

**COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT**

PLYMOUTH, SS

C.A. No. PLCV2014-01018-B

NICHOLAS G. BELEZOS, on behalf of himself
and all others similarly situated,
Plaintiff

v.

BOARD OF SELECTMEN of
the Town of Hingham
in their official capacity,
on behalf of themselves and
all others similarly situated,
Defendants

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT BOARD OF SELECTMEN OF THE TOWN OF HINGHAM'S
MOTION TO DISMISS PURSUANT TO MASS. R. CIV. P. 12(b)(5)**

NOW COME the Defendants, Board of Selectmen of the Town of Hingham , who hereby move this Honorable Court, pursuant to Massachusetts Rules of Civil Procedure 12(b)(5) to dismiss the Plaintiff's Complaint in its entirety for insufficient service of process.

I. STATEMENT OF RELEVANT PROCEDURE/FACTS

A. PROCEDURE

Plaintiff, Nicholas G. Belezos, on behalf of himself and all others similarly situated, brings claims for relief against the Board of Selectmen of the Town of Hingham, in their official capacity on behalf of themselves and all others similarly situated. He brings sixteen (16) claims for relief based upon his belief that he should not have been held liable for a speeding ticket that was issued to him on September 28, 2011 was

illegally issued because the speed limit sign upon which his ticket was based was unlawfully posted.

Plaintiff's Complaint was filed on September 29, 2014. (See Docket; Attached as Exhibit A).¹ Pursuant to Mass. R. Civ. P. Rule 4(j), Plaintiff was required to have served his Complaint by December 28, 2014. He did not. Nor did the Plaintiff move for leave for additional time to serve his Complaint. On December 29, 2014, Plaintiff filed his First Amended Complaint and according to the return of service, served his Complaint on December 29, 2014 upon the Chairman of the Board of Selectmen for the Town of Hingham. (Return Receipt; Attached as Exhibit B). Not only was the Complaint served outside of the ninety day requirement set by Rule 4(j), but his Complaint was insufficiently served. The Board of Selectmen of the Town of Hingham is not "an authority, board, committee, or similar entity, subject to suit under a common name," it is, for all intents and purposes, the Town of Hingham. Pursuant to Mass. R. Civ. P. Rule 4(d)(4), service upon a town must be made to the treasurer or clerk. It is undisputed that the Plaintiff did not serve his Complaint upon the Town of Hingham treasurer or clerk.

For the reasons stated succinctly above and more fully below, the entry of default must be vacated and the Plaintiff's Complaint must be dismissed.

B. FACTS

On September 29, 2014, Plaintiff filed his Original Complaint. According to Plaintiff's December 29, 2014 First Amended Complaint, Plaintiff, Nicholas G. Belezos, on behalf of himself and all others similarly situated, brings claims for relief against the Board of Selectmen of the Town of Hingham, in their official capacity on behalf of themselves and all others similarly situated. (Pl.'s Am. Compl.; Attached as Exhibit C).

¹ At the outset, Plaintiff has failed to comply with the applicable three year statute of limitations.

He brings sixteen (16) claims for relief based upon his belief that he should not have been held liable for a speeding ticket that was issued to him on September 28, 2011 was illegally issued because the speed limit sign on the roadway he was traveling and upon which his ticket was based was unlawfully posted. (*Id.*).

Mr. Belezos' claim is nearly identical to a claim brought by his attorney, Frederic Zotos, in the United States District Court for the District of Massachusetts in the matter of *Zotos v. Town of Hingham*, et al., 1:12-cv-11126 in July of 2012. (Zotos Complaint, July 9, 2012; Attached as Exhibit D). There the federal district court addressed the sufficiency of Mr. Zotos' pleadings and in a thorough and well-reasoned decision determined that none of the claims could withstand a Rule 12(b)(6) motion to dismiss. (Zotos Decision, September 19, 2013; Attached as Exhibit E). Mr. Zotos appealed to the United States Court of Appeals for the First Circuit and the First Circuit affirmed the dismissal. (First Circuit Decision, February 18, 2015; Attached as Exhibit F). For the reasons Mr. Zotos' claims could not withstand a Rule 12(b)(6) motion to dismiss, Mr. Belezos claims are equally insufficient.

