IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Bachner Company Incorporated, Appellant, vs. State of Alaska, Department of Administration, Division of General Services, Appellee.	)	Case No. 3AN-21-07638 CI

ORDER AFFIRMING COMMISSIONER'S DECISION

Appellant Bachner Company Incorporated ("BCI") appeals the Department of Administration Commissioner's decision adopting the decision of the administrative law judge ("ALJ").

This case involves BCI's lease of office space to the State. BCI claims that the ALJ failed to address the legal arguments that the Alaska Supreme Court remanded in *Bachner Company, Inc. v. State*, 468 P.3d 702 (Alaska 2020), that the ALJ made erroneous findings of fact, that quasi estoppel bars the State from arguing waiver now, that the ALJ violated BCI's right to due process by creating new issues sua sponte and failing to give BCI an opportunity to respond to those new issues, that the State breached the covenant of good faith and fair dealing, that mutual mistake renders the contract voidable and subject to reformation, and that BCI is entitled to relief under theories of unjust enrichment, quantum meruit, and unconstitutional takings. The State argues that the ALJ's interpretation of the lease is reasonable and gives effect to the parties'

reasonable expectations, that BCI had an opportunity to be heard, that BCI's quantum meruit claim is barred by the law of the case and unclean hands doctrines, and that BCI's takings argument is waived.

The Court has reviewed BCI's brief filed April 13, 2022, the State's brief filed July 12, 2022, and BCI's reply brief filed August 30, 2022. Having reviewed and considered the briefing, together with oral argument on November 9, 2022, the Court affirms the Commissioner's decision.

I. FACTS AND PROCEEDINGS

BCI's commercial lease of portions of the Denali Building in Fairbanks to the State has been the subject of two Alaska Supreme Court decisions: *Bachner Company Incorporated v. State*, 387 P.3d 16 (Alaska 2016) (*Bachner I*) and *Bachner Company, Inc. v. State*, 468 P.3d 703 (Alaska 2020) (*Bachner II*). In *Bachner II*, the Alaska Supreme Court issued a decision regarding the lease terms, concluding that the Commissioner's decision that the State did not materially breach the lease was supported by substantial evidence, upholding the Commissioner's decision that the lease did not terminate and the State properly exercised its right to renew, and remanding BCI's claim to rent for an additional 1,434 square feet after October 2013 for further proceedings.

The Alaska Supreme Court described BCI's claim at issue now as seeking rent for additional square footage which "the State occupies because of floor-plan changes but which the parties did not address in the lease."[1] The Alaska Supreme Court rejected

[1] *Bachner II*, 468 P.3d 703, 711 (Alaska 2020).

BCI's claim to the extent BCI was seeking rent retroactive to 2003 because BCI "clearly waived any claim to rent for that space during the lease's firm term with its unequivocal statement to the ALJ."[2] The Alaska Supreme Court affirmed the Commissioner's decision in "all respects except for the issue of whether [BCI] waived its claim to rent for the additional 1,434 square feet after October 2013."[3]

To the extent that BCI seeks rent from September 26, 2003 onward for all of the square footage that the State has been occupying, that argument was already rejected in *Bachner II*, and BCI may not re-litigate the issue in this case.

A. Lease

BCI leased to the State "approximately 15,730 square feet of office space located within the building which is more commonly known as the Denali Building" in Fairbanks, Alaska.[4] The initial term of the lease was ten years from September 26, 2003 through September 30, 2013.[5] The lease rate was $23,931.10 per month payable on the first day of each month.[6]

The lease includes an option to renew the lease for ten additional one-year periods, with the lease rate calculated using a monthly lease rate:

> [(Variable Cost Percentage x Base Monthly Lease Rate) X Percentage of Change in Consumer Price Index)] + Base Monthly Lease Rate will equal (=) the adjusted monthly lease rate.[7]

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[2] *Id*.
[3] *Id*.
[4] Exc. 1.
[5] Exc. 2.
[6] *Id*.
[7] Exc. 8-9.

