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At an IAS Term of the Rensselaer County Supreme Court, held in and for the County of Rensselaer, in the City of Troy, New York, on the 18th day of May 2015

PRESENT: HON. PATRICK J. McGRATH, JSC

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

Joshua G. Stegemann,

Plaintiff,

Decision and Order
Index No. 248213-14

-against-

Rensselaer County Sheriff's Office, Rensselaer County, Rensselaer County Emergency Response Team, Rensselaer County District Attorneys Office, Jack Mahar, Pat Russo, Ricahrd J. McNally, Jr., Art Hyde, Steve Wohlleber, William Webster, Shane Holcomb, J.S. Robelotto, Mark Geracitano, Sandra Blodgett, Justin Walread, Jami Panichi, New York National Guard, Richard J. Sloma, Chris Clifford, Warren County Sheriff's Office, Warren County, Nathan York, Christopher Perilli, New York State Police, New York State Police SORT, Investigator Kiley, Fulton County Sheriff's Office, Fulton County, Berkshire County Sheriff's Office, Berkshire County, Thomas Bowler, Scott Colbert, Pittsfield Police Department, City of Pittsfield, Michael Wynn, Tyrone Price, John Mazzeo, Glenn F. Decker, Glenn Civello, Massachusetts State Police, Captain of the Massachusetts State Police Troop B, David Brian Foley, Travis McCarthy, William Scott, Dale Gero, Michelle Mason, John Stec, Todd Patterson, Steve Jones, Berkshire County District Attorney's Office, David F. Capeless, Richard Locke, Berkshire County Drug Task Force, Cellco Partnership, d/b/a Verizon Wireless, and Subsurface Informational Surveys, Inc.,

Defendants.

APPEARANCES:

JOSHUA G. STEGEMANN
Self Represented Plaintiff

DAVID J. LAWLESS, ESQ.
Attorney for the Pittsfield Defendants, *infra*

MAURA HEALEY
Attorney General of the Commonwealth of Massachusetts
Attorney for the Commonwealth Defendants, *infra*

STEPHEN A. PECHENIK
Rensselaer County Attorney
Attorney for the Rensselaer County Defendants, *infra*

McGRATH, PATRICK J., J.S.C.

Plaintiff brings this motion for "no cost service" of his complaint and summons upon the defendants at their own expense as well as a motion for an extension of time for service pursuant to CPLR 306-b.

The Berkshire County Sheriff's Office, Thomas Bowler, Scott Colbert, the Commonwealth of Massachusetts, the Massachusetts State Police, Captain of Troop B, Brain David Foley, Travis McCarthy, Willliam Scott, John Stec, Todd Patterson, Michelle Mason, Steve Jones, Dale Gero, the Berkshire County District Attorney's Office, David C. Capeless, Richard Locke, and the Berkshire County Drug Task Force, hereinafter, "the Commonwealth defendants," oppose plaintiff's motion. The Commonwealth defendants also bring a cross motion to dismiss.

The Pittsfield Police Department, City of Pittsfield, Michael Wynn, Tyrone Price, John Mazzeo, Glenn F. Decker, and Glenn Civello, hereinafter the "Pittsfield defendants", also oppose the motion. The Pittsfield defendants also bring a cross motion to dismiss

Rensselaer County Sheriff's Office, Rensselaer County, Rensselaer County Emergency Response Team, Rensselaer County District Attorney's Office, Jack Mahar, Pat Russo, Ricahrd J. McNally, Jr., Art Hyde, Steve Wohlleber, William Webster, Shane Holcomb, J.S. Robelotto, Mark Geracitano, Sandra Blodgett, Justin Walread, and Jami Panichi, hereinafter, "the Rensselaer County defendants" oppose the motion.

The plaintiff also brings a cross motion for summary judgment against the Pittsfield defendants pursuant to CPLR §§ 3211(c), 3212.

The plaintiff Joshua Stegemann's complaint alleges that various county law enforcement and district attorneys offices, state police entities, individual officers and investigators, members of the National Guard, and private telecommunications services have violated his constitutional rights. Between April 30, 2013 and May 2, 2013, numerous defendants executed an allegedly invalid warrant to search and seize various property from Stegemann's residence in Stephentown, New York. Stegemann contends that his property was destroyed with his personal property being broken and scattered, residence walls being ripped down, gardens being destroyed, and yard excavated. Stegemann contends that the search warrant by which his property was searched and seized was improperly signed by a Rensselaer County Judge who did not possess authority to sign the warrant. Further, Stegemann contends that once he was placed into the Rensselaer County Jail, his calls were improperly monitored and recorded. Finally, Stegemann alleges that his cell phones, and the calls and text messages he sent and received, were also unlawfully intercepted pursuant to wiretaps, pen registers, and trap and trace devices.

The search warrants lead to the discovery of the following:

1. Found buried in the grounds and in a rock wall located in the area which Stegemann was fleeing, were 819.9 gross grams of cocaine and a handgun.
2. Seized from within his bedroom was a loaded shotgun. Also discovered in the residence was a highly advanced surveillance system, along with 2066 gross grams of suspected marijuana and $16,000 of U.S. currency.
3. Discovered and seized on the grounds of the residence were 108.2 gross grams of crack cocaine, 80.1 gross grams of cocaine, 100.1 gross grams of heroin, 86 gross grams of oxycodone and $280,100 of U.S. currency.
4. Found in the fields adjoining Stegemann's residence, investigators also seized 819.9 gross grams of suspected cocaine, 69.2 gross grams of oxycodone and 114.5 gross grams of heroin.

