UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

EDWARD M. LILLY,

Plaintiff,

vs.

JEFFREY SWICK, individually and in his official capacity as a Town of Lewiston Police Officer, JAMES ULLERY, individually and in his official capacity as a Town of Lewiston Police Officer, DANIEL TRAPASSO, individually and in his official capacity as a Town of Lewiston Police Officer, BRANDON HALL, individually and in his official capacity as a Town of Lewiston Police Officer, UNNAMED Lewiston Police Officers, individually and in their official capacity as a Town of Lewiston Police Officers, TOWN OF LEWISTON, DAVID M. HEIM, individually and in his official capacity as a Town of Wheatfield prosecutor, TOWN OF WHEATFIELD, OTHERS NOT YET IDENTIFIED, individually and in their official capacity,

Defendants.

MEMORANDUM OF LAW ON BEHALF OF LEWISTON DEFENDANTS

CIVIL ACTION NO. 19-cv-176

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PRELIMINARY STATEMENT

The following Memorandum of Law is submitted on behalf of defendants Jeffrey Swick, James Ullery, Daniel Trapasso, Brandon Hall, and the Town of Lewiston ("Town") (collectively "moving defendants"), in support of their motion pursuant to Fed. R. Civ. P. 12(b)(2) and (5), 12(c), and 4(m) for an order dismissing the Complaint of plaintiff Edward M. Lilly, in its entirety and with prejudice.

LEGAL ARGUMENT

POINT I THE PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR INSUFFICIENT AND UNTIMELY SERVICE

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(5) is the proper vehicle for a defendant to challenge either the mode of delivery, or the lack of delivery, of a summons and complaint. See Sunset Homeowners Ass'n v. Difrancesco, 2019 U.S. Dist. LEXIS 65057, *15 (W.D.N.Y. 2019).[1] When a defendant raises a challenge to the sufficiency of service of process, the plaintiff bears the burden of proving that service was adequate. See id.

After commencing an action in federal court, a plaintiff must properly serve a defendant with the summons and complaint in accordance with either Fed. R. Civ. P. 4 or applicable state law. See Fed. R. Civ. P. 4(e), (j). Pursuant to Fed. R. Civ. P. 4(m), a plaintiff must effect service within 90 days of the filing of the complaint. If the plaintiff fails to effect service within this 90 day period, the Court, on motion or on its own after notice to the plaintiff, may dismiss the action without prejudice against the defendants who were not timely served, or order that service be

[1] When, as in this case, the defendants assert insufficient and untimely service in their answer, they may move to dismiss the complaint after the answer has been filed. Since it is somewhat unclear whether the motion should be made pursuant to Fed. R. Civ. P. 12(b)(5) or 12(c), the moving defendants in this case move pursuant to both sections, in an abundance of caution. See Santiago v. Jordan, 2018 U.S. Dist. LEXIS 147279, *5-6 (W.D.N.Y. 2018) (Geraci, J.); Parfitt Way Mgmt. Corp. v. GSM by Nomad, LLC, 2018 U.S. Dist. LEXIS 87190, *10-13 (N.D.N.Y. 2018).

made within a specified time. If the plaintiff shows good cause for his failure, the Court must extend the time for service for an appropriate period. See Fed. R. Civ. P. 4(m).

The plaintiff commenced this action on February 8, 2019, which meant that he had until May 9, 2019 to effect service upon all of the defendants. The plaintiff's own Proof of Service, however, establishes that service was not properly effected upon any of the moving defendants, and that service was not properly effected by May 8, 2019.

The plaintiff purported to serve the Town of Lewiston by delivering a copy of the Summons and Complaint to Linda Kreps on May 3, 2019. See Exhibit C to Affidavit of Daniel T. Cavarello, Esq., ("Cavarello Affidavit"). Ms. Kreps is the Deputy Town Clerk. See Declaration of Donna R. Garfinkel ("Garfinkel Declaration"), ¶ 2. Pursuant to Fed. R. Civ. P. 4(j), to properly serve a local government, a plaintiff must either deliver a copy of the summons and complaint to the municipality's chief executive officer or effect service in the manner described by New York State law. Pursuant to N.Y. C.P.L.R. § 311, personal service upon a town is made by serving either the supervisor or the clerk. In this case, the plaintiff did not comply with either Fed. R. Civ. P. 4(j) or N.Y. C.P.L.R. § 311. He served the Deputy Town Clerk, not its chief executive officer, or its supervisor or clerk. See Garfinkel Declaration, ¶¶ 2-4. The plaintiff has, therefore, not properly served the Town, and his deadline for doing so pursuant to Fed. R. Civ. P. 4(m) has lapsed.

Defendants James Ullery and Brandon Hall are employed by the Town as Police Officers. As with the Town itself, the plaintiff purported to serve Officer Ullery and Officer Hall by delivering copies of the Summons and Complaint to Linda Kreps, the Deputy Town Clerk, on May 3, 2019. See Exhibit C to Cavarello Affidavit. Since this was not proper service upon the Town, it was not proper service upon Officers Ullery and Hall in their official capacities. Nor

did this qualify as proper service upon Officer Ullery and Officer Hall in their individual capacities. Pursuant to Fed. R. Civ. P. 4(e), an individual may be served by delivering the summons and complaint to the individual personally; by leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or by delivering a copy of each to an agent authorized by appointment or law to receive such service. Clearly, none of these methods was used in this case. Fed. R. Civ. P. 4(e) also permits an individual to be served pursuant to New York State law. CPLR § 308 establishes the rules for service of an individual and requires personal delivery; delivery of the summons to a person of suitable age and discretion at the defendant's actual place of business, dwelling place, or usual place of abode, followed by a compliant mailing to the defendant's last known address or actual place of business; delivery of the summons to an agent for service; or, when neither of the first two methods of service can be made within due diligence, use of "nail and mail" service. In this case, the summons and complaint were merely delivered to Linda Kreps. Even assuming this qualifies as a delivery to a person of "suitable age and discretion" at these defendants' "actual place of business," there was no follow-up mailing within twenty days, as required by C.P.L.R. § 308(2). The plaintiff has, therefore, not properly served Officer Ullery or Officer Hall, and his deadline for doing so pursuant to Fed. R. Civ. P. 4(m) has lapsed.

