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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA BUILDING, INC., an Alaskan corporation, Plaintiff, v. 716 WEST FOURTH AVENUE, LLC, KOONCE PFEFFER BETTIS, INC., d/b/a KPB ARCHITECTS, PFEFFER DEVELOPMENT, LLC, LEGISLATIVE AFFAIRS AGENCY, and CRITERION GENERAL, INC., Defendants.	Case No.: 3AN-15-05969CI

LEGISLATIVE AFFAIRS AGENCY'S REPLY IN SUPPORT OF MOTION TO DISMISS OR IN THE ALTERNATIVE SEVER CLAIMS FOR MISJOINDER

Apparently recognizing its lack of standing, as alleged in its original Complaint, Plaintiff Alaska Building, Inc. ("Plaintiff") has filed an amended Complaint in an effort to salvage some claim against the Legislative Affairs Agency (the "Agency"). The amended Complaint fares no better. As to Count 1, Plaintiff has no interest-injury

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standing because it does not claim to have been harmed by the lease at issue. Plaintiff has no citizen-taxpayer standing because it is not the appropriate plaintiff to litigate the legality of the lease. As to Count 2, the proposed amended Complaint seeks to add a new claim against the Agency, but the amendment is futile and should be dismissed outright. The Agency's action of entering into a lease agreement does not render it liable for any alleged damage purportedly caused by the lessor, a contractor, or any other third-party. Finally, if Count 1 is not dismissed due to Plaintiff's lack of standing, Count 1 should be severed from Count 2 and Plaintiff should be forced to proceed with that case separately.

I. PLAINTIFF LACKS INTEREST-INJURY STANDING FOR COUNT 1.

Plaintiff's entire argument in support of its claimed interest-injury standing is two sentences long.[1] Plaintiff claims that it has a personal stake in the outcome of the controversy because it is seeking a windfall of 10% of any savings the Agency obtains if the lease is invalidated or reformed.[2] That is not, however, the test for interest-injury standing. As held in *Keller v. French*, a plaintiff lacks interest-injury standing when it alleges no plausible injury to its own interests.[3] In order to have standing, a Plaintiff must have "an interest which is adversely affected by the complained-of conduct."[4] Plaintiff alleges no such adverse effect and no such injury. It does not claim to have been harmed at all by the alleged illegality of the lease. It seeks only a windfall here – not

[1] *See* Plaintiff's Opposition to Legislative Affairs Agency's Motion to Dismiss or, in the Alternative, to Sever Claims for Misjoinder ("Opp.") at 6.
[2] *See id.* Plaintiff fails to identify any cognizable theory supporting its requested windfall.
[3] 205 P.3d 299, 305 (Alaska 2009).
[4] *Id.* at 304 (quoting *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 915 (Alaska 2000)).

compensation for any alleged injury. In the absence of an actual injury caused by the alleged illegality of the lease, Plaintiff does not have interest-injury standing to litigate Count 1.

II. PLAINTIFF LACKS CITIZEN-TAXPAYER STANDING FOR COUNT 1.

Plaintiff acknowledges that the Alaska Supreme Court's citizen-taxpayer jurisprudence requires that a plaintiff must establish there is no plaintiff more directly affected by the governmental action who could bring suit.[5] Surprisingly, however, Plaintiff fails to address or even consider any such entity other than the State. Plaintiff simply declares that the State, acting through the Attorney General, is unable to bring suit against the Agency and therefore Plaintiff must be the appropriate litigant to challenge the lease. Not so. As held in *Ruckle v. Anchorage School District*, which was also a dispute involving public procurement determinations, a taxpayer is less directly affected than a contractor (or potential lessor, in this instance) who was purportedly deprived of a substantial contract by the procurement process.[6] Plaintiff therefore lacks citizen-taxpayer standing to litigate Count 1 of the Complaint.

In its opening brief, the Agency explained that it complied with the Alaska Legislative Procurement Procedures when it entered into the lease.[7] The Agency also explained that the Legislature had made a deliberate decision not to require a competitive re-procurement process, contrary to Plaintiff's stated preference. Plaintiff alleges in its

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[5] *See* Opp. at 7-8.
[6] 85 P.3d 1030, 1036-37 (Alaska 2004).
[7] Legislative Affairs Agency's Motion to Dismiss or, in the Alternative, to Sever Claims for Misjoinder ("Motion") at 9-12. Plaintiff does not dispute this.

Complaint that the lease violates the State Procurement Code because it failed to comply with the "normal competitive procurement process" and did not meet certain conditions that would excuse compliance with that process.[8] Even assuming that Plaintiff is correct that a competitive procurement process was required here, which it is not, the resulting process would have no direct effect on Plaintiff. Instead, some other potential lessors – not Plaintiff – may have been able to secure the lease as part of the competitive re-procurement process. It is those potential lessors who would be more directly affected and may have standing to bring a claim (as in *Ruckle*). Plaintiff does not address these potential lessors at all, even though this was the principal argument in the Agency's opening brief. As the Agency explained in its opening brief, there is no indication that there is anything limiting these potential lessors from bringing suit.[9] Plaintiff does not dispute this. "That individuals who are more directly affected have chosen not to sue despite their ability to do so does not confer citizen-taxpayer standing on an inappropriate plaintiff."[10] Accordingly, Plaintiff is an "inappropriate plaintiff" and lacks citizen-taxpayer standing to bring Count 1 challenging the application of the State Procurement Code.

III. PLAINTIFF'S PROPOSED AMENDED COMPLAINT AGAINST THE AGENCY FOR COUNT 2 SHOULD BE DISMISSED AS FUTILE.

In an effort to avoid complete dismissal of its action, Plaintiff has now named the Agency as a defendant in Count 2 – its negligence claim – by alleging that "[b]y entering

[8] Complaint ¶¶ 17-21. The proposed amended Complaint makes no change to these allegations.
[9] *See* Motion at 12.
[10] *Keller*, 205 P.3d at 303.

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into the LIO Project, 716 LLC and [the Agency] caused the damage to the Alaska Building."[11] This Court should reject Plaintiff's amended complaint as a futile attempt to impose negligence liability on a lessee for the conduct of others.[12]

Plaintiff appears to allege that the Agency caused negligent construction damage to Plaintiff's property simply by virtue of signing a lease with the lessor, even though Plaintiff does not allege that the Agency had any role in the construction. The Agency, as lessee, owes no duty to Plaintiff for damage allegedly caused by others who were hired by the lessor and owner of the building: 716 LLC.[13] Plaintiff alleges that the damage to his property resulted from (1) the negligent design, (2) management, or (3) construction (or some combination thereof) of the project.[14] Plaintiff does not, however, allege that the Agency did any of those things. Instead, Plaintiff alleges that defendant Koonce Pfeffer Bettis, Inc., was the architect for the project (i.e., the design).[15] Plaintiff alleges that defendant Pfeffer Development, LLC, was the project manager for the project (i.e., the management).[16] Plaintiff also alleges that defendant 716 LLC was the owner and lessor of the building, was obligated to maintain the party wall and not damage the

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[11] Proposed amended Complaint ¶ 31.

[12] *See Fomby v. Whisenhunt*, 680 P.2d 787, 790 (Alaska 1984) ("That a dispositive motion has been filed, but not decided, should be grounds for denying amendment where the amendment is seen as a 'futile gesture' or as an attempt to plead around an obvious legal roadblock." (internal footnote omitted)). The Agency reserves its right to seek dismissal of this amended Complaint pursuant to Civil Rule 12(b)(6) if the amendment is not dismissed outright.

[13] Restatement (Second) of Torts § 362; Restatement (Second) of Torts §421 (lessor of land, who hires contractor to make repairs, is liable for independent contractor's negligence).

[14] Proposed amended Complaint ¶ 28.

[15] *Id.* ¶ 24.

[16] *Id.* ¶ 25.

Alaska Building through work impacting it, and that 716 LLC hired a general contractor, defendant Criterion General, Inc., to complete the project (i.e., the construction).[17] Plaintiff cannot avoid dismissal of his claim simply by asserting that the Agency's willingness to enter into a lease somehow caused property damage when there are no allegations that the Agency played any role in any of the underlying activity.

Plaintiff does not, for example, allege that the Agency is vicariously liable for the actions of the other defendants because Plaintiff could not, consistent with the requirements of Civil Rule 11, assert that the Agency "retained control" of some independent contractor.[18] Plaintiff does not allege that the Agency took any affirmative actions to hire, supervise, control or manage the contractor or any other party involved in the remodel. Plaintiff does not allege that the Agency so much as swung a hammer in connection with the remodel. In fact, Plaintiff quotes an Access, Indemnity, and Insurance Agreement stating that Criterion has a duty to indemnify and hold harmless the Plaintiff from all damages or losses resulting from the negligent performance of "the contractor, any subcontractor, [or] anyone directly or indirectly employed by any of them."[19] Plaintiff does not allege that the Agency is Criterion's subcontractor or employee. The Agency, as a lessee, cannot be held liable for damage allegedly caused by

