

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

JUN 13 2016

Clerk of the Trial Courts

Case No. 3AN-15-05969CI

REPLY Re:
ALASKA BUILDING, INC., MOTION FOR COSTS AND
ATTORNEY'S FEES AGAINST 716 WEST FOURTH AVENUE LLC
AND LEGISLATIVE AFFAIRS AGENCY

This replies to the oppositions of both the Legislative Affairs Agency and 716 West Fourth Avenue LLC (716 LLC) to Alaska Building, Inc.'s Motion for Costs and Attorney's Fees Against 716 West Fourth Avenue LLC and Legislative Affairs Agency.

A. Alaska Building Inc., is the Prevailing Party

Both the Legislative Affairs Agency and 716 LLC assert plaintiff Alaska Building, Inc., is not the prevailing party because it did not prevail on peripheral claims. 716 LLC cites *Alliance of Concerned Taxpayers, Inc. v. Kenai Peninsula Borough*,¹ for the proposition that the court may decide there is no prevailing party, but *Alliance of Concerned Taxpayers* only held that permissible. *Alliance* also held a prevailing party

¹ 273 P.3d 1123 (Alaska 2012).

determination will only be overturned if it is manifestly unreasonable.² It is respectfully suggested that Alaska Building, Inc., is the prevailing party on the main issue in the case, which is the illegality of the lease.

B. Attorney's Fees Should Not Be Apportioned by Issue

The Legislative Affairs Agency argues that this Court should engage in an exercise to apportion fees by issue, but the Alaska 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.*,³ through *Nautilus Marine Enterprises, Inc. v. Exxon Mobil Corp.*,⁴ citing to *Gold Bondholders*. In *Tenala, Ltd. v. Fowler*,⁵ for example, the Alaska Supreme Court held:

Rule 82(a) does not require that attorneys' fees be calculated with reference to the disposition of individual issues. Rather, it expressly provides that a reasonable award of fees shall be made, at the trial court's discretion, to the prevailing party. The clear meaning of that provision is that the party who prevails on the principal dispositive issue is entitled to reasonable costs calculated according to the trial court's discretion. We refuse to now alter the purview of Rule 82 by requiring the niceties in apportionment urged by the Bondholders. We hold that the superior court did not abuse its discretion by awarding Santa Fe attorneys' fees for time spent on issues on which Santa Fe did not prevail.

² 273 P. 3d at 1126.

³ 658 P.2d 776 , 779 (Alaska 1983).

⁴ 332 P.3d 554, 564 (Alaska 2014) , citing *Gold Bondholders*.

⁵ 993 P.2d 447, 450 (Alaska 1999), footnote omitted.

(emphasis added). Objection was made to including fees for work on the 10% of savings and punitive damages claims.⁶ The fees relating to these should be included in accordance with the longstanding jurisprudence in Alaska.

Objection was also made to fees relating to Count 2 for damage to the Alaska Building, which was severed from this action. In *Tenala*, the argument that fees for work on an abandoned count should not have been awarded was rejected by the Supreme Court. It is therefore respectfully suggested the attorney's fees for Count 2, which was severed from this case, should be included.⁷ At pages 7-8 of its opposition, the Legislative Affairs Agency cites *Nautilus* in the middle of the sentence for the proposition that fees do not have to be apportioned by issue and then makes the statement that "wholly separate claims that have been severed into independent suits must stand on their own for calculating attorney's fees," without citing any authority whatsoever. This appears to be deliberately misleading. Fees relating to Count 2 should be included.⁸

⁶ 716 LLC and the Legislative Affairs Agency present an untrue description of the basis for Alaska Building, Inc.'s 10% of savings claim. For an accurate description *see*, Alaska Building, Inc.'s June 10, 2016 Opposition to the Legislative Affairs Motion for Rule 11 and Rule 82 Fees.

⁷ At page 7 of its Opposition, the Legislative Affairs Agency stated that there was no basis for bringing the damages claim against it because the Legislative Affairs agency "played no role in the construction of the building." The truth is the Legislative Affairs Agency was extensively involved in the construction as demonstrated by the 55 pages of plans attached to the lease, specifying the work to be performed including that which damaged the Alaska Building. Exhibit A to June 12, 2015, Affidavit in Support of Plaintiff's Motion for Partial Summary Judgment (Not Extension).

⁸ At footnote 3 of its opposition, 716 LLC suggests that an award relating to the fees identified as being for the severed Count 2 should make clear that Alaska Building, Inc.,

The requests to have this Court parse the attorney's fees by issue should be rejected.

