

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

VERNON E. THOMPSON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 02-1360-MPT
	:	
DOVER DOWNS, INC.,	:	
	:	
Defendant,	:	

MEMORANDUM

Vernon E. Thompson, 3330 Buchanan Street #101, Mount Rainier, Maryland 20712, pro se.

David K. Sheppard, Esquire, Blank Rome LLP, 1201 N. Market Street Suite 800, Wilmington, Delaware 19801, attorney for defendant, Dover Downs, Inc.

Dated: October 6, 2003
Wilmington, Delaware

Thyng, U.S. Magistrate Judge

I. Introduction

Before the court is defendant's motion to dismiss for plaintiff's failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated below, defendant's motion to dismiss is GRANTED.

Also before the court is the plaintiff's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure for a lack of genuine issue of material fact. For the reasons stated below, plaintiff's motion to dismiss is DENIED.

II. Background

A. Factual

On July 31, 2002, plaintiff and his 4 month old dog attempted to enter Dover Downs Slots to meet his mother and a friend. *D.I. 1 at 2*. The dog was wearing a service vest. *D.I. 1 at 4*. A security officer stopped the plaintiff and informed him that pets were not allowed in the casino. *D.I. 10 at 4*. Upon being informed by the plaintiff that the dog was a service animal, the security officer inquired as to what the dog was trained to do. *Id.* Plaintiff refused to answer the question. *Id.* The security officer radioed the security shift manager, who also inquired about the dog's training. *Id.* Plaintiff states that he presented K-9 credentials to the security officers and claims that the security officers badgered him about the basis of his disability. *D.I. 1 at 4*. Plaintiff then produced the Department of Justice "hotline" number for the security guards. The security guards called the number and were informed that they could legally inquire

about the training of the dog; however, they were not allowed to inquire about the person's disability. *D.I. 10 at 5*. They were also told that a dog's attire is not proof as to its training and that it takes one to two years to train a service animal. *Id.* The security guard then once again inquired about the dog's training and plaintiff refused to answer. *D.I. 10 at 6*. Plaintiff was denied entry onto the premises. *Id.* Plaintiff requested the names and badge numbers of the security officers and left the premises. *Id.* Since the incident, plaintiff has admitted during a Delaware Human Rights Commission hearing that he has returned to Dover Downs and suffered no additional discrimination. *D.I. 30 at 2*.

Plaintiff is seeking \$500,000 in punitive damages, as well as, letters of apology from Dover Downs and security guards. *D.I. 1 at 3*.

B. Procedural

On August 5, 2002, plaintiff filed a complaint against Dover Downs alleging violations of Title III of the Americans with Disabilities Act ("ADA"). *D.I. 1*. On September 27, 2002, plaintiff filed a complaint against Dover Downs with the Delaware Human Rights Commission alleging violations of the Delaware Equal Accommodations Law. *D.I. 10 at 3*.

On November 18, 2002, plaintiff filed a request for default judgment claiming that defendant did not file an answer in a timely manner. *D.I. 6*. On December 10, 2002, defendant filed an answer and a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendant claims that plaintiff has failed to state a claim, as a matter of law, for which relief can be granted. *D.I. 10*.

On January 13, 2003, the court ordered a status teleconference to occur on

January 28, 2003 at 9:00 a.m. *D.I. 14*. On that date, plaintiff could not be reached. On February 6, 2003, the court ordered another teleconference to take place on February 28, 2003 at 9:00 a.m. *D.I. 16*. On February 27, 2003, the teleconference scheduled for February 28, 2003 at 9:00 a.m. was rescheduled for March 17, 2003 at 10:00 a.m. *D.I. 18*. At the time of that teleconference, the court and defense counsel were once again unable to reach plaintiff.

On March 17, 2003, the court scheduled a rule to show cause hearing on April 29, 2003 as to why this matter should not be dismissed due to plaintiff's failure to comply with its orders. *D.I. 20*. As a result, during the rule to show cause hearing on May 9, 2003, plaintiff's motion for default judgment was dismissed. *D.I. 25*.

On May 22, 2003, plaintiff cross-moved for summary judgment claiming that there is no dispute of material facts. *D.I. 29*.

III. Discussion

A. 12(b)(6) Motion to Dismiss.

To grant a 12(b)(6) motion, a court must determine that the moving party is entitled to relief under the "reasonable reading of the pleadings, assuming the truth of all the factual allegations in the complaint." *Alexander v. Whitman*, 114 F.3d 1392, 1397 (3d Cir. 1997). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Id.*

When reviewing "motion to dismiss for failure to state a claim, the complaint must be viewed in the light most favorable to plaintiff and should not be dismissed merely because the court doubts that plaintiff will be able to prove all of the necessary factual

allegations.” *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982). “A motion to dismiss will be granted if it is beyond doubt the litigant cannot prove as set of facts which will entitle him to relief.” *CCPI, Inc. v. American Premier, Inc.*, 967 F.Supp. 813, 815 (D. Del. 1997).

First, the facts must be reviewed in the most favorable light to the plaintiff. Plaintiff has alleged discrimination and being badgered regarding his disability by the security guards. Even if some doubt exists whether the plaintiff ‘s allegations are accurate, this is not a basis on which the court may dismiss the claim. Plaintiff has alleged discrimination and facts in support thereof. However, the court must now examine the validity of the remedy that plaintiff requests.

Since the plaintiff brought this action under Title III of the Americans with Disabilities Act (“ADA”), a review of the statute is required concerning the appropriate remedy for such possible violations. The purpose of Title III is to prevent a public accommodation from discriminating against an individual on the basis of his or her ability. 42 U.S.C. § 12181. When a reasonable basis for discrimination is found, the ADA provides that remedies “for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order” are available. 42 U.S.C. § 2000a-3(b).

Courts have held that “Title III [of the ADA] limits the remedy of a private claim to injunctive relief. *Riggs v. American Heritage Life Insurance Company*, 2002 WL 1335118 (E.D. Pa., Jun 7, 2002). They have also determined that “under §2000(a)(3)(a), damages are unavailable to private plaintiffs.” *Sphychalsky v. Sullivan*, 2003 WL 22071602 (E.D.N.Y. Aug. 9, 2003).

First, it is undisputed that Dover Downs is a public accommodation and that plaintiff is a private individual. Since plaintiff seeks only *punitive* damages and letters of apology, on the face of his complaint, he cannot obtain relief. Under Title III of the ADA, the only relief is an injunction and punitive damages are not an available remedy for private plaintiffs. Injunctive relief has not been requested. Even if plaintiff could prove discrimination, the remedy demanded is not legally feasible. Moreover, by plaintiff's admission, injunctive relief does not appear feasible since the discrimination, if it occurred, is not continuing. Therefore, the defendant's motion to dismiss is granted.

B. Motion to for Summary Judgment

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The non-moving party must establish that there is a fact that is both genuine and material.

A fact is genuine, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To be material, it must "affect the outcome of the litigation." *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1957). Summary judgment allows the court to "dispose of factually unsupported", therefore immaterial claims. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). The "court should grant motion for summary judgment only when "there is no evidence upon which a reasonable mind might fairly conclude guilt beyond

reasonable doubt”. *Anderson*, 477 U.S. at 253.

Also, the moving party is entitled to summary judgment if “the nonmoving party has failed to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof”. *Celotex*, 477 U.S. 323. Sufficient evidence must “be evidence on which the jury could reasonably find for the plaintiff” and not “the mere existence of a scintilla of evidence.” *Anderson*, 477 U.S. at 252. The motion “must set forth specific facts showing there is a genuine issue for trial”. *Id.* at 248.

As a result of granting defendant’s motion to dismiss, plaintiff’s action expired and his subsequent motion for summary judgment is moot.

IV. Conclusion

For the foregoing reasons discussed above, plaintiff has failed to state a claim upon which relief could be granted; therefore defendant’s motion to dismiss is GRANTED.

As a result, plaintiff’s motion for summary judgment is DENIED as moot.

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v.	:	C.A. No. 02-1360-MPT
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DOVER DOWNS, INC.,	:	
	:	
	:	
Defendant,	:	

ORDER

At Wilmington this **6th** day of **October, 2003**,

IT IS ORDERED that defendant's motion to dismiss (D.I. 10) is
GRANTED. Plaintiff's motion for summary judgement (D.I. 29) is DENIED as moot.

Mary Pat Thyng
UNITED STATES MAGISTRATE JUDGE