The lease allows for adjustments in the rate but to be made, but prohibits retroactive adjustments.[8]

BCI and the State also agreed to additional terms:

1. The monthly lease payment indicated herein is applicable only to 14,330 square feet of the lease. The remaining 1,400 square feet of lease space are provided by the Lessor to the State, for the State's exclusive use, at no cost to the State during the firm term. During the firm term, there shall be no charges related to the State's use of this space including, but not limited to, additional utility costs, other operating costs, administrative costs, or users fees of any kind.
2. At the end of the firm term, if the State exercises one or more of its renewal options, the State shall either vacate and discontinue use of this 1,400 square feet of space or negotiate with the Lessor to pay the then-prevailing market lease rates for the 1,400 square feet of space. If the State and Lessor are unable to agree on the then-prevailing market lease rates, a mutually acceptable third party shall be contracted to determine the market lease rates. The Lessor and the State shall each pay fifty percent (50%) of the fee to be paid to the third party.
3. The market lease rates calculated in step #2 above shall apply only to 1,400 square feet of the lease space. The monthly lease payments for the remaining 14,330 square feet of lease space shall be $6,018.60, plus applicable CPI adjustments, for any renewal periods as previously indicated in this lease agreement.[9]

The lease also incorporates the terms and conditions of the underlying Request for Proposal ("RFP").[10] The RFP states that the location of the offered space within the building is "Levels 1 & 2."[11] The RFP provides an itemized list of "Offered Space," which includes the corresponding measurements in square feet of each space listed, along with the sum total "approximate number of net usable

[8] *Id.*; Exc. 30-31.
[9] Exc. 10-11.
[10] Exc. 10.
[11] Exc. 70.

square feet offered," which is 14,330 square feet.[12] The Offered Space list also expressly includes circulation space.[13] The RFP also includes floor plans of the first and second floors.[14] The floor plan for the first floor reflects that the first floor includes approximately 9,085 square feet of total space for use by the State, including 1,400 square feet of space "offered for free" and 7,685 square feet of space charged to the State.[15]

The RFP also sets forth the requirements for "Net Usable Area," including the State's use of common spaces:

> The net usable area of leased space shall be computed by measuring to the finished surface of the office side of corridors and other permanent walls; to the center of partitions that separate the office from adjoining usable areas; and to the inside finished surface of the dominant portion of the permanent outer building walls. No deductions shall be made for columns or projections necessary to the building. The State shall have full access to and use of all common areas of the building including, but not limited to elevators, lobbies, stairwells and restrooms .[16]

B. Administrative Proceedings

After the Alaska Supreme Court remanded BCI's claim for rent for 1,434 square feet, BCI modified its position to reflect that it is seeking rent for 1,871 square feet. BCI and the State moved for summary adjudication, and the ALJ issued a Decision on Cross-Motions for Summary Adjudication.[17]

[12] Exc. 71-73.
[13] Exc. 73.
[14] Exc. 91-92.
[15] Exc. 92.
[16] Exc. 45.
[17] Exc. 221-30.

The ALJ considered the question of whether BCI has a right to demand additional rent for occupancy of the entire first floor upon lease extension in 2013. The ALJ held that BCI did not waive its claim concerning BCI's rights upon the 2013 lease extension because BCI raised that claim at the time of the lease extension.[18] The ALJ concluded that BCI did, however, waive any claims regarding the behavior of State personnel in 2003.[19]

The ALJ further held that even though the State occupies all of the usable space on the first floor, BCI has no right to additional rent for whole-floor occupancy or the non-exclusive space.[20] The ALJ clarified that the State has non-exclusive rights to the space and that it is irrelevant whether any entity other than the State actually uses the space.[21] The ALJ reasoned that the lease language makes evident that "the parties intended the rent to cover all of the State's rights under the Lease."[22] Accordingly, "the rent is a lump sum payment" for those rights, rather than "a price per square foot."[23] In addition, the ALJ determined that in the lease, "BCI conferred the right to occupy the entire first floor."[24] The lease provides that "the only action that triggers additional rent is retention of the Bonus space," and "describes no other action that can increase the rent" or provide for separate or increased rent for common or any of the other Non-Exclusive Space.[25]

[18] Exc. 225.
[19] *Id*.
[20] Exc. 226.
[21] Exc. 226 n.41.
[22] Exc. 227.
[23] *Id*.
[24] *Id*.
[25] *Id*.

