

[Query](#) [Reports](#) [Utilities](#) [Help](#) [Log Out](#)

STAT-CONSENT,TRIAL-OMAHA

**U.S. District Court
District of Nebraska (8 Omaha)
CIVIL DOCKET FOR CASE #: 8:18-cv-00449-LSC-CRZ**

Hillesheim v. RVD Real Estate Properties LLC
Assigned to: Judge Laurie Smith Camp
Referred to: Magistrate Judge Cheryl R. Zwart
Cause: 42:12101 Americans with Disabilities Act

Date Filed: 09/25/2018
Jury Demand: None
Nature of Suit: 446 Civil Rights:
Americans with Disabilities - Other
Jurisdiction: Federal Question

Plaintiff

Zach Hillesheim

represented by **Padraigin L. Browne**
BROWNE LAW FIRM
8530 Eagle Point Boulevard
Suite 100
Lake Elmo, MN 55042
(612) 293-4805
Email: paddy@brownelawllc.com
ATTORNEY TO BE NOTICED

V.

Defendant

RVD Real Estate Properties LLC

represented by **Edward F. Pohren**
SMITH, SLUSKY LAW FIRM
8712 West Dodge Road
Suite 400
Omaha, NE 68114
(402) 392-0101
Fax: (402) 392-1011
Email: epohren@smithslusky.com
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/25/2018	1	COMPLAINT against RVD Real Estate Properties LLC (Filing fee \$ 400, receipt number ANEDC-3771630), by Attorney Padraigin L. Browne on behalf of Zach Hillesheim (Attachments: # 1 Exhibit A)(Browne, Padraigin) (Entered: 09/25/2018)
09/25/2018	2	Summons Requested as to RVD Real Estate Properties LLC regarding Complaint 1 . (Browne, Padraigin) (Entered: 09/25/2018)

09/25/2018	3	TEXT NOTICE OF JUDGE ASSIGNED: Magistrate Judge Michael D. Nelson assigned. (LKO) (Entered: 09/25/2018)
09/25/2018	4	Summons Issued as to defendant RVD Real Estate Properties LLC. YOU MUST PRINT YOUR ISSUED SUMMONS, WHICH ARE ATTACHED TO THIS DOCUMENT. PAPER COPIES WILL NOT BE MAILED. (LKO) (Entered: 09/25/2018)
10/29/2018	5	NOTICE of Appearance of <i>Counsel</i> by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC (Pohren, Edward) (Entered: 10/29/2018)
10/30/2018	6	MOTION to Extend <i>Time</i> by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC.(Pohren, Edward) (Entered: 10/30/2018)
10/30/2018	7	TEXT ORDER granting 6 Motion to Extend. Defendant shall have an extension of time to November 20, 2018, to file an answer or other responsive pleading to the Complaint. Ordered by Magistrate Judge Michael D. Nelson. (SMN) (Entered: 10/30/2018)
10/31/2018	8	TEXT NOTICE REGARDING CORPORATE DISCLOSURE STATEMENT by Deputy Clerk as to Defendant RVD Real Estate Properties LLC. Pursuant to Fed. R. Civ. P. 7.1, non-governmental corporate parties are required to file Corporate Disclosure Statements (Statements). The parties shall use the form Corporate Disclosure Statement, available on the Web site of the court at http://www.ned.uscourts.gov/forms/ . If you have not filed your Statement, you must do so within 15 days of the date of this notice. If you have already filed your Statement in this case, you are reminded to file a Supplemental Statement within a reasonable time of any change in the information that the statement requires.(CS) (Entered: 10/31/2018)
11/02/2018	9	CORPORATE DISCLOSURE STATEMENT pursuant to Fed. R. Civ. P. 7.1 by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC.(Pohren, Edward) (Entered: 11/02/2018)
11/20/2018	10	MOTION to Dismiss <i>Complaint</i> by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC.(Pohren, Edward) (Entered: 11/20/2018)
11/20/2018	11	INDEX in support of MOTION to Dismiss <i>Complaint</i> 10 by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC.(Pohren, Edward) (Entered: 11/20/2018)
11/20/2018	12	REASSIGNMENT ORDER - that this case is reassigned to District Judge Laurie Smith Camp for disposition and to Magistrate Judge Cheryl R. Zwart for judicial supervision. Ordered by Chief Judge John M. Gerrard. (KLF) (Entered: 11/20/2018)
12/11/2018	13	BRIEF in opposition to MOTION to Dismiss <i>Complaint</i> 10 by Attorney Pdraigin L. Browne on behalf of Plaintiff Zach Hillesheim.(Browne, Pdraigin) (Entered: 12/11/2018)
12/11/2018	14	

		INDEX in opposition to MOTION to Dismiss <i>Complaint 10</i> by Attorney Padraigin L. Browne on behalf of Plaintiff Zach Hillesheim.(Browne, Padraigin) (Entered: 12/11/2018)
12/12/2018	15	REPLY BRIEF in support of MOTION to Dismiss <i>Complaint 10 Of Defendant</i> by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC.(Pohren, Edward) (Entered: 12/12/2018)
12/17/2018	16	ATTACHMENT - CONTINUED regarding Index 14 . by Attorney Padraigin L. Browne on behalf of Plaintiff Zach Hillesheim.(Browne, Padraigin) (Entered: 12/17/2018)
01/21/2019	17	MOTION Leave to file Supplemental Index and Memorandum by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC. (Attachments: # 1 Supplement Supplemental Index of Evidence, # 2 Supplement Supplemental Memorandum)(Pohren, Edward) (Entered: 01/21/2019)
01/22/2019	18	TEXT ORDER granting 17 Motion. The proposed supplemental declaration and memorandum of law (filings 17-1 and 17-2) shall be separately filed by Defendant as a Supplemental Reply. Plaintiff is given until February 4, 2019 to file any additional response. The motion to dismiss filed by Defendant 10 will be deemed fully submitted on February 5, 2019. Ordered by Magistrate Judge Cheryl R. Zwart. (Zwart, Cheryl) (Entered: 01/22/2019)
01/22/2019	19	Supplemental Index on Motion to Dismiss 10 by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC.(Pohren, Edward) Modified on 1/22/2019 (Zwart, Cheryl). (Entered: 01/22/2019)
01/22/2019	20	Supplemental Brief on Motion to Dismiss 10 by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC.(Pohren, Edward) Modified on 1/22/2019 (Zwart, Cheryl). (Entered: 01/22/2019)
02/04/2019	21	SUPPLEMENT regarding Brief 13 by Attorney Padraigin L. Browne on behalf of Plaintiff Zach Hillesheim.(Browne, Padraigin) (Entered: 02/04/2019)
02/14/2019	22	MEMORANDUM AND ORDER that the Motion to Dismiss, ECF No. 10 , filed by Defendant RVD Real Estate Properties LLC, is converted to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Plaintiff Zach Hillesheim may respond to the pending motion for summary judgment on or before February 28, 2019. Ordered by Senior Judge Laurie Smith Camp. (LAC) (Entered: 02/14/2019)
02/26/2019	23	MOTION Discovery Under Rule 56(d) and to Extend Time to Respond regarding MOTION to Dismiss <i>Complaint 10</i> by Attorney Padraigin L. Browne on behalf of Plaintiff Zach Hillesheim.(Browne, Padraigin) (Entered: 02/26/2019)
02/26/2019	24	BRIEF in support of MOTION Discovery Under Rule 56(d) and to Extend Time to Respond regarding MOTION to Dismiss <i>Complaint 10 23</i> by Attorney

		Padraigin L. Browne on behalf of Plaintiff Zach Hillesheim.(Browne, Padraigin) (Entered: 02/26/2019)
02/26/2019	25	INDEX in support of MOTION Discovery Under Rule 56(d) and to Extend Time to Respond regarding MOTION to Dismiss <i>Complaint 10 23</i> by Attorney Padraigin L. Browne on behalf of Plaintiff Zach Hillesheim. (Attachments: # 1 Exhibit A)(Browne, Padraigin) (Entered: 02/26/2019)
02/27/2019	26	RESTRICTED CASE CONFERENCE INSTRUCTIONS. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(a). Ordered by Magistrate Judge Cheryl R. Zwart. (KLF) (Entered: 02/27/2019)
02/27/2019	27	TEXT ORDER SETTING HEARING: A Telephonic Conference is set for March 5, 2019, at 04:30 PM before Magistrate Judge Cheryl R. Zwart. The parties shall use the case conferencing instructions at Filing No. 26 to participate in the conference. Ordered by Magistrate Judge Cheryl R. Zwart. (JLA) (Entered: 02/27/2019)
02/28/2019	28	TEXT ORDER granting Plaintiff additional time to respond to Defendant's (converted) Motion for Summary Judgment (Filing No. 10). The time extension shall be set at the March 5, 2019 Telephonic Hearing (see Filing No. 27). Ordered by Magistrate Judge Cheryl R. Zwart. (JLA) (Entered: 02/28/2019)
03/04/2019	29	MOTION for Protective Order by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC.(Pohren, Edward) (Entered: 03/04/2019)
03/04/2019	30	BRIEF in support of MOTION for Protective Order 29 and in Opposition to Plaintiff's Motion for Discovery by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC.(Pohren, Edward) (Entered: 03/04/2019)
03/04/2019	31	INDEX in support of MOTION for Protective Order 29 and in Opposition to Plaintiff's Motion for Discovery by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC. (Attachments: # 1 Exhibit 1 - Affidavit of Edward F Pohren, # 2 Exhibit 2 - Browning 3-25-16, # 3 Exhibit 3 - Jones 8-22-18, # 4 Exhibit 4 - Hansmeier Plea Agreement, # 5 Exhibit 5 - Browning 8-17-18, # 6 Exhibit 6 - Minnesota DOL Certified Accessibility Specialist)(Pohren, Edward) (Entered: 03/04/2019)
03/05/2019	32	DECLARATION regarding MOTION Discovery Under Rule 56(d) and to Extend Time to Respond regarding MOTION to Dismiss <i>Complaint 10 23</i> by Attorney Padraigin L. Browne on behalf of Plaintiff Zach Hillesheim.(Browne, Padraigin) (Entered: 03/05/2019)
03/05/2019	33	DECLARATION regarding MOTION Discovery Under Rule 56(d) and to Extend Time to Respond regarding MOTION to Dismiss <i>Complaint 10 23</i> by