On June 3, 2013, a federal criminal complaint was filed naming Joshua Stegemann as defendant.

On September 18, 2013, the case was indicted. United States v. Stegemann, No. 13- CR-357 (GLS) at Dkt. No. 10. The three-count Indictment charged Stegemann with (1) Possession with Intent to Distribute Controlled Substances; (2) Possession of Firearms in Furtherance of Drug Trafficking; and (3) Possession of Firearms and Ammunition by a Prohibited Person. Stegemann entered a not guilty plea, and filed a motion to dismiss part of the indictment and to suppress various evidence.

On July 29, 2014, Stegemann's motion to suppress evidence derived from the wiretaps and surveillance was denied. The Court reserved on whether the evidence intercepted from the Rensselaer County Jail, and any evidence derived therefrom, was admissible. There is no evidence before this Court as to whether a trial date has been scheduled.

Stegemann commenced a civil rights complaint pursuant to 42 USC § 1983 in federal court in the Northern District of New York against the same defendants as captioned above, as well an application for permission to proceed *in forma pauperis* (IFP). In accordance with Section 1915(e) of Title 28 of the United States Code, when a plaintiff seeks to proceed IFP, "the court shall dismiss the case at any time if the court determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). Thus, the matter was referred to US Magistrate Judge Hummel to determine that whether plaintiff could properly maintain his complaint before permitting him to proceed further with his action.

On February 2, 2015, Judge Hummel issued his report/recommendation and held that the action should be dismissed, pursuant to 28 USC 1915 for failure to state a cause of action upon which relief can be granted and lack of subject matter jurisdiction. Further, Judge Hummel found that plaintiff would be unable to amend the complaint in a manner that would survive dismissal.

Specifically, the Court found that all of Stegemann's Fourth and Fifth Amendment claims were barred by Heck v. Humphrey, 512 US 477 (1994). In that case, the Supreme Court decreed, in

pertinent part, that"in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal," or that it would "otherwise be invalidated." The Supreme Court further stated that such a claim would not otherwise be cognizable under the statute, and that if the district court were to determine that "a judgment [on the § 1983 claim] in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence," it must dismiss the case until the litigant can prove that the conviction has been so invalidated. Judge Hummel determined that the evidence that was seized on and surrounding Stegemann's property was the very basis of the pending criminal indictment. "Thus, in finding that the warrant was invalid in this civil suit, the Court would be challenging the exact vehicle through which the named law enforcement agencies found the drugs, guns, and money which compromise the evidence in the criminal indictment...were Stegemann to succeed on any theory espoused above, he would necessarily call into question the validity of [the] theory behind his pending criminal prosecution." The Court found that all claims concerning the search warrants and the wiretaps would necessarily imply the invalidity of the indictments and prosecution, and that they were all *Heck* barred. With respect to Stegemann's 14th Amendment claims concerning the unlawful destruction and seizure of property, Judge Hummel held that the federal courts do not provide redress for deprivation of property if there is an adequate state court remedy for the plaintiff, and that Stegemann could proceed via Article 78, and seek monetary damages in the Court of Claims for any claims against New York State. Finally, the Court finally noted that the complaint named several New York defendants, and that Stegemann was a citizen of New York, and thus he had not established complete diversity, depriving federal court of jurisdiction.

On February 19, 2015, District Judge Thomas J. McAvoy accepted and adopted the recommendation of Magistrate Judge Hummel and dismissed the action with prejudice.

Plaintiff Stegemann has now filed a civil action in this Court, against the same defendants, asserting the same claims. Specifically, Stegemann asserts claims for Constitutional Tort in violation of NY Const Art. 1, §12, violations of the Massachusetts Declaration of Rights, Art IVX, violation of the 4th, 5th and 14th Amendments to the United States Constitution, violations of New York Criminal Procedure Law §§ 690.05, 690.25, 690.35, 690.45, as well as the Federal and Massachusetts wiretap statutes. Again, he claims that defendants illegally monitored and recorded his calls prior to his arrest and those he made from the County Jail. He claims that search warrants issued by Rensselaer County Court were illegal because the judge did not sit as a local court. He claims that law enforcement seized property outside the particulars of the warrant and destroyed his real property.

In this motion, plaintiff states that he served the above captioned defendants between March 4 and 7, 2015 pursuant to CPLR §312-a. On March 7, 2015, he filed a copy of the Complaint, Summons, Notice of Service and an affirmation of service with the County Clerk. Between March 7 and 17, 2015, he served the defendants with an additional CPLR §312-a Notice and a pre-stamped self addressed envelope. Plaintiff claims that the defendants were required to return a copy of the Acknowledgment of Receipt within 30 days of receipt, but that he has not received an

Acknowledgment of Receipt from any defendant, or an Answer from any defendant. He acknowledges that he is required to effect service by some other means if the defendants fail to provide the Acknowledgment of Receipt within 30 days of receipt, but that the "novel circumstances" of this case preclude him from effecting service as otherwise set forth in Article 3. These circumstances include being an inmate, subject to immediate transfer at any time, and being an adjudged "poor person." He also claims these circumstances constitute good cause to extend the time for service pursuant to CPLR §306-b. He requests that the Court order service in a manner the Court deems necessary (CPLR § 308(5)), and that the cost be charged to the defendants.

