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Court of Appeals

MOTION TO...
November 23, 2016 15:12

By: ROBERT E. CAHILL 0072918

Confirmation Nbr. 919024

MICHAEL J. SKINDELL

CA 15 103976

vs.

Judge:

MARY LOUISE MADIGAN, ET AL.

Pages Filed: 7

IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

MICHAEL J. SKINDELL,	)	
	)	CASE NO. CA-15-103976
Plaintiff/Appellant,	)	
	)	
v.	)	
	)	On Appeal from Cuyahoga County
MARY LOUISE MADIGAN, et al.,	)	Court of Common Pleas
	)	Case No. CV-15-855961
Defendants/Appellees.	)	
	)	

APPELLEES' MOTION TO EXCUSE ATTENDANCE AT MEDIATION

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APPELLEES' MOTION TO EXCUSE ATTENDANCE AT MEDIATION

NOW COME Appellees Mary Louise Madigan, Ryan Nowlin, David W. Anderson, Thomas R. Bullock III, Shawn Juris, and Cindy Marx, by and through counsel, and hereby move to excuse their attendance at the mediation that is scheduled for December 12, 2016. Appellees and Lakewood City Council will be adequately represented at the scheduled mediation by Appellee Samuel O'Leary, who is City Council President and who was the only City Council member called to testify by Appellant during the trial of this matter. Moreover, excusing the attendance of the remaining six individually-named Appellees will ensure that any action taken by City Council in response to this mediation will occur in an open meeting in Lakewood City Hall, as opposed to behind closed doors in this Court's mediation department.

Appellees are very sensitive to the allegations made by Appellant Michael J. Skindell that they did not deliberate Ordinance 49-15 in open meetings before the public. The fact of the matter is that Ordinance 49-15 is likely the most openly deliberated ordinance in the City's history. City Council conducted extensive fact-finding and analyzed the viability of Lakewood Hospital and the future of healthcare in the City of Lakewood in an eleven-month process, which was not only fully open to the public, but which was shaped by extensive public comment, ultimately leading to the passage of Ordinance 49-15 on December 21, 2015.

Since then, the public discussion about the future of healthcare in Lakewood has continued at just about every single City Council meeting that has been held this year in addition to many public meetings leading up to the referendum vote on Ordinance 49-15, titled Issue 64,

which occurred on November 8, 2016. The majority of the citizens of Lakewood voted for Issue 64, which approved the passage of Ordinance 49-15.¹

Not only was Ordinance 49-15 the culmination of the most publicly discussed and deliberated ordinance in the City's history, but the citizens of Lakewood themselves, participating in the legislative process in the most democratic way possible, affirmed the passage of Ordinance 49-15. Therefore, City Council rightly has grave concerns about its members coming together behind closed doors with the Court's mediator and Appellant to discuss whether there can be any resolution to this appeal in light of the very public process by which Ordinance 49-15 was enacted and the recent referendum vote approving the very same ordinance Appellant seeks to invalidate.

While Appellees recognize that there may be limited authority for the proposition that mediation of this matter constitutes a quasi-judicial proceeding that would not be subject to Ohio's Open Meetings Act, the only case that stands for that proposition of which Appellees are aware also makes clear the potential land mines awaiting a legislative body entering into such a mediation. In *Carver v. The Township of Deerfield*, 139 Ohio App.3d 64, 742 N.E.2d 1182 (11th Dist. 2000), the Court noted in *dicta* that "We agree that meetings which are specifically part of the mediation proceedings do not fall within the scope of the Sunshine Law." Nevertheless, the plaintiff in *Carver* brought suit alleging that the township trustees violated Ohio's Open Meeting Act at both their pre-mediation meetings and their post-mediation meetings even though there was no allegation of a violation during the mediation itself. Given the meritless allegations that

¹ http://boe.cuyahogacounty.us/pdf_boe/en-US/electionresults2016/112016/official/11082016OfficialResultsbyContest.HTM

City Council violated the Open Meeting Act in what was the most public of deliberations arriving at the passage of Ordinance 49-15, Appellees anticipate that other citizens may raise Open Meetings Act-related allegations arising from a mediation in which Appellees have participated outside of an open meeting.

Excusing the attendance of six of the seven individually-named Appellees will help to reduce even the possibility of an alleged Open Meeting Act violation involving this mediation. Specifically, permitting only Council President Samuel O'Leary to represent City Council will eliminate any potential for an alleged violation of the Open Meeting Act before and during the mediation. As Art. I, Section 2 of the Second Amended Charter of the City of Lakewood only permits City Council to act through resolution or ordinance, any resolution or ordinance which potentially could arise from this mediation would be deliberated in front of the citizens of Lakewood at a City Council meeting.

Furthermore, permitting City Council President to represent the Appellees will help to de-politicize this mediation. The online comments made by those sympathetic to Appellant's cause to Lakewood's community newspaper, *The Observer*, began to politicize this mediation shortly after this Court directed the parties to mediate this matter. See <http://lakewoodobserver.com/forum/viewtopic.php?f=7&t=23558> and <http://lakewoodobserver.com/forum/viewtopic.php?f=7&t=23556>. It is clear from these comments that the mere fact that the Court has ordered the parties to mediation has been politicized. Requiring all of the named Appellees to attend the mediation will needlessly encourage this specious line of argument thereby permitting those sympathetic to Appellant's cause to further politicize this mediation to the detriment of these elected officials, who have diligently worked in the best interests of Lakewood's citizenry. The goals of mediation are

undermined when an order to appear is interpreted as having some bearing on the merits of the case.

A final reason for excusing six of the seven named Appellees is because under no circumstances will the full current City Council be present at the mediation. Appellees Mary Louise Madigan and Shawn Juris' council terms expired last year and they are no longer on council. While City Council itself is named as a party in this litigation, this Court has no jurisdiction over City Council itself because City Council is not *sui juris*. In *City of Cuyahoga Falls v. Robart*, 58 Ohio St.3d 1, 6, 567 N.E.2d 987, 992 (1991), the Court held that:

...the "city council" was not a proper party plaintiff in its own right. A city council is not *sui juris* and therefore cannot sue or be sued in its own right, absent statutory authority. *State, ex. rel. Cleveland Municipal Court, v. Cleveland City Council* (1973), 34 Ohio St. 2d 120, 122, 63 O.O. 2d 199, 200, 296 N.E. 2d 544, 547; *Council of Whitehall v. Rogers* (1980), 69 Ohio App. 2d 124, 23 O.O. 3d 329, 432 N.E. 2d 216.

Conducting mediation with five acting council members and two past council members is obviously problematic because the two past members have no authority to act on behalf of the City. The best solution is to excuse the attendance of all Appellees, except for City Council President Samuel O'Leary, who will adequately represent City Council at the mediation, and then City Council will have the opportunity to act by resolution or ordinance during an open meeting in Lakewood City Hall on any meritorious proposals made during the mediation.

For all the foregoing reasons, Appellees Mary Louise Madigan, Ryan Nowlin, David W. Anderson, Thomas R. Bullock III, Shawn Juris, and Cindy Marx respectfully request that this Honorable Court excuse their participation in the mediation scheduled for December 12, 2016. In alternative, they request that, if the Court is not inclined to grant this motion, they be permitted to participate in the mediation as needed by telephone.

Respectfully submitted,

s/Kevin M. Butler

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2016, the foregoing Appellees' Motion to Dismiss was electronically filed with the Clerk of the Court using the Court's Electronic Filing system which will send notification of to each party to this action. In addition, the following have been served with this motion via e-mail:

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