Finally, service was not properly effected upon defendants Jeffrey Swick and Daniel Trapasso. There is no dispute that Mr. Swick and Mr. Trapasso are no longer employed by the Town. The plaintiff himself alleges in his Complaint that neither Officer Swick nor Officer Trapasso still works for the Town. *See* Exhibit A to Cavarello Affidavit, Complaint ("Comp."), ¶¶ 6, 8. Further, the moving defendants have offered a declaration from Amy Smith, the Confidential Secretary to the Town Supervisor, establishing that neither defendant has worked

for the Town since 2016. Even though he was apparently aware that neither defendant worked for the Town, the plaintiff still purported to serve them by delivering a copy of the Summons and Complaint to Linda Kreps, a Town employee, on May 3, 2019. See Exhibit C to Cavarello Affidavit. Copies of the Summons and Complaint were also sent to both Officer Swick's current place of business and Officer Trapasso's home by certified mail on May 6, 2019. See Exhibit C to Cavarello Affidavit. This delivery and mailing did not comply with the service requirements of either Fed. R. Civ. P. 4(e) or N.Y. C.P.L.R. § 308, discussed above. The plaintiff has, therefore, not properly served Officer Swick and Officer Trapasso, and his deadline for doing so pursuant to Fed. R. Civ. P. 4(m) has lapsed.

For all of these reasons, and because good cause does not exist for the plaintiff's failure to effect proper service in a timely manner, the plaintiff's Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(2) and (5), 12(c), and 4(m). Further, even if this Court would be inclined under other circumstances to grant a pro se plaintiff an extension of time to effect proper service, this Court should not do so in this case because it would be futile. As set forth below, this Court should dismiss the entire Complaint with prejudice and on the merits pursuant to Fed. R. Civ. P. 12(c) because the plaintiff fails to state a cause of action.

POINT II THE STANDARD FOR A MOTION PURSUANT TO FED. R. CIV. P. 12(c)

A defendant may make a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) after the close of pleadings, on the grounds that the plaintiff has failed to state a claim. See Patel v. Contemporary Classics of Beverly Hills, 259 F.3d 123 (2d Cir. 2001). "The standard for granting a Rule 12(c) motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion for failure to state a claim." Id. at 126. If a complaint has been filed by a pro se plaintiff, the complaint "must be construed liberally with special solicitude and interpreted to raise the

strongest claims that it suggests." See Hogan v. Fischer, 738 F.3d 509, 515 (2d Cir. 2013) (quotation marks omitted). A pro se plaintiff must, however, still state a plausible claim for relief pursuant to the standards set forth in Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009). See Hogan, 738 F.3d at 515 (citing Harris v. Mills, 572 F.3d 66, 73 (2d Cir. 2009)).

When analyzing a motion to dismiss pursuant to Rule 12(b)(6), a court must accept all well-pleaded allegations in the complaint as true, and draw all reasonable inferences in the plaintiff's favor. See Sudler v. City of New York, 689 F.3d 159, 168 (2d Cir. 2012). The federal pleading standard, however, demands more than "an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678. In other words, "a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (quotation marks omitted).

For a complaint to survive a motion to dismiss, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. This "plausibility standard" requires "more than a sheer possibility that a defendant has acted unlawfully." Id. If the complaint "pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" Id. (quoting Twombly, 550 U.S. at 557).

In this case, the plaintiff fails to state a cause of action in his Complaint for all of the reasons set forth below, and his Complaint should be dismissed in its entirety and with prejudice.

POINT III ANY AND ALL STATE LAW CLAIMS SHOULD BE DISMISSED AS TIME-BARRED AND FOR FAILURE TO SERVE A NOTICE OF CLAIM

The plaintiff's fourth cause of action purports to assert a claim "under federal and/or state law." He alleges that the defendants "initiated and continued an unlawful seizure against [him] without probable cause, and with actual malice," and references the notice of claim he allegedly filed on August 31, 2016 against Mr. Heim and Officer Trapasso. Regardless of which alleged incident the plaintiff intends to base this cause of action on, any and all state law claims should be dismissed as time-barred and for failure to serve a timely notice of claim.

Pursuant to New York General Municipal Law §§ 50-e and 50-i, a plaintiff cannot bring a state common law tort claim against a municipality or its employees unless the plaintiff serves a notice of claim within ninety days of when the claim arose. See McGowan v. Town of Evans, 2017 U.S. Dist. LEXIS 149509, *41 (W.D.N.Y. 2017). Failure to serve a timely notice of claim will result in the dismissal of the tort claim. See id. Pursuant to General Municipal Law § 50-i, the statute of limitations for such a common law tort claim is one year and ninety days after the happening of the event upon which the claim is based.

The plaintiff commenced this action on February 7, 2019. Therefore, any state law claims that arose more than one year and ninety days before February 7, 2019 (i.e., before November 9, 2017), are time-barred. With a single exception, every alleged incident referenced in the Complaint is alleged to have occurred before November 9, 2017, and any state law claim relating to those incidents is time-barred. The only incident that is alleged to have occurred within the statute of limitations is the alleged "tailgating" incident on April 28, 2018. Any claims with

respect to that April 28, 2018 incident should, however, also be dismissed because the plaintiff has not alleged that he served a timely notice of claim with respect to that incident.[2]

Any and all state common law claims alleged in the plaintiff's Complaint should, therefore, be dismissed as to all of the moving defendants.

