandum in Support of Summary Judgment Motion at 9; Reply Memorandum at 4. Both of these arguments ring rather hollow. As to the first argument, Gamma has not presented any evidence that it has modified the facility since having taken over as its operator. As to the second argument, Gamma appears to ignore the fact that each of the Plaintiffs alleges that they are qualified individuals as that term is defined under the ADA and that each Plaintiff has, in fact, visited the Center.

<sup>7</sup> Section 12183 addresses new construction and alteration in public accommodations and commercial facilities. 42 U.S.C. § 12183.

operated facility. However, the Court of Appeals for the Eighth Circuit has concluded that the “futility provision” of the ADA allows a plaintiff to file suit as long as the plaintiff establishes knowledge of the barriers accompanied by an assertion that they would visit a facility but for the existence of the barriers. See, e.g., Steger v. Franco, Inc., 228 F.3d 889, 891 (8th Cir. 2000). Additionally, the Court of Appeals for the First and Ninth Circuits have found that a plaintiff who is deterred from patronizing a public accommodation because of a defendant’s failure to comply with the ADA may be considered to have suffered an “actual” or “imminent” injury. See, e.g., Disabled Americans for Equal Access, Inc. v. Ferries Del Caribe, Inc., 405 F.3d 60, 64-65 (1st Cir. 2005) (finding plaintiff who had not actually traveled aboard ferry boat suffered actual injury because various barriers precluded his ability to board); Pickern v. Holiday Quality Foods, Inc., 293 F.3d 1133, 1138 (9th Cir. 2002) (holding that “a disabled individual who is currently deterred from patronizing a public accommodation due to a defendant’s failure to comply with the ADA has suffered an ‘actual injury’”).

District courts have followed this reasoning, finding that as long as a plaintiff can establish actual knowledge of barriers and a reasonable likelihood that but for the barriers the plaintiff would utilize the facility, he or she has standing to bring a claim. See, e.g., Small v. General Nutrition Cos., Inc., No. 03-1872, 2005 WL 887020, at \*6 (E.D.N.Y. Feb. 25, 2005) (finding that complaint supported standing only for store which plaintiff alleged to have actual knowledge of physical barriers); Clark v. Burger King Corp., 255 F. Supp. 2d 334, 343 (D.N.J. 2003) (finding that past patronage at certain restaurants, combined with intent to return to these restaurants, demonstrated a real and immediate threat of future injury); Clark v. McDonald’s Corp., 213 F.R.D. 198, 229 (D.N.J. 2003) (finding that plaintiff suffered “actual injury” where he

was “currently deterred from patronizing a public accommodation due to a defendant’s failure to comply with the ADA”); cf. Resnick v. Magical Cruise Co., Ltd., 148 F. Supp. 2d 1298, 1301-02 (M.D. Fla. 2001) (finding no standing where plaintiff’s allegations were based solely on review of defendant’s website and an attempt to take a cruise on one of defendant’s ships “at some unspecified time in the future” did not constitute a concrete, particularized injury).

In the instant case, each of the Plaintiffs alleges that they have personally visited the Center and continues to desire to visit the Center in the future. Complaint at ¶¶ 3-5. Additionally, Plaintiffs Kratzer and Trainer have, by affidavit, attested that they have attended conferences and experienced barriers at the Center, and that due to its location, size and affordability, the Center is a desirable facility to hold future conferences.<sup>8</sup> Kratzer Aff. at ¶¶ 7-8; Trainer Aff. at ¶¶ 4, 7. Plaintiffs additionally allege very specific violations of the ADA in the common areas and the main facility of the Center, including assertions that there are insufficient accessible parking spaces and no level landing outside the front entrance doors of the hotel, the ramps leading from the lobby to the hallway are too steep and lack adequate handrails; the public telephone is too high and does not have a volume control; the thresholds at the doors leading from the pool area into the main lobby are too high. Complaint at ¶ 14. Considering these allegations as true, as the Court must, the Court finds that Plaintiffs have stated a sufficient claim for an actual and imminent injury under the ADA.<sup>9</sup>

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<sup>8</sup> Gamma relies on the absence of the submission of an affidavit from Mr. Ross to support its argument that there has been no actual injury. However, the lack of an affidavit from Mr. Ross does not negate the allegation in the Complaint that Mr. Ross had, in fact, visited the Center and intends to do so but continues to be denied safe and equal access. Complaint at ¶ 4.

<sup>9</sup> Gamma vigorously argues that the Center does comply with the ADA and that the factual allegations in the Complaint are inaccurate. It supports this argument with a portfolio of

## CONCLUSION

In summary, upon review of the Motion for Summary Judgment filed by Gamma Management Group, Inc., after considering Plaintiffs' allegations and attestations by affidavit that they have visited the facility and remain unable to hold conferences there due to existing barriers, and noting that discovery with respect to this case has not yet been completed and that many facts asserted by Gamma remain disputed by the parties, the Court concludes that the allegations in the Complaint are sufficient to support an allegation that Plaintiffs have suffered an actual injury and that future injuries are, assuming the allegations in the Amended Complaint to be true, imminent. Therefore, Gamma's Motion for Summary Judgment will be denied. An appropriate Order follows.

/S/  
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Gene E.K. Pratter  
United States District Judge

October 12, 2005

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photographs of the exterior and interior of the Center. It is, however, virtually impossible for the Court to discern from the photographs whether the precise allegations made by Plaintiffs have merit. Moreover, despite the fact that the present motion is one for summary judgment, the Court notes that discovery in this case has not yet been completed. Therefore, the Court reserves judgment with respect to actual compliance with the ADA for a later date at which such compliance can be fairly assessed on a more complete record.

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**O R D E R**

**AND NOW**, this 12<sup>th</sup> day of October, 2005, upon consideration of the Motion for Summary Judgment filed by Gamma Management Group, Inc. (Docket Nos. 10, 11), the response thereto (Docket No. 15) and the Reply Brief (Docket No. 16), it is **ORDERED** that the motion is **DENIED**.

BY THE COURT:

/S/ \_\_\_\_\_  
GENE E.K. PRATTER  
United States District Judge