

**UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT**

VERMONT RAILWAY, INC.,)	
Plaintiff,)	
)	
v.)	Civil Action No. 2:16-cv-16
)	
TOWN OF SHELBURNE and)	
JOE COLANGELO in his capacity)	
as Town Manager and)	
Zoning Enforcement Officer,)	
Defendants.)	

MOTION TO DISMISS DEFENDANT JOE COLANGELO

NOW COMES Joe Colangelo (hereinafter also “Colangelo”), in his capacity as Town Manager and Zoning Enforcement Officer for the Town of Shelburne (hereinafter also the “Town”), Vermont, by and through his attorneys, Monaghan Safar Ducham PLLC, and hereby moves this honorable Court to dismiss the claims against him pursuant to Fed. R. Civ. P. 12(b)(6) and support thereof submits the following Memorandum of Law.

MEMORANDUM OF LAW

STANDARD OF REVIEW

In reviewing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court must accept as true all factual allegations set forth in the complaint and draw all reasonable inferences in favor of the plaintiff, as the non-moving party. *See McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007). Even accepting as true all factual allegations in Vermont Railway, Inc.’s (hereinafter also “Railway”)



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Complaint, Colangelo must be dismissed, because he is not a proper party against whom Railway can seek relief.

ARGUMENT

Even though this case has been brought in federal court, capacity to be sued is determined by the law of the state where the federal court is located. *See* Fed. R. Civ. P. 17(b)(2). Here, that is Vermont, where it is well accepted that a plaintiff cannot sue individual municipal employees who were acting within the scope of their authority. Under Vermont law, “[w]here an action is given to any appointed or elected municipal officer . . . the action shall be brought in the name of the town in which the officer serves If the action is given against such officers, it shall be brought against such town” 24 V.S.A. § 901(a). It is undisputed that Colangelo is the Town’s Town Manager and Zoning Enforcement Officer, *see* Complaint ¶ 3, and per Vermont law he is an appointed officer vested with the responsibility of enforcing all Town laws and ordinances. *See* 24 V.S.A. App. §§ 147-3.5(a), 147-5.1(a), 147-7.1(a), 147-7.6; *see also* Town of Brattleboro v. Garfield, 2006 VT 56, ¶ 10, 180 Vt. 90 (Municipal charters are state statutes.).

Colangelo was acting in this official capacity when he sent Railway the Notice of Violation that is the basis of Railway’s Complaint against both the Town and Colangelo, in his capacity as Town Manager and Zoning Enforcement Officer. Per statute, Colangelo, as Town Manager, is vested with the responsibility of enforcing all Town laws and ordinances, which include the Town’s Zoning Bylaws. Accordingly, and pursuant to 24 V.S.A. § 901(a), Colangelo is an improper party to the above captioned case and must be dismissed. Hee v. Everlof, 812 F. Supp. 1350,



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