

COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF THE TRIAL COURT

District Court Department  
Palmer Division  
Civil Action No.: 1143CV293

BRIAN JOHNSON )  
 )  
                  PLAINTIFF )  
 )  
v. )  
 )  
PETER FREI )  
 )  
                  DEFENDANT )

PLAINTIFF'S OPPOSITION TO DEFENDANT'S  
MOTION TO DISMISS

Now comes Brian Johnson, the Plaintiff in the above-captioned matter ("Johnson"), and hereby opposes the Motion to Dismiss filed by the Defendant, Peter Frei ("Frei") and respectfully requests that Frei's Motion to Dismiss ("Motion") be denied. The basis for this opposition is as follows:

- Johnson filed a complaint on June 9, 2011 against Frei alleging violation of Massachusetts General Laws, c. 272, §99;
- Frei has admitted that he recorded Johnson and others on February 19, 2011;
- Frei did not request Johnson's permission or advise Johnson that he was recording this conversation prior to recording it; and
- this conduct violates G.L. c. 272, § 99Q.

The relevant statutory section provides as follows:

Any aggrieved person whose oral or wire communications were intercepted, disclosed or used except as permitted or authorized by this section or whose personal or property interests or privacy were violated by means of an interception except as permitted or authorized by this section shall have a civil cause of action against any person who so intercepts, discloses or uses such communications or who so violates his personal, property or privacy interest, and shall be entitled to recover from any such person ...

G.L. c. 272, §99Q (emphasis added).

Thus, Frei's conclusion that to be successful under G.L. c. 272, §99Q, a plaintiff must claim that the audio recording violated the plaintiff's personal or property interest or privacy is not true. As is evident from the unambiguous statutory language, a cause of action will lie if the facts support any or all of the following alternatives: oral or wire communications were intercepted, disclosed or used or a person's personal or property interests or privacy were violated. The allegations in the complaint are sufficient to support the claim against Frei, because Johnson alleges that Frei recorded him without his knowledge or consent. The statute does not require that all of the alternatives be satisfied to prevail on a cause of action under G.L. c. 272, §99Q, but only requires that at least one of the alternatives be satisfied. The allegations contained in the Complaint satisfy the requirement that Johnson's oral communications were intercepted. Therefore, the Motion should be denied.

In addition, the case of *Commonwealth v. Hyde*, 454 Mass. 594 (2001) cited by and relied upon by Frei does not support his conclusion that Johnson must show an expectation of privacy in order to prevail on this cause of action. The *Hyde* case in fact supports the conclusion that the allegations contained in

the complaint are sufficient to support a claim under G.L. c. 272, § 99Q. The *Hyde* Court actually held:

We conclude that the Legislature intended G.L. c. 272, §99, strictly to prohibit all secret recordings by members of the public, including recordings of police officers or other public officials interacting with members of the public, when made without their permission or knowledge.

*Id.* at 600.

Contrary to Frei's representation to this Court, the Supreme Judicial Court expressly rejected the requirement of a reasonable expectation of privacy as an element of a civil action claim under G.L. c. 272, §99Q. "[W]e would render meaningless the Legislature's careful choice of words if we were to interpret 'secretly' as encompassing only those situations where an individual has a reasonable expectation of privacy." *Id.* at 601, *citations omitted*.

As Johnson has alleged sufficient facts to prevail on his complaint, Frei's Motion to Dismiss should be denied. Johnson also requests that he be awarded his reasonable attorney's fees for opposing the Motion to Dismiss.

WHEREFORE, for the foregoing reasons, Brian Johnson requests that the Motion to Dismiss filed by Peter Frei be denied and that he be awarded the reasonable attorney's fees incurred in opposing the Motion.

Respectfully submitted,

The Plaintiff,  
Brian Johnson,  
By his attorney,

  
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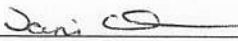
Dated: July 12, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above document was served upon the following via hand delivery to:

Peter Frei  
101 Maybrook Road  
Holland, MA 01521

Dated: July 12, 2011

  
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Tani E. Sapirstein