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.; 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.

Supreme Court Albany County All Purpose Term, August 31, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Tabner, Ryan and Keniry
Thomas R. Fallati, Esq.
Attorneys for Science Applications International Corporation
18 Corporate Woods Blvd.
Albany, New York 12211

Harriton & Furrer, LLP
Attn: Urs Broderick Furrer, Esq.
Attorneys for Defendants 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; Buckno, Lisicky & Company, PC; Blount Energy, Inc.; JTNY, LLC; and Lehigh Gas Corp.
84 Business Park Drive, Suite 302
Armonk, New York 10504

Harris Beach, PLLC
Frank Pravia, Esq.
Attorneys for Environmental Risk Solutions, LLC
99 Garnsey Road
Pittsford, New York 14534

TERESI, J.:

This matter is scheduled for trial on October 9, 2012.

Plaintiff/defendant Science Applications International Corporation, ("SAIC") and defendant Environmental Risk Solutions, LLC ("ERS") move for an Order *In Limine* limiting, excluding or precluding the testimony of defendant Lehigh's expert Jeffrey Johnson in regard to the legal obligations of the parties under the Agreements and precluding 1) any testimony regarding future damages as the testimony lacks a proper foundation and is speculative, 2) any evidence regarding damages on Lehigh's fraud claims, 3) any evidence of future damages on Lehigh's breach of contract claims and 4) any evidence regarding SAIC's intent regarding its contractual duties including the inadmissability of certain internal e-mails and documents. The movants also seek to apply New York law regarding the claims and limit damages to $5 million dollars pursuant to the damage cap provision of the Master Agreement. The defendants/plaintiffs, previously referred to as "Lehigh" with the exception of Buckno and ERS oppose the motions of SAIC and ERS. Lehigh alleges the *in limine* motions of the defendants are procedurally

defective. Lehigh also moves for an Order *In Limine* limiting certain evidence SAIC and ERS may introduce at the time of trial. SAIC and ERS oppose Lehigh's *in limine* motion. SAIC and ERS also cross-move for an Order granting them leave to amend their pleadings to add the affirmative defenses of Payment, Account Stated and Collateral Source pursuant to CPLR § 4545. Lehigh opposes the motions and alleges the proposed amendments are untimely.

Lehigh alleges the motions *in limine* are procedurally defective as they did not comply with the Court's July 1, 2010 Discovery Order as they failed to arrange a conference to resolve discovery disputes prior to filing the motions.

The January 23, 2012 Decision and Order of this Court addressed the expert witness issues and directed the plaintiffs in Action #2 to serve and Amended Expert Response. This Decision and Order resolved expert discovery issues up to that point. On April 2, 2012, SAIC moved to strike or preclude or limit the testimony of Lehigh's expert. The Court finds the motion was timely made pursuant to paragraph 14 of the Discovery Order which provides "Any motion to preclude, or limit expert testimony under this rule must be returnable as soon as practicable but no later that forty-five days of its receipt or the motion will be waived." Since Lehigh admits the SAIC motion was filed on the 45th day, it is therefore timely and substantially complied with the provisions of the Discovery Order.

SAIC and ERS seek to preclude any expert testimony offered by Lehigh in regard to the interpretation of the Agreements of the parties. SAIC and ERS allege expert testimony should be limited to industry practice to the extent that such testimony aids the fact-finder in interpreting any contractual terms that the Court deems ambiguous as a matter of law. SAIC and ERS seek to preclude the testimony of Dr. Johnson alleging his testimony exceeds the scope of expert

testimony on the issues of liability pursuant to the Agreements and on the use of damages as the testimony lacks a necessary foundation.

In opposition to the motions, Lehigh claims it does not intend to "offer any opinions as to his interpretation of the parties' obligations under the applicable contractual agreements" as the contracts "are clear and unambiguous and no expert testimony is needed in that regard."

The Court has authority to grant a motion *in limine* to exclude evidence in advance of trial. (PCK Development Co. v. Assessor of Town of Ulster, 43 AD3d 539 [3rd Dept. 2007]). To be properly admitted, expert opinion must generally be based upon facts either found in the record, personally known to the witness, derived from a professionally reliable source or from a witness subject to cross-examination. (McAuliffe v. McAuliffe, 70 AD3d 1129 [3rd Dept. 2010]). Expert testimony is admissible "when it helps to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." (DeLong v. County of Erie, 60 NY2d 296 [1983]). The admissibility and scope of expert testimony is a determination committed to the sound discretion of the trial court. (Mariano v. Schuylerville Cent. Sch. Dist., 309 AD2d 1116 [3rd Dept. 2003]).

