

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 Civil

**REPLY TO ABI'S OPPOSITION TO 716 WEST
FOURTH AVENUE, LLC'S MOTION TO DISMISS COUNT I**

716 West Fourth Avenue, LLC ("716") files this reply to Plaintiff's Opposition to 716's Motion to Dismiss Count I. As explained in 716's Motion to Dismiss and reiterated below, Plaintiff ("ABI") has no interest-injury standing because it has not been harmed by the lease at issue. Nor does ABI have citizen-taxpayer standing, as it is not the appropriate plaintiff to litigate the legality of the lease.

I. Plaintiff Does not have Interest-Injury Standing for Count I.

ABI argues its standing to sue under Count I arises from (1) its ability to sue for Count II related construction claims, and (2) ABI's "separate interest in its claim for 10% of any savings arising from a declaration that the LIO Lease is illegal under AS

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36.30.083(a).”¹ Neither claim has any merit.

As the Supreme Court of Alaska held in *Keller v. French*, a plaintiff lacks interest-injury standing when it alleges no plausible injury to its own interests.² In order to have standing, a Plaintiff must have “an interest which is adversely affected by the complained-of conduct.”³ ABI has thus far made generic arguments about “obvious corruption,”⁴ but has stated absolutely no plausible injury to *its own* interests by virtue of the lease agreement between 716 and the Agency.

First, the exhibit ABI attached to its opposition, an email (including attachments) dated January 23, 2015, evidences that ABI believes it was adversely affected not by the lease but rather by the “demolition and reconstruction project.”⁵ ABI complains of “substantial damage” including structural degradation to its building “as a result of [the demolition and reconstruction] project.”⁶ ABI cites an engineer who estimated that the physical damage to the Alaska building was approximately \$250,000.⁷ ABI’s exhibit also includes a summary of the alleged damage to the Alaska Building during the “Demolition and Reconstruction” project, as well as pictures demonstrating the alleged

¹ See Plaintiff’s Opposition to 716 LLC’s Motion to Dismiss Count 1 at 2.

² 205 P.3d 299, 305 (Alaska 2009).

³ *Id.* at 304 (quoting *Alaska for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 915 (Alaska 2000)).

⁴ See Plaintiff’s Opposition to 716 LLC’s Motion to Dismiss Count 1 at 5.

⁵ See Plaintiff’s Opposition to 716 LLC’s Motion to Dismiss Count 1 Exhibit 1; 3-25.

⁶ *Id.*

⁷ *Id.*

damage.⁸

Any alleged damage to ABI's building would have been caused by the actual construction process; not from the *lease* between 716 and the Agency. Any argument advanced by ABI that the lease itself caused the alleged damage is nonsensical. Yet, ABI asks this court to bootstrap its ability to sue on construction related negligence claims in Count II into a cause of action to sue regarding the propriety of the lease in Count I. This is not allowed under Alaska law, as explained below.

Alaska uses the substantial factor test to determine causation in negligence actions.⁹ The test has been described as follows:

[T]he elements of proximate cause: [n]egligent conduct may be found to be the 'legal cause' of harm if the negligent act 'was more likely than not a substantial factor in bringing about [the] injury'. . . . Normally, in order to satisfy the substantial factor test it must be shown *both* that the accident would not have happened 'but for' the defendant's negligence and that the negligent act was so important in bringing about the injury that reasonable men would regard it as a cause and attach responsibility to it.¹⁰

There is absolutely no causal link between the lease extension and the alleged negligent conduct in the Count II construction claims. Once again, ABI has neglected to articulate any recognizable harm from the alleged illegality of the lease. ABI's right to sue under Count II, where it has arguably alleged an

⁸ *Id.* at 3-25.

⁹ *Osborne v. Russell*, 669 P.2d 550, 555 (Alaska 1983).

¹⁰ *Gonzales v. Krueger*, 799 P.2d 1318, 1320 (Alaska 1990)(citations omitted); *see also* Alaska Civil Pattern Jury Instruction 3.07 (comments section).

“identifiable trifle” with respect to the construction claim, does **not** entitle it to sue on another count under which it fails to state an actual injury.

ABI’s request for a windfall, which it describes as “10% of any savings” arising from the court’s declaration that the lease is “illegal,” is also not “a sufficient interest” to confer standing.¹¹ Standing is a “rule of judicial self-restraint”, and fundamentally requires adversity.¹² Count I is an undisguised attempt by ABI to engage this court in the judicial creation of a private whistle blower action with the goal of obtaining a large damages award. ABI has never alleged that it should be compensated for any alleged injury to *its interests* stemming from the lease, because there are no identifiable injuries to its interests. In the absence of an actual injury caused by the alleged illegality of the lease, Plaintiff does not have interest-injury standing to litigate Count I.

II. ABI does not have Citizen-Taxpayer Standing to litigate Count I.

ABI incorrectly asserts that 716 has conceded that this case presents a matter of public significance.¹³ In *Trustees for Alaska v. State*, the Alaska Supreme Court held that the case was one of public significance in that if the plaintiffs prevailed, the State would have to change its entire method of making state land available for mining.¹⁴ The plaintiffs, a coalition of environmental, Native, and fishing groups challenged the

¹¹ See Plaintiff’s Opposition to 716 LLC’s Motion to Dismiss Count 1 at 2.

