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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, and LEGISLATIVE AFFAIRS AGENCY, Defendants.	Case No.: 3AN-15-05969 CI

MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DENYING MOTION FOR SUMMARY JUDGMENT RE: LACHES

Defendant 716 West Fourth Avenue LLC ("716"), by and through counsel, Ashburn & Mason, P.C., and pursuant to Alaska Rule of Civil Procedure 77(k), hereby respectfully moves the court to reconsider its January 7, 2016 order denying Defendants' motion for summary judgment under the laches doctrine. 716 asks this Court to reconsider two portions of its ruling. First, under Civil Rule 77(k)(1)(ii)[1], this Court overlooked or misconceived the material fact that Plaintiff was in fact seeking damages when it brought the instant action. Second, under Civil Rule 77(k)(1)(ii), the court should reconsider its application of the prejudice prong of the equitable defense of laches.

[1] Under Civil Rile 77(k)(1)(ii), a party may move the court to reconsider a ruling previously decided if, in reaching its decision: (ii) the court has overlooked or misconceived some material fact or proposition of law.

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I. Plaintiff did in fact seek damages in this suit

The Court overlooked or misconceived the scope and breadth of ABI's actual (and **repeated**) requests for damages throughout this litigation. In balancing ABI's 17 month delay in bringing suit against the hardship the defendants would suffer if the lease were declared illegal, the Court concluded that the harm was yet "unknown."[2] The Court then admitted that it would have likely reached a different conclusion "if ABI were seeking an award of damages."[3] Yet, Plaintiff's request for *qui tam* damages dominates the pleadings in this case

Plaintiff's initial complaint sought, *inter alia*, a judgment in its favor for "10% of the savings to the Legislative Affairs Agency" if the lease were invalidated or reformed.[4] ABI pressed onward with its request for this award even *after* the court concluded that it only had citizen taxpayer standing and not interest injury standing,[5] filing a Second Amended Complaint a mere five days after the ruling requesting the identical 10% award for itself.[6] In his October 16, 2015 deposition, Mr. Gottstein acknowledged that even though this wasn't a *qui tam* case, he was still dedicated to

[2] *See* Court's Order at 7.

[3] *See Id.* The Court's footnote acknowledged that ABI **was seeking** a novel *qui tam* damages claim, which at the time of the January 7, 2016 order regarding laches was still outstanding.

[4] *See* Plaintiff's Complaint at Page 5, ¶ C.

[5] *See* Order regarding Motion to Dismiss dated 8/20/2015.

[6] *See* Second Amended Complaint, dated 8/25/2015.

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"com[ing] up with some law" that would justify the court rewarding him, a private litigant, 10% relief.[7]

ABI never wavered from its *qui tam* damages request. For example, on October 2, 2015, Plaintiff submitted an affidavit from Larry Norene estimating that over the course of the lease term (10 years), the Agency would pay $20,765,360 over the permissible market rental rate under AS 36.30.083(a).[8] Accordingly, as he has admitted, Mr. Gottstein could have potentially pocketed over $2,000,000 had the Court permitted his *qui tam* claim to go forward and ultimately accepted Norene's overpayment calculations.[9]

ABI has unabashedly sought damages in this case and the Court overlooked this material fact in its order regarding laches. Yes, as all parties have acknowledged, the Plaintiff sought a "novel" award. And, as this Court found, the award was without merit and had no basis in statutory law. Nevertheless, Defendants were forced to defend against this claim in numerous motions filed by ABI and in all three Complaints filed in this action. Accordingly, in light of having overlooked the fact that ABI actually pursued damages, 716 requests that the court reconsider its decision precluding a summary judgment ruling in its favor under the laches doctrine.

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[7] *See* 716's Reply to ABI's Opposition to Motion for Ruling of Law, Attachment A at 4.

[8] *See* Larry Norene Affidavit attached to Plaintiff's Motion for Preliminary Injunction.

