

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

ALASKA BUILDING, INC., an Alaska corporation,)
vs.)
716 WEST FOURTH AVENUE LLC, and)
LEGISLATIVE AFFAIRS AGENCY)
Defendants.)

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JUN 10 2016

Case No. 3AN-15-05969CI

**ALASKA BUILDING, INC., OPPOSITION TO
LEGISLATIVE AFFAIRS AGENCY'S MOTION FOR
RULE 11 AND RULE 82 FEES**

Alaska Building, Inc., opposes the Legislative Affairs Agency's Motion for Rule 11 and Rule 82 Fees.

A. Rule 11 Fees Are Not Appropriate Here

At page 3 of its Memorandum, the Legislative Affairs asserts that "Under Rule 11(b)(2), claims, defenses and other legal contentions must be 'warranted by existing law.'"

At page 4, the Legislative Affairs Agency also argues sanctions under Rule 11 are appropriate when a pleading "is not warranted by existing law or a reasonable argument for its extension," citing to 2 cases considering a prior version of Rule 11. The Legislative Affairs Agency then submits a single page of a deposition stating Alaska Building, Inc., admitted under oath it had no support for its claim for 10% of the savings to accrue to the State from the lease being declared illegal.

LAW OFFICES OF
JAMES B. GOTTSSTEIN
406 G STREET, SUITE 206
ANCHORAGE, ALASKA

**TELEPHONE
(907) 274-7686**

**FACSIMILE
(907) 274-9493**

First, Rule 11(b)(2) provides:

(b) **Representations to the Court.** By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . .

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(emphasis added).

Attached hereto as Exhibit 1, is the full deposition testimony regarding the issue, which is as follows:

Q. (Kevin Cuddy) · · Under a qui tam case like you pursued in the Matsutani case, the complaint is filed under seal. · Is that right?

A. · (Jim Gottstein) Yes.

Q. · And that was not done here?

A. · No. · It's not really a qui tam case.

Q. · Okay.

A. · And...

Q. · So I think we can agree on that, that this is not a qui tam case. · What is the basis for claiming an entitlement to 10 percent of the savings?

A. · I think that it's -- it's a way to make real the citizen taxpayers' right to bring actions on behalf of the government to stop government -- illegal government action.

What we had -- from about 1974 through 1998, the Alaska Supreme Court had established what's called · a public interest exception to Civil Rule 82, providing that public interest litigants that were truly suing on behalf of the public were not subjected to having attorneys' fees against them and would have -- if they prevailed, would have -- be awarded full attorneys' fees.

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406 G STREET, SUITE 206
ANCHORAGE, ALASKA
99501

TELEPHONE
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FACSIMILE
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So there wasn't really -- if they could establish that they were public interest litigants, they wouldn't really face the risk of having attorneys' fees awarded against them.

In 2003, the Alaska legislature passed a statute that changed that, except with respect to constitutional claims, basically because they were tired of paying attorneys' fees in all these cases where the government was found to have acted illegally.

And so now you have a situation where anybody trying to bring such a suit faces potentially ruinous attorneys' fees if they don't prevail, or certainly large attorneys' fees if they don't prevail. And that, in my -- my sense of it, has essentially virtually dried up public interest litigation, and so now the government pretty much has free rein to act illegally without any kind of check through this public interest litigation.

And so by -- in these types of cases, where a big, you know, savings or recovery on behalf of the government is achieved, this is a way to really make real the citizens' rights to sue to redress illegal government action.

Q. · · So thank you for the answer. · I'm going to go back to my original question, which is: · What is the basis for your claim to an entitlement of 10 percent of the fees?

A. · · I just said it.

Q. · · I'm not sure that you have. · You gave me a history lesson about the public interest exception for Rule 82. · Is there a statute?

A. · · No.

Q. · · False Claims Act? · This isn't a qui tam case, right?

A. · · Correct.

Q. · · Is there any common law that you can point to to say that a savings of this type had been given a private litigant?

A. · · No. · Well, not yet anyway. · So, I mean, it's possible I'll come up with some, but I haven't found -- I haven't seen any yet.

