

HOV Servs., Inc. v ASG Tech. Group, Inc.
2022 NY Slip Op 32911(U)
August 26, 2022
Supreme Court, New York County
Docket Number: Index No. 657346/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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HOV SERVICES, INC.,	INDEX NO.	<u>657346/2020</u>
Plaintiff,	MOTION DATE	<u>02/28/2022</u>
- v -	MOTION SEQ. NO.	<u>011</u>
ASG TECHNOLOGIES GROUP, INC.,	DECISION + ORDER ON MOTION	
Defendant.		

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 386 were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, HOV Services, Inc. (**HOV**)’s motion seeking reargument pursuant to CPLR 2221 is granted solely to the extent of sealing certain documents as set forth below.

A motion to reargue requires that the movant “establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law” (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; CPLR § 2221[d]). A motion to reargue does not offer an unsuccessful party successive attempts to reargue the questions previously decided (*Pro Brokerage, Inc. v Home Ins. Co.*, 472 NYS2d 661, 662 [1st Dept 1984]).

In sum and substance, HOV argues that it is entitled to reargument and reconsideration by this Court because the prior Decision and Order (the **Prior Decision**; NYSCEF Doc. No. 371), dated January 27, 2022 (i) misapprehended HOV’s waiver defense, (ii) failed to deny ASG

Technologies Group, Inc. (ASG)'s summary judgment motion as to HOV's estoppel defense with respect to Exhibit D, (iii) misapprehended the continuing wrong doctrine and its applicability to ASG's counterclaim for breach of contract, and (iv) misapprehended the law relevant to expert discovery. HOV is simply not correct. The facts are set forth in this Court's Prior Decision. Familiarity is presumed. Terms used herein but not otherwise defined shall have the meaning ascribed thereto in the Prior Decision.

Relying on *Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234 (1st Dept 2013) which acknowledged the general proposition (*i.e.*, this was not at issue in that case) that even where a contract specifically contains a no-waiver and no modification clause, it nevertheless can be modified by course of conduct, HOV argues that this Court erred in granting summary judgment with respect to HOV's waiver defense. The court did not. As previously discussed, waiver and estoppel are not the same and HOV's argument that ASG's knowledge of the breach before executing Exhibit D and Exhibit E does not support a waiver defense. Nothing in the record can be construed to create an issue of fact or create a course of conduct establishing ASG's knowing and intentional waiver of their rights (*Navillus Tile, Inc. v Turner Constr. Co.*, 2 AD3d 209, 211 [1st Dept 2003]).

HOV argues that the Court erred by not indicating that HOV has an estoppel defense not just with respect to Exhibit E as the Court indicated but also with respect to Exhibit D. As previously discussed, on the record before the Court, HOV has not established that ASG knew of the breach *prior* to the Exhibit E negotiations and the Report IDs in the Site Assessment are simply too

ambiguous to create an issue of fact to the contrary. Thus, HOV does have an estoppel defense as to Exhibit E but not as to Exhibit D.

HOV's argument that the Court misapplied the continuing wrong doctrine in permitting ASG's counterclaim for breach of contract to survive fails. Although the initial breach may have occurred as early as 2015 as HOV argues, the continuing wrong doctrine tolls the running of the statute of limitations where a contract imposes a continuing duty on a breaching party (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017]). As previously discussed, ASG is entitled to damages to the extent that ASG can demonstrate HOV violated its continuing duty not to engage ASG customers which occurred within the two year limitation period prior to filing the SDNY Action.

HOV's argument that the Court misapplied the law of admissibility of expert testimony also fails. An "expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror" (*De Long v County of Erie*, 60 NY2d 296, 307 [1983]). Critically, Dr. Malek admits that his opinion is unnecessary and not based on any professional or technical knowledge (NYSCEF Doc. No. 263, 130:21-2 ["You know, you can look at those databases . . . and you don't even have to be a computer scientist or even a -- a programmer to be able to tell that those two files do not have the same content"]; 131:8-9 ["anybody can do that, just comparing the two files"]). Thus, by his own admission, Dr. Malek's opinion is not proper expert testimony, and it was properly excluded (*De Long*, 60 NY2d at 307).

With respect to the branch of the motion seeking reargument as to the sealing of certain documents, 22 NYCRR § 216.1(a) provides that:

(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard

(22 NYCRR § 216.1[a]).

The motion is granted to the extent that the Clerk of the Court is directed to seal NYSCEF Doc. Nos. 139-42, 154-55, 158, 165, 170, 182-86, 195-98, 200, 213, 278, 286, 288, 355-57, 280 and 285 because the Court finds “good cause” that outweighs the interests of the public to warrant sealing of these documents (*Danco Lab., Ltd. v Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 8 [1st Dept 2000]; 22 NYCRR § 216.1[a]). The motion however is denied as to NYSCEF Doc. No. 291. As to NYSCEF Doc. Nos. 190, 212, 250, 274, 319, and 338, HOV is not entitled to the wholesale sealing of these documents simply because part of the document contains client names. They are entitled to redactions of the client names and shall redact the client names and uploaded replacement documents with the client names redacted for these documents no later than August 31, 2022. The Court shall direct the Clerk of the Court to seal these documents pending the replacement documents with only the client names redacted uploaded in their place.

Accordingly, it is

ORDERED that HOV Service Inc.'s motion to reargue is granted solely to the extent of sealing the duplicate documents to documents already sealed by this Court's Prior Decision and the documents for which this Court finds good cause is shown, but is otherwise denied; and it is further

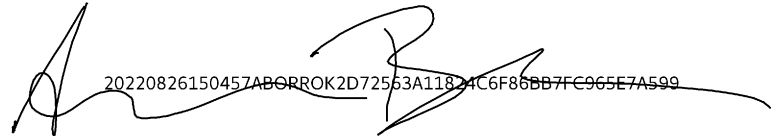
ORDERED that the Clerk of the Court is directed to seal NYSCEF Doc. Nos. 139-42, 154-55, 158, 165, 170, 182-86, 190, 195-98, 200, 212, 213, 250, 274, 278, 280, 285-86, 288, 319, 338 and 355-57 in this action in its entirety upon service on him (60 Centre Street, Room 141B) of a copy of this order with notice of entry; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to NYSCEF Doc. Nos. 139-42, 154-55, 158, 165, 170, 182-86, 190, 195-98, 200, 212, 213, 250, 274, 278, 280, 285-86, 288, 319, 338 and 355-57 to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this case and any party; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that HOV Service Inc. shall upload redacted versions of NYSCEF Doc. Nos. 190, 212, 250, 274, 319, and 338; and it is further

ORDERED that the parties shall appear for a status conference on September 12, 2022 @ 12:30 pm.


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8/26/2022
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE