IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MELANIE DAVIS, Plaintiff, vs. ANTHONY, INC., Defendant.	**8:16CV140** **MEMORANDUM AND ORDER**

This matter is before the Court on Defendant Anthony, Inc.'s ("defendant") Motion to Dismiss for Lack of Subject Matter Jurisdiction (Filing No. 10) under Federal Rule of Civil Procedure 12(b)(1). For the reasons stated below, the motion is granted.

I. BACKGROUND

In January 2016, Melanie Davis ("Davis"), a resident of Nicollet, Minnesota, attempted to patronize Anthony's Steakhouse restaurant ("restaurant") in Omaha, Nebraska. Davis, who suffers from Cerebral Palsy and uses a wheelchair for mobility, alleges she "was unable to use the parking spaces at" the restaurant because "[t]he accessible parking spaces, located near the entrance of the restaurant, did not have adjacent access aisles." Davis also alleges there were too few accessible spaces and the posted signage for two of the existing spaces was inadequate. According to Davis, she could not independently access the restaurant "because of her disabilities, due to the physical barriers to access and violations of the [Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*] that exist" there. In her Complaint, Davis states she intends to return to the restaurant on a future visit to Omaha, "but these architectural barriers deter her from doing so."

On April 4, 2016, Davis, without relaying her concerns to the defendant, filed suit in federal court, alleging the defendant discriminated against Davis on the basis of her disability in violation of Title III of ADA and its implementing regulations. *See* 42 U.S.C. § 12182(a) ("No individual shall be discriminated against on the basis of disability

in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."); 42 U.S.C. § 12188 (providing for a private right of action). Davis seeks a declaration pursuant to 28 U.S.C. § 2201 that the restaurant is in violation of federal law and requests "an injunction requiring Defendant to make modifications to the [restaurant] facilities so that they are fully accessible to, and independently usable by, individuals with disabilities." Davis also requests reasonable attorney fees, litigation expenses and costs pursuant to 42 U.S.C. § 12205 and 28 C.F.R. § 36.505.

On May 25, 2016, the defendant moved to dismiss this action pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction. According to the defendant, this case is moot because the defendant modified its parking facilities to address the ADA violations Davis identified and to make the parking lot accessible. The defendant further contends dismissal is required because Davis lacks standing to sue under Article III of the U.S. Constitution.

Neither the defendant nor Davis has requested an evidentiary hearing regarding the jurisdictional questions the defendant raises, and the Court finds a hearing unnecessary in light of the record in this case. *See, e.g.*, *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) (explaining a motion to dismiss on jurisdictional grounds "may be supported with affidavits or other documents" and "[i]f necessary, the district court can hold a hearing at which witnesses may testify"); *Johnson v. United States*, 534 F.3d 958, 964 (8th Cir. 2008) ("Because 'there is no statutory procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court.'" (quoting *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947))). The defendant and Davis have each submitted sworn statements and documentary evidence to support their respective positions.

II. DISCUSSION

A. Mootness

"The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). "The express limitation of the Declaratory Judgment Act to cases 'of actual controversy' is explicit recognition of this principle." *Golden v. Zwickler*, 394 U.S. 103, 110 (1969) (quoting 28 U.S.C. § 2201). "[A]n actual controversy must exist at all stages of review, and not simply at the date the action is initiated." *Associated Gen. Contractors of Minn. v. Int'l Union of Operating Eng'rs Twin City Local No. 49*, 519 F.2d 269, 271 (8th Cir. 1975).

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. ___, ___, 133 S. Ct. 721, 726-27 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). A defendant's "voluntary conduct can moot a case 'if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated.'" *Hummel v. St. Joseph Cty. Bd. of Comm'rs*, 817 F.3d 1010, 1023 (7th Cir. 2016) (quoting *Chi. United Indus., Ltd.*, 445 F.3d 940, 947 (7th Cir. 2006)). "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

The defendant has met that "formidable burden" under the facts and circumstances of this case. *Id.* In support of its Motion to Dismiss, the defendant submits two sworn declarations from Anthony Fucinaro ("Fucinaro"), the proprietor of the restaurant; fifteen photographs of the accessible parking spaces at the restaurant; and two work invoices, all indicating the defendant has voluntarily remediated the alleged ADA violations Davis

seeks to enjoin. In his sworn declaration, Fucinaro agrees with Davis that the restaurant parking lot did not fully comply with the ADA and its implementing regulations at the time Davis filed her Complaint. But Fucinaro declares the defendant has since taken the necessary steps to ensure its parking facilities are now ADA compliant, including seeking legal advice and hiring a contractor "to implement counsel's advice regarding ADA-compliant facilities." Supported by photographs documenting the changes to the restaurant parking lot and copies of invoices from the contractors who completed the remediation work, Fucinaro declares the defendant has permanently remediated all of the ADA violations Davis identified in her complaint by (1) adding and marking compliant adjacent access aisles; (2) adding accessible spaces; and (3) posting the required signs.