C. Enhanced Fees Should Be Awarded

Alaska Building Inc., will address just a few points made by the Legislative Affairs Agency and 716 LLC regarding attorney fee enhancement, relying primarily on the reasons set forth in the Fee Motion for why full attorney's fees should be awarded or substantially enhanced.

(1) Full Fees Are Appropriate Because of the Frivolous Defense of the Lease's Legality

The Legislative Affairs Agency and 716 LLC are simply incorrect when they state full fees may only be awarded if the losing party acted in bad faith or engaged in vexatious conduct. Both the Legislative Affairs Agency and 716 LLC ignore that the Supreme Court held in *Johnson v. Johnson*,⁹ that full fees can be awarded if a defense is frivolous even in the absence of bad faith. Here, the defense of the legality of the lease was frivolous as it obviously did not "extend a real property lease," nor was the rent at least 10% below market rent,¹⁰ as required by AS 36.30.083(a). And the parties knew it as shown by the e-mail correspondence cited by Alaska Building, Inc. Full fees are certainly justified here.

may not also seek recovery of those fees in the new case, 3AN-15-09875CI. Alaska Building, Inc., does not object to such a clarification.

⁹ 239 P.3d 393, 400 (Alaska 2010).

¹⁰ The Legislative Affairs Agency asserts that the later appraisal submitted to it proved that 716 LLC's recognition that the project could not be constructed for a cost that would allow a lease at least 10% below market rent was unfounded. The March 24, 2016, Order On Motion for Summary Judgment Re: Lease is Not An Extension, which was entered as a

*Reply Re: Alaska Building
Motion for Attorney's Fees*

Page 4 of 6

(2) Substantial Enhancement Over the Default Should be Awarded

Even if full fees are not awarded, substantial enhancement over the default should be awarded. It is respectfully suggested that at least 75% of full fees be awarded. There are a lot similarities between this case and the 75% of full fees approved by the Alaska Supreme Court in *United Services Auto. Ass'n v. Pruitt ex rel. Pruitt*.¹¹

(3) The Legislature Paying Continuing Rent With No Apparent Legal Authority Is No Reason to Reduce Attorney's Fees to Alaska Building, Inc.

At footnote 30 of its opposition, 716 LLC states that because the Legislature continues to occupy the Anchorage Legislative Information Office Building and continues to pay rent it is not certain the State will achieve any cost savings as a result of this Court's declaratory judgment that the lease is illegal and invalid.¹² Alaska Building, Inc., is unaware of any authority for the continued payment of rent under the lease which this court has declared illegal and invalid. While perhaps not technically being a contempt of court because this court did not order such illegal payments be stopped, that the Legislature continues to pay and 716 LLC continues to receive rent under a lease that has

final appealable order, mooted consideration of the fraudulent nature of that appraisal, but the only actual evidence in this case on market rental value is the October 2, 2015, Affidavit of Larry Norene, filed on October 6, 2016, in support of Alaska Building, Inc.'s Motion for Preliminary Injunction. A logical conclusion why no actual evidence was presented purporting to prove that the lease was at least 10% below market rent is no appraiser was willing to swear or affirm that the lease was at least 10% below market rent.

¹¹ 38 P.3d 528, 535 (Alaska 2001).

¹² On the other hand, at page 14 of its opposition, the Legislative Affairs Agency states it is going to be forced to leave.

been declared illegal and invalid should not be the occasion to reduce the attorney's fee award to Alaska Building, Inc.

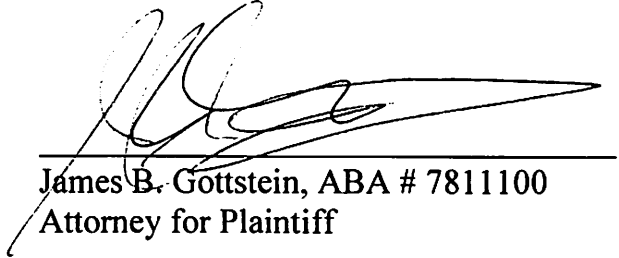
D. Unequal Apportionment Between the Legislative Affairs Agency and 716 LLC is Permissible.

The Legislative Affairs Agency argues that substantially more than half the attorney's fees award should be assessed against 716 LLC. This is permissible and Alaska Building, Inc., has no objection.

E. Conclusion

For the foregoing reasons Alaska Building, Inc.'s Motion for Costs and Attorney's Fees Against 716 West Fourth Avenue LLC and Legislative Affairs Agency should be **GRANTED.**

Dated June 13, 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 13, 2016.



Jim Gottstein