Lehigh's expert will not be permitted to interpret the contractual agreements between the parties. Lehigh agrees there is no need for expert testimony in regard to the contracts. Mr. Johnson shall be limited to opinions relating to industry practices. In addition, the expert witness should not be called to offer an opinion as to the legal obligations of the parties under the contract as that is an issue to be determined by the trial court. (Colon v. Rent-A-Center, Inc., 276 AD2d 58 [1st Dept. 2000]).

In regard to future damages for breach of contract, SAIC and ERS allege Dr. Johnson's

proposed testimony lacks a proper foundation in that 1) he based his cost estimates of the current contamination on delineations which were inadequate and 2) Synergy (replaced SAIC for environmental remediation of the properties) prepared the cost estimates of the current contamination. The defendants maintain Dr. Johnson's testimony lacks a proper foundation. The defendants allege Dr. Johnson did not prepare the cost estimates about which he intends to testify. The defendants contend Synergy prepared the cost estimates. The defendants claim Dr. Johnson admitted the estimates are based on what he alleges are inadequate delineations of the contamination located at the properties. The defendants claim neither Dr. Johnson or Synergy prepared new delineations to serve as the basis for the cleanup cost projections that currently exist. The defendants allege in regard to future damages, no documentation was offered to support this calculation and the testimony of Dr. Johnson is speculative and lacks a proper foundation.

Lehigh alleges it was SAIC's responsibility to prepare an independent delineation formula before it was terminated for convenience on October 14, 2009. Lehigh claims since "SAIC never performed the proper delineation, Dr. Johnson can only estimate the true extent of the contamination." Lehigh claims Dr. Johnson's estimated future costs based upon the current state of the sites is proper.

An expert's opinion cannot be based on speculation but "must be based upon facts either in the record or personally known to the witness." (Pember v. Carlson, 45 AD3d 1092 [3rd Dept. 2007]).Where an expert's ultimate assertions are speculative or unsupported by any evidentiary foundations the opinion is of no probative force. (Diaz v. New York Downtown Hosp., 99 NY2d 542 [2002]).

After a review of the record, the Court concludes Dr. Johnson has not prepared any cost estimates regrading future damages. Dr. Johnson relies on the information compiled by Synergy and he may express his opinion regarding the contamination figures prepared by Synergy which are part of the record. As a result, the opinions of Dr. Johnson are not speculative or devoid of factual support in the record.

SAIC seeks to limit testimony by Lehigh for all costs relating to the cause of action for fraud. SAIC claims Lehigh may only recover for out-of-pocket losses. Lehigh may offer proof on its claim for fraud and resulting damages subject to an appropriate instruction to the jury by the Court at the conclusion of the trial. In addition, Lehigh may use internal correspondence of SAIC that are part of the record in order to offer evidence that SAIC had no intention to meet the "Cleanup Standard" of the Agreements for the contaminated sites.

On August 23, 2005, SAIS and ERS entered into a Professional Services Master Agreement for environmental remediation of properties throughout New York State. Section 11.6 of the Master Agreement caps damage claims at $5 million. The Master Agreement provides:

> Each party's total liability to the other for any and all liabilities, claims or damages arising out of any or all task orders under this Agreement, howsoever caused and regardless of the legal theory asserted, including breach of contract, or warranty, tort, strict liability, statutory liability or otherwise, shall not, in the aggregate exceed $5 million.

SAIC contends the limitation of damages applies to Lehigh's claims against SAIC as Lehigh is a third-party beneficiary of the SAIS/ERS Master Agreement.

Lehigh alleges it is not bound by the terms of the Master Agreement or other agreements as it was never a party to any agreements with SAIC. Lehigh contends contractual provisions

limiting damages are not enforceable when the party seeking enforcement has engaged in misconduct, gross negligence or intentional wrongdoing.

