IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

ALASKA BUILDING, INC., an Alaskan corporation, Plaintiff, vs. 716 WEST FOURTH AVENUE, LLC, and LEGISLATIVE AFFAIRS AGENCY, Defendants.	)	3AN-15-05969 CI

ORDER DENYING MOTION FOR SUMMARY JUDGMENT RE: LACHES

I. Background

On September 9, 2013, the Legislative Affairs Agency (LAA) and the 716 West Fourth Avenue LLC (716) entered into an agreement to renovate and expand the existing Legislative Information Office (LIO Project).[1] The project required a virtual "gutting" of the existing rental space, demolition and subsequent reconstruction of a separate building on an adjoining lot, increasing the square footage of the leasehold from approximately 23,645 square feet to approximately 64,048 square feet. The agreement called for the LAA to pay for certain tenant improvements estimated to have cost in excess of $7.5 million. The project required relocation of the tenants for several months. At the completion of this project, the LAA once again leased the office space. Construction began in December 2013 and was completed around January 9, 2015. [2]

[1] LAA Mot. for Summ. J. at 2.
[2] *Id.* at 5.

The monthly rental increased from $56,863.05 to $281,638 and the term of the lease was extended to May 31, 2024.

The Alaska Building, owned by Alaska Building Inc. (ABI) whose president and sole member is James Gottstein, is a building adjacent to the LIO Project. By October 3, 2013, Mr. Gottstein was aware that the LAA and 716 had signed a contract for the LIO Project and that the project would cost several million dollars.[3] By October 11, 2013, Mr. Gottstein had met with the attorney for 716 and expressed concerns that the lease was illegal and was contemplating filing an injunction[4]. Around October 28, 2013, he once again met with 716's attorney and expressed his opinion that the project was illegal under AS 36.30.083(a).[5] Mr. Gottstein filed a lawsuit on behalf of ABI on March 31, 2015 alleging in relevant part that because the LIO Project did not comply with the requirements of AS 36.30, the project is illegal.[6] Under AS 36.30, leases in which the LAA is a party are subject to a competitive bidding process and legislative notice, unless exempted. AS 36.30.083 exempts lease "extensions" that will result in a "cost savings of at least 10 percent below the market rental value of the… property." Over defendants' objections, Mr. Gottstein was granted citizen taxpayer standing.[7] LAA filed this motion requesting summary judgement under the laches doctrine. 716 joined in LAA's motion for summary judgement.

II. Issues Presented

A. Is the equitable defense of laches available to ABI's declaratory relief request?

B. Did ABI fail to bring its complaint in a timely manner?

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[3] LAA Mot. Summ. J. Exhibit A Request for Admission (RFA) Nos. 4-5.
[4] *Id.* Interrogatory No. 1.
[5] *Id.* Interrogatory No. 2.
[6] First Amended Complaint ¶¶17-21.
[7] ABI's original complaint contained two counts: Count 1 alleged the illegality of the lease and Count 2 alleged damage to ABI's building during the renovations. The LAA moved that the suit be dismissed as against it because ABI lacked standing to bring suit on Count 1 and the LAA was not the correct party against whom to bring suit in Count 2. Alternatively, the LAA requested that the suit be severed. The court found that ABI had citizen taxpayer standing for Count 1 and severed the counts pursuant to Alaska's Civil Rule 20(a) in its Aug. 8, 2015 Order. ABI filed an amended complaint as to Count 1 and filed a separate suit regarding the allegations in Count 2 that is currently before Judge Rindner in 3AN-15-09785CI.

C. Will ABI's delay harm the LAA?

D. Will ABI's delay harm 716?

III. Summary Judgement Standard

Summary judgement is appropriate where "there is no issue as to any material fact and the moving party is entitled to a judgement as a matter of law."[8] The non-moving party must "set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issues of fact exists."[9] Alaska has a lenient summary judgement standard,[10] but mere allegations are insufficient and the non-moving party "must set forth specific facts showing that there is a genuine issue of material fact."[11] The court views "the facts in the light most favorable to the non-moving party and draw[s] all factual inferences in the non-moving party's favor."[12]

IV. Analysis

Both the LAA and 716 assert the equitable defense of laches against ABI's lawsuit. For a laches defense to succeed, the defendants must show that 1) the plaintiff waited an unreasonable amount of time in bringing his suit and 2) that the plaintiff's unreasonable delay resulted in prejudice or undue harm to the defendants.[13] As part of determining whether the delay was unreasonable, the court can consider "a lack of diligence in seeking a remedy, or acquiescence in the alleged wrong…"[14] Importantly, "[t]he analysis is actually less of a distinct two-part test than an overall balancing of the equities."[15] Because of the balancing nature of the laches test, whether a delay is unreasonable is often better judged in light of the harm suffered by the defendants. Unless the Alaska Supreme Court is left with a "definite and firm conviction that a

