UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

JUAN CARLOS GIL,

Plaintiff,

v. **CASE NO. 3:19-cv-00392-TKW-HTC**

CITY OF PENSACOLA, FLORIDA,

Defendant.
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ORDER ON MOTION TO DISMISS

This case is before the Court on the City of Pensacola's motion to dismiss the amended complaint (Doc. 28). Plaintiff filed a response in opposition to the motion. (Doc. 29). No hearing is necessary to rule on the motion.

Plaintiff is blind and currently lives in Miami. He allegedly has "concrete plans to move," and he considers Pensacola to be a "viable living option." Plaintiff accessed the City's website (www.cityofpensacola.com) to find out more about the City and its disability policies, but he was not able to access some of the documents on the City's website because they were in a "flat surface format" that was not compatible with his screen-reader. Plaintiff brought this issue to the City's attention

and requested an accommodation, but he claimed that the City did not respond to his request.[1]

Shortly thereafter, Plaintiff filed this action under Title II of the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of 1973, seeking declaratory and injunctive relief, compensatory damages, and attorney's fees and costs. Plaintiff alleged that because he cannot view some of the documents on the City's website, he experiences "shame," "humiliation," "isolation," "pain," and "anguish," and that he cannot participate in the City's services, programs, or activities.

The City filed a motion to dismiss, arguing (among other things[2]) that Plaintiff does not have Article III standing to seek redress for the alleged inaccessibility of portions of the City's website because he has not alleged an injury in fact or a real and immediate threat of future injury. In response, Plaintiff argues that he has

[1] The latter assertion appears to be patently false because, according to a letter attached to the City's response in opposition to the motion to dismiss, not only did the City respond to the letter in which Plaintiff raised the website accessibility issues, but it offered to work with him to ensure that he was able to view the documents on the website he was interested in. *See* Doc. 28-1 ("If for some reason, your reader does not work in helping to view the information available on our website, please let the Human Resources team know (850-435-1720) and we will work with you to ensure you are able to receive/review the documents of interest."). However, at this stage of the proceeding, the Plaintiff's allegation must be accepted as true. *See Randall v. Scott*, 610 F.3d 701, 705 (11th Cir. 2010) (explaining that when reviewing a Rule 12(b)(6) motion the court "accept[s] as true the facts as set forth in the complaint and draw[s] all reasonable inferences in the plaintiff's favor").

[2] The Court declines to address the other arguments raised by the City based on the Court's disposition of the standing argument.

standing because he will continue to be uninformed about the City's governmental functioning, policies, programs, and activities so long as the documents on the City's website remain inaccessible. The Court agrees with the City.

To establish standing, "a plaintiff must demonstrate: (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) that the injury is likely to be redressed by a favorable decision." *Miccosukee Tribe of Indians v. Fla. State Athletic Comm'n*, 226 F.3d 1226, 1228 (11th Cir. 2000). An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted) (internal quotation marks omitted). Additionally, a plaintiff seeking declaratory or injunctive relief must show "a real and immediate—as opposed to a merely conjectural or hypothetical—threat of *future* injury." *Wooden v. Bd. of Regents of Univ. Sys. of Georgia*, 247 F.3d 1262, 1284 (11th Cir.2001) (emphasis in original).

In *Price v. City of Ocala, Florida*, 375 F. Supp. 3d 1264 (M.D. Fla. 2019), the court persuasively addressed the issue of Article III standing in a nearly-identical government website accessibility suit. There, as here, a blind plaintiff sued a city under Title II of the ADA and the Rehabilitation Act because he was unable to access portions of the city's website that were incompatible with his screen-reader. *Id.* at 1267. The court dismissed the suit for lack of standing because the plaintiff failed

to allege a real and immediate threat of future injury. *Id.* at 1277. The court identified the following factors to be considered with the totality of the relevant facts in determining whether the plaintiff has alleged a real and immediate threat of future injury in the context of a suit alleging inaccessibility of a governmental entity's website: (1) the plaintiff's connection with the defendant;[3] (2) the type of information that is inaccessible on the website;[4] and (3) the relation between the inaccessibility and the plaintiff's alleged future harm.[5] *Id.* at 1274-75.

Here, with respect to the first factor, Plaintiff has not alleged any meaningful connection to the City Pensacola. Although Plaintiff alleges that he "has concrete plans to move from Miami," he does not allege any concrete plans to move to, or even visit, Pensacola; instead, he only considers the City to be a "viable living

[3] The court explained that because government websites generally provide services to the government's constituents, not the world at large, there needs to be a meaningful "link" between the plaintiff and the governmental entity." *Id.* at 1274 ("Without a link between the plaintiff and the governmental entity—*e.g.*, the plaintiff is a citizen or lives nearby, the plaintiff has concrete plans to relocate to within that government's bounds or visit it, the plaintiff has family or friends who are citizens whom depend on the plaintiff, etc.—this factor would weigh against an immediate threat of future injury.").

[4] The court explained that "[t]here is a difference between inaccessible information about current governmental services, programs, or activities, and merely archival information" because the inaccessibility of archival information poses a lesser (or no) risk of future harm as compared to the inaccessibility of current information. *Id.* at 1274-75.

[5] The court explained that an "ADA tester" searching for and finding inaccessible portions of the website is different from a person's inability to use the website to participate in or benefit from a government service because "the future harm [is] not the inaccessibility of the information itself; rather, it [is] the effect that the inaccessibility ha[s] on the plaintiff's ability to use the information for its intended purpose." *Id.* at 1275.

option" that he is considering.[6] "Such '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." *Lujan*, 504 U.S. at 564. Accordingly, this factor weighs strongly against Plaintiff having a real or immediate threat of future injury.