Contractual limitation of liability provisions are generally enforceable unless the party seeking to avoid liability has engaged in grossly negligent conduct evincing a "reckless disregard for the rights of others." (Colnaghi, U.S.A. v. Jewelers Protections Servs., 81 NY2d 821 [1993]). A third-party beneficiary whose rights are derivative, is subject to the same defenses as are available to the contracting party. (Artwear, Inc. v. Hughes, 202 AD2d 76 [1st Dept. 1994]).

As a third-party beneficiary, Lehigh's claims are limited to the agreed upon contractual damage cap of $5 million per the Master Agreement. Lehigh has not demonstrated misconduct, gross negligence or intentional wrongdoing by SAIC. Lehigh's allegations do not show a reckless disregard necessary to avoid the contractual limitation of damages. (Pacnet Network, LTD. v. KDDI Corp., 78 AD3d 478 [1st Dept. 2010]).

ERS maintains Lehigh should be precluded from offering expert testimony regarding the applicability of the Navigation Law. ERS claims the provisions of the Navigation Law are inapplicable as it did not discharge petroleum or is an insurer of a party who did. ERS contends it never owned or operated any of the properties and Exxon Mobil was identified as the discharger at each site. Lehigh claims the provisions of the Navigation Law are applicable to the acts of ERS and it should be permitted to offer its application at trial including the testimony of its expert Dr. Johnson.

Navigation Law § 172(8) defines a discharge as "any intentional or unintentional action or omission" that results in the release of petroleum. "Owners of petroleum systems from which petroleum spilled or leaked are 'dischargers' within the purview of Navigation Law § 172(8)

even where the discharge occurred before their ownership began and the owners did not contribute to the discharges or know that it had occurred. (see, Navigation Law § 181; State v. C.J. Burth Services, Inc., 79 AD3d 1298 [3rd Dept. 2010]; White v. Long, 85 NY2d 564 [1995]).

ERS cannot be found to be a discharger as it was neither the owner or landlord of the properties and only contracted with SAIC for environmental remediation of the sites. Lehigh is precluded from offering any evidence that ERS is subject to the Navigation Law and its expert, Dr. Johnson, is also precluded from offering any testimony relating to this statute.

ERS also seeks to preclude Lehigh from offering testimony relating to the RECAPP insurance policies. ERS alleges Lehigh's witnesses, Mr. Topper and Mr. Robinson, should be precluded from testifying as they have no personal knowledge of the status of the RECAPP policies. ERS alleges Lehigh has failed to establish a proper foundation and the witness testimony should be excluded.

Lehigh contends that all parties should be precluded from offering any evidence regarding the existence of the RECAPP policies at trial as their existence is entirely irrelevant. Lehigh contends whether a witnesses possesses the requisite personal knowledge is an issue that must be determined a the time of trial.

The RECAPP policies are relevant to Lehigh's breach of contract claims as they are part of the record and were subject to extensive discovery. Lehigh's witnesses' testimony shall be admissible but limited to industry practice subject to cross-examination.

ERS also seeks to preclude Lehigh from offering any testimony relating to the policies and procedures of the New York State Department of Conservation ("DEC"). ERS alleges Lehigh's witnesses, D. Robinson, J. Topper and T. Donnellon are not qualified as experts and

their interpretations of the Agreements and the DEC's procedures relating to environmental cleanups should be precluded.

Lehigh maintains it does not intend to have its witnesses testify with respect to their legal interpretations of the contractual provisions or the DEC's polices and procedures. Lehigh claims the contractual Agreements and the DEC's polices and procedures are clear and unambiguous and no testimony is needed in that regard. Lehigh contends it will produce a DEC representative at the trial for testimony relating to policies and procedures.

Although Lehigh claims its witnesses will not offer any legal opinions relating to the Agreements and the policies and procedures of the DEC, any testimony by Lehigh's witnesses shall relate to industry practice. Legal opinions are reserved for determination by the Court.

Lehigh claims Pennsylvania law applies to its breach of contract claims. Lehigh admits that non-contract claims are governed by New York law. Section 20. 2 of the Master Agreement between SAIC and ERS provides, "this Agreement shall be governed by the laws of the State of Pennsylvania." SAIC and ERS now claim the laws of the State of New York should apply to this action. SAIC and ERS allege all of the properties are located in New York and were remediated in accordance with New York State law and DEC regulations. SAIC and ERS claim General Business Law § 757(1) voids the choice-of-law and choice-of-forum in construction contracts. General Business Law § 757(1) provides, in part, that a construction contract that makes the contract subject to the laws of another state is void and unenforceable. SAIC and ERS claim the required environmental remedial work is a construction contract pursuant to the Agreements between the parties.