POINT IV SOME § 1983 CLAIMS ARE TIME-BARRED AND ALL FEDERAL CLAIMS AGAINST OFFICER SWICK SHOULD BE DISMISSED

The plaintiff alleges that the Town retaliated against him in 2014 by telling him that he was not allowed to contact Town Hall or the police, and that he was not entitled to Town police services other than 911 emergency.[3] He also alleges that, after an incident at the Brickyard BBQ in September 2015, Officer Swick falsified his police report. Any federal claims based upon these alleged incidents should be dismissed as barred by the three-year statute of limitations that applies to 42 U.S.C. § 1983 claims filed in a District Court in New York. See Hogan v. Fischer, 738 F.3d 509, 517 (2d Cir. 2013). The plaintiff did not commence this action until February 7, 2019, well more than three years after these alleged incidents in 2014 and 2015.

The plaintiff's Complaint should also be dismissed, in its entirety, as against Officer Swick. An individual may only be held liable under § 1983 if that individual was "personally involved" in the alleged constitutional deprivation. See Littlejohn v. City of New York, 795 F.3d 297, 314 (2d Cir. 2015). The plaintiff only alleges personal involvement by Officer Swick in 2015, which

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[2] The moving defendants do not waive any argument they may have that the plaintiff failed to serve notices of claim with respect to the other incidents alleged in his Complaint. It is simply not necessary to make such an argument at this time because those claims are time-barred.

[3] The plaintiff previously attempted to allege a First Amendment retaliation claim in connection with the same alleged letters in Lilly v. Hall (16-CV-242). However, Hon. H. Kenneth Schroeder, Jr. recommended that the plaintiff's First Amendment retaliation claim against the Town of Lewiston be dismissed, Lilly v. Hall, 2018 U.S. Dist. LEXIS 8338, *13-16 (W.D.N.Y. 2018), and Hon. Lawrence J. Vilardo accepted that recommendation, Lilly v. Hall, 2019 U.S. Dist. LEXIS 10152, *12-13 (W.D.N.Y. 2019).

is well-outside the three-year statute of limitations for a § 1983 claim and, as set forth in Point III above, well outside the statute of limitations for a state common law tort claim.

POINT V THE FOURTH AMENDMENT CLAIMS SHOULD BE DISMISSED

Read liberally, the plaintiff's first, second, and fourth causes of action all allege that he was seized in violation of his rights under the Fourth Amendment.[4] The plaintiff's first cause of action alleges "malicious seizure," and that he was maliciously seized for the purpose of retaliation. See Comp., ¶ 104. His second cause of action alleges "police retaliation," and that he was seized without probable cause. See Comp., ¶ 112. His fourth cause of action alleges that the defendants "initiated and continued an unlawful seizure against [him] without probable cause, and with actual malice." See Comp., ¶ 131. All three causes of action, which are brought pursuant to § 1983, should be dismissed for failure to state a cause of action.[5]

"The temporary detention of an individual during a traffic stop qualifies as a Fourth Amendment 'seizure.'" Paige-El v. Herbert, 735 Fed. App'x 753, 756 (2d Cir. 2018) (citing Whren v. United States, 517 U.S. 806, 809-10 (1996)). "The Fourth Amendment requires that an officer making such a stop have probable cause or reasonable suspicion that the person stopped has committed a traffic violation or is otherwise engaged in or about to be engaged in criminal

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[4] The Complaint also references the Fourteenth Amendment. It is, however, well-established that a Fourteenth Amendment due process claim cannot be predicated on the same factual basis as a Fourth Amendment seizure claim. See Levantino v. N.Y. State Police, 56 F. Supp. 3d 191, 203 (E.D.N.Y. 2014); see also Bryant v. City of N.Y., 404 F.3d 128, 135-36 (2d Cir. 2005).

[5] Since the fourth cause of action purports to be brought pursuant to "federal and/or state law," the Complaint can be read liberally to be attempting to assert a state common law claim for false imprisonment. As set forth above, however, any such claim is time-barred. In any case, any common law false imprisonment claim can and should be analyzed together with the plaintiffs' § 1983 claim alleging unlawful seizure under the Fourth Amendment, and both claims should be dismissed for the same reasons. See Bied v. County of Rensselaer, 2018 U.S. Dist. LEXIS 55143, *64-65 (N.D.N.Y. 2018); Roberites v. Huff, 2012 U.S. Dist. LEXIS 46206, *16 n.8 (W.D.N.Y. 2012).

activity." Id. (citing Holeman v. City of New London, 425 F.3d 184, 189-90 (2d Cir. 2005)). In this case, however, the plaintiff has not pled that there was actually a traffic stop. Instead, he merely alleges that, on February 7, 2016, Officers Ullery and Trapasso "were stationed around the corner from [his] house," and that he "pulled over for the Lewiston Police." See Comp., ¶¶ 53, 55. Although the plaintiff refers to this incident as a "stop" elsewhere in his Complaint, he never actually alleges that Officers Ullery and Trapasso pulled him over and, in fact, his own allegations suggest that he simply, and consensually, "pulled over." A consensual encounter requires no justification, so "long as the police do not convey a message that compliance with their requests is required." See United States v. Tehrani, 49 F.3d 54, 58 (2d Cir. 1995) (quotation marks omitted).

Nor has the plaintiff plausibly alleged that he was actually "seized" after he "pulled over." "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." Brown v. City of Oneonta, 221 F.3d 329, 340 (2d Cir. 1999) (quotation marks omitted); see also United States v. Drayton, 536 U.S. 194, 200-01 (2002) ("Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen."); Florida v. Bostick, 501 U.S. 429, 434 (1991) ("Since Terry, we have held repeatedly that mere police questioning does not constitute a seizure."). "However, a seizure does occur when, by means of physical force or show of authority, a police officer detains a person such that a reasonable person would have believed that he was not free to leave." Brown, 221 F.3d at 340 (quotation marks and citations omitted). Courts will analyze the following factors to determine whether a seizure occurred: "the threatening presence of several officers; the display of a weapon; physical touching of the person by the officer; language or tone

indicating that compliance with the officer was compulsory; prolonged retention of a person's personal effects, such as airplane tickets or identification; and a request by the officer to accompany him to the police station or a police room." Id.