The Commonwealth defendants, the Pittsfield defendants, and the Rensselaer County defendants oppose this motion[1], and all argue that service was improper and that plaintiff has failed to effect service within the 120 days from the filing of the summons and complaint, which occurred on December 8, 2014. Defendants note that plaintiff failed to strictly adhere to the statutory requirements that a summons and complaint be served by mailing to each person or entity to be served, by first class mail, postage prepaid, a copy of the summons and complaint, together with two copies of a statement of service by mail and acknowledgment of receipt, with a return envelope, postage prepaid, addressed to the sender. Defendants note that plaintiff failed to provide two copies of the statement of service, failed to provide two copies of the acknowledgment, and failed to provide these papers to each individual defendant. Defendants also argue that service was defective where plaintiff served process only by mail under CPLR § 312-a, defendant did not return acknowledgment, and plaintiffs did not attempt another manner of service.

In reply, the plaintiff contends that the defendants have consented to jurisdiction by raising other grounds for dismissal in their pre-answer motions in addition to their jurisdictional objections. " 'An appearance by a defendant in an action is deemed to be the equivalent of personal service of a summons upon him [or her], and therefore confers personal jurisdiction over him [or her], unless he [or she] asserts an objection to jurisdiction either by way of motion or in his [or her] answer'." Ohio Sav. Bank v Munsey, 34 AD3d 659, 659 (2006) *quoting* Skyline Agency v Coppotelli, Inc., 117 AD2d 135, 140 (1986); *see* CPLR 320. "The effect of the adoption of CPLR 320 [b] was to abolish the special appearance and to permit the joinder of a defense on the merits with an objection to jurisdiction. In re Katz, 81 A.D.2d 145; Colbert v. International Sec. Bureau, Inc., 79 A.D.2d 448 (2d Dept. 1981). Therefore, plaintiff's claims in this regard lack merit, and the Court will consider the jurisdictional question.

The service requirements of CPLR §312-a are stated above, and courts construe them strictly. *See* Strong v. Bi-Lo Wholesalers, 265 AD2d 745 (3d Dept. 1999); Nagy v. John Heuss House Drop In Shelter for the Homeless, 198 AD2d 115 (1st Dept. 1993). The plaintiff does not dispute the defendants' allegations that he failed to strictly adhere to the service requirements of CPLR § 312-a.

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[1] Defendants New York National Guard, Richard J. Sloma, Chris Clifford, New York State Police, New York States Police SORT, and Inv. Kiley have obtained an extension to submit opposition papers and a cross motion to dismiss.

It also is well established that mailing of process pursuant to CPLR § 312-a does not effect personal service; service is complete only when acknowledgment of receipt is mailed or returned to sender. Wells Fargo Bank, N.A. v Wine, 90 AD3d 1216 (3d Dept. 2011); Koulkina v. City of New York, 559 F.Supp.2d 300 (SDNY 2008); Horseman Antiques, Inc. v. Huch, 50 AD3d 963 (2d Dept. 2008); Dominguez v Stimpson Mfg. Corp., 207 AD2d 375 (2d Dept. 1994); Shenko Electric, Inc. v Harnett, 161 AD2d 1212 (4th Dept. 1990); Nagy v. John Heuss House Drop In Shelter for the Homeless, supra; Patterson v Balaquiot, 188 AD2d 275 (1st Dept. 1992). Contrary to the plaintiff's contention, defendants are not obligated to "cooperate" with him. Rather, the obligation was on the plaintiff to attempt another manner of service if he did not receive the Acknowledgment within 30 days. *See* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, § 312-a, at 17.

Having failed to properly serve the defendants, plaintiff now moves for an extension of time to serve pursuant to CPLR 306-b, and for alternate service.

Service of the summons and complaint shall be made within one hundred twenty days after the commencement of the action. CPLR 306-b. In Leader v Maroney, Ponzini & Spencer, 97 NY2d 95 (2001), the Court of Appeals articulated that a determination as to whether to grant an extension of time under the "interest of justice" standard of CPLR 306-b is a discretionary determination requiring: "a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." Id. at 105-106; *see also* Della Villa v Kwiatkowski, 293 AD2d 886, 887 (3d Dept. 2002).

As to the interest of justice standard, a review of the complaint and the papers before the Court indicates that the plaintiff's claim of novel circumstances preventing him from making proper service are not in fact novel; the Third Department has upheld the dismissal of cases where other inmates failed to effect service pursuant to CPLR 312-a. *See* Clarke v Smith, 98 AD3d 756 (3d Dept. 2012); Hilaire v. Dennison, 24 AD3d 1152 (3d Dept. 2005); Strong v. Bi-Lo Wholesalers, 265 AD2d 745 (3d Dept. 1999).

