

**Invesco Group Servs., Inc. v AST Fund Solutions,  
LLC**

2024 NY Slip Op 32523(U)

July 12, 2024

Supreme Court, New York County

Docket Number: Index No. 653581/2022

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

-----X  
 INVESCO GROUP SERVICES, INC.

Plaintiff,

- v -

AST FUND SOLUTIONS, LLC,

Defendant.

INDEX NO. 653581/2022

MOTION DATE 01/03/2024

MOTION SEQ. NO. 008

**DECISION + ORDER ON  
 MOTION**

-----X  
 HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 193, 194, 203, 205, 206, 210, 221, 222, 225

were read on this motion to/for

DISMISS

In this breach of contract action, plaintiff Invesco Group Services, Inc. (Invesco) alleges that defendant AST Fund Solutions, LLC (AST) overcharged plaintiff for defendant's call services. Defendant asserts counterclaims against plaintiff for anticipatory breach of contract, unjust enrichment, and declaratory judgment (NYSCEF #173 – Counterclaims). Invesco now moves to dismiss AST's counterclaims pursuant to CPLR 3211(a)(1) and (7), which defendant opposes. Based on the reasons below, plaintiff's motion to dismiss the counterclaims is granted.

**Background<sup>1</sup>**

In 2019, Invesco's parent company acquired OFI Global Asset Management Inc. (OFI Global). As part of the acquisition process, OFI Global requested that AST submit rates and estimates for its proxy solicitation services in advance of a shareholder vote on the acquisition (Counterclaims ¶ 3). AST submitted these rates in December 2018, and a proxy solicitation services agreement under somewhat modified terms was reached on February 7, 2019 (*id.* ¶¶ 3-4). The agreement included a detailed pricing schedule for three categories of calls: (1) "Inbound and Outbound Calls (with a live operator)," (2) "Alternative Outreach Calls (AOC) (w/ rollout voting option)," and (3) "Telephone Answering Machine Messages Left (live

<sup>1</sup> Unless otherwise noted, the following facts are based on the allegations in AST's Answer and Counterclaims, which for the purpose of this motion must be accepted as true, and the documentary evidence submitted by the parties.

operator)” (TAMM). The rate for Inbound and Outbound Calls was significantly higher than the rate for the other types of calls (*id.* ¶ 5).

AST’s pricing estimates for the proxy solicitation campaign included estimates about the number of calls that AST believed would be necessary to complete the project (NYSCEF #4 – Project Estimate). AST alleges that, with the proxy vote approaching, Invesco requested AST to make calls beyond the estimates in the agreement (Counterclaims ¶ 9). Specifically, AST avers, Invesco implored AST to “pummel phones” and work “like the FINAL meeting is days away” (*id.*). According to AST, these efforts earned effusive praise from Invesco in light of the solicitation campaign’s ultimate success (*id.* ¶ 12.).

In early 2019, AST submitted four invoices to OFI Global, all of which were paid promptly (*id.* ¶ 13). In total, the invoices included more Inbound and Outbound Calls than the high-end estimate provided in the fee schedule (*id.* ¶ 14; Project Estimate at 6). AST asserts that it had the right to charge for additional Inbound and Outbound calls but declined to do so in “the ordinary exercise of billing judgment” (Counterclaims ¶ 14).

In December 2020, approximately 18 months after Invesco paid the final invoice for the calls, Invesco requested an audit related to the telephone campaign solicitations. AST complied (*id.*). AST provided Invesco with detailed backup data pertaining to the telephone campaign (*id.*). After the audit, Invesco claimed that AST overcharged it by classifying too many calls as live operator calls (*id.* ¶¶ 15,16). For its part, however, AST alleges that it had determined during the audit that it had excluded all AOC calls from its final invoice, leading to an undercharge (*id.* ¶ 19). AST alleges that it further reclassified a number of live operator calls to TAMM calls at a significantly lower rate (*id.* ¶¶ 19, 20).

AST claims that Invesco repudiated the agreement in pre-litigation communications and by commencing the current action (*id.* ¶ 22). In particular, AST argues that Invesco adheres to a narrow interpretation of the “Inbound & Outbound Calls” provision of the agreement, which it characterizes as “baseless” (*id.* ¶ 23).

### Current Litigation and Claims

In September 2022, Invesco commenced a breach of contract action against AST, seeking \$25 million in damages. Invesco alleged that AST misled OFI Global and Invesco into overpaying for AST’s services (NYSCEF #21 – Complaint ¶ 25). In particular, Invesco contended that AST applied charges for unsuccessful live operator calls, despite that provision applying when a live operator reached an investor and actually conducted a solicitation or received and handled an inbound call from a shareholder” (*id.* ¶ 31). As Invesco puts it, AST significantly overcharged them by intentionally billing calls without a live operator as live operator calls (*id.* ¶¶ 26-27).

AST unsuccessfully moved to dismiss the complaint on the based on the account stated and voluntary payment doctrines (MS 004). In denying AST's motion, this court found AST's defenses inapplicable since Invesco had alleged that AST misrepresented the nature of the telephone calls billed on its invoices and Invesco may not have had full knowledge of the facts when it paid AST's invoices (NYSCEF #170 – Decision and Order dated July 24, 2023 – at 3-6).

In its answer to the complaint, AST asserted three counterclaims in the alternative for anticipatory breach of contract, unjust enrichment, and declaratory judgment should its account stated and voluntary payment defenses fail (Counterclaims ¶¶ 1-2). Invesco now moves to dismiss these counterclaims on the basis of estoppel and waiver.

### **Legal Standard**

Under CPLR 3211(a)(1), the court must dismiss a claim if the moving party is able to establish a defense that is “founded on documentary evidence” (CPLR 3211[a][1]). In such a case, dismissal is appropriate if the moving party's documentary evidence conclusively establishes a defense as a matter of law (*Goldman v Metro. Life Ins. Co.*, 5 NY3d 561 [2005]). The moving party bears the burden of demonstrating that the documentary evidence submitted conclusively refutes the non-moving party's claim (*Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100 [2018]).

Under CPLR 3211(a)(7), a claim that fails to state a cause of action must be dismissed (CPLR 3211[a][7]). And in a motion to dismiss, the non-moving party's pleadings must be afforded a “liberal construction,” with all favorable inferences made for the non-moving party, and all facts assumed to be true (*Leon v Martinez*, 84 NY2d 83 [1994]). However, these inferences and assumptions do not apply to “bare legal conclusions” (*Gertler v Goodgold*, 107 AD2d 481 [1st Dept 1985]).

### **Discussion**

Invesco argues that AST's counterclaims are barred by the doctrines of estoppel and waiver. Invesco's dismissal argument on estoppel grounds will be addressed first followed by its grounds on waiver.

#### *Estoppel*

Invesco asserts that AST's claims should be dismissed on the basis of estoppel because (1) the counterclaims assume that AST misrepresented the nature of the telephone calls it billed for on its invoices, and (2) it would be inequitable for AST to recover more than it previously accepted due to those misrepresentations (NYSCEF # 194 – Pltfs MOL at 5). A party asserting estoppel must establish: (1) conduct amounting to a false representation or concealment of material facts; (2) an intention or expectation that such conduct will be relied upon by the other party;

and (3) actual knowledge of the real facts (*757 3rd Ave. Assoc., LLC v Patel*, 117 AD3d 451, 453 [1st Dept 2014]).

Here, AST's conduct satisfies all three criteria for estoppel. First, because AST's affirmative defenses were dismissed (*see* Order dated July 24, 2023, at 4), the counterclaims assume the invoices AST sent to Invesco inaccurately reflected the work done by characterizing calls not performed with a live operator as live operator calls. Furthermore, if AST now seeks to recover previously unbilled calls after issuing a "final invoice," its previous representations that the invoice represented complete payment for services rendered would be false. Second, AST doubtlessly intended that Invesco would rely on the finality of its invoices by paying them, as Invesco did. Finally, AST admits to having actual knowledge of the real number of calls because it alleges that its decision not to bill for the extra calls for which it now seeks payment was done "in the ordinary exercise of billing judgment" (Counterclaims ¶ 14).