The ALJ noted that BCI did not identify a lease provision or alternative interpretation of the lease to support its claim. Instead, BCI argued that the State must "pay[] rent on all square footage of a floor if it occupies the entire floor" because the State has a longstanding policy of doing so.[26]

The ALJ pointed out that BCI failed to identify "Lease language that would allow it to increase or adjust the basis for rent at the time of lease extension."[27] In addition, the ALJ concluded that "adding additional rent for the Non-Exclusive Space would be a material change to the Lease" because such a change would be significant and unforeseeable given the absence of a lease provision allowing for the change.[28] The ALJ pointed out that the State had been using the space since inception, and that the lease did not include a provision similar to the Bonus Space provision reflecting that the parties anticipated a change in rent due to the continued use of the space. The ALJ also pointed out that the State could not have agreed to such a change to the lease because "[m]aterial changes, even when agreed to by both parties, are prohibited for competitive public contracts," and it would be unreasonable to interpret the lease as allowing it.[29]

The ALJ denied BCI's takings clause and quasi-contract legal claims, because they "are all premised [on the] view that the State is using space not provided for under the Lease," and the lease grants the State the right to use that space.[30] The ALJ reasoned

[26] *Id*.
[27] Exc. 228.
[28] *Id*.
[29] Exc. 228-29.
[30] Exc. 229.

that "the Lease unambiguously provides for the State to use . . . all of the spaces on the first floor usable by a tenant."[31] The ALJ accordingly denied BCI's takings clause claim because the State "has not been using any first-floor space not granted to it by the Lease" and has been paying all rent required by the lease.[32] The ALJ denied BCI's unjust enrichment and quantum meruit claims because "there is no space on the first floor that the Lease did not give the State the right to use."[33] Finally, the ALJ denied BCI's good faith claim "because BCI expressly offered use of all usable first floor space under the Lease," and "the Division could not violate the implied covenant of good faith by exercising that contractual right."[34]

II. JURISDICTION AND STANDARD OF REVIEW

The superior court has jurisdiction to act as an intermediate appellate court and review appeals from administrative agencies under AS 22.10.020(d) and AS 44.62.560–70.[35]

The Supreme Court of Alaska has recognized four standards of review for superior court review of administrative decisions: (1) the substantial evidence test applies to an agency's factual findings, (2) the reasonable basis test applies to questions of law involving agency expertise, (3) the substitution of judgment test applies to questions of

[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] Exc. 229-30.
[35] *See also* Alaska R. App. P. 602(a)(2).

law not involving agency expertise, and (4) the reasonable and not arbitrary test applies to an agency's interpretation of its own regulations.[36]

Contract interpretation generally involves questions of law, which appellate courts review de novo under the substitution of judgment standard.[37] The Court will "adopt the rule of law that is most persuasive in light of the precedent, reason, and policy."[38] Questions of constitutional interpretation are also questions of law "reviewed de novo under the substitution of judgment standard."[39]

III. DISCUSSION

A. The lease does not allow BCI to demand rent for additional space

BCI argues that because the State has exclusively occupied and used the entire first floor, including an additional 1,871 square feet of free office space, the State is obligated to pay rent for that space. The State argues that the lease does not identify the 1,871 square feet of space for which BCI demands additional rent, and that although the lease accounts for a change in rent depending on the State's occupancy of the 1,400 square feet of lease space, the rest of the rent under the lease is on a lumpsum basis.