The defendant's strong evidence that it has fully and permanently removed the barriers Davis identified to Davis's "full and equal enjoyment," 42 U.S.C. § 12182(a), of the restaurant leads the Court to conclude Davis's request for declaratory and injunctive relief no longer presents a live Case or Controversy for purposes of Article III. *See, e.g.*, *Hummel*, 817 F.3d at 1022 (finding the defendant's intervening installation of ADA-compliant facilities "provided plaintiffs the relief they sought," "eliminated any need for injunctive relief," and deprived them of a present "interest in maintaining th[eir] claim"); *Kennedy Bldg. Assocs. v. Viacom, Inc.*, 375 F.3d 731, 745 (8th Cir. 2004) ("A case becomes moot if it can be said with assurance that there is no reasonable expectation that the violation will recur or if interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."). "Where, as here, an issue is no longer 'live' and the parties 'lack a legally cognizable interest in the outcome,' the claim is 'moot and must be dismissed for lack of jurisdiction.'" *Id.* (quoting *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 626 (7th Cir. 2007)).

Davis denies this action is moot but neither contradicts the defendant's remediation evidence nor identifies any remaining ADA violations. Rather, Davis argues the defendant "cannot persuade the Court that its parking lot will remain compliant." The

argument is unavailing. As the defendant points out, it spent significant time and money to remediate the ADA violations in its parking lot and it "would have no reason to go back and tear out the newly-poured cement in front of its restaurant, to remove the newly painted accessible parking lines and access aisle line, or to remove the signage that is now part of the premises." Given the absence of any evidence to suggest the defendant will senselessly undue its remediation efforts, the Court is satisfied the ADA violations Davis alleged in her Complaint cannot "reasonably be expected to recur." *Friends of the Earth, Inc.*, 528 U.S. 167, 190 (2000).

The Court also rejects Davis's contention that "[t]he admitted noncompliance of Anthony's parking lot is sufficient reason to infer that Davis will discover additional interior architectural barriers during her formal sight [sic] inspection." Davis's proposed inference is little more than sheer speculation. Davis does not identify any other specific architectural barriers inside or outside the restaurant, and the defendant has removed every specific barrier Davis identified in her Complaint. Davis's vague reference to other "potential barriers" at the restaurant is insufficient to withstand dismissal. *See, e.g.*, *McFarlin v. Newport Special Sch. Dist.*, 980 F.2d 1208, 1211 (8th Cir. 1992) ("A mere 'physical or theoretical possibility' is insufficient; a 'demonstrated probability' must be shown." (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam))). The mere possibility that Davis might find some—as yet unidentified—ADA violations somewhere in the restaurant at some point in the future (should Davis ever follow through on her stated intention to travel several hours from her home in Minnesota to Omaha to visit the restaurant) does not present "an actual, ongoing case or controversy" for purposes of Article III. *Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1172 (8th Cir. 1994). As such, this "case is moot and the federal court no longer has jurisdiction to hear it."[1] *Id.*

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[1]Because the Court finds this case is moot, it need not consider the defendant's alternative argument that Davis lacks Article III standing.

B. Attorney Fees, Litigation Expenses, and Costs

In addition to requesting declaratory and injunctive relief, Davis requests an award of attorney fees, litigation expenses, and costs pursuant to 42 U.S.C. § 12205 and 28 C.F.R. § 36.505. Under § 12205, the Court may, in its discretion, allow such an award to a "prevailing party." It may appear that Davis is a prevailing party because her suit prompted the defendant to remedy the admitted ADA violations in its parking lot. But the Supreme Court has held "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change" in the parties' legal relationship to qualify the plaintiff as a prevailing party for purpose of awarding fees under § 12205. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001). Davis's request for an award under § 12205 is denied.

III. CONCLUSION

The defendant's voluntary remediation of all of the barriers to access that Davis identified in her Complaint has rendered Davis's claims for declaratory and injunctive relief moot. The defendant's Motion to Dismiss for lack of subject-matter jurisdiction is GRANTED, and this case is DISMISSED as moot.

Dated this 26th day of September, 2016.

BY THE COURT:

s/ *Robert F. Rossiter, Jr.*
United States District Judge