

**Science Applications Int'l. Corp. v Environmental
Risk Solutions, LLC**

2010 NY Slip Op 32265(U)

August 23, 2010

Sup Ct, Albany County

Docket Number: 3688-10

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

SCIENCE APPLICATIONS
INTERNATIONAL CORPORATION,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 3688-10
RJI NO. 01-10-100559

ENVIRONMENTAL RISK SOLUTIONS, LLC;
1694 NIAGARA FALLS BLVD TONAWANDA, LLC;
2058 DELAWARE AVE, BUFFALO, LLC; JAMES M.
DONEGAN; JOSEPH RIITANO; 7549 OSWEGO RD
CLAY, LLC; 1361 ABBOT RD LACKAWANNA, LLC;
RED-KAP SALES, INC.; CORTLAND PUMP & EQUIPMENT,
INC.; 690 PITTSFORD VICTOR RD PITTSFORD LLC; and
BUCKNO, LISICKY & COMPANY, PC,

Defendants.

Supreme Court Albany County All Purpose Term, July 29, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiff commenced this action by filing a Summons and Complaint, with the Albany County Clerk's Office, on June 7, 2010. Plaintiff seeks to recover, in part, for unpaid services it performed pursuant to an agreement (hereinafter "master agreement") with Environmental Risk Solutions, LLC (hereinafter "ERS"). Plaintiff also seeks to foreclose the Mechanic's Liens it filed on the properties where such services were rendered, i.e. at real property owned by Defendants Red-Kap Sales, Inc.; 1694 Niagara Falls Blvd Tonawanda, LLC; 2058 Delaware Ave Buffalo, LLC; James Donegan; Joseph Riitano; 7549 Oswego Rd Clay, LLC and 1361 Abbot Road Lackawanna, LLC. Additionally, Plaintiff apparently¹ seeks to enforce a trust fund on the proceeds of the sale of 690 Pittsford Victor Road, Perinton, New York (hereinafter "690 Pittsford") and on the master agreement's escrow fund, held by Buckno, Lisicky & Company, PC (hereinafter "BLC").

Plaintiff now moves, by two Orders to Show Cause, for an Order transferring seven Lien Law §38 proceedings to this Court, for a preliminary injunction prohibiting BLC's distribution of funds from the master agreement's escrow fund, for an Order directing BLC to furnish supplemental accountings and for an Order requiring Defendant 690 Pittsford Victor Rd Pittsford, LLC to furnish a verified statement relative to the sale of its property. While

¹ As Plaintiff failed to attach a complete copy of its Complaint to its motion, this finding is derived from the record rather than a review of the Complaint.

Defendants Red-Kap Sales, Inc.; 1694 Niagara Falls Blvd Tonawanda, LLC; 2058 Delaware Ave Buffalo, LLC; James Donegan; Joseph Riitano; 7549 Oswego Rd Clay, LLC; 1361 Abbot Road Lackawanna, LLC and 690 Pittsford Victor Rd Pittsford, LLC have all opposed the motion,² no opposition has been filed by Cortland Pump & Equipment, Inc.; BLC or ERS.

On this record, because Plaintiff failed to demonstrate its compliance with the Orders to Show Cause's service directives, its motions are denied without prejudice. Both Orders to Show Cause required service "on or before June 11, 2010" with such service to be "made by overnight mail." Plaintiff's affidavits of service, however, fail to allege service "by overnight mail." Plaintiff's first affidavit of service alleges service occurring on "June 10, 2010," but was made "[b]y depositing a true and correct copies of the [Orders to Show Cause and Plaintiff's moving papers] properly enclosed in a post-paid wrapper FED-EX EXPRESS in the Official Depository maintained and exclusively controlled by the United States." (emphasis added). Similarly, Plaintiff's second affidavit of service alleges service occurring on "June 11, 2010," made "[b]y depositing a true and correct copies of the [Orders to Show Cause and Plaintiff's moving papers] properly enclosed in a post-paid wrapper FED-EX EXPRESS in the Official Depository maintained and exclusively controlled by the United States." (emphasis added). Because depositing a "FED-EX EXPRESS" package into a depository maintained by the "United States," and not one maintained by Federal Express, would not properly effectuate "overnight mail," Plaintiff failed to demonstrate its compliance with the service directives of the Orders to Show

² In addition to opposing the motion, Defendants 1694 Niagara Falls Blvd Tonawanda, LLC; 2058 Delaware Ave Buffalo, LLC; James Donegan; Joseph Riitano; 7549 Oswego Rd Clay, LLC; 1361 Abbot Road Lackawanna, LLC and 690 Pittsford Victor Rd Pittsford, LLC (hereinafter collectively "moving Defendants") have also cross moved to dismiss the complaint.

Cause. As Plaintiff's "failure to give requisite notice of motion deprives the court of jurisdiction to entertain [its] motion[s]," they are denied without prejudice. (Burstin v. Public Service Mut. Ins. Co., 98 AD2d 928 [3d Dept. 1983], *see also* Feldman v. Feldman, 54 AD3d 372 [2d Dept. 2008]; Ciochenda v. Department of Correctional Services, 68 AD3d 1363 [3d Dept. 2009]; Pettus v. Fischer, 72 AD3d 1313 [3d Dept. 2010]).

Turning next to moving Defendants' cross motion, because they failed to demonstrate their entitlement to dismissal, their motion is denied.

First, moving Defendants claim that this Court has no jurisdiction over Plaintiff's lien law causes of action, due to CPLR §507, because the real property subject to the lien is not located within Albany County. Notwithstanding CPLR §507's mandatory "shall" language, relied upon by moving Defendants, such statute relates only to an action's venue not the jurisdiction of the Court. (Railroad Fed. Sav. & Loan Assn. v Rosemont Holding Corp., 248 AD 909 [2d Dept. 1936]; *see also* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 507; Drachman Structurals, Inc. v. Anthony Rivara Contracting Co., 78 Misc2d 486 [Sup Ct, Nassau County 1974]; Lien Law § 41). As such, moving Defendants motion to dismiss based upon this ground is wholly unavailing.

Similarly, moving Defendants did not demonstrate their entitlement to dismissal because of Plaintiff's failure to name 690 Pittsford's current owner, an allegedly necessary party under Lien Law §44. While it is undisputed that the owner of property subject to a lien is a necessary party in an action to enforce that lien. (Lien Law §44). Plaintiff does not seek to "enforce a lien" against 690 Pittsford. Rather, Plaintiff's complaint seeks to enforce the trust created by the deed that transferred 690 Pittsford to its current owner. (*see* Lien Law §§ 13, 70, 71, 77). As

Lien Law §44 is not applicable to an action to enforce a trust, and the trust fund is held by a named party, this portion of the moving Defendants' motion unsubstantiated and denied.

Lastly, the moving Defendants failed to demonstrate their entitlement to dismissal based upon documentary evidence, i.e. one of the contractual provisions of the master agreement.

In the context of a motion to dismiss the Court must "accord plaintiffs the benefit of every possible favorable inference". (Leon v. Martinez, 84 NY2d 83, 87 [1994]). On a motion to dismiss on the ground that the action is barred by documentary evidence "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Erie Ins. Group v. National Grange Mut. Ins. Co., 63 AD3d 1412 [3d Dept. 2009]; Goshen v. Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 [2002], pursuant to CPLR §3211[a][1]). The documentary evidence submitted must resolve "all factual issues as a matter of law and definitively dispose... of the plaintiff's claim". (Wallach v. Hinckley, 12 AD3d 893 [3d Dept. 2004]).

Here, moving Defendants claim their entitlement to dismissal of the complaint by operation of master agreement ¶19, which states:

"Liens. [Plaintiff] shall immediately discharge, bond over or otherwise cause to be removed any mechanics liens that may be filed in connection with the [Plaintiff's work at the moving Defendants' property]. If [Plaintiff] fails to do so within twenty (20) days after receiving notice of such lien, then ERS as [Plaintiff's] authorized agent and for [Plaintiff's] account shall have the right but not the obligation to secure such release or discharge in any reasonable manner without regard to the merits of such claim. [Plaintiff] shall indemnify and hold harmless ERS, ERS's client on the Project, and the owner of the Site (if different from ERS's client) from and against any liability, claim, demand, damage... relating to any such claim of lien for labor performed or material furnished..."

Moving Defendants assert that the word "any" requires Plaintiff to discharge the lien it placed on their property and precludes Plaintiff's suit against them. According Plaintiff the benefit of every

favorable inference, however, such argument is misplaced. While the master agreement's use of the term "any" is expansive, it is not specific in its application to Plaintiff. Rather, read as a whole and in a light most favorable to Plaintiff, the master agreement ¶19 applies only to third party claims against the moving Defendants. "Although the words might seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view." (Hooper Associates, Ltd. v. AGS Computers, Inc., 74 NY2d 487 [1989], quoting Robertson v Ongley Elec. Co., 146 NY 20 [1895][internal quotations omitted]; Murray-Gardner Management, Inc. v. Iroquois Gas Transmission, 229 AD2d 852 [3d Dept. 1996]). On this record, because the moving Defendants failed to demonstrate that master agreement ¶19 resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim, this portion of their motion is denied.

Accordingly, both Plaintiff's and moving Defendants' motions are denied in their entirety.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
August 23, 2010


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated June 10, 2010; Order to Show Cause, dated June 10, 2010; Affidavit of Steven Bonde, dated June 3, 2010, and attached Exhibit A-G; Affirmation of Thomas Fallati, dated June 10, 2010, with attached Exhibits A-C; Letter of Brian Quinn, dated July 28, 2010, with unnumbered exhibits.
2. Notice of Cross-Motion, dated June 21, 2010, Affirmation of Urs Broderick Furrer, dated June 21, 2010, with attached Exhibits A-J.
3. Affidavit of James Donegan, dated June 23, 2010,
4. Affirmation of Marc Gerstman, dated June 23, 2010, with attached Exhibits A-E; Affidavit of Jonathan Kaplan, dated June 23, 2010.
5. Reply Affidavit of Steven Bonde, dated June 24, 2010.
6. Reply Affirmation of Urs Broderick Furrer, dated June 28, 2010.