"[L]eases are contracts and should be interpreted according to contract principles."[40] The goal in interpreting a contract is to "give effect to the reasonable

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[36] *State, Dep't of Health & Soc. Servs. v. N. Star Hosp.*, 280 P.3d 575, 579 (Alaska 2012); *Gottstein v. State, Dep't of Nat. Res.*, 223 P.3d 609, 620 (Alaska 2010).
[37] *State, Dep't of Nat. Res. v. Alaskan Crude Corp.*, 441 P.3d 393, 398 (Alaska 2018)*; Exxon Corp. v. State*, 40 P.3d 786, 792 (Alaska 2001) ("Interpretation of a contract is a question of law that is not within [a] department's special expertise or skill.")
[38] *McMullen v. Bell*, 128 P.3d 186, 190 (Alaska 2006).
[39] *Studley v. Alaska Pub. Offs. Comm'n*, 389 P.3d 18, 22-23 (Alaska 2017).
[40] *Rockstad v. Global Fin. & Inv. Co.*, 41 P.3d 583, 586 (Alaska 2002).

expectations of the parties."[41] The Alaska Supreme Court has described a two-step analysis for lease interpretation.[42] First, courts determine whether the lease is ambiguous by considering the language of the lease and extrinsic evidence.[43] "Disagreement alone does not establish the existence of an ambiguity. . . . '[A]n ambiguity exists only where the disputed terms are reasonably subject to differing interpretation after viewing the contract as a whole and the extrinsic evidence surrounding the disputed terms.'"[44]

Second, if the lease is clear and unambiguous, courts must "keep to the four corners of the lease."[45] If the lease is ambiguous, courts apply "well-established rules of contract interpretation and determine the reasonable expectations of the parties." [46] Where there is ambiguity, the following rules of contract interpretation apply: "'First, ambiguities are construed against the party that supplied and drafted the form. . . . Second, ambiguities are construed against the lessor. Third, a construction of an ambiguous provision which permits the continued performance of a lease is favored.'"[47] "In applying these principles [courts] must strive to give effect and reasonable meaning to all provisions of the instrument. And [courts] also must attempt to interpret the terms of the lease harmoniously, avoiding those interpretations that cause conflicts among the provisions."[48]

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[41] *Stepanov v. Homer Elec. Ass'n*, 814 P.2d 731, 734 (Alaska 1991) (internal quotations omitted).
[42] *Rockstad*, 41 P.3d at 586; *Kimp v. Fire Lake Plaza II, LLC*, 484 P.3d 80, 87 (Alaska 2021), reh'g denied (Apr. 28, 2021).
[43] *Id*.
[44] *Id.* (quoting *Wessells v. State, Dep't of Highways*, 562 P.2d 1042, 1046 (Alaska 1977)).
[45] *Kimp*, 484 P.3d at 87.
[46] *Rockstad*, 41 P.3d at 586.
[47] *Id.* (quoting *Wessells*, 562 P.2d at 1048).
[48] *Id.* at 586-87.

Here, the lease is clear and unambiguous that the space under lease could only be changed to account for the State's occupancy or vacancy of the 1,400 square feet after the firm term, and that the rent rate could only be adjusted to account for the State's occupancy of the 1,400 square feet after the firm term or changes in Consumer Price Index according to the formula written in the lease. The lease expressly provides that the State must either vacate the 1,400 square feet or negotiate the rent rate for that space at the end of the firm term, and stipulates the method by which to determine the rent rate for that space.[49] The lease also provides that the rent rate may be adjusted based on changes in the Consumer Price Index after two years, and includes a formula by which to calculate the adjusted rent rate.[50] The only variable that changes in this formula is the percentage change in the Consumer Price Index.[51] Square footage is not a part of the formula.[52] These are the only two processes by which the parties may adjust or renegotiate the rent rate. The parties would reasonably expect that the lease does not allow for any other changes in the rent rate or leased space.

