

SUMMIT LAW GROUP PLLC
315 FIFTH AVENUE S., SUITE 1000
SEATTLE, WA 98104-2682
TEL: (206) 676-7000

Jeffrey M. Feldman, Alaska Bar No. 0765029
SUMMIT LAW GROUP PLLC
315 5th Avenue South
Suite 1000
Seattle, WA 98104
(206) 676-7000
(206) 676-7001
jefff@summitlaw.com

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

ALASKA BUILDING, INC., an Alaska)
corporation,)
)
Plaintiff,)
)
vs.)
) Case No.: 3AN-15-05969 CI
716 WEST FOURTH AVENUE LLC, and)
LEGISLATIVE AFFAIRS AGENCY,)
Defendants.)
)

**OPPOSITION TO LAA’S MOTION TO CONSOLIDATE ACTIONS UNDER
CIVIL RULE 42(A)**

The Legislative Affairs Agency (“LAA”) has moved to consolidate 716 West Fourth Avenue LLC’s (“716”) administrative appeal of its estoppel claim (3AN-16-10821CI, or “Administrative Appeal”) with Alaska Building, Inc.’s (“ABI”) taxpayer-citizen suit against 716 and LAA (3AN-15-05969CI, or “Taxpayer-Citizen Suit”). Among the many problems raised by LAA’s motion, the most significant is that it seeks to consolidate a

closed trial court proceeding with an active appeal. Not surprisingly, LAA cites no case law to support this unusual request.

LAA's representation that the two cases substantially overlap is incorrect. The cases involve different legal issues, different parties, and different facts. It is true that both cases relate to LAA's lease of office space from 716, but the similarities end there.

The Taxpayer-Citizen Suit is completed and closed: a final judgment was entered in the spring of 2016, and the time for appeal has long since run.¹ LAA has attempted to circumvent this defect in its consolidation motion by petitioning the Court to reopen the Taxpayer-Citizen Suit. But, as explained in detail in 716's Opposition to LAA's Rule 60(b) and 77(k)(5) Motion for Relief from Laches Order and Orders that Lease Is Not an Extension ("Opposition to LAA Motion for Relief"), LAA is not entitled such relief.² And even if the Court were to grant LAA's Motion to reopen the Taxpayer-Citizen Suit, there would still be no legal basis to support consolidation of the two proceedings that obviously are in very different stages.

Finally, LAA fails to mention that the Court already expressly rejected the arguments LAA makes in its current motion. In March 2016, after the Court issued its

¹ ABI appealed certain issues regarding attorney's fees, but the merits of the Court's ruling were not appealed by any party, including LAA.

² See Opposition to LAA's Rule 60(b) and 77(k)(5) Motion for Relief from Laches Order and Orders that Lease Is Not an Extension.

ruling invalidating the Lease in the Taxpayer-Citizen Suit, LAA specifically requested that the Court retain jurisdiction in the event that 716 filed a contract-based claim against it. The Court denied this request, explaining that it had resolved all claims at issue in the Taxpayer-Citizen Suit and that the parties were free to pursue any unpled claims that might arise between them in another proceeding.³

In short, LAA is seeking to circumvent the Court's prior rulings, reopen a case that has been closed for the better part of a year, and "consolidate" it with an administrative appeal involving different legal issues and different parties in order to make an end run around the final judgment in the Taxpayer-Citizen Suit.

ARGUMENT

I. LAA Has Not Met The Standard For Consolidation.

Alaska Rule of Civil Procedure 42(a) provides, in relevant part:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

³ Order Denying Motion for Reconsideration of Declaratory Judgment and Summary Judgment at 2, May 20, 2016 (“[T]his court is not going to retain jurisdiction, after fully resolving the issues presented, just in case one of the defendants wants to further utilize the courts to resolve their unpled, potential claims against each other.”)

Consolidation under Rule 42(a) thus requires two things: the actions sought to be consolidated must be “pending before the court,” and they must involve “common question[s] of law or fact.” Neither condition is satisfied here.

A. The Taxpayer-Citizen Suit is not pending before the court because a final judgment has previously been entered.

716’s Opposition to LAA’s Motion for Relief explains, with detailed citations to both the record and Alaska case law, that a final judgment already has been issued in the Taxpayer-Citizen Suit. That discussion, incorporated here by reference, demonstrates that the Taxpayer-Citizen Suit is no longer “pending before the court” as required by Rule 42(a).

B. There are no “common question[s] of law or fact” between the two proceedings.

LAA argues that there are common parties, facts, and legal issues between the Administrative Appeal and the Taxpayer-Citizen Suit. It is difficult to understand this position.

