

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

ALASKA BUILDING, INC., an Alaska
corporation,

Plaintiff

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.

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Clerk of the Trial Courts

Case No. 3AN-15-05969CI

**PLAINTIFF'S OPPOSITION TO
LEGISLATIVE AFFAIRS AGENCY'S MOTION
TO STAY PROCEEDINGS**

Plaintiff, Alaska Building, Inc. (ABI), opposes the Legislative Affairs Agency's Motion to Stay Proceedings (Motion to Stay Proceedings).

A. Procedural Setting

Count One of the Amended Complaint requests a declaration that the current lease for the new Anchorage Legislative Information Office (LIO Lease)¹ is illegal in that it does

¹ More particularly described as that certain contract, dated September 19, 2013, by and between defendant Legislative Affairs Agency and defendant 716 West Fourth Avenue LLC (716 LLC), titled "Extension of Lease and Lease Amendment No. 3, a true and correct copy of which is attached as Exhibit 1 to the June 12, 2015, Affidavit in Support of Plaintiff's Motion for Partial Summary Judgment (Supporting Affidavit).

not comply with the exception to the normal public bidding requirement for leases contained in AS 36.30.083(a). Under AS 26.30.083(a) a narrow exception to the public bidding requirement for leases allows a sole source lease extension for up to ten years if the rental rate is at least 10% below market. Count One applies to defendants Legislative Affairs Agency as tenant, and 716 West Fourth Avenue LLC as landlord (716 LLC). Count Two pertains to damage to the Alaska Building from the construction of the new Anchorage Legislative Information Office Building as a result of the illegal LIO Lease.

On May 27, 2015, the Legislative Affairs Agency filed (1) a motion to dismiss Count One for lack of standing, or, in the alternative, to sever Count One from Count Two (Motion to Dismiss or Sever), and (2) a motion to stay discovery with respect to Count One pending determination of the Motion to Dismiss or Sever (Motion to Stay Discovery).

On June 8, 2015, ABI, filed an opposition to the Motion to Stay Discovery to the extent the stay lasted more than a few weeks. On June 17, 2015, this Court granted a stay of discovery for 45 days or decision on the Motion to Dismiss or Sever, whichever is earlier.

On June 12, 2015, ABI filed (1) its opposition to the Motion to Dismiss or Sever, and (2) a Motion for Partial Summary Judgment (Not Extension) on the grounds that the LIO Lease does not comply with AS 36.30.083(a) in that it does not extend a real property lease.

In response, on June 15, 2015, the Legislative Affairs Agency filed its Motion to Stay Proceedings to which this is the opposition.

*Opposition to Motion
to Stay Proceedings*

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On June 19, 2015, the Legislative Affairs Agency's filed its reply regarding the Motion to Dismiss or Sever (Dismiss or Sever Reply).

Also on June 19, 2015, ABI filed a request for oral argument on the Legislative Affairs Agency's Motion to Dismiss or Sever, which is non-discretionary under Civil Rule 77(e)(2).

On June 23, 2015, ABI filed a motion for leave to file a sur-reply to the Legislative Affairs Agency's Dismiss or Sever Reply² because the Legislative Affairs Agency so grossly mischaracterized *Ruckle v. Anchorage School District*, 85 P.3d 1030 (Alaska 2004).

Also on June 23, 2015, 716 LLC filed (1) its Joinder in the Legislative Affairs Agency's Motion to Stay Proceedings (716 Joinder), (2) a motion to dismiss for lack of standing (716 Motion to Dismiss), which is essentially duplicative of the Legislative Affairs' Agency's Motion to Dismiss or Sever, and (3) a Civil Rule 56(f) Request for Additional Time to Respond to ABI's Motion for Partial Summary Judgment (Rule 56(f) Request).

