

**NOTIFY**

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT NO.: 2084CV01170A

MICHAEL LYNCH,

Plaintiff

v.

CIVIL SERVICE COMMISSION and

TOWN OF ARLINGTON,

Defendants

DECISION ON "PLAINTIFF'S MOTION FOR EXTENSION OF A TRACKING ORDER AND ESTABLISHMENT OF A BRIEFING SCHEDULE" and DEFENDANTS MOTION TO DISMISS FOR LACK OF PROSECUTION

Buckley, E.M., Justice

PROCEDURAL HISTORY

This is an action brought by the plaintiff, Michael Lynch, seeking judicial pursuant to G. L. c. 30A sec. 14 of a decision of the Civil Service Commission affirming the decision of the Town of Arlington denied plaintiff's selection for the position of "Parks Supervisor".

The case was filed by Attorney Corey Williams on behalf of the plaintiff on June 4, 2020. The defendant, Civil Service Commission, was served with the Complaint three months later, on September 2, 2020. Thereafter, defendant Civil Service Commission filed its Answer<sup>1</sup> which included the Administrative Record on October 29, 2020. On October 8, 2020 counsel for the Town of Arlington agreed to accept service of process of the Amended Complaint. Despite this, counsel for the plaintiff did not file the Amended Complaint with the court until December 15, 2020 and to date, the court docket does not indicate that the return of service for the Town of Arlington has ever been filed by the plaintiff with the court. On April 30, 2021, more than six (6) months after the Administrative Record was filed and five (5) months after the deadline for the plaintiff to file his Motion for Judgment on the Pleadings in accordance with Superior Court Standing Order 1-96(4), the plaintiff filed a " Motion to Extend Tracking Order and Establish Briefing Schedule". Defendant Town of Arlington filed its opposition and also filed a cross-motion to Dismiss for

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<sup>1</sup> And waiver of argument.

failure to prosecute, which was opposed by the plaintiff. The parties were before the court for an initial hearing on the plaintiff's motion to extend the tracking order/ establish a briefing schedule. During hearing and based upon the submissions provided by the plaintiff, the court ordered the parties to file supplemental Affidavits and memoranda.

The court has received and reviewed the supplemental Affidavits and memoranda filed by the parties. For the reasons set forth below, the plaintiff's Motion to Extend the Tracking Order and Establish a Briefing Schedule is DENIED. The defendant's Motion to Dismiss plaintiff's Complaint for Failure to Prosecute is ALLOWED.

### ANALYSIS

While stylized as a Motion to Extend the Tracking Order, the plaintiff's motion is in reality a motion seeking relief from the requirements of Superior Court Rule 1-96(4) which governs the filing requirements for the plaintiff's complaint for judicial review pursuant to Mass. Gen. Laws. c. 30A sec. 14.

Superior Court Standing Order 1-96 provides that "[A] claim for judicial review shall be resolved thorough a motion for judgment on the pleadings. Mass. R. Civ. P. 12(c)...A plaintiff's Rule 12(c) motion and supporting memorandum shall be served within thirty (30) days of the service of the record ...". Id. Despite the apparent mandatory language of the Standing Order, the rule further provides "[T]he court may alter the time to serve or file for good cause shown." Id. Therefore, the inquiry here is whether the Affidavits provided by the plaintiff provide sufficient basis for a finding by the court of good cause. It is undisputed among the parties that the time pursuant to the rule for the plaintiff to file his Motion for Judgment on the Pleadings expired on November 30, 2020.