In this case, the plaintiff has not plausibly alleged that he was seized within the meaning of the Fourth Amendment. Instead, the plaintiff's own allegations support a conclusion that he had to be asked for his license and registration more than once, and that he never actually handed his license over to the officers. See Comp., ¶¶ 56, 62-63. The plaintiff also alleges that he, himself, called 911 "to request supervision," which resulted in additional officers responding. See Comp., ¶¶ 65-67. The plaintiff does not allege that any of the officers displayed weapons, that they physically touched him, or that they asked him to accompany them anywhere. Nor does the plaintiff allege any physically threatening behavior. Instead, the plaintiff's only allegations are the hyperbolic claim that Officer Hall "made an exaggerated display of his gun belt just like the Bad Ass Southern Sheriff's [*sic*] do in the movies, just prior to shooting someone;" an allegation that the officers "surrounded" his vehicle and "perform[ed] their well practiced 'Show of Force,'" without any actual description of what that "Show of Force" allegedly entailed; and speculation that "[r]epeated demands for [him] to roll down window were designed to further intimidate, menace, scare and harass." See Comp., ¶¶ 68, 71-72. These allegations do not plausibly plead that a Fourth Amendment seizure occurred.

Further, even if the plaintiff's Complaint could be construed as alleging a seizure, his Fourth Amendment claims should still be dismissed because the officers only required reasonable suspicion to stop the plaintiff, and the plaintiff has not plausibly alleged that reasonable suspicion was lacking.[6] See Holeman, 425 F.3d at 189-90. "Although the concept of

[6] Probable cause was not required. Compare United States v. Ceballos, 654 F.2d 177 (2d Cir. 1981) (holding that the criminal defendant was subjected to an arrest for which probable cause

reasonable suspicion is not susceptible to precise definition, the requisite level of suspicion to make an investigative stop is considerably less than proof of wrongdoing by a preponderance of the evidence." United States v. Glover, 957 F.2d 1004, 1009 (2d Cir. 1992) (citations and quotations marks omitted). The test for reasonable suspicion is objective, and is "not dependent on the intentions or motivations of the particular detaining officers." Id. at 1010.

In his Complaint, the plaintiff does not mention the reasonable suspicion standard. Instead, he references only the higher, and inapplicable, probable cause standard, and he does so only in the most vague and conclusory manner, by simply alleging, with no factual support, that the ticket he was issued was "unwarranted" and that he was unlawfully seized "without probable cause." See Comp., ¶¶ 71, 112, 131. Even viewing the Complaint in the light most favorable to the plaintiff, he does not plausibly allege an absence of reasonable suspicion or probable cause because he never describes any of the circumstances that led him to pull his vehicle over. For example, although it appears from his allegations that he was given a speeding ticket, the plaintiff never actually alleges that he was not speeding in the moments before he pulled over. See Comp., ¶ 89. Further, the plaintiff's conclusory, unsupported allegation that it was "obvious" that the officers were motivated by "retaliation" for his prior complaints does not suffice to plausibly plead a lack of reasonable suspicion or probable cause. See Comp., ¶ 60. It is well-established that such an allegation is not dispositive because "'the subjective intentions or motives of the officer making the stop are irrelevant.'" See Lilly v. Town of Lewiston, 2019 U.S. Dist. LEXIS 101118, *10-11 (W.D.N.Y. 2019) (quoting United States v. Bayless, 201 F.3d 116, 133 (2d Cir. 2000)). Therefore, even viewing these allegations in the light most favorable

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was required, rather than a Terry stop, where the defendant's vehicle was blocked at a traffic light by at least three vehicles driven by law enforcement officials, and officers approached the defendant's vehicles with guns drawn and ordered him out of his car). Even if it were, however, the plaintiff has not plausibly pled an absence of probable cause for the reasons set forth above.

to the plaintiff, he has not plausibly alleged an absence of reasonable suspicion or probable cause.

Finally, the plaintiff does not plausibly allege that the scope and duration of any alleged "seizure" was impermissible. "Even when a stop is reasonable at its inception, it can violate the Fourth Amendment if it is 'prolonged beyond the time reasonably required to complete that mission.'" McLeod v. Mickle, 765 Fed. App'x 582, 584 (2d Cir. 2019) (quoting United States v. Gomez, 877 F.3d 76, 86 (2d Cir. 2017)). To determine whether the stop's scope and duration were reasonable, a court will consider its length, its condition, and the availability of alternative forms of investigation. See Tehrani, 49 F.3d at 58-59.

In this case, the plaintiff makes no attempt to plausibly allege that any alleged "seizure" was unreasonable in either scope or duration. Instead, he merely alleges, in a purely conclusory fashion, and unsupported by any facts, that "[t]he detention was longer than necessary to issue a ticket." See Comp., ¶ 71. It is well-established that a plaintiff must do more than simply offer a "formulaic recitation of the elements of a cause of action," and that he must allege "sufficient factual matter" that, when accepted as true, states a plausible claim to relief. See Twombly, 550 U.S. at 555 (quotation marks omitted); Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). The plaintiff does not, however, make any attempt to estimate how long, in minutes, the incident or any part of the incident lasted. Nor does he attempt to describe what the officers were allegedly doing during the alleged "seizure," except to allege that they were engaged in a "'Show of Force,'" a term the plaintiff uses throughout his Complaint but never actually defines. See Comp., ¶ 71. Without even such basic factual allegations, the plaintiff cannot plausibly allege a Fourth Amendment violation. See Lilly, 2019 U.S. Dist. LEXIS 101118 at *12 (holding that the plaintiff failed to plausibly allege that the Terry stop at issue was unreasonable in scope

or direction where, *inter alia*, the plaintiff failed to allege how long the officer's questioning lasted).

It is also well-established that, during a traffic stop, an officer can check the driver's license, and inspect the vehicle's proof of insurance. See Gomez, 877 F.3d at 88-89; United States v. Dunnigan, 2018 U.S. Dist. LEXIS 109104, *5 (W.D.N.Y. 2018) (quoting Rodriguez v. United States, 135 S. Ct. 1609, 1615 (2015)). Here, the plaintiff himself alleges that he had to be asked for his license and registration more than once; that he never actually handed his license over to the officers; and that he refused to roll down his window to accept the ticket. See Comp., ¶¶ 56, 62-63, 72-73. He also alleges that he was the person who asked for additional officers be sent to the scene for "supervision." See Comp., ¶ 65. Therefore, even reading the Complaint in the light most favorable to the plaintiff, he has not plausibly alleged that the defendants unreasonably prolonged any detention beyond the time needed to issue the ticket. Compare McLeod, *supra* (holding that the plaintiff plausibly alleged a Fourth Amendment violation where he alleged that shortly after he was stopped and as soon as he conceded that his state inspection sticker was expired, the officer repeatedly asked him if his car contained illegal drugs and asked for permission to search his vehicle, and where the plaintiff alleged that he was not permitted to leave for approximately 35 to 40 minutes while they waited for the K9 unit to arrive and the dog sniffed his vehicle).

Finally, to the extent the plaintiff attempts to base a Fourth Amendment claim against Officer Trapasso upon the alleged incident on May 31, 2016, that claim must be dismissed. The plaintiff does not allege *any* conduct by Officer Trapasso during the alleged incident with Mr. Heim that could even be liberally interpreted as a "seizure." The plaintiff merely alleges that Officer Trapasso was behind him while Mr. Heim allegedly "closed in" on him. See Comp., ¶

80. Further, the plaintiff himself alleges that he was "seized primarily by Heim" and "only for a minute." See Comp., ¶ 82. Under no reading do these allegations plausibly state a Fourth Amendment seizure claim against Officer Trapasso.

For all of these reasons, the plaintiff's Fourth Amendment claims should be dismissed.

POINT VI THE FIRST AMENDMENT CLAIM SHOULD BE DISMISSED

The plaintiff's third cause of action alleges a violation of his First Amendment rights. To plead a First Amendment retaliation claim, a plaintiff must allege: "(1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by his exercise of that right; and (3) the defendant's actions caused him some injury." See Dorsett v. County of Nassau, 732 F.3d 157, 160 (2d Cir. 2013). For the following reasons, the plaintiff's Complaint fails to state a claim upon which relief can be granted for First Amendment retaliation, and this cause of action should be dismissed.

A. The February 7, 2016 Encounter

The first instance of alleged "retaliation" identified in the plaintiff's Complaint that is even possibly within the three-year statute of limitations for a § 1983 claim is the incident that is alleged to have occurred on February 7, 2016, after the plaintiff "pulled over" for members of the Town of Lewiston Police Department. According to the plaintiff, it is "obvious" that this incident was "retaliation" for his "complaints." See Comp., ¶ 60. The plaintiff, however, fails to plausibly allege that he exercised a right protected by the First Amendment, or that any of the moving defendants engaged in retaliation that was causally related to that exercise.

The plaintiff simply alleges that the officers retaliated against him for his "complaints," without specifying what alleged "complaints" he is referring to. He does not make any attempt to link any words or actions by the officers who were allegedly present on February 7, 2016 to

any of the prior incidents or complaints he mentions in his Complaint. Specifically, he has not alleged that any of the defendants who were allegedly present were aware of any protected speech he had previously engaged in, or that any of the defendants actually referred to his alleged prior protected speech during this encounter. Compare Lilly v. Hall, 2019 U.S. Dist. LEXIS 10152, *9-10 (W.D.N.Y. 2019). If, for example, the plaintiff is attempting to allege that the defendants were retaliating for the notice of claim he allegedly served with respect to Officer Swick in December 2015, the plaintiff has not alleged any facts to suggest that these defendants even knew about the existence of the notice of claim, let alone the allegations the plaintiff had made against Officer Swick. Instead, the plaintiff merely speculates about the motivations of the officers, claims that the retaliatory nature of the incident should be "obvious," and attempts to describe what "Bullies" allegedly "[o]ften" do when they "are retaliating on someone else's behalf." See Comp., ¶ 61. Such baseless speculation is patently insufficient to state a cause of action for First Amendment retaliation.

The plaintiff also appears to be attempting to bootstrap his First Amendment allegations in this case onto his First Amendment claim in another case he brought against the Town of Lewiston and Officer Hall, among others. In his Complaint, the plaintiff alleges that "Ullery, Trapasso and Hall were all engaged in a conversation similar to what plaintiff had experienced with Hall, Grainge and Ljiljanich (16-cv-00242)." See Comp., ¶70. In the case bearing Index No. 16-cv-00242, the plaintiff alleged that Officer Hall violated his First Amendment rights by conducting an allegedly retaliatory seizure, and Judge Vilardo accepted Magistrate Judge Schroeder's recommendation not to dismiss the plaintiff's First Amendment retaliation claim against Officer Hall. See Lilly, 2019 U.S. Dist. LEXIS 10152. In that case, however, the plaintiff made allegations in his Complaint that Judge Vilardo construed as indicating that

Officer Hall was aware of the plaintiff's prior protected speech. Perhaps most importantly, Judge Vilardo also noted that the plaintiff had alleged that, during the alleged retaliatory seizure, Officer Hall "actually referred to Lilly's protected speech when he discussed with fellow officers the need to teach Lilly 'not to put us in the newspaper anymore.'" Id. at *10. Judge Vilardo specifically noted that two of the newspaper articles to which these comments allegedly referred had been published only a couple of months before the alleged seizure at issue in that case. Judge Vilardo concluded that the plaintiff's "allegations about Hall's knowledge and statements during that incident, combined with its temporal proximity to the publication of the articles, suffice to plausibly plead that [the plaintiff's] First Amendment speech caused Hall's alleged retaliation." Id. at *10.

This Court should reject the plaintiff's attempt to bootstrap his allegations in this Complaint to the allegations in his other case against Officer Hall. The plaintiff cannot plausibly plead a causally related First Amendment violation simply by making vague and conclusory references to allegations in a completely different case. Further, even if he could, the plaintiff does nothing more than allege in his Complaint here that a "similar" conversation occurred, without actually identifying what he claims the officers said, or when the alleged protected speech occurred in relation to the February 7, 2016 encounter. Without such allegations, the plaintiff has not plausibly pled a causally connected First Amendment retaliation.[7]

B. The May 31, 2016 Incident

The second incident of alleged "retaliation" is alleged to have occurred on May 31, 2016,

[7] The moving defendants do not concede that the plaintiff has plausibly alleged the third element, that they caused him some injury. It does, however, appear from his Complaint that he is alleging he was given a speeding ticket. See Complaint, ¶ 89. In Lilly, 2019 U.S. Dist. LEXIS 10152 at * 10-11, Judge Vilardo concluded that the plaintiff's allegation that he was issued an equipment violation ticket alleged a sufficient injury for purposes of a First Amendment retaliation claim.

at the Wheatfield Court. The only moving defendant who is alleged to have been present during this alleged incident was Officer Trapasso. The plaintiff has not, however, plausibly alleged that he exercised a right protected by the First Amendment, or that Officer Trapasso engaged in any retaliation that was causally related to that exercise. The plaintiff has not, in fact, alleged any retaliatory conduct by Officer Trapasso during this alleged incident, let alone conduct that was causally related to any exercise of his right to free speech. The plaintiff has alleged nothing more than that Officer Trapasso was standing at the doorway of Mr. Heim's office "[f]or no legitimate reason" when the plaintiff was escorted there, and that Officer Trapasso was behind the plaintiff when Mr. Heim "abruptly turned around and closed in on plaintiff." See Comp. ¶¶ 77, 80. These allegations are patently insufficient to state a cause of action for First Amendment retaliation.

Further, the plaintiff cannot state a cause of action for retaliation based upon this alleged incident because he has not alleged that he suffered any injury as a result. A plaintiff will only have standing to make a First Amendment retaliation claim if his speech was actually chilled by the alleged retaliation, or if he suffered some other concrete harm. See Dorsett, 732 F.3d at 160-61; see also Zherka v. Amicone, 634 F.3d 642 (2d Cir. 2011). "Hurt feelings or a bruised ego are not by themselves the stuff of constitutional tort." Zherka, 634 F.3d at 645-46. In this case, the plaintiff has not alleged any concrete or tangible harm, or, in fact, any harm at all. Nor has the plaintiff alleged that his speech was actually "chilled." He has, therefore, not stated a cause of action for First Amendment retaliation.

C. The April 18, 2018 Incident

The third incident of alleged "retaliation" is characterized by the plaintiff as a "tailgating" incident, and is alleged to have occurred on April 18, 2018. This is an even more extreme

example of speculation by the plaintiff. In his Complaint, the plaintiff has done nothing more than describe his alleged observations about how an unidentified driver allegedly operated a patrol car, and then speculate that the unidentified driver must have been "targeting" him. The plaintiff simply cannot plausibly plead causally related First Amendment retaliation with such barebones and speculative assertions. Further, since he cannot identify the driver of the patrol car, he cannot plausibly allege that any of the individual moving defendants were personally involved in the alleged constitutional violation and he, therefore, cannot state a cause of action against any of them under § 1983. See Victory v. Pataki, 814 F.3d 47, 67 (2d Cir. 2016). Nor can the plaintiff pursue a First Amendment retaliation claim against the Town of Lewiston pursuant to § 1983 based only upon the doctrine of respondeat superior. See id. Further, the plaintiff cannot state a cause of action for retaliation based upon this alleged incident because he has not alleged that his speech was chilled or that he suffered some other concrete harm as a result of this alleged incident. See Dorsett, 732 F.3d at 160-61; Zherka, 634 F.3d at 645-46.

The plaintiff has, therefore, failed to state a cause of action for First Amendment retaliation and his third cause of action should be dismissed.

POINT VII ANY CONSPIRACY CLAIM SHOULD BE DISMISSED

Although the plaintiff does not articulate a separate conspiracy claim in his Complaint, he alleges in his first, second, and third causes of action that the defendants "conspired" to seize him. See Comp., ¶¶ 104, 112, 125. To the extent the plaintiff purports to assert a conspiracy claim against any of the moving defendants, it should be dismissed.

"To bring a § 1983 conspiracy claim, a plaintiff must allege (1) an agreement between two or more state actors . . . ; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." Kernan v. New York State Dep't of

Fin. Servs., 712 Fed. App'x 61, 66 (2d Cir. 2017) (quotation marks omitted). "'[C]omplaints containing only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed.'" Ciambriello v. County of Nassau, 292 F.3d 307, 324-25 (2d Cir. 2002) (quoting Dwares v. City of New York, 985 F.2d 94, 100 (2d Cir. 1993)). In this case, the plaintiff makes nothing more than perfunctory and conclusory allegations of a conspiracy, and he does not plausibly allege any of the required elements. See Ciambrello, 292 F.3d at 324-25. Further, the plaintiff's failure to plausibly allege that his constitutional rights were violated, as set forth above, also requires dismissal of any conspiracy claim. See Lilly v. Town of Lewiston, 2019 U.S. Dist. LEXIS 101118, *15 (W.D.N.Y. 2019). Therefore, to the extent the plaintiff is attempting to assert a conspiracy claim against any of the moving defendants, that claim should be dismissed.