B. Argument

The Legislative Affairs Agency (joined by 716 LLC) asserts its Motion to Stay Proceedings as to Count One should be granted (1) because standing is a threshold issue that should be resolved before consideration of the merits, (2) for reasons of judicial economy, and (3) conservation of party resources, and (4) because the granting of a stay

² Incorrectly dated as June 25, 2015, rather than June 23, 2015. Counsel apologizes for the error.

will not prejudice ABI. As will be discussed in order, proper analysis of these factors weigh against granting the requested stay of proceedings.

(1) That Standing May Be A Threshold Issue Does Not Mean a Stay of Proceedings is Required

In *Richardson v. Estate of Berthelot*, 2013 WL 203271 (Alaska 2013)

(unpublished),³ the Alaska Supreme Court held, "A stay of proceedings is a matter of convenience and not a matter of right," citing *Beck v. Commc'ns Workers of Am.*, 468 F.Supp. 87, 91 (D.Md.1979); *Cutler Assocs. v. Merrill Trust Co.*, 395 A.2d 453, 456 (Me.1978) (holding that a stay is "not a matter of right but a matter of grace"); and *Clark's Fork Reclamation Dist. No.2069 v. Johns*, 259 Cal.App.2d 366, 66 Cal.Rptr. 370, 373 (Cal.Ct.App.1968).

Simply put, that there may be a pending motion to dismiss does not mean that a stay of proceedings should be granted. It is quite common for proceedings to continue while such motions are under consideration. In this case, absent ABI's Motion for Partial Summary Judgment, it is likely the Legislative Affairs Agency and 716 LLC, would file Civil Rule 12(b)(6) motions to dismiss if the motions to dismiss for lack of standing are not granted,⁴ arguing, for example, that Count One fails to state a claim upon which relief

³ Counsel cites to this unpublished decision because it is the only Alaska Supreme Court case counsel has found that directly addresses the point that a stay of proceedings is a matter of convenience and not a matter of right.

⁴ Such arguments should now be raised in opposition to ABI's Motion for Partial Summary Judgment.

may be granted.⁵ Filing motions such as the extant motions to dismiss for standing and a Civil Rule 12(b)(6) motion is in defendants' counsel's playbook and if filing such motions entitled defendants to stay proceedings, litigation would be unnecessarily prolonged. Clearly, more than just a motion to dismiss for lack of standing is required to justify staying the proceedings.

There is simply little reason not to queue up the Motion for Partial Summary Judgment in the event the Motion to Dismiss is not granted. Oppositions to the Motion for Partial for Summary Judgment are due on June 29, 2015, although 716 LLC has requested 10 months under Civil Rule 26(f), 20 days after the close of discovery, before responding (Rule 26(f) Request). If the Rule 26(f) Request is denied, which ABI believes it should, or a much shorter time allowed, briefing on ABI's Motion for Partial Judgment should be completed soon.

Moreover, the Motion for Partial Summary Judgment is relevant in establishing citizen-taxpayer standing⁶ because one reason for denying citizen-taxpayer standing is the "plaintiff appears to be incapable, for economic or other reasons, of competently

⁵ In fact, at note 12 of its Reply in Support of its Motion to Dismiss or Sever, the Legislative Affairs Agency indicates it will likely file a Civil Rule 12(b)(6) motion on the sufficiency of Count Two as it applies to the Legislative Affairs Agency. Similarly, in note 7 of 716 LLC's June 23, 2015, Motion to Dismiss Count One, 716 LLC "reserves the right to . . . move for dismissal on any additional grounds of Count I should the court rule in Plaintiff's favor."

⁶ In its opposition to the Legislative Affairs Agency's Motion to Dismiss or Sever, ABI asserts both interest-injury and citizen-taxpayer standing.

advocating the position it has asserted."⁷ The briefing and oral argument on ABI's Motion for Partial Summary Judgment should lay to rest that plaintiff is incapable of advocating for the position it has asserted.

It is respectfully suggested that allowing prompt consideration of the Legislative Affairs Agency's and 716 LLCs motions to dismiss for lack of standing and ABI's Motion for Partial Summary Judgment, all of which are potentially dispositive of different aspects of this action, is the more efficient way for this Court to proceed as will be discussed next.

