

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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SUPERIOR GUNITE,

Plaintiff,

Index No. 54272/2013

-against-

**AFFIDAVIT IN OPPOSITION TO  
MOTION TO STRIKE NOTE OF  
ISSUE AND STAY ACTION**

YONKERS CONTRACTING COMPANY, INC. and  
ZURICH AMERICA INSURANCE COMPANY,

Defendant.  
-----X

STATE OF NEW YORK     )  
                                      ) ss.:  
COUNTY OF NEW YORK    )

**MARK A. CANIZIO**, being duly sworn, deposes and says:

1. I am a member of the law firm of Duane Morris LLP, attorneys for plaintiff Superior Gunitite ("Gunitite"). As such, I am fully familiar with the facts and circumstances set forth herein.

2. This affidavit is respectfully submitted in opposition to the motion by defendants Yonkers Contracting Corp. ("Yonkers") and Zurich America Insurance Company ("Zurich"), for an order striking the note of issue and staying the within action.

3. As is set forth more fully below, defendants' request for a stay and to vacate the note of issue herein must be denied on the grounds that a) the Yonkers' newly asserted defective work claim was not part of the present pleadings, and was not the subject of any discovery had prior to the filing of the note of issue; b) the claim is in its nascent stages and will not be fully developed for at least another year, thereby unnecessarily delaying this action; and (c) defendants

had ample opportunity to conduct discovery on the issues that are raised by the present pleadings. As such, there is no reason to strike the note of issue, or stay this action from going forward.

#### **BACKGROUND**

4. Gunitite is a concrete specialty subcontractor that places concrete by pumping it through a hose under pressure. The Project that is the subject of the action involves the construction of parts of the new subway station for the Metropolitan Transit Authority's ("MTA") number seven train located at 34th St. between 10th and 11th Avenues in Manhattan (the "Project"). Gunitite's work began in 2011 when it constructed the "sandwalls" that line the unfinished excavations. The structural walls and arches, which are built inside the sandwalls, were completed by Gunitite and others by September 2012.

5. Upon completing its work, Gunitite billed the entire contract, including certain approved amendments leaving only ten (10%) percent retainage unbilled. However, Yonkers breached the subcontract, by failing to pay Gunitite in excess of \$3.1 million dollars, even though the MTA has paid Yonkers its entire contract, less only five (5%) percent retainage.

6. Thus, while Yonkers has it received payment from the MTA of more than ninety-nine (99%) percent of its general contract, it has paid Gunitite only sixty-six (66%) percent of its subcontract. In February 2013, having waited for payment for more than six months from the completion of its work, Gunitite wrote to Yonkers and made one last plea for final payment. When this demand went unanswered, it commenced this action.

## **THE LITIGATION**

7. As is described generally in the moving papers, Gunite commenced this action in or about March 25, 2013, almost 6 months after it had completed all its work on the Project (McKenna Aff., Ex. "1"). Discovery proceeded in accordance with the preliminary conference and order dated July 25, 2013, (McKenna Aff., Exhibit "7") until mid-January 2014. The only issues raised by the pleadings are Gunite's breach of contract claims based on Yonkers failure to pay amounts due, and Yonkers counterclaims based on last minute back charges for clean-up costs and scope disputes. Yonkers' claim that Gunite is somehow responsible for leaks that have appeared at the Project, was not raised by its pleading, and hence no discovery was had by either party concerning it.

8. With respect to discovery, each party exchanged document discovery, followed by the production of electronically stored information. It bears noting in this regard, that although defendants complain about the timing of Gunite's discovery responses, defendants' did not serve their Demand for the Production of Documents until October 11, 2013 almost two months later than required by the Preliminary Conference Order. As a result, no responses were due until, at the earliest, November 11, 2013. Gunite made its initial production on November 20, 2013, followed by its production of electrically stored information, which was extensive, thirty days later.