With respect to the second factor, many of the allegedly inaccessible documents identified by Plaintiff contained archival information[7], but some likely contain current information.[8] Accordingly, this factor does not weigh for or against Plaintiff in having a real or immediate threat of future injury.

With respect to the third factor, Plaintiff generally alleges that the inaccessibility of documents on the City's website prevented him from "from

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[6] Plaintiff made similar claims about other locales, which makes his connection to Pensacola even more tenuous and speculative. *See, e.g.*, *Gil v. Broward Cty., Fla.*, 2018 WL 4941108, at *2 (S.D. Fla. May 7, 2018) (claiming that he is "considering living in Broward County"); *see also Gil v. Wakulla County Florida*, Case No. 4:19-cv-00085-AW-CAS (Am. Compl., Doc. 20, at ¶¶27-28, 46) ("Wakulla County has presented as a viable living option."); *Gil v. Washington County, Florida*, Case No. 5:19-cv-00066-TKW-MJF (2d Am. Compl., Doc. 20, at ¶¶29-30, 45) ("Washington County presents as a viable living option."); *Gil v. Gilchrist County, Florida*, Case No. 1:19-cv-00042-AW-GRJ (Am. Compl., Doc. 11, at ¶¶27-28, 33, 47) ("Gilchrist County has presented as a viable living option."); *Gil v. Franklin County Florida*, Case No. 4:19-cv-00134-AW-CAS (Am. Compl., Doc. 9, at ¶¶29-30, 42) ("Franklin County has presented as a viable living option."); *Gil v. Alachua County, Florida*, Case No. 1:19-cv-00128-MW-GRJ (Compl., Doc. 1, at ¶¶29, 42) ("Alachua County presents as a viable living option.").

[7] *See, e.g.*, Doc. 23, at 31 (referencing budget documents from 2015-18 and city commission agendas from 2016-18).

[8] *See, e.g.*, Doc. 23, at ¶¶31, 33 (referencing 2019 Sanitation Holiday Collection Schedule, Winter 2019 Playbook, 2019 hurricane preparedness article, and fiscal year 2019 budget documents).

becoming informed about the City of Pensacola's governmental functioning, policies, programs, services and activities that Defendant offers to the disabled and infirm" and prohibited him "from enjoying the programs, services and activities offered by Defendant to the public" or to "disabled and infirm residents of and visitors to the City." However, like the plaintiff in *Price*, Plaintiff does not specifically allege *how* his involvement with the City was hindered by the inaccessible documents. *See* 375 F. Supp.3d at 1377 (explaining that the plaintiff's failure to allege "any specific way that the inaccessible information hindered in his ability to be involved with the City's government" was "akin to an allegation that he was harmed by the inaccessibility itself"). Accordingly, this factor weighs against Plaintiff in having a real or immediate threat of future injury.

On balance of these factors (and the totality of the circumstances alleged in the amended complaint), the Court finds that Plaintiff has not adequately alleged a real and immediate threat of future injury. Accordingly, Plaintiff lacks Article III standing to pursue his claim for declaratory and injunctive relief.[9]

[9] Plaintiff's claim for compensatory damages cannot go forward either because Plaintiff did not—and in good faith likely cannot, *see* note 1 *supra*—adequately allege that the City violated his rights under the ADA or Rehabilitation Act with discriminatory intent or with deliberate indifference to his statutory rights. *See McCullum v. Orlando Reg'l Healthcare Sys., Inc.*, 768 F.3d 1135, 1146-47 (11th Cir. 2014); *Price v. Town of Longboat Key*, 2019 WL 2173834, at **5-6 (M.D. Fla. May 20, 2019).

In *Price*, although the court agreed with the city that the plaintiff lacked standing, it allowed him an opportunity to amend his complaint to reallege standing because the court had articulated new considerations of which the plaintiff was unaware of when he filed his original complaint. 375 F. Supp. 3d at 1267. Here, by contrast, Plaintiff could have addressed the factors relied on in *Price* in his amended complaint because the decision in that case (and another case applying the same factors[10]) was issued before the amended complaint was filed. Thus, unlike *Price*, principles of due process do not require that Plaintiff be given another[11] opportunity to amend his complaint.

The Court has not overlooked Plaintiff's assertion in his response to the motion to dismiss that he can allege additional facts that will establish his standing based on the factors in *Price*. *See* Doc. 29, at 7. Specifically, Plaintiff claims that, if given the opportunity to file a second-amended complaint, he will allege that "he has been a vacation visitor to the City of Pensacola" and that he "will add reasons for his considering moving to the city based on his personal experience." *Id.* Even with these additional facts, the Court would find that Plaintiff has not shown a sufficient connection to the City to give him Article III standing. Indeed, the fact

[10] *Price v. Town of Longboat Key*, *supra*.

[11] Plaintiff was granted leave to file an amended complaint after the City filed a motion to dismiss the original complaint. *See* Docs. 15 (motion to dismiss), 21 (motion to amend), 24 (order granting leave to amend).

that Plaintiff "has been" (past tense) a vacation visitor to the City does not prove a real and immediate threat of *future* injury, and additional reasons that Plaintiff might move to the City, without any concrete plans to do so, do not change the "some day" nature of Plaintiff's alleged injury.

Accordingly, for the reasons stated above, it is

ORDERED that the motion to dismiss (Doc. 28) is **GRANTED**, and the amended complaint (Doc. 23) is **DISMISSED with prejudice**.

DONE AND ORDERED this 22nd day of August 2019.

T. Kent Wetherell, II

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UNITED STATES DISTRICT JUDGE