



IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA BUILDING, INC., an Alaska )  
corporation, )

Plaintiffs, )

vs. )

Case No.: 3AN-15-05969 Civil

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.

**REPLY TO PLAINTIFF'S OPPOSITION TO 716 WEST  
FOURTH AVENUE, LLC'S CIVIL RULE 56(f) REQUEST FOR  
ADDITIONAL TIME TO ANSWER PLAINTIFF'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT (NOT EXTENSION)**

Plaintiff Alaska Building, Inc. ("ABI") filed its Motion for Partial Summary Judgment a mere *four days* after its Amended Complaint was filed. As no meaningful discovery had yet occurred on the claims at issue, Defendant 716 West Fourth Avenue, LLC ("716") requested that this Court grant a routine Rule 56(f) continuance. ABI opposed 716's request on three grounds: (1) 716 allegedly failed to provide any reason justifying its Rule 56(f) request, (2) ABI believes 716 should be able to produce any facts related to the Motion for Partial Summary Judgment without a continuance, and (3) the State of Alaska would be prejudiced by an extension. Yet ABI's arguments suffer from a fatal flaw: they presume that ABI's preferred version of the *facts*—a

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version unsupported by any evidence, and which has not been verified in discovery—is correct. As explained below, many of ABI’s factual assumptions are already in dispute, and many more are subject to challenge through the discovery process. In light of this, entering judgment against 716 before formal discovery has even begun would be a violation of 716’s due process right to explore its claims and defenses in discovery.

**I. DISCUSSION.**

The Alaska Supreme Court has explained the purpose of Rule 56(f):

Our civil rules contemplate that dismissal motions will be filed early in litigation because they generally are decided on the pleadings; indeed, to expedite the resolution of litigation some dismissal motions may be filed before a pleading. Summary judgment motions, on the other hand, may require that parties spend considerable time and effort discovering and developing facts necessary for a full presentation[.]<sup>1</sup>

For that reason, the Court has “repeatedly held that requests made under Rule 56(f) *should be granted freely* because Rule 56(f) provides a safeguard against premature grants of summary judgment.”<sup>2</sup>

ABI’s request for partial summary judgment is irredeemably premature. Not only has 716 filed dispositive motions on ABI’s lack of standing, with accompanying requests to stay proceedings and discovery, but 716 is diligently involved in the discovery process surrounding Count II, the construction count. The complexity of the legal and factual issues, the importance of the topic of litigation, and the numerous parties to this matter are all additional important reasons justifying a Rule 56(f) request.

<sup>1</sup> *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 758 (Alaska 2008).

<sup>2</sup> *Id.* at 758 (emphasis added) (internal quotation marks and citations omitted).

Moreover, merely requesting a Rule 56(f) continuance does not require 716 to pre-litigate its opposition to any summary judgment motion, despite ABI's attempts to get the parties to do just that.<sup>3</sup>

**A. 716 has articulated numerous adequate reasons justifying its Rule 56(f) request.**

ABI argues 716 has not provided sufficient reasoning for why it is requesting relief under Rule 56(f). This is not the case. 716's Affidavit, filed with its initial motion, explains with specificity numerous reasons supporting its request. 716 once again addresses these points and responds to the additional points raised by ABI in its Opposition.

*First*, numerous material facts are clearly in dispute. ABI's Motion for Partial Summary Judgment is premised on the "legal conclusion that the lease for the new Anchorage Legislative Information Office (LIO Lease) does not extend a real property lease and is therefore illegal under AS 36.30.083(a)."<sup>4</sup> ABI's argument is founded on four "facts" that it claims "cannot be genuinely disputed."<sup>5</sup> However, these four "facts" are nothing more than ABI's interpretation of provisions cherry-picked from a lengthy, complex real property lease presented in isolation. To support them, ABI relies solely on the affidavit of James Gottstein. Under Alaska law, the self-serving affidavit testimony of a party to a contract, prepared during litigation, is not probative evidence

<sup>3</sup> See *Munn v. Bristol Bay Housing Authority*, 777 P.2d 188, 193-4 (Alaska 1989)(Rule 56(f) affidavits not required to contain evidentiary facts going to merits of the case).

<sup>4</sup> ABI's Opp. to 716's Rule 56(f) Request at 2-3.

<sup>5</sup> *Id.* at 3.

of the meaning of contract terms; it follows that the self-serving affidavit testimony of a litigant who was *not* a party to the contract would be even less probative.<sup>6</sup> Mr. Gottstein's conclusory affidavit testimony on the "undisputed facts" is not evidence that can be relied on by the Court on summary judgment.

Even if Mr. Gottstein's affidavit did constitute reliable evidence, it would not prevent ABI's "facts" from being very much in dispute. For example, ABI's assertion that the agreement called for a "new office building" rather than a remodel is contested by 716.<sup>7</sup> 716's pleadings characterize the agreement as an expansion and renovation (or "remodel") of the LIO, in accordance with the terms of the lease at issue.<sup>8</sup> ABI's Opposition is laden with other genuinely disputed factual issues connected to what it refers to as the "not extension" issue.<sup>9</sup> Even ABI's own pleadings and briefing place some of its "undisputed facts" in dispute,<sup>10</sup> and ABI has expressly admitted that factual

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<sup>6</sup> *Peterson v. Wirum*, 625 P.2d 866, 870 (Alaska 1981).

