2019 WL 1905865
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United States District Court, M.D. Florida,
Ocala Division.

Joel PRICE, Plaintiff,
v.
ESCALANTE - BLACK DIAMOND GOLF CLUB LLC, Defendant.

Case No: 5:19-cv-22-Oc-30PRL
|
Entered 04/29/2019

Attorneys and Law Firms

Scott R. Dinin, Scott R. Dinin, P.A, Miami, FL, for Plaintiff.

Kevin W. Shaughnessy, Mary Caroline Cravatta, Baker & Hostetler, LLP, Orlando, FL, for Defendant.

ORDER

James S. Moody, Jr., United States District Judge

***1** Joel Price is a blind resident of Florida who recently learned of the U.S. Blind Golf Association. Price then visited the Escalante-Black Diamond Golf Club, LLC ("Black Diamond") website to determine if the golf club would be suitable for him to learn and play golf there. But, Price alleges, Black Diamond's website is incompatible with his screen reader, in violation of Title III of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12181–12189 ("ADA"). So Price sued Black Diamond seeking an injunction to require it to make its website accessible. Black Diamond now moves to dismiss the action, arguing Price lacks standing and that he failed to state a claim.

This is one of many recent cases in which persons with disabilities have alleged that private entities' websites violate the ADA. The spate of these cases has out paced any regulations from the Department of Justice on what businesses must do to have ADA compliant websites, and courts have reached no consensus. Applying this Circuit's case law in Title III ADA cases, the Court concludes Price failed to adequately plead his standing. But even if he had, the Court concludes Price also failed to state a claim because he has not pleaded facts showing that the Black Diamond website impedes his ability to access and enjoy the golf club. But the Court will grant Price an opportunity to file an amended complaint if he is able to do so.

BACKGROUND

Black Diamond brings a factual challenge to Price's standing, so the Court can consider facts from outside the four corners of the Complaint. *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1336 (11th Cir. 2013) ("in a factual challenge to subject matter jurisdiction, a district court can 'consider extrinsic evidence such as deposition testimony and affidavits.' "). So the Court will first address the allegations in the Complaint, and then set out the additional facts raised by Black Diamond.

A. The Complaint

Joel Price has had a long-standing desire to play golf. At some point, he came across the U.S. Blind Golf Association, which further excited Price about the possibility of learning to play golf. Price then began researching golf courses online to determine whether they were suitable locations at which he could learn to play. One of the golf course websites Price visited was that of Black Diamond (www.blackdiamondranch.com), a golf community in Lecanto, Florida.

While researching Black Diamond online in December 2018, Price alleges that portions of its website were in accessible via his screen reader.[12] Specifically, Price alleges Black Diamond's website was inaccessible such that he could not do the following:

a. find out about golf lessons,

b. request membership and learn about the procedure to reserve a golf tee time,

c. book a "stay and play" package or nightly house rental online,

d. learn about the monthly happenings at the golf to enjoy a meal there in when spending a day recreating and golfing at the golf club.

(Doc. 1, ¶ 31). In a footnote to sub-paragraph d., Price links to a July 2017 Member newsletter (https://www.blackdiamondranch.com/files/July%20Newsletter.pdf) that is in PDF format. (Doc. 1, n. 7). Other than the link to the newsletter, Price does not specifically identify any portions of the website that are inaccessible. Price alleges that his inability to communicate with Black Diamond through its website created a virtual barrier that resulted in an effective barrier hindering, impeding, and inhibiting his access to Black Diamond's physical location. (Doc. 1, ¶ 36).

[1] Price also alleges that the website does not include the universal symbol for the disabled or the symbol for web accessibility. But Price does not allege that failure to include these items renders any information on the website inaccessible.

[2] Price does not allege what screen reader software he used. While that fact is not relevant at this stage, the failure to include this information could later present an issue Black Diamond's counsel posited at the April 9, 2019 motion hearing. According to counsel, a website could be accessible by some but not all screen readers, and the idea of universally or fully accessible websites is essentially a myth given today's technological constraints. Assuming that is true, a website could appear to be both ADA compliant and non-compliant depending on the software a vision-impaired person uses. If that is the case, with what number of screen reader software programs must a website be compatible to be ADA compliant? But that is a question for another day.

***2** Despite being unable to learn the above information on the Black Diamond website, Price alleges he has concrete plans to golf at Black Diamond the first weekend of every month beginning in Spring 2019. (Doc. 1, ¶ 40). Based on its allegedly inaccessible website, Price sued Black Diamond for violating Title III of the ADA.

