

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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JUL 2 =

**Clerk of the Trial Courts**

Case No. 3AN-15-05969CI

**PLAINTIFF'S OPPOSITION TO 716 WEST FOURTH AVENUE LLC'S  
CIVIL RULE 56(f) REQUEST FOR ADDITIONAL TIME TO ANSWER  
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (NOT  
EXTENSION)**

Plaintiff, Alaska Building, Inc. (ABI), opposes the request by defendant 716 West Fourth Avenue LLC (716 LLC) for additional time Under Civil Rule 56(f) to respond to ABI's Motion for Partial Summary Judgment. In the alternative, the current 45 day stay of discovery should be terminated and 716 LLC granted no more than a 45 day extension from the original due date of June 29, 2015.

**A. 716 Has Failed to Provide Any Reasons Justifying Its  
Rule 56(f) Extension Request**

In *Munn v. Bristol Bay Housing Authority*, 777 P.2d 188, 193 (Alaska 1989), the Alaska Supreme Court held that in order to receive relief under Civil Rule 56(f), the party

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must state in its affidavit "adequate reasons why 'he cannot [within the original time frame] . . . present . . . facts essential to justify his opposition' to the motion for summary judgment." The cases cited by 716 LLC similarly require adequate reasons for why the party cannot produce evidence in the normal time frame. *See, Gamble v. Northshore Partnership*, 907 P.2d 477, 485 (Alaska 1995); *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 759 (Alaska 2008); and *Hymes v. Deramus*, 119 P.3d 963 (Alaska 2005).

In *Mitchell*, 193 P.3d at 759 the Alaska Supreme Court noted that adequate reasons had been given:

Mitchell provided adequate reasons why he needed additional time to oppose summary judgment. He noted that the conversion of the dismissal motion came before discovery had been completed, advised the court that the parties were in the process of setting up a deposition schedule, and even described some of the information he was trying to discover. It is noteworthy that in conformance with his representations to the court, Mitchell then conducted at least nine depositions between February and May 2006 and participated in others that Teck Cominco conducted.

In *Hymes*, 119 P.3d at 965, the Alaska Supreme Court held that

The circumstances of this case required a reasonable continuance. Thirty days is not likely to be enough time for an incarcerated pro se litigant to arrange for an expert medical affidavit.

Unlike these cases, not only has 716 LLC failed to provide adequate reasons why it cannot provide evidence to oppose ABI's Motion for Partial Summary Judgment, there simply are not any genuine disputes as to any material facts. ABI's Motion for Partial Summary Judgment is based on the legal argument that the lease for the new Anchorage

Legislative Information Office (LIO Lease)<sup>1</sup> does not extend a real property lease and is therefore illegal under AS 36.30.083(a). In support of the Motion for Partial Summary Judgment, ABI submitted an affidavit as to the following facts, which it believes are not disputed and, frankly, cannot be genuinely disputed:

The 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.

On June 26, 2015, in connection with a request by 716 LLC for an extension of time to file replies to the motions and request 716 LLC, itself, had just filed, counsel wrote 716 LLC's counsel, stating that it was believed the above were undisputed facts and asked the following questions:

Do you dispute any of these facts? If so, why can't you produce such evidence? Are there any other facts that you think are relevant? If so, what? And why can't you produce those? In other words, how is discovery going to have any impact on the Motion for Partial for Summary

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<sup>1</sup> 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).

Judgment other than to allow your client to continue to collect rent from the illegal lease that will then likely not be recoverable.

Exhibit A, p.2. 716 LLC responded, "I am not going to hash out in any way what you claim to be 'undisputed facts.' " *Id*, at p. 1.

However, responding to, or "hashing out," as 716 LLC calls it, what ABI asserts are undisputed facts is exactly what is required of 716 LLC upon the filing of ABI's Motion for Partial Summary Judgment. As set forth above, *Munn* and all of the other cases require 716 LLC to give adequate reasons why it cannot present facts essential to justify its opposition' to the motion for summary judgment within the normal time frame. 716 LLC has given no reasons why it cannot present facts in opposition to the Motion for Partial Summary Judgment in the time frame allowed.<sup>2</sup>

**B. 716 LLC Should Be Able to Produce Any Facts Related to the Motion for Partial Summary Judgment**

716 LLC is the developer and Lessor of the new Anchorage LIO Building. It should have readily at hand any facts it might need. In *Munn*, 777 P.2d at 193, citing, Wright & Miller with approval, the Alaska Supreme Court noted that while normally a party need not show what facts are sought and what steps have been taken to access them, it is appropriate when the court is skeptical about a genuine factual issue emerging.

