UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

J. R. HARDING,

Plaintiff,

-vs- **Case No. 6:11-cv-85-Orl-19DAB**

ORLANDO APARTMENTS, LLC & BEHRINGER HARVARD DISTRICT REIT, LLC.,

Defendant.

ORDER

This cause came on for consideration without oral argument on the following motions filed herein:

MOTION:	**PLAINTIFF'S MOTION FOR ENLARGEMENT OF TIME FOR DISCLOSURE OF EXPERT REPORT (Doc. No. 44)**
FILED:	**December 2, 2011**

THEREON it is **ORDERED** that the motion is **GRANTED,** and the deadline for Plaintiff's expert report is extended until February 15, 2012; Defendants' reports are likewise extended. No further extensions will be granted absent a showing of good cause.

Provided, however, this extension in no way relieves the parties of other obligations and deadlines set forth in the Scheduling Order, including the discovery deadline which remains July 2, 2012 and the dispositive motions deadline remains August 2, 2012. This extension shall not be the basis for seeking relief from that Order.

MOTION: **PLAINTIFF'S MOTION TO COMPEL ENTRY UPON LAND (Doc. No. 43)**

FILED: **December 1, 2011**

THEREON it is **ORDERED** that the motion is **GRANTED in part and DENIED in part** as set forth herein**.**

The parties dispute the extent of the inspection of the premises that is at the heart of this Fair Housing Act suit against Defendants.[1] Harding alleged that he encountered certain violations on November 24, 2010, when he visited the District, currently owned by BHDR, as a "tester" after reviewing floor plans available on the Internet and having a reasonable basis to belief that discriminatory architectural barriers existed at the property. *See* Doc. 11 ¶4. Harding's served on BDHR a Rule 34 Request for Entry dated August 15, 2011 to inspect the following categories:

> A. One unit each of the rental units designated by floor plan name as (1) Antigua; (2) Aruba; (3) Belize; (4) Bonaire; (5) Cayman; (6) Martinique; (7) St. Croix; and (8) St. Martin.
> B. All elevators.
> C. Covered parking areas.
> D. Resort style pool with cabanas.
> E. Cyber Cafe.
> F. Two-level health and fitness center.
> G. Outdoor grilling and picnic area.
> H. All tenant spaces located in the District Shoppes which regularly conduct retail activities.
> I. Parking areas.

Doc. 45-1.

BHDR objects to Harding and his expert being permitted to inspect certain areas of the apartment complex principally because Harding did not identify the specific features he wished to

[1]To the extent BHDR argues some of Harding's claims are without merit, those arguments are more properly raised in a motion for summary judgment.

inspect or limit his inspection to the 24 matters identified in the Amended Complaint. BHDR also contends that the areas, as listed, "cover thousands of square feet of occupied residences and community space where he would simply hunt for potential violations" and "at various times, all of the units of a given type of floor plan are occupied by residents" and allowing an inspection would disrupt the tenants.[2] Doc. 45. BHDR argues that Harding seeks to turn his complaints about the floor plans from "tested" issues into the more broad "sampled" issues by inspecting architectural barriers that he has not encountered and of which he has not complained.

Plaintiff argues that BHRD simply "seeks immunity from Harding pursuing injunctive relief to remove any barriers which he fortuitously did not observe while on the property on November 24, 2010 ostensibly as a potential tenant touring the apartment complex." Doc. 43. Plaintiff contends he is merely seeking to obtain entry to the broader apartment complex premises for "the limited purpose of gathering evidence relevant to the claims and allegations contained in Harding's First Amended Complaint that "[t]he Defendants' violations of the FHAA are widespread" and part of an "ongoing and continuous pattern and practice in the rental of dwellings." Amended Complaint ¶ 7. The issue boils down to whether the inspection should be limited to those alleged barriers Harding alleged in the Complaint or whether he may conduct a broader, more extensive inspection of the property.

The general description of the law of Rule 34 inspections among the majority of courts in the Eleventh Circuit, where disability-related claims are alleged, is accurately described in the opinion in *Harty v. SRA/Palm Trails Plaza, LLC*, 755 F. Supp. 2d 1215, 1217 (S.D. Fla. 2010):

> Plaintiff argues that he is entitled to have remedied all ADA violations at the subject property which impact his disability, not just the specific violations alleged in his Complaint. Defendant argues that this Court and the Eleventh Circuit have rejected

[2]BHDR also raises timeliness concerns which the Court finds without merit, given the extension to the expert report deadline and the significant amount of time before the discovery and dispositive motions deadlines.