When the Court must determine a motion pursuant to CPLR 306-b, "[t]he most significant factor ... is whether the action is meritorious." Pierce v. Village of Horseheads Police Dept., 107 AD3d 1354, 1357-58 (3d Dept. 2013). Therefore, the Court will examine the complaint to determine whether the plaintiff has a meritorious cause of action.

The Commonwealth defendants and the Pittsfield defendants argue that Judge Hummel's decision bars the plaintiff's instant claims based on the doctrine of *res judicata*. "Under *res judicata*, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, once a claim is brought to a final conclusion, all other claims

arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343, 347 (1999) (citations and quotation marks omitted). It is well settled that "[t]he general doctrine of *res judicata* gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently re-litigating any questions that were necessarily decided therein." Landau v LaRossa, Mitchell & Ross, 11 NY3d 8, 13 (2008) *quoting* In re Shea's Will, 309 NY 605, 616 (1956).

Collateral estoppel, by contrast, precludes a party from relitigating an issue that has already been decided against that party. Tuper v Tuper, 34 AD3d 1280, 1282 (2006). "Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling . . . The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party. . . The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination." Buechel v Bain, 97 NY2d 295, 303-04 (2001), cert denied 535 US 1096 (2002).

Upon reviewing the complaint submitted in the federal action, it is readily apparent that the 4th and 5th Amendment claims pertaining to both the search warrants and the wiretaps (including those claims made pursuant to the federal wiretap statute) were squarely raised and conclusively decided to be Heck barred in the Federal action. Under such circumstances, this Court concludes that plaintiff is barred by *res judicata* and collateral estoppel from asserting those § 1983 claims.[2]

However, dismissal of an action by a federal court does not have preclusive effect when the federal court declines to exercise its pendent jurisdiction over related state law claims, or otherwise dismisses those claims without prejudice. *See* McLearn v Cowen & Co., 60 NY2d 686, 688 (1983); Brown v State of New York, 9 AD3d 23 (3d Dept. 2004); Landsman v Village of Hancock, 296 AD2d 728, 733 (3d Dept. 2002).

With respect to the plaintiff's claims under the Massachusetts Declaration of Rights, the Court notes that the Complaint states that plaintiff is "afforded no protection under the

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[2] The Pittsfield defendants note that under Heck, *supra*, and *Wallace v. Kato*, 549 US 384 (2007), the Court could stay the action pending resolution of the plaintiff's criminal complaint, especially since his 4th Amendment claims may not necessarily impugn the conviction because of the doctrines of inevitable discovery, independent source, and/or harmless error. While it appears that *Wallace v. Kato*, supra, is squarely on point, this Court is also constrained by res judicata and collateral estoppel with respect to the federal court's prior determination that the claims should be dismissed as Heck barred. To further complicate the matter, the report and recommendation determined that dismissal without prejudice was appropriate, but the subsequent adoption order dismissed the claims with prejudice. However, to avoid inconsistent results, the Court will adhere to the prior adjudication that the 4th and 5th Amendment claims are Heck barred.

Massachusetts Declaration of Rights." However, to the extent that he makes such claims, the Court notes that liability for those claims is governed by the Massachusetts Civil Rights Act (MCRA), which provides a private right of action against "any person or persons", whether or not acting under color of law, who interferes with a plaintiff's exercise of his or her rights secured by the Constitution or law of the Commonwealth via "threats, intimidation, or coercion." *See* Commonwealth.Swanset Dev. Corp. v. Taunton, 423 Mass. 390, 395 (1996) (citations omitted). The Commonwealth, agencies of the Commonwealth, agencies of the State of New York, as well as state and local officials acting in their official capacities, are immune to claims under the MCRA because they are not "persons" for purposes of the statute. *See* Williams v. O'Brien, 78 Mass. App. Ct. 169 (2010) ("the Commonwealth, including its agencies, is not a 'person' subject to suit.").

None of the following agencies or entities are "persons" under the Massachusetts Declaration of Rights:

> the Rensselaer County Sheriff's Department, Rensselaer County, Rensselaer County Emergency Response Team, Rensselaer County District Attorneys Office; the New York National Guard; Warren County Sheriff's Office; New York State Police; New York State Police SORT; Fulton County Sheriff's Office; Fulton County; the Berkshire County Sheriff's Office; the Berkshire County District Attorneys Office; the Berkshire County Drug Task Force; the Pittsfield Police Department; the City of Pittsfield, the Commonwealth of Massachusetts, the Massachusetts State Police, the Berkshire County District Attorney's Office.

Therefore, plaintiff has no cognizable claims as against any of the aforementioned defendants under the Massachusetts Declaration of Rights and/or the Massachusetts Civil Rights Act. The Commonwealth defendants and Pittsfield defendants have brought a cross motion for dismissal on this specific basis, and that motion, as to those specific defendants, is granted.

