

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

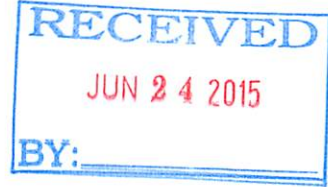
ALASKA BUILDING, INC., an Alaska)
corporation,)

Plaintiffs,)

vs.)

716 WEST FOURTH AVENUE LLC,)
KOONCE PFEFFER BETTIS, INC., d/b/a)
KPB ARCHITECTS, PFEFFER)
DEVELOPMENT, LLC, LEGISLATIVE)
AFFAIRS AGENCY, and CRITERION)
GENERAL, INC.,)

Defendants.)



Case No.: 3AN-15-05969 CI

MOTION TO DISMISS COUNT I

Defendant 716 West Fourth Avenue, LLC (“716”), by and through counsel Ashburn & Mason, P.C., hereby moves this court to dismiss Count I for lack of subject matter jurisdiction. The Plaintiff lacks both interest-injury standing and citizen-taxpayer standing.

I. PROCEDURAL BACKGROUND

On March 31, 2015, the Plaintiff filed a two count complaint against the above-listed defendants. Count I challenges the legality of the Legislative Information Office Project (the “Project”) lease under Alaska Statute 36.30.83(a). Count II alleges damages caused to the Plaintiff’s building during the construction process.

On May 27, 2015, the Legislative Affairs Agency (the “Agency”) moved this court to dismiss Count I for lack of subject matter jurisdiction pursuant to Civil Rule

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12(b)(1).¹ The Agency argues Plaintiff lacks both interest-injury and citizen-taxpayer standing to challenge the legality of the Project under Count I. In the absence of a dismissal, the Agency argues severance of the counts is appropriate.²

Plaintiff filed an Amended Complaint on June 8, 2015, attempting to bolster its negligence claims under Count II and specifically listing all defendants as parties to Count II.³ The Plaintiff then filed an opposition to the Agency's motion to dismiss on June 12, 2015.

While unclear from the original and amended Complaints, according to the Plaintiff's Opposition, the Plaintiff has named 716 as a defendant for both Count I and Count II.⁴ Indeed, the Agency's Motion to Dismiss made clear that the Agency believed it was "the only defendant with respect to the first count of the Complaint."⁵ Only in the Opposition does the Plaintiff allege for the first time that it is seeking punitive damages "against 716 for entering into the illegal LIO Lease."⁶

This motion is filed in response to that clarification. In the event that Plaintiff has actually contemplated 716 as a properly named Defendant in Count I, Defendant

¹ See Agency's Motion at 1.

² *Id.* at 12. 716 takes no position on severance at this time.

³ See Plaintiff's Opposition to Motion to Dismiss or Sever.

⁴ *Id.* at 3-4, 9;

⁵ See Agency's Motion to Dismiss at 3.

⁶ Plaintiff's Opposition to Motion to Sever at 9; See Compl. ¶¶ 31 E.

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716 hereby moves the court to dismiss Count I for lack of subject matter jurisdiction pursuant to Civil Rule 12(b)(1) and 12(h)(3).⁷

II. STANDARD FOR DECISION

This Court does not have subject matter jurisdiction over Count I as the Plaintiff cannot establish standing. The “basic requirement for standing in Alaska is adversity.”⁸ Courts in Alaska recognize “two general types of standing sufficient to meet the adversity requirement—interest-injury standing and citizen-taxpayer standing.”⁹ The fundamental question raised by both forms of standing is “whether the litigant is a proper party to seek adjudication of a particular issue.”¹⁰ As the Plaintiff cannot establish either form of standing, dismissal of Count I is warranted.

III. ARGUMENT

a. Plaintiff has failed to establish interest-injury standing.

In order to establish interest-injury standing, a plaintiff must demonstrate a controversy exists, a “sufficient personal stake” in the outcome of that controversy, and “an interest which is adversely affected by the complained-of conduct.”¹¹ While the degree of injury need not be great—an “identifiable trifle” is sufficient—a showing of some injury is required.¹² The Alaska Supreme Court and the United States Supreme

⁷ Civil Rule 12(b)(1) & 12(h)(3). 716 reserves the right to raise any and all motions to dismiss Count II or move for dismissal on any additional grounds of Count I should the court rule in Plaintiff’s favor.