I mean, I think that the -- this is a very important public issue, and the point is, is that if ·this right of public -- the public citizens to sue over illegal government action is to have any, you know, reality at all, there

LAW OFFICES OF
JAMES B. GOTTSSTEIN
406 G STREET, SUITE 206
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99501

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FACSIMILE
(907) 274-9493

needs to be some countervailing element for the prospect of attorneys' fees being awarded against a plaintiff if they're unsuccessful.

Exhibit 1. Perhaps more coherently, Alaska Building Inc., made the same argument in its October 27, 2015 Opposition to 716's Motion for Ruling of Law Precluding ABI's Claims for *Qui Tam* and Punitive Damages, Section B. The 10% of Savings Remedy Should Not Be Foreclosed.

Alaska Building, Inc., was clear that it was attempting to establish new law to partially ameliorate the adverse effects of the Legislature's abrogation of the Public Interest Litigant Exception to Rule 82. This is specifically allowed under Rule 11(b)(2), as set forth above. In fact, the amendment to Rule 11 in 2012 through Supreme Court Order No. 1728, specifically added that a nonfrivolous argument for establishing new law is not grounds for Rule 11 sanctions. It is also respectfully suggested this Court should heed the Supreme Court's caution that Rule 11 should not "stifle creative advocacy or chill an attorney's enthusiasm in pursuing factual or legal theories." *Enders v. Parker*, 125 P.3d 1027, 20132 (Alaska 2005) (internal quotations omitted).

In *Alaska State Employees Ass'n v. Alaska Public Employees Ass'n*, 813 P.2d 669, 672 (Alaska 1991), the Supreme Court reversed an award of Rule 11 sanctions holding, the party's "position was not so devoid of merit as to justify the imposition of sanctions." The Supreme Court also noted that "Under Rule 11, a court cannot impose sanctions on a party simply for losing." 813 P.2d at 671. Moreover, even if this Court were to find that Rule 11 was violated, this Court acts within its discretion to deny sanctions. *Rude v. Cook Inlet*

LAW OFFICES OF
JAMES B. GOTTSSTEIN
406 G STREET, SUITE 206
ANCHORAGE, ALASKA
99501

TELEPHONE
(907) 274-7686
FACSIMILE
(907) 274-9493

Region, Inc., 322 P.3d 853, 860 (Alaska 2014). *See, also, Enders v. Parker*, 125 P.3d 1027, 1037 (Alaska 2005).

B. Rule 82 Fees Should Not Be Awarded to the Legislative Affairs Agency

The Legislative Affairs Agency also asks this Court to award it fees with respect to what was Count 2. This would be improper.

First, the Legislative Affairs Agency is not a prevailing party even with respect to what was Count 2. In its August 20, 2015, Order, this Court ordered Count 2 be severed from this action:

Count One should be severed from Count Two. Plaintiff shall file an amended complaint in this action as to the allegations in Count One. Plaintiff shall file a separate action, if desired, on the allegations in Count Two. . . .

RULING

. . . This Court further finds that the claims present in Court Two shall be SEVERED from the current matter and a new suit shall proceed separately.

This does not make the Legislative Affairs Agency the prevailing party on Count 2. That Alaska Building, Inc., did not name the Legislative Affairs Agency in the new suit does not change that. In fact, Alaska Building, Inc., could still amend the complaint in that suit to name the Legislative Affairs Agency.¹ In any event, this question was essentially

¹ In its October 29, 2015, Reply In Support of Request for Entitlement to Attorneys' Fees and Costs, the Legislative Affairs Agency correctly points out that Alaska Building, Inc., got the timing wrong on the Criterion settlement. However, Alaska Building, Inc., believes it had and still has a colorable claim against the Legislative Affairs Agency for damage to the Alaska Building. It just has so far chosen not to pursue it in the separate suit.

answered in *Tenala, Ltd. v. Fowler*, 993 P.2d 447, 450 (Alaska 1999) where the Supreme Court rejected a claim for attorney's fees for an abandoned claim.

Second, the Supreme Court has a long jurisprudence that Rule 82 fees are to be awarded to the party "who prevails on the principal dispositive issue" and not apportioned by issue *Gold Bondholders Protective Council v. Atchison, Topeka and Santa Fe Railway Co.*, 658 P.2d 776 , 779 (Alaska 1983); *Nautilus Marine Enterprises, Inc. v. Exxon Mobil Corp.*, 332 P.3d 554, 564 (Alaska 2014), citing *Gold Bondholders*.