The Taxpayer-Citizen Suit was filed by Plaintiff ABI against defendants LAA and 716. No cross-claims or counterclaims were filed by either defendant against the other; the only claims at issue were ABI’s claims against the two defendants regarding the Lease’s validity under Alaska procurement law. The facts relevant to ABI’s claims involved LAA’s procurement process in entering into the Lease. The case was decided on summary

judgment, without a trial or any other evidentiary proceeding, and the Court issued its final judgment in May of 2016. No party appealed the merits of the Court's decision.

The Administrative Appeal involves 716's contract-based estoppel claim against LAA. The only parties are 716 and LAA. LAA mischaracterizes 716's claim as a mere continuation of the Taxpayer-Citizen Suit, representing that "716 argued that the invalidity of the procurement for the Lease (as found by this Court) entitled 716 to payment of \$37,016,021."⁴ This is incorrect. The basis for 716's administrative claim is not only the procurement process that resulted in the Lease; instead, it is LAA's decision to renounce the Lease and acquire new space, rather than honor its representations and resulting obligations to 716. Those claims were not asserted, and those issues were not raised, litigated or decided in the Taxpayer-Citizen Suit. Indeed, at the time LAA made the decision to abandon the Lease and its obligations, the Taxpayer-Citizen Suit already was resolved and closed. Thus, the facts that gave rise to 716's administrative claim did not even exist at the time the Taxpayer-Citizen Suit was litigated.

716 stated this explicitly in the introduction to its estoppel claim: "The claims described below are brought *because the Legislature's decision to abandon its commitments to 716 and seek another building* improperly imposes the consequences of

⁴ Mot. at 7.

its flawed process entirely on 716.”⁵ In other words, 716 claims that LAA is liable for its own subsequent conduct, not the invalidity of the Lease.⁶ Accordingly, while the facts relevant to 716’s claim involve representations made by LAA during initial Lease negotiations, the claim primarily is based on LAA’s conduct in renouncing its obligations to 716 and vacating the LIO Building, all of which post-date the conclusion of the Taxpayer-Citizen Suit. The specific issue on appeal is review of the agency’s denial of 716’s estoppel claim.

To support its Motion to Consolidate, LAA maintains that the two matters have three issues in common.⁷ But, LAA merely lists these issues and does not explain how they are purportedly common. Each of these alleged “common issues” is addressed in turn below.

The first purported “common issue” is whether LAA’s non-appropriation of funds effectively terminated the Lease and precludes any damages claim by 716 against LAA. This is a defense LAA has raised in the Administrative Appeal, but the issue was never

⁵ 716 Contract Claim at 2 (emphasis added), *available at* [http://www.alaskajournal.com/sites/alaskajournal.com/files/files/716%20West%20Fourth%20Contract%20Claim\(1\).pdf](http://www.alaskajournal.com/sites/alaskajournal.com/files/files/716%20West%20Fourth%20Contract%20Claim(1).pdf).

⁶ While the legality of the Lease and the flawed procurement process are elements of the estoppel claim, the other elements of the estoppel theory that 716 is pursuing in its administrative appeal are unrelated and remote from the issues in the Taxpayer-Citizen Suit, including but not limited to LAA’s decision to abandon the Lease and pursue another building.

⁷ Mot. at 9.

raised or litigated in the Taxpayer-Citizen Suit. Indeed, all the events and facts relevant to this asserted defense post-date the final judgment in the Taxpayer-Citizen Suit. This is not a “common issue” between the two cases.

The second purported “common issue” is whether 716 can recover \$37 million from LAA, or whether the claim fails as contrary to public interest. \$37 million is the amount of damages 716 is seeking in the Administrative Appeal, and the public interest issue is, again, one of LAA’s asserted defenses. This issue goes directly to the merits of 716’s estoppel claim, which were never raised—much less litigated—in the Taxpayer-Citizen Suit. As with the first issue listed, most of the critical events and facts supporting 716’s claim post-date the final judgment in the Taxpayer-Citizen Suit. This, too, is not a “common issue” between the two cases.

The third purported “common issue” is whether the Court’s orders in the Taxpayer-Citizen Suit harmed LAA or 716. This issue misconstrues the effect of legal rulings. The Court in the Taxpayer-Citizen Suit ruled that the Lease was invalid because of flaws in the procurement process. This ruling caused no harm to LAA. It did not force LAA to vacate the LIO building and incur potential liability to 716. LAA’s subsequent actions, not the Court’s orders, are the source of any harm it may have suffered.⁸ This issue is not before

⁸ As the Court noted in its orders, LAA was free to negotiate a new agreement with 716. It was also free to explore other options, such as purchasing the building. Instead, LAA chose, instead

the Court in either of the two lawsuits. Indeed, when LAA attempted to raise it in the Taxpayer-Citizen Suit in the context of seeking reconsideration of the Lease invalidation order, the Court expressly rejected it as beyond the scope of that suit.⁹ Nothing has occurred in the interim to change that. LAA has not been ordered to pay any sum of money; nor was LAA ordered to vacate the building – LAA made that decision on its own and for its own reasons. 716’s claim has already been denied twice; and up to two rounds of appeals remain to be heard before the claim is finally resolved.¹⁰ Any alleged “harm” LAA may suffer is, at this point, purely speculative. This speculative harm is certainly not a “common issue” between the two cases.

and for its own reasons, to purchase and renovate another building, and vacate its existing office space, with full knowledge that it was exposing itself to a claim by 716.

⁹ See LAA’s Response to 716’s Motion For Reconsideration dated May 6, 2016 at 4 (“In short, the court must retain jurisdiction of this matter in order to determine what further necessary or proper relief is appropriate... . The invalidation of the lease triggers potential cross claims and, therefore, potential application of the laches doctrine as a result of those cross claims.”). See also, Order Denying Motion for Reconsideration of Declaratory Judgment and Summary Judgment dated May 20, 2016 at 2 (“If the court’s ruling that the lease “extension” is invalid raises justiciable issues between 716 and LAA, neither is precluded by the court’s ruling from pursuing their remedies (perhaps other than requesting a subsequent court to revise the lease extension’s compliance with AS 36.30.083(a) which was presumably *res judicata* between the two parties). But this court is not going to retain jurisdiction, after fully resolving the issues presented, just in case one of the defendants wants to further utilize the courts to resolve their unpled, potential claims against each other.”)(Emphasis added).

¹⁰ The Administrative Appeal has been filed in superior court, but no briefing or other proceedings on the merits have occurred. Once the superior court has ruled on 716’s appeal, the matter may proceed to the Alaska Supreme Court.

C. Alaska Case Law Supports Denial of LAA's Motion.

LAA cites several cases to support its interpretation of Rule 42(a), but none of the authority it relies on is from Alaska.¹¹ The omission of citations to Alaska authority is surprising because this is not an issue of first impression; rather, there is ample Alaska case law addressing consolidation requests. Two cases, *Moffitt v. Moffitt*¹² and *C.L. v. P.C.S.*,¹³ provide helpful guidance here.

In *Moffitt*, the Alaska Supreme Court reviewed the superior court's denial of a motion to consolidate.¹⁴ The appellant had moved to consolidate her case—seeking rescission of a contract entered into by her parents to sell the family farm—with the probate of her parents' estate, which included the farm. Like LAA here, she sought to consolidate two different types of cases, pending before two different courts, and involving different legal issues. The superior court declined to consolidate the two actions, reasoning, *inter alia*, that “consolidation was not appropriate because the probate proceedings involved issues beyond the dispute over the family farm;” and “denying consolidation posed little risk of delay or duplicative litigation.”¹⁵ The Alaska Supreme Court affirmed this decision,

¹¹ Mot. at 8 (nn. 17-20) (citing cases from D. Minn., 1st Cir., 2d Cir., 5th Cir., 11th Cir.).

¹² 341 P.3d 1102 (Alaska 2014).

¹³ 17 P.3d 769 (Alaska 2001).

¹⁴ 341 P.3d 1102 (Alaska 2014).

¹⁵ *Moffitt*, 341 P.3d at 1106.

finding that the superior court's reasons were adequate and additionally that the appellant had "not explained how she has been prejudiced" by the non-consolidation. The Supreme Court thus affirmed the denial of the consolidation motion, despite the fact that both cases involved the disposition of the family farm.

Moffitt is analogous to the situation here. Although both the Administrative Appeal and the Taxpayer-Citizen Suit touch on the same piece of real property—the LIO building—the legal issues in each case do not overlap. Additionally, because of this lack of overlap, and because all of the claims in the Taxpayer-Citizen Suit have been finally adjudicated, there is no risk of delay or duplicative litigation.¹⁶ Finally, LAA has not shown how the failure to consolidate will cause it any prejudice. The only harm it cites (its potential liability for 716's damages) is speculative, and—if established—flows directly from its own conduct in renouncing its obligations to 716. LAA has identified no harm flowing from the separate nature of the Administrative Appeal and the Taxpayer-Citizen Suit other than the risk that it may be held legally responsible for its decisions and actions.¹⁷ That is not enough.

C.L. involved a motion to consolidate two separate adoption cases involving children who were sisters, filed by the sisters' grandparents. The grandparents argued that

¹⁶ See discussion *infra* at Section I(A).