		Attorney Pdraigin L. Browne on behalf of Plaintiff Zach Hillesheim.(Browne, Pdraigin) (Entered: 03/05/2019)
03/05/2019	34	TEXT ORDER: After conferring with counsel, 1) Plaintiff's brief in opposition to Defendant's motion for protective order, 29 , and in reply to the motion for discovery under Rule 56(d), filing 23 , shall be filed on or before March 18, 2019. 2) Defendant's reply to the motion for protective order shall be filed on or before March 25, 2019. 3) Plaintiff's deadline for responding to Defendant's Rule 56 motion is stayed pending further order of the court. Ordered by Magistrate Judge Cheryl R. Zwart. (Zwart, Cheryl) (Entered: 03/05/2019)
03/18/2019	35	BRIEF in opposition to MOTION for Protective Order 29 , MOTION Discovery Under Rule 56(d) and to Extend Time to Respond regarding MOTION to Dismiss <i>Complaint 10 23</i> by Attorney Pdraigin L. Browne on behalf of Plaintiff Zach Hillesheim.(Browne, Pdraigin) (Entered: 03/18/2019)
03/22/2019	36	BRIEF in support of MOTION for Protective Order 29 by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC.(Pohren, Edward) (Entered: 03/22/2019)
03/22/2019	37	INDEX in support of MOTION for Protective Order 29 (<i>Supplemental</i>) by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC. (Attachments: # 1 Exhibit 7 - Real Yellow Pages)(Pohren, Edward) (Entered: 03/22/2019)
04/29/2019	38	MEMORANDUM AND ORDER - Hillesheim's Motion for Discovery under Rule 56(d) (Filing No. 23) is granted. Hillesheim shall file his response to the pending motion for summary judgment within 14 days after the property measurements are taken. RVD's Motion for Protective Order (Filing No. 29) is denied. Ordered by Magistrate Judge Cheryl R. Zwart. (LKO) (Entered: 04/29/2019)
05/09/2019	39	Certificate of Service by Attorney Pdraigin L. Browne on behalf of Plaintiff Zach Hillesheim.(Browne, Pdraigin) (Entered: 05/09/2019)
05/30/2019	40	BRIEF in opposition to Memorandum and Order,, Set/Reset Motion and R&R Deadlines/Hearings, 22 , MOTION to Dismiss <i>Complaint 10</i> by Attorney Pdraigin L. Browne on behalf of Plaintiff Zach Hillesheim.(Browne, Pdraigin) (Entered: 05/30/2019)
05/30/2019	41	INDEX in support of Brief 40 by Attorney Pdraigin L. Browne on behalf of Plaintiff Zach Hillesheim. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3)(Browne, Pdraigin) (Entered: 05/30/2019)
06/10/2019	42	BRIEF in opposition to <i>Plaintiff's Brief In Response to Defendant's Motion for Summary Judgment</i> by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC.(Pohren, Edward) (Entered: 06/10/2019)

06/10/2019	43	INDEX in support of <i>Defendant's Brief in Response to Defendant's Motion for Summary Judgment</i> by Attorney Edward F. Pohren on behalf of Defendant RVD Real Estate Properties LLC. (Attachments: # 1 Affidavit of Ed Pohren, # 2 Declaration of Ken Donahoo)(Pohren, Edward) (Entered: 06/10/2019)
06/12/2019	44	MEMORANDUM AND ORDER - The Motion to Dismiss, ECF No. 10 , filed by Defendant RVD Real Estate Properties LLC, and converted to a motion for summary judgment, is denied, without prejudice and subject to reassertion. Ordered by Senior Judge Laurie Smith Camp. (KLF) (Entered: 06/12/2019)
06/21/2019	45	ANSWER to Complaint by RVD Real Estate Properties LLC (Pohren, Edward) (Entered: 06/21/2019)
06/24/2019	46	SCHEDULING ORDER - Rule 26 Meeting Report Deadline set for 7/24/2019. Ordered by Magistrate Judge Cheryl R. Zwart. (KLF) (Entered: 06/24/2019)
06/24/2019	47	RESTRICTED CASE CONFERENCE INSTRUCTIONS. ACCESS TO THE PDF DOCUMENT IS RESTRICTED TO CASE PARTICIPANTS AND THE COURT PURSUANT TO THE E-GOVERNMENT ACT AND FEDERAL RULE OF CIVIL PROCEDURE 5.2(a). Ordered by Magistrate Judge Cheryl R. Zwart. (KLF) (Entered: 06/24/2019)

PACER Service Center			
Transaction Receipt			
07/01/2019 14:07:11			
PACER Login:	tcn22015	Client Code:	
Description:	Docket Report	Search Criteria:	8:18-cv-00449-LSC-CRZ
Billable Pages:	4	Cost:	0.40

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

ZACH HILLESHEIM,

Plaintiff,

vs.

RVD REAL ESTATE PROPERTIES LLC,

Defendant.

8:18CV449

MEMORANDUM AND ORDER

This matter is before the Court on the Motion to Dismiss, ECF No. 10, filed by Defendant RVD Real Estate Properties LLC (RVD), which the Court previously converted to a motion for summary judgment, Mem. and Order, ECF No. 22. For the reasons stated below, the motion will be denied without prejudice and subject to reassertion.

BACKGROUND

On July 7, 2018, Plaintiff Zach Hillesheim visited Fort Street Plaza, a multi-tenant commercial building owned by RVD and located in Omaha, Nebraska. Compl. ¶ 2, ECF No. 1, Page ID 1. Hillesheim uses a wheelchair for mobility and, during his July 7, 2018, visit, he found that Fort Street Plaza's forty-space parking lot lacked at least two ADAAG¹ compliant accessible parking spaces. *Id.* at ¶¶ 14-17.²

¹ ADAAG stands for ADA Accessibility Guidelines, which "is a comprehensive set of structural guidelines that articulates detailed design requirements to accommodate persons with disabilities." *Davis v. Anthony, Inc.*, 886 F.3d 674, 676 (8th Cir. 2018).