POINT VIII ANY SIXTH AMENDMENT CLAIM SHOULD BE DISMISSED

Although the plaintiff does not specifically articulate a cause of action pursuant to § 1983 alleging a violation of his Sixth Amendment rights, he alleges multiple times in his Complaint that his Sixth Amendment rights were violated. See Comp., ¶¶ 1, 87, 89. For example, he alleges that the Town "took steps to prevent evidence from being available" and that Chief Previte "was obviously directed to rescind the offer" to meet with him. See Comp., ¶¶ 86-87. To the extent the plaintiff purports to allege a § 1983 claim based upon these vague allegations, he has not stated a cause of action. First and foremost, none of these allegations are directed at any specific individual moving defendants, whose personal involvement in any constitutional violation would be required for them to be held liable, and there are no allegations in the Complaint that would support municipal liability pursuant to Monell v. Department of Soc. Servs. of the City of N.Y., 436 U.S. 658 (1978). Further, the plaintiff has not made any attempt

to allege, let alone plausibly allege, any of the elements that would be required for such a claim, including favorability, suppression, and prejudice/materiality of the alleged evidence at issue. See Nnodimele v. Derienzo, 2016 U.S. Dist. LEXIS 9881 (E.D.N.Y. 2016).

POINT IX ANY 42 U.S.C. § 1985 CLAIM SHOULD BE DISMISSED

Although the plaintiff does not specifically articulate a cause of action pursuant to 42 U.S.C. § 1985, he alleges that his rights under that statute were violated. See Comp., ¶¶ 1, 4. Any such claim should, however, be dismissed for failure to state a cause of action.

The first two subsections of § 1985, which concern conspiracies to prevent an officer from performing his duties, and conspiracies to obstruct justice and to intimidate parties, witnesses, and jurors, are inapplicable on the face of the plaintiff's Complaint. See Guadagni v. New York City Transit Auth., 2009 U.S. Dist. LEXIS 6054, *13 (E.D.N.Y. 2009).

To state a claim pursuant to subsection (3) of § 1985, a plaintiff must allege: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, . . .; (3) an act in furtherance of the conspiracy; (4) whereby a person is . . . deprived of any right of a citizen of the United States." See Brown v. City of Oneonta, 221 F.3d 329, 341 (2d Cir. 1999) (quotation marks omitted). A plaintiff must also allege and prove that the conspiracy was motivated by racial or class-based discriminatory animus. See id.; Housand v. Heiman, 594 F.2d 923, 925 (2d Cir. 1979). A constitutional conspiracy claim pursuant to § 1985 must be pleaded with "at least some degree of particularity." Respass v. New York City Police Dep't, 852 F. Supp. 173, 179 (E.D.N.Y. 1994). In this case, the plaintiff utterly fails to state a claim pursuant to § 1985(3). He has not pled any facts to support the existence of a conspiracy, let alone pled a conspiracy with the requisite degree of particularity. He certainly has not alleged that the moving defendants' alleged actions were

motivated by race or class-based discriminatory animus. Therefore, to the extent the plaintiff is attempting to assert a § 1985 claim, it should be dismissed.

POINT X ANY MALICIOUS PROSECUTION CLAIM SHOULD BE DISMISSED

Although the plaintiff does not articulate a specific cause of action for malicious prosecution, he does allege at several points in his Complaint that he was maliciously prosecuted. See Comp., ¶¶ 78, 100. Any common law claim for malicious prosecution would certainly be time-barred, as set forth in Point III above, and would also likely be barred by the plaintiff's failure to serve a timely notice of claim. In any case, the plaintiff has not stated a claim for malicious prosecution under common law or pursuant to § 1983.

Since a malicious prosecution claim brought pursuant to § 1983 is grounded in the Fourth Amendment's prohibition of unreasonable seizures, there must be some post-arraignment seizure. See Swartz v. Insogna, 704 F.3d 105, 112 (2d Cir. 2013). Courts in this Circuit have, however, held that issuance of a traffic ticket or court summons, standing alone, does not constitute a "seizure" for purposes of a Fourth Amendment malicious prosecution claim. See Lanning v. City of Glens Falls, 2017 U.S. Dist. LEXIS 32878, *23-24 (N.D.N.Y. 2017), aff'd on other grounds 908 F.3d 19 (2d Cir. 2018); Ramdath v. Favata, 2014 U.S. Dist. LEXIS 196540, *21-22 (N.D.N.Y. 2014); Lo Sardo v. Ribaudo, 2015 U.S. Dist. LEXIS 13999, *12-13 (E.D.N.Y. 2015). Because the plaintiff's only allegation is that he was given a "speeding ticket," he has not alleged a sufficient seizure for purposes of a malicious prosecution claim pursuant to § 1983.

Regardless of whether it is brought as a common law tort claim or under § 1983, the elements of a malicious prosecution claim are "(1) the initiation of a proceeding, (2) its termination favorably to plaintiff, (3) lack of probable cause, and (4) malice." See Savino v. City of New York, 331 F.3d 63, 72 (2d Cir. 2003). As set forth above, the plaintiff has made nothing

but the most conclusory and perfunctory allegations regarding probable cause, and the same is true of his allegations regarding malice. Further, even the plaintiff himself alleges that the proceeding did not terminate in his favor because he alleges that he "agreed to accept a parking ticket plea." See Comp., ¶ 89. See Black v. Petitinato, 2019 U.S. App. LEXIS 3021, *8-9 (2d Cir. 2019) (citing Posr v. Court Officer Shield No. 207, 180 F.3d 409, 418 (2d Cir. 1999)).