> this argument, holding that ADA plaintiffs do not have standing to complain about alleged barriers of which they are unaware at the time they file their complaints.
>
> The authority Plaintiff cites in support of his argument is mainly from other districts and circuits. Although there are at least two cases from this district which tend to agree with Plaintiff's argument, most courts in this district and in the Eleventh Circuit require a claim of actual knowledge of particular barriers to confer standing to challenge them. As this Court noted in *Fox v. Morris Jupiter Associates*:
>
> > Some courts have held that a plaintiff need not encounter all barriers nor have knowledge of all barriers to obtain relief. In other words, a plaintiff may have only encountered one barrier . . . but the injunction would apply to all barriers in existence for people with the plaintiff's particular disability. Courts in the Eleventh Circuit have been more cautious, requiring a showing of plaintiff's actual knowledge of particular barriers in order for the plaintiff to have standing to challenge those barriers. (Internal citations omitted).
>
> Thus, to the extent that Plaintiff alleges entitlement to a Rule 34 inspection to determine whether there are mobility-related barriers on Defendant's property, other than those specified in his Complaint, the argument is unpersuasive.

Id.. at 1216-17 (citations omitted).

Other judges in the Middle District of Florida have similarly limited plaintiffs' Rule 34 inspections to only those mobility-related barriers on the defendants' properties which were specified in the complaint. *See, e.g., Norkunas v. Seahorse NB, LLC,* 720 F.Supp.2d 1313, 1319-20 (M.D. Fla. 2010) (holding that a plaintiff does not have standing to challenge alleged barriers of which he was unaware at the time of filing of his complaint) (citing *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1002-03 (11th Cir. 2004)), *aff'd*, __ Fed. Appx. __ (11th Cir. Oct. 25, 2011); *Macort v. Goodwill Industries-Manasota, Inc.*, 220 F.R.D. 377, 379 (M.D. Fla. 2003) (holding that plaintiff's Rule 34 inspection would be limited to inspecting only those mobility-related barriers on defendant's property specified in the complaint). *See also Fox v. Morris Jupiter Associates*, 2007 WL 2819522, *6 (S.D. Fla. 2007) (holding that a plaintiff must have actual knowledge of a barrier encountered or

identified at the time of the filing of a complaint in order to have standing to challenge such barrier, but factual issues remained as to plaintiff's "actual knowledge" of barriers); *Access Now, Inc. v. South Florida Stadium*, 161 F.Supp.2d 1357, 1365 (S.D. Fla. 2001) (holding that plaintiff was limited to seeking relief for violations he personally encountered or about which he had actual notice when the complaint was filed).

The cases cited by Plaintiff, *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034 (9th Cir. 2008) and *Steger v. Franco, Inc.*, 228 F.3d 889 (8th Cir. 2000), from the Ninth and Eighth Circuits are not binding authority and are not persuasive that Harding is entitled to a broad inspection for barriers he has not alleged prevent him from accessing the apartment complex or retailers. *Compare Harty*, 755 F.Supp.2d at 1217 ("most courts in this district and in the Eleventh Circuit require a claim of actual knowledge of particular barriers to confer standing to challenge them"); *Campbell v. Moon Palace, Inc.*, __ F. Supp. 2d __, Case No. 11-60274-CIV, 2011 WL 4389894, *3-4 (S.D. Fla. Sept. 21, 2011) (holding that allowing plaintiff standing to complain of violations he had not suffered would be to allow him to complain on behalf of all disabled individuals, which "would expand the standing doctrine beyond the limits of Article III.") *with Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1043-44 (9th Cir. 2008) (the broad policy that "where a disabled person has Article III standing to bring a claim for injunctive relief under the ADA because of at least one alleged statutory violation of which he or she has knowledge which deters access to, or full use and enjoyment of, a place of public accommodation, he or she may conduct discovery to determine what, if any, other barriers affecting his or her disability existed at the time he or she brought the claim.") *and Steger v. Franco, Inc.*, 228 F.3d 889 (8th Cir. 2000) (holding plaintiff had standing to seek relief for other violations as long as they were related to his disability of blindness, but not unrelated disabilities).

Harding's Motion to Compel Rule 34 Inspection (Doc. 43) is **GRANTED in part and DENIED in part** as set forth herein. Harding's inspection is limited to the specific features Plaintiff identifies in the subparagraphs (a) to (w) in Paragraph 25 of the Amended Complaint (Doc. 11). To the extent that there is a "Model Unit"[3] in more than one floor plan, Harding will be allowed to inspect the "Model Unit" for the applicable floor plan(s).

As to the BHDR's argument that (where there are no vacant units), the inspection would disrupt the tenants, Harding proposes that BHRD can demonstrate that by an affidavit or other proffer; and counsel can confer in good faith as to how to address the issue, pursuant to Local Rule 3.01. Harding proposes several alternatives that the Court would expect counsel to explore before seeking the Court's involvement in a resolution of the issue. Doc. 43 at 10.

There does not appear to be any disagreement between the parties that they intend to select a mutually agreeable time, or that Plaintiff's representatives should be accompanied by representatives of BHDR at all times.

DONE and **ORDERED** in Orlando, Florida on December 30, 2011.

David A. Baker

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Counsel of Record

[3]In the Amended Complaint, Harding alleges several violations in a "Model Unit" without specifying which designated floor plan (or plans) contains the Model Unit. *See* Doc. 25 ¶ 25.