To the extent the complaint asserts violations of the Massachusetts Declaration of Rights and/or the Massachusetts Civil Rights Act against individual defendants, the Commonwealth and Pittsfield defendants cross move to dismiss, noting that the Legislature "explicitly limited the [act's] remedy to situations where the derogation of secured rights occurs by threats, intimidation or coercion." Bally v. Northeastern Univ., 403 Mass. 713, 718, 532 N.E.2d 49 (1989). A 'threat' is 'the intentional exertion of pressure to make another fearful or apprehensive of injury or harm.' Planned Parenthood League v. Blake, 417 Mass. 467, 474, cert. denied, 513 U.S. 868 (1994) . . . . 'Intimidation' involves putting one in fear for the purpose of compelling or deterring conduct.' Id. 'Coercion' is the application to another of force to constrain him to do against his will something he would not otherwise have done.' Id., *quoting* Deas v. Dempsey, 403 Mass. 468, 471 (1988)." Kennie v. Natural Resource Dep't of Dennis, 451 Mass. 754, 763 (2008).

Both the Commonwealth and Berkshire defendants cross move to dismiss for the failure to state a cause of action. CPLR 3211(a)(7). "The standard to be applied on a motion to dismiss for failure to state a cause of action is both familiar and well settled — we must afford the complaint

a liberal construction, accept as true the allegations contained therein, accord the plaintiff the benefit of every favorable inference and determine only whether the facts fit within any cognizable legal theory. That said, the favorable treatment accorded to a plaintiff's complaint is not limitless and, as such, conclusory allegations — claims consisting of bare legal conclusions with no factual specificity — are insufficient to survive a motion to dismiss." Rodriguez v Jacoby & Meyers, LLP, 126 AD3d 1183, 1185 (3d Dept. 2015) (internal quotations and citations omitted).

The Court agrees that the complaint fails to make any factual allegations that any of the individual defendants interfered with "threats, intimidation, or coercion" with plaintiff's exercise of his rights. The complaint alleges that search warrants and wiretaps were obtained unlawfully. Obtaining the warrants to search and monitor plaintiff's residence and phone calls all occurred outside of his presence, and therefore, cannot amount to a claim of "threats, intimidation, or coercion." The papers attached to plaintiff's opposition papers establish that he was apprehended shortly after the police arrived and placed in a police vehicle while the search was conducted, and thus he was not required to do anything while the police executed their warrant. Accordingly, the complaint states no cause of action against any of the individual defendants for violations of the Massachusetts Declaration of Rights and/or the Massachusetts Civil Rights Act, and the cross motion to dismiss made by the Commonwealth and Pittsfield defendants on these grounds is granted.

Next, the Commonwealth and Pittsfield defendants cross move to dismiss for the failure to state a cause of action with respect to the New York and Massachusetts wiretap statutes. CPLR 3211(a)(7). The Complaint alleges "deprivation of Rights as enumerated under the...New York State and Massachusetts Wiretap Statutes." The Court notes that both states provide for the interception of wire or oral comminations by law enforcement officers pursuant to a warrant. M.G.L. c. 272, §99D; NY CPL 700.10. The only paragraphs of the complaint which provide any factual recitations concerning the wiretaps are that the defendants used the wiretap statutes to eavesdrop on eight (8) of the plaintiff's cellular phones, and that the defendants applied for and executed the eavesdropping warrants between the dates of March 12, 2013 and May 5, 2013. Nowhere in the complaint does the plaintiff provide any other factual detail regrading the wiretap statutes or how they were allegedly violated. The complaint merely alleges conclusory statements, including that the eavesdropping warrants were obtained "in violation of the Equal Protection clause of the 14th Amendment" and were "unlawfully executed." Plaintiff provides more detail concerning his claims in his Affirmation in opposition to the Pittsfield defendants' motion to dismiss, arguing that the Massachusetts wiretap statute, MGL 272, § 99 states that wiretaps conducted pursuant to same may only be executed "within the Commonwealth of Massachusetts," and that probable cause for a Massachusetts State wiretap must be based upon reliable assertions of violations of Massachusetts State Law.

The Court notes that "[s]ection 1983 of title 42 of the United States Code provides a right of action for those whose rights under the United States Constitution and Federal statutes were violated under color of State law, and does not create a cause of action for the violation of State law." Carpenter v. Plattsburgh, 105 AD2d 295, 299 (3d Dept. 1981). Therefore, plaintiff cannot maintain a right of action under 1983 for these violations, nor did the Legislature provide for a right of action for violations of these statutes.

Therefore, the motion by the Commonwealth and Pittsfield defendants to dismiss for failure to state a cause of action is granted.

Next, the Commonwealth defendants argue that the plaintiff's claims pursuant to Article I, § 12 of the New York State Constitution must be dismissed. In Brown v State of New York, 89 NY2d 172, 192 (1996), plaintiffs alleged that state and local law enforcement officials investigating a reported knifepoint attack allegedly engaged in racially motivated interrogations, citywide, of nonwhite males in violation of their State constitutional rights; none of the plaintiffs was charged with a crime. The Court held that implying a damage remedy was not only consistent with the purposes of the Search and Seizure and Equal Protection Clauses that had allegedly been violated but also "necessary and appropriate to ensure the full realization of the rights they state." Id. at 189. The remedy recognized in Brown, *supra,* addressed two interests: the private interest that citizens harmed by constitutional violations have an avenue of redress, and the public interest that future violations be deterred. Under the facts of Brown, *supra*, neither declaratory nor injunctive relief was available to the plaintiffs, nor--without a prosecution--could there be suppression of illegally obtained evidence. As the Court noted in Martinez v. City of Schenectady, 97 NY2d 78, 83 (2001), for the plaintiffs in Brown, *supra,* it was "damages or nothing." Martinez v. City of Schenectady, 97 NY2d 78, 83 (2001).

