

ESSAY QUESTION NO. 9

Answer this question in booklet No. 9

Ann is an architect specializing in the design of commercial office buildings. She leased office space from Baker Corporation (Baker), which owns several office buildings in Anchorage. Ann and Baker entered into a professional services contract in which Ann agreed to design a new five-story office building for Baker.

Baker built its new office building using Ann's design. Although Baker was satisfied with the design, it failed to pay Ann her design fees due to Baker's unrelated financial difficulties. Several months after the building was completed, Ann timely filed a lawsuit in Anchorage Superior Court to recover her design fees from Baker. Meanwhile, Ann stopped making lease payments to Baker for her office space. Baker timely answered Ann's complaint without mentioning Ann's unpaid rent. Two months after Baker answered Ann's complaint, the new office building that Ann designed for Baker experienced structural defects. Believing that Ann's design may have caused the structural defects, Baker hired a team of engineers and architects to assess the cause of the defects.

After completing its initial review, Baker's new team of engineers and architects concluded that Ann's design contained a number of errors which caused the building's structural defects. On the same day, Baker received Ann's Civil Rule 12(c) motion for judgment on the pleadings relating to her claim for unpaid design fees.

1. Does Baker abandon its claim against Ann for unpaid rent if it does not raise this claim in Ann's lawsuit? Explain.
2. Does Baker abandon its claim against Ann for her alleged professional negligence in the design of the office building if it does not raise this claim in Ann's lawsuit? Explain.
3. Baker files its opposition to Ann's Civil rule 12(c) motion for judgment on the pleadings, asserting that Ann delivered a defective design. Baker supports its opposition with affidavits from its team of engineers and architects that state that Ann's design caused the structural defects. Is the court likely to consider these affidavits in deciding Ann's motion and, if so, what procedural steps should the court take with regard to Ann's motion? Explain.

GRADER'S GUIDE

*** QUESTION NO. 9 ***

SUBJECT: CIVIL PROCEDURE

1. Permissive Counterclaim (25 points)

Baker's claim for Ann's unpaid office rent will not be abandoned if Baker does not raise the claim in Ann's lawsuit to recover her design fees because the two claims do not arise out of the same transaction or occurrence. Alaska Rule of Civil Procedure 13(a) requires a pleader to state as a compulsory counterclaim any claim which, at the time of serving the pleading, the pleader has against the opposing party, if the claim arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim. Failure to raise a compulsory counterclaim may result in abandonment of the claim. Rule 13(a); *Wells v. Noey*, 399 P.2d 217 (Alaska 1965). Ann's claim for unpaid professional fees and Baker's claim for unpaid office space rent do not arise out of the same transaction or occurrence. Thus, Baker's claim is not a compulsory counterclaim.

2. Compulsory Counterclaim (25 Points)

Baker risks abandoning its claim against Ann for professional negligence in the design of the new office building if Baker does not raise the claim in Ann's lawsuit for unpaid design fees, because the claim arises out of the same transaction or occurrence. As explained above, Rule 13(a) requires such claims to be brought in the same action, designating them compulsory counterclaims. Baker should move to amend its answer to include the counterclaim for professional negligence and seek to recover damages from Ann for the structural defects.

Even though the issue of the design defect is likely a compulsory counterclaim, a court probably would not hold that Baker abandoned its professional negligence claim against Ann even if Baker does not raise the claim in the current action. A claim is not compulsory, even if it arises out of the same transaction or occurrence as the plaintiff's claim, if the claim is not mature at the time the party serves its pleading. *Andrews v. Wade & DeYoung, Inc. P.C.*, 950 P.2d 574 (Alaska 1997). Baker did not know about the new building's structural defects until after Baker answered Ann's complaint for unpaid professional fees. Thus Baker's claim was not compulsory when it filed its answer because it was not mature.

3. Judgment on the Pleadings (50 Points)

Baker has opposed Ann's motion for judgment on the pleadings, brought under Rule 12(c), which states that, after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. Such motions are viewed with disfavor and should rarely be granted by the courts. *Guerrero v. Alaska Housing Finance Corp.*, 6 P.3d 250 (Alaska 2000); *Kollodge v. State*, 757 P.2d 1024 (Alaska 1988).

Baker has submitted affidavits from engineers and architects stating that Ann's faulty design caused the new building's structural defects, in opposition to Ann's claim for unpaid design fees. The affidavits support Baker's defense that Ann has not earned her design fees under the professional services contract because she delivered a defective design, and therefore that Baker does not owe Ann anything for her services. It should be noted that this defense is distinct from a potential counterclaim that Baker could bring against Ann, discussed above, for structural damages to the new building caused by Ann's design.

The court has complete discretion to determine whether or not to accept any material that is offered beyond the pleadings. *Martin v. Mears*, 602 P.2d 421 (Alaska 1979) (considering a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted). The court may either exclude Baker's affidavits and continue to treat the motion as a motion for judgment on the pleadings, or consider Baker's affidavits and convert the motion to a motion for summary judgment under Rule 56. *Demmert v. Kootznoowoo, Inc.*, 960 P.2d 606 (Alaska 1998). The court probably would consider Baker's affidavits, since they bear on the issue of whether Ann has earned her design fees under the professional services contract.

When matters outside the pleadings have been presented and not excluded, the court should treat the motion for judgment on the pleadings as a motion for summary judgment and give the parties a reasonable opportunity to present all materials pertinent to a summary judgment motion. *Reed v. Municipality of Anchorage*, 741 P.2d 1181 (Alaska 1987); *Adams v. State*, 555 P.2d 235 (Alaska 1976) (considering a rule 12 (c) motion). Ann should have an opportunity to submit affidavits or other evidence supporting her motion and opposing Baker's claim that her design was defective. In any event, the court must affirmatively and expressly indicate whether it had considered or excluded Baker's affidavits, submitted outside the pleadings, or Ann's motion will automatically be converted to a motion for summary judgment per rule 56 unless the material submitted is immaterial to the court's decision. *Brice v. State, Div. Of Forest, Land & Water*, 669 P.2d 1311 (Alaska 1983); *Adkins v. Nabors Alaska Drilling, Inc.*, 609 P.2d 15 (Alaska 1980).

If the court did convert Ann's Civil rule 12(c) motion to a Civil Rule 56 motion for summary judgment, it would be unlikely to grant the motion because Baker has raised a material issue of fact regarding Ann's design. Rule 56(c); *American Restaurant Group v. Clark*, 889 P.2d 595 (Alaska 1995) (summary judgment improper where a genuine issue of fact exists).