The lease clearly identifies the bonus or free space as 1,400 square feet. At the time of the *Bachner II* decision, BCI defined the space additional to the 1,400 square feet of free space as 1,434 square feet: "When the State included the free and unfinished floor space in the lease description 2530, the State now had exclusive use of the entire first

[49] Exc. 10-11.
[50] Exc. 9.
[51] *See id*.
[52] *See id*.

floor, and was requiring BCI to provide 2,834 sf of free office space."[53] Now BCI defines the space additional to the 1,400 square feet of free space as 1,871 square feet. In other words, BCI is claiming that the rent should have been adjusted for 3,271 square feet instead of the 1,400 square feet agreed to in the lease.

The lease is also clear and unambiguous that the State is authorized to use all of the usable space on the first floor. The RFP states that the location of the offered space within the building is "Levels 1 & 2," with no further qualification.[54] The floor plan of the first floor does not indicate that any space on the first floor is excluded from the lease, or that there is any space in addition to the 7,685 square feet of charged space and the 1,400 square feet of offered free space.[55] The total square footage figure of 9,085 square feet was labeled as "approximate," demonstrating that the parties anticipated a degree of inaccuracy and did not intend for square footage to be a precise or controlling description of the leased space.[56] It was reasonable for the parties to expect that the first floor did not include any square footage beyond the approximately 9,085 square feet encompassing the entire first floor, as pictured on the floor plan. The fact that BCI now measures the first floor space as 10,956 square feet does not alter the terms of the lease.[57]

The lease is also clear and unambiguous that the State has the right to use all common areas in the building: "The State shall have full access to and use of all common

[53] Exc. 130.
[54] Exc. 70.
[55] *See* Exc. 92.
[56] *See, e.g.,* Exc. 1, 73, 92.
[57] *See* Exc. 259.

areas of the building including but not limited to elevators, lobbies, stairwells and restrooms."[58] For example, the floor plan reflects that there is an elevator and elevator machine room on the first floor.[59] The parties would reasonably interpret the lease as allowing the State to use any common spaces in the building.

The State has occupied all of the usable space on the first floor since the beginning of the lease in 2003. The Court agrees with the contracting officer's conclusion that "[t]he State has always had contractually exclusive use of the space shown in the mutually agreed upon floor plan for the monthly rent indicated in the lease."[60] There is no evidence that the State has ever occupied more space than allowed by the lease, or that the State's occupancy has expanded or otherwise changed since the lease began. The State's use of all usable space on the first floor, including common spaces, does not entitle BCI to demand additional rent, even if no other entity has used or could use the common spaces. Adding rent for an extra 1,871 square feet would charge the State for space that the parties reasonably expected to be included in the lease. Moreover, there are no lease provisions allowing for any increase in square footage of the lease.

B. BCI's challenges to the Commissioner's decision fail

BCI challenges numerous aspects of the ALJ decision adopted by the Commissioner. BCI asserts that the ALJ failed to address the legal arguments remanded in *Bachner II*, that the ALJ made erroneous findings of fact, that the ALJ violated BCI's

[58] Exc. 45.
[59] Exc. 92.
[60] Exc. 136.

right to due process by creating new issues sua sponte and failing to give BCI an opportunity to respond to those new issues, and that quasi estoppel bars the State from arguing waiver now.

1. The ALJ properly addressed the issues on remand

BCI changed its position regarding the amount of free space it provided to the State, increasing the amount from 1,434 to 1,871 square feet over the 1,400 square feet listed in the lease. The broker initially hired to determine the rate for the free space described the 1,400 square feet space plus 1,434 square feet as "being used to provide access to the rest of the DNR office on the first floor (circulation space) or was being used for filing cabinet or book case storage."[61] But the broker also determined that it was "unable to determine which 1400 square feet out of the 2834 square feet the State is using, but does not have under contract" that it was asked to value.[62] In addition, the broker pointed out that the "space identified on the [floor plan] as free space is not 1400 square feet."[63]