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<sup>2</sup> At ¶ 8 of its June 23, 2015, affidavit filed in support of its Rule 56(f) Request, counsel for 716 LLC states that he will be unavailable from June 29, 2015, through July 14, 2015. This is a reason to ask for an extension of time to respond to ABI's Motion for Partial Summary Judgment (which 716 LLC has done) but it is not a reason why 716 LLC is not able to produce facts necessary to oppose summary judgment.

It is respectfully suggested this Court should be extremely skeptical about a genuine material factual issue emerging. ABI's Motion for Partial Judgment is based on the simple and straightforward enforcement of AS 36.30.083(a), which only allows deviation from the normal public bidding process to extend a lease. 716 LLC can pretend that discovery will produce facts relevant to opposing the Motion for Partial Summary Judgment, but the question is a legal one. Is entering into a contract to tear down a building to its steel frame and foundation, tear down the building next to it, and having the tenant vacate the building for over a year while a new building is constructed before the tenant occupies the newly constructed building a lease extension? These facts are not in genuine dispute. Whether the LIO Lease extends a real property lease is a legal issue.

### **C. The State is Prejudiced by an Extension**

716 LLC asks for a ten month extension until 20 days after the close of discovery to produce evidence to oppose ABI's Motion for Partial Summary Judgment. In support of this, at page 5 of its Rule 56(f) Request, 716 LLC cites to *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 758 (2008), as follows:

The [Alaska Supreme] 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.

This appears to be deliberately misleading because it suggests the Alaska Supreme Court set a briefing schedule twenty days after the close of discovery. No such extension was granted by the trial court or approved by the Alaska Supreme Court. In fact, it was only the proposed order that set such a schedule and the Alaska Supreme Court was discussing

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the requirement that a request under Civil Rule 56(f) be unambiguous. There is simply no reason in this case for the 10 month extension requested by 716 LLC to produce evidence to oppose the Motion for Summary Judgment.<sup>3</sup>

Delay in considering the Motion for Partial Summary Judgment will almost certainly severely prejudice the State of Alaska if this Court determines that the LIO Lease is illegal for violation of AS 36.30.083(a), because 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 to the Supporting Affidavit, 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 at this point 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, the amount allowed by AS 36.30.083(a), is around \$104,000 per month. Thus, the allowable rent under AS 36.30.083(a) will likely not even cover the debt service on the building.<sup>4</sup>

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<sup>3</sup> As 716 LLC acknowledges, one of the other requirements for a Rule 56(f) extension of time to produce evidence to oppose a motion for summary judgment is the requestor not be dilatory in conducting discovery. 716 LLC's request for a ten month extension essentially seeks permission to be dilatory. This is an additional reason for denying its Rule 56(f) Request. Moreover, through its June 23, 2015, Motion to Stay Discovery it is seeking to be prevented from conducting discovery, beyond the 45 day stay of discovery granted by this Court on June 17, 2015. In other words, 716 LLC wants it both ways. It is saying it needs discovery to produce facts and at the same time is seeking a stay of discovery.

<sup>4</sup> 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.

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.<sup>5</sup> 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 LIO Lease.<sup>6</sup> Every month that goes by without a determination that the LIO Lease is illegal under AS 36.30.083(a) is extremely prejudicial.

In *Miller v. Treadwell*, 245 P.3d 867, 876 (Alaska 2010), the Supreme Court held:

[T]hough we have interpreted Civil Rule 56(f) liberally to allow a litigant a meaningful opportunity to obtain evidence to present a case, pure speculation cannot support a fishing expedition for evidence to oppose summary judgment in an election contest.

(footnote omitted). It is respectfully suggested that here, 716 has not even presented pure speculation to support a fishing expedition for evidence to oppose summary judgment. It simply wants to delay the day of reckoning. It is also respectfully suggested that the likely prejudice to the State from 716 LLC's probable inability to pay rent back that was paid to it under the illegal LIO Lease is a compelling reason not to allow a Rule 56(f) extension to allow a speculative fishing expedition. It isn't in the same category as an election dispute, but it is respectfully suggested, it is a compelling reason.

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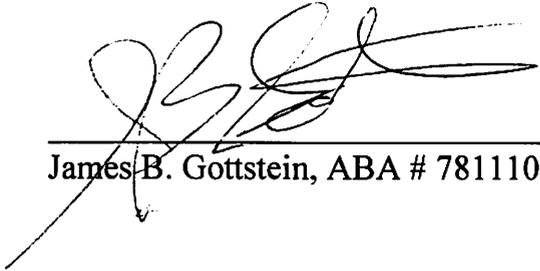
<sup>5</sup> Under AS 10.50.265 limited liability company members are not liable for the debts of the limited liability company solely by reason of being a member.

