TO: Members of the Troy City Council
FROM: Lori Grigg Bluhm, City Attorney
Allan T. Motzny, Assistant City Attorney
DATE: June 2, 2009
SUBJECT: Kocenda v. Troy et. al.

In August 2007, David Kocenda filed a lawsuit against the City of Troy and some of its police officers. He alleged the officers provided false information about him to a prospective employer (Palm Beach Gardens Police Department) during a background investigation. He claimed he was entitled to damages for defamation (Count I) and for intentional infliction of emotional distress (Count II). The Troy defendants filed a motion for summary disposition, on the basis that the complaint failed to state a valid claim, and that the defamation claim was barred by the statute of limitation, and also on the basis that all the claims were barred by governmental immunity. After receiving Troy's motion for dismissal, Kocenda filed a motion to amend his complaint to add an additional claim based on an alleged tortious interference with a business relationship.

On February 13, 2008, Oakland County Circuit Court Judge Fred Mester granted summary disposition to the City and its police officers, and denied Kocenda's motion to amend the complaint. Kocenda then filed a motion for reconsideration, which was denied by Judge Mester on May 19, 2008. Thereafter, Kocenda filed an untimely appeal of right with the Michigan Court of Appeals. The Court of Appeals dismissed the claim of appeal on August 27, 2008, and ordered Kocenda to reimburse the City for its costs incurred in filing a motion to dismiss the untimely appeal. Kocenda then filed a Motion for Relief from Order in the Oakland County Circuit Court, alleging the case should be re-opened on the basis of "newly discovered evidence." That motion was also denied in November 2008 by Judge Mester.

Kocenda then filed a delayed application for leave to appeal. In his application, he sought leave to appeal three of Judge Mester's decisions, namely: 1) the order granting summary disposition of the claim for intentional infliction of emotional distress; 2) the order denying the motion to amend the complaint to add a count for tortious interference with a business relationship; and 3) the order denying the motion to re-open the case based on newly discovered evidence. He also filed a motion to expand the record on appeal. In that motion, Kocenda requested that the Court of Appeals consider evidence that was not introduced in the Circuit Court.

On May 21, 2009, the Court of Appeals granted the delayed application for leave to appeal, but limited the appeal to whether or not Judge Mester abused his discretion in denying Kocenda's motion to amend his complaint to allege a claim for tortious interference with a business relationship. All of Plaintiff's other requests were denied. A copy of the Court of Appeals order is attached.

After the extensive briefing and argument by the parties, if the Court of Appeals finds that Judge Mester abused his discretion in refusing to allow Plaintiff to assert a claim of tortuous interference with a business relationship, the City still has the opportunity to raise all applicable defenses, including but not limited to the fact that his new prospective employer provided the City with an executed release, allowing the City to release information requested in the police officer candidate background investigation. Governmental immunity and claim preclusion would also likely be raised as alternative defenses if Plaintiff overcomes the hurdle to get the case remanded.

Court of Appeals, State of Michigan

ORDER

DAVID KOCENDA V CITY OF TROY

Docket No. 290346

LC No. 2007-085524-CZ

Deborah A. Servitto
Presiding Judge

E. Thomas Fitzgerald

Pat M. Donofrio
Judges

The Court orders that the application for delayed leave to appeal is GRANTED, limited to the issues concerning the circuit court's denial of plaintiff's motion to amend his complaint to allege a claim for tortious interference with a business relationship. MCR 7.205(D)(4); MCR 7.216(A)(9). The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(D)(3).

The motion to expand the record is DENIED.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAY 21 2009
Date

Sandra Schultz Mengel
Chief Clerk