B. Additional Facts[3]

[3] These facts are derived from other lawsuits filed by Price in the Middle District of Florida and were argued at the April 9, 2019 hearing on Black Diamond's motion. The Court has taken judicial notice of those cases. *Ladd v. City of W. Palm Beach*, 681 F. App'x 814, 816 (11th Cir. 2017) (explaining courts with pending ADA claims can take judicial notice of other cases at motion to dismiss stage, and citing *Lozman v. City of Riviera Beach, Fla.*, 713 F.3d 1066, 1075 n.9 (11th Cir. 2013)).

Price, a resident of Daytona Beach, Florida, is a serial filer of ADA claims, having filed more than 100 cases in Florida's Middle District against businesses and public entities. At least seven of these cases involve claims that golf courses' websites violate the ADA. One of Price's other cases against a golf course is also pending before this Court: *Price v. Heritage Golf Group, Inc.*, 8:19-cv-393-T-30TGW (hereinafter, "*TPC Tampa Bay*"). The complaints in this case and Price's other golf course lawsuits are substantially similar, but also contain conflicting allegations. For instance, in this case, Price alleges that he intends to golf at Black Diamond the first weekend of every month; but in *TPC Tampa Bay*, Price alleges that he intends to golf at that course the first Sunday of every month.

Black Diamond raises the fact that Price has filed multiple lawsuits not as an independent ground on which to dismiss this case, but for two reasons related to standing. First, Black Diamond argues that it is implausible that Price—who has never played golf and lives 110 miles away from Black Diamond—would be able to physically and financially travel across the state to play at the golf courses with the frequency he alleges in his complaints. Second, Price's conflicting allegations indicate that he does not actually intend to golf at any of the locations. Both arguments go to whether Price has suffered an injury-in-fact and has an immediate risk of future injury.

DISCUSSION

Black Diamond raises two primary arguments. First, it argues that Price lacks standing because he has not suffered an injury-in-fact and has no immediate risk of future injury. Second, it argues that Price's Complaint fails to state a claim for many reasons.

This Court recently had the opportunity to discuss standing and how to state a claim in ADA website cases in another case brought by Price: *Price v. City of Ocala*, No. 5:19-CV-39-OC-30PRL, —— F.Supp.3d ——, 2019 WL 1811418 (M.D. Fla. Apr. 22, 2019). Several of the

background portions from that Order are equally applicable here, so the Court includes those sections below (specifically, §§ A–D). The Court will then analyze Price's standing in this case before considering whether the Complaint states a claim.

A. General principles of Article III standing

"In every federal case, the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 2308, 159 L.Ed.2d 98 (2004), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014). To do so, a plaintiff must demonstrate three things:

> ***3** First, he must show that he has suffered an "injury-in-fact." Second, the plaintiff must demonstrate a causal connection between the asserted injury-in-fact and the challenged action of the defendant. Third, the plaintiff must show that "the injury will be redressed by a favorable decision." These requirements are the " 'irreducible minimum' required by the Constitution" for a plaintiff to proceed in federal court.

Shotz v. Cates, 256 F.3d 1077, 1081 (11th Cir. 2001) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); and *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993)). When seeking an injunction, a plaintiff must also demonstrate "are a land immediate—as opposed to a merely conjecturalorhypothetical—threatof*future*injury."*Id.* (emphasis in original); *see also Houston v. Marod Super markets, Inc.*, 733 F.3d 1323, 1328 (11th Cir. 2013). To satisfy the future injury requirement, a plaintiff must espouse more than a "some day" intention. *Lujan*, 504 U.S. at 564, 112 S.Ct. 2130.

To plead an injury-in-fact, a plaintiff must allege facts showing "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Aaron Private Clinic Mgmt. LLC v. Berry*, 912 F.3d 1330, 1336 (11th Cir. 2019) (quoting *Lujan*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)); *see also Spokeo, Inc. v. Robins*, —— U.S. ——, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (explaining that a plaintiff must "clearly ... allege facts demonstrating each element" (citation and internal quotation marks omitted)). "While the proof required to establish standing increases as the suit proceeds, the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) (citation omitted).