II. STANDARD OF REVIEW

A. MASS. R. CIV. P. RULE 12(b)(5) STANDARD OF REVIEW

Before a federal court may exercise personal jurisdiction over a defendant, proper service of process must be effected. *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 108 S. Ct. 404, 98 L. Ed. 2d 415 (1987). Rule 4 sets forth the acceptable methods for service of process. Under Rule 4(e), there are four ways in which an individual defendant can be served within a judicial district of the United States: (1) by following the requirements of state law for serving a summons in actions brought in the

courts of general jurisdiction in the state where the district court is located or where service is made (here, Massachusetts); (2) by delivering a copy of the summons and the complaint to the individual personally; (3) by leaving copies of those items at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (4) delivering copies to an agent authorized by appointment or by law to receive service of process. Fed. R. Civ. P. 4(e).

The Massachusetts rules for service are substantially similar to the federal rules. Service can be made upon an individual by delivering a copy of the complaint to him personally; or by leaving copies thereof at his last and usual place of abode; or by delivering copy of the summons and of the complaint to an agent authorized by appointment or by statute to receive service of process . . . Mass. R. Civ. P. 4(d)(1).

Under the federal rules, service of process must take place within 120 days after the complaint is filed, or the court must dismiss the action without prejudice against that defendant or order that service be made within a specified time. Fed. R. Civ. P. 4(m). However, if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. *Id.*

B. MASS. R. CIV. P. RULE 12(b)(6) STANDARD OF REVIEW

The 12(b)(6) standard of review is included herein to the extent that the 12(b)(5) discussion requires an analysis of prejudice to the Plaintiff in dismissing the Complaint. For the reasons discussed more fully below, if the Plaintiff's Complaint were properly served, it would be subject to dismissal for failure to state a claim for relief under Rule 12(b)(6) and, thus, Plaintiff will suffer no prejudice if his claims are dismissed pursuant to Rule 12(b)(5).

To survive a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, a complaint must evince the requisite factual detail to establish a *plausible* claim that “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In other words, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 679. In evaluating a motion to dismiss, the court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff’s favor. *Langadinis v. American Airlines, Inc.*, 199 F.3d 68, 68 (1st Cir. 2000). The court may consider “only facts and documents that are part of or incorporated into the complaint.” *Trans-Spec Truck Serv., Inc. v. Caterpillar, Inc.*, 524 F.3d 315, 321 (1st Cir. 2008).

III. ARGUMENT

A. *RULE 12(b)(5) DISMISSAL IS APPROPRIATE AS PLAINTIFF HAS FAILED TO PROPERLY EFFECT SERVICE OF THE COMPLAINT UPON THE TOWN OF HINGHAM*²

The arguments made in *Memorandum of Law in Support of Defendant Board of Selectmen of the Town of Hingham’s Motion to Vacate Entry of Default* are referenced and incorporated fully herein.

Additionally, Under Mass. Super. Ct. Standing Order 1-88, service must be completed on all parties and all returns of service filed within ninety days. Standing Order 1-88(E)(i)(1), (ii)(1), (iii)(1). The Standing Order is clear that if service is not made upon the defendant, the action shall be dismissed as to the defendant without prejudice

² As discussed more fully in *Defendant Board of Selectmen of the Town of Hingham’s Memorandum of Law In Support Of Their Motion To Vacate Entry of Default*, the Board of Selectmen of the Town of Hingham is, for all intents and purposes, the Town of Hingham.

unless otherwise ordered by the Regional Administrative Justice upon request filed within ninety days after the complaint is filed. The Standing Order further provides that steps and limitations shall be mandatory except upon special written waiver or modification granted by the Regional Administrative Justice. Standing Order 1-88(E). *Matthews v. Marshall*, 2006 Mass. Super. LEXIS 524, 1 (Mass. Super. Ct. Oct. 2, 2006).

Mass. R. Civ. P. 4(d)(4) provides that a political subdivision of the commonwealth may be served by leaving a copy of the summons and complaint at the office of the treasurer or the clerk thereof. *Samson v. City of Boston*, 1999 Mass. Super. LEXIS 344, 1 (Mass. Super. Ct. 1999).

It is clear, in fact, admitted, that the Plaintiff served the Chairman of the Board of Selectmen of the Town of Hingham rather than the clerk or treasurer of the Town of Hingham as required by Rule 4(d)(4). As such, service of process was insufficient and the Complaint must be dismissed.

B. PLAINTIFF HAS FAILED TO COMPLY WITH GENERAL LAWS CHAPTER 258 AND, THUS, CANNOT COMPLY WITH THE APPLICABLE STATUTES OF LIMITATION

Although dismissal without prejudice is typical where the Plaintiff has made an effort to serve process but has technically failed to do so, here, a dismissal without prejudice is *de facto* a dismissal with prejudice for multiple reasons.

1. Plaintiff Has Failed To Comply With General Laws Chapter 258

Plaintiff's Amended Complaint includes claims for relief against the Town of Hingham for injury or loss of property or personal injury for alleged wrongful acts of public employees acting within the scope of their employment. For such claims, General Laws Chapter 258 governs. M.G.L. c. 258, § 2 states in relevant part:

Public employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment, in the same manner and to the same extent as a private individual under like circumstances, except that public employers shall not be liable to levy of execution on any real and personal property to satisfy judgment, and shall not be liable for interest prior to judgment or for punitive damages or for any amount in excess of \$100,000; provided, however, that all claims for serious bodily injury against the Massachusetts Bay Transportation Authority shall not be subject to a \$100,000 limitation on compensatory damages. The remedies provided by this chapter shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer or, the public employee or his estate whose negligent or wrongful act or omission gave rise to such claim, and no such public employee or the estate of such public employee shall be liable for any injury or loss of property or personal injury or death caused by his negligent or wrongful act or omission while acting within the scope of his office or employment; provided, however, that a public employee shall provide reasonable cooperation to the public employer in the defense of any action brought under this chapter.

Claims required to be brought under Chapter 258 have a statutorily mandated presentment requirement. See G.L. c. 258, § 4, which states in relevant part:

A civil action shall not be instituted against a public employer on a claim for damages under this chapter unless the claimant shall have first presented his claim in writing to the executive officer of such public employer within two years after the date upon which the cause of action arose, and such claim shall have been finally denied by such executive officer in writing and sent by certified or registered mail, or as otherwise provided by this section.

The Plaintiff has wholly failed to present his claims. As the Plaintiff has failed to present his claims pursuant to G.L. c. 258, § 4 within two years after the date upon which the cause of action arose, his claims must be dismissed.

2. ***Plaintiff Cannot Comply With The Applicable Statute Of Limitations***

In the same vein, even if the claims were presented immediately upon receipt of this motion, Plaintiff cannot comply with the applicable statute of limitations. Each of the Plaintiff's claims has a three year statute of limitations period.

Claims under 42 U.S.C. § 1983 have a three year statute of limitations period. Section 1983 provides a federal cause of action, but in several respects relevant here federal law looks to the law of the State in which the cause of action arose. *Wallace v. Kato*, 594 U.S. 384, 387 (2007). This is so for the length of the statute of limitations. *Owens v. Okure*, 488 U.S. 235, 249-250 (1989); *Wilson v. Garcia*, 471 U.S. 261, 279-280 (1985). However, the accrual date of a § 1983 cause of action is a question of federal law. *Wallace*, 594 U.S. at 388. Under federal law, it is “the standard rule that [accrual occurs] when the plaintiff has ‘a complete and present cause of action.’” *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997). A complete and present cause of action occurs when “the plaintiff can file suit and obtain relief.” *Id.* Whether the claim be classified in tort or as a civil rights action, Massachusetts law provides for a statutory period of three years after the accrual of the cause of action. M.G.L. c. 260, § 2A (Torts); M.G.L. c. 260, § 5B (Civil rights actions).

Massachusetts General Laws chapter 260, Section 2A applies to the Plaintiff's common law claims. Section 2A provides that “actions of tort ... to recover for personal injuries ... shall be commenced only within three years next after the cause of action accrues.” Each and every one of the Plaintiff's claims has a three year statute of limitations.

The day late filing may have sufficed if the Plaintiff had presented his claims to the Town of Hingham. See *Mahoney v. DeMatteo-Flatiron LLP*, 66 Mass. App. Ct. 903, 904 (Mass. App. Ct. 2006) applying G.L. c. 4, § 9 to G.L. c. 260, § 2A. However, the presentment requirement is a mandatory pre-requisite to filing which the Plaintiff did not complete. As such, he cannot comply with the applicable statutes of limitation.

C. PLAINTIFF CANNOT PROPERLY EFFECTUATE SERVICE UPON THE TOWN OF HINGHAM WITHIN THE TIME REQUIRED BY MASS. R. CIV. P. RULE 4(j)

"Rule 4(j) provides that if service has not been made within ninety days after filing of the complaint and no good cause for such failure has been shown, the court upon its own initiative shall dismiss the action without prejudice." *Hanson v. Venditelli*, 47 Mass. App. Ct. 413, 415 n.3 (1999). Once a plaintiff has failed to effectuate service within the ninety day limit of rule 4(j), dismissal is mandatory unless the plaintiff can "show 'good cause' why service was not made within the time period required by the rule." *Shuman v. Stanley Works*, 30 Mass. App. Ct. 951, 953 (1991).

"Good cause is 'a stringent standard requiring diligen[t]' albeit unsuccessful effort to complete service within the period prescribed by the rule." *Commissioner of Rev. v. Carrigan*, 45 Mass. App. Ct. 309, 311 (1998), quoting from *Shuman v. Stanley Works*, 30 Mass. App. Ct. at 953. "The focus of the court's inquiry [as to good cause] is the reasonableness and diligence of counsel's effort to effect service within the time required." *Ibid.* See *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3rd Cir. 1995) (with Federal counterpart to rule 4[j]), primary focus when deciding [6] whether good cause exists is on "plaintiff's reasons for not complying with the time limit in the first place"). "The only example of good cause provided by the

legislative history is the obvious one of a defendant's evasion of service." See *Lyons v. Planning Bd. of Andover*, 2007 Mass. App. Unpub. LEXIS 869, 5-6 (Mass. App. Ct. Jan. 5, 2007) citing *Shuman v. Stanley Works*, supra, quoting from *Wei v. State*, 763 F.2d 370, 371 (9th Cir. 1985). Evaluations of the plaintiff's diligence are left to the trial court's discretion. See *Lyons v. Planning Bd. of Andover*, supra, citing *Shuman v. Stanley Works*, supra. See also *Friedman v. Estate of Presser*, 929 F.2d 1151, 1157 (6th Cir. 1991); *Habib v. General Motors Corp.*, 15 F.3d 72, 73 (6th Cir. 1994).

A defendant must be served within 90 days after a complaint is filed. Mass. R. Civ. P. 4(j). The complaint in this case was filed on September 28, 2014 and, therefore, the 90-day window for service of process expired on December 28, 2014. Plaintiff served his Complaint on December 29, 2014. Not only was service insufficient, it was late.

D. PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

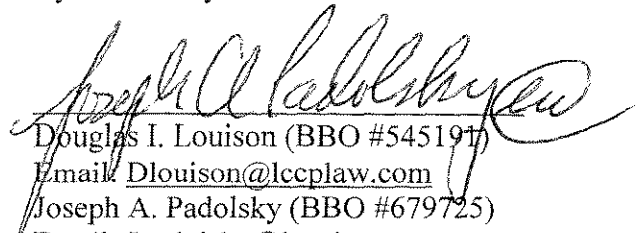
As discussed above, Mr. Belezos' claims are nearly identical to the claims brought by his attorney, Frederic Zotos, in the United States District Court for the District of Massachusetts in the matter of *Zotos v. Town of Hingham*, et al., 1:12-cv-11126 in July of 2012. There, the federal district court addressed the sufficiency of Mr. Zotos' pleadings and in a thorough and well-reasoned decision determined that none of the claims could withstand a Rule 12(b)(6) motion to dismiss. Mr. Zotos appealed to the United States Court of Appeals for the First Circuit and the First Circuit affirmed the dismissal. For the reasons Mr. Zotos' claims could not withstand a Rule 12(b)(6) motion to dismiss, Mr. Belezos claims are equally insufficient. At this stage of the pleadings, given the insufficiency of the service of process and the subsequent entry of default, the Defendants do not move this Honorable Court pursuant to Rule 12(b)(6). However, the

decisions in *Zotos v. Town of Hingham*, et al., clearly show the insufficiency of the Plaintiff's claims.

IV. CONCLUSION

For the foregoing reasons, Massachusetts Rules of Civil Procedure 12(b)(5) and the authorities cited above require that Defendant, Board of Selectmen of the Town of Hingham be dismissed in its entirety for insufficient service of process.

Respectfully submitted,
DEFENDANTS,
BOARD OF SELECTMEN OF
THE TOWN OF HINGHAM,
By its attorneys:



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Date: February 27, 2015

CERTIFICATE OF SERVICE

I, Joseph A. Padolsky, hereby certify that on the below date, I served the foregoing document by causing a copy to be mailed, postage prepaid, directed to:

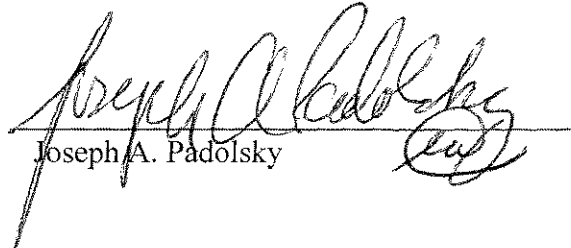
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15 TRI 020



Joseph A. Padolsky