

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

Alaska Building Inc.,)
)
Plaintiff,)
)
v.)
)
716 West Fourth Avenue LLC, and)
Legislative Affairs Agency,) Case No. 3AN-15-05969CI
)
Defendants.)

**ORDER REGARDING ABI'S QUI TAM AND PUNITIVE DAMAGES REQUEST FOR
RELEIF**

I. Background

On September 9, 2013, the Legislative Affairs Agency (LAA) and the 716 West Fourth Avenue LLC (716) entered into an agreement to renovate and expand the existing Legislative Information Office (LIO Project). At the completion of this project, the LAA once again leased the office space.¹ Construction began in December 2013 and was completed around January 9, 2015.²

The Alaska Building, owned by Alaska Building Inc. (ABI), is a building adjacent to the LIO Project whose president and sole member is James Gottstein. ABI filed a lawsuit on behalf of ABI and the Alaskan taxpayers on March 31, 2015 alleging in relevant part that because the LIO Project did not comply with the requirements under AS 36.30, the project is illegal. Under AS 36.30, leases into which LAA enter are subject to a competitive bidding process and legislative notice. AS 36.30.083 exempts from these bidding and notice requirements lease extensions that will result in a "cost savings of at least 10 percent below the market rental value of the... property." As part of his remedies, ABI requested "[j]udgement in favor of Alaska Building in the amount of

¹ 716's Opp. to Mot. for Prelim. Inj. 1-2.

² *Id.* at 4.

10% of the savings to the Legislative Affairs Agency for invalidation of the LIO Project Lease”³ and “[p]unitive damages against 716 W. Fourth Avenue LLC.”⁴ 716 and the LAA have moved for a ruling of law as to whether ABI may pursue these two requested reliefs.

II. Legal Standard

716 and LAA have requested a “ruling of law precluding ABI’s claims for *qui tam* and punitive damages.”⁵ The practical effect of a ruling in favor of 716 and LAA would be granting them summary judgement on these issues. As such, the summary judgement standard will be utilized here.

Summary judgement is appropriate where “there is no issue as to any material fact and the moving party is entitled to a judgement as a matter of law.”⁶ The non-moving party must “set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant’s evidence and thus demonstrate that a material issues of fact exists.”⁷ Alaska has a lenient summary judgement standard,⁸ but mere allegations are insufficient and the non-moving party “must set forth specific facts showing that there is a genuine issue of material fact.”⁹ The court views “the facts in the light most favorable to the non-moving party and draw[s] all factual inferences in the non-moving party’s favor.”¹⁰

III. Issues Presented

A. *ABI has no legal grounds upon which to request 10% of any savings resulting invalidating the lease.*

³ Second Amended Complaint ¶¶ C.

⁴ *Id.* at ¶ E.

⁵ Title of Defendant’s Motion “716’s Motion for Ruling of Law Precluding ABU’s Claims for Qui Tam and Punitive Damages.”

⁶ Alaska R. Civ. P. 56(c).

⁷ *Christensen v. Alaska Sales and Service, Inc.* 335 P.3d 514, 517 (Alaska 2014).

⁸ *Estate of Milos v. Quality Asphalt Paving, Inc.*, 145 P.3d 533, 537 (Alaska 2006).

⁹ *Kelly v. Municipality of Anchorage*, 270 P. 3d 801, 803 (Alaska 2012) (internal citations omitted).

¹⁰ *Kalenka v. Jadon, Inc.*, 305 P.3d 346, 349 (Alaska 2013).

B. *ABI may not seek punitive damages because declaratory judgment provides no pecuniary relief.*

IV. Analysis

A. *ABI has no legal grounds upon which to request 10% of any savings resulting from invalidating the lease.*

Black's Law Dictionary defines a *qui tam* action as "[a]n action brought *under a statute* that allows a private person to sue for a penalty, part of which the government or some specific public institution will receive."¹¹ This court first notes that ABI is not bringing its lawsuit under a statute that provides a monetary penalty. It therefore finds that ABI is not bringing a *qui tam* case.

ABI argues that it is not in fact bringing a *qui tam* action¹² but that the court should grant an award equaling 10% of the savings "to make meaningful the right of citizen-taxpayers to seek judicial redress of illegal government action."¹³ It argues that the 2003 passage of HB 145 codified as AS 09.60.010(b)-(e) had a chilling effect on citizen-taxpayer suits. ABI urges this court to create a common law incentive for bringing public interest law suits.

HB 145 abolished the Alaska Supreme Court's public-interest exception to Alaska Rule of Civil Procedure 82 concerning attorney's fees.¹⁴ Rule 82 provides discretion for courts to allocate attorney's fees, and in most civil litigation, it acts as a "'loser pays' rule."¹⁵ In *Gilbert v. State*, the Alaska Supreme Court carved out its exception holding that "it is an abuse of discretion [under Civil Rule 82] to award attorney's fees against a losing party who has in good faith raised a question of genuine public interest before the

¹¹ *Qui Tam Action*, Black's Law Dictionary (10th ed.2014) (emphasis added).

