

<b>HOV Servs., Inc. v ASG Tech. Group, Inc.</b>
2022 NY Slip Op 30299(U)
January 27, 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.,	<b>INDEX NO.</b>	<u>657346/2020</u>
Plaintiff,	<b>MOTION DATE</b>	_____
- v -		
ASG TECHNOLOGIES GROUP, INC.,	<b>MOTION SEQ. NO.</b>	<u>001 006 007</u> <u>008 009</u>
Defendant.		

**DECISION + ORDER ON  
MOTION**

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 53, 60, 61, 62, 63, 64, 65, 66, 67, 68, 348, 349

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 74, 75, 76, 77, 127, 345

were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 128, 346, 347

were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 323, 324, 325, 326, 327, 328, 339, 340, 343, 344, 360, 361

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 009) 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 341, 342, 354, 355, 356, 357, 362, 363, 364

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER .

Upon the foregoing documents and for the reasons set forth on the record (1.25.22), ASG Technologies Group, Inc.'s (**ASG**) motion to dismiss (Mtn. Seq. No. 001) pursuant to CPLR 3211(a)(1) and (a)(7) is denied to the extent that it is based on the argument that the claims are untimely. Executive Order 202.8, as renewed by subsequent order, limited court operations to essential matters during the pendency of the COVID-19 health crisis from March 20, 2020 until November 3, 2020 and prevented the filing of this action during that time period. HOV Services Inc. (**HOV**) originally sued ASG in the United States District Court of the Southern District of New York (the **SDNY Action**) on October 23, 2018. The court dismissed the federal claims in the SDNY Action and declined to exercise supplemental jurisdiction as to the state claims on February 2, 2021. This action was filed here on December 30, 2020, well within the 2 year time statute of limitations period set forth in the SLA (NYSCEF Doc. No. 20, ¶ 20(B). It does not matter that the complaint brought in the SDNY Action did not include certain claims brought in this lawsuit because HOV could well have amended in the SDNY Action and could have brought this complaint timely had the Executive Orders not prevented them from doing so.

The motion to dismiss, however, is granted to the extent of (i) dismissing the fraudulent inducement cause of action because ASG was not a fiduciary to HOV and the fraudulent inducement here, as alleged is based on an omission and (ii) the violation of New York General Business Law (**GBL**) § 349 cause of action because ASG's conduct was not consumer-oriented to give rise to a claim under GBL § 349. This dispute involves a contract between HOV and ASG, two sophisticated parties. The fact that HOV's customers information may not have been preserved if HOV did not agree to ASG's terms for the Exhibit E does not change the result.

ASG's motion (Mtn. Seq. No. 008) for summary judgment pursuant to CPLR 3212 is granted to the extent of dismissing HOV's affirmative defenses for fraud (second affirmative defense) and waiver (fourth affirmative defense). As discussed above, no fiduciary relationship exists between ASG and HOV. Pursuant to the SLA, ASG was not required to provide its customer list to HOV and HOV could have taken measures to avoid violating the Overlapping Customer Restriction. Additionally, the parties agreed pursuant to the SLA, that their failure to enforce one term of the SLA did not constitute a waiver (NYSCEF Doc. No. 3, ¶ 11). Waiver and estoppel are not the same and, for the avoidance of doubt, ASG may be estopped as to Exhibit E if ASG knew that HOV was in breach of the overlapping customer prohibition and elected to enter into Exhibit E with HOV.

HOV's motion for summary judgment (Mtn Seq. No. 009) pursuant to CPLR 3212 is granted to the extent of limiting ASG's claims arising out of the Overlapping Customer Restriction to claims that occurred on or after November 30, 2016 pursuant to Section 20(B) of the License Agreement because, as HOV asserts and ASG does not dispute, ASG failed to raise a claim regarding the Overlapping Customer Restriction until November 30, 2018. ASG's argument in opposition to HOV's motion for summary judgment that the conclusion of Dr. Sam Malek, HOV's "expert", that HOV's database was dissimilar to ASG's database must be granted. Dr. Malek's testimony is that no scientific methodology was employed (*Frye v United States*, 293 F 1013 [D.C. Cir. 1923]; *see People v Wesley*, 83 NY2d 417, 422 [1994]).

ASG's motion to seal (motion seq. no. 006) and HOV's motion to seal (motion seq. no. 007) are granted to the extent set forth on the record (12.1.21 and 1.25.22) for good cause shown in accordance with Part 216 of the Uniform Rules for the Trial Courts.

### Discussion

On a motion to dismiss, the pleading is to be afforded a liberal construction and the court must accept the facts as alleged in the complaint as true, according plaintiffs the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). CPLR 3211 provides for dismissal where a defense is grounded in documentary evidence (CPLR 3211[a][1]), on statute of limitations grounds (CPLR 3211[a][5]) and for failure to state a cause of action (CPLR 3211[a][7]).

