

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, and
LEGISLATIVE AFFAIRS AGENCY

Defendants.

COPY
Original Received

NOV 10 2015

Clerk of the Trial Courts

Case No. 3AN-15-05969CI

OPPOSITION TO MOTION FOR PROTECTIVE ORDER

Plaintiff Alaska Building, Inc., opposes the Motion for Protective Order filed by defendant 716 West Fourth Avenue LLC (716 LLC).

A. The Motion for Protective Order is Defective

Civil Rule 26(c) requires that a motion for a protective order be "accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." 716 LLC did not comply with this requirement in spite of Alaska Building, Inc., inviting it to do so. In fact, on September 24, 2015, counsel wrote to counsel for 716 LLC with respect to 716 LLC withholding material on the ground it was confidential or proprietary that, "The proper procedure is to first try to negotiate a protective order under Civil Rule 26(c), and failing that, to move for an appropriate protective order." Exhibit 1, page 1. 716 LLC, declined this invitation to negotiate a protective order and never conferred with counsel for Alaska

Building, Inc., about a protective order. 716 LLC's Motion for Protective Order thus does not include the required accompanying certification and by all rights should be denied on that basis.

However, Alaska Building, Inc., believes, as it stated at footnote 4 of its Memorandum in Support of Motion to Compel Responses to Plaintiff's First Requests for Production to 716 West Fourth Avenue LLC (Motion to Compel) that "a protective order is probably appropriate with respect to personal financial information." In addition, Alaska Building, Inc., addresses the merits so the parties can just move on and discovery proceed without further delays by 716 LLC. A proposed discovery order is filed contemporaneously herewith that protects personal financial information and allows 716 LLC the opportunity to make the required particularized showing of good cause that is required for a protective order.

B. 716 LLC's Complaint About Public Dissemination Is Misplaced

First, though, Alaska Building addresses the erroneous charge that Alaska Building, Inc., acted improperly to make discovery publicly available since the Motion for Protective Order was explicitly prompted by the public dissemination of material provided by 716 LLC in discovery. . 716 LLC asserts it is improper to publicly disseminate discovery materials, but the Motion for Protective Order is devoid of any authority other than the inapposite case of *McCormick v. Chippeway, Inc.*, 330 P.3d 345 (Alaska 2014). However, it is clear that absent a valid protective order, parties to litigation have a constitutionally protected right to disseminate materials obtained during discovery as they see fit. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 780 (1st Cir. 1988); *Oklahoma Hosp. Ass'n v. Opposition to Motion for Protective Order*

Oklahoma Pub. Co., 748 F.2d 1421, 1424 (10th Cir.1984), *cert. denied*, 473 U.S. 905, 105 S.Ct. 3528 (1985). *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (3rd Cir. 1994), similarly held that absent a protective order, parties to a law suit may disseminate materials obtained during discovery as they see fit. In *Estate of Frankl v. Goodyear Tire and Rubber Co.*, 853 A.2d 880, n5 (N.J. 2004), the New Jersey Supreme Court noted that absent a protective order, parties may voluntarily disclose discovery documents.

Alaska Building, Inc., did not abuse the discovery process; 716 LLC simply did not take the well-established step of seeking a protective order to prevent disclosure, despite being invited to do so.

C. 716 Has Made No Showing of Good Cause

Under Civil Rule 26(c), the moving party must show good cause for a protective order. 716 LLC has made no showing at all. Counsel did not find any Alaska Cases interpreting Civil Rule 26(c)'s good cause requirement, so it will cite cases interpreting the similar Federal Rule.

716 LLC is requesting what is known as a "blanket" protective order, applying to all discovery. *San Jose Mercury News, Inc. v. U.S. Dist. Court, District of Northern California*, 187 F.3d 1096, 1103 (9th Cir. 1999) discusses the inherently infirm nature of such a protective order as follows:

It is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public. Rule 26(c) authorizes a district court to override this presumption where "good cause" is shown.

In the instant case, the district court entered a blanket stipulated protective order pursuant to Rule 26(c). Such blanket orders are inherently subject to challenge

and modification, as the party resisting disclosure generally has not made a particularized showing of good cause with respect to any individual document.

(Citations omitted.)

San Jose Mercury mentions the requirement that there be a particularized showing of good cause for protection of each document. This was explicitly stated a few years later in *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir 2003):

Any such [Rule 26(c) protective] order, however, requires that the court's determination "identify and discuss the factors it considered in its 'good cause' examination to allow appellate review of the exercise of its discretion." *Phillips v. Gen. Motors*, 307 F.3d 1206, 1212 (9th Cir.2002).

