

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.

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Original Received

JAN 04 2016

Clerk of the Trial Courts

Case No. 3AN-15-05969CI

REPLY Re:
**CONDITIONAL CIVIL RULE 56(f) REQUEST FOR ADDITIONAL
TIME TO CONDUCT DISCOVERY REGARDING LEGISLATIVE
AFFAIRS MOTION FOR SUMMARY JUDGMENT UNDER THE
LACHES DOCTRINE**

In its Opposition to Plaintiff's Conditional Civil Rule 56(f) Request (Opposition), 716 West Fourth Avenue LLC (716 LLC) asserts Alaska Building, Inc., should not be allowed to raise the unclean hands defense because (1) it was not included in Alaska Building, Inc.'s opposition to the Defendant Legislative Affairs Agency's Motion for Summary Judgment Under the Laches Doctrine (Laches Motion), (2) the unclean hands defense cannot be used by a plaintiff, and (3) Alaska Building, Inc., has been dilatory in conducting discovery. None of these arguments are well taken.

1. Timeliness

This situation is analogous to *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751 (Alaska 2008) in which the Supreme Court reversed and vacated summary judgment

because the superior court did not grant a Civil Rule 56(f) request. In that case, Mitchell filed a supplemental opposition in which he requested a Civil Rule 56(f) continuance. Here, Alaska Building, Inc., filed a conditional Civil Rule 56(f) request following the end of the normal briefing cycle, but a week before oral argument.¹ The reason for filing a conditional Civil Rule 56(f) request is Alaska Building, Inc., believes the Laches Motion should be denied upon the current record, either outright or because there are factual disputes that must be determined at an evidentiary hearing.

Alaska Building, Inc., believes the laches defense should be denied outright because, as a matter of law, (1) the Legislative Affairs Agency has admitted it will save over \$22 million by moving into the Atwood Building, and (2) 716 LLC is precluded from asserting that it will lose money by invalidating the lease because that argument is directly contrary to its central substantive contention in this case that the lease is more than 10% below market rent.² In addition, as the Court pointed out at oral argument on the Laches Motion, the Legislative Affairs Agency has the right to terminate the lease for lack of funds or appropriation. Thus, as a matter of law, neither the Legislative Affairs Agency nor 716 LLC suffer any undue prejudice by the delay.

¹ While the court was surprised at the oral argument about the laches argument, opposing counsel were served an extra copy *via* e-mail a week before the argument to give them the maximum amount of time to prepare for it. Still, counsel acknowledges it would have been better to have raised the issue earlier. In such circumstances, the opposing parties can be given additional time to respond, but the unclean hands defense should not be disallowed on timeliness grounds.

² As counsel stated at oral argument, the assertion by 716 LLC that the lease is more than 10% below market rent is not true, but 716 LLC is precluded from making this argument inconsistent with its central substantive position in this action.

To the extent the Court does not agree the record is currently sufficient to deny the Laches Motion outright, the factual disputes over whether there is any undue prejudice to either party by the delay must be resolved at an evidentiary hearing.³ Unlike *City and Borough of Juneau v. Breck*, 706 P.2d 313 (Alaska 1985), here, Alaska Building, Inc., has presented evidence challenging the prejudice proposed by the Legislative Affairs Agency and 716 LLC. Granting summary judgment in light of these factual disputes would be error. The Court can deny the Laches Motion without foreclosing the laches argument pending an evidentiary hearing on undue prejudice if it does not find that the Laches Motion should be denied as a matter of law on the current record.

However, if the Court does not deny the Laches Motion either outright or because of the factual disputes, Alaska Building, Inc., should be allowed to conduct further discovery on unclean hands under Civil Rule 56(f) to oppose the Laches Motion.

2. The Availability of the Unclean Hands Defense

716 LLC also makes the erroneous argument that only defendants can assert unclean hands, i.e., that it is unavailable to a plaintiff to defeat a laches argument. This is untrue. As the 9th Circuit recently held:

The doctrine [of unclean hands] bars relief to a plaintiff who has violated conscience, good faith or other equitable principles in his prior conduct, as well as to a plaintiff who has dirtied his hands in acquiring the right presently asserted. *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 173 (9th Cir.1989) (citations omitted). The doctrine of unclean hands also can bar a defendant from asserting an equitable defense. See *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 841–42 (9th Cir.2002) (noting that a

³ Alaska Building, Inc., also disputes that the delay was unreasonable, but does not believe there is any genuine factual dispute on this issue.

defendant with unclean hands is barred from asserting the equitable defense of laches).

Seller Agency Council, Inc. v. Kennedy Center for Real Estate, 621 F.3d 981, 986 (9th Cir 2010), emphasis added.

Some courts hold that the misconduct has to have caused the delay, while others do not. In addition to it not being a requirement in the 9th Circuit as explicated in *Seller*, the Nebraska Supreme Court has held:

Laches is an equitable defense, and in order to benefit from the operation of laches, a party must come to the court with clean hands. Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.

Olsen v. Olsen, 657 N.W.2d 1, 10 (Neb 2003). It does not appear the Alaska Supreme Court has yet had occasion to address this question. If the wrongdoing in an unclean hands defense to a laches motion is only available in Alaska as to the issue of delay, here, the threat of damage to the Alaska Building by 716 LLC qualifies.

3. Discovery

Finally, 716 LLC asserts Alaska Building, Inc., has been dilatory in conducting discovery. In doing so, 716 LLC turns its refusal to provide adequate responses to Alaska Building, Inc.'s First Requests for Production into Alaska Building, Inc., being dilatory.⁴

Alaska Building, Inc., served requests for production on 716 LLC and the Legislative Affairs Agency on August 3, 2015, the day the stay of discovery expired. Since then,

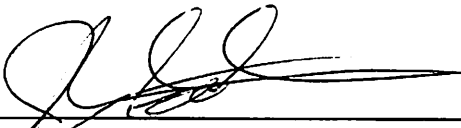
⁴ That Alaska Building, Inc., has chosen not to conduct depositions prior to obtaining adequate responses does not make it dilatory.

Alaska Building, Inc., has been taking steps to obtain proper compliance, including filing a motion to compel on October 6, 2015. 716 LLC has withheld documents on the specious grounds that they are confidential and proprietary.⁵ 716 LLC has withheld documents on the grounds of privilege without complying with Civil Rule 26(b)(5) and redacted others without any reason asserted at all. 716 LLC has failed to produce documents referred to in e-mails and otherwise failed to provide requested documents.

4. Conclusion

For the foregoing reasons, Alaska Building, Inc.'s Conditional Civil Rule 56(f) Request should be granted if the Legislative Affairs Agency's Motion for Summary Judgment Under the Laches Doctrine is not denied on the current record.

Dated January 3, 2016.


James B. Gottstein, ABA # 7811100
Attorney for Plaintiff

CERTIFICATE OF SERVICE

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

Dated January 3, 2016.


Jim Gottstein

⁵ Also pending is a motion for a protective order filed after the Motion to Compel. This is the proper way to handle confidential and proprietary documents, rather than flouting the discovery rules and withholding them.