

**Science Applications Intl. Corp. v Environmental  
Risk Solutions, LLC**

2012 NY Slip Op 31013(U)

April 18, 2012

Supreme Court, Albany County

Docket Number: 3688-10

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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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,

**ACTION #1**

Defendants.

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BLOUNT ENERGY, INC.; JTNY, LLC;  
and LEHIGH GAS CORP.,

Plaintiffs,

-against-

**INDEX NO. 8473-10**

ENVIRONMENTAL RISK SOLUTIONS, LLC;  
SCIENCE APPLICATIONS INTERNATIONAL  
CORPORATION; and AMERICAN INTERNATIONAL  
SPECIALITY LINES INSURANCE CO.,

**ACTION #2**

Defendants.

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Supreme Court Albany County All Purpose Term, February 23, 2012  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Tabner, Ryan and Keniry  
Thomas R. Fallati, Esq.

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Harriton & Furrer, LLP

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2058 Delaware Ave Buffalo, LLC; 7549 Oswego Rd Clay, LLC; 1361 Abbot  
Road Lackawanna, LLC; 690 Pittsford Victor Rd Pittsford, LLC; Buckno, Lisicky  
& Company, PC; Blount Energy, Inc.; JTNY, LLC; and Lehigh Gas Corp.*  
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**TERESI, J.:**

By Stipulation of the parties dated March 7, 2011 (hereinafter “Stipulation”), this Court consolidated Actions 1 and 2, revised the scheduling order applicable to both, and restricted disbursements from three specified escrow accounts. Lehigh<sup>1</sup> and Buckno, Lisicky & Company, PC (hereinafter “Buckno”) now move to vacate the Stipulation’s escrow restrictions. While Environmental Risk Solutions, LLC (hereinafter “ERS”) objects to Lehigh and Buckno’s characterization of certain proof, it takes no position on the escrow issue. Science Applications International Corporation (hereinafter “SAIC”), however, opposes Lehigh and Buckno’s motion, and cross moves for a preliminary injunction increasing the restrictions on two of the three escrow accounts. Because neither Lehigh and Buckno nor SAIC demonstrated their entitlement to the relief they seek, their motions are denied.

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<sup>1</sup> “Lehigh” will hereinafter collectively refer to: 1694 Niagara Falls Blvd Tonawanda, LLC; 2058 Delaware Ave Buffalo, LLC; 7549 Oswego Rd Clay, LLC; 1361 Abbot Road Lackawanna, LLC; 690 Pittsford Victor Rd Pittsford, LLC; Blount Energy, Inc.; JTNY, LLC; and Lehigh Gas Corp.

“[O]nly where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation.” (Hamilton v Murphy, 79 AD3d 1210, 1211-12 [3d Dept 2010] lv to appeal dismissed, 16 NY3d 794 [2011] rearg denied, 16 NY3d 885 [2011], quoting Robison v. Borelli, 239 AD2d 656 [3d Dept 1997]; Tverskoy v Ramaswami, 83 AD3d 1195 [3d Dept 2011]; Hallock v. State of New York, 64 NY2d 224 [1984]).

On this record, Lehigh and Buckno failed to proffer sufficient proof to invalidate the Stipulation. The affidavit of Joseph Topper<sup>2</sup> makes no allegation of fraud, collusion, mistake or accident in the execution of the Stipulation. His conclusory statement that Lehigh “had no choice but to agree to” the Stipulation, simply fails to establish the evidentiary foundation necessary to vacate it. Nor did the affidavit of the replacement environmental consulting firm, Synergy Environmental, Inc. (hereinafter “Synergy”). Both the Synergy and Topper affidavits detail the extensive remediation work Synergy has performed, but neither allege that this work was not contemplated or foreseeable at the time the Stipulation was entered. Thus, contrary to Lehigh and Buckno’s contention, the Stipulation cannot be vacated due to the doctrine of frustration of purpose. (Rebell v Trask, 220 AD2d 594 [2d Dept 1995]). To the extent Lehigh and Buckno’s counsel produced documents allegedly demonstrating SAIC’s breach of contract, negligence and fraud in entering and performing the contracts underlying this action, such showing fails to demonstrate fraud, collusion, mistake or accident in their execution of the Stipulation. Moreover, Lehigh and Buckno’s argument that the Stipulation’s escrow restrictions

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<sup>2</sup> He is the Chief Executive Officer of Lehigh Gas Corp.; Blount Energy, Inc.; and JTNY, LLC.

will cause environmental damage is not supported by any factual showing of specific environmental damage. Because Lehigh and Buckno failed to demonstrate fraud, collusion, mistake or accident their motion is denied.

SAIC similarly failed to demonstrate its entitlement to a preliminary injunction.

“As the moving party, [SAIC] was required to establish a likelihood of success on the merits, irreparable harm in the absence of an injunction and a balancing of the equities in [their] favor.” (Moore v Ruback's Grove Campers' Ass'n, Inc., 85 AD3d 1220, 1221 [3d Dept 2011]).

“Notwithstanding the tripartite test, if [SAIC] has an adequate remedy at law and may be fully compensated by monetary damages, a preliminary injunction will not be granted.” (Roushia v Harvey, 260 AD2d 687, 688 [3d Dept 1999]; Credit Agricole Indosuez v Rossiyskiy Kredit Bank, 94 NY2d 541 [2000]).

While SAIC seeks a preliminary injunction to increase the restraint on two of the three escrow accounts and to continue the Stipulation's restraint on the third, it failed to proffer any proof that it has no adequate remedy at law. It is undisputed that the escrow accounts at issue were initially funded by non-party ExxonMobil Corporation (hereinafter “Exxon”), for the purpose of paying for environmental remediation at three portfolios of properties Exxon sold to Lehigh (hereinafter “portfolio properties”). After SAIC was refused payment from the escrow funds for environmental remediation work it allegedly completed on specified portfolio properties, it commenced Action 1 to foreclose a number of mechanic's liens it had filed on portfolio properties. SAIC's liens were thereafter discharged by the filling of bonds, and the escrow fund was no longer a subject of the action. (CPLR §6301). The bond's assurance of payment belies SAIC's claim that a reduction of the escrow accounts may result in its not being

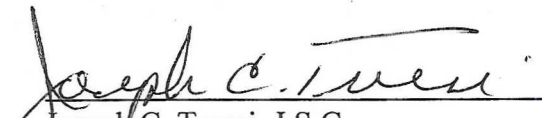
fully compensated. Moreover, SAIC offered no proof to substantiate or explain its assertion that its damages are not covered by the liens it filed. Nor did SAIC show that the escrowed funds may be used to pay interest on its theoretical damage award. SAIC similarly proffered no proof, nor cites to a provision of the underlying escrow agreement, that allows it to collect a judgment for attorney's fees from such escrowed funds. Due to such lack of proof, SAIC failed to demonstrate that the escrowed funds are the subject of this action or that it has no adequate remedy at law.

Accordingly, SAIC's motion is denied.

This Decision and Order is being returned to the attorneys for SAIC. 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  
April 18, 2012

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Order to Show Cause, dated January 19, 2012, with attached Exhibit A; Affirmation of Urs Broderick Furrer, dated January 18, 2012, with attached Exhibits A-R; Affidavit of Brian Fitzpatrick, dated January 17, 2012, with attached Exhibit A; Affidavit of Joweph Topper, dated January 16, 2012.
2. Notice of Cross-Motion, dated February 14, 2012; Affidavit of Steven Bonde, dated February 13, 2012, with attached unnumbered exhibit; Affirmation of Thomas Fallati, dated February 14, 2012, with attached Exhibits A-H; Affidavit of John Conrad, dated February 13, 2012, with attached Exhibit A; Affirmation of Brian Quinn, dated February 14, 2012, with unnumbered exhibits.
3. Affidavit of Frank Pavia, dated February 13, 2012, with attached Exhibits A-B.
4. Reply Affirmation of Urs Broderick Furrer, dated February 20, 2012, with attached Exhibits A-B.