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[8] Alaska R. Civ. P. 56(c).
[9] *Christensen v. Alaska Sales and Service, Inc.* 335 P.3d 514, 517 (Alaska 2014).
[10] *Estate of Milos v. Quality Asphalt Paving, Inc.*, 145 P.3d 533, 537 (Alaska 2006).
[11] *Kelly v. Municipality of Anchorage*, 270 P. 3d 801, 803 (Alaska 2012) (internal citations omitted).
[12] *Kalenka v. Jadon, Inc.*, 305 P.3d 346, 349 (Alaska 2013).
[13] *Laverty v. Alaska R.R. Corp.*, 13 P.3d 725, 729 (Alaska 2000).
[14] *Kollander v. Kollander*, 322 P.3d 897, 903 (Alaska 2014).
[15] *McGill v. Wahl*, 839 P.2d 393, 399 (Alaska 1992).

mistake has been committed"[16] it will not overturn the trial court's determination of whether laches bars a suit.[17]

A. Is the equitable defense of laches available to ABI's declaratory relief request?

Mr. Gottstein objects to the defense of laches being raised, arguing that this defense is not available against his requested declaratory relief. Alaska courts have held that "laches is an equitable defense against equitable causes of action, but not a legal defense against actions at law."[18] However, declaratory relief is neither equitable nor legal, but an additional remedy.[19] The LAA urges the court to view this requested relief as an equitable pleading and allow it to raise the defense of laches. [20]

In its complaint, ABI only seeks declaratory relief. But ABI has also requested a preliminary injunction[21], asking the court to utilize equitable powers to prevent perceived harm during the period of the pending lawsuit. Realistically, the declaratory relief requested would effectively bar either defendant from reliance on the provisions of the lease, opening up a myriad of both legal and equitable resolutions to the situation which defendants would then find themselves. Under the unique facts in this litigation, the court does find that the defense of laches is available to this lawsuit.

B. Did ABI fail to bring his complaint in a timely manner?

In determining whether a delay was unreasonable, the court "will look to the point in time at which the defendants' actions indicated that their conduct was irrevocable and

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[16] *Laverty,* 13 P.3d at 729.
[17] *Id.*
[18] Laverty, 13 P.3d at 730; See also Hanson v. Kake Tribal Corp., 939 P.2d 1320, 1325 n. 1 (Alaska 1997).
[19] Laverty, 13 P.3d at 730.
[20] ABI belatedly raised the unclean hands doctrine to defeat the laches summary judgment motion. While certainly one who requests an equitable ruling must "come with clean hands", the court notes there may be additional material questions of fact surrounding this issue, but does not base its current decision on this recently raised legal argument.
[21] Pl.'s Mot for Prelim.Inj. (docketed Oct. 6, 2015). ABI requests that 716 be enjoined from disbursing any funds received under the lease beyond what is necessary to operating expenses and debt service.

would have galvanized a reasonable plaintiff into seeking a lawyer."[22] There is no specific length of time that serves as the threshold for a successful defense of laches. [Instead], the court will balance the length of the delay against the seriousness of the prejudice the defendant suffers.[23] As part of determining whether the delay was unreasonable, the court can consider "a lack of diligence in seeking a remedy, or acquiescence in the alleged wrong…" [24]

LAA and 716 rely heavily on *City and Borough of Juneau v. Breck,* 706 P.2d 313 (Alaska 1985) to persuade the court that Mr. Gottstein's seventeen month delay was unreasonable. In that case, Ms. Breck sued the City of Juneau for violating the city code's competitive bid process when it hired a construction firm to complete a project. From April through June 1984, Ms. Breck appeared before the borough assembly expressing her concerns that the construction contract was illegal. In August, after nearly 50% of the project was completed and the city had spent approximately $1.5 million, she sued the city asking for an injunction. The Alaska Supreme Court found that the two elements necessary for laches to apply were present: "1) that the plaintiff ha[d] unreasonably delayed in bringing the action; and 2) that this unreasonable delay ha[d] caused undue harm or prejudice to the defendant."[25] The court reasoned that though that Plaintiff had waited only four months from when the contract was signed until she brought her law suit, her delay had prejudiced the city because of the amount of money it had already spent and the additional costs the city would incur by cancelling the contract, send the project out to bid, and complete the project with a new firm.[26]

Specifically, the court in *Breck* found that when the parties signed the construction contract and subsequently started construction, Mrs. Breck should have been prompted to seek counsel.[27] Without explicitly saying so, the Court balanced the