² Hillesheim alleged that the lack of ADAAG-compliant accessible parking caused him not to enter the premises. *See Hillesheim v. Holiday Stationstores, Inc.*, 900 F.3d 1007, 1011 (8th Cir. 2018) ("By offering specific evidence that the allegedly dangerous circumstances caused him not to enter the store, Hillesheim did enough to establish an injury-in-fact."). RVD does not challenge Hillesheim's standing under Article III.

As of July 7, 2018, three of Fort Street Plaza's forty parking spaces were designated as accessible by a painted symbol on the surface of each space. Hillesheim's Complaint alleged none of the three designated accessible spaces complied with ADAAG vertical-signage and slope regulations in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*

After Hillesheim filed his Complaint, RVD repainted the lines and symbols and added vertical signage on two of its accessible parking spaces. *Compare* Compl., ECF No. 1-1, Page ID 15 (depicting accessible parking spaces on July 7, 2018), *with* Foral Aff., Ex. A, ECF No. 11, Page ID 36 (depicting accessible parking spaces following remedial work). RVD also hired a construction company to measure the slope of these parking spaces, and the construction company determined that neither of the spaces exceeded the ADAAG's slope restrictions. Donahoo Aff., ECF No. 19. RVD then filed a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure arguing Hillesheim's ADA claim was moot.

Ruling on that motion, the Court found—and Hillesheim conceded—that RVD remedied all the alleged ADAAG violations except the slope violations in the accessible parking spaces and the shared access aisle. The Court converted RVD's motion to dismiss into a motion for summary judgment because RVD did not take any remedial action with respect to the alleged slope violations but challenged those allegations on the merits. Mem. and Order, ECF No. 22, Page ID 72-3. The Court then provided Hillesheim an opportunity to respond in accordance with Rule 56 of the Federal Rules of Civil Procedure. *Id.* at Page ID 74.

Hillesheim submitted his response in opposition to RVD's converted motion for summary judgment on May 30, 2019, ECF Nos. 40 & 41, and RVD submitted an untimely reply on June 10, 2019. ECF Nos. 42 & 43; see NECivR. 56.1 & 7.1(c) ("The moving party may file a reply brief and index of evidence within 7 days after the opposing party files and serves the opposing brief."). The converted motion for summary judgment is therefore ripe for decision.³

STANDARD OF REVIEW

"Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Garrison v. ConAgra Foods Packaged Foods, LLC*, 833 F.3d 881, 884 (8th Cir. 2016) (citing Fed. R. Civ. P. 56(c)). "Summary judgment is not disfavored and is designed for every action." *Briscoe v. Cty. of St. Louis*, 690 F.3d 1004, 1011 n.2 (8th Cir. 2012) (quoting *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir. 2011) (en banc)). In reviewing a motion for summary judgment, the Court will view "the record in the light most favorable to the nonmoving party . . . drawing all reasonable inferences in that party's favor." *Whitney v. Guys, Inc.*, 826 F.3d 1074, 1076 (8th Cir. 2016) (citing *Hitt v. Harsco Corp.*, 356 F.3d 920, 923–24 (8th Cir. 2004)). Where the nonmoving party will bear the burden of proof at trial on a dispositive issue, "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere

³ Hillesheim continues to argue that this case is not moot. Mootness is no longer at issue because RVD challenged Hillesheim's slope allegations on the merits, and, as a result, the Court converted RVD's Rule 12(b)(1) motion into a motion for summary judgment. Thus, the issue is not whether the case is moot but whether there is genuine question of material fact that prevents summary judgment.

pleadings themselves.” *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 618 (8th Cir. 2011) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). The moving party need not produce evidence showing “the absence of a genuine issue of material fact.” *Johnson v. Wheeling Mach. Prods.*, 779 F.3d 514, 517 (8th Cir. 2015) (quoting *Celotex*, 477 U.S. at 325). Instead, “the burden on the moving party may be discharged by ‘showing’ . . . that there is an absence of evidence to support the nonmoving party’s case.” *St. Jude Med., Inc. v. Lifecare Int’l, Inc.*, 250 F.3d 587, 596 (8th Cir. 2001) (quoting *Celotex*, 477 U.S. at 325).

In response to the moving party’s showing, the nonmoving party’s burden is to produce “specific facts sufficient to raise a genuine issue for trial.” *Haggenmiller v. ABM Parking Servs., Inc.*, 837 F.3d 879, 884 (8th Cir. 2016) (quoting *Gibson v. Am. Greetings Corp.*, 670 F.3d 844, 853 (8th Cir. 2012)). The nonmoving party “must do more than simply show that there is some metaphysical doubt as to the material facts, and must come forward with specific facts showing that there is a genuine issue for trial.” *Wagner v. Gallup, Inc.*, 788 F.3d 877, 882 (8th Cir. 2015) (quoting *Torgerson*, 643 F.3d at 1042). “[T]here must be more than the mere existence of some alleged factual dispute” between the parties to overcome summary judgment. *Dick v. Dickinson State Univ.*, 826 F.3d 1054, 1061 (8th Cir. 2016) (quoting *Vacca v. Viacom Broad. of Mo., Inc.*, 875 F.2d 1337, 1339 (8th Cir. 1989)).

In other words, in deciding “a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts.” *Wagner*, 788 F.3d at 882 (quoting *Torgerson*, 643 F.3d at 1042). Otherwise, where the Court finds that “the record taken as a whole could not lead a rational trier of

fact to find for the non-moving party,” there is no “genuine issue of material fact” for trial and summary judgment is appropriate. *Whitney*, 826 F.3d at 1076 (quoting *Grage v. N. States Power Co.-Minn.*, 813 F.3d 1051, 1052 (8th Cir. 2015)).