Third, it is unclear that this Court even has jurisdiction to award fees as to a severed claim.

Finally, there is no way to really evaluate the reasonableness of the fees because there is no allocation to the issues for which the Legislative Affairs Agency seeks fees.

C. Conclusion

For the foregoing reasons, the Legislative Affairs Agency's Motion For Rule 11 And Rule 82 Fees should be **DENIED**.

Dated June 10, 2016.

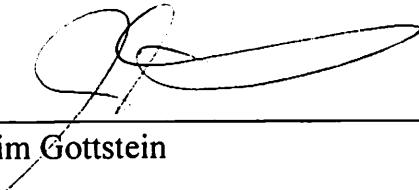


James B. Gottstein, ABA # 7811100
Attorney for Plaintiff

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 June 10, 2016.



Jim Gottstein

In the Matter Of:

ALASKA BUILDING vs. 716 WEST FOURTH AVENUE LLC

JAMES GOTTSTEIN - VOLUME I

October 16, 2015

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CERTIFIED
TRANSCRIPT

8 716 WEST FOURTH AVENUE LLC,
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10 AGENCY,

11

12 Defendants.

13 Case No. 3AN-15-05969 CI /

14

15 DEPOSITION OF JAMES B. GOTTSTEIN
16 VOLUME I

17 Pages 1 - 58, inclusive

18

19 Friday, October 16, 2015
20 2:00 P.M.

21

22 Taken by Counsel for
23 Defendant 716 West Fourth Avenue LLC
24 at
25 ASHBURN & MASON
26 1227 West 9th Avenue, Suite 200
27 Anchorage, Alaska

1 that. I would be -- I'd welcome any kind of any
2 indication of that.

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4 the Matsutani case, the complaint is filed under
5 seal. Is that right?

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24 countervailing element for the prospect of attorneys'
25 fees being awarded against a plaintiff if they're

1 unsuccessful.

2 Q. So I'm going to switch gears.

3 MR. ROBINSON: Before you do that, Kevin, I'm
4 going to request a brief restroom break. Is that
5 okay?

6 MR. CUDDY: Sure. Yeah.

7 MR. ROBINSON: Just a couple minutes.

8 (Recess taken.)

9 MR. CUDDY: Okay. I am ready whenever you
10 are.

11 Q. Mr. Gottstein, just stepping back for a
12 minute, the construction in this project started in,
13 roughly, early December of 2013. Is that right?

14 A. Yes.

15 Q. And once construction started, you had no
16 reason to believe that the Legislative Affairs
17 Agency was going to abandon the lease due to any
18 alleged problem with the procurement process,
19 correct?

20 A. Yes.

21 Q. And you were aware, once construction
22 started, that the defendants were going to be
23 committing millions of dollars to the project in
24 order to complete the construction?

25 A. It's been asked and answered, hasn't it?

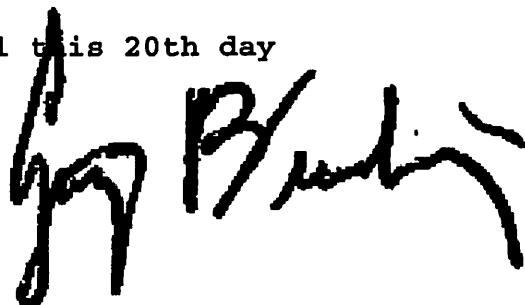
1

CERTIFICATE

2

3 I, GARY BROOKING, Registered Professional
4 Reporter and Notary Public in and for the State of
5 Alaska, do hereby certify that the witness in the
6 foregoing proceedings was duly sworn; that the
7 proceedings were then taken before me at the time
8 and place herein set forth; that the testimony
9 and proceedings were reported stenographically by
10 me and later transcribed by computer transcription;
11 that the foregoing is a true record of the
12 testimony and proceedings taken at that time;
13 and that I am not a party to nor have I any
14 interest in the outcome of the action herein
15 contained.

16 IN WITNESS WHEREOF, I have hereunto set
17 my hand and affixed my seal this 20th day
18 of October, 2015.



21
22 GARY BROOKING, RPR
23 My Commission Expires 6/28/2016
24

25 GB4223