

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.

COPY
Original Received
JUL 10 2015
Clerk of the Trial Courts

Case No. 3AN-15-05969CI

OPPOSITION TO 716 LLC'S MOTION TO DISMISS COUNT 1

Plaintiff Alaska Building, Inc., (ABI) opposes the Motion to Dismiss Count 1 filed by defendant 716 West Fourth Avenue LLC (716 Motion to Dismiss).

A. ABI Has Interest Injury Standing

There are two different bases for interest-injury standing with respect to Count One. One is based on injury to the Alaska Building, the second on the Alaska Building's interest in receiving 10% of any savings from a declaration that the LIO Lease¹ is illegal.

Under *Keller v. French*, 205P.3d 299, 304-305 (Alaska 2009):

To establish interest-injury standing plaintiffs must demonstrate that they have a "sufficient personal stake" in the outcome of the controversy and "an interest which is adversely affected by the complained-of conduct." The

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).

degree of the injury need not be great: an "identifiable trifle" is sufficient to establish standing "to fight out a question of principle."

(footnotes omitted).

Attached hereto as Exhibit 1 is the original² \$250,000 claim ABI made regarding the damage to the Alaska Building resulting from the demolition of the old Anchorage Legislative Information Office and old Empress Theatre and construction of the new Anchorage Legislative Information Office building under the LIO Lease. This injury resulted from the LIO Lease. Thus ABI has an interest which is adversely affected by the complained-of-conduct, as the Alaska Supreme Court put it in *Keller*. Also, as *Keller* put it, the degree of injury is more than an "identifiable trifle." This gives ABI standing "to fight out [the] question of principle" regarding the illegality of the LIO Lease.

Keller refers to injury-interest, but only addresses standing arising from injury. In this case there is also ABI's separate interest in its claim for 10% of any savings arising from a declaration that the LIO Lease is illegal under AS ~~26~~³.30.083(a).³ Whether such a claim will ultimately be allowed is certainly an issue to be litigated, but for purposes of the 716 LLC Motion to Dismiss, it is a sufficient interest for standing.

² Additional damage has been identified and/or has occurred since the original claim was filed, but the original claim is sufficient for standing purposes.

³ 716 LLC complains that ABI seeks only enrichment in Count One, but ignores that that the State will receive 90% of the savings if it is successful.

B. ABI Has Citizen-Taxpayer Standing for Count One

The seminal case for citizen-taxpayer standing in Alaska is *Trustees for Alaska v. State, Dep't of Natural Res.*, 736 P.2d 324, 329-330 (Alaska 1987), which set out the following elements:

First, the case in question must be one of public significance. . . .
Second, the plaintiff must be appropriate in several respects. For example, standing may be denied if there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit. The same is true if there is no true adversity of interest, such as a sham plaintiff whose intent is to lose the lawsuit and thus create judicial precedent upholding the challenged action. Further, standing may be denied if the plaintiff appears to be incapable, for economic or other reasons, of competently advocating the position it has asserted.

(Footnotes omitted). This formulation was confirmed in *Ruckle v. Anchorage School District*, 85 P.3d 1030, 1034-1035 (Alaska 2004). 716 LLC misstates the criteria when it states at page 6 of its brief that ABI must be "the" appropriate plaintiff. ABI only has to be an appropriate plaintiff and there must not be a plaintiff more directly affected who has or is likely to bring suit.

(1) The Illegality of the LIO Lease is a Matter of Public Significance

716 LLC essentially concedes this case presents a matter of public significance at pages 6 and 8 of its brief. Presumably this is because it is indisputable. That, as a result of corruption, the LIO Lease violates AS 36.30.083(a)'s requirements, resulting in being overcharged by more than \$20 million, is a matter of public significance on a couple of levels. First, and most importantly, addressing the corruption is a matter of public significance. The culture of corruption in state politics, represented by the participation in the corruption and acquiescence of those who should not have allowed it, is a matter of

great public significance.⁴ Second, the over \$20 million the State is being overcharged is of public significance, especially in this time of fiscal crisis for the state.

(2) There is No Plaintiff More Directly Affected by the LIO Lease Who Has or is Likely to Bring Suit

716 LLC flatly misstates *Ruckle* at page 9 of its brief when it states:

The court in *Ruckle* expressly rejected the argument that members of the public are appropriate litigants for challenging the application of the State Procurement Code merely on the basis of being taxpayers."