DISCUSSION

“Title III of the ADA prohibits discrimination on the basis of disability in a place of ‘public accommodation,’” *Disability Support All. v. Heartwood Enters.*, 885 F.3d 543, 545 (8th Cir. 2018) (quoting 42 U.S.C. § 12182(a)), and “[d]iscrimination includes ‘failure to remove architectural barriers . . . in facilities . . . where such removal is readily achievable,’” *id.* “The ADAAG is a comprehensive set of structural guidelines that articulates detailed design requirements to accommodate persons with disabilities.”⁴ *Davis*, 886 F.3d at 676 n.2 (quoting *Daubert v. Lindsay Unified Sch. Dist.*, 760 F.3d 982, 986 (9th Cir. 2014)). The ADA provides a private right of action for injunctive relief to any person being subjected to discrimination on this basis. *Steger v. Franco, Inc.*, 228 F.3d 889, 892 (8th Cir. 2000) (citing 42 U.S.C. § 12188).

The parties agree that RVD’s two accessible parking spaces and their shared access aisle must not have slopes steeper than 1:48, which converts to 2.083% or roughly 1.19 degrees. ADAAG 502.4 (“Slopes not steeper than 1:48 shall be permitted.”). To prevent summary judgment, Hillesheim submitted Peter Hansmeier’s Declaration, ECF No. 41-2, Page ID 198, and several photographs of slope measurements taken within the accessible parking spaces and the shared access aisle, ECF No. 41-2, Page ID 206-18. The photographs show four measurements taken within the “west” parking space, six

⁴ See 36 C.F.R. § 1191, appendices B and D.

measurements taken within the “east” parking space, and three measurements taken within the shared access aisle. The measurements all exceed 1.19 degrees—or 1:48—and range from 1.3 to 2.6 degrees, which directly contradicts the evidence previously submitted by RVD, Donahoo Aff., ECF No. 19, Page ID 61 (stating the accessible parking spaces and access aisle comply with ADAAG slope requirements).

In its untimely reply, RVD argues that the Court should disregard Hillesheim’s evidence and grant summary judgment because Hansmeier’s methods of measurement did not strictly conform to those recommended by the United States Access Board. Although RVD may be able to show that Hillesheim’s measurement evidence lacks credibility, it has made no showing that Hillesheim’s evidence could not be presented in an admissible form at trial, which—if necessary—would be to the bench. *Smith v. Kilgore*, ___F.3d___, No. 18-1040, 2019 WL 2426497, at *3 (8th Cir. 2019) (quoting *Gannon Int’l, Ltd. v. Blocker*, 684 F.3d 785, 793 (8th Cir. 2012) (“The standard is [] whether the evidence at the summary judgment stage . . . *could* be presented at trial in an admissible form.”) (emphasis in original); Fed. R. Civ. P. 56(c)(2). Therefore, the Court cannot disregard Hillesheim’s evidence at this stage, and it may not weigh the credibility of that evidence.

RVD also argues that summary judgment should be granted because Hansmeier measured slope in degrees making it impossible for Hillesheim to prove, with certainty, that any slope exceeded the applicable industry tolerance. However, Hillesheim’s burden at this stage is not to produce evidence which proves his case with certainty. His burden is to produce evidence which sufficiently raises a genuine issue of fact. The Court finds

that Hillesheim discharged that burden, and, at this juncture, RVD has failed to demonstrate otherwise.

Finally, RVD argues the Court should grant its motion for summary judgment because the balance of the hardships does not favor granting injunctive relief in this case. RVD provided no support for granting summary judgment on this basis in an ADAAG case, and the Court is not persuaded that the hardships associated with ADAAG compliance justify summary judgment in RVD's favor. Thus, not only is RVD's reply untimely, it lacks merit.

Accordingly, the Court will deny RVD's motion for summary judgment, without prejudice and subject to reassertion. If RVD takes remedial action on the alleged slope violations, it may submit another motion to dismiss under Rule 12(b)(1). See Fed. R. Civ. P. 12(h)(3).

IT IS ORDERED: The Motion to Dismiss, ECF No. 10, filed by Defendant RVD Real Estate Properties LLC, and converted to a motion for summary judgment, is denied, without prejudice and subject to reassertion.

Dated this 12th day of June, 2019.

BY THE COURT:

s/Laurie Smith Camp
Senior United States District Judge

**UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA**

<p>ZACH HILLESHEIM,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p>v.</p> <p>RVD REAL ESTATE PROPERTIES LLC,</p> <p style="text-align: center;"><i>Defendant</i></p>	<p>Case No. _____</p> <p style="text-align: center;">COMPLAINT</p> <p style="text-align: center;">Injunctive Relief Sought</p>
---	--

Plaintiff Zach Hillesheim, by and through the undersigned counsel, brings this action against RVD Real Estate Properties LLC, a Nebraska limited liability company, for violations of the Americans With Disabilities Act, 42 U.S.C. § 12181, *et seq.* (the “ADA”) and its implementing regulations, and alleges as follows:

INTRODUCTION

1. Plaintiff brings this civil rights action against Defendant for failing to design, construct, and/or own or operate facilities that are fully accessible to, and independently usable by, persons with disabilities.

