

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

Civil Action No.: 1:16-cv-00432-PAB-MEH

SANTIAGO ABREU
Plaintiff,

v.

TAVIN FOODS, INC.
d/b/a RIVERBEND MARKET AND EATERY,
Defendant.

MOTION TO DISMISS

Defendant, Tavin Foods, Inc., by and through its counsel, Courtenay Patterson of Law Offices of Courtenay Patterson, moves the Court under Fed. R. Civ. P. Rule 12(b)(6) and 12(b)(1) for an order dismissing Plaintiff Santiago Abreu’s (“Plaintiff”) Complaint against Defendant Tavin Foods, Inc. (“Defendant”). In support of this motion, Defendant states as follows:

I. INTRODUCTION

Plaintiff brings this case alleging violations of Title III of the Americans with Disabilities Act (“ADA”) seeking injunctive relief and attorney fees and costs. However, as Plaintiff failed to exhaust his administrative remedies as required under both of these statutes, his Complaint must be dismissed.

II. ARGUMENT

Title III of the ADA prohibits discrimination in public services operated by private entities. 42 U.S.C. §12182. This section also provides that persons who have been subjected to discrimination may be entitled to remedies and procedures, such as injunctive relief and reasonable attorney fees, under 42 U.S.C. § 2000a-3. *Id.* §12188(a); *Colorado Cross Disability Coalition, et al. v. Hermanson Family Ltd. Partnership I, et al.*, 264 F.3d 999, 1002 (10th Cir. 2001) (A successful plaintiff in a Title III action may be entitled to attorney fees and costs under 42 U.S.C. § 2000a-3(b)). However, Section 2000a-3 also states that, in a State which has a law prohibiting the alleged violation and authorizes a State authority or agency to address such practices, then “no civil action may be brought . . . before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person.” 42 U.S.C. § 2000a-3(c). Thus, “[b]y making § 2000a-3 applicable to enforcement actions under 42 U.S.C. § 12188, Congress has imposed a state law exhaustion requirement on disabled individuals seeking to enforce their rights under Subchapter III of the ADA.” *Howard v. Cherry Hills Cutters, Inc.*, 935 F.Supp. 1148, 1150 (D.Colo. 1996); *Spicer v. Auraria Campus Bookstore*, 2012 U.S. Dist. LEXIS 28295, *3-4 (D. Colo. 2012); *Lillard v. Sunflower Farmers Mkt., Inc.* (D. Colo. 2012) 2012 U.S. Dist. LEXIS 168083, *3-4 (D. Colo. 2012) (“42 U.S.C. § 12188 states, ‘the remedies and

procedures set forth in section 204(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-3(a)) are the remedies and procedures of this title.’ Section 2000a-3(a) sets forth the remedies and authorizes aggrieved parties to commence a civil action for injunctive relief. Section 2000a-3(c) sets forth the procedure for commencing a civil action and imposes a pre-suit notice requirement on claims for relief under § 2000a-3. If Congress intended only to incorporate the Civil Rights Act’s remedies, and not procedures, it would have excluded the word “procedures” from 42 U.S.C. § 12188.”) (citing *Spicer v. Auraria, supra*); see also *White v. Denny’s Inc.*, 918 F. Supp 1418, 1423 (D. Colo. 1996).

Colorado does have a state law prohibiting discrimination in places of public accommodation, C.R.S. §§ 24-34-601 to 24-34-602 (2008), and authorizes the Colorado Civil Rights Division (CCRD) to address all violations proscribed in Parts 4 through 7 of Title 24, Article 34. C.R.S. § 24-34-302. The prohibitions against discrimination in places of public accommodation are found in Part 6 of Article 34. See C.R.S. § 24-34-601.

Similar to the federal law, Colorado law also requires the exhaustion of administrative remedies prior to the filing of any civil action. Specifically, C.R.S. § 24-34-306 (14) provides:

No person may file a civil action in this state based on an alleged discriminatory or unfair practice prohibited by parts 4 to 7 of this article without first exhausting the proceedings and remedies available

to him under this part 3 unless he shows, in an action filed in the appropriate district court, by clear and convincing evidence, his ill health which is of such a nature that pursuing administrative remedies would not provide timely and reasonable relief and would cause irreparable harm.

In his Complaint, Plaintiff does not allege or produce any evidence that he has exhausted his administrative remedies with the CCRD as he is required to do by the federal and state laws from which he seeks relief. In fact, Plaintiff acknowledges in his Complaint that “Defendant may not have had actual knowledge of said violations until the Complaint made Defendant aware of same.” (Exhibit 1, line 25). In addition, Plaintiff has neither alleged nor put forth any evidence that he is of such ill health that requiring him to exhaust such remedies would cause him irreparable harm. Accordingly, Defendant seeks the dismissal of this Complaint under Fed. R. Civ. P., Rule 12(b)(6) and 12(b)(1).

Respectfully submitted this 1st day of October 2016.

LAW OFFICES OF COURTENAY PATTERSON

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October 2016, I electronically filed the foregoing Motion to Dismiss the Complaint with the Clerk of Court using the CM/ECF service, which provided electronic service to the following:

Brett Huff
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and

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