Ruckle held no such thing. .

In *Ruckle* the Alaska Supreme Court first addressed the importance and purpose of the public bidding system:

In *McBirney & Associates v. State*,⁵ this court explained that the purposes of the competitive public bidding system are:

to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the [state] receives the best work or supplies at the most reasonable prices practicable.

... [T]he requirement of public bidding is for the benefit of property holders and taxpayers, and not for the benefit of the bidders; and such requirements should be construed with the primary purpose of best advancing the public interest.

85 P.3d at 1035, footnotes omitted.

Then the Alaska Supreme Court made clear that *Ruckle* would have had standing if no suit had already been filed by a disappointed bidder.

⁴ At page 10 of its brief, 716 LLC states that the Legislative Council's decision to enter into the LIO Lease was ratified by the full legislature, but cites to an unpublished Alaska Supreme Court decision that has nothing to do with ratification of the LIO Lease.

⁵ 753 P.2d 1132 (Alaska 1988).

These cases do support the proposition that citizen-taxpayers have standing to challenge the results of public bidding systems. However, none of these cases involve a situation, such as the one at bar, where both the bidder and a citizen-taxpayer have filed suit on the same issue, and three of the cases hail from jurisdictions where bidders are only permitted to challenge the bid procedures of municipalities in which they are also municipal taxpayers.

85 P.3d at 1035-1036, footnotes omitted. Here, no other suit has been filed by anyone else, whether a disappointed or potential bidder, or anyone else, such as the Attorney General.

In *Trustees for Alaska*, 236 P.2d at 330, the Alaska Supreme Court held the mere possibility that the Attorney General may sue does not mean that Trustees for Alaska and the other plaintiffs were inappropriate plaintiffs. ABI would welcome a suit by the Attorney General, or anyone else for that matter and, because of the Civil Rule 82 risk to itself, would probably dismiss Count One should such a suit be brought.⁶

ABI has citizen-taxpayer standing. Frankly, if there is no citizen-taxpayer standing here, where as a result of obvious corruption, the State of Alaska is being overcharged over \$20 million⁷ and the politics has resulted in state officials ignoring the corruption, it is hard to see when citizen-taxpayer standing could ever be established.

⁶ Exhibit 1 to Plaintiff's Opposition to Legislative Affairs Agency's Motion to Stay Discovery, dated June 8, 2015, is an e-mail transmitting the original complaint in this matter to Craig Richards, the Attorney General of the State of Alaska expressing the hope that he will support invalidation or reformation of the illegal LIO Lease.

⁷ See, page 3 of Plaintiff's Opposition to Legislative Affairs Agency's Motion to Stay Discovery, dated June 8, 2015.

(3) ABI Is Not A Sham Plaintiff or Akin to a Sham Plaintiff

At Section 3.b.i) of its brief, using the pejorative phrase, "seeking personal enrichment," 716 LLC argues that by seeking damages ABI is akin to a sham plaintiff. However, seeking damages is exactly the opposite of a sham plaintiff. It shows adversity. Again, whether such a claim will ultimately be allowed is certainly an issue to be litigated, but for purposes of the 716 LLC Motion to Dismiss, it defeats the notion that ABI is akin to a sham plaintiff.

One of the consequences of the LIO Lease, which ABI claims is illegal through Count One, is that the Alaska Building was substantially damaged. In addition to this establishing interest-injury standing, it is also the sort of adversity that precludes it from being a sham plaintiff, or akin to a sham plaintiff.

(4) Plaintiff is Capable of Advocating its Positions

At Section 3.b.ii), 716 LLC argues that by sending a letter to the Governor with a copy to the Attorney General, urging him to ask the Attorney General to investigate the corruption involved in the violation of AS 36.30.083(a) in entering into the LIO Lease, pointing out that it appears a crime was being committed, but it was unknown who is guilty of the crime, somehow makes ABI incompetent to bring this lawsuit.

First, what the Alaska Supreme Court actually held in *Trustees* is:

[S]tanding may be denied if the plaintiff appears to be incapable, for economic or other reasons, of competently advocating the position it has asserted.


736 P.2d at 330. This Court can decide for itself if ABI is incapable of competently advocating the position it has asserted, in this lawsuit.