Lehigh opposes this application and maintains the choice-of-law provision contained in

the Master Agreement is enforceable. Lehigh alleges the Agreements required environmental remediation of the contaminated sites and should not be construed as construction contracts.

Courts will enforce a choice-of-law clause so long as the choice-of-law bears a reasonable relationship to the parties or to the transaction and does not violate a fundamental public policy of New York. (Cooney v. Osgood Mach., 81 NY2d 66 [1993]). A basic precept of contract interpretation is that agreements should be construed to effectuate the parties' intent. (Greenfield v. Philles Records, 98 NY2d 562 [2002]). Where an agreement is clear and unambiguous, a court is not free to alter it and impose its personal notions of fairness. (Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 NY3d 470 [2004]).

The choice-of-law provision contained in the Master Agreement is enforceable. The breach of contract claims shall be governed by the laws of the State of Pennsylvania. SAIC and ERS did not prove that the contract claims were subject to New York law pursuant to General Business Law § 757. The subject Agreements provided for environmental remediation of contaminated sites throughout New York. The Agreement cannot be considered a construction contract. The Master Agreement is clear and unambiguous and the Pennsylvania choice of law provision is valid. (Welsbach Elec. Corp. v. MasTec N. Am., Inc., 7 NY3d 624 [2006]; Frankel v. Citicorp Ins. Services, Inc., 80 AD3d 280 [2nd Dept. 2010]).

Lehigh also moves for an Order *In Limine* which seeks to limit certain evidence SAIC and ERS may produce at the time of trial. Lehigh offers a lengthy Affirmation is support of the motion and argues that both SAIC and ERS should be precluded from offering any evidence in relation to the Agreements and their defenses in this action. Lehigh outlines fourteen issues that it claims SAIC should not be able to introduce at trial. Lehigh also claims ERS should not be able

to offer any evidence in support of its position relating to the Agreements.

In opposition, SAIC and ERS maintain the motion offered by Lehigh is a motion for summary judgment and is procedurally improper and inappropriate. SAIC and ERS allege Lehigh now presents the same material that was submitted in the prior summary judgment motion and recasts it as evidentiary issues. SAIC claims Lehigh seeks to preclude it from offering certain evidence at trial in support of its claims and defenses. SAIC alleges, for the most part, Lehigh does not identify what evidence it wants excluded. SAIC contends Lehigh's motion seeks dispositive relief dismissing SAIC's claims and defenses. SAIC alleges Lehigh now raises the very same arguments it raised in the prior summary judgment motion which was denied.

The purpose of a motion *in limine* is to exclude the introduction of anticipated inadmissible, immaterial or prejudicial evidence. (State v. Metz, 241 AD2d 192 [1st Dept. 1998]. In a Decision and Order dated June 13, 2012, this Court dismissed all motions for summary judgment as untimely. After a review of Lehigh's extensive submissions and the relief sought, the Court concludes this *in limine* motion is akin to a motion for summary judgment. "A motion *in limine* is an inappropriate substitute for a motion for summary judgment." (Ofman v. Ginsberg, 89 AD3d 908 [2nd Dept. 2011]). A motion *In Limine* is an inappropriate device to obtain relief in the nature of partial summary judgment (Clermont v. Hillside Industries, Inc., 6 AD3d 376 [2nd Dept. 2004]). As a result, Lehigh's *In Limine* motion is denied.

SAIC and ERS move by cross-motion and seek leave to amend their pleadings to add several affirmative defenses pursuant to CPLR 3025. SAIC seeks to add the defense of Payment, Account Stated and Collateral Source. ERS also seeks to add the Collateral Source Rule as an affirmative defense pursuant to CPLR § 4545. The parties maintain the addition of the proposed

affirmative defenses would not result in surprise or prejudice to Lehigh. SAIC and ERS allege Lehigh has been aware of the RECAPP policies and its protection against cost overruns during this litigation. SAIC alleges the RECAPP policies were produced during discovery and extensive depositions were conducted in relation to the policies. Moreover, SAIC and ERS allege the additional collateral source defense has merit as additional cleanup costs would be covered by the RECAPP policies.