2. Defendant owns the multi-tenant commercial building known as “Fort Street Plaza” which to the extent it was constructed and first occupied after January 26, 1993 or was altered after January 26, 1993 was required to be designed and constructed to be readily accessible to persons with disabilities. To the extent “Fort Street Plaza” was not constructed or altered before January 26, 1993, it was required to remove barriers to access to the extent barrier removal was readily achievable. “Fort Street Plaza” contains architectural barriers to accessibility.

3. The violations alleged in this complaint occurred at “Fort Street Plaza”, located at 10615 Fort St, Omaha NE 68134.

4. Defendant’s failure to provide equal access to “Fort Street Plaza” violates the mandates of the ADA to provide full and equal enjoyment of a public accommodation’s goods, services, facilities, privileges, and advantages.

5. Defendant’s conduct constitutes an ongoing and continuous violation of the law.

6. Accordingly, Plaintiff seeks a declaration that Defendant’s facilities violate federal law and an injunction requiring Defendant to make modifications to the facilities so that they are fully accessible to, and independently usable by, individuals with disabilities. Plaintiff further requests that the Court retain jurisdiction over this matter for a period to be determined to ensure that Defendant continues to comply with the relevant requirements of the ADA.

JURISDICTION AND VENUE

7. Jurisdiction of this Court arises under 28 U.S.C. §§ 1331 and 1343(a)(3). This action includes federal law claims brought pursuant to Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181–12189. The Court has the jurisdiction to issue a declaratory judgment pursuant to 28 U.S.C. § 2201 and Fed R. Civ. P. 57.

8. Venue in this judicial district is proper because Defendant is located and transacts business within this judicial district and has sufficient contacts to be subject to personal jurisdiction in this judicial district, and because this is the judicial district in which the acts and omissions giving rise to the claims occurred.

PARTIES

9. Plaintiff Zach Hillesheim is a resident of the city of Omaha, Nebraska.

10. Plaintiff suffers from, and all times relevant hereto has suffered from, a legal disability as defined by the ADA, 42 U.S.C. § 12102(2). Plaintiff is therefore a member of a protected class under the ADA, under the regulations implementing the ADA set forth at 28 C.F.R. § 36.101 *et seq.*

11. Plaintiff Hillesheim was paralyzed as an infant while undergoing surgery to address a congenital heart defect. During the surgery, his spine was severed, paralyzing him below the waist. Mr. Hillesheim cannot walk and uses a wheelchair for mobility. As a person with a disability, Mr. Hillesheim has a personal interest in having full and equal access to places of public accommodation and to the goods, services, facilities, privileges, advantages or other things offered therein.

12. Defendant RVD Real Estate Properties LLC, a Nebraska limited liability company, is the owner of the real property and improvements which are the subject of this action, the multi-tenant commercial building known as “Fort Street Plaza”, a place of public accommodation within the meaning of the ADA, located at the street address of 10615 Fort St, Omaha NE 68134.

FACTUAL BACKGROUND

13. On July 7, 2018 Plaintiff Hillesheim visited the multi-tenant commercial building “Fort Street Plaza” in Omaha, Nebraska. “Fort Street Plaza” had tenant businesses, including Dunkin’ Donuts, Steskal Chiropractic, Pro-Cuts, and a dental clinic.

14. When Plaintiff drove to “Fort Street Plaza” he found 40 parking spaces and 3 parking spaces reserved as accessible parking spaces through paint on the surface of the parking spaces.

15. 2 of the 3 parking spaces reserved as accessible parking spaces were not reserved with posted signage, and the sign reserving the third reserved parking space was posted low to the ground.

16. The 3 parking spaces reserved as accessible parking spaces had slopes that made it difficult for Plaintiff to transfer between his vehicle and the customer parking lot.

17. The photograph in Exhibit A to this Complaint depicts the reserved parking spaces in the “Fort Street Plaza” customer parking lot as they appeared on Plaintiff’s July 7, 2018 visit.

18. In light of the architectural barriers at “Fort Street Plaza”, Plaintiff Hillesheim is deterred from visiting “Fort Street Plaza” in the future. Plaintiff Hillesheim intends to return to “Fort Street Plaza”, but these architectural barriers deter him from doing so. He plans to return and patronize “Fort Street Plaza” when he learns that the premises have been made fully accessible to persons who use wheelchairs for mobility.

19. Plaintiff Hillesheim is a resident of Omaha, Nebraska, and he plans to continue visiting businesses in the greater Omaha area in the future and would enjoy being able to patronize Defendant’s multi-tenant commercial building.

20. Plaintiff Hillesheim attempted to access Defendant’s premises but could not do so independently on a full and equal basis because of his disabilities, due to the physical barriers to access and violations of the ADA that exist at Defendant’s premises. As a result of Defendant’s non-compliance with the ADA, Plaintiff Hillesheim cannot independently access the facilities and/or is excluded from full and equal enjoyment of the goods, services, privileges, advantages, and/or accommodations offered therein.

THE ADA AND ITS IMPLEMENTING REGULATIONS

21. On July 26, 1990, President George H.W. Bush signed into law the ADA, 42 U.S.C. § 12101, *et seq.*, a comprehensive civil rights law prohibiting discrimination on the basis of disability. In its findings, Congress determined that, among other things:

- a. Some 43 million Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole grows older;

- b. Historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, discrimination against individuals with disabilities continues to be a serious and pervasive social problem;
- c. Discrimination against individuals with disabilities persists in such critical areas as employment, public housing accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
- d. Individuals with disabilities continually encounter various forms of discrimination; and
- e. The continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our society is justly famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. § 12101(a)(1)–(3), (5), (9).