ABI is not in a position to conduct a criminal investigation of the corruption resulting in the LIO Lease, but it is respectfully suggested it can competently advocate the LIO Lease is illegal under AS 36.30.083(a).

C. Conclusion

For the foregoing reasons the Motion to Dismiss Count One by 716 West Fourth Avenue LLC should be **DENIED**.

Dated July 10, 2015.



James B. Gottstein, ABA # 7811100

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he mailed a copy hereof to Kevin M. Cuddy, Jeffrey W. Robinson/Eva R. Gardner, Blake Call, Mark Scheer, Daniel T. Quinn, and Cynthia L. Ducey.

Dated July 10, 2015.



Jim Gottstein

Jim Gottstein

From: Jim Gottstein <jbg@alaskabldg.com>
Sent: Friday, January 23, 2015 1:35 PM
To: DaveD@criteriongeneral.com; Bob O'Neill; Mark Pfeffer
Cc: jbg@alaskabldg.com; Dennis Berry
Subject: Alaska Building Claim
Attachments: 150123Claim.pdf

Dear Messrs. DeRoberts, O'Neill & Pfeffer:

Please find attached the claim for damage to the Alaska Building (Claim) as a result of your Legislative Information Office demolition and reconstruction project (Project).

As the Claim documents, there has been substantial damage to the Alaska Building as a result of your Project, including structural degradation. I have discussed this with Mr. Berry and he made the observation that the Alaska Building will continue to shift and move around to adapt to the displaced Party Wall for some time. He also indicates that in his opinion the \$250,000 claimed is reasonable.

From my perspective I don't see why the Alaska Building should bear any loss or damage as a result of your project. The offer represented by this Claim may be withdrawn at any time prior to acceptance by you.

Jim Gottstein, President
Alaska Building, Inc.
Home of the AlaskaCam (r)
406 G Street, Suite 206
Anchorage, AK 99501
Tel: (907) 274-7686
Fax: (907) 274-9493
<http://alaskabldg.com>
jbg@alaskabldg.com



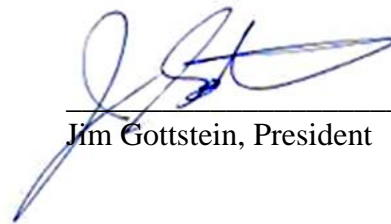
ALASKA BUILDING, INC.

406 G Street, Suite 206, Anchorage, Alaska 99501
(907) 274-7686 Phone ~ (907) 274-9493 Fax

Claim

To: 716 West Fourth Avenue, LLC & Criterion Construction
From: Alaska Building, Inc.
For: Damage from Legislative Information Office Building Reconstruction Project
Amount: \$250,000

Dated: January 23, 2015:



Jim Gottstein, President

**Known Damage to Alaska Building Caused by Old Empress Theater
Demolition & Construction of Elevator & Utility Tower for
Legislative Information Office Demolition and Reconstruction**

Chronology

- There was a tremendous amount shaking during the demolition phase of the project.
- When the Old Empress Theater was demolished, the flashing protecting preventing water running down the Alaska Building side of the Party wall was removed and the roof membrane protecting it left open, exposing it to the elements. This was later discovered to have allowed water under the roof and into the building.
- On February 9th there was so much shaking that items fell off the shelves in Octopus Ink and broke. Criterion settled with Octopus Ink only.
- On February 24, 2014, the slab adjoining the party wall failed due to excavation of the basement of the Old Empress Theater, exposing a large void underneath the slab. The void was immediately filled with cement/grout due to extreme safety concerns. A review of the post/beam connection and door to the server room at the top of the internal stairs points to about an inch of downward movement of the wall and floor at the top of the stairs.
- On April 1, 2014, Shara of Octopus Ink reported that things had shifted around so much that the locks are no longer lining up, including that she is not strong enough to open the lock to the alley. Criterion adjusted the doors so they would lock/unlock.
- On April 3, 2014, Dennis Berry noted that the North end of the Party Wall had moved about an inch and Jim Gottstein noted a crack in the slab he hadn't noticed before.
- On May 14, 2014, the pounding removal of the braces caused so much shaking that Jim Gottstein went up and stopped the workers. The braces, which had been placed when it was close to or below 0 degrees Fahrenheit, had apparently expanded, and the workers were pounding them out. An inspection of the stairwell to 4th Avenue reveals that the party wall had moved to the West with significant resultant damage to the Alaska Building.
- From 4th Avenue the extent of the damage/wall movement is even more evident with about an inch of westward movement of the party wall at the top of the stairwell door.
- On May 17, 2014, Jim Gottstein noted that the pounding of the steel beams during the erection of the tower was causing severe shaking.
- Also on May 17, 2014, it was discovered that leaving the membrane covering the Party Wall on the North end open to the elements had caused water to collect under the roof.
- On June 25, 2014, a leak appeared behind the door to Jim Gottstein's office.
- On July 7, 2014, Jim Gottstein noticed a crack in his 4th avenue wall within a few feet of the Party Wall.
- On July 11, 2014, Jim Gottstein was informed that water was running down the Alaska Building on the South side of the Party Wall and had been for weeks.
- On July 25, 2014, water again was running down the Alaska Building side of the Party Wall during a period of heavy rain.
- On August 6, 2014, it appeared that the bracing from the slab failure was failing, indicating further settlement of the slab.
- On August 18, 2014, Jim Gottstein noticed that a couple of ceiling tiles below where the water had accumulated below the roof membrane were stained. The tiles were not stained before the project.
- On January 23, 2015: flashing above the 4th Avenue Stairway door had still not been replaced.