In strong contrast with Brown was the plaintiff in Martinez, *supra*. In that case, pursuant to a search warrant, defendants - Schenectady police officers - entered the residence of plaintiff Melody Martinez, and seized four ounces of cocaine from a dresser drawer in her bedroom and arrested her. The Court of Appeals held that "[r]ecognition of a constitutional tort claim here is neither necessary to effectuate the purposes of the State constitutional protections plaintiff invokes, nor appropriate to ensure full realization of her rights. Without question, the cost to society of exclusion of evidence and consequent reversal of plaintiff's conviction notwithstanding proof of guilt beyond a reasonable doubt will serve the public interest of promoting greater care in seeking search warrants. Unlike in *Brown*, the deterrence objective can be satisfied here by exclusion of the constitutionally challenged evidence." The Court concluded that plaintiff failed to assert a cognizable constitutional tort claim. *See also* Flemming v State of New York, 120 AD3d 848 (3d Dept. 2014); Waxter v. State of New York, 33 AD3d 1180 (3d Dept. 2006); Peterec v State of New York, 124 A.D.3d 858 (2d Dept. 2015); LM Bus. Assoc., Inc. v State of New York, 124 AD3d 1215 (4th Dept. 2015).

The instant defendant has been indicted and charged with numerous crimes and is contesting the admissibility of the evidence against him within the context of the federal criminal proceeding. As noted above, the cost to society of the potential exclusion of evidence and consequent reversal of plaintiff's conviction notwithstanding proof of guilt beyond a reasonable doubt will serve the public interest of promoting greater care in seeking search warrants. As plaintiff does not fall in the "damages or nothing" category, he fails to assert a cognizable constitutional tort claim under the New York Constitution. The Commonwealth defendants and Pittsfield defendants' cross motion to dismiss for failure to state a cause of action is thus granted.

Finally, plaintiff asserts claims under the 14th Amendment of the US Constitution for what

he terms "an excessive seizure." Specifically, he alleges that the search warrants on his residence were executed by all named members of the Rensselaer County Sheriff's Department, Warren County Sheriff's Department, Fulton County Sheriff's Department, Berkshire County Sheriff's Department, Berkshire County District Attorney's Office (through Sub-Surface Informational Surveys, Inc.), Massachusetts State Police, the Pittsfield Police Department, the New York State Police (NYSP), the NYSP SORT team, and NYSP Inv. Kiley. He states that the SORT team fired a flashbang grenade into his house in the early morning hours to commence the search. He claims that police "destroyed" his residence during the search, noting that police used excavation equipment to dig up walkways, patios, etc. Further, that the police seized personal items such as "generators, power tools, home records, personal papers", none of which was listed as items authorized to be seized on the face of the warrant or in the body of the application.

42 USC 1983 provides as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The party against whom recovery is sought must be a "person" within the meaning of the Civil Rights Act, and not be cloaked with immunity. Fine v. City of New York, 529 F.2d 70, 73 (2d Cir. 1975); *see also* Imbler v. Pachtman, 424 US 409, 418 (1976) (Section 1983 is "to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them").

The Commonwealth defendants also move to dismiss as against the Berkshire County District Attorney's Office, Berkshire County Sheriff's Office, and the Massachusetts State Police, noting that these agencies are not "persons" within the meaning of 42 USC 1983, and that sovereign immunity protects states, their agencies, and their officials sued in their official capacities from suit for federal civil rights violations. The Pittsfield defendants argue that the Pittsfield Police Department is not a proper party to this action because police departments lack independent legal identities, and cannot sue or be sued. Hall v. City of White Plains, 185 F. Supp.2d 293, 303 (SDNY 2002); Fanelli v. Town of Harrison, 46 F. Supp. 2d 254 (SDNY 1999); Baker v. Willett, 42 F. Supp. 2d 192, 197 (NDNY 1999); Wilson v. City of New York, 800 F. Supp. 1098, 1101 (EDNY 1992).

The Court agrees with the Commonwealth and Pittsfield defendants, however, there is an exception to the general rules stated above, namely, "where the municipality itself causes the constitutional violation at question." Canton v. Harris, 489 US 378, 385 (1989) *citing* Monell v. New York Dept of Social Services, 436 US 658 (1978). The municipality itself causes the injury when either: (1) the execution of the government's policy or custom causes the injury (Monell, 436 US at 694); or (2) the act of an employee with final policy making authority in the particular area involved causes the injury (St. Louis v. Praprotnik, 485 US 112, 121-23 (1988)). In this case, plaintiff has failed to allege the existence of a policy or custom that caused the alleged violations. To the extent the plaintiff is bringing any claims under the 14th Amendment against the Berkshire County District Attorney's Office, Berkshire County Sheriff's Office, and the Massachusetts State Police or the Pittsfield Police Department, the motion to dismiss is granted.