- 22. Congress explicitly stated that the purpose of the ADA was to:
 - a. Provide a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities;
 - b. Provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; and
 - c. Invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to ad-

dress the major areas of discrimination faced day-to-day by individuals with disabilities.

42 U.S.C. § 12101(b)(1), (2), (4).

23. Title III of the ADA prohibits discrimination in the activities and facilities of places of public accommodation, and requires places of public accommodation to comply with ADA standards and to be readily accessible to, and independently usable by, individuals with disabilities. 42 U.S.C. § 12181–89.

24. The ADA provided places of public accommodation one and one half years from its enactment to implement its requirements. The effective date of Title III of the ADA was January 26, 1992 (or January 26, 1993 if a business had 10 or fewer employees and gross receipts of \$500,000 or less). 42 U.S.C. § 2181; 28 C.F.R. § 36.508(a).

25. Pursuant to the mandates of 42 U.S.C. § 12134(a), the Department of Justice (“DOJ”) promulgated federal regulations to implement the requirements of Title III of the ADA, which are codified at 28 C.F.R. Part 36. Appendix A of the 1991 Title III regulations (republished as Appendix D to 28 C.F.R. Part 36) contains the ADA Standards for Accessible Design, which were based upon the ADA Accessibility Guidelines (“1991 ADAAG”) published by the Access Board on the same date. Public accommodations were required to conform to these regulations by January 26, 1992 (or January 26, 1993 if a business had 10 or fewer employees and gross receipts of \$500,000 or less). 42 U.S.C. § 12181, *et seq.*; 28 C.F.R. § 36.508(a).

26. In 1994, the Access Board began the process of updating the 1991 ADAAG by establishing a committee composed of members of the design and construction industries, the building code community, and State and local government entities, as well as individuals with disabilities.

27. In 1999, based largely upon the report and recommendations of the advisory committee, the Access Board issued a notice of proposed rulemaking to update and revise the 1991 ADAAG.

28. The Access Board issued final publication of revisions to the 1991 ADAAG on July 3, 2004.

29. On September 30, 2004, the DOJ issued an advance notice of proposed rulemaking to begin the process of adopting the 2004 ADAAG revisions.

30. On June 17, 2008, the DOJ published a notice of proposed rulemaking covering Title III of the ADA.

31. The extended process of revising the 1991 ADAAG culminated with the DOJ's issuance of the 2010 Standards for Accessible Design ("2010 Standards"). The 2010 Standards incorporated the revised 2004 ADA Accessibility Guidelines ("ADAAG"), as well as the requirements contained in subpart D of 28 C.F.R. Part 36. The DOJ published the Final Rule detailing the 2010 Standards on September 15, 2010. The 2010 Standards became effective on March 15, 2011.

FACTUAL ALLEGATIONS

32. Defendant has discriminated against Plaintiff on the basis of his disabilities by failing to comply with the requirements of the ADA and the ADAAG with regard to "Fort Street Plaza". A specific, though not exclusive, list of unlawful physical barriers and ADA violations present at "Fort Street Plaza" which limit the ability of persons in wheelchairs to access the facilities and/or to enjoy the goods, services, privileges, advantages and/or accommodations offered therein on a full and equal basis, includes the following:

- a. The "Fort Street Plaza" customer parking lot had 40 parking spaces and 0 parking spaces reserved as accessible spaces that complied with ADAAG

502, in violation of ADAAG 208.2. Plaintiff requires accessible parking spaces which comply with all elements of 502 (including location, width, length, signage, slope, and presence of an access aisle) to ensure he can park safely, make a safe transfer between his vehicle and wheelchair, and travel safely between the parking lot to the building entrance.

- b. 2 parking spaces in the “Fort Street Plaza” customer parking lot reserved through paint on the ground lacked posted signage designating them as accessible parking spaces, and 1 parking space reserved as an accessible parking space had signage posted lower than 60 inches above the surface of the parking space, in violation of ADAAG 216.5 and 502.6. Missing or improperly posted signage creates the risk of someone inadvertently parking in the parking space, makes it difficult to find accessible parking, and hinders the ability of law enforcement to enforce parking laws and regulations.
- c. The 3 parking spaces reserved as accessible parking spaces and their adjacent access aisles had slopes steeper than 1:48, in violation of ADAAG 502.4. Plaintiff requires a flat surface to make a safe transfer between his vehicle and the customer parking lot.

33. The above listing is not to be considered all-inclusive of the barriers and violations of the ADA encountered by Plaintiff or which exist at “Fort Street Plaza”. To qualify as an accessible parking facility, and for a parking space to qualify an accessible parking space, the space must be located on an accessible route, the route must be the shortest accessible route, the space must be marked by appropriate signage, the space must be flanked by an access aisle, and the space and access aisle must comply with sloping requirements. ADAAG 206; 208; 216, Chapter 4 including but not limited to

402, 403, 404, 405, and 406; and 502 – including, but not limited to, 502.4 which governs the floor or ground surfaces of both parking spaces and access aisles.

34. In order to fully remedy the discriminatory conditions, Plaintiff requires an inspection of “Fort Street Plaza” in order to photograph and measure all such barriers to access and violations of the ADA and the ADAAG.

35. Compliance with the ADA standards, and the ADAAG is required by 42 U.S.C §§ 12182 and 12183 to the extent the facility was designed and constructed or altered after January 26, 1993, and the violations to the ADAAG requirements are not a result of compliance being structurally impracticable. 28 C.F.R § 36.401(a)(1).

