

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

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

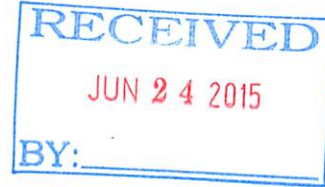
Plaintiffs,)

vs.)

Case No.: 3AN-15-05969 Civil

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.



**CIVIL RULE 56(F) REQUEST FOR ADDITIONAL TIME TO ANSWER
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (NOT
EXTENSION)**

COMES NOW, Defendant 716 West Fourth Avenue, LLC ("716"), and hereby respectfully moves the court to grant additional time to respond to Plaintiff's motion for partial summary judgment (not extension). This request is made pursuant to Civil Rule 56(f), which provides:

When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

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Typically, dismissal motions will be filed early in litigation because they are generally decided on the pleadings, whereas summary judgment motions may require that parties spend considerable time and effort discovering and developing facts necessary for a full presentation, and for this reason parties are provided “a reasonable opportunity” to respond.¹ Under Civil Rule 56(c), summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” Plaintiff’s motion, as described herein, is thus wildly premature under the fabric of the summary judgment rule.

The Alaska Supreme Court has “repeatedly held that ‘requests made under Rule 56(f) should be granted freely because Rule 56(f) provides a safeguard against premature grants of summary judgment.’”² In order to be granted Rule 56(f) relief, a party must 1) unambiguously request relief under Rule 56(f), although not necessarily mention Rule 56(f); (2) must not have been dilatory during discovery; and (3) must provide adequate reasons why additional time is required.

¹ *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 758 (Alaska 2008).

² *Id.* (citing *Hymes v. DeRamus*, 119 P.3d 963, 965 (Alaska 2005)).

First, 716 is making an unambiguous request for Rule 56(f) relief in this motion. Second, 716 has not been dilatory with discovery.³ Plaintiff filed its original complaint on March 31, 2015, and amended the complaint on June 9, 2015. 716's deadline to answer Plaintiff's amended complaint arises today. The court issued its routine pretrial order on May 21, 2015. Trial has been scheduled approximately 14 months out, and the parties are in the very beginning stages of the discovery process.⁴ Plaintiff has served a few interrogatories and requests for production, but has not otherwise conducted depositions, requested admissions, or otherwise meaningfully engaged in the typical course of discovery practice.

Additionally, 716 filed a potentially dispositive motion to dismiss Count I for lack of standing concurrently with this motion, including a request to stay discovery until the motion is decided on its merits. 716 strongly believes that the court lacks subject matter jurisdiction to adjudicate plaintiff's claim with respect to Count I. 716 has also concurrently moved the court to stay proceedings until the court rules on the subject matter jurisdiction issue. If the court grants the motion to stay discovery and/or the motion to stay proceedings, discovery would likewise come to a halt.

³ See *Brock v. Weaver Bros.*, 640 P.2d 833, 837 (Alaska 1982)(concluding that the court did not abuse its discretion in denying Rule 56(f) relief because "approximately three years had elapsed since the accident...[and] no discovery...had been undertaken").

⁴ 716 has already provided Plaintiff with approximately 300 pages of discovery related to Count II, and pointed Plaintiff to publically available documents germane to the lease issue. (The lease was publically recorded.) Plaintiff has attached some of the publically related documents in its Motion for Partial Summary Judgment (Not Extension).

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Third, in the event that the court does not grant the dispositive motion to dismiss on subject matter jurisdiction grounds, a continuance is especially appropriate given that discovery has not closed (and, in fact, just begun) in this matter. For example, the parties have until April 11, 2016 to file written discovery. The parties have not deposed a single witness with respect to Count I, retained experts, or done anything else of significance in the early stages of discovery. 716 is not requesting an indefinite delay to submit evidence to rebut the movant's summary judgment claim.

Instead, 716 makes the reasonable request that in the event that 716's dispositive subject matter jurisdiction motion is disposed of in plaintiff's favor, the motion for summary judgment be held in abeyance **at least** until twenty days after the April 11, 2016 final date for the parties to serve written discovery. A continuance of this length would allow 716 to gather more information during planned discovery. A request for Rule 56(f) relief need not state what specific facts further discovery will produce; instead, the request will generally be granted if the party provides adequate reasons why the party cannot produce facts necessary to oppose summary judgment within the original time frame.⁵

In *Mitchell v. Teck Cominco Alaska Inc.*, the Alaska Supreme Court held that the superior court's failure to grant a request by an employee, as nonmovant for summary judgment, for a continuance in order to conduct additional discovery and respond to


⁵ *Gamble v. Northshore Partnership*, 907 P.2d 477 (Alaska 1995).

employer's summary judgment motion actually prejudiced the employee, and thus, the entry of summary judgment would be vacated and case would be remanded for further proceedings on that claim.⁶ The Court found that the employee's proposed order requesting a continuance expressly stated that the court would hold the summary judgment in abeyance pending completion of discovery and additional briefing, and set a briefing schedule twenty days after the close of discovery.⁷

For these reasons, and for the reasons explained in the attached affidavit of counsel, the court should grant 716 a continuance consistent with this motion and the attached affidavit of counsel.

ASHBURN & MASON, P.C.
Attorneys for 716 West Fourth Avenue, LLC

DATED: 6/23/15

By: 
Jeffrey W. Robinson
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⁶ 193 P.3d 751 (Alaska 2008).

⁷ *Id.* at 758.

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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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