## **DEPOSITION OF RON FEDERICO**

9. With regard to depositions, Gunite did not resist or obstruct Yonkers ability to take the deposition of anyone. It bears noting, that defendants never served a Notice of Deposition or a witness list of any kind, much less one demanding the deposition of Ron

Frederico. Nevertheless, when counsel asked Gunite to produce him, I advised Anthony Tavormina, Mr. McKenna's associate, that Mr. Federico, a California resident, was no longer an employee of Gunite, and that I could not guarantee that he would voluntarily make himself available for a deposition, especially one conducted in New York. Counsel for each party spoke to the Court's law secretary, Gretchen Walsh, on November 27, 2013. I advised the Court that I had no control over this out-of-state witness, but that I would nonetheless try to secure his attendance. At the time, defendants were considering obtaining a commission to take Mr. Federico's deposition in California. Ms. Walsh's asked if I could have Mr. Federico make himself available in New York so as to avoid any further delay to the discovery schedule. On December 20, 2013, I advised defendant's counsel that Mr. Federico was scheduled to fly into New York at the end of the year. I offered to schedule Mr. Federico's deposition on Thursday, January 2, 2014. When counsel for the defendants advised they were not available on this date, I offered to hold Mr. Federico's deposition on either Monday, December 30<sup>th</sup>, or Tuesday, December 31<sup>st</sup>, if necessary. However, counsel advised they were unavailable to proceed on any of these dates. (See e-mail attached as Exhibit "A.") I explained that given the impending January 15, 2014 cut-off for the discovery, the defendants should not forego this opportunity as it would be difficult, if not impossible, to accommodate alternate dates within the schedule. Plaintiff conducted depositions of Yonkers two principal witnesses on January 10 and 13, 2014. Defendants did not request or notice the deposition of any other Gunite witnesses. At the Court Conference held on January 28, 2014, the Court directed Gunite to file a note of issue within ten days, which it did.

### **NEWLY DISCOVERED DEFECTIVE WORK CLAIMS**

10. The crux of defendants' motion to strike the note of issue and for a stay is their claim that newly discovered leaks at the Project were allegedly caused by Gunitite. Defendants seek to have the new claim added to the case. However, the fact remains that these allegations are not only baseless, but totally undeveloped. Indeed, there is no evidence that Gunitite is responsible for any of the leaks at the Project, no reason why this newly asserted claim could not be litigated in a separate action, and no reason why the claims framed by the current pleadings should be delayed from proceeding to trial. At present, no monetary claim has been asserted against Gunitite arising out of this allegedly defective work. It also bears noting that the stop work order issued by the MTA in July 2013, was lifted, by Yonkers own admission, in early December 2013. Gunitite performed whatever work the MTA requested, and Gunitite has not heard from the MTA since then. That is, in limited areas where the shotcrete coverage was in question, Gunitite grouted the particular locations at its own expense and in accordance with the MTA's specifications. The work was completed in December, and no additional work has been required by the MTA.

11. In fact, the follow-on contractor Skanska/Railworks Construction is proceeding with the completion of the new subway station, including the installation of escalators and framing that will cover Gunitite's work. As can be seen as can be seen from the photographs attached as Exhibit "B," the installation of the escalators and other work has already begun. Obviously, this would not be permitted if there were any issues whatsoever with the integrity of Gunitite's shotcrete work.

12. Upon information and belief, the only issues which remain open between Yonkers and the MTA, involve waterproofing, for which Yonkers and its waterproofing subcontractor are responsible. Concrete, whether it is placed by pneumatic pumping or by conventional formwork, is not a waterproof material. Before any concrete was placed on this Project, Yonkers' waterproofing subcontractor was required to install a waterproof membrane, wherever necessary, to keep underground structures watertight. Any remaining waterproofing issues are between Yonkers, and its waterproofing subcontractor, and not Gunitite.

13. Although Yonkers maintains that the MTA believes Gunitite is at fault for waterproofing issues, it has failed to produce any evidence from the MTA supporting its position.

14. In sum, the claims referenced by Yonkers as grounds for striking the note of issue and seeking a stay are clearly separate and distinct from the issues in this case, and should be handled, if necessary, in a separate proceeding.

WHEREFORE, for all of the foregoing reasons it is respectfully requested that the Court deny defendant's Motion to Strike the Note of Issue, and for Stay in its entirety and grant plaintiff such other and further relief as is just and proper

  
MARK A. CANIZIO

Sworn to before me this  
7<sup>th</sup> day of March, 2014

  
NOTARY PUBLIC