BCI had argued to the ALJ that it was entitled to rent for the additional 1,871 square feet of free space based in part on the Alaska Supreme Court decision in *Altman v. Alaska Truss & Mfg. Co., Inc.*[64] In *Altman*, the tenant had been using land adjacent to the

[61] Exc. 97.
[62] Exc. 98.
[63] *Id*.
[64] 677 P.2d 1215, 1227-28 (Alaska 1983).

leased property for free, and the Alaska Supreme Court concluded that the owner could decide to charge rent for the adjacent land.[65]

The facts of this case are distinguishable from those in *Altman*. Here, the property used by the State was already part of the lease. The parties agreed to a lump sum amount for the State to lease space on two floors of the building, and agreed that for the first ten years of the lease, the State would also have exclusive use of 1,400 square feet of free space on the first floor. The ALJ correctly examined the lease and determined that the additional space now claimed by BCI was already part of the lease. It is irrelevant to the Court's analysis how that space is described. For purposes of the analysis, the Court assumes that the State has had exclusive use of the additional space for which BCI now seeks rent. The parties negotiated the initial and renewal terms of the lease. The fact that BCI now has buyer's/bidder's remorse regarding how it described the amount of free space provided to the State does not render the agreement unjust or voidable. The lease governs the terms of the parties' agreement.

2. BCI was not denied due process

The parties had notice and an opportunity to address the applicable lease terms.[66] Both parties moved for summary adjudication. The State argued that BCI waived its claim for rent, and, in the alternative, BCI is not entitled to the equitable remedy of reformation in the lease.[67] BCI argued that the State breached the covenant of good faith

[65] *Id*.
[66] *See Alborn Constr., Inc., v. Dep't of Lab. & Workforce Dev., Lab. Standards & Safety Div.*, 507 P.3d 468, 483 (Alaska 2022).
[67] Exc. 203-06.

and fair dealing, and that BCI is entitled to rent for 1,871 square feet of office space under a theory of quantum meruit/unjust enrichment and unconstitutional taking. The State responded that BCI agreed to be bound by the terms of the RFP and lease, including the floor plan.

The ALJ decision analyzed the lease terms, and rejected BCI's legal arguments regarding violation of the takings clauses and quasi-contract remedies of unjust enrichment and quantum meruit. The ALJ explained that "what the Supreme Court remanded for consideration, is whether the 2013 lease extension triggered a right to demand additional rent based on whole-floor occupancy."[68] The ALJ determined that the claim was not waived, except to the extent BCI's claim was "based on behavior of Division personnel in 2003."[69] The ALJ concluded that the lease "unambiguously provides for the State to use the Exclusive Space, Bonus Space, and common space – i.e., all of the spaces on the first floor usable by a tenant."[70] Regardless of how the extra free space is defined, the State has been using the entire first floor from lease inception, and it has been paying all rent provided for in the lease.[71]

After the ALJ issued its decision, BCI submitted a Proposal for Action Regarding Proposed Decision on Cross-Motions for Summary Adjudication.[72] BCI requested that the Commissioner return the case to the ALJ to take new evidence, revise its factual

[68] Exc. 225.
[69] *Id*.
[70] Exc. 229.
[71] *See id*. ("[T]here is no space on the first floor that the Lease did not give the State the right to use").
[72] Exc. 231.

findings, and revise its legal conclusions.[73] BCI argued that (1) the ALJ's findings were erroneous because the State has exclusive use of the entire first floor and the Division agreed to pay for all areas not identified in the lease beginning in 2013, (2) the ALJ violated BCI's constitutional right to due process by creating new issues sua sponte and failing to give BCI an opportunity to file briefs or present evidence, and (3) the ALJ misconstrued the Supreme Court's directive on remand.[74] The Commissioner allowed the ALJ decision to become the final agency decision.[75] Because BCI has been given notice and opportunity to be heard, BCI has not been denied due process.