⁸ *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987).

⁹ *Law Project for Psychiatric Rights, Inc. v. State*, 239 P.3d 1252, 1255 (Alaska 2010).

¹⁰ *Trs. for Alaska*, 736 P.2d at 327 (quoting *Moore v. State*, 553 P.2d 8, 23 n. 25 (Alaska 1976)).

¹¹ *Keller v. French*, 205 P.3d 299, 304 (Alaska 2009).

¹² *Id.* at 304-305.

Court have “consistently held that a plaintiff raising only a generally available grievance about government . . . and seeking relief that no more directly and tangibly benefits him that it does the public at large – does not present a controversy.”¹³

A plaintiff must have sufficient personal stake in the outcome of the controversy to establish interest-injury standing.¹⁴ For instance, in *Larson v. State, Dept. of Corrections*, an inmate sought injunctive and declaratory relief on a claim that the prison's own revised visitor application policies relating to minors violated his state constitutional right to rehabilitation because it was more restrictive than administrative regulations governing visitation.¹⁵ The Alaska Supreme Court found that because Larson was an inmate with children who continued to be subject to the contested visitation policies, he demonstrated a sufficient personal stake in the outcome of the controversy to establish interest-injury standing.¹⁶

In addition to a showing of sufficient personal stake in the outcome of the controversy, a plaintiff must also demonstrate an actual injury. In *Keller v. French*, the Alaska Supreme Court held that State legislators did not have interest-injury standing to sue other legislators, a permanent legislative committee, and an independent investigator.¹⁷ The plaintiff legislators had sued alleging a state constitutional “fair and just treatment clause” violation based on the governor's dismissal of the Public Safety

¹³ *Lamb v. Obama*, No. S-15155, 2014 WL 1016308, at *1 (Alaska Mar. 12, 2014)(citing *Lamb v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992)).

¹⁴ *Larson v. State, Dept. of Corrections*, 284 P.3d 1, 12 (Alaska 2012).

¹⁵ *Id.*

¹⁶ *Id.* at 12.

¹⁷ *Keller*, 205 P.3d at 299.

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Commissioner. The Court held the plaintiff legislators had failed to identify how the investigation was likely to cause them any sort of harm and therefore dismissed the claim for lack of injury.¹⁸

In the present matter, despite having filed three pleadings, the Plaintiff has not been able to articulate something beyond a generally available grievance about Alaska procurement law. With respect to Count I, Plaintiff alleges the Project is illegal “because it is neither a lease extension, nor at least 10% below market rent as required by AS 36.30.083(a).”¹⁹ Like the unsuccessful Plaintiffs in *Keller*, the Plaintiff has been unable to articulate a plausible injury to its own interests.²⁰

The Plaintiff claims entitlement to relief under Count I to “invalidate or reform the LIO Lease to 10% less than market rent and award [Plaintiff] 10% of any cost savings.”²¹ According to the Plaintiff, it is this claim for 10% of any cost savings that specifically gives it interest-injury standing.²² The mere fact that the Plaintiff has requested monetary damages for the act of raising this generalized grievance does not in itself create a “sufficient personal stake in the outcome of the controversy to ensure the requisite adversity.”²³ Plaintiff does not seek compensation because he has been injured; rather, Plaintiff seeks compensation simply for enrichment purposes. A finding that the Plaintiff “has interest-injury standing because of its claim for 10% of any cost

¹⁸ *Id.*

¹⁹ Plaintiff Opposition at 6.

²⁰ *Keller*, 205 P.3d at 305 (Alaska 2009).

²¹ *Id.*

²² *Id.*

²³ *Larson*, 284 P.3d at 12.

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savings” actually incentives plaintiffs to bring generalized grievances, which are exactly the types of claims the interest-injury standing requirement is intended to bar.

As the Plaintiff has failed to prove that it has sustained an injury or demonstrated a genuine controversy, the court should find that Plaintiff lacks interest-injury standing.²⁴

b. **Plaintiff has failed to and cannot establish citizen-taxpayer standing.**

In addition to lacking interest-injury standing, the Plaintiff lacks citizen-taxpayer standing to bring Claim I. “[T]axpayer-citizen standing cannot be claimed in all cases as a matter of right.”²⁵ In order for the Plaintiff to successfully rely on citizen-taxpayer standing, he must establish not only that the case is of public significance, but also that he is the appropriate plaintiff to bring suit.²⁶ The Supreme Court in *Keller* noted the following are inappropriate plaintiffs: a “sham plaintiff” with no true adversity of interest, a plaintiff incapable of competently advocating his or her position, and “when there was another potential plaintiff more directly affected by the challenged conduct who had sued or was likely to sue.”²⁷

The Supreme Court in *Keller* went on to state that is the more appropriate plaintiff’s *ability* to bring suit, rather than their *intention* to do so, that is the key

²⁴ *Keller*, 205 P.3d at 304.

²⁵ *Trustees for Alaska v. State*, 736 P.2d 324, 329 (Alaska 1987)

²⁶ *Id.*

²⁷ *Keller*, 205 P.3d at 302.

inquiry.²⁸ The fact that “individuals who are more directly affected have chosen not to sue despite their ability to do so does not confer citizen-taxpayer standing on an inappropriate plaintiff.”²⁹

i) **The Plaintiff is akin to a “sham plaintiff.”**

In the present case, the Plaintiff’s motives in bringing Claim I appear to be wholly fueled by a desire to seek an arbitrary amount of damages for personal enrichment purposes.³⁰ While it is unclear why the Defendant believes himself entitled to 10% of any cost savings or punitive damages, as he has alleged against 716, there is nothing in the pleadings to indicate the Defendant would bring the suit but for these potential damages. Indeed, excluding the negligence claims contained in Count II, the Defendant has not shown any particularized interest that is adverse to the Project. Neither the location of Plaintiff’s building, nor the fact Plaintiff is alleging negligence damages related to the construction changes this analysis. The specific grievances alleged in Count I are not particularized to the Plaintiff any more than any other taxpayer.

The notion that the Plaintiff is motivated by personal enrichment is further supported by the addition of 716 to Count I. It would appear that the Plaintiff’s only

²⁸ *Id.* at 303.

²⁹ *Id.*

³⁰ *Compare to Trustees for Alaska*, 736 P.2d at 330.

reason for naming 716, an entity which has nothing to do with the formation of Alaska Legislative Procurement procedures, to Count I is to seek “punitive damages.”³¹

ii) **The Plaintiff is incapable of competently advocating his positions.**

Even if this was an issue of public significance, this particular Plaintiff appears incapable of competently advocating his position. The Plaintiff has created a website regarding the lawsuit with a separate section devoted to “Media Coverage”³² with links to articles detailing Plaintiff’s questionable motivation for filing the lawsuit.³³ Included on the site is a self-serving “News Release” referencing an Open Letter that Plaintiff delivered to the Governor urging him to “investigate this blatant corruption that appears to be a crime.”³⁴ In this May 1, 2105 letter to the Governor, Plaintiff claims that a “[Class C felony] crime appears to have been committed[,]” but proceeds to state “I don’t know who is guilty of this crime.”³⁵ Plaintiff’s inability to determine who exactly he is opposing, as evidenced by his misguided inclusion of 716 in Count I, and what

³¹ Amended Complaint at p.6.

³² Available at <http://gottsteinlaw.com/AkBldgv716W4thAve/AkBldgv716W4thAveLLC.htm>.

³³ See “Lawsuit Challenges Expensive State Lease for Anchorage Legislative Building,” Alaska Dispatch News, March 31, 2015, available at <http://www.adn.com/article/20150331/lawsuit-challenges-expensive-state-lease-downtown-legislative-building>.

³⁴ See “Governor Walker Called on to Line Item Veto Anchorage Legislative Information Office Appropriation and Request a Criminal Investigation.” May 4, 2015, News Release, available at <http://www.adn.com/article/20150331/lawsuit-challenges-expensive-state-lease-downtown-legislative-building>

³⁵ See “Governor Walker Called on to Line Item Veto Anchorage Legislative Information Office Appropriation and Request a Criminal Investigation.” May 4, 2015, News Release, available at <http://www.adn.com/article/20150331/lawsuit-challenges-expensive-state-lease-downtown-legislative-building>

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crime he's alleging are two examples of this particular Plaintiff's inability to competently advocate this issue.

iii) **The decision of more appropriate potential plaintiffs not to sue does not give citizen-taxpayer standing to this Plaintiff.**

In *Ruckle v. Anchorage School District*, the Alaska Supreme Court affirmed the trial court's ruling that the plaintiff lacked citizen-taxpayer standing to dispute a public procurement determination and related regulations.³⁶ The Alaska Supreme Court concluded that a taxpayer who sought to challenge the school district's bidding process for transportation contracts was not the most appropriate plaintiff to bring suit. The Court found that the former provider of transportation for the school district, who unsuccessfully bid on the contract, and who filed a nearly identical suit prior to *Ruckle* was a more appropriate plaintiff to file suit challenging the State Procurement Code.³⁷

Even were this court to determine the Project should have been competitively bid on, Plaintiff has yet to establish that it would be an appropriate plaintiff to challenge the lease. The court in *Ruckle* expressly rejected the argument that members of the public are appropriate litigants for challenging the application of the State Procurement Code merely on the basis of being taxpayers.³⁸ The Plaintiff was not, and has never indicated it would be, a potential lessor of the Legislative Information Office. The Plaintiff is

³⁶ *Ruckle v. Anchorage Sch. Dist.*, 85 P.3d 1030, 1034 (Alaska 2004)

³⁷ *Id.*; See also *Lakloey, Inc. v. Univ. of Alaska*, 157 P.3d 1041, 1049 (Alaska 2007)(holding that an unsuccessful bidder on a state university contract for a deionization system was an interested party with standing to protest the university's award of the contract to lowest bidder, even though the unsuccessful bidder was not the next lowest bidder on the contract. The unsuccessful bidder was therefore entitled to an administrative hearing under the general procurement code and the University's own regulations.)

³⁸ *Ruckle*, 85 P.3d 1035.

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therefore without the “enormous economic incentive” to bring suit and raise State Procurement Code challenges if it had indeed lost out on a bid for the lease.³⁹ The fact that no such entity has decided to bring a challenge to the lease extension does not confer citizen-taxpayer standing on Plaintiff.⁴⁰

It is noteworthy that Plaintiff has yet to identify how it was in any way the appropriate plaintiff to bring suit against 716. Under AS 36.30.020, “[t]he **legislative council** adopts and publishes procedures to govern the procurement of supplies, services, professional services, and construction by the legislative branch.”⁴¹ The lease extension was authorized under AS 36.30.083, which foregoes a competitive re-procurement process as long as the criteria contained in the statute are met. As Plaintiff is aware, the Project was approved unanimously by the legislative council. Having thus determined that the lease was in its best interests, the legislative council’s decision then was ratified by the full legislature.⁴²

For the reasons stated above, this Plaintiff lacks citizen-taxpayer standing to pursue Claim I.

³⁹ *Id.* at 1037.

⁴⁰ *See Keller*, 205 P.3d at 303; *Law Project for Psychiatric Rights*, 239 P.3d at 1255-56.

⁴¹ *See* AS 36.30.020(emphasis supplied.)

⁴² *See Lamb v. Obama*, No. S-15155, 2014 WL 1016308, at *2 (Alaska Mar. 12, 2014)(holding that the Alaska Supreme Court lacked jurisdiction to hear Plaintiff’s claim regarding President Obama’s eligibility and qualifications for president. Voting procedures for presidential elections were already established in 3 U.S.C. §, et. seq. and the court was inclined to refrain from involving itself in “questions beyond its scope.”

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IV. CONCLUSION

Because Plaintiff lacks both interest-injury standing and citizen-taxpayer standing to challenge the legality of the Project, this Court should dismiss Count I against 716. This court should thus also find that Plaintiff's claim against 716 in Count I should be dismissed for lack of subject matter jurisdiction.

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DATED: 6/23/15

By: JW
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically messenger facsimile U.S. Mail on the 23 day of June 2015, on:

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