<sup>7</sup> See ABI's Opp. to 716's Rule 56(f) Request at 3.

<sup>8</sup> 716's Answer to Compl. at 3, ¶14; 716's Answer to Am. Compl. at 3, ¶14; see Aff. in Support of Pl.'s Mot. for Partial S.J. ("Plaintiff's Aff.") (Ex. 1 at 1 and 49).

<sup>9</sup> See Opp. to 716 LLC Rule 56(f) Request at 6, FN 4. For instance, ABI claims that "[i]t was far more expensive to demolish the old Anchorage Legislative Information Office Building and the Anchor Pub and then construct a new building on the site than it would have been to just construct a new building," but offers no proof to back up such a claim. ABI likewise never establishes with specificity how the terms of the Lease Extension differ so drastically from the original lease as to prevent it from being an extension, as ABI asserts.

<sup>10</sup> Plaintiff asks this court to find that the lease violates AS 36.30.083(a) because it "does not extend a real property lease," see Pl.'s Proposed Order Granting Mot. for Partial S.J., yet at the same time admits that whether rent paid by the Agency is proper under that statute "is a factual issue, unlikely to be resolvable on summary judgment." Plaintiff's Mem. in Support of Mot. for Partial S.J. at 2. Indeed, Plaintiff's claim that the rental rate "is at least twice the market rental value" is not only disputed, but wholly unfounded: to date, it has not been supported by any appraisal or other documentary evidence. See Amended Complaint ¶ 21



issues surround the lease agreement in this case.<sup>11</sup>

The factual disagreements between the parties are both numerous and material, rendering summary judgment at this time inappropriate.

*Second*, summary judgment at this stage would be premature. ABI filed its Amended Complaint on June 8, 2015 and its partial summary judgment motion on June 12—a mere four days later. The purpose of discovery is to allow parties the opportunity to explore the strengths and weaknesses of their respective claims and defenses, and to enable the Court to render a decision on a full and fair record. Yet ABI is asking this Court to forego the entire discovery process and enter judgment based solely on the unproven allegations in ABI's complaint.

Although ABI asserts that 716's motion for Rule 56(f) relief "essentially seeks permission to be dilatory[,] " 716 has requested nothing of the sort.<sup>12</sup> 716 merely seeks to exercise its due process right—granted by the Civil Rules—to explore and challenge ABI's claims through the rule-mandated discovery process. The discovery period has only just begun; there are over *11 months* remaining before it closes.<sup>13</sup> 716 is not aware of any rule or precedent that requires a party to complete discovery 11 months early, on penalty of having judgment entered against it. Rather, parties are entitled to use the full discovery period to explore their defenses and collect evidence.

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<sup>11</sup> See Plaintiff's Mem. in Support of Mot. for Partial S.J. at 2.

<sup>12</sup> See Plaintiff's Opp. at 6, FN 3.

<sup>13</sup> According to the Routine Pretrial Order, dated May 21, 2015, expert discovery is not set to conclude until June 20, 2016.

*Third*, extensive Alaska case law supports 716's request. Even ABI cites numerous cases that support 716's motion. In *Hymes v. Deramus*, a pro se litigant and his wife sued the Department of Corrections.<sup>14</sup> The defendants moved for summary judgment six months later and included an affidavit from an expert. The trial court gave the plaintiffs a month to supplement their opposition with an expert medical affidavit. The Supreme Court found that this was not likely enough time given that the pro se litigant was incarcerated.<sup>15</sup> In *Gamble v. Northshore Partnership*, the plaintiffs sued Northshore for reformation of a recorded easement in January of 1993.<sup>16</sup> Northshore moved for summary judgment six days before the *close* of discovery and one and one-half months before trial.<sup>17</sup> The Gambles were denied Rule 56(f) relief, and the Supreme Court reversed, concluding that the plaintiffs made an unambiguous request for a continuance with which to undertake additional discovery and that the request was warranted.<sup>18</sup> Comparatively, ABI filed for summary judgment relief *four days* after filing the amended complaint and before discovery even formally began. 716, and evidently ABI, is unaware of any case where such a motion was granted.

Extensive material facts are in dispute; 716 has a due process right to conduct discovery before having judgment summarily entered against it; and Alaska law

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<sup>14</sup> *Hymes v. Deramus*, 119 P.3d 963 (Alaska 2005).

<sup>15</sup> *Id.* at 967-68.

<sup>16</sup> *Gamble v. Northshore Partnership*, 907 P.2d 477, 480 (Alaska 1985).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 486.

supports holding summary judgment motions in abeyance under Rule 56(f) while discovery runs its course. These reasons alone justify 716's motion.