<sup>6</sup> Piercing the limited liability shield is a difficult, uncertain, endeavor and there is no reason to exacerbate the problem by allowing 716 LLC to continue to receive illegal rent as it is attempting to do without adequate protection of the State. *See*, Exhibit A, page 2.

**D. Conclusion**

For the foregoing reasons, the defendant 716 West Fourth Avenue LLC's Request for a Civil Rule 56(f) extension of time to respond to Plaintiff's Motion for Partial Summary Judgment (Not Extension) should be **DENIED** or, the current discovery stay terminated and 776 LLC allowed 45 days from the original due date of June 29, 2015.

Dated July 2, 2015.



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James B. Gottstein, ABA # 7811100

**CERTIFICATE OF SERVICE**

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

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Eva R. Gardner  
Ashburn & Mason, PC  
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Anchorage, AK 99501

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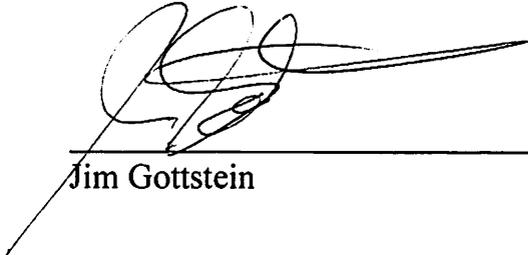
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Dated July 2, 2015.



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*Opposition to 716 LLC  
Rule 56(f) Request*

## James B. Gottstein

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**From:** Jeffrey W. Robinson <jeffrey@anchorlaw.com>  
**Sent:** Friday, June 26, 2015 11:57 AM  
**To:** James B. Gottstein; Eva R. Gardner  
**Cc:** Donald W. McClintock  
**Subject:** RE: Blanket Extension Request

Thanks, Jim. I simply asked if you would agree to extend me the courtesy of replying to any oppositions or motions you file until a week after I return. I am not going to hash out in any way what you claim to be "undisputed facts." I am not going to reply to the questions you posed at the end of your message. You are entitled to oppose any motions we have filed or file whatever you deem to be in your best interest to file to protect your interests. If you do not agree to my request, please note that Eva Gardner from my firm will be covering the case for me in my absence. She is copied here. Please copy both of us on future correspondence. I hope you have a good weekend, and that your father's health has improved.

JWR

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**From:** James B. Gottstein [<mailto:james.b.gottstein@gottsteinlaw.com>]  
**Sent:** Friday, June 26, 2015 11:48 AM  
**To:** Jeffrey W. Robinson  
**Cc:** [james.b.gottstein@gottsteinlaw.com](mailto:james.b.gottstein@gottsteinlaw.com); Donald W. McClintock  
**Subject:** Blanket Extension Request

Hi Jeff,

Yesterday, you wrote, "I am paternity leave from 6/30-7/15 and would appreciate the opportunity to reply to any oppositions, or oppose any motions, until at least a week or so after my return. Is this agreeable?"

Normally, this wouldn't be a problem and in the final analysis I won't oppose allowing you until July 22nd for any responsive pleadings so long as you include this e-mail, but your client gains an extreme financial benefit from delay and has been doing everything possible to achieve such delay. Its Rule 56(f) Request to not even be required to present opposing evidence to Alaska Building's Motion for Partial Summary Judgment (Not Extension) for ten months dramatically illustrates this. Especially since your client should have any such evidence at hand. The Motion for Partial Summary Judgment is purely a legal question based on what I believe are the following undisputed facts:

The New LIO Lease provides for:

1. 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,
2. demolition of the adjacent old Empress Theatre, located at 712 West 4th Avenue, occupied by the Anchor Pub at that time,
3. moving the existing Anchorage Legislative Information Office prior to the demolition of the old Legislative Information Office Building, and
4. construction of a new office building for lease as the new Anchorage Legislative Information Office.

Do you dispute any of these facts? If so, why can't you produce such evidence? Are there any other facts that you think are relevant? If so, what? And why can't you produce those? In other words, how is discovery going to have any impact on the Motion for Partial for Summary Judgment other than to allow your client to continue to collect rent from the illegal lease that will then likely not be recoverable.

So, I have some questions for you.

1. Will 716 West Fourth Avenue LLC agree to sequester all rent not needed for debt service and direct operating costs, including not paying any money to any of its members, directly or indirectly, and recover any such money previously paid until Count One is resolved?
2. Will 716 West Fourth Avenue LLC post a bond for repayment of any rent that the Court holds should be repaid?
3. If not, will 716 West Fourth Avenue LLC provide me with its accounting data to date and on a monthly basis notwithstanding the stay of discovery as to Count One?

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