3. BCI waived any claim based on alleged conduct in 2003

The ALJ determined that only to the extent that BCI's claim was based on conduct of Division personnel in 2003, the claim was waived. AS 36.30.620(a) requires that claims must be filed within 90 days after the party becomes aware of the basis of the claim. Accordingly, to the extent that BCI's claim is based on conduct which it was aware of in 2003, it is untimely. Moreover, even if BCI raised the issue prior to signing the lease, BCI decided to move forward and enter the lease agreement. As set forth in *Bachner II*, "the evidence is undisputed that in 2003 Bachner freely entered into the lease designating the 1,400 square feet as free for the duration of the firm term."[76]

In addition, the doctrine of quasi estoppel is not available to BCI based on alleged conduct of Division personnel in 2003 because the State has not taken an inconsistent

[73] Exc. 232.
[74] Exc. 231-243.
[75] Exc. 275.
[76] 468 P.3d at 708.

position.[77] Instead, the State has consistently maintained that it is not required to pay for the additional space, and what the parties agreed to is reflected in the lease terms. The State's position is not unconscionable.

C. BCI is not entitled to other relief

BCI seeks relief under the covenant of good faith and fair dealing, the doctrine of mutual mistake, and theories of unjust enrichment, quantum meruit, and unconstitutional takings.

1. The State did not breach the covenant of good faith and fair dealing

It is well-established that "[t]he covenant of good faith and fair dealing is implied in all contracts in Alaska."[78] There are two components to the covenant: "A party must act in subjective good faith, meaning that it cannot act to deprive the other party of the explicit benefits of the contract, and in objective good faith, which consists of acting in a manner that a reasonable person would regard as fair."[79] However, the "purpose of the covenant is to effectuate the reasonable expectations of the parties, not add to them."[80]

Here, the parties' agreement that the State became obligated to pay for 1,400 square feet upon renewal is contained in the lease. There is no agreement that the State would be obligated to pay for additional square feet beyond the 1,400 square feet

[77] *See Wright v. State*, 824 P.2d 718, 721 (Alaska 1992) (quasi estoppel applies "where 'the existence of facts and circumstances mak[es] the assertion of an inconsistent position unconscionable'") (quoting *Jamison v. Consolidated Utilities, Inc.*, 576 P.2d 97, 102 (Alaska 1978)).
[78] *Casey v. Semco Energy, Inc.*, 92 P.3d 379, 384 (Alaska 2004).
[79] *Id*.
[80] *Id*.

expressly agreed to in the lease. Because the covenant of good faith and fair dealing cannot add terms to a contract, BCI's claim fails.

2. There are no grounds to reform the lease

Reformation of a contract may be warranted when there is a "mutual mistake of fact in which the [contract], as written, does not conform to the prior agreement of the parties."[81] The Alaska Supreme Court applies a three-part test to determine whether there is a mutual mistake of fact: "(1) the mistake relates to a 'basic assumption on which the contract was made,' (2) the mistake has a material effect on the agreed exchange of performances, and (3) the party seeking relief does not bear the risk of the mistake."[82]

As the ALJ pointed out, the parties "did not calculate square footage as the product of the floor's length and width when they entered the Lease," and they did not "provide for calculating square footage by the floor's length and width if the State ever occupied an entire floor or upon lease extension."[83] Because BCI has not shown that any mistake relates to a basic assumption on which the contract was made, BCI is not entitled to reformation of the lease. Moreover, to the extent the Court allocates risk, BCI bears the risk of the mistake as it agreed to define the free space as 1,400 square feet. BCI was in the best position to create the floor plan and describe the leased space.

[81] *Wasser & Winters Co. v. Ritchie Bros. Auctioneers (America), Inc.*, 185 P.3d 73, 77 (Alaska 2008) (quoting *Adams v. Adams*, 89 P.3d 743, 752 (Alaska 2004)).
[82] *Id*. (quoting *Old Harbor Native Corp. v. Afognak Joint Venture*, 30 P.3d 101, 108 (Alaska 2001)).
[83] Exc. 228.