¹⁷ See discussion *supra* at Section II.

without consolidation, the Court would be unable to consider the potential separation of the sisters and the importance of sibling bonding.¹⁸ The facts in *C.L.* were far more compelling than those asserted here by LAA, but the matters were not consolidated. The Supreme Court, affirming the superior court’s denial of the motion, cited among its reasons the advanced stage of one of the cases: the grandparents had not filed their motion until a month and a half after trial in one case had begun and significant testimony had been received. The Supreme Court also noted that the grandparents “were free in both cases to present evidence” regarding the importance of placing the sisters together.¹⁹

Here, even more than in *C.L.*, the dissimilar stages of the two suits do not support consolidation. As explained above, the Taxpayer-Citizen Suit was decided on summary judgment nearly a year ago, and the Court ruled, in a final order that is now beyond appeal, that all claims had been resolved. The Administrative Appeal, on the other hand, is in a very different procedural posture, with the parties just now briefing 716’s request for a hearing de novo. LAA, like the grandparents in *C.L.*, will not be prejudiced if the Administrative Appeal proceeds separately. LAA remains free to present any admissible evidence and argue any viable legal theory as it sees fit.

¹⁸ *C.L.*, 17 P.3d at 773.

¹⁹ *Id.*

II. Consolidation Would Prejudice 716's Ability To Freely Litigate Its Estoppel Claim

LAA has not identified any credible prejudice it will suffer as a result of the denial of its motion. LAA makes the conclusory and speculative claim that “confusion that would result if two different judges had to ‘ping-pong’ these issues back and forth, repeatedly adjusting their prior orders based on the other court’s rulings.”²⁰ LAA offered no elaboration or facts supporting this assertion. Given the lack of overlap between the facts and issues in the two cases, as explained above, the risk LAA raises is all but non-existent.

In contrast, 716’s ability to litigate the claim at issue in its Administrative Appeal would be substantially prejudiced if the motion were granted. 716 has the right to litigate its claims and defenses using the counsel of its choice. If the Taxpayer-Citizen Suit were reopened and the cases consolidated, 716 would be forced to lose its preferred counsel of record in that suit. 716’s counsel of record in the Taxpayer-Citizen Suit is Ashburn & Mason; its counsel of record in the Administrative Appeal is Jeffrey Feldman. But Ashburn & Mason attorneys were involved in negotiations with LAA on behalf of 716— negotiations that are relevant to the factual basis of its estoppel claim. If the estoppel claim is heard in a trial de novo as 716 has requested, Ashburn & Mason attorneys will testify as fact witnesses. They cannot ethically be counsel of record *and* witnesses in the same case.

²⁰ Mot. at 8-9.

Granting LAA's motion would thus constrain 716's choice of counsel and force 716 to incur substantial additional attorney's fees, as new counsel would have to expend significant time and resources in order understand all the facts and issues in the Taxpayer-Citizen Suit in order to litigate the case responsibly.

Consolidation would also prejudice 716's claim. ABI is not a party to the Administrative Appeal and has no role in 716's estoppel claim, but it would become a party—with all attendant rights—if the cases were consolidated. Based on the manner in which ABI litigated the Taxpayer-Citizen Suit, this would dramatically expand the scope of the proceeding and could introduce elements far beyond 716's claim against LAA.²¹

CONCLUSION

The mere fact that one defendant in the Taxpayer-Citizen Suit has subsequently sued the other in a different proceeding, based on different facts, is inadequate to support consolidation—especially in light of the substantial prejudice 716 will suffer if LAA's motion is granted. For these reasons, and those detailed above, 716 respectfully requests that the Court deny LAA's Motion to Consolidate.

²¹ For example, in the Taxpayer-Citizen Suit, ABI introduced a legally unfounded *qui tam* cause of action that was ultimately found frivolous by the Court, but nevertheless required the defendants to expend time, attention, and other valuable resources addressing it.

SUMMIT LAW GROUP PLLC
315 FIFTH AVENUE S., SUITE 1000
SEATTLE, WA 98104-2682
TEL: (206) 676-7000

ASHBURN & MASON, P.C.

DATED: 3-4-17

By: 
Jeffrey W. Robinson
Alaska Bar No. 0805038

SUMMIT LAW GROUP, LLC

By: 
Jeffrey M. Feldman
Alaska Bar No. 0765029

Attorneys for 716 West Fourth Avenue, LLC

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically messenger
facsimile U.S. Mail on the 3 day of March, 2017, on:

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, Alaska 99501

Kevin Cuddy
Sarah Langberg
Stoel Rives, LLP
510 L Street, Suite 500
Anchorage, Alaska 99501

ASHBURN & MASON

By: 
Heidi Wyckoff