

**Aero, Inc. v Aero Metal Prods., Inc.**

2014 NY Slip Op 33910(U)

June 2, 2014

Supreme Court, Erie County

Docket Number: 2013-801148

Judge: Timothy J. Walker

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF ERIE

AERO, INC.,

Plaintiff,

- against

AERO METAL PRODUCTS, INC. and  
SERVOTRONICS, INC.,

Defendants.

**COMMERCIAL DIVISION  
DECISION AND ORDER**  
INDEX NO. 2013-801148

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **Nixon Peabody LLP**  
**Laurie Styka Bloom, Esq., Of Counsel**  
Attorneys for Plaintiff

**Cosgrove Law Firm**  
**J. Michael Lennon, Esq., Of Counsel**  
Attorneys for Defendants

**WALKER, J.**

Plaintiff has moved to reargue/renew its previous motion to dismiss Defendants' affirmative defense and counterclaims, and to strike Defendants' discovery demands (the "Prior Motion"). For the reasons that follow, the Court grants leave to reargue and, on reargument, adheres to its previous decision and order; and denies leave to renew.

**FACTS**

The transactions giving rise to this action, and the relevant facts pertaining to this, and the Prior Motion are set forth in this Court's Commercial Division Decision and Order, dated

February 24, 2014 (the "Prior Decision and Order").

Pared to its essentials, Defendants claim that non-party Nicholas Trbovich ("Trbovich") (while "wearing dual hats") convinced Defendant Servotronics, Inc. ("Servotronics") to form Defendant Aero Metal Products, Inc. ("AMP") in order to lease and operate Plaintiff's real and personal property located in Arkansas ("the Arkansas Facility"). During lease negotiations, Trbovich allegedly provided false and misleading information to Servotronics regarding Plaintiff's financial stability, and failed to disclose that Plaintiff and/or the Arkansas Facility:

- Ceased doing business in 2009;
- Had limited customer orders;
- Was delinquent in payments to vendors; and
- Was approaching insolvency (Answer at ¶¶ 47-48)

Trbovich further allegedly misrepresented to Servotronics that certain equipment, including a CNC Grinder and Water Filtration and Processing System, was operational - such claims being false at the time they were made (Answer at ¶¶ 48-52).

### LEGAL ANALYSIS

It is well-settled that a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matter of fact not offered in the prior motion" (CPLR 2221 (d)(2)).

Plaintiff asserts that, in the Prior Decision and Order, the Court failed to address its argument that, as a matter of law, the counterclaims cannot proceed without Trbovich as a party, and that he cannot be made a party, because any claims relating to his employment with

Servotronics are the exclusive subject of an on-going arbitration (the "Arbitration").

Additionally, Plaintiff alleges that Defendants cannot recover against it for Trbovich's alleged breaches of fiduciary in his capacity as officer, employee, or director of Aero, because Aero owed no such duty to Defendants. However, the counterclaims do not set forth claims for breach of fiduciary duty. Instead, they contain allegations of fraud by an agent of Plaintiff (namely, Trbovich), to the detriment of Defendants (*see* Answer ¶ 68), and for reimbursement of clean-up costs.

As to the Arbitration, it is well-settled that parties (here, Defendants) may not be required to arbitrate issues or claims about which they have not clearly and unambiguously agreed to arbitrate (*see e.g. Kielich v Romanowski*, 34 AD3d 12-6, 1208 [4<sup>th</sup> Dept 2006]). Defendants assert that there are no counterclaims against Trbovich in the Arbitration. Assuming *arguendo*, the same facts are the subject of this action and the Arbitration, this is not a basis to compel Defendants to arbitrate their (counter)claims against Plaintiff. To the extent Plaintiff claims prejudice due to an adverse determination in the Arbitration, this action is not the proper forum for such claims.

Plaintiff contends further that the Court failed to address its claim that Trbovich is a necessary party whose interests may be adversely affected by a potential judgment in this matter, but who cannot be made a party (*see Karmel v White Plains Common Council*, 284 Ad2d 464 [2<sup>nd</sup> Dept 2001], CPLR 1001[a], 1003). However, the record is devoid of any factual basis for this claim. Plaintiff fails to state how Trbovich's interests – as opposed to those of Plaintiff, an entity he no longer owns - may be affected. On this record, this argument lacks merit.

Finally, Plaintiff asserts that it is entitled to renewal based upon the "new" fact that there

is a "gag order" regarding the Arbitration, barring Plaintiff from access to the proceedings. However, the arbitrator merely issued a routine order, directing that no persons who would be called as witnesses may be present during the testimony of those witnesses testifying prior to them, or to be informed by others of the content of such testimony or evidence presented prior thereto. Servotronics asserts that the entire transcript of the Arbitration proceedings, with the possible exception of limited medical testimony deemed confidential, would be available to Mrs. Trbovich - Plaintiff's sole shareholder - at the conclusion of the Arbitration, and she is allowed to attend the remainder of the arbitration proceedings after she testifies.

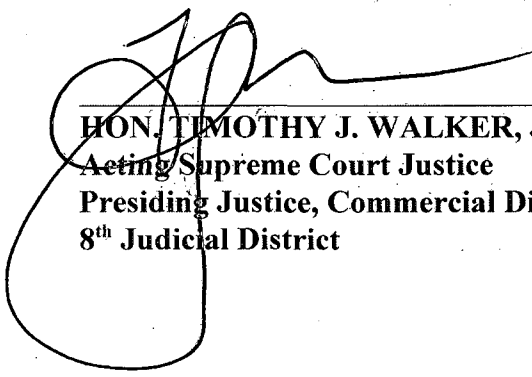
Accordingly, it is hereby

**ORDERED**, that, consistent with the determinations set forth herein, Plaintiff's motion to reargue the Prior Motion is granted and, upon reargument, the Court adheres to the Prior Decision and Order; and it is further

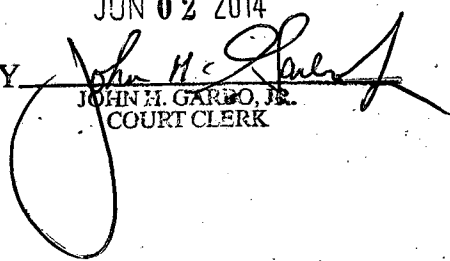
**ORDERED**, that Plaintiff's motion to renew the Prior Motion is denied.

This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: June 2, 2014  
Buffalo, New York

  
**HON. TIMOTHY J. WALKER, J.C.C.**  
 Acting Supreme Court Justice  
 Presiding Justice, Commercial Division  
 8<sup>th</sup> Judicial District

**GRANTED**

JUN 02 2014  
 BY   
 JOHN H. GARBO, JR.  
 COURT CLERK