

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, *et al.*

Defendants.

Case No. 3AN-15-05969CI

**REPLY TO:
LEGISLATIVE AFFAIRS AGENCY'S OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
(NOT EXTENSION AND REQUEST FOR RELIEF UNDER CIVIL
RULE 56(f))**

**A. The Parties' Characterization of the Lease Is Not
Controlling**

Defendant Legislative Affairs Agency's Opposition to the Motion for Partial
Summary Judgment (Not Extension) by Alaska Building, Inc. (ABI) is largely that by
calling the LIO Lease¹ an extension it complies with the AS 36.30.083(a) requirement that

¹ More particularly described as that certain contract, dated September 19, 2013, by and
between defendant Legislative Affairs Agency and defendant 716 West Fourth Avenue
LLC (716 LLC), titled "Extension of Lease and Lease Amendment No. 3, a true and
correct copy of which is attached as Exhibit 1 to the June 12, 2015, Affidavit in Support of
Plaintiff's Motion for Partial Summary Judgment (Supporting Affidavit).

it extend a real property lease to bypass the regular public bidding process.² It is respectfully suggested that it is the actual effect of the LIO Lease, rather than what it is called that controls. *See, e.g., Department of Revenue v. Baxter*, 486 P.2d 360, 364 (Alaska 1971) (the substantial effect of the instruments employed, rather than the particular form used controlling).

Here, ABI's motion for Partial Summary Judgment contends that the LIO Lease does not extend a real property lease as required under AS 36.30.083(a). With respect to this issue, ABI asserts that the following terms and effect of the LIO Lease results in the legal conclusion that it does not extend a real property lease:³

- a. Demolition of the then existing Anchorage Legislative Information Office located at 716 West 4th Avenue in Anchorage, Alaska down to its foundation and steel frame,
- b. Demolition of the adjacent old Empress Theatre, located at 712 West 4th Avenue, occupied by the Anchor Pub at that time,
- c. Moving the existing Anchorage Legislative Information Office prior to the demolition of the old Legislative Information Office Building, and
- d. Construction of a new office building for lease as the new Anchorage Legislative Information Office.

Paragraph 2 of Supporting Affidavit.

It is a simple argument, which may or may not ultimately prevail, but it is a legal issue based on indisputable facts.

² AS 36.30.083(a) also requires that such a lease achieves "minimum cost savings of at least 10 percent below the market rental value."

³ The Legislative Affairs Agency tries to make a big deal that ABI does not dispute that the LIO Lease is a real property lease. The point isn't whether it is a real property lease or not—ABI agrees it is—but whether it extends such a lease.

Confirming the provisions of the LIO Lease, its effect, as depicted in the following photographs produced by defendant Koonce Pfeffer Bettis, Inc., d/b/a KPB Architects (KPB) in its Initial Disclosures⁴ confirm that the old Anchorage Legislative Information Office was demolished down to its steel frame and foundation, the adjacent old Empress Theatre, most recently the Anchor Pub, was demolished, and a new building constructed.⁵



⁴ Reply Affidavit, ¶2.

⁵ The Legislative Affairs Agency objects to ABI's use of the word "new," but that is another irrelevancy. However one describes what was constructed, the question is whether the LIO Lease extended a real property lease.



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

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

*Reply Re: Motion for
Partial Summary Judgment (Not Extension)*

Page 4



While this demolition and construction occurred, the existing Anchorage Legislative Information Office was moved, which is both provided in the LIO Lease at ¶1.1.c.2. and Exhibit B-1 thereto,⁶ and affied to in the Supporting Affidavit at ¶2.c.

So, again, the question is whether these indisputable facts establish as a legal matter that the LIO Lease did not extend a real property lease as required by AS 36.30.083(a) in order to legally avoid the public bidding process. It is respectfully suggested the points raised by the Legislative Affairs Agency do not defeat the Motion for Partial Summary Judgment.

⁶ Pages 3 and 83 of Exhibit 1, to Supporting Affidavit.

B. AS 36.30.083(a) Is Controlling

At page 7 of its Opposition, the Legislative Affairs Agency asserts that a factual issue over whether there has been compliance with the terms of AS 36.30.020 precludes summary judgment as to compliance with AS 36.30.038(a). While there certainly is great doubt as to the validity of the findings that there was compliance with AS 36.30.020, that factual issue is irrelevant to the Motion for Partial Summary Judgment. That the Legislative Affairs Agency was also required to comply with AS 36.30.020, does not mean it was not required to comply with AS 36.30.083(a). Or put differently, even if there was compliance with AS 36.30.020, if the LIO Lease does not extend a real property lease, it is still illegal under AS 36.30.083(a).

C. That There May Have Been Previous Extensions Is Irrelevant to Whether the LIO Lease Complies With AS 36.30.083(a)

At pages 4-5 of its opposition, the Legislative Affairs Agency argues that because there have been previous amendments or extensions of the lease for the Anchorage Legislative Information Office Building, the LIO Lease is an extension. However, that there have been previous modifications or extensions of the lease is irrelevant to whether the LIO Lease is in compliance with requirement in AS 36.30.083(a) that in order to be legal, the LIO Lease must extend a real property lease.