In opposition, Lehigh alleges the proposed amendments to the pleadings are untimely. Lehigh also claims the amendments are without merit. Lehigh contends the motions should be denied as the actions have been pending for approximately two years, the Note of Issue was filed ten months ago, discovery was closed three months ago and the matter is scheduled for trial on October 9, 2012. Lehigh contends the proposed amendments are not based upon newly discovered evidence or facts not known until now. In addition, Lehigh alleges SAIC and ERS had knowledge of these issues when they interposed their Answers. Lehigh claims the motions must be denied as neither party has proffered an excuse for their delay. Lehigh claims if the motions to amend are granted, it will sustain prejudice as it would not have the opportunity to engage discovery with respect to the collateral source issue.

Leave to amend a pleading rests within the trial court's discretion and should be freely granted in the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit.(see, CPLR 3025; Ramos v. Baker, 91 AD3d 930 [2nd Dept. 2012]). Whether to grant or deny leave to amend is committed to the Supreme Court's discretion to be determined on a case by case basis. (Edenwald Contr. Co. v. City of New York, 60 NY2d 957 [1983]). In exercising its discretion, the court will consider how long

the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay is offered and whether prejudice will result. (Sampson v. Contillo, 55 AD3d 591 [2nd Dept. 2008]). "Where a party is guilty of an extended delay in moving to amend, the court should insure that the amendment procedure is not abused by requiring a reasonable excuse for the delay and an affidavit of merit." (Boyd v. Trent, 297 AD2d 301 [2nd Dept. 2002]). Leave to amend may be denied where the opposing party has been or would be prejudiced by a dely in seeking the amendment. (Fahey v. County of Ontario, 44 NY2d 934 [1978]).

The motions to amend the Answers of SAIC and ERS to assert additional affirmative defenses are denied. The proposed basic defenses, especially the Collateral Source Rule, should have been included in the original Answers. It is reasonable that Lehigh would sustain prejudice if the motions were granted on the eve of trial. In addition, SAIC and ERS have not offered a reasonable excuse for the delay in moving to amend. The Court is mindful that when a case is certified for trial, judicial discretion "should be exercised in a discreet, circumspect, prudent and cautious manner". (Delahaye v. Saint Anns School, 40 AD3d 679 [2nd Dept. 2007]). From the facts presented, the motions to amend the pleadings are denied. (Voyticky v. Duffy, 19 AD3d 685 [2nd Dept. 2005]).

All requests for a pre-trial hearing are denied.

The Court has reviewed the parties' remaining contentions and concludes they either lack merit or are unpersuasive given the Court's determination. (Hubbard v. County of Madison v. County of Madison, 71 AD3d 1313 [3rd Dept. 2010]).

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
September 24, 2012

Joseph C. Teresi, J.S

PAPERS CONSIDERED:

1. Notice of Motion dated August 1, 2012;
2. Affirmation of Thomas E. Fallati, Esq. dated August 1, 2012 with attached Exhibits A-H and A-C;
3. SAIC's Memorandum of Law dated August 1, 2012;
4. Notice of Motion dated August 1, 2012;
5. Affirmation of Frank C. Pavia, Esq. dated August 1, 2012 with attached Exhibits A-P;
6. ERS's Memorandum of Law dated August 1, 2012;
7. Affirmation of Urs Broderick Furrer, Esq. dated August 24, 2012 with attached Exhibits A-K;
8. Notice of Motion dated August 1, 2012;
9. Affirmation of Urs Broderick Furrer, Esq. dated August 1, 2012 with attached exhibits 1-93;
10. Affirmation of Brian M. Quinn, Esq. dated August 22, 2012 with attached exhibits A-J;
11. Notice of Cross-motion dated August 22, 2012;
12. Affirmation of Frank C. Pavia, Esq. dated August 22, 2012 with attached Exhibit A;
13. Notice of Cross-motion dated August 24, 2012;
14. Affirmation Thomas R. Fallati, Esq. dated August 23, 2012 with attached Exhibits A-K and 8 volumes of bound Exhibits;
15. SAIC's Memorandum of Law dated August 24, 2012;
16. Affirmation of Kimberly A. Sanford, Esq. dated August 30, 2012 with attached exhibits A & B.