At the first hearing on the plaintiff's motion, the court was unpersuaded by the lack of sworn facts in the affidavits submitted by the plaintiff as to why the deadline was missed. The court gave the parties additional time to file supplemental briefs and affidavits. The plaintiff filed three (3) new affidavits, one of current counsel, Justin Murphy, Esq., one of prior counsel Corey Williams, Esq., and two from members of the AFSCME union, Mr. Eddie Nastari and Mr. Mark Bernard. Upon careful review these Affidavits do little to inform the court as to a rational basis for counsel's failure to file the motion within the proscribed thirty days. Much time is devoted in all of the affidavits to inform the court of the difficulties the pandemic caused to the offices of AFSCME and of the attrition over time of lawyers within that office; most of the conduct and difficulties averred are prior to the filing of the Complaint and only after January 2021. Indeed, there is nothing in any of the Affidavits which offers a reason or indeed, even information during the operative period to explain why Attorney Williams, counsel of record for the plaintiff missed the deadline and that plaintiff's counsel waited for over 138 days to file the present motion.

The court notes that Attorney Williams, prior counsel was counsel of record for the plaintiff in this case from the inception of the case in June 2020 until his withdrawal from the case in March 2020. Nothing in Williams' Affidavit speaks to specific reasons why he missed the deadline. While

he (and others ) speak to brief office closures, periods of remote work, and other employees leaving the office, there are no specific reasons upon which this court could find good cause and excusable neglect on the part of Attorney Williams. Indeed, The court finds it most curious that during the period that Attorney Williams and the other Affiants on behalf of the plaintiff complain that there were office closures, an inability to work etc., that Williams and others were actively filing complaints and grievances on behalf of other union members in other forums. See, Foskett Affidavit, Exhibit #3 which the court credits. Further, as evidenced in the court's recitation of the procedural history of the case, missing the deadline in this case was not the first misstep by Attorney Williams in prosecuting his case. Indeed, he never named the Town of Arlington in the original Complaint and only upon the entreats of counsel for the Civil Service Commission and her instruction to Williams to name the Town did he do so. Thereafter, despite gaining the assent of counsel for the Town of Arlington to accept service of process of the Amended Complaint, Williams never filed the return of service and indeed, waited two months after receiving that assent to even file the Amended Complaint with the Court on December 5, 2020- which was only 5 days after the expiration of the time to file plaintiff's motion for judgment on the pleadings. Had counsel been diligent, he would have acknowledged that he had run afoul of Standing Order 1-96(4) and timely sought relief with the court which he never did. Indeed, it was only when new counsel came into the case after Williams withdrew that the instant motion was filed.

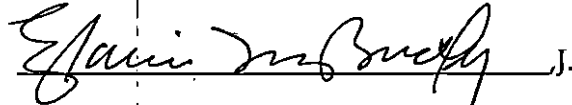
In his Affidavit Williams states he wasn't sure if his Amended Complaint was going to be accepted by the court. This statement is nonsensical and belies counsel's clear lack of understanding of the rules of civil procedure. First, the Amended Complaint was docketed, not returned to counsel. Additionally, pursuant to mass. R. Civ. P. 15(a), the amendment would have been as of right as no responsive pleading had been filed. Equally, despite having received assent of Attorney Foskett to accept service of process on behalf of the Town of Arlington, Williams never filed the return of service which is a procedural requisite.

The Affidavits filed by the plaintiff are insufficient to establish good cause or a basis for the court to find excusable neglect on behalf of plaintiff's counsel. Nothing in William's Affidavit which establishes a justifiable basis for excuse and neglect of the clear filing mandates of Standing Order 1-96(4). The court therefore DENIES the plaintiff's Motion to Extend Tracking Order and Establish Briefing Schedule.

On the defendant's cross-motion to Dismiss for Lack of Prosecution pursuant to Mass. R. Civ. P. 41(b)(2), it is **ALLOWED**. The plaintiff having failed to comply with the procedural requisites of Superior Court Standing Order 1-96(4) and further failure to establish excusable neglect on the part of plaintiff's counsel, the court **DISMISSES** the plaintiff's Complaint.

**ORDER**

The plaintiff's Motion to Extend Tracking Order and Establish Briefing Schedule is DENIED. The defendant's Motion to Dismiss for Failure to Prosecute is ALLOWED.

 J.

Elaine M. Buckley, Justice of the Superior Court

Dated: 7/15/2021.