Photographs

Slab Failure



February 24, 2014



This shows where the post had dropped by what looks to be about an inch
February 24, 2014



August 6, 2014 (Bracing failing)

Server Room Door at top of Stairs from Party Wall- (Shows Almost 1 Inch Drop in Floor)



(January 20, 2015)

Roof



January 9, 2014



March 13, 2014



March 13, 2014



May 16, 2014



May 16, 2014



May 18, 2014



June 2, 2014



August 20, 2014

Ceiling Tile Stains/Water Damage



Unstained Ceiling Tiles December 1, 2013



August 17, 2014

Cracks in 4th Avenue Wall



July 7, 2014



December 26, 2014

4th Avenue Stairwell (All Taken May 16, 2014)





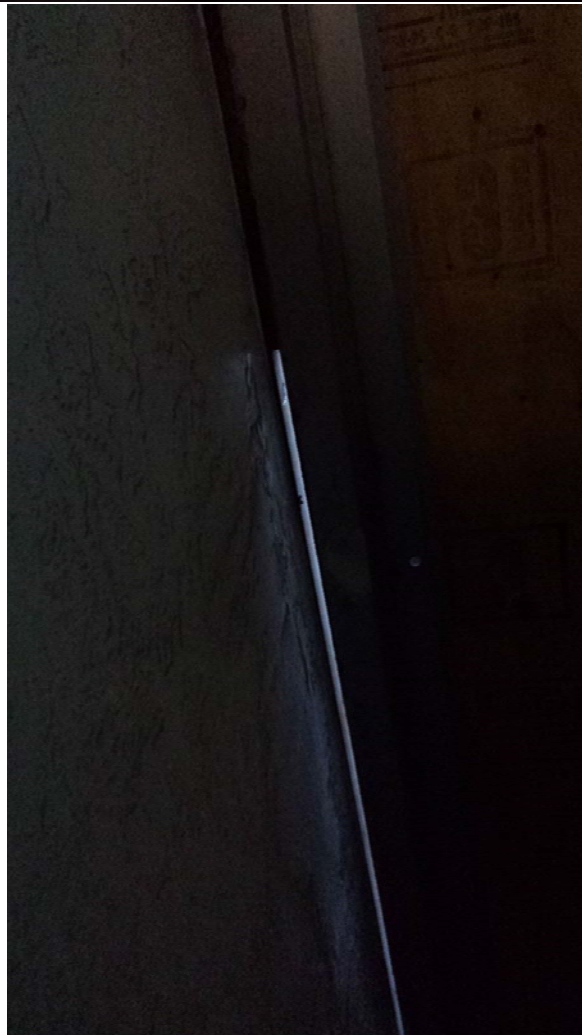


4th Ave Stairwell Door before Project





4th Avenue Stairwell Door after Project





The 4th Avenue Side of the Stairwell Door (January 9, 2015)





January 23, 2015



Top of 4th Avenue Stairwell Before Project



Top of 4th Avenue Stairwell on January 23, 2015



Party Wall Water



July 10, 2014



July 25, 2014



July 25, 2014



July 25, 2014



July 25, 2014



July 25, 2014 (may be upside down)



January 23, 2015