(2) Allowing the Motion for Partial Summary Judgment to Go Forward Promotes Judicial Economy

The primary stated purpose of the Legislative Affairs' Motion to Stay Proceedings is judicial economy and conservation of party resources on the theory that its motion to dismiss for lack of standing will be granted.⁸ This is a very short-sighted view as to judicial resources. Even if the motion to dismiss for lack of standing is granted by this Court, which ABI vigorously disputes, since this is the type of issue that is likely to be reviewed by the Supreme Court, granting the stay could substantially prolong this matter and be an inefficient use of judicial resources. In addition, it is respectfully suggested the Motion for Partial Summary Judgment should be in a posture to be decided in the event that the motions to dismiss for lack of standing are not granted.

⁷ Trustees for Alaska v. State, Dep't of Natural Res., 736 P.2d 324, 329-30 (Alaska 1987).

⁸ One would suspect the most important reason, though, is that the LIO Lease so clearly does not extend a lease and therefore violates AS 36.30.083(a) that the Legislative Affairs Agency does not want to have this court consider this blatant violation of law.

At page 3 of its Motion for Stay of Proceedings, the Legislative Affairs Agency cites *Myers v. Robertson*, 891 P.2d 199, 203 (Alaska 1995), for the proposition that "Before this Court can proceed to address any of Plaintiffs claims, it should consider whether it even has subject matter jurisdiction to hear those claims." However, in *Myers* both the issue of standing and merits were heard by the Supreme Court at the same time. It is respectfully suggested this Court should allow the same. By being in a position to address both potentially dispositive motions, if either is granted, the Alaska Supreme Court would be in a position to consider the merits even if this Court grants the motion to dismiss on standing grounds.

**C. The Legislative Affairs Agency and 716 LLC Should
Have Considered Whether the LIO Lease Extended an
Existing Lease Prior to Entering Into the LIO Lease**

Another ground interposed by the Legislative Affairs Agency in support of its Motion to Stay Proceedings is that it will conserve party resources. The issue of party resources only applies to the Legislative Affairs Agency and 716 LLC because ABI is not concerned about its own applicable resource expenditure and the other parties are not involved in Count One. The stated concern of the Legislative Affairs Agency regarding conservation of its resources rings hollow when it is being overcharged through the LIO Lease to the tune of \$177,328 per month⁹ and as will be discussed below, every month of delay will likely result in a corresponding \$177,328 loss to the State of Alaska. Of course, 716 LLC has every reason to delay a reckoning on the illegal nature of the LIO Lease as it

⁹ See, page 3 of June 8, 2015, Plaintiff's Opposition to Legislative Affairs Agency's Motion to Stay Discovery.

receives some \$177,328 in excess of that allowed by law every month of delay it can achieve.

The LIO Lease is replete with references that it was entered into pursuant to AS 26.30.083(a).¹⁰ The Legislative Affairs Agency and 716 LLC should have undertaken the legal analysis to support the contention that the LIO lease "extends a real property lease" as required by AS 36.30.083(a) prior to entering into the LIO Lease and should not be heard to complain now that it has been challenged on the point that it is going to have to expend resources for a post hoc rationalization.

In the overall scheme of things, the amount of resources expended by the Legislative Affairs Agency (or 716 LLC for that matter) should not be very much. It is not expected that there will be any dispute that the New LIO Lease provides for:

- a. demolition of the then existing Anchorage Legislative Information Office located at 716 West 4th Avenue in Anchorage, Alaska down to its foundation and steel frame,
- b. demolition of the adjacent old Empress Theatre, located at 712 West 4th Avenue, occupied by the Anchor Pub at that time,
- c. moving the existing Anchorage Legislative Information Office prior to the demolition of the old Legislative Information Office Building, and
- d. construction of a new office building for lease as the new Anchorage Legislative Information Office.

Supporting Affidavit, Paragraph 2.¹¹

¹⁰ Such references are highlighted in yellow in Exhibit 1 to the Supporting Affidavit. *See*, e.g., pages 2, 4, 86, 88, 92, 93, and 94.