A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted. *Id.* at 1210-11 (citing *San Jose Mercury News*, 187 F.3d at 1102); see also *Beckman*, 966 F.2d at 476 ("[B]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.") (quoting *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir.1986) (internal quotation marks omitted)); *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653 (D.Md.1987) (requiring party requesting a protective order to provide "specific demonstrations of fact, supported where possible by affidavits and concrete examples, rather than broad, conclusory allegations of potential harm").

To the same effect is *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786-787 (3rd Cir. 1994):

"Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity." *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir.1984). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," do not support a good cause showing. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir.1986), *cert. denied*, 484 U.S. 976, 108 S.Ct. 487, 98 L.Ed.2d 485 (1987). The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order. *Id.* at 1122.

(footnote omitted.)

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Civil Rule 26(c) allows protective orders to be issued when good cause has been shown to protect against embarrassment, but this is a high bar:

[B]ecause release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious. As embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground. Cf. *Joy v. North*, supra (a protective order will not issue upon the broad allegation that disclosure will result in injury to reputation); to succeed, a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.

Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3rd Cir. 1986).

The extent to which there is a First Amendment component restricting the scope of protective orders is discussed in *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 6-7 (1st Cir. 1986).

This is particularly germane here because of the intense public interest in this case.

Filed contemporaneously herewith is a proposed discovery order which Alaska Building, Inc., believes adequately protects confidential material and ensures that protection is afforded only to material so entitled

D. Alaska Building, Inc., Should Not Bear the Cost of 716 LLC's Redactions

716 LLC alternatively requests that Alaska Building, Inc., be forced to bear the costs of redacting documents. This is not proper. If 716 LLC wants to protect certain information through redactions it should bear its own costs in doing so. Alaska Building, Inc., is not waiving the right to assert such redactions are improper.

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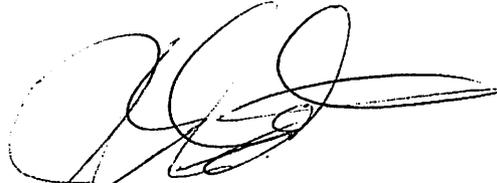
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E. Conclusion

For the foregoing reasons, 716 LLC's Motion for Protective Order should be **DENIED** without prejudice to seek protection of documents pursuant to the proposed discovery order filed contemporaneously herewith.

Dated November 10, 2015.

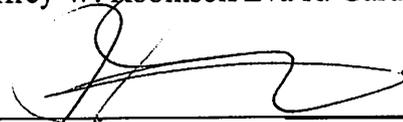


James B. Gottstein, ABA # 7811100
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he mailed a copy hereof and the accompanying proposed discovery order to Kevin M. Cuddy and Jeffrey W. Robinson/Eva R. Gardner.

Dated November 10, 2015.



Jim Gottstein

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September 24, 2015

Jeffrey L. Robinson
Ashburn & Mason
1227 W. 9th Ave., Ste. 200
Anchorage, AK 99501

Re: 716 LLC's Responses to Alaska Building, Inc's First
Requests for Production; *Alaska Building, Inc., v. 716 West
Fourth Avenue LLC, et al.*, Anchorage Superior Court Case
No. 3AN-15-5969CI

Dear Mr. Robinson:

This is an attempt under Civil Rules 34(b) and 37(d) to resolve without court action your failure to provide certain requested documents under Civil Rule 34 in response to Plaintiff's First Requests for Production to 716 West Fourth Avenue LLC (Production Requests).

You have objected to producing documents on the following grounds:

1. They are confidential and/or proprietary.
2. They are protected by the attorney client privilege, work product doctrine.
3. They are not relevant and not reasonably calculated to lead to the discovery of admissible evidence.

First, that documents are confidential and/or proprietary is no justification for withholding them. *Lockwood v. Geico*, 323 P.3d 691, 699-700 (Alaska 2014). The proper procedure is to first try to negotiate a protective order under Civil Rule 26(c), and failing that, to move for an appropriate protective order. *Id.*

Second, Civil Rule 26(b)(5), expressly requires you to provide sufficient information with respect to documents withheld on privilege grounds to enable the plaintiff to challenge any claims of privilege:¹

(5) *Claims of Privilege or Protection of Trial Preparation Materials.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Third, your relevance objection is misplaced. As the Alaska Supreme Court reiterated in *Lockwood*, 323 P.3d at 699, the "relevancy standard is to be broadly construed at the discovery stage." In fact, in light of my previously informing you of the relevance of 716 LLC's financial information, it is disingenuous at best to claim lack of relevance. I have spoken with you in person about its relevance as well as written you. See, attached e-mails. In a nutshell, it is

¹ See, *Lee v. State*, 141 P.3d. 232, n1 of Appendix, adopted by reference, 141 P.3d. 351.