Therefore, to the extent the plaintiff is attempting to assert a claim for malicious prosecution, it should be dismissed.

POINT XI THE CLAIMS AGAINST THE TOWN SHOULD BE DISMISSED

As set forth above in Point III, any and all state common law claims against the moving defendants, including the Town, should be dismissed as time-barred and for failure to comply with the General Municipal Law's notice of claim requirements. All claims made against the Town pursuant to § 1983 should also be dismissed for failure to state a cause of action.

A municipality cannot be held liable pursuant to 42 U.S.C. § 1983 by application of the doctrine of respondeat superior. See Rookard v. Health & Hosps. Corp., 710 F.2d 41, 45 (2d Cir. 1983); see also Monell v. Department of Soc. Servs. of the City of N.Y., 436 U.S. 658 (1978). Put another way, proof that a municipality employed an alleged tortfeasor is not enough, standing alone, to establish municipal liability. See Rookard, 710 F.2d at 45. Instead, a plaintiff who sues a municipality pursuant to § 1983 must establish that the alleged constitutional violation resulted from a municipal policy, custom, or practice. See id. However, "'[m]ere allegations of a municipal custom or practice of tolerating official misconduct are insufficient to demonstrate the existence of such a custom unless supported by factual details.'" Lilly v. Hall, 2018 U.S. Dist. LEXIS 8338, *15 (W.D.N.Y. 2018) (quoting Triano v. Town of Harrison, 895 F. Supp. 2d 526, 535 (S.D.N.Y. 2012)); see also Oparaji v. City of New York, 1998 U.S. App.

LEXIS 14967, *3-4 (2d Cir. 1998).

In this case, plaintiff has not alleged, plausibly or otherwise, that any of the constitutional violations he allegedly suffered resulted from a policy, custom, or practice of the Town to conduct retaliatory and/or unlawful seizures.[8] The plaintiff simply speculates that the "excessive types of police contacts described in this and other complaints are too frequent, too intense and too unusual to be anything other than intentional actions." See Comp., ¶ 98. Further, the vague allegations the plaintiff makes about the alleged "targeting" and "victimization" of his family members, and his perfunctory reference to the index numbers of other civil actions (some of which are not even alleged to have involved the Town or Town employees), do not allege, plausibly or otherwise, the existence of any relevant policy, custom or practice. Finally, to the extent the plaintiff is attempting to allege that the Town had a "'Show of Force'" policy, he fails to state a cause of action. As Judge Wolford recently held in a case involving the plaintiff's son, vague and conclusory allegations about an alleged "'Show of Force'" policy, without any factual allegations "detailing the nature of the policy" do not adequately allege a policy or custom, let alone one that violated the plaintiff's constitutional rights. See Lilly v. Town of Lewiston, 2019 U.S. Dist. LEXIS 101118, *16-18 (W.D.N.Y. 2019).

Further, even if the plaintiff had plausibly pled the existence of a municipal policy or custom, his § 1983 claims should still be dismissed as to the Town because, as set forth above,

[8] In his other action against the Town of Lewiston and Officer Hall (16-cv-00242), the plaintiff made similarly inadequate allegations against the Town of Lewiston, and Judge Vilardo concluded that the plaintiff had not sufficiently pled a cause of action against the Town pursuant to Monell. Judge Vilardo stated: "Lilly has not plausibly alleged the existence of any policy, custom, or practice that resulted in Hall's issuing an equipment violation ticket in retaliation for Lilly's criticism of New York State troopers. Likewise, Lilly has not pleaded facts sufficient to suggest that the Town of Lewiston has a policy of failing to adequately investigate complaints made against its police officers." Lilly v. Hall, 2019 U.S. Dist. LEXIS 10152, *13 (W.D.N.Y. 2019).

he has not plausibly pled a violation of his constitutional rights by any individuals employed by the Town. See Lee v. City of Syracuse, 446 Fed. App'x 319, 322 (2d Cir. 2011) ("Municipal liability under § 1983 can only be predicated on *individual* wrongdoing that is carried out in accordance with a municipal policy, custom, or practice.").[9]

Further, to the extent the plaintiff is attempting to sue the individual defendants in their official capacities pursuant to § 1983, those claims should be dismissed as duplicative of the plaintiff's claims against the Town. It is well-established that a claim against a governmental official in his or her official capacity is essentially a claim against the municipality. See Kretzmon v. Erie County, 2013 U.S. Dist. LEXIS 23270, at *39 (W.D.N.Y. 2013).

POINT XII THE REQUEST FOR PUNITIVE DAMAGES SHOULD BE DISMISSED

Punitive damages are only warranted in a 42 U.S.C. § 1983 action where the defendant's violation of the plaintiff's constitutional rights was intentional, or where "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." See McCardle v. Haddad, 131 F.3d 43, 53 (2d Cir. 1997) (quotation marks omitted). Under New York law, punitive damages may only be awarded if the defendants' conduct was wanton and reckless or malicious. See Marinaccio v. Town of Clarence, 20 N.Y.3d 506, 511 (2013). Even viewing the Complaint in the light most favorable to the plaintiff, none of the conduct alleged to have occurred rises to the level where punitive damages are appropriate. Further, to the extent the plaintiff is seeking punitive damages from the Town, that request must be dismissed because one cannot recover punitive damages from a municipality. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

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[9] The plaintiff also presumably seeks to recover from the Town for common law false imprisonment pursuant to the principle of *respondeat superior*. If this claim is not dismissed as untimely, it should also be dismissed as against the Town because the plaintiff has not plausibly alleged that any Town employee committed that tort.

CONCLUSION

For the foregoing reasons, the plaintiff's Complaint should be dismissed, in its entirety and with prejudice.

Dated: Buffalo, New York
July 3, 2019

Respectfully submitted,

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