

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

2012 NY Slip Op 31550(U)

June 13, 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

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.

BLOUNT ENERGY, INC.; JTNV, 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.

Supreme Court Albany County All Purpose Term, April 27, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Tabner, Ryan and Keniry

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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.:

Actions 1 and 2 above were consolidated by this Court's execution of the parties' Stipulation dated March 7, 2011 (hereinafter "Stipulation"). Now, Science Applications International Corporation (hereinafter "SAIC"), Lehigh¹, Buckno, Lisicky & Company, PC (hereinafter "Buckno"), and Environmental Risk Solutions, LLC (hereinafter "ERS") all move for summary judgment. The parties each submitted opposition papers, with Lehigh cross-moving to strike SAIC's opposition and for sanctions. Because not one of the summary judgment motions was timely made, each is denied. Lehigh also failed to establish its entitlement to strike or for sanctions.

CPLR §3212(a) states, in pertinent part, that "the court may set a date after which no [summary judgment] motion may be made, such date being no earlier than thirty days after the

¹ "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.

filing of the note of issue.” Failure to comply with CPLR §3212(a) requires denial of the motion. (Brill v City of New York, 2 NY3d 648 [2004]; Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]; Coty v County of Clinton, 42 AD3d 612 [3d Dept 2007]; Town of Kinderhook v Slovak, 47 AD3d 1093 [3d Dept 2008]; Harrington v Palmer Mobile Homes, Inc., 71 AD3d 1274 [3d Dept 2010]).

Here, the parties’ made their motions after the CPLR §3212(a) time period expired. The Stipulation explicitly reads “[a]ny dispositive motions shall be made no later than (60) days following the filing of the Note of Issue.” SAIC filed the Note of Issue in this consolidated action with the Albany County Clerk’s Office on October 31, 2011. Thus, in accord with the Stipulation and CPLR §3212(a), the parties had until December 30, 2011 to make their respective summary judgment motions. However, the parties failed to comply. According to the parties’ respective affidavits of service, while SAIC and ERS made their motions on February 24, 2012, Lehigh and Buckno made their motion on February 23, 2012. (CPLR §2211). Because of this CPLR §3212(a) noncompliance, it would be an “abuse of discretion... to consider the motion[s.]” (White v Frize, 35 AD3d 983, 984 [3d Dept 2006]).

Additionally, not one of the parties sought leave for their late filing or demonstrated “good cause” for their delay. (CPLR §3212[a]). While the parties twice informed this court that they had agreed, among themselves, to extend the Stipulation’s deadlines, such extensions were explicitly rejected. As is specifically relevant here, the parties informed this Court, by letter dated January 30, 2012, that they had agreed to extend the deadline for making summary judgment motions and requested such extension to be so ordered. The request was unequivocally denied. Despite such denial, the parties still made their untimely summary judgment motions.

Even if the parties stipulated among themselves to their late filing, such “stipulation is insufficient to excuse the delay.” (Coty v County of Clinton, supra 614).

Accordingly, the summary judgment motions are all denied.

Turning to Lehigh’s motion to strike and for sanctions, conspicuously absent from its argument is any authority supporting its request for the drastic remedy of striking SAIC’s opposition. Instead, Lehigh relies on the Rules of Professional Conduct and the NYCRR’s financial sanctions rule (22 NYCCR 130-1.1) in claiming that SAIC’s counsel made a “frivolous” statement, one that is material, factual and false. Because the merits of SAIC’s motion are not being considered, it cannot form the basis of a “frivolous” finding because the statement at issue was not considered and therefore is not material. Moreover, the statement constituted commentary on factual evidence that was fully submitted. It was not evidence itself. Nor was SAIC’s commentary, although stretching, false to a degree that warrants sanctions. (Dickson v Slezak, 73 AD3d 1249 [3d Dept 2010]).

Accordingly, Lehigh’s cross-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
June 13, 2012


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated February 23, 2012; Affirmation of Thomas Fallati, dated February 23, 2012, with attached Exhibits A-G; Exhibit to Fallati Affirmation - Escrow Administrator Deposition; Exhibit to Fallati Affirmation - Topper Deposition; Exhibit to Fallati Affirmation - Robinson Deposition; Exhibit to Fallati Affirmation - Fitzpatrick Deposition; Exhibit to Fallati Affirmation - Edwin Miller Deposition; Exhibit to Fallati Affirmation - Anderson Deposition; Exhibit to Fallati Affirmation - May Deposition; Exhibit to Fallati Affirmation - Pleadings; Exhibit to Fallati Affirmation - Contract Documents; Exhibit to Fallati Affirmation - Invoices (Late 2009-2010); Affidavit of John Conrad, dated February 21, 2012, with attached Exhibits A-C; Affidavit of Steven E. Bonde, dated February 23, 2012, with attached Exhibits A-I; Affirmation of Brian Quinn, dated February 23, 2012, with attached Exhibits A-I.
2. Notice of Motion, dated February 23, 2012; Affidavit of Gregory Marshall, dated February 21, 2012, with Exhibits A-N; Affidavit of Edward Allen, dated February 21, 2012; Affidavit of Vincent Dick, dated February 22, 2012, with attached Exhibit A; Affirmation of Frank Pavia, dated February 24, 2012, with Exhibits A-N.
3. Notice of Motion, dated February 23, 2012; Affirmation of Urs Broderick Furrer, dated February 22, 2012, with Exhibits 1-94; Affidavit of Daniel Robinson, dated February 21, 2012; Affidavit of Joseph Topper, dated February 21, 2012; Affidavit of Jeffrey Johnson, dated February 22, 2012, with attached Exhibits A-E.
4. Affirmation of Thomas Fallati, dated March 26, 2012, with Exhibit - Byron Nickerson Deposition; Affidavit of John Conrad, dated March 26, 2012; Affidavit of Byron Nickerson, dated March 22, 2012; Affidavit of Eric Schmidley, dated March 22, 2012, with attached Exhibits A-E; Affirmation of Brian Quinn, dated March 26, 2012, with unattached exhibits: Itemization for 7549 Oswego Clay, LLC A-B, Itemization for 1210 Altamont Avenue Schenectady, LLC A-F, Itemization for 1361 Abbott Road, Lackawana, LLC A-G, Itemization for 2058 Delaware Ave Buffalo, LLC A-H, Itemization for 7888 US Route 11 Cicero, LLC A-H, Itemization for 1694 Niagara Falls Blvd Tonawanda, LLC A-J, Itemization for 690 Pittsford Victor Road Pittsford, LLC A-K.
5. Affidavit of Gregory Marshall, dated March 22, 2012, with attached Exhibits A-C; Affidavit of Edward Allen, dated March 22, 2012; Affidavit of Vincent Dick, dated March 23, 2012, with attached Exhibits A-D; Affirmation of Frank Pavia, dated March 23, 2012, with Exhibits A-F.
6. Notice of Cross-Motion, dated March 26, 2012; Affirmation of Urs Broderick Furrer, dated March 26, 2012, with attached Exhibits 1-21; Affidavit of Daniel Robinson, dated March 23, 2012; Affidavit of Brian Loughnane, dated March 23, 2012; Affidavit of Jeffrey Johnson, dated March 23, 2012, with attached Exhibit A; Affidavit of Kevin Hale, dated March 21, 2012.
7. Affirmation of Thomas Fallati, dated April 19, 2012; Affirmation of Thomas Fallati, dated April 25, 2012; Affirmation of Brian Quinn, dated April 19, 2012.
8. Affirmation of Urs Broderick Furrer, dated April 25, 2012, with attached Exhibits 1-20.