B. Title III cases and future injury

"The ADA covers three main types of discrimination, each of which is addressed in one of the statute's three main subchapters: Title I prohibits discrimination in private employment; Title II prohibits discrimination by public entities (state or local governments); and Title III prohibits discrimination by a 'place of public accommodation,' which is a private entity that offers commercial services to the public." *A.L. by & through D.L. v. Walt Disney Parks & Resorts US, Inc.*, 900 F.3d 1270, 1289 (11th Cir. 2018).

To state a claim under Title III, a plaintiff must establish "(1) that the plaintiff is disabled; (2) that the defendant owns, leases, or operates a place of public accommodation; and (3) that the defendant denied the plaintiff—on the basis of the disability—full and equal enjoyment of the premises." *Bell v. FTMC, LLC*, No. 8:17-CV-3100-T-23AAS, 2018 WL 4565745, at *1 (M.D. Fla. Sept. 24, 2018) (Merry day, J.).

Title III applies to both tangible and intangible barriers to accessing a "place of public accommodation." *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1283 (11th Cir. 2002); *see also J.A.M. v. Nova Se. Univ., Inc.*, 646 F. App'x 921, 925 (11th Cir. 2016) ("Title III covers both tangible barriers, that is, physical and architectural barriers that would prevent a disabled person from entering an accommodation's facilities and accessing its goods, services and privileges, and intangible barriers, such as discriminatory policies and procedures that restrict a disabled person's ability to enjoy the defendant entity's goods, services and privileges."). Regardless of the barrier, there must be some nexus between the alleged violation and a physical, concrete place of public accommodation. *See Rendon*, 294 F.3d at 1284 (concluding the plaintiffs stated a claim that a game show's telephone screening system violated Title III and explaining in dicta that plaintiffs had shown a nexus between the discriminatory telephone screening and the physical theater in which the game show was recorded).

***4** In considering the future injury element of standing in Title III cases, district courts in this Circuit apply a four-factor test that this Court will refer to as the *Houston* factors. The *Houston* factors are: "(1) the proximity of the

defendant's business to the plaintiff's residence; (2) the plaintiff's past patronage of the defendant's business; (3) the definiteness of the plaintiff's plan to return; and (4) the frequency of the plaintiff's travel near the defendant's business." *Houston*, 733 F.3d at 1337 n.6; *see also Silva v. Baptist Health S. Fla., Inc.*, 856 F.3d 824, 832 (11th Cir. 2017) (citing *Houston* and explaining, "In the ADA context, our standing inquiry has focused on the frequency of the plaintiff's visits to the defendant's business and the definitiveness of the plaintiff's plan to return."). The Eleventh Circuit has explained, though, that these *Houston* factors are not exclusive, and no factor is dispositive. *Houston*, 733 F.3d at 1337 n.6. Instead, Court should consider the totality of the relevant facts. *Id.*

C. Unique standing concerns in ADA website cases

Recently there have been an explosion of cases—under both Title II and III—alleging that websites violate the ADA. Usually, they arise in the context of websites either failing to be compatible with screen reader software or failing to have closed captioning for videos. Courts have struggled to apply traditional principles of standing to these website cases and have disagreed about what features a website must have to comply with the ADA. The latter is largely due to a complete lack of rules and regulations being promulgated by the Department of Justice despite being aware of this issue for years.[4] That said, as far back as 2011, the DOJ explained its position on the ADA's relation to the Internet:

> Although the language of the ADA does not explicitly mention the Internet, the Department has taken the position that title III covers access to Web sites of public accommodations. The Department has issued guidance on the ADA as applied to the Web sites of public entities, which includes the availability of standards for Web site accessibility. See Accessibility of State and Local Government Websites to People with Disabilities (June 2003), available at www.ada.gov/websites2.htm. As the Department stated in that publication, an agency (and similarly a public accommodation) with an inaccessible Web site also may meet its legal obligations by providing an accessible alternative for individuals to enjoy its goods or services, such as a staffed telephone information line.... Additional guidance is available in the Web Content Accessibility Guidelines (WCAG), available at http://www.w3.org/TR/WAI–WEB CONTENT (last visited June 24, 2010), which are developed and maintained by the Web Accessibility Initiative, a subgroup of the World Wide Web Consortium (W3C®).

28 C.F.R. § Pt. 36, App. A.[5] So while the ADA undoubtedly applies to websites, there is no guidance from the DOJ about what a "public place of accommodation" must do to make its website ADA compliant.