36. In the alternative, to the extent any architectural elements were constructed prior to that date, compliance with the ADA standards and the ADAAG is required by 42 U.S.C § 12182(b)(2)(A)(iv) because removal of architectural barriers is readily achievable. Compliance with the ADA standards and the ADAAG is readily achievable by Defendant due to the lack of difficulty and low cost of remedying the above-listed barriers. Some of the above-listed violations can be remedied through the same measures prescribed by federal regulation as examples of modifications that are “readily achievable”, including, but not limited to, creating accessible parking spaces. 28 C.F.R. § 36.304(b).

37. Compliance is also readily achievable due to the significant assistance available to businesses. Section 44 of the IRS Code allows a Disabled Access tax credit for small businesses with 30 or fewer full-time employees or with total revenues of \$1 million or less, which is intended to offset the cost of undertaking barrier removal and alterations to improve accessibility. Section 190 of the IRS Code provides a tax deduction for businesses of all sizes for costs incurred in removing architectural barriers, up to \$15,000. *See ADA Update: A Primer for Small Business,*

<http://www.ada.gov/regs2010/smallbusiness/smallbusprimer2010.htm#tax> (Mar. 16, 2011).

38. As a person with a disability, Plaintiff Hillesheim has a personal interest in having full and equal access to places of public accommodation and to the goods, services, facilities, privileges, advantages or other things offered therein.

39. Without injunctive relief, Defendant's failure to remove accessibility barriers will continue to cause injury to Plaintiff, who will continue to be unable to independently access "Fort Street Plaza" and/or to enjoy the goods, services, privileges, advantages and/or accommodations offered therein on a full and equal basis, in violation of his rights under the ADA.

FIRST CAUSE OF ACTION

Violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*

40. Plaintiff incorporates and realleges the above paragraphs.

41. Section 302(a) of Title III of the ADA, 42 U.S.C. §§ 12101 *et seq.*, provides:

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. Under Section 302(b)(1) of Title III of the ADA, it is unlawful discrimination to deny individuals with disabilities an opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations that is equal to the opportunities afforded to other individuals.

43. Defendant has discriminated against Plaintiff and others in that it failed to make its place of public accommodation fully accessible to persons with disabilities on a

full and equal basis in violation of 42 U.S.C. § 12182(a) and the regulations promulgated thereunder, including the ADAAG, as described above. Plaintiff Hillesheim has been denied full and equal access to “Fort Street Plaza” and/or has been denied the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations on a full and equal basis.

44. Defendant has failed to take any prompt and equitable steps to remedy its discriminatory conduct. Defendant’s violations of the ADA and ADAAG are ongoing.

45. Defendant has failed to remove architectural barriers to full and equal access by Plaintiff Hillesheim, even though removing the barriers was required and is readily achievable.

46. Plaintiff Hillesheim plans to visit “Fort Street Plaza” again in the near future. Plaintiff is without adequate remedy at law, has suffered and is suffering irreparable harm, and reasonably anticipates that he will continue to suffer irreparable harm upon his planned return visit to “Fort Street Plaza” unless and until Defendant is required to remove the physical barriers to access and ADA violations that exist at Defendant’s place of public accommodation, including those set forth specifically herein.

47. This Court has authority under 42 U.S.C. § 12188 to grant Plaintiff injunctive relief, including an order requiring Defendant to make “Fort Street Plaza” readily accessible to and independently usable by individuals with disabilities to the extent required by the ADA and ADAAG, and/or to close “Fort Street Plaza” until such time as Defendant cures the access barriers.

48. Plaintiff has retained the undersigned counsel for the filing and prosecution of this action, and is entitled to recover reasonable attorneys’ fees, litigation expenses and costs from Defendant, pursuant to 42 U.S.C. §§ 12205, 12117, and 28 C.F.R. § 36.505.

WHEREFORE, Plaintiff respectfully requests:

- a. Plaintiff demands a trial in Omaha, Nebraska.
- b. That the Court issue a Declaratory Judgment that determines that Defendant's facilities, at the commencement of the instant suit, are in violation of Title III of the ADA, 42 U.S.C. § 12181, *et seq.*, and the relevant implementing regulations including the ADAAG.
- c. That the Court award nominal damages.
- d. That the Court issue a permanent injunction, pursuant to 42 U.S.C. § 12188(a)(2) and 28 C.F.R. § 36.504(a), enjoining Defendant from continuing its discriminatory practices; including an order directing Defendant to remove all barriers to the maximum extent feasible or in the alternative make all readily achievable alterations to its facilities so as to remove physical barriers to access and make its facilities fully accessible to and independently usable by individuals with disabilities to the extent required by the ADA; and also including an order requiring Defendant to make all reasonable modifications in policies, practices or procedures necessary to afford all offered goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities on a full and equal basis.
- e. That the Court award Plaintiff his reasonable attorneys' fees, litigation expenses, and costs of suit pursuant to 42 U.S.C. § 12205 and 28 C.F.R. § 36.505, or as otherwise provided by law; and
- f. That the Court issue such other relief as it deems just and proper, and/or is allowable under Title III of the ADA.

DATED: September 25, 2018

/s/ Padraigin L. Browne
Padraigin L. Browne (MN Bar # 389962)
Browne Law LLC
8530 Eagle Point Blvd, suite 100
Lake Elmo, MN 55042
E-mail: paddy@brownelawllc.com
Phone: (612) 293-4805

EXHIBIT A

