

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-----X
SUPERIOR GUNITE,

Index No.:

Plaintiff,

SUMMONS

-against-

YONKERS CONTRACTING COMPANY, INC. and
ZURICH AMERICA INSURANCE COMPANY,Defendants,
-----X**To the Above Named Defendants:**

YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your Answer, or, if the Complaint is not served with this Summons, to serve a Notice of Appearance on Plaintiff's attorneys within twenty (20) days after the service of this Summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this Summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Plaintiff designates Westchester County as the place of trial. The basis of venue is designated in the contract between the parties.

Dated: New York, New York
March 25, 2013

DUANE MORRIS LLP
Attorneys for Plaintiff

By: 

Mark Canizio, Esq.
1540 Broadway
New York, NY 10036
212-692-1000
MACanizio@duanemorris.com

Defendants' Addresses:

Yonkers Contracting Company, Inc.
969 Midland Avenue
Yonkers, New York 10704

Zurich American Insurance Company
1400 American Lane
Schaumburg, IL 60196

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Index No.:

**VERIFIED
COMPLAINT**

Plaintiff, Superior Gunite, by its attorneys Duane Morris LLP, as and for its verified complaint against defendants Yonkers Contracting Company, Inc. ("Yonkers") and Zurich America Insurance Company ("Zurich"), respectfully alleges as follows:

THE PARTIES

1. At all times relevant herein, Superior Gunite was and is a corporation organized and existing under the laws of the State of California and authorized to do business in the State of New York, with an office and principal place of business located at 12306 Van Nuys Blvd. Lakeview Terrace, California.

2. Upon information and belief, and at all times relevant herein, Defendant Yonkers was and is a domestic corporation organized and existing under the laws of the State of New York, with its place of business located at 969 Midland Avenue, Yonkers, New York.

3. Upon information and belief, at all times relevant herein, Defendant Zurich was and is a surety company licensed and authorized to conduct business within the State of New York.

AS AND FOR A FIRST CAUSE OF ACTION AGAINST YONKERS

4. Superior Gunite repeats and reiterates these allegations set forth in paragraphs "1" through "3" hereof.

5. On or about March 3, 2011, Superior Gunite and Yonkers entered into a certain written subcontract agreement (the "Subcontract") pursuant to which Superior Gunite agreed, inter alia, to perform certain work in connection with the project known as the Excavation/Mining/Lining of Vertical Shaft, E1, E2 Inclined Tunnels, TI Connector Tunnel, and the Construction of a Ventilation Building and Station Entrance Structure at Site J in New York, New York (the "Project").

6. The Subcontract required Superior Gunite to provide all labor, materials and equipment necessary for the furnishing, installation and placement of certain shotcrete work at the Project.

7. In consideration for the work, labor, services and materials to be provided by Superior Gunite, the Subcontract required Yonkers to pay the sum of \$7,500,000, including such other additions or deletions to the work as the parties might agree upon.

8. The Subcontract further provided that the parties could make changes in the work to be performed, and that such changes would be memorialized in change orders adjusting the Subcontract price.

9. Subsequent to March 3, 2011, a series of change orders and other additions were issued by Yonkers to Superior Gunite, adjusting the Subcontract price to the sum of \$9,149,073, of which only \$5,949,834 has been paid, leaving a balance in the amount of \$3,199,239 no part of which has been paid dispute due demand therefor.

10. Superior Gunitite has fully performed all of its obligations under the Subcontract, except to the extent it was prevented from doing so by the actions or omissions of Yonkers.

11. Yonkers materially breached the Subcontract by failing and refusing to pay Superior Gunitite as required by the Subcontract.

12. The total amount which Superior Gunitite is entitled to be paid for its obligations under the Subcontract is \$9,149,073, of which Yonkers has paid only \$5,949,834, leaving a balance of \$3,199,239, no part of which has been paid despite due demand.

13. As a result of the foregoing, Yonkers is liable to Superior Gunitite in the amount of \$3,199,239, plus interest thereon.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST ZURICH

14. Superior Gunitite repeats and reiterates the allegations set forth in paragraphs "1" through "13" hereof.

15. On or about September 3, 2010, Zurich, as surety, and Yonkers, as principal, signed and executed a payment bond, Bond No. PRF09011946, guaranteeing prompt payment of all monies due to persons furnishing labor, supplies, materials or equipment used in the prosecution of the Project, including the work performed pursuant to the Subcontract between Superior Gunitite and Yonkers (the "Bond"). (A true and complete copy of the Bond is annexed hereto as Exhibit "A").

16. Pursuant to the Subcontract, Superior Gunitite provided certain labor and equipment, and furnished certain materials for the Project.

17. Superior Gunitite fully performed all of its obligations under the Subcontract, except to the extent that its performance was hindered or prevented by the acts and/or omissions

of Yonkers, including Yonkers failure and/or refusal to make payments as required under the Subcontract.

18. On or about January 3, 2013, Superior Gunite notified Zurich and Yonkers, among others, of its claim against the Bond.

19. By virtue of the work performed by Superior Gunite pursuant to the Subcontract, there is currently due and owing to Superior Gunite the sum of \$3,199,239 together with interest thereon, no part of which has been paid by Yonkers or Zurich although duly demanded.

20. By reason of the foregoing, Superior Gunite has been damaged in the sum of \$3,199,239, together with interest thereon.

WHEREFORE, Plaintiff Superior Gunite demands judgment as follows:

1. On the First Cause of Action, against Yonkers in the amount of \$3,199,239, together with interest thereon;
2. On the Second Cause of Action against Zurich in the amount of \$3,199,239 together with interest thereon; and
3. For such other and further relief as the Court may deem just and proper.

Dated: New York, New York
March 25, 2013

DUANE MORRIS LLP
Attorneys for Plaintiff

By: 

Mark Canizio, Esq.
1540 Broadway
New York, NY 10036
212-692-1000
MACanizio@duanemorris.com

To: Yonkers Contracting Company, Inc.
969 Midland Avenue
Yonkers, New York 10704

Zurich American Insurance Company
1400 American Lane
Schaumburg, IL 60196

ATTORNEY VERIFICATION


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

MARK CANIZIO, an attorney duly admitted to practice law before the Courts of the State of New York, being duly sworn deposes and says:

I am a member of the firm of Duane Morris LLP, attorneys for Superior Gunite, the plaintiff in the within action; I have read the foregoing Complaint and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

This Verification is submitted by me and not by plaintiff, Superior Gunite, for the reason that the plaintiff is not within the county where I have my office and I am familiar with the facts upon which the suit is based.

The grounds of my belief as to all matters not stated upon my knowledge are investigations and reports made to me.


MARK CANIZIO

Sworn to before me this
25th day of March, 2013


NOTARY PUBLIC

MAUREEN MULLEN
Notary Public, State of New York
No. 01MU4830532
Qualified in Queens County
Certificate Filed in New York County
Commission Expires February 28, 2014