4 The following quote from an Eastern District of New York court perfectly sums up the failure of the DOJ to provide clarity as to the ADA's application to the Internet:

> Despite being queried by members of Congress nearly two decades ago on the issue of whether website accessibility falls under the ADA, *see* Letter from Deval L. Patrick, Assistant Att'y Gen., to Senator Tom Harkin (Sept. 9, 1996), the DOJ has still not promulgated rules related to this specific issue. The DOJ, the agency tasked with promulgating regulations implementing the ADA, *see* 42 U.S.C. § 12186(b), issued an Advance Notice of Proposed Rulemaking ("ANPRM") seven years ago stating that it was "considering revising the regulations implementing title III of the [ADA] in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the Internet, specifically at sites on the World Wide Web (Web), accessible to individuals with disabilities." Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460-01, 43460, 2010 WL 2888003 (July 26, 2010). No rule or regulation emerged from the ANPRM. Prompted by changes to "the Internet, accessibility tools, and assistive technologies," on April 29, 2016, the DOJ withdrew the ANPRM and issued a Supplemental Advance Notice of Proposed Rulemaking ("SANPRM"). Department of Justice, *Statement Regarding Rulemaking on Accessibility of Web Information and Services of State and Local Government Entities* (Apr. 29, 2016), *available at* https://www.ada.gov/regs2016/sanprm_statement.ht

> ml (last visited on June 23, 2017). The SANPRM only sought input on accessibility guidelines related to the websites of entities covered by Title II of the ADA. Development of website accessibility rules for entities covered by Title III is proceeding on a separate track. *See id.* ("The Department received approximately 400 public comments addressing issues germane to both titles II and III in response to the 2010 ANPRM. Upon review of those comments, the Department announced in 2015 that it decided to pursue separate rulemakings addressing Web accessibility for titles II and III. The Department is moving forward with rulemaking under title II first."). It is unknown when a similar notice related to regulations concerning Title III entities will be issued.
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> *Andrews v. Blick Art Materials, LLC*, 268 F.Supp.3d 381, 402-03 (E.D.N.Y. 2017).

[5] The Court notes, merely for clarification, that this excerpt is different from the quote in its Order in *City of Ocala,* which referenced the DOJ's position on Title II website claims. —— F.Supp.3d at ——, 2019 WL 1811418, at *4.

D. Pleading Title III website cases

***5** Most of the ADA website case law involves violations of Title III. These cases have been primarily concerned with two issues that go to whether a plaintiff has stated a claim. First, the cases consider whether a website is a "place of public accommodation" such that it is governed by the ADA. *Compare Access Now, Inc. v. Sw. Airlines, Co.*, 227 F.Supp.2d 1312 (S.D. Fla. 2002) (concluding an airline's website was not a "place of public accommodation"); *with Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 904 (9th Cir. 2019) (concluding business website and app were "places of public accommodation").

Second, courts in this Circuit have considered what a plaintiff must allege to establish a nexus between a website and "place of public accommodation" such that a website claim is actionable. *See e.g. Price v. Everglades College, Inc.*, No. 6:18-CV-492-ORL-31GJK, 2018 WL 3428156, at *2 (M.D. Fla. July 16, 2018) (explaining that there must be a nexus between a website and a brick-and-mortar place for an actionable Title III claim); and *Haynes v. Dunkin' Donuts LLC*, 741 F. App'x 752, 754 (11th Cir. 2018) (holding a plaintiff stated a claim by pleading "the alleged inaccessibility of Dunkin' Donuts' website denies Haynes access to the services of the shops that are available on Dunkin' Donuts' website").[6] When considering whether there is a nexus, courts distinguish between "an inability to use a website to gain information about a physical location and an inability to use a website that impedes access to enjoy a physical location," with only the latter being sufficient to state a claim. *Everglades College,* 2018 WL3428156, at *2 (explaining that a contrary view "would require all websites with *any* nexus to a physical public accommodation to be formatted in such a way that they are accessible to screen reader software.")

[6] Although an unpublished opinion is not binding, it may be cited as persuasive authority. *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, No. 17-15606, —— F.3d ——, —— n.6, 2019 WL 1746869, at *7 n.6 (11th Cir. Apr. 19, 2019).

