

Stegemann v Rensselaer County Sheriff's Off.
2015 NY Slip Op 32514(U)
September 21, 2015
Supreme Court, Rensselaer County
Docket Number: 248213-14
Judge: Patrick J. McGrath
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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 6th day of July 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, Richard J. McNally, Jr., Art Hyde, Steve Wohleber, 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, Cellico Partnership, d/b/a Verizon Wireless, and Subsurface Informational Surveys, Inc.,

Defendants.

APPEARANCES: JOSHUA G. STEGEMANN
Self Represented Plaintiff

HANCOCK ESTABROOK, LLP
THOMAS C. CAMBIER, ESQ.
Attorneys for the Defendants Cellico Partnership, d/b/a Verizon Wireless

Received
County Clerks Office
Sep 29, 2015 10:30A
Rensselaer County
Frank J Herold

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

Plaintiff brings this motion for “no cost service” of his summons and complaint upon the defendants at their own expense as well as a motion for an extension of time for service pursuant to CPLR 306-b. Defendants (hereinafter, “Verizon”) oppose plaintiff’s motion, and bring a cross motion to dismiss based on lack of personal jurisdiction due to defective service, a complete defense based upon documentary evidence, as well as collateral estoppel/res judicata. CPLR 3211(a)(1), (5), (8). Plaintiff opposes the motion.

The 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). The three-count Indictment charged Stegemann with (1) Possession with Intent to Distribute Controlled Substances; (2) Possession of Firearms in Furtherance of a Drug Trafficking Crime; 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. United States v. Stegemann, 40 F. Supp.3d 249 (NDNY 2014).

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 as 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 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. Stegemann v. Rensselaer County Sheriff's Office, 2015 U.S. Dist. LEXIS 20229 (NDNY 2015).

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 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. Stegemann v. Rensselaer County Sheriff's Office, 2015 U.S. Dist. LEXIS 20230 (NDNY Feb. 19, 2015)

On August 5, 2015, plaintiff was convicted by a federal jury of all three counts of the Indictment. He is scheduled to be sentenced on December 2, 2015. Press Release, Department of Justice, U.S. Attorney's Office, Northern District of New York: "Jury Convicts Stephentown Man Of Possessing Cocaine, Heroin And Oxycodone With The Intent To Distribute," <http://www.justice.gov/usao-ndny/pr/jury-convicts-stephentown-man-possessing-cocaine-heroin-and-oxycodone-intent-distribute>.

Plaintiff has commenced the present civil rights action on an essentially identical complaint as that filed in federal court, against the same defendants, asserting the same claims. With respect to Verizon, Stegemann asserts that defendant conducted or authorized wiretaps or electronic surveillance of the plaintiff between March 8, 2013 and May 6, 2013. Further, that Verizon is liable for the unlawful execution of search warrants upon his residence, and the unlawful execution of wiretaps on his cellular phone.

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.

Verizon argues that service was improper and that plaintiff has failed to effect service within the 120 days from the filing of the summons and complaint. Counsel for Verizon states that on or about March 12, 2015, plaintiff mailed a Summons and Complaint together with two copies of a statement of service by mail and acknowledgment of receipt by mail to Verizon's office in Bedminster, New Jersey. Further, that Verizon did not acknowledge plaintiff's purported service by

mail, nor did it ever execute or return an acknowledgment of receipt. Verizon claims 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.

The service requirements of CPLR §312-a are strictly construed. 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). It 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); Koulikina 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 seeks 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.

Verizon argues 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 the wiretaps were squarely raised and conclusively decided to be *Heck* barred in the Federal action. The Court also notes that plaintiff has now been convicted of all crimes contained in the indictment; and that civil recovery in this Court would impugn that conviction. Additionally, this Court concludes that plaintiff is barred by *res judicata* and collateral estoppel from asserting those § 1983 claims here.

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).