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[22] McGill v. Wahl, 839 P.2d 393, 398-99 (Alaska 1992).
[23] Pavlik v. State, Dept. of Community and Regional Affairs, 637 P.2d 1045, 1047-8 (Alaska 1981) (internal citations omitted) (No specific time must elapse before the defense of laches can be raised because the propriety of refusing to hear a claim turns as much upon the gravity of the prejudice suffered by the defendant as the length of the plaintiff's delay." Thus, where there is a long delay, a lesser degree of prejudice will be required).
[24] Kollander v. Kollander, 322 P.3d 897, 903 (Alaska 2014).
[25] *Id.* at 315.
[26] *Id.*
[27] 706 P.2d 313, 315-16 (Alaska 1985).

length of her delay against the prejudice that ensued from her delay citing estimates that such a delay would cost between $1.5-2 million. Thus, when balanced against the prejudice Ms. Breck's delay caused the ostensibly short amount of time (four months) it took for her to file her suit rose to the level of "unreasonable."

The court finds that Mr. Gottstein was aware of the potential illegality of the contract within weeks of its announcement. Yet he waited seventeen months and until the completion of the project to bring suit.[28] In his responses to LAA's request for admissions, Mr. Gottstein admitted that "there was no indication, once construction began in late 2013, that [the LAA] had any intention to voluntarily declare the Lease Extension void due to an alleged irregularity in the procurement process." During the seventeen month delay, Mr. Gottstein also collected $15,000 in professional fees from 716[29] and $10,000 in rent from the construction company.[30] The court views Mr. Gottstein's financial gains as acquiescence and, combined with the seventeen months ABI waited to bring the law suit, this delay seems "unreasonable."

Mr. Gottstein cites concerns over retaliatory actions from 716 if he brought this law suit during the construction period. The court finds that Mr. Gottstein's fears do not seem particularly well-founded[31] and any threatened retaliatory damage could be remedied by damages. The court finds that fear of retaliation is not a legitimate reason to not bring a timely lawsuit especially when damages could have made Mr. Gottstein whole again.

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[28] See Ex. A Interrogatory No. 2.
[29] See id. RFA 9.
[30] See id. RFA 12-14.
[31] Mr. Gottstein states several times during his October 23, 2015 deposition that he was concerned that 716 was going to shut off the gas to the ABI building. See e.g. Pl.'s Opp. Mot. Sum. J. Laches, Exhibit 1, pg. 4-5 (Gottstein Dep. 87: 5-7; 97: 17-19) However, he also admits that 716 never actually threatened to disconnect his gas. Id. at pg 11-12 (Gottstein Dep. 141:22-142:6). . Bolstering this assertion, he also provides a series of emails between 716's counsel and himself discussing 716 disconnecting and re-connecting Alaska Building's gas lines. Pl.'s Opp. Mot. Sum. J. Laches, Exhibit 2. Even viewing these emails and statements in the light most favorable to Mr. Gottstein, it does not appear that 716 was threatening to cut off the Alaska Building's gas supply for longer than it would take to reconnect it to another meter. He also states that he was worried that 716 would demolish a shared "Party Wall." Pl.'s Opp. Mot. Sum. J. Laches, pg. 3-5. It appears this fear stems from a disagreement over who owned portions of that wall. See Pl.'s Opp. Mot. Sum. J. Laches, Exhibit 3. It is unclear whether 716 would have torn down this wall regardless of ownership if Mr. Gottstein had moved ahead with his suit.

Though the court could find ABI's delay was unreasonable, the court must still balance the delay against the hardship the defendant's will suffer. Neither the LAA's nor 716's future harm seems particularly egregious. In fact, viewing the facts in a light most favorable to ABI as this court is required to do, a finding that the lease is "illegal, null and void" may potentially benefit either party, as discussed below. Thus, when balanced against the unknown degree of harm that the parties may incur because of this delay, the court may ultimately determine that the seventeen month delay is not so unreasonable.

While balancing the harm, the court might come to a different conclusion if ABI were seeking an award of damages[32]. The court would find unreasonable delay if damages were requested for the period between the fall of 2013 and the date of the lawsuit. But all that is before the court is a request for declaratory relief[33] seeking to declare void a process which resulted in an executory contract that still has eight and one-half years (8&1/2) of monthly rental payments remaining.

C .Will ABI's delay harm the LAA?

As part of the LIO Project, the LAA paid $7.5 million in tenant improvements. The LAA argues it will be harmed if the lease is found null and void because it may have to relocate and abandon those improvements. Had Mr. Gottstein brought this suit before or even during construction, the LAA contends it could have saved all or part of the $7.5 million.

Though there are many similarities between *Breck* and the current case, a key distinguishing element is that in *Breck* the expense was a one-time outlay of money. Here, the LAA will continue paying a sizeable monthly rent for several additional years in addition to its initial $7.5 million investment in tenant improvements. Mr. Gottstein's real estate expert conservatively calculated that over the course of the current lease, the LAA will be paying over $17 million in excess of allowable rent. If the lease is found

[32] Other than the novel claim of *qui tam* damages which is subject to a separate dispositive motion.
[33] Laverty, 13 P.3d at 730,731.

"illegal, null and void"[34] and the LAA abandons the building in favor of less expensive office space, it and the Alaskan tax payers will be saving potentially much more than the original $7.5 million. It remains a question of fact whether the LAA would ultimately forfeit the entire $7.5 million it spent on improvements since the lease makes no specific mention of such a contingency.[35].

There are other material questions pertaining to the extent of harm the LAA may suffer. The lease provides for termination if not funded by the legislature, meaning the requested declaratory relief may not harm either party if the court simply determines the legality of an already voidable contract.[36] The court finds that summary judgment favoring the LAA is inappropriate at this time without an opportunity to fully develop the facts, determine the credibility of the witnesses, and test the data supplied in support of harm alleged in the request for summary judgment.

D. Will ABI's delay harm 716?

716 similarly argues that it will be unfairly prejudiced absent a successful defense of laches. In joining the LAA's motion for summary judgement under this doctrine, 716 utilized its briefing against Mr. Gottstein's motion for a preliminary injunction in its entirety to argue it will be unfairly prejudiced. There, 716 argues that it spent over $44 million in renovations, some which were specifically tailored to the LAA's needs.[37] 716 further argues had Mr. Gottstein brought this suit earlier, it could have avoided this tremendous outlay of money. Obviously the money spent could have been avoided, but spending money is not the equivalent of suffering harm if the money is recouped in a different fashion.

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[34] First Amended Complaint Requested Relief A.
[35] *See* September 19, 2013 Lease Extension and Amendment 3, Section 3 (Renovation and Delivery of Premises) and Section 33 (Remedies on Default). Neither section mention what would happen to the $7.5 million in the event of a default or otherwise. The court does not intend to speculate on legal remedies or "attachments" to the leasehold in this summary judgment format. Suffice to say that uncertainty exists.
[36] Extension of Leaseand Lease Amendment NO.3, Sec. 1.2, at p.4 of 22. Neither party seemed to commit to the legal ramifications of that clause in the lease.
[37] 716 Opp. to Mot. for Prelim. Inj. 12

The facts on this issue are not yet fully ascertainable and certainly aren't presented with such a degree of certainty that this court should rely on them for summary judgment. On the one hand, if the court finds the lease "illegal, null and void" 716 and the LAA may renegotiate the contract to reflect a 10% below market value rental rate meaning 716 may have to amortize the renovation's expense over a longer time and lose some of the benefit of its bargain, therefore incurring some harm. 716 may not be able to lease to any one on similar terms also incurring harm. On the other hand, in the event that the court declares the lease "illegal, null and void," and the parties are unable to reach a new agreement, 716 will be able to lease the building at a greater rate since it claims the current rate is 10% below the market value. Indeed, 716 may even benefit from a finding that the lease is "illegal, null and void."

The court finds that there are genuine issues of material facts pertaining to the extent of harm 716 may suffer and that summary judgment favoring 716 is inappropriate at this time.

V. Conclusion

After balancing the equities, the court finds that while it is fairly clear ABI should have brought this law suit at an earlier date, there are material questions of fact as to the continuing harm suffered by the two defendants. ABI's only acknowledged request is for a declaratory ruling on the legality of the lease for failure to follow procurement procedures mandated by Alaska law. Summary dismissal of this litigation by the court's invoking its equitable powers and utilizing the defense of laches would result in a complete avoidance of a ruling on the legality of the LAA/716 lease -- hardly an equitable result to any involved party, but most especially to the citizen taxpayer.

Summary judgement is not appropriate at this time. In particular, the court finds that neither the LAA nor 716 have conclusively established that it will be harmed by a court ruling on the legality of the LAA/716 lease extension agreement.

This decision is not to be construed as a finding that the defense of laches is unavailable to the defendants at trial. The court simply finds that defendants have not

met the substantial burden required by a party seeking summary judgment. Summary judgment is DENIED.[38]

Dated this 7th day of January, 2016, at Anchorage, Alaska.

Patrick J. McKay/Superior Court Judge

I certify that on 1/7/16 a copy of the following was ~~mailed/ faxed/ hand delivered~~ emailed to each of the following at their addresses of record. James Gottstein
Jeffrey Robinson/Kevin Cuddy

Administrative Assistant

[38] ABI's motion for a ARCP 56(f) continuance is deemed moot.