

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.

FILED in the TRIAL COURTS
State of Alaska Third District
FEB 29 2016
Clerk of the Trial Courts
By _____ Deputy

Case No. 3AN-15-05969CI

**OPPOSITION TO 716'S MOTION FOR PROTECTIVE
ORDER**

Plaintiff Alaska Building, Inc., opposes the Motion for Protective Order filed February 17, 2016, by 716 West Fourth Avenue LLC (716), which is the second motion for what might be characterized as a case management protective order filed by 716 (Second Motion for Protective Order).

**A. The Second Motion for Protective Order Should Be
Denied for Failure to Comply With Civil Rule 26(c)**

As a threshold matter, counsel for 716 did not confer or attempt to confer with counsel for Alaska Building, Inc., to try to resolve the discovery dispute without court action as required by Civil Rule 26(c). As a result, 716's motion lacks the certification required by the rule. Instead, paragraph 2 of the Affidavit of Jeffrey W. Robinson in Support of Motion for Protective Order (Robinson Affidavit) states that "716 has previously attempted to negotiate a confidentiality agreement with [Alaska Building, Inc.]

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governing discovery in this matter without success." This is a disguised way of stating that 716 has not complied with the requirement to confer or attempt to confer before filing its Second Motion for Protective Order. Alaska Building, Inc. respectfully submits that 716's failure to comply with Civil Rule 26(c) is sufficient reason to deny its Second Motion for Protective Order.

**B. The Issues Raised in the Motion Have Already Been
Decided Against 716**

On October 6, 2015, Alaska Building, Inc. filed a Motion to Compel Responses to Plaintiff's First Requests for Production to 716 West Fourth Avenue LLC. On October 29, 2015, 716 filed a previous motion for protective order (First Motion for Protective Order) on substantially similar grounds to its Second Motion for Protective Order.

On January 13, 2016, this Court denied 716's objections to some of Alaska Building, Inc.'s requests for production, sustained others, and required proper logs for documents withheld on grounds of privilege.¹ In denying 716's objections to Request for Production No. 1 for loan related documents, the order states in relevant part:

As discussed above, there is no confidential exemption to discovery; 716 can instead seek a protective order under Rule 26(c) for this information. 716 also claims that these documents are protected by privilege and work-product doctrine. 716 has not provided a privilege log for these documents. 716 must either produce these documents or provide a log as required by Rule 26(b)(5).

Order to Compel at pp 2-3.

By its Discovery Order of January 15, 2016, this Court denied 716's First Motion for Protective Order and also set procedures to be followed in this matter, "to expedite the

¹ See Order Regarding Alaska Building Inc's Motion to Compel (Order to Compel).

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."² The Discovery Order was entered after briefing by both parties, including citation to *Foltz v. State Farm Mut. Auto. Ins. Co.*,³ and *Pansy v. Borough of Stroudsburg*,⁴ by Alaska Building, Inc., holding that protective orders require a particularized showing of good cause with respect to each document for which protection is requested.

Paragraphs 5 & 7 of the Discovery Order implement this particularized showing requirement as follows:

5. A producing party wishing to redact documents . . . or keep any documents confidential must produce the documents when due and properly seek a protective order under Civil Rule 26(c).

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.

By ordering the production of documents while keeping them confidential pending a determination of a motion for protective order, the Discovery Order allows the requesting party and, if necessary, the Court to evaluate what protection, if any, should be accorded specific documents.

The grounds 716 gives for claiming protection in its Second Motion for Protective Order are, "Publication of these sensitive documents would expose 716's finances and

² Order to Compel at p.1.

³ 331 F.3d 1122, 1130 (9th Cir 2003).

⁴ 23 F.3d 772. 786-787 (3rd Cir. 1994)

inner workings to the public, to the detriment of its business relationships and future negotiation power."⁵ The only support for this claimed harm are the conclusory statements in paragraphs 4 and 5 of the Robinson Affidavit that: "The additional production compelled by the Court's January 13, 2016 order is comprised of sensitive business information" and "Dissemination of these documents would have a detrimental effect on 716's business operations."

First, Mr. Robinson is 716's attorney, not an owner or manager of 716. As such, he lacks the competency to make such factual proof. Second, even if Mr. Robinson had the competency to affie to these facts, they are insufficient to support the required particularized showing of good cause for protection of each document. Furthermore, to the extent Mr. Robinson's statements are read to mean that all such documents, if disseminated, would have some detrimental effect on 716's business operations, they are demonstrably false.

As set forth in Exhibit 1 to Alaska Building, Inc.'s February 22, 2016, "Memorandum in Support of Motion to Show Cause Why 716 West Fourth Avenue Should Not Be Held in Contempt," and paragraph 3 of the supporting Affidavit of James B. Gottstein, out of 150 pages of documents produced pursuant to the Order to Compel, 3 pages were an e-mail Alaska Building, Inc., already possessed, 26 pages were of a deed of trust that was recorded, and 116 pages were of the "Lowe Appraisal," which was also already in Alaska Building, Inc.'s possession. This leaves only 5 pages pertaining to

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⁵ Second Motion for Protective Order, pp 7-8.

applications for payment by Criterion General, Inc., which do not seem to be the sort of documents for which a protective order is warranted.

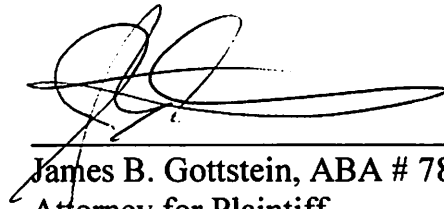
Alaska Building, Inc. respectfully submits that 716 should be required to follow the court-ordered procedures—procedures specified by this Court after 716 was given a full and fair opportunity to be heard.

C. Conclusion

For the foregoing reasons, Alaska Building, Inc. respectfully urges that 716's Second Motion for Protective Order be denied, with the order specifying that contemporaneously with complying with the Order to Compel, 716 may move for a confidentiality order as allowed in the Discovery Order.

A proposed order has been lodged herewith.

Dated February 29, 2016.



James B. Gottstein, ABA # 7811100
Attorney for Plaintiff

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**ORDER DENYING
716 WEST FOURTH AVENUE LLC'S MOTION FOR
PROTECTIVE ORDER**

In consideration of the second Motion for Protective Order filed under Civil Rule 26(c) by defendant 716 West Fourth Avenue's on February 17, 2016, and the opposition of plaintiff Alaska Building, Inc., and in light of 716 West Fourth Avenue LLC's non-compliance with previous discovery orders, it is hereby **ORDERED** that the motion is **DENIED. IT IS FURTHER ORDERED**, that within three days hereof 716 West Fourth Avenue LLC shall fully comply with this Court's January 13, 2016, Order Regarding Alaska Building Inc's Motion to Compel, subject to the provisions of this Court's January 15, 2016, Discovery Order.

Dated _____, 2016.

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Patrick J. McKay, Superior Court Judge