The proponent of a summary judgment motion must make a *prima facie* showing of its entitlement to judgment as a matter of law and must tender sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68, NY2d 320, 324 [1986]). Once that burden has been met, the party opposing the motion must produce evidence in admissible form to establish that a triable issue of material facts exists (*id.*).

### ***The Complaint Fails to State a Cause of Action for Fraudulent Inducement and GBL § 349 (Motion Seq. No. 001)***

To state a cause of action for fraudulent inducement, a party must allege an intentional material misrepresentation, intent to defraud, reasonable reliance, and damages (*Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 537 [1st Dept 2016], *affirmed* 29 NY3d 137 [2017]). An

omission does not constitute fraud unless there is a fiduciary relationship between the parties (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 42 [1st Dept 2012]). HOV fails to allege that such a relationship existed here, and, as such, the cause of action for fraudulent inducement must be dismissed.

HOV's cause of action for breach of GBL § 349 must also be dismissed. As discussed above, the complaint is based on conduct arising out the SLA, an agreement negotiated between two sophisticated parties. That the conduct may have affected HOV's customers does not rise to consumer-oriented conduct implicating GBL § 349. Therefore, the GBL § 349 cause of action must also be dismissed.

***HOV Cannot Assert Affirmative Defenses of Fraud, Waiver (Motion Seq. No. 008)***

HOV's affirmative defense of fraud, like its cause of action for fraudulent inducement, is based on ASG's omission that HOV was in violation of the Overlapping Customer Restriction and fails for the reasons stated above.

HOV alleges an affirmative defense of waiver of the Overlapping Customer Restriction because ASG did not provide customer lists or information to HOV to allow HOV to determine which customers might be subject to the Overlapping Customer Restriction and concealed from HOV that it believed HOV was in violation of the Overlapping Customer Restriction. This defense fails because ASG was not obligated, contractually or otherwise, to provide such information to HOV. As discussed above, ASG may however be estopped from asserting claims based on Exhibit E.

***ASG is Barred from Asserting Damages based on the Overlapping Customer Restriction Outside the Contractual Limitations Period (Motion Seq. No. 009)***

Section 20(B) of the SLA states that no action arising out of the SLA can be brought more than two years after the cause of action has arisen. The agreed upon statute of limitations period is unequivocal (*see* CPLR 201). ASG failed to raise a claim for breach of the Overlapping Customer Restriction until November 30, 2018. The contractual limitations period limits any claims for violation of the Overlapping Customer Restriction to claims arising on or after November 30, 2016. Thus, any damages accruing prior to that time are time barred.

Under *Frye*, an expert opinion is admissible if the opinion is based on scientific techniques “generally accepted” as reliable in the relevant scientific community (*Marsh v Smyth*, 12 AD3d 307, 308 [1st Dept 2004]). Dr. Malek’s opinion is not an expert opinion under *Frye* because as HOV admits, his analysis is not based on a special or scientific methodology. As such, his opinion is not proper expert testimony and must be precluded (*De Long v County of Erie*, 60 NY2d 296, 307).

It is hereby ORDERED that ASG’s motion to dismiss is granted to the extent of dismissing HOV’s causes of action for fraudulent inducement and violation of GBL § 349; and it is further

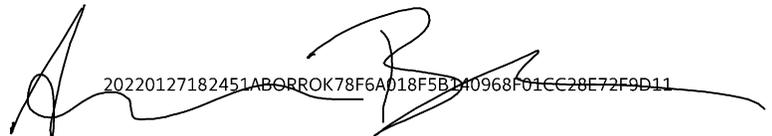
ORDERED that ASG’s motion for summary judgment is granted to the extent of dismissing HOV’s affirmative defenses of fraud and waiver; and it is further

ORDERED that HOV’s motion for summary judgment is granted to the extent of limiting ASG’s claims under the Overlapping Customer Restriction to claims arising on or after November 30, 2016; and it is further

ORDERED that the Clerk of the Court is directed, upon service on him (60 Centre Street, Room 141B) of a copy of this order with notice of entry, to seal NYSCEF Doc. Nos. 80-114, 119-124, 131, 133-134, 137, 145, 153, 156, 160, 162, 167, 171, 180, 188, 194, 228, 244, 246-249, 252-53, 258, 260, 263-64, 272-73, 275-77, 279, 281, 283-84, 287, 289-90, 292-93, 298, 300-306, 310-313, 315-317, 324, 331-332, 334-335, 337 and to separate these documents and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the said sealed documents 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 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](http://www.nycourts.gov/supctmanh)).



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1/27/2022  
DATE

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ANDREW BORROK, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER

OTHER

APPLICATION:

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