**B. 716 Does Not Have All Facts "Readily at Hand" and Intends to Pursue Substantial Discovery from the Agency.**

716 cannot prepare a defense to ABI's Motion for Partial Summary Judgment without discovery. Without any supporting documentation or citation to evidence in the record, ABI asserts this Court should be "extremely skeptical" about a genuine material factual issue emerging.<sup>19</sup> ABI's claims raise a multitude of issues ranging from the specific lease agreement at issue to the construction processes used to Alaska's procurement process. Every one of these issues requires discovery. Below, 716 details the scope and nature of some of the information that requires discovery, and which is material to the issues in ABI's summary judgment motion.

ABI continually asserts that the lease violated AS 36.30.083(a), but has, to date, ignored parts of the actual procurement process. In other pleadings, 716 has pointed out that the legislative council publishes its own procedures governing procurement.<sup>20</sup>

ABI argues in its Opposition that 716 should be able to produce any facts related to the Motion for Partial Summary Judgment without a continuance. Unsurprisingly, information available to the Agency—a government entity—is not equally accessible to

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<sup>19</sup> Plaintiff's Opp. at 5. ABI's reliance on *Munn v. Bristol Bay Housing Authority* is misplaced: far from supporting ABI's position, that case expressly states that "Courts even have allowed parties *with no clear idea of what specific facts they hope to obtain* to overcome a summary judgment motion, at least temporarily," under Rule 56(f). *Munn*, 777 P.2d at 193 (emphasis added).

<sup>20</sup> See 716's Motion to Dismiss Count I at 10; see also AS 36.30.102.

716, a private landlord. Discovery is necessary for 716 to obtain relevant information regarding—among other facts—the Agency’s complex internal procurement process.<sup>21</sup> If the court refuses to dismiss Count I of ABI’s suit on standing grounds, discovery on the Agency’s internal procurement process will be necessary. Presumably this information would include appraisals that were done in compliance with AS 36.30.080(a) or other relevant provisions of the Alaska Legislative Procurement Procedures. Certainly, the facts supporting the Agency’s written determination that the lease could be materially modified to incorporate the immediately adjacent property without procurement of a new lease are relevant discovery.<sup>22</sup> Those facts are not available to 716 at this time.

As a matter of due process, 716 is entitled to conduct the discovery allowed by the Civil Rules, and under the timeframe provided by the Court’s scheduling order.

**C. ABI’s Allegation Regarding Prejudice to the State Is a Red Herring.**

ABI has been unable to say how it would be prejudiced by allowing the discovery period to run its course. Instead, it argues that any delay in considering the Motion for Partial Summary Judgment “will almost certainly prejudice the State of Alaska.”<sup>23</sup> This claim is apparently based on ABI’s unsupported assertion that “716, LLC is not likely to be able to pay back the rent it has improperly received.”<sup>24</sup> But, ABI

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<sup>21</sup> See Alaska Stat. Ann. § 36.30.020.

<sup>22</sup> See LAA’s Opp. To Plaintiff’s Mtn. for Partial Summary Judgment (Not Extension) at 3.

<sup>23</sup> Plaintiff’s Opp. to 716 LLC Rule 56(f) Request at 6.

<sup>24</sup> See Mem. in Support of Mtn. for Partial S.J. (Not Extension).



is not an advocate for the State of Alaska. ABI has not been chosen to bring forward this claim on behalf of the State. The State has separate representation adverse to ABI. Once again, ABI is unable to articulate why it is an appropriate plaintiff to bring this suit or how its interests have been adversely affected by the lease.<sup>25</sup>

## II. CONCLUSION.

In light of the foregoing, 716 respectfully requests the Court grant its request for a Rule 56(f) continuance.<sup>26</sup>

716 further respectfully submits that oral argument on the Motion for Partial Summary Judgment (as requested by ABI) would be a senseless exercise at this time. The evidentiary record is currently inadequate to support any ruling on the merits of that motion. The statements of counsel at oral argument will not be able to supplement the record, because the arguments of counsel are not evidence. As there is no conceivable utility to oral argument, 716 requests that oral argument on the underlying motion similarly be held in abeyance until the record is ripe for decision on the merits.

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<sup>25</sup> Instead of describing any actual prejudice to its own interests, ABI makes wild speculations about 716's financial health, including the motivation for the formation of 716's corporate structure, and promulgates a new damages theory whereby 716 should now be held "liable for all of the rent paid to it under the LIO lease." *Id.* Again, it appears that ABI's sole purpose in participating in this litigation is to seek a personal windfall.

<sup>26</sup> In the alternative, to maintain an orderly docket, the Court could deny ABI's Motion for Partial Summary Judgment without prejudice to refile after the close of discovery. *See* Civil Rule 56(f) ("... the court may refuse the application for judgment or may order a continuance ...").

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Attorneys for 716 West Fourth Avenue, LLC

DATED: 7/10/15

By: [Signature]  
for Jeffrey W. Robinson  
Alaska Bar No. 0805038

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served via ☐ hand-delivery ☐ facsimile ☒ U.S. Mail on the 10<sup>th</sup> day of July 2015, on:

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REPLY TO OPPOSITION OF 716'S CIVIL RULE 56(f) REQUEST FOR ADDITIONAL TIME  
*Alaska Building, Inc. vs. 716 West Fourth Avenue, LLC, et. al.* 3AN-15-05969 Civil

{10708-101-00276461;7}

Page 10 of 10

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