D. The LIO Lease Is Not In Accord with the Intent of AS 36.30.083(a)

At page 7 of ABI's Memorandum in Support of Motion for Partial Summary Judgment (Partial Summary Judgment Memo) it states:

*Reply Re: Motion for
Partial Summary Judgment (Not Extension)*

Page 6

Exhibit 1, is the legislative history that describes the rationale behind AS 36.30.083(a). The fundamental economic principle is that rental rates in new leases spread the costs of construction, including tenant improvements over the term of the lease (amortization) and that during a lease extension, the landlord does not have those costs and can and often will dramatically reduce the rent for an extension to reflect it having already recovered those costs.

The Legislative Affairs Agency does not dispute this in its opposition.

The Legislative Affairs Agency complains about the non-Alaska cases cited by ABI in support of its contention that the LIO Lease is not an extension, but cites no authority of its own. There are no cases interpreting AS 36.30.083(a) and it is respectfully suggested it should be interpreted in accord with its fundamental purpose, as repeatedly and consistently stated in its legislative history, which is attached as Exhibit 1 to the Memorandum in Support of the Motion for Partial Summary Judgment and described above.

Whether one calls the project a renovation or construction of a new building, the LIO Lease achieves the opposite of the Legislature's intent in enacting AS 36.30.083(a).

E. A Civil Rule 56(f) Extension Would be Pointless

The Legislative Affairs Agency requests a Civil Rule 56(f) extension in the event the Motion for Partial Summary Judgment is not denied. Defendant 716 West Fourth Avenue LLC (716 LLC) also requested a Civil Rule 56(f) extension and rather than repeat its entire argument here, ABI hereby incorporates its July 2, 2015, opposition thereto with additional points germane specifically to the Legislative Affairs Agency's Rule 56(f) Request.

*Reply Re: Motion for
Partial Summary Judgment (Not Extension)*

Page 7

Unlike 716 LLC, the Legislative Affairs Agency has identified two factual issues for which it asserts it needs discovery. The first is that the Legislative Affairs Agency needs "discovery from the other defendants concerning details of the construction activities, including the permits that were obtained."⁷ First, neither the construction details nor the permits are relevant to determining the Motion for Partial Summary Judgment. Second, defendant KPB Architects provided construction details and permit documents with its Initial Disclosures.⁸

The other factual issue for which the Legislative Affairs Agency asserts it needs discovery is "whether the lease extension is so 'drastically different' from the original lease that it should not qualify as an extension."⁹ However, attached as Exhibits A-C to the June 29, 2015, Kevin Cuddy Affidavit are what he affies are the prior versions of the lease.¹⁰ Thus, the Legislative Affairs Agency doesn't need to discover the original lease to compare it with the LIO Lease. Since the Legislative Affairs Agency is the lessee, it should have these in its files and, apparently, already does.

In order to receive a Civil Rule 56(f) extension, a party is required to provide adequate reasons why the party cannot produce evidence in the normal time frame. *See, Gamble v. Northshore Partnership*, 907 P.2d 477, 485 (Alaska 1995); *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 759 (Alaska 2008); and *Hymes v. Deramus*, 119 P.3d

⁷ June 29, 2015, Kevin Cuddy Affidavit ¶ 10.

⁸ Reply Affidavit, ¶ 3. KPB Architects' Initial Disclosures were served after the Legislative Affairs Agency's opposition to the instant motion.

⁹ June 29, 2015, Kevin Cuddy Affidavit ¶ 11.

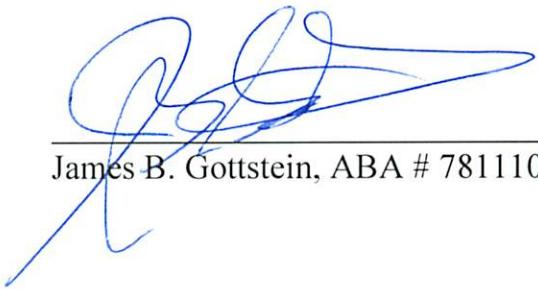
¹⁰ June 29, 2015, Kevin Cuddy Affidavit ¶¶ 15-17.

963 (Alaska 2005). It is respectfully suggested that the Legislative Affairs Agency has failed to do so. However, should this Court grant the Legislative Affairs Civil Rule 56(f) Request, ABI respectfully suggests that the current discovery stay be terminated and the Legislative Affairs Agency allowed 45 days from the original due date of June 29, 2015 to supplement its opposition to ABI's Motion for Partial Summary Judgment with whatever discovery it has obtained that it asserts is relevant.

F. Conclusion

For the foregoing reasons, plaintiff Alaska Building, Inc.'s Motion for Partial Summary Judgment (Not Extension) should be **GRANTED**. In the alternative, it is respectfully suggested the current discovery stay should be terminated and defendant Legislative Affairs Agency allowed 45 days from the original due date of June 29, 2015.

Dated July 7, 2015.



James B. Gottstein, ABA # 7811100

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

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

*Reply Re: Motion for
Partial Summary Judgment (Not Extension)*

Page 9