¹² *Trustees for Alaska v. State*, 736 P.2d 324, 327 (Alaska 1987)(internal quotations omitted).

¹³ See Plaintiff’s Opposition to 716 LLC’s Motion to Dismiss Count 1.

¹⁴ *Trustees for Alaska v. State*, 736 P.2d 324 at 329.

State's then-existing mineral leasing system, which potentially affected approximately 50,000 existing mining claims.¹⁵ Because the State was at risk of forfeiting extensive areas of state land to the federal government, it conceded public significance.¹⁶

Contrary to the plaintiffs in *Trustees*, here ABI has argued that the matter is of public significance because "corruption" motivated the execution of the lease:

That, as a result of corruption, the LIO Lease violates AS 36.30.083(a)'s requirements . . . addressing the corruption is a matter of public significance. The culture of corruption in state politics, represented by the participation in the corruption and acquiescence of those who should not have allowed it, is a matter of great public significance.¹⁷

ABI's inability to specify how 716 engaged in the unspecified acts of "corruption" it alleges were committed during the procurement process is fatal to its case against 716. ABI has failed to identify what it means by "corruption" and to specifically assert how 716 is in anyway involved in the Legislative Council's decisions to authorize the lease extension under AS 36.30.083. ABI has never suggested that 716 usurped the Legislature's authority to negotiate lease extensions, interfered with the lease process, or otherwise acted inappropriately in any way, shape or form. Instead, ABI's gripe is not against 716, the private landlord of the Legislative Information Office, but rather against unnamed "state officials" it believes are "ignoring the corruption."¹⁸ These accusations do not provide the Court with sufficient subject matter jurisdiction over

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ See Plaintiff's Opposition to 716 LLC's Motion to Dismiss Count 1 at 5.

ABI's claim.

Irrespective of whether the case is of public significance, ABI has failed to show itself to be an appropriate plaintiff to file suit, as required to establish citizen-taxpayer standing.¹⁹ ABI has not contended that an actual disappointed hypothetical bidder or any other potential plaintiff would be somehow limited in their ability to sue regarding the lease, but rather that "no other suit has been filed by anyone else."²⁰ In *Keller v. French*, the Alaska Supreme Court rejected this exact argument: "[t]hat 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."²¹

The *Keller* Court compared other potential parties' claims with those of the actual Keller plaintiffs in order to establish "how indirectly, if at all" the investigation in question affected the Keller plaintiffs.²² There, the plaintiffs filed suit under the fair and just treatment clause in an action to enforce the constitution's protection.²³ The fair and just treatment clause of the state constitution was written to avoid certain excesses of abusive legislative and executive investigations, including "vilification, character assassination, and an intimation of guilt by association."²⁴ The *Keller* Court identified possible appropriate plaintiffs, namely people who would be harmed by an investigation

¹⁹ *Keller v. French*, 205 P.3d 299, 303 (Alaska 2009).

²⁰ See Plaintiff's Opposition to 716 LLC's Motion to Dismiss Count 1 at 5.

²¹ *Keller v. French*, 205 P.3d at 303.

²² *Id.* at 303-304.

²³ *Id.* at 304.

²⁴ *Id.*

that was not “fair and just.” The Court then opined, “[b]ut there is no indication the Keller plaintiffs might personally be exposed to any such abuses of legislative power; they do not claim that they were potential witnesses or investigative targets, or that the investigation would somehow implicate them in Monegan's dismissal.”²⁵ Based on its analysis, the Court rejected the plaintiffs’ claim of citizen-taxpayer standing.

Like the *Keller* plaintiffs, ABI seeks to have the Court “confer citizen-taxpayer standing on an inappropriate plaintiff.”²⁶ Despite being given numerous opportunities to identify how *it* was affected by the Agency’s determination to extend its lease under AS 36.30.083, ABI has failed to do so. ABI has never indicated, because it would be untruthful for it to do so, that ABI would have competitively bid upon the lease had the Agency decided to open up the lease for competitive bidding. Nor has ABI identified what “obvious corruption” it perceives, how the procurement process affects its own interests, or a compelling rationale supporting why ABI is an appropriate plaintiff to bring suit on Claim I. ABI’s invitation to the Attorney General “or anyone else for that matter” to bring suit in exchange for dismissing its own claim does not cure ABI’s inappropriateness as a plaintiff. As repeatedly pointed out by 716, neither the proximity of the Anchorage Building to the LIO or ABI’s decision to bring forth unrelated construction claims (Count II) suffices to afford citizen-taxpayer status as to Count I.

²⁵ *Keller v. French*, 205 P.3d 299, 304 (Alaska 2009).

²⁶ *Id.* at 303.

III. Conclusion.

Count I should be dismissed in its entirety as ABI has failed to establish either interest-injury or citizen-taxpayer standing. Moreover, as explained *supra*, 716 had no involvement in the Agency's internal procurement procedure process and continues to remain wholly uninvolved with matters relating to AS 36.30.083(a). 716 therefore respectfully asks this Court dismiss Count I and vacate oral argument on this matter, rather than allow ABI yet another opportunity to repeat the same arguments over and over again.

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DATED: _____

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By: _____

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REPLY TO OPPOSITION OF 716'S MOTION TO STAY DISCOVERY OF COUNT I
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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 15th day of July 2015, on:

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