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[17] *Id.* ¶¶ 16, 23, 26, 29.
[18] *Moloso v. State,* 644 P.2d 205, 210-11 (Alaska 1982).
[19] Complaint at ¶16.

the other defendants when there are no allegations that the Agency hired, managed, or supervised any of them.[20]

Not only does the Agency, as a lessee, not owe a duty to Plaintiff, but Plaintiff has failed to allege the requisite causal connection. Plaintiff does not allege that the Agency's signing of the lease agreement was negligent or that the Agency owed (or breached) any specific duty to Plaintiff. Plaintiff fails to allege that the Agency's alleged negligence was a legal cause of Plaintiff's harm.[21] Under Alaska law, to make out a claim for relief based on negligence there must be a "reasonable close causal connection between the conduct and the resulting injury."[22] Negligent conduct will be a "legal cause" of a plaintiff's injury if the negligent act was more likely than not a substantial factor in bringing about the injury.[23] Here, however, no negligent act by the Agency is alleged. Further, Plaintiff fails to allege that the mere act of signing a lease agreement was a substantial factor in bringing about the alleged injury, as opposed to the actual affirmative conduct that is alleged for the remaining defendants. There is no causal link between the Agency's contract and the alleged negligent conduct of any of the other defendants.

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[20] *See also e.g., Guclu v. 900 Eighth Ave. Condominium, LLC*, 81 A.D. 3d 592, 593 (N. Y. 2011) (lessees were not liable for plaintiff's injuries where they did not hire the contractor, or supervise or control the work at the job site that caused the plaintiff's injuries); *Guzman v. L.M.P. Realty Corp.*, 262 A.D. 2d 99 (N.Y. 1999) (a lessee is liable under a labor law statute only where it can be shown that it was in control of the work site, and one test of such control is where the lessee actually hires the general contractor).

[21] *See* Restatement (Second) of Torts § 430.

[22] *Sharp v. Fairbanks North Star Borough*, 569 P.2d 178, 181 (Alaska 1977) (quoting *State v. Abbott*, 498 P.2d 712, 725 (Alaska 1972)).

[23] *Id.*

If Plaintiff's claim were allowed to stand, every tenant or lessee could be held liable for damage caused during a remodel since the remodel would not have occurred "but for" the tenant or lessee's commitment to rent or lease the premises. Plaintiff's attempt to add the Agency as a defendant to Count 2 is futile and should be disregarded.

IV. IN THE ALTERNATIVE, SEVERANCE IS APPROPRIATE HERE.

If this Court does not grant the Agency's motion to dismiss, Count 1 should be severed from the remainder of the case. Despite Plaintiff's claim that Count 1 is against the Agency and Defendant 716 LLC, the two portions of the proposed Amended Complaint do not arise out of the same transaction or occurrence and there are no common questions of law or fact.[24] Count 1 concerns the procurement of the lease, while Count 2 concerns construction work on the building. Count 1 is statutory in nature, while Count 2 is based on common law negligence. It is not enough simply to allege, as Plaintiff does, that both Counts relate to the LIO Project. These are fundamentally different transactions and occurrences – Count 1 focuses on the legality of a lease procurement while Count 2 relates to tort claims for some later work performed.

Moreover, Plaintiff's argument that it should not be required to file a separate case to proceed against the Agency after this Court severs Claims 1 and 2 fails. When a court severs a claim, it preserves the identity of an action, but requires a plaintiff to file a separate action to proceed with the severed claim.[25] Therefore, the Agency's Proposed

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[24] Civil Rule 20(a).

[25] *See e.g., Mehlenbacher v. DeMont,* 103 Wn. App. 240, 245, 11 P.3d 871 (2000) (after holding that the claims arose from different transactions and occurrences and that there

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Order is proper and this Court should sever Count 1 from Count 2 if the Court declines to dismiss Count 1 in its entirety.

DATED: June 19, 2015.

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CERTIFICATE OF SERVICE AND OF FONT

This certifies that on June 19, 2015, a true and correct copy of the foregoing was served via First Class Mail on:

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were no common issues of law or fact, the trial court ordered the claim at issue to be severed and the plaintiffs to file a separate action to proceed with the severed claim).

I further certify that this document was substantively produced in Times New Roman 13, in compliance with Alaska Appellate Rule 513.5(c)(1) and Civil Rule 76(a)(3).

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