The Commonwealth defendants also note that the claims against Berkshire County District Attorney David Capeless and Assistant District Attorney Richard Locke must be dismissed, as they are entitled to absolute immunity. Maye v. New York, 517 Fed. Appx. 56 (2d Cir. 2013) ("[A]bsolute immunity protects a prosecutor from § 1983 liability for virtually all acts, regardless of motivation, associated with his function as an advocate. The immunity attaches to [the prosecutor's] function, not to the manner in which he performed it.") (Internal citations and quotations omitted). Therefore, to the extent there are any 14th Amendment claims against these individuals, the motion to dismiss is granted.

The Commonwealth defendants also argue that Sheriff Bowler and Deputy Sheriff Colbery are entitled to qualified immunity. Qualified immunity protects public officials from liability for civil damages when one of two conditions is satisfied: "(a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law." Poe v. Leonard, 282 F.3d 123, 133 9 (2d Cir 2002) (internal quotations omitted). Even if the constitutional privileges "are so clearly defined that a reasonable public official would know that his actions might violate those rights, qualified . . . immunity might still be available . . . if it was objectively reasonable for the public official to believe that his acts did not violate those rights." Kaminsky v. Rosenblum, 929 F.2d 922, 925 (2d Cir.1991); Magnotti v. Kuntz, 918 F.2d 364, 367 (2d Cir.1990). Qualified immunity generally is a question of law to be resolved by the court, and since it is "an immunity from suit rather than a mere defense to liability," (Mitchell v. Forsyth, 472 US 511, 526 (1985)), it should be decided at the earlier possible stage of the litigation. Colao v. Mills, 39 AD3d 1048, 1050 (3d Dept 2007) *citing* Hunter v Bryant, 502 U.S. 224, 228 (1991).

It is well established that "officers executing search warrants on occasion must damage property in order to perform their duty." Cody v. Mello, 59 F.3d 13, 16 (2d Cir. 1995) (internal quotation marks omitted). "Before any due process liability can be imposed for property damage occurring in a lawful search, it must be established that the police acted unreasonably or maliciously in bringing about the damage." Id; *see* Dockery v. Tucker, No. 97-CV-3584, 2008 U.S. Dist. LEXIS 49426, 2008 WL 2673307, at *10 (EDNY June 26, 2008) ("[I]t is settled that some disarray in conducting a search, including tangential destruction of items that could not contain the object of the search, does not state a claim of constitutional magnitude.").

The search of plaintiff's home was conducted pursuant to a valid search warrant. *See* Messerschmidt v. Millender, 132 S.Ct. 1235, 1245 (2012) ("[T]he fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner[.]"). There were two search warrant applications made in this case (copies of both are provided by the plaintiff). The first application allowed police to enter the premises to search for, *inter alia*, evidence of the possession/distribution/sale of narcotics. The second application was made after Stegemann was placed in custody. The application noted that police had conducted a line search in the area Stegemann fled in order to determine if he discarded anything, and found a cell phone, cocaine wrapped in a plastic bag, and 9mm handgun wrapped in a plastic bag secreted in a rock wall. Pursuant to the first warrant, the applicant described how police had found various amounts of US

currency, narcotics and firearms secreted around the premises: some under tree stumps, under pine needles, secreted in a rock wall. Trails were observed leading from plaintiff's residence to adjoining properties. The applicant noted that, through training and experience, individuals involved in the sale of narcotics go to "great lengths" to conceal and secrete narcotics and proceeds from the sale thereof, and therefore, deponent sought the ability to use excavation equipment to check areas underground. The warrant provided such access, and the search of the home yielded drugs in separate locations, including under the ground and inside walls.

Under the circumstances, the damage depicted in the complaint is neither unreasonable nor indicative of malicious conduct. The execution of a search warrant does not violate a "clearly established" 14th Amendment right because a reasonable officer would have considered his conduct in executing the warrant, in exactly the manner permitted by the warrant, to be constitutional; therefore, the answer to the "qualified immunity" question as to such conduct is presumably yes.

With respect to plaintiff's claims that the officers seized property outside the scope of the warrant, including a "weed whacker, tractors, lawnmowers, ATV's, generators, power tools, home records, personal papers, chain saws, vehicles, etc." The plaintiff has provided the Court with a copy of the Search Warrant Application and the Search Warrant. The warrant specifically includes papers (books, records, receipts) related to the sale and/or distribution of controlled substances. The warrant also includes "rented vehicles" and "vehicles registered" to plaintiff. Finally, the warrant includes "stolen property such as but not limited to" a lawnmower, a raptor ATV, and a "cub car." Therefore, it appears from the very face of the warrant that plaintiff's claim lacks merit.

With the exception of the specific cross-motions to dismiss granted herein, the entirety of the instant analysis has been focused on whether plaintiff has a meritorious cause of action, such that he can correct the improper service he attempted via CPLR 312-a. Pierce v. Village of Horseheads Police Dept., *supra* ("[t]he most significant factor here is whether the action is meritorious.").

