

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>LISA KRAGNES, Plaintiff, vs. CITY OF DES MOINES, IOWA, Defendant.</p>	<p>Equity No. 49273</p> <p>RESISTANCE TO CITY OF DES MOINES MOTION TO DISMISS</p> <p>FILED POLK COUNTY, IA 2009 AUG 10 3:38 CLERK OF DISTRICT COURT</p>
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COMES NOW, the Plaintiff, Lisa Kragnes, and resists the City of Des Moines' Motion to Dismiss and in support thereof states:

1. The Plaintiff denies the allegations set forth in paragraphs 1 through 5 of the Defendant's Motion to Dismiss. The City of Des Moines has failed to brief the issues presented in its Motion to Dismiss and consequently the Plaintiff reserves the right to provide a brief in support of its resistance.

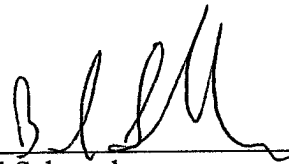
2. A Motion to Dismiss is only properly granted if a plaintiff's petition, "on its face shows no right of recovery under any state of facts." *Trobaugh v. Sondag*, 668 N.W.2d 577, 580 (2003). A motion to dismiss is properly granted only when there exists no conceivable set of facts entitling the non-moving party to relief. *Barkema v. Williams Pipeline Co.*, 666 N.W.2d 612, 614 (2003). It is necessary to view the plaintiff's allegation "in the light most favorable to the plaintiff with doubts resolved in that party's favor." *Soike v. Evan Matthews & Co.*, 302 N.W.2d 841, 842 (1981). The Supreme Court has discouraged the granting of a Motion to Dismiss and has stated:

"We recognize the temptation is strong for a defendant to strike a vulnerable petition at the earliest opportunity. Experience has however taught us that vast judicial resources could be saved with the exercise of more professional patience.

On the foregoing rules dismissal of many of the weakest cases must be reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of summary judgment or even by way of defense at trial. From a defendant's standpoint, moreover, it is far from unknown for the flimsiest of cases to gain strength when its dismissal is reversed on appeal." *Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 181 (1991). Cited favorably in *Rees v. City of Shenandoah*, 682 N.W.2d 77, 78 (2004)."

3. The allegations moved in support of the City's Motion to Dismiss require the Court to make determinations based on facts not contained in the pleadings. To the extent the Court may be compelled to make a decision based on the averments in Plaintiff's Petition, the Court is forced to speculate as to any set of conceivable facts which will entitle the non-moving party to relief. In this particular case, the City of Des Moines points the Court in the direction of alleged utility board proceedings and MidAmerican Energy and refers to information outside the pleadings. Consequently, the issues presented cannot be resolved through a motion to dismiss, but are instead appropriate either through trial to the trier of fact or a motion for summary judgment after both parties have had ample opportunity to conduct discovery and there exists no dispute as to any material fact.

WHEREFORE, the Plaintiff respectfully requests that the Court deny the Defendant's Motion to Dismiss. The Plaintiff reserves the right to respond to any brief in support of its Motion to Dismiss that may be filed with the Court. The Plaintiff further agrees that a scheduling order for the submission of briefs and the setting of oral hearing on the Defendant's Motion to Dismiss should be entered. The Plaintiff requests such other and further relief as the Court deems equitable in the premises.



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ATTORNEYS FOR PLAINTIFF

Original filed.

Copy to:

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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on August 31 2004

By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Certified Mail Other:

Signature Kasey Parenya