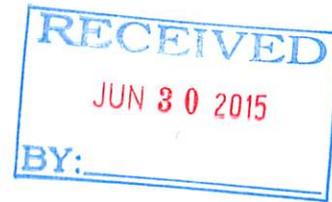


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LEGISLATIVE AFFAIRS AGENCY

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 OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT (NOT EXTENSION) AND
REQUEST FOR RELIEF UNDER CIVIL RULE 56(F)**

The Legislative Affairs Agency (the "Agency") opposes Plaintiff's motion for partial summary judgment because it is wrong on the facts and wrong on the law. The Court should deny Plaintiff's motion for partial summary judgment. In the alternative, the Court should decline to rule on Plaintiff's motion for partial summary judgment until

LAA'S OPP. TO PLAINTIFF'S MTN. FOR PARTIAL SUMMARY JUDGMENT (NOT EXTENSION)
ALASKA BUILDING, INC. v. 716 WEST FOURTH AVENUE, LLC, et al., Case No. 3AN-15-05969CI

Page 1 of 10

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after the Agency is given a fair opportunity to obtain necessary discovery pursuant to Civil Rule 56(f). Plaintiff asserts that it is undisputed that this was a “new office building” rather than a renovation project, and that the terms of the lease contains terms that are too “drastically different” from the lease it purports to extend to qualify as a lease extension, but these are ultimately factual determinations for the trier of fact. The Agency requires an opportunity to obtain discovery from the defendants before it should be forced to respond to this premature summary judgment motion. Discovery is currently stayed with respect to Count 1 of the Complaint, and the Court should order a continuance pursuant to Civil Rule 56(f) so that the Agency can obtain the necessary information to respond to this motion.

I. PLAINTIFF’S “UNDISPUTED” FACTS ARE WRONG AND INCOMPLETE

Plaintiff attempts to summarize a 22-page Extension of Lease and Lease Amendment No. 3 (the “Lease Extension”) with a few paragraphs of an affidavit.¹ Plaintiff’s summary of the Lease Extension omits certain key facts, including:

- There was a lease for the premises at 716 West 4th Avenue, dated April 6, 2004 which was being extended and amended by the Lease Extension.²
- The April 6, 2004 lease had been previously amended and renewed on May 13, 2013.³

¹ See Affidavit in Support of Plaintiff’s Motion for Partial Summary Judgment (Not Extension) (“Plaintiff’s Aff.”) ¶¶ 1-2.

² See Exh. 1 at 1 (attached to Plaintiff’s Aff.).

- Pursuant to the Alaska Legislative Procurement Procedures, the chairman of the Legislative Council made a written determination that the lease may be materially modified without procurement of a new lease to incorporate the immediately adjacent property.⁴
- The Lease Extension extended the existing lease for 10 years from June 1, 2014, to May 31, 2024.⁵

Plaintiff states that the project entailed “[c]onstruction of a new office building for lease[.]”⁶ The Lease Extension, however, states that the premises are to be renovated and expanded – not that a new building was being constructed.⁷

II. THE LEASE EXTENSION DID EXTEND A REAL PROPERTY LEASE

A. The Lease Extension Relates to a Real Property Lease

Plaintiff claims that the Lease Extension did not “extend a real property lease” under AS 36.30.081.⁸ Plaintiff does not dispute, however, that the subject of the Lease Extension is a “real property lease.” The Lease Extension amends the original 2004 lease

(. . . continued)

³ *See id.*

⁴ *See id.* at 2, Exh. C.

⁵ *See id.* at 2.

⁶ Memorandum in Support of Plaintiff’s Motion for Partial Summary Judgment (Not Extension) (the “Motion”) at 3.

⁷ *See* Exh. 1 at 1; *see also id.* at 49 (“As part of this project . . . the 6-story office building [will be] remodeled and expanded.”).

⁸ *See* Motion at 7.

(recorded in Book 2004-024411-0, Anchorage Recording District, Third Judicial District, State of Alaska, as previously amended). It relates to the leasing of certain real property rights from 716 West Fourth Avenue, LLC (the “Lessor”).

B. The Lease Extension Is an Extension of a Lease

The Agency first entered into a five-year lease for office space and parking spaces on 4th Avenue with the Lessor in 2004, and included five one-year renewal options.⁹ The lease was amended and extended at various times.

In 2006, the lease was amended to modify the amount of the property being rented – the number of reserved parking spaces was decreased from 98 to 86.¹⁰ The parties also agreed to a reduction in the rent to account for the change in the amount of rented property.¹¹

In 2009, the lease was amended again to modify the amount of property that was available exclusively to the Agency. The Agency assigned certain rights to manage roughly 60% of the reserved parking spaces to the Anchorage Community Development Authority for “off hours parking.”¹² The term was also extended by a year through the exercise of a renewal and the rent was modified to reflect changes in the Lessor’s

⁹ See Exh. A at 1.

¹⁰ See Exh. B at 1 ¶ 1.

¹¹ See *id.* at 2 ¶ 2.

¹² See Exh. C at 2-3 ¶ 2 [sic] (amending paragraph 39 of the original lease).

variable costs.¹³

Despite these regular modifications in the scope, price, and other terms of the lease since 2004, Plaintiff's argument is that the Agency did not "extend" a lease when it extended the duration of that lease because there were also modifications to some of the terms.¹⁴ Plaintiff's lead contention is that the Lease Extension is not a continuation of the same contract.¹⁵ This is demonstrably incorrect. The Lease Extension is precisely a continuation of the same contract. By its terms, the Lease Extension extended the May 23, 2013 Renewal of Lease No. 5, which in turn amended the Lease dated April 6, 2004.¹⁶ It amends, extends, and modifies the original lease, as did earlier amendments, *but it is still the continuation of the same contract.* The same parties (the Agency and 716 West Fourth Avenue, LLC) continued their longstanding contractual arrangement for the leasing of office space and parking spaces on the corner of 4th Avenue and G Streets in Anchorage. There have been fluctuations along the way over the past decade: the number of allotted parking spaces has changed¹⁷; the rent has changed (sometimes up, sometimes down)¹⁸; and the facilities have undergone renovations, including relocation

¹³ See *id.* at 1-2 ¶¶ 1-2.

¹⁴ See Motion at 6-7.

¹⁵ See *id.* at 6.

¹⁶ See Exh. 1 at 1.

¹⁷ See Exh. B.

¹⁸ See *id.* (decrease of rent); Exh. C (increase of rent).

of staff, tearing down walls, and creating offices.¹⁹ None of these changes to the leased space or the applicable rent means that any of these prior amendments were not “the same contract.” Modifications to leases are routine, but that does not render each modification a different contract.

Plaintiff relies on two Georgia cases for the proposition that an “extension” only occurs when there is a stipulation to lengthen the term of the contract on the same terms and conditions as stated in the original lease.²⁰ This Georgia case law is inapposite. That case law generally involves whether an old broker is entitled to additional commissions for an extension of the original lease it procured, as opposed to some renewal of a different agreement (for which the new broker would be entitled to the commissions).²¹ AS 36.30.083 has nothing to do with a broker’s entitlement to commissions or the triggering of certain rights by a lessee. On its face, the statute relates to the ability of the Agency, the court system, and other public entities to continue a leasing relationship with the existing lessor by extending the term of the existing relationship. There is no requirement that the terms remain exactly the same as the original lease. In fact, the Alaska Legislature made clear in the text of the statute that the substantive terms of the

¹⁹ See Exh. A.

²⁰ See *id.* at 6 (citing *Crystal Blue Granite Quarries, Inc. v. McLanahan*, 261 Ga. 267, 268 (Ga. 1991) and *Brannen/Goddard Co. v. Sheffield, Inc.*, 524 S.E.2d 534 (Georgia App. 1999)).