The Court has already determined that plaintiff has failed to provide a reasonable excuse as to why he failed to follow the service requirements of CPLR 312-a, nor has he demonstrated that his incarceration prevented him from effecting proper service. The Court notes that incarceration has not prevented plaintiff from attempting to commence two civil rights lawsuits, and from extensive motion practice in both the federal court (in his civil and criminal cases) and before this Court. Further, an analysis of the instant complaint demonstrates that it is rife with procedural and substantive impediments. Considering all of the factors, but especially given the lack of merit, an extension of time to effect service is not warranted in the interest of justice.

As defendant has failed to obtain personal jurisdiction over these defendants, his cross motion to convert the Pittsfield defendants' motion to dismiss into one for summary judgment, prior to any answers being filed, cannot be entertained, as the Court has no jurisdiction over the defendants.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the plaintiff's motion for "no cost service" of his complaint and summons upon the defendants at their own expense is denied, and it is further

ORDERED that the plaintiff's motion for an extension of time for service pursuant to CPLR 306-b is denied, and it is further

ORDERED that the complaint is dismissed as to the Commonwealth defendants, the Pittsfield defendants, and the Rensselaer County defendants, and it is further

ORDERED that as a separate grounds for dismissal, the cross motion by the Pittsfield and Commonwealth defendants to dismiss the 4th and 5th Amendment claims is granted, and it is further

ORDERED that as a separate grounds for dismissal, the cross motion by the Pittsfield and Commonwealth defendants to dismiss all claims under the Massachusetts Declaration of Rights is granted, and it is further

ORDERED that as a separate grounds for dismissal, the cross motion by the Pittsfield and Commonwealth defendants to dismiss all claims pursuant to the New York and Massachusetts wiretap statutes is granted, and it is further

ORDERED that as a separate grounds for dismissal, the cross motion by the Pittsfield and Commonwealth defendants to dismiss all claims pursuant Article 1, § 12 of the New York Constitution is granted, and it is further

ORDERED that plaintiff's cross motion to covert the motion to dismiss by Pittsfield defendants into one for summary judgment is denied.

This shall constitute the Decision, Order and Judgment of the Court. This Decision, Order and Judgment is being returned to the attorneys for the Rensselaer County defendants. All original supporting documentation is being filed with the Rensselaer County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. The County Attorney is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

Dated: June 25, 2015
Troy, New York

PATRICK J. McGRATH
Supreme Court Justice

Papers Considered:

1. Notice of Motion, dated May 8, 2015; Memorandum of Law in Support of Motion for Service of Complaint and Summons upon Defendants at their own Expense and Motion for Extension of Time for Service of Process upon Defendants Pursuant to CPLR 306-b, dated May 8, 2015.
2. Affirmation in Opposition to Plaintiff's Motion for Service of Complaint and Summons upon Defendants at their own Expense, Abigail Fee, Esq., dated May 15, 2015; Notice of Cross Motion to Dismiss, dated April 13, 2015; Affirmation, Abigail Fee, Esq., dated April 13, 2015, with annexed Exhibits A-J; Memorandum of Law in Support of the Commonwealth Defendants' Motion to Dismiss, Abigail Fee, Esq., dated April 13, 2015.
3. Affirmation in Opposition to the Commonwealth Defendants' Motion to Dismiss, Joshua G. Stegemann, dated April 22, 2015; Affidavit/Memorandum of Law in Opposition to the Commonwealth Defendants' Motion to Dismiss, Joshua G. Stegemann, dated April 20, 2015, with annexed Exhibits A.
4. Reply Affirmation in Further Support of Commonwealth Defendants' Motion to Dismiss, Abigail Fee, Esq., dated April 30, 2015.
5. Notice of Motion to Dismiss (Brian David Foley), dated June 2, 2015; Affirmation, Abigail Fee, Esq., dated June 2, 2015.
6. Affirmation in Opposition to Motion to Dismiss (Brian David Foley), Joshua G. Stegemann, dated June 6, 2015.
7. Notice of Motion, dated April 20, 2015; Affirmation, Michael J. Wynn, dated April 17, 2015, with annexed Exhibits A-D; Memorandum of Law in Support of Motion to Dismiss, David S. Lawless, Esq., dated April 20, 2015; Affirmation, David S. Lawless, Esq., dated April 20, 2015; Memorandum of Law in Opposition to Plaintiff's Motion for Service of Complaint and Summons upon Defendants at their own Expense and Motion for Extension of Time for Service of Process upon Defendants Pursuant to CPLR 306, David J. Lawless, Esq., dated May 20, 2015.
8. Notice of Cross Motion for Summary Judgment per CPLR 3211(c) and 3212, Joshua G. Stegemann, dated April 28, 2015; Plaintiff's Memorandum in Opposition to the City of Pittsfield, Massachusetts Defendants' Motion to Dismiss and in Support of Cross Motion for Summary Judgment, Joshua G. Stegemann, dated April 28, 2015; Affidavit/Memorandum of Law, Joshua G. Stegemann, dated April 26, 2015, with annexed Exhibit A.
9. Affirmation in Opposition, Elizabeth A. Murphy, Esq., dated May 11, 2015, with annexed Exhibits A-J.
10. Reply Affirmation in Further Support of Plaintiff's Motion for Service of Complaint and Summons upon Defendants at their own Expense and Motion for Extension of Time for Service of Process upon Defendants Pursuant to CPLR 306-b, dated May 13, 2015.