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August 11, 2010

Claire Mee, Clerk
Washington Superior Court
65 State Street
Montpelier, VT 05602

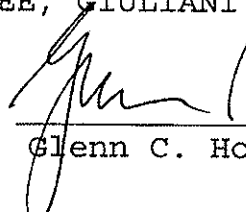
Re: Wallace S. Nolen v. State of Vermont
Docket No. 575-8-10 Wncv

Dear Claire:

I enclose this firms Entry of Appearance on behalf of the City of Montpelier, Anthony Facos and John Doe Defendants No. 1-20, together with our Motion to Dismiss. I certify that I have mailed a copy of the within materials to the Plaintiff, Wallace S. Nolen at P.O. Box 1025, Montpelier, VT 05601-1025. Thank you for your assistance.

Very truly yours,

MCKEE, GIULIANI & CLEVELAND, P.C.

By: 

Glenn C. Howland, Esq.

GCH:ja
[8881-210]

Enclosures

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON COUNTY UNIT

CIVIL DIVISION
DOCKET NO. 575-8-10 Wncv

Wallace S. Nolen
Plaintiff

v.

State of Vermont,
City of Montpelier
Anthony Facos,
John Doe 1-20",
and "John Doe 21-40"
Defendants

ENTRY OF APPEARANCE

NOW COMES Glenn C. Howland, Esq. of the Law Firm of
McKee, Giuliani & Cleveland, P.C., P.O. Box 1455, 94 Main
Street, Montpelier, Vermont 05601, and hereby enters the
appearance of the firm on behalf of the City of
Montpelier, Anthony Facos, and "John Doe 1-20", so-called.

Dated August 11, 2010.

CITY OF MONTPELIER, ANTHONY FACOS
JOHN DOE DEFENDANTS NO. 1-20

MCKEE, GIULIANI & CLEVELAND, P.C

By: _____

GLENN C. HOWLAND, ESQ.

GCH:ja
[8881-210]

STATE OF VERMONT

SUPERIOR COURT
WASHINGTON COUNTY UNIT

CIVIL DIVISION
DOCKET NO. 575-8-10 Wncv

Wallace S. Nolen
Plaintiff

v.

State of Vermont,
City of Montpelier
Anthony Facos,
John Doe 1-20",
and "John Doe 21-40"
Defendants

MOTION TO DISMISS

NOW COMES the City of Montpelier, Anthony Facos and "John Doe 1-20", named Defendants in this matter, and hereby respectfully moves to dismiss the within action insofar as it is intended to state a claim against the City of Montpelier, Anthony Facos, or any employee or agent of the City of Montpelier denominated in the caption as Defendants "John Doe 1-20" ("City Defendants"), on the grounds that the Complaint as drafted states no claim against either the City of Montpelier or any of the City Defendants of a nature such that this Court may afford Plaintiff relief.

MEMORANDUM

Vermont Rule of Civil Procedure 12(b)(6) provides that in the event a Complaint fails to state a claim upon which relief can be granted, a Defendant may move for dismissal of the action. In that event, the Motion may be made before other pleading. Defendant so moves.

A Motion to Dismiss for failure to state a claim will not prevail unless it is beyond doubt that there exists no facts or circumstances that would entitle Plaintiff to relief. In considering such a motion, the Court applies a standard deferential to the factual allegations made by Plaintiff, and will assume for the moment that all factual allegations in the Complaint are true. Moreover, the Court for this purpose accepts as true all reasonable inferences that may be derived from Plaintiff's pleadings and assumes that all contravening assertions in Defendant's pleadings, if yet filed, are false. Richards v. Town of Norwich, 169 Vt. 44 (1999). Accordingly in determining whether a Motion to Dismiss for failure to state a claim will be granted or denied, the Court must review the factual allegations in the Complaint to determine if any claims made against the City of Montpelier and the City Defendants are sufficiently explicit to trigger the Article III jurisdiction of the Court over the Defendant City and its employees.

First, it appears that Plaintiff has made no claim against any person for any actions taken outside the scope of his employment with the City of Montpelier or, in the

case of the City as Defendant, as outside the scope of the police power delegated to the City of Montpelier as a Municipality.

Second, although the Complaint names Anthony Facos as a Defendant, no allegation has been made specifically against Chief Facos, nor has any allegation suggested that Plaintiff was ever arrested by the Chief or any Montpelier Police Officer with respect to the matters addressed in the Complaint.

Third, although the Complaint does not so state, the implication appears strong that all actions of any person of which Plaintiff complains, were made in reliance on applicable Vermont Law, including 13 V.S.A. §1026, ("Disorderly Conduct").

In paragraphs 13, 14, 15 and 16 of the Complaint, Plaintiff alleges that he has been repeatedly warned "by respondents" against continuing apparently tumultuous, or unreasonable, or abusive or disruptive behavior, or if not, "he would be arrested." Complaint, paragraphs 13-16. Although Plaintiff clearly takes issue with the language of 13 V.S.A. §1026 as constitutionally infirm, he has made no allegation against the City of Montpelier, or any of the City Defendants that would trigger either this Court's legal or equitable powers to provide relief. He hasn't alleged that any person has violated the law. He hasn't alleged that any person has abused authority held under §1026. Rather, his issue is with the statutory language itself.

Indeed, Plaintiff's Complaint suggests that City Defendants acted *within* the law as it presently exists. Accordingly, the Complaint states no claim against the City of Montpelier, or any of the City Defendants.

As a litigant challenging the constitutionality of the statutory provision, Plaintiff has properly named the State of Vermont as a Defendant. It appears that Plaintiff's argument is with the State and with no other entity. Accordingly, no basis is shown in the Complaint to allow this action to proceed against the City of Montpelier, Anthony Facos, or any of the John Doe Defendants employed by or attached to the City of Montpelier and Defendants respectfully request that this action be dismissed without prejudice.

Dated of City of Montpelier, this 11th day of August, 2010.

CITY OF MONTPELIER, ANTHONY FACOS
JOHN DOE 1-20

McKEE, GIULIANI & CLEVELAND, P.C

By: 

GLENN C. HOWLAND, ESQ.

GCH:ja
[8881-210]

cc: City of Montpelier
State of Vermont
Anthony Facos
Wallace S. Nolen