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probable to highly probable that at least Mr. Pfeffer is sucking out all funds in excess of that needed to operate the building, which will leave 716 LLC even more unable to pay any award. As you know, my client believes excess payment to 716 LLC is accumulating at over \$175,000 per month. You can expect a motion for a preliminary injunction to sequester funds along the lines of the attached e-mails.

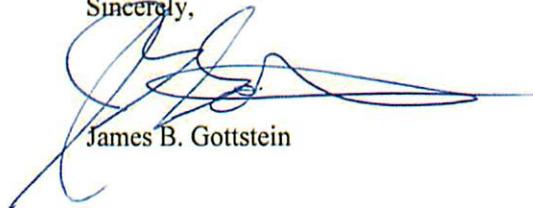
The relevance of the Operating Agreement also goes to the ability to pay back overpayments as well as whether 716 LLC is essentially a completely different entity other than having the same name. Publicly available documents show that Mr. Pfeffer is now the Manager, apparently in sole control. This is relevant to whether the contract between the Legislative Affairs Agency and 716 LLC is an extension. It is also possible Mr. Pfeffer has agreed to indemnify Mr. Acree for any costs associated with the agreement being illegal under AS 36.30.083(a).

You also objected to producing documents related to the LIO Lease complying with the requirement in AS 36.30.083(a) that it extend a real property lease (Request for Production No. 6) on the grounds that these documents "would be in the possession of the Legislative Affairs Agency," and related assertions. If your client has no such documents in its possession, it should just respond thusly. If, it does have such documents in its possession, it is required to produce them.

You also objected to providing documents relating to payments by the Legislative Affairs Agency for what is called renovations (Request for Production No. 8), on the grounds that (a) it is duplicative of requests made to Pfeffer Development LLC (Pfeffer Development), and (b) they relate to business activities of third parties not named in Count One. Neither of these objections are well taken, even leaving aside that Pfeffer Development is no longer in the case and has refused to respond to the requests for production served on it for that reason.

It is my hope that your client will comply with its discovery obligations as outlined herein without court action. I will also call to confer about this in an attempt to resolve this.

Sincerely,



James B. Gottstein

cc: *via* e-mail

Enc.

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DISCOVERY ORDER

Upon the motion by defendant 716 West Fourth Avenue for a protective order pursuant to Alaska Rule of Civil Procedure 26(c), and in consideration of the opposition of plaintiff Alaska Building, Inc., it is hereby ORDERED that the motion is denied, except as follows to expedite the flow of discovery material, facilitate the prompt resolution over confidentiality, adequately protect confidential material, and ensure that protection is afforded only to material so entitled:

1. This Order applies to all products of discovery in this matter subsequent to the date of this Order, but does not apply to documents or information gained by means other than the discovery process in this matter, including documents that may have also been produced through discovery in this matter.

2. Except as otherwise ordered by the Court, personal financial information shall be classified as confidential.

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3. Except as otherwise ordered by the Court Social Security Numbers shall be redacted.
4. Except as otherwise ordered by the Court,
 - (a) documents containing bank, credit union, or other financial institution accounts may be redacted except for the last three digits of the account number and the name of the financial institution, and
 - (b) credit card, bank card, or debit card account may be redacted except for the last four digits of the account number and the name of the issuing institution
5. A producing party wishing to redact documents in any other manner or keep any documents confidential must produce the documents when due and properly seek a protective order under Civil Rule 26(c).
6. Any documents withheld or redacted on the basis of a privilege shall describe such documents as follows:
 - (a) The date of the document or other item;
 - (b) The author or addressor of the document or other item;
 - (c) The recipient or addressee of the document or other item;
 - (d) The number of pages of the document;
 - (e) The general subject matter of the document or other item;
 - (f) Each person who sent, received and obtained copies of the document or other item;
 - (g) A general description of the document or other item; and
 - (h) The basis of the privilege asserted.
7. With the exception of documents or information acquired other than through

discovery in this matter, produced documents for which a motion for protective order has

been filed shall not be further disseminated by any receiving party pending determination of the motion for protective order.

Dated _____, 2015.

PATRICK J. McKAY,
SUPERIOR COURT JUDGE