¹¹ ABI views 716's Rule 56(f) Request as a subterfuge as there it shouldn't need any discovery to address ABI's Motion for Partial Summary Judgment. This will be addressed in ABI's forthcoming opposition to the Rule 56(f) Request.

The question presented by ABI's Motion for Partial Summary Judgment is whether, given these undisputed facts, the LIO Lease extends a real property lease" as required by AS 36.30.083(a). This should not be an expenditure of a lot of resources in the overall scheme of things with the benefit of having a more complete picture before this Court and, potentially, the Supreme Court, greatly outweighing any savings.

**D. The State of Alaska Will Likely be Severely Prejudiced
by the Stay**

The final rationale presented by the Legislative Affairs Agency for staying proceedings is it will not prejudice ABI. ABI will be prejudiced by a delay of more than a few weeks, but more importantly, it is highly likely that the State of Alaska will be severely prejudiced because if this Court determines that the LIO Lease is illegal for violation of AS 36.30.083(a), 716 LLC is almost certainly not going to be able to pay back the money it received under the illegal lease, or even the approximately \$177,000 per month above the amount allowed under AS 36.30.083(a). As set forth in Exhibit A, there is a \$28,600,000 loan on the new LIO Building. The 45 day discovery stay with respect to Count One prevents ABI from discovering the terms of the loan and 716 LLC's capitalization, but even at a low interest rate of 5% per year for a 30 year loan, the monthly payments are over \$150,000 per month, while 10% under market rent is around \$104,000

per month. Thus, the allowable rent under AS 36.30.083(a) will not even cover the debt service on the building.¹²

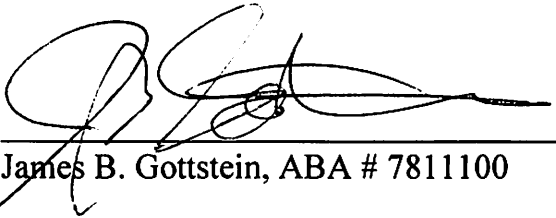
One of the purposes of utilizing the Limited Liability Company form of business, such as 716 LLC is almost always, if not always, to shield the owners (members) from liability.¹³ 716 LLC appears to be a single property LLC and as such it is very unlikely to have the assets to pay back much, if any, rent that is paid to it in excess of that allowable under AS 36.30.083(a), let alone should the remedy be that 716 LLC is liable for all of the rent paid to it under the illegal LIO Lease.¹⁴

Every month that goes by without a determination that the LIO Lease is illegal under AS 36.30.083(a) is extremely prejudicial.

E. Conclusion

For the foregoing reasons, the Legislative Affairs Agency's Motion to Stay Proceedings should be **DENIED**.

Dated June 25, 2015.


James B. Gottstein, ABA # 7811100

¹² It was far more expensive to demolish the old Anchorage Legislative Information Office Building and the Anchor Pub and then construct a new building on the site than it would have been to just construct a new building.

¹³ Under AS 10.50.265 limited liability company members are not liable for the debts of the limited liability company solely by reason of being a member.

¹⁴ Piercing the limited liability shield is a difficult, uncertain, endeavor and there is no reason to exacerbate the problem by allowing 716 LLC to delay its day of reckoning as it is attempting to do.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he mailed a copy hereof to:

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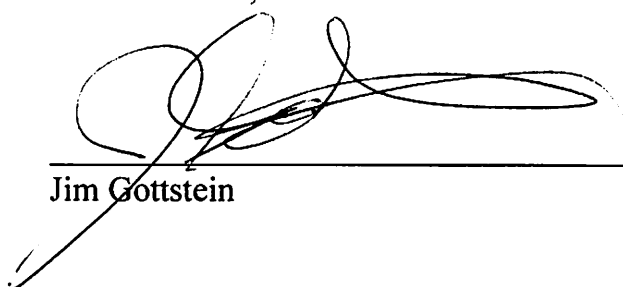
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Dated June 25, 2015.



Jim Gottstein



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Exhibit A

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