[9] A good deal of Mr. Gottstein's sworn deposition testimony addressed this issue:
Q:. And you still believe you're entitled to roughly a $2.1 million windfall if the court accepts your qui tam argument?
A: Well, I object to the characterization as "windfall," and we'll see whether or not the courts agree with it, but I'm certainly making that claim. *See* 10/23/15 Deposition at 76: 19-24

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a) The court overlooked undisputed factual evidence of the actual prejudice incurred by 716 because of ABI's delay in filing suit

There are no genuine issues of material facts pertaining to the harm suffered by 716 as a result of Plaintiff's unreasonable delay. It is undisputed that 1) 716 spent tens of millions of dollars renovating and expanding the LIO, 2) Plaintiff gained financially from the Project, 3) and Plaintiff failed to file a lawsuit to prevent the Project from going forward despite believing that it was illegal even *before* construction commenced. The Court's Order acknowledges the $44 million dollar outlay in construction costs was **avoidable** had Plaintiff timely challenged the lease, but perplexingly concludes that "spending money is not the equivalent of suffering harm if the money is recouped in a different fashion."[10] Even looking in the light most favorable to ABI, there are simply no factual inferences in the record to suggest that 716 would be able to recoup the $44 million in building costs should the lease be declared illegal.[11]

ABI has never contested that 716 served as the Landlord of the LIO for 23 years[12] and that the *entire* renovation and expansion project was *designed* to meet the Lessee's specific needs.[13] On one hand, the Court acknowledged that "716 may not be

[10] *See* Court's Order at 8.

[11] In the instant case, the construction contract alone was in excess of $30 million dollars. In *Laverty v. Alaska R.R. Corp.*, 13 P.3d 725, 729 (Alaska 2000) where the Supreme Court denied Plaintiff's request for injunctive relief because it was barred by laches, the gravel removal company spent large amount of time and money on "geotechnical studies" and the overall permitting process, fees which pale in comparison to what 716 spent on the instant Project.

[12] *See* Affidavit of Mark Pfeffer, attached to 716's Opposition to Plaintiff's Motion for Preliminary Injunction, incorporated into 716's Joinder in the Agency's Motion to Dismiss.

[13] *See* Extension of Lease and Lease Amendment No. 3 at 1.

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able to lease to any one on similar terms"[14] should it declare the lease illegal, and on the other hand the Court definitively concluded that upon a declaration that the current lease is illegal 716 "**will** be able to lease the building at a greater rate since it claims the current rate is 10% below the market value."[15] There are no factual inferences in the record to support the notion that should the lease be declared illegal, 716 could find a replacement tenant for *any* meaningful rental rate. Plaintiff presented no facts in support of the idea that 716 may recoup any sum should it renegotiate its existing lease or find an entirely new tenant at some future date should the contract be voided.

Nor has there been any meaningful inference from the record that any hypothetical replacement tenant would commit to occupying the uniquely designed building for any meaningful length of time. There has never been any factual inference in the record to suggest that the parties to the lease did not intend to extend the lease for any period other than the full June 1, 2014-May 31, 2024 ten-year lease term as authorized under AS 346.30.080(a).[16] Because the Court overlooked the **actual** prejudice suffered by 716 as a result of ABI's delay, 716 respectfully asks the Court to reconsider its Order and find that Plaintiff's lawsuit is equitably barred by the doctrine of laches.

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[14] *See* Court's Order at 9. It goes without saying that it is illegal to enforce a lease that violates a statute.

[15] *See Id.*

[16] *See* Affidavit of Mark Pfeffer in support of 716's opposition to Plaintiff's Motion for Preliminary Injunction at ¶ 9.

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DATED: 1/19/16

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served ☐ electronically ☐ messenger ☐ facsimile ☒ U.S. Mail on the 19th day of January, 2016, on:

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[PROPOSED] ORDER GRANTING MOTION FOR RECONSIDERATION

Having considered the parties' briefing regarding Defendant 716 West Fourth Avenue, LLC's Motion for Reconsideration of the Court's Order Denying Motion for Summary Judgment Re: Laches, the request is GRANTED.

DATED: _____

_____
HON. PATRICK J. McKAY
Superior Court Judge

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