But those cases, which make up the majority of the case law, do not address standing. In the few cases that have addressed standing in Title III website cases, district courts have applied the *Houston* factors[7] to determine whether a plaintiff pleaded a future injury. *See e.g. Price v. Orlando Health, Inc.*, No. 6:17-CV-1999-ORL-40DCI, 2018 WL 6434519, at *4 (M.D. Fla. Dec. 7, 2018) (finding plaintiff had not alleged a future injury related to a hospital website because of the distance between his house and the "place of public accommodation," his failure to travel to the area frequently, and his lack of definite plan to return); and *Honeywell v. Harihar Inc*, No. 2:18-CV-618-FTM-29MRM, 2018 WL 6304839, at *3 (M.D. Fla. Dec. 3, 2018) (concluding a plaintiff pleaded a future injury related to a hotel's website by alleging she intended to travel from Fort Lauderdale to Fort Myers within six months).

[7] Again, those factors are: "(1) the proximity of the defendant's business to the plaintiff's residence; (2) the plaintiff's past patronage of the defendant's business; (3) the definiteness of the plaintiff's plan to return; and (4) the frequency of the plaintiff's travel near the defendant's business." *Houston*, 733 F.3d at 1337 n.6.

As a review of the above cases shows, courts cannot agree on how to apply traditional Title III case law to website cases. There is disagreement about when a website impedes access to a physical location, or whether a plaintiff must actually visit a "place of public accommodation" to state a claim after having visited a website. And that is to say nothing of the uneven application of the *Houston* factors in Title III website cases. Guidance is sorely needed in this arena.[8]

[8] An appeal from *Gil v. Winn-Dixie Stores, Inc.*, 257 F.Supp.3d 1340 (S.D. Fla. 2017), another Title III ADA website case dealing with standing, is currently pending before the Eleventh Circuit (Case No: 17-13467) and may resolve some of these issues.

E. Price lacks standing

***6** With that background, the Court now turns to Price's standing to sue Black Diamond. Black Diamond argues that Price lacks standing because he has not alleged an injury-in-fact and because he has no immediate risk of future injury.

Courts in this Circuit consider the *Houston* factors to determine whether a Title III ADA complainant has an immediate risk of future injury, but those factors are not exclusive. *Houston*, 733 F.3d at 1337, n.6. Instead, courts are to consider the totality of relevant facts. *Id.* The Court, therefore, will first consider the *Houston* factors and then discuss two additional factors this Court identified in *City of Ocala*, which have broad application in both Title II and III ADA website cases.

The first *Houston* factor—Price's proximity to Black Diamond—weighs against there being an immediate risk of future injury because Price lives in Daytona Beach, and Black Diamond is more than 100 miles away in Lecanto, Florida. The second *Houston* factor—Price's past patronage of Black Diamond—also weighs against Price having an immediate risk of future injury because he has never visited Black Diamond before (or, apparently, any other golf course). The third *Houston* factor—the definiteness of Price's plan to return—is, at best, neutral because Price alleges he intends to visit Black Diamond the first weekend of every month while also alleging he intends to visit the *TPC Tampa Bay* golf course the first Sunday of every month. Given that the allegations in his cases conflict, the Court concludes Price's allegation that he intends to visit Black Diamond the first weekend of every month is entitled to little weight. Finally, the last *Houston* factor—Price's frequency of travel near Black Diamond—weighs against an immediate risk of future harm because Price does not allege that he frequently travels near Lecanto, Florida. So the *Houston* factors do not support Price's standing.

The two other factors that merit consideration are:(1) the type of information that is inaccessible,[9] and (2) the relation between the inaccessibility and Price's alleged future harm.[10] *City of Ocala*, —— F.Supp.3d at ——, 2019 WL 1811418, at *8 (identifying factors relevant to future injury in Title II ADA website cases, which the Court concludes are also relevant in Title III ADA website cases). As to the first of these additional factors, the Court concludes it weighs against Price having an immediate risk of future harm. The only portion of the website he expressly identified as being inaccessible was a Black Diamond members' newsletter from July 2017. By the time Price attempted to access that newsletter in December 2018, the information was a year-and-a-half old, so the inaccessibility of it creates little (or no) risk of immediate future harm to Price. The Court also notes that Price did not allege the December 2018 members' newsletter was inaccessible (assuming one exists), or explain how the inaccessibility of the July 2017 newsletter affected his ability to patronize Black Diamond beginning in Spring 2019. So the Court concludes the allegedly inaccessible information creates no immediate risk of future harm to Price.

[9] Price's counsel admitted that this is a factor courts should consider at the April 9, 2019 hearing when he stated, "[I]f there's a bunch of pictures on their websites that are inaccessible, I wouldn't have brought this lawsuit. Because it's not really critical to what the client needs."