¹² Pl.'s Opp. Mot. 6.

¹³ *Id.* at 3.

¹⁴ *State v. Native Village of Nunapitchuk*, 156 P.3d 389, 391-92 (Alaska 2007).

¹⁵ *Id.* at 394.

courts.”¹⁶ HB 145 overruled this judicially created public interest exception and courts are no longer allowed to consider whether a claim is of a public interest nature except in limited constitutional contexts.¹⁷

The Alaska Supreme Court’s public interest exception was grounded in the discretion Rule 82 afforded to courts when allocating attorney’s fees. Here, there is no statutory authority that would allow this court to create such an incentive, and ABI does not provide any legal theory upon which this court could justify creating new law. Rather, ABI’s argument is one of public policy, which is better left to legislature; like HB 145, any incentive to bring a public interest case should go through the proper legislative channels. The court therefore declines ABI’s invitation to create a public interest lawsuit incentive and finds that ABI has no legal grounds on which to request 10% of any lease savings.

B. ABI may not seek punitive damages because declaratory judgment provides no pecuniary relief.

Alaska allows punitive damages when the plaintiff can show “by clear and convincing evidence that the defendant’s conduct[:]

- (1) Was outrageous, including acts done with malice or bad motives; or
- (2) Evidenced reckless indifference to the interest of another person.”¹⁸

716 argues that because ABI is not seeking compensatory damages, punitive damages are unavailable.¹⁹ Thus the first issue is whether punitive damages are even available to ABI.

Compensatory damages are a legal remedy. ABI requests in relevant part that the lease between the LAA and 716 be declared “illegal, null and void.”²⁰ A declaratory

¹⁶ *Id.* (internal citations omitted).

¹⁷ *Id.* at 395.

¹⁸ AAS 09.17.020 (b)(1)-(2).

¹⁹ Def.’s Mot. Ruling of Law 3.

²⁰ Second Amended Compl. ¶1A.

judgement is neither legal nor equitable but is an additional remedy²¹ and does not provide any remedy beyond a declaration of “the rights and legal relations of an interested party seeking the declaration.”²² Though ABI states that “the State should be awarded compensatory damages in the amount of rent illegally received by 716 LLC,”²³ the relief requested does not provide the legal remedy of compensatory damages.²⁴ However, the unavailability of compensatory damages does not necessarily foreclose ABI from receiving punitive damages.

Alaska’s punitive damage statute does not require, per se, that compensatory damages, or any damages, be awarded before punitive damages are allowed.²⁵ In capping punitive damages, the statute provides that a punitive damages award “may not exceed the greater of 1) three times the amount of compensatory damages awarded to the plaintiff in the actions; or 2) the sum of \$500,000.”²⁶ Looking at the first section, logic dictates that if the compensatory damages are zero then the punitive damages must also be zero. But, the two sections are separated by the disjunctive “or” suggesting that compensatory damages are not a prerequisite for punitive damages if the plaintiff has met the other statutory requirements. A cursory review of the Alaska’s tort reform act of 2007 (HB 58) does not provide any insight on whether Alaska’s legislators intended punitive damages to be tied strictly to an award of compensatory damages or if punitive damages could be awarded in the absence of other damages.

Despite the ambiguity of Alaska’s punitive damages statute, the traditional position is that punitive damages are not allowed absent a request for or award of

²¹ *Laverty v. Alaska R.R. Corp.*, 13 P.3d 725, 730 (Alaska 2000).

²² AS 22.10.020(g).

²³ Plt.’s Opposition Mot. 9.

²⁴ Moreover, when a court finds a contract is illegal it often “leave[s] the parties as the court finds them at the time the illegality is discovered, [and does not] restore them to the same position they would have been had the contract never existed.” *Jipac, N.V. v. Silas*, 174 Vt. 57, 61-62 (Vermont 2002). A declaratory judgement that the lease is illegal may therefore not allow for any money to be returned to the LAA.

²⁵ See AS 09.17.020.

²⁶ AS 09.17.020(f)(1)-(2).

compensatory damages.²⁷ The Mississippi Supreme Court succinctly summarizes the justification of this line of thinking:

As a general rule, exemplary or punitive damages are “added damages” and are in addition to the actual or compensatory damages due because of an injury or wrong. The kind of wrongs to which punitive damages are applicable are those which, besides the violation of a right or the actual damages sustained, import insult, fraud, or oppression and not merely injuries but injuries inflicted in the spirit of wanton disregard for the rights of others. In order to warrant the recovery of punitive damages, there must enter into the injury some element of aggression or some coloring of insult, malice or gross negligence, evincing ruthless disregard for the rights of others, so as to take the case out of the ordinary rule.

In other words, punitive damages do not exist in a vacuum, but serve as a way of increasing the punishment in cases involving truly reprehensible behaviors.

716 cites *DeNardo v. GCI Commc'n Corp.*, 983 P.2d 1288, 1292 (Alaska 1999), which states “[a] punitive damages claim cannot stand alone; because we reject DeNardo’s underlying claim, we also necessarily affirm summary judgment on his punitive damages claim.” However, in that case, the court affirmed summary judgement against all DeNardo’s underlying claims leaving *only* a request for punitive damages. This scenario is distinguishable from the present case where compensatory damages are not requested or recoverable but other claims exist besides that for punitive damages.

Alaska courts have awarded punitive damages without compensatory damages. In *Lockhart v. Draper*, 209 P.3d 1025 (Alaska 2009) the Alaska Supreme Court found that:

²⁷ *Groshek v. Trewin*, 784 N.W.2d 163, 175 (Wis. 2010) (Therefore, our holding in *Tucker* forecloses recovery of punitive damages in a case where there is no award of compensatory damages); *Nabours v. Longview Sav. & Loan Ass’n*, 700 S.W.2d 901, 903 (Tx. 1985) (Even in cases where actual damages are *not recoverable*, it is still necessary to allege, prove and secure jury findings on the existence and amount of actual damage sufficient to support an award of punitive damage) (emphasis in original).

punitive damages may be available though actual damages are not an “essential element” of the cause of action if (1) the underlying cause of action states a claim for relief independent of the request for punitive damages, and (2) the plaintiff establishes that defendant's conduct rose to the requisite level of culpability and that plaintiff suffered “substantial damage,” even if the amount of actual damages may be uncertain.²⁸

There, the appellant was appealing an award of punitive damages against him in a fraudulent conveyance action. The Alaska Supreme Court upheld the superior court's conclusion that “it could award punitive damages “in a case where something substitutes for the compensatory damages, i.e., the wrongful conveyance which is righted.” The *Lockhart* court relied on *Haskins v. Sheldon*, 558 P.2d 487 (Alaska 1976) which allowed the return of a wrongfully converted tractor to substitute for damages and upheld the appellee's award of punitive damages because of the malice conduct under which the tractor was seized.

In both cases, the courts found that there was an underlying pecuniary loss that was righted even though damages were not an element of either legal theory under which the cases were brought. In *Haskins* it was the return of the seized tractor and in *Lockhart* it was the corrected wrongful conveyance. These two situations are distinguishable from the present case. Assuming *arguendo* that the contract is found to be “illegal null and void,” this declaratory judgement would not provide a substitute for compensatory damages necessary under the *Lockhart* and *Haskins* reasoning.²⁹ Thus, even though punitive damages may be awarded even when compensatory damages are not sought as long as the two elements identified in *Lockhart* are present,³⁰ a declaratory judgement would not provide a substitute for compensatory damages and thus the first element of *Lockhart* is absent. The court therefore finds that ABI may not

²⁸ *Lockhart v. Draper*, 209 P.3d 1025, 1028 (Alaska 2009).

²⁹ In addition to the *Lockhart* and *Haskins* reasoning, the Alaska Supreme Court has also permitted punitive damages when only nominal damages are awarded. *Barber v. Nat'l Bank of Alaska*, 815 P.2d 857, 864 (Alaska 1991) (holding punitive damages may be awarded in nominal damages).

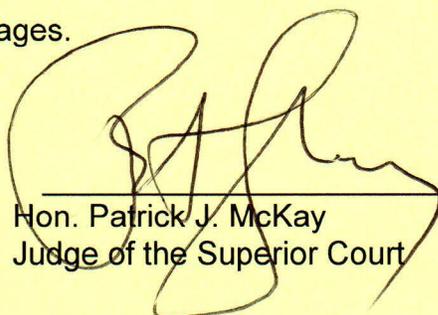
³⁰ “(1) the underlying cause of action states a claim for relief independent of the request for punitive damages, and (2) the plaintiff establishes that defendant's conduct rose to the requisite level of culpability and that plaintiff suffered “substantial damage,” even if the amount of actual damages may be uncertain.” *Lockhart v. Draper*, 209 P.3d at 1028 (Alaska 2009).

pursue punitive damages. Because the court has determined that ABI may not seek punitive damages in the absence of some pecuniary relief, it does not need to address *Lockhart's* second element - malicious or egregious behavior.³¹

V. Conclusion

There is no statutory authority under which ABI may request 10% of any savings stemming from invalidating the lease nor is there statutory authority that would permit the court to create a monetary incentive for bringing public interest law suits. The court therefore finds that ABI is not entitled to request such relief. The court further finds that though punitive damages may be awarded absent compensatory damages, there must at least be an aspect of pecuniary relief, which is absent in the present case, and thus ABI is precluded from requesting punitive damages.

1/13/16
DATE



Hon. Patrick J. McKay
Judge of the Superior Court

I certify that on 1/13/16,
a copy of the above was mailed to each of
the following at their addresses of record: *emailed*
James Robinson
Jeffrey Robinson *Kevin Cuddey*

K. Nixon/Judicial Assistant

³¹ Additional issues regarding whether ABI may seek punitive damages include whether ABI can request punitive damages on behalf of the state and whether the state can collect punitive damages in a public-interest law suit. Because the court has already determined that ABI may not pursue punitive damages, the court will not address these questions at this time.