3. BCI cannot recover under theories of unjust enrichment or quantum meruit

> A party seeking to recover for unjust enrichment must show (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him to retain it without paying the value thereof.[84]

"[T]here can be no valid claim of unjust enrichment where a party has given fair consideration or value for the benefits obtained."[85] "Where a defendant has given fair consideration or value to a third party in exchange for the benefits conferred by the plaintiff, there is no windfall and no recovery will lie."[86]

Here, the State has given fair consideration in exchange for the benefits conferred by BCI. The parties negotiated a lease agreement for the State's use of the space and the State has been paying the rent set by the terms of the lease. Accordingly, BCI may not recover under a theory of unjust enrichment.

The Alaska Supreme Court has recognized that "[c]ourts generally treat actions brought upon theories of unjust enrichment, quasi-contract, contracts implied-in-law and

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[84] *Ware v. Ware*, 161 P.3d 1188, 1197 (Alaska 2007) (citing *Beluga Mining Co. v. State, Dep't of Natural Res*., 973 P.2d 570, 579 (Alaska 1999)).
[85] *Soules v. Ramstack*, 95 P.3d 933, 940 (Alaska 2004) (citing *Alaska Sales & Serv. Inc. v. Millet*, 735 P.2d 743, 746 (Alaska 1987)).
[86] *Alaska Sales & Serv*., 735 P.2d at 746; *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 25(2)(b) (2011) (There is no unjust enrichment if the defendant has liability to pay for claimant's performance); *id*. at cmt. b. ("The second fundamental requirement of unjust enrichment in these circumstances is that B must stand to obtain a valuable benefit at A's expense without paying *anyone* for it (§ 25(2)(b)).") (*emphasis added*); *id*. ("To recapitulate: this section authorizes restitution only as the claimant's secondary recourse; only if the defendant will otherwise retain the benefit without paying for it; only if restitution is not displaced by the parties' contractual arrangements; and only if restitution will not subject the defendant to a forced exchange.").

quantum meruit as essentially the same."[87] Quantum meruit recovery for an implied-in-fact contract "is based on circumstances that demonstrate that the parties intended to form a contract but failed to articulate their promises."[88] Here, the parties formed a contract, and the lease sets forth the terms of the parties' agreement. The space for which BCI now seeks to recover rent under a quantum meruit theory is the subject of the lease. The State has been paying rent for its authorized use of the space. Accordingly, there are no grounds for BCI to recover under a quantum meruit theory.

4. The State's use of the space does not violate the takings clauses of the Alaska Constitution or United States Constitution

BCI argues that because the State has been occupying BCI's property since September 26, 2003, the State is required to pay BCI just compensation for the taking of BCI's property under the Fifth Amendment of the United States Constitution and Article I, Section 18 of the Alaska Constitution. However, here, the parties negotiated a lease agreement for space which the State has been occupying and paying for consistent with the terms of the lease.[89] Because BCI has not shown that there has been a "taking" or that it is not receiving just compensation, BCI is not entitled to relief under the takings clause of the Alaska Constitution or the United States Constitution.

[87] *Alaska Sales & Serv., Inc. v. Millet*, 735 P.2d 743, 746 n.6 (Alaska 1987).
[88] *Reeves v. Alyeska Pipeline Serv. Co.*, 926 P.2d 1130, 1141 (Alaska 1996).
[89] *See Vanek v. State, Bd. of Fisheries*, 193 P.3d 283, 295 (Alaska 2008) ("Under Alaska law, the right to compensation for a taking can validly be waived or contracted away in the terms of a lease.").

IV. CONCLUSION

For the foregoing reasons, the Court affirms the Commissioner's decision.

DATED this 8th day of May 2023, in Anchorage, Alaska.

[redacted]
Yvonne Lamoureux
Superior Court Judge

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