Verizon provides the Affidavits of Debra Ennis, associate director within the Verizon Security Assistance Team. She oversees the Court Order Compliance Team to ensure that all of the court orders and search warrants served on the company are reviewed, validated and processed in a timely manner. She is able to determine whether Verizon has received any electronic surveillance orders by reviewing the internal case management system. She conducted a search of the company records and internal case management system for records associated with plaintiff. She conducted her initial search based on the Summons and Complaint, which contained plaintiff's name, but no mobile telephone numbers. She was unable to find any records related to an order in connection with

Joshua Stegemann, but based upon the exhibits attached to plaintiff's opposition papers, including the wiretap applications and warrants for Verizon Mobile devices, Ms. Ennis was able to determine that plaintiff was using two prepaid telephone numbers (as listed in her Affidavit), as well as the exact numbers he was using. Based on the information supplied by the plaintiff, Ms. Ennis was able to run a new search on the numbers listed in the warrants serviced by Verizon Wireless for order issued in accordance with 18 USC 2510 ("Wire and Electronic Communications Interception and Interception of Oral Communications," hereinafter "the Federal Wiretap Act"). She found two orders dated March 20, 2013, issued by Massachusetts Trial Court Justice Hon. John Agostini, directing Verizon to provide assistance and information necessary to intercept oral and wire communications and other technical assistance necessary to accomplish electronic interception of both numbers listed in the warrants as the Stegemann Target Telephones. She attaches a copy of both orders, both of which provide that any action taken by Verizon in compliance with the Order shall be deemed an absolute defense to any subsequent lawsuit pursuant to Cpt. 272, Sec. 99 of the Massachusetts General Laws. She states that Verizon acted in good faith reliance on the foregoing Orders.

Counsel for Verizon states that the Federal Wiretap Act, as well as the New York and Massachusetts wiretap statutes (NY CPL 700.35(5); Massachusetts Law Part IV Chpt. 72, § 99) provide that a good faith reliance on a court order or warrant is a "complete defense" to an action brought under the respective statutes. Counsel argues that the Orders issued by Justice Agostini provide Verizon with a complete defense in this action. This Court agrees. It is apparent that the aforementioned laws are designed to insulate providers from civil actions arising out of their cooperation with law enforcement officers in carrying out the provisions of an eavesdropping warrant. *See Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 700.35 at 365.* In this case, the Massachusetts Court orders provided by Verizon indicate that it is entitled to this protection.

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. Further, Verizon has provided evidence of a complete defense to the lawsuit. Considering all of the factors, but especially given the lack of merit, an extension of time to effect service is not warranted.

Therefore, in accordance with the foregoing, it is hereby

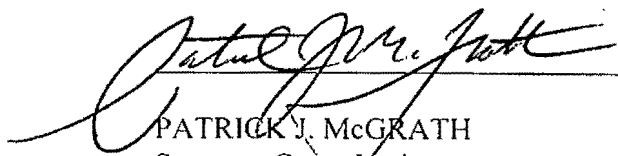
ORDERED that the plaintiff's motion for "no cost service" of his complaint and summons upon Verizon at defendant's expense is denied, and it is further

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 Cellco Partnership, d/b/a Verizon Wireless.

This shall constitute the Decision and Order of the Court. This Decision and Order is being returned to the attorneys for Cellco Partnership, d/b/a Verizon Wireless. The Court will forward all original supporting documentation to the Rensselaer County Clerk's Office for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

Dated: September 21, 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. Notice of Cross Motion, dated July 16, 2015; Affidavit, Debra Ennis, dated July 14, 2015; Affirmation, Thomas C. Cambier, Esq., dated July 16, 2015, with annexed Exhibits A-C.
3. Plaintiff's Response and Opposition to Cross Motion to Dismiss Filed by Cellco Partnership b/d/a verizon Wireless, Joshua G. Stegemann, dated July 27, 2015, with annexed Exhibit A.
4. Affidavit, Debra Ennis, dated August 17, 2015, with annexed Exhibits A & B; Affirmation, Thomas C. Cambier, Esq., dated August 20, 2015.

Received
County Clerks Office
Sep 29, 2015 10:30A
Rensselaer County
Frank J Merola