The gist of AST's argument against estoppel rests on the principle that a party may sue for a greater amount than previously charged on a rejected invoice (Def't's MOL in Opp at 11). AST argues that if Invesco succeeds in defeating its defenses to the complaint, it has essentially rejected AST's invoices, and AST should accordingly be free to pursue a recovery larger than before (*id.*). However, AST ignores the fact that Invesco *paid* the invoices that were sent; the cases AST cites in support of the principle all involve invoices that were not paid (*see e.g. Stryker v Cassidy*, 76 NY 50, 54 [1879] [plaintiff not precluded from seeking larger sum in subsequent action because defendant "did not assent to the account as rendered"]; *Williams v Glenny*, 16 NY 389, 392 [1857] [plaintiff was able to recover \$500 from defendant for his legal services after providing defendant with an invoice for \$150 that went unpaid]; *Mandell v Curtis*, 205 Misc 856, 858 [City Ct. 1954] [plaintiff not precluded from seeking larger payment for attorney's fees than initially stated on an invoice because defendant repudiated bill by declining to complete payment]). AST's other arguments against estoppel are similarly unavailing. AST claims that there were no misrepresentations because the invoices reflected "what Invesco was being charged for," instead of the total amount owed (Defendant's Brief in Opposition at 11). However, the plain meaning of a "final invoice" is clear, and courts have recognized that it establishes a final balance on a transaction (*see Johnson v Commercial Constr. Tech., Inc.*, 34 Misc 3d 157(A) [App Term, 2d Dept 2012] [finding that a defendant who submitted a "final invoice" for a lower amount on a contract was bound by that lower amount]).

### *Waiver*

Invesco also argues that AST's counterclaims are barred by the waiver doctrine. AST, in its exercise of billing judgment decided not to bill all the inbound and outbound calls, issued four invoices (including a "final invoice"), and accepted payment on them (Counterclaims ¶ 13, 14). By doing so, Invesco claims that AST

effectively waived its right to seek additional amounts (Pltf's MOL at 6). A party can waive its rights under a contract either explicitly or through conduct that is "clear, unequivocal, and deliberate" (*Silverman v Silverman*, 304 AD2d 41, 46 [1st Dept 2003]). By this conduct, defendant plainly demonstrates the kind of "clear, unequivocal, and deliberate" conduct that courts regularly deem as constituting a waiver (*see e.g. Kamco Supply Corp. v On the Right Track, LLC*, 149 AD3d 275 [2d Dept 2017] [finding that landlord waived right to terminate lease after accepting late payment from tenant]).


To avoid this outcome, AST points to the agreement's "express no-waiver provision" and argues that no-waiver provisions are "uniformly enforced" (*Awards.com, LLC v Kinko's, Inc.*, 42 AD3d 178, 188 [1st Dept 2007]). Such reliance is unavailing because no-waiver clauses are routinely set aside in circumstances where a party has clearly and deliberately waived its rights. For instance, the Court of Appeals has found that a landlord who accepted late rental payments waived his right to terminate its lease with a tenant despite the "nonwaiver" clauses found in the lease (*TSS-Seedman's, Inc. v Elota Realty Co.*, 72 NY2d 1024, 1027 [1988]) (*id.* at 1027). Similarly, another court found that a mother who accepted and cashed child support arrears for over a three-year period was found to have evidenced a clear "intent to relinquish" any right to seek further arrears for those years despite a no-waiver clause (*see Hannigan v Hannigan*, 104 AD3d 732, 733, 735 [2d Dept 2013]). As these cases reveal, New York courts regularly recognize that accepting payment for services in a given time period—as AST did here—constitutes a waiver of the right to demand additional payment for the relevant time period.

**Conclusion**

For the foregoing reasons, it is

ORDERED that plaintiff Invesco Group Services, Inc.'s motion to dismiss defendant AST Fund Solutions LLC's counterclaims is granted.

This constitutes the Decision and Order of the Court.

7/12/2024			
DATE			MARGARET A. CHAN, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE