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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 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

HON. ERIC T. SCHNIEDERMAN
(Tiffany M. Rutnik, of Counsel)
For the Defendants New York State Police, Daniel P. Kiley, New York State Army and Air National Guard, Richard Sloma, and Christopher Clifford

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.

Defendants New York State Police, Daniel P. Kiley, New York State Army and Air National Guard, Richard Sloma, and Christopher Clifford (hereinafter, the "State defendants") oppose plaintiff's motion, and bring a cross motion to dismiss. Plaintiff also moves to covert his opposition into a motion for summary judgment pursuant to CPLR 3211[c], and for an order compelling the State defendants to disclose the "reports" relied upon as referenced in the Affidavit of Daniel P. Kiley. Additionally, that the Court issue a subpoena to the Columbia County Jail to disclose his mail logs. The State defendants oppose this relief.

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 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 Stegemann has now commenced the present civil rights action on an essentially identical complaint as the one filed in federal 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 State defendants 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). 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).

While the plaintiff requests that the Court issue a subpoena to the Columbia County Jail (where he was housed when he attempted to serve the defendants) to produce his mail logs, to verify that "all papers were mailed out to all parties to this lawsuit", he does not assert anywhere that he fully complied with the directives of 312-a, nor does his "Affirmation of Service" indicate proper service. The "Affirmation of Service" attached to plaintiff's papers is a generic Affirmation, with an

original signature, addressed to "above listed defendants" which states that they are being served with a copy of the necessary papers. Obviously, if this Affirmation contains an original signature, it was not mailed. Even if it was, there is no indication that the defendants returned the mailed acknowledgment of receipt to plaintiff, or that he attempted another manner of service in the requisite time period. 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 State 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. 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).

The State defendants also argue that the suit lacks merit because sovereign immunity protects any state official acting in his or her official capacities from suit for federal civil rights violations, and that the Eleventh Amendment precludes claims against the state unless the state has expressly waived its immunity, or Congress has expressed its intent to override such immunity under the Fifth Amendment.

A citizen may prosecute a claim under 42 USC § 1983 against a person who, under color of state law, causes a deprivation of the citizen's rights, privileges or immunities secured by the Constitution or federal laws. Due to sovereign immunity under the Eleventh Amendment, the state itself is not considered a "person" subject to suit under 42 USC § 1983; neither are state officers or employees acting in their official capacities, as they are considered mere agents of the state. *See* Will v Michigan Dept. of State Police, 491 US 58, 71 (1989); Kentucky v Graham, 473 US 159, 165-67(1985); *see also* Matter of Gable Transp. v State of New York, 29 AD3d 1125, 1128 (3d Dept. 2006). Contrary to plaintiff's assertions, 42 USC § 1983 does not allow for recovery against the State under respondeat superior principles. Monell v New York City Dept. of Social Servs., 436 US 658, 691-94 (1978). In this case, all of plaintiff's papers and affirmations make clear that the acts

complained of plainly occurred in the exercise of defendants' governmental functions.

The Court agrees with the State defendants, but would note that 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, and therefore, does not fall within this exception.

The Court notes that plaintiff makes various arguments concerning the viability of his claims against the State of New York, but out of the over fifty defendants sued in this action, the State of New York is not among them. Nor would a suit against the State of New York be proper in Supreme Court, as such actions are within the exclusive jurisdiction of the Court of Claims. N.Y. Const. art. VI, § 9; *see also* Morell v Balasubramanian, 70 NY2d 297, 300 (1987) ("[A]ctions against [s]tate officers acting in their official capacity in the exercise of governmental functions are deemed to be, in essence, claims against the [s]tate and, therefore, suable only in the Court of Claims").

Plaintiff argues that his claims pursuant to Article I, § 12 of the New York State Constitution are cognizable, and cites Brown v State of New York, 89 NY2d 172, 192 (1996). In that case, 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 plaintiff had the ability to contest 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.

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.

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 plaintiff has failed to obtain personal jurisdiction over the State defendants, his cross motion to convert the State defendants' motion to dismiss into one for summary judgment, as well as the motion seeking discovery and subpoenas, cannot be entertained, as the Court has no jurisdiction over these 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 State 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 New York State Police, Daniel P. Kiley, New York State Army and Air National Guard, Richard Sloma, and Christopher Clifford, and it is further

ORDERED that plaintiff's motion to covert the motion to dismiss by defendants into one for summary judgment, and for discovery and/or subpoenas, 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 New York State Police, Daniel P. Kiley, New York State Army and Air National Guard, Richard Sloma, and Christopher Clifford. 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. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

Dated: September 14, 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 to Dismiss, dated June 11, 2015; Affidavit, Daniel P. Kiley, Esq., dated June 1, 2015, with annexed Exhibits A-C; Affirmation, Robert G. Conway, Esq., dated June 11, 2015; Affirmation, Amanda N. Nissen, Esq., dated June 2, 2015; Affidavit, Michel A. Natali, dated June 11, 2015, dated A-D; Affirmation, Tiffany M. Rutnick, Esq., dated June 10, 2015, with annexed Exhibits A-F; Memorandum of Law in Opposition to Plaintiff's Motion to An Order Compelling Service at State Defendants' Expense and in Support of State Defendants' Cross Motion to Dismiss, Tiffany M. Rutnick, Esq., dated June 12, 2015.
3. Notice of Cross Motion for Summary Judgment per CPLR 3211[c] and 3212, for Production of Reports and Subpoena of Records, dated June 18, 2015; Affidavit, Joshua G. Stegemann, dated June 18, 2015; Plaintiff's Memorandum of Law in Opposition to the State Defendants' Motion to Dismiss and in Support of Cross Motion for Summary Judgment and for Production of Reports and Subpoena of Records, Joshua G. Stegemann, dated June 18, 2015, with annexed Exhibits A-D.
4. Reply Memorandum of Law in Further Support of State Defendants' Cross Motion to Dismiss and in Opposition to Plaintiff's Cross Motion for Summary Judgment, Discovery and the Issuance of a Subpoena, Tiffany M. Rutnick, Esq., dated July 2, 2015.