²¹ See *Brannen/Goddard Co.*, 524 S.E.2d at 535-36. *Crystal Blue Granite Quarries, Inc.* related to a lessee’s desire to compel the lessor to continue a leasing arrangement under existing favorable terms.

lease were expected – and likely required – to be different in any extension. In particular, the rent due under the lease was expected to be different than the original lease. It may be less than the original lease – because certain upfront costs no longer apply during the extended term, as emphasized by Plaintiff.²² Or it may be more than the original lease – because market rents in the area have gone up dramatically during the term of the original lease and the original lease rent is uneconomic and unrealistic. In either case, the rent is different. Further, the original lease involved different leased space because fewer parking spaces were available.

Plaintiff also fails to address the Agency’s adherence to the Alaska Legislative Procurement Procedures, as provided by AS 36.30.020. Consistent with those procedures, the Procurement Officer made a written determination that material modifications were appropriate as part of the Lease Extension for a host of fact-specific reasons.²³ To the extent that Plaintiff challenges any of those rationales for the modifications to the lease, those are disputed issues of material fact that require denial of Plaintiff’s motion for partial summary judgment. In any event, there can be no good-faith dispute that the Lease Extension was an extension of the original lease arrangement. Insofar as Plaintiff asserts that the terms of the Lease Extension are too “drastically different” from the original lease to qualify as an extension, that is a factual question that

²² See *id.* at 7.

²³ See Exh. 1 at 85-93.

must be addressed by the factfinder.²⁴

III. A CONTINUANCE IS REQUIRED UNDER CIVIL RULE 56(F)

To the extent that the Court does not deny Plaintiff's partial summary judgment for the reasons described above, the Agency respectfully requests a continuance pursuant to Civil Rule 56(f) so that it may obtain discovery that is required to respond to this motion. Requests pursuant to Civil Rule 56(f) should be freely granted as a safeguard against premature grants of summary judgment.²⁵

Summary judgment motions typically require that parties spend considerable time and effort discovery and developing facts necessary for a full presentation of any opposition.²⁶ This case is no exception. The Agency has not been dilatory with discovery. The Complaint was only filed recently and the Agency has promptly filed a dispositive motion as to Count 1 (to which this motion applies) as well as a motion to stay discovery until that dispositive motion is addressed. The Court granted the motion to stay discovery so that the parties and the Court could properly focus on the issue of standing. Accordingly, the Agency is unable to procure the necessary discovery to respond to this motion at this time. There has been no meaningful discovery taken to date.

If Count 1 is not dismissed due to Plaintiff's lack of standing, the Agency will

²⁴ See Motion at 6.

²⁵ See *Mitchell v. Teck Cominco Alaska, Inc.*, 193 P.3d 751, 758 (Alaska 2008).

²⁶ See *id.*

need to obtain discovery from the other defendants concerning certain details of the construction activities, including the permits that were obtained, to challenge Plaintiff's assertion that this was a "new office building" rather than a renovation as contemplated by the Lease Extension. The Agency will also need to obtain discovery concerning whether the terms of the lease extension were so "drastically different" from those in the original lease that it should not qualify as an extension. The Agency is unable to obtain this discovery at this time due to the current order staying discovery.²⁷

IV. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion for partial summary judgment. In the alternative, the Court should order a continuance that postpones the Agency's obligation to respond to Plaintiff's motion for partial summary judgment pursuant to Civil Rule 56(f).

DATED: June 29, 2015.

STOEL RIVES LLP

By: 

KEVIN CUDDY
(Alaska Bar #0810062)
Attorney for Defendant
LEGISLATIVE AFFAIRS AGENCY

²⁷ See Affidavit of Kevin Cuddy.

CERTIFICATE OF SERVICE AND OF FONT

This certifies that on June 29, 2015, a true and correct copy of the foregoing was served via First Class Mail on:

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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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