[10] This factor is relevant because there is a difference between a plaintiff alleging the future harm is the inability to access the information itself versus alleging the future harm is being unable to use the information for its intended purpose. *City of Ocala*, —— F.Supp.3d at ——, 2019 WL 1811418, at *8.

***7** The second factor also weighs against Price's standing. Again, Price only identifies the July 2017 members' newsletter as being inaccessible. Yet Price alleges he was harmed by the website's inaccessibility because he could not learn about stay-and-play packages, learn about pricing and golf instruction, or learn about membership events. Only the last alleged harm—the inability to learn about membership events—has any relation to the allegedly inaccessible newsletter, but even that relationship is tenuous given that the newsletter was a year-and-a-half old. Failure to identify other portions of the website that related to Price's alleged harm, therefore, causes this factor to weigh against Price being at risk of immediate future harm.

So considering the *Houston* factors and the additional factors relevant to Title III websites claims, the Court

concludes Price failed to plead an immediate risk of future injury. But the Court will give Price another opportunity to plead his standing rather than dismissing his case at this time.

F. Price Failed to State a Claim

1. 12(b)(6) Standard

Federal Rule of Civil Procedure 12(b)(6) allows a complaint to be dismissed for failure to state a claim on which relief can be granted. When reviewing a motion to dismiss, courts must limit their consideration to the well-pleaded allegations, documents central to or referred to in the complaint, and matters judicially noticed. *See La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (internal citations omitted); *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). Courts must accept all factual allegations as true and view the facts in a light most favorable to the plaintiff. *See Erickson v. Pardus*, 551 U.S. 89, 93–94, 127 S.Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007).

Legal conclusions, however, "are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 664, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). In fact, "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003). To survive a motion to dismiss, a complaint must instead contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (internal quotation marks and citations omitted). This plausibility standard is met when the plaintiff pleads enough factual content to allow the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (internal citations omitted).

2. Analysis

The case law in this Circuit regarding how to state a claim in Title III ADA website cases is conflicting. But at least this much appears clear: websites themselves are not "places of public accommodation," and a plaintiff must allege a nexus between a website and a "place of public accommodation." *See Sw. Airlines, Co.*, 227 F.Supp.2d at 1319 ("[T]his Court cannot properly construe 'a place of public accommodation' to include Southwest's Internet website."); and *Dunkin' Donuts*, 741 F. App'x at 754 (noting that the website is a service that facilitates use of shops that are "places of public accommodation"). So the Court rejects without further discussion Price's argument that Black Diamond's website is a place of public accommodation, and Black Diamond's argument that the ADA does not apply to its website because there is a nexus between the website and golf course.

Instead, the crux of this issue is whether Price alleged that the inaccessible portions of the website "hinders the full use and enjoyment" of Black Diamond's facilities. *Everglades College, Inc.*, 2018 WL 3428156, at *2 (quoting *Gomez v. Bang & Olufsen Am., Inc.*, No. 1:16-cv-23801, 2017 WL 1957182, at *3 (S.D. Fla. Feb. 2, 2017)). The answer to that question is no.

***8** The only specific portion of the website that Price claims is inaccessible is the July 2017 members' news letter.[11] Price has not alleged how the inability to access the July 2017 newsletter in December 2018 hinders Price's full use and enjoyment of Black Diamond's facilities. Absent such allegations, the Court concludes that Price failed to state a claim.

[11] While Price argued in his response and at the April 9 hearing that other portions of the website are also inaccessible, he never alleged facts in the Complaint that support that argument.

The Court, though, will allow Price to amend his Complaint to identify other portions of the website that are inaccessible and allege how they hindered his ability to use and enjoy Black Diamond's facilities if he can do so.[12]

[12] Black Diamond alluded in its Motion and at the April 9 hearing that the allegedly inaccessible information on its website was available via an alternative method--namely, by calling Black Diamond. The Court concludes this argument would not go to whether Price is able to state a claim but would instead be an affirmative defense.

Accordingly, it is ORDERED AND ADJUDGED that:

1. Defendant Escalante – Black Diamond Golf Club, LLC's Motion to Dismiss Plaintiff's Complaint (Doc. 5) is GRANTED.

2. The Complaint is DISMISSED WITHOUT PREJUDICE.

3. Plaintiff Joel Price may file an amended complaint within fourteen (14) days from the date of this Order. Failure to do so will result in this case being closed without further notice.

DONE and **ORDERED** in Tampa, Florida, this 22nd day of April, 2019.

All Citations

Slip Copy, 2019 WL 1905865

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