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March 12, 2014

- Via Electronic Filing -
Honorable Alan D. Scheinkman
Supreme Court Justice
Commercial Division
Westchester County Courthouse
111 Dr. Martin Luther King, Jr. Boulevard
White Plains, New York 10601

Re: Superior Gunite v. Yonkers Contracting Company, Inc. et al.
Index No.: 54272/2013
Reply to Plaintiff's Affidavit in Opposition to Motion to Strike Note of Issue and Stay Action

Dear Judge Scheinkman:

Please accept this letter brief in lieu of a more formal reply in support of the undersigned's Motion to Vacate Note of Issue and to Stay Action, to be heard Friday, March 15, 2014.

The claims that Superior Gunite ("Plaintiff") now argues should be tried as a separate action are not a "new" issue. Yonkers' Counterclaim against the Plaintiff, for breach of contract, included allegations that Superior had improperly performed work. Indeed, we informed the Court and Superior Gunite of the presence of these major disputes in our October 2013 letter to your Honor. (McKenna Affirmation Ex. 8). In recognition of same, the Plaintiff, in turn, demanded production of documents relating to "the work purportedly defectively performed," (See Plaintiff's Demand for Documents ¶11, attached as Exhibit A), and did itself produce documents relating to the defective work issue. It is plain that it was and is part of this action. The mere fact that Plaintiff's own breaches continue and damages continue to develop and grow due to those breaches is not the fault of Yonkers. The matter should be temporarily stayed and the Note of Issue vacated.

The problem is that this case was started before Superior Gunite completed its work on the contract, work that remains uncompleted even today — work that is now being completed by others. Thus, Plaintiff's contention that the defective work issues were neither a part of the pleadings nor of discovery misconstrues the nature of this action. Plaintiff's defective work has always been at issue. The exact nature of that defective work and the extent of damage wrought by it are what remain to be determined, pending completion of remedial work and issuance, by the Project's owner, of a Certificate of Final Completion. As it is uncontested that discovery regarding Plaintiff's defective work is incomplete and that the Action has not been severed, Defendants respectfully submit that the Note of Issue be vacated and a temporary stay of action imposed until such time as discovery can be completed.

I. Plaintiff's defective work is an inherent part of the present litigation, without which an efficient and comprehensive resolution cannot be reached.

Plaintiff's defective work pertains to "voids" within its installed concrete that were discovered by the Project's Owner, the Metropolitan Transit Authority (MTA), waterproofing subcontractor, and follow-on contractor. (See emails attached as Exhibit B, Bates labeled by Plaintiff as "SG ESI 0007264"). Although this defective work was discovered after the initiation of the present lawsuit, it is inevitably intertwined with the claims and allegations asserted in the various pleadings to this action (McKenna Affirmation ¶ 25), and pertains to the very Subcontract and scope of work that is the subject of this litigation. (Strobel Aff. ¶ 24). Moreover, any and all damages stemming from Plaintiff's defective work will necessitate adjustments to the various claims asserted by and between Plaintiff and Defendants in the pleadings because they relate to the very same work performed by Plaintiff on the Project.

Plaintiff cautiously avoids discussing the importance and relevance of its defective work to the present lawsuit. For instance, Plaintiff implied that there cannot be "any issues whatsoever with the integrity of [Plaintiff's] shotcrete work" because escalators are currently being installed atop the very concrete installed by Superior. (Canizio Aff. ¶ 11).[1] In support of this implication, Plaintiff provided five photographs — none of which have any foundation, and none of which offer any insight as to the integrity of Plaintiff's concrete. (Id. Ex. B). The pictures are also undated. If they were dated, it would show that they were just taken in the past few weeks, which in and of itself show that evidence in this matter is not yet complete. There are other areas where the remedial work related to Superior's work continue. (Strobel Aff. ¶ 18, 25). In various Meetings with the MTA and its design consultants, Plaintiff was made well aware that the

1 It should also be recognized that Mr. Canizio, as counsel for Superior, is not in a position to assert such factual information in an Affidavit. Mr. Canizio is not in a position to make such factual representations to this Court and they should be ignored. Nor should the photographs, which also have no evidential basis. As shown in the Affidavit of Mr. Strobel, Yonkers' Vice-President in charge of this Project, major issues remain.

structural integrity of the arches on the Project are the main concern (see emails attached as Exhibit C, Bates labeled by Plaintiff as "SGI ESI 0006287"; see Stepien Aff. Ex. 2-3), not the floor upon which the escalators rest. As these arches were designed to support significant loads from the structures above them, their compliance with the Project's design criteria was absolutely critical to the safety of the greater public. Furthermore, the installation of these arches was a part of Plaintiff's scope of work under the Subcontract, and as such, Plaintiff's defective work with respect thereto is directly related to the basis of this action.

II. This case cannot move forward to trial because relevant discovery information is still in development.

Plaintiff mistakenly states that its work on the Project was "completed" by September of 2012. (Canizio Aff. ¶ 4, 7).[2] In reality, Plaintiff's work on the Project has yet to be accepted by the MTA and continued, at least, through December of 2013 (Strobel Aff. ¶ 22), as Plaintiff even acknowledges in its Opposition (Canizio Aff. ¶ 10). Plaintiff's work will only be deemed completed when the MTA issues a Certificate of Final Completion — an event that has yet to occur. (Strobel Aff. ¶ 25). Until such time, and as remedial work continues, information will continue to develop concerning the totality of damages caused by Plaintiff and assessment of liquidated damages. (Id. ¶ 24-26). Therefore, the discovery information necessary to prepare for trial and comprehensively resolve this litigation cannot have possibly been produced because it is still in development — a fact that Plaintiff admits in its Opposition (Id. ¶ 3, 10), evidencing that Plaintiff's Note of Issue was blatantly erroneous in stating that discovery was complete. Specifically, Plaintiff expressly states that information related to Plaintiff's defective work is not yet "fully developed." (Canizio Aff. ¶ 3). Yonkers agrees with this contention and further emphasize that this action should be stayed on such grounds.

Plaintiff contends that discovery information related to its defective work has not been produced by either party prior to the filing of its Note of Issue on February 6, 2014. (Id. ¶ 3, 7). For starters, if this statement is taken at face value, it is definitive recognition that the Note of Issue should be vacated. There is no real issue that the defective work is part of the underlying action. But Mr. Canizio's statement is also incorrect. A review of Plaintiff's discovery documents alone yield a plethora of information related to the issue of Superior's defective work — which apparently has gone either unnoticed or ignored by Mr. Canizio. Such documents include various emails, letters, and even include an Engineering Analyses related to the effects of Plaintiff's defective work on the intended design criteria of the Project. For instance, Plaintiff's discovery documents even contain an analysis of Plaintiff's defective work performed by its own hired engineering consultant dated October 18, 2013 — well before the filing of its Note of Issue. (See

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2 Again, this Court should not entertain or place any reliance in factual representations of Project conditions made by Superior's counsel. This is improper. The same can be said for the majority of Mr. Canizio's Affidavit.

letter attached as Exhibit D, Bates labeled by Plaintiff as "SG ESI 0006425"). Surely, Mr. Canizio knows that such information was produced, because Mr. Canizio contributed to its actual production. Nevertheless, the production of discovery information related to Plaintiff's defective work still remains unfinished as the parties await the completion of remedial work on the Project, the MTA's issuance of the Certificate of Final Completion, and information on the assessment of liquidated damages or other potential damages.

Mr. Canizio also asserted that at present, no monetary claim has been made against it arising from Superior's allegedly defective work. (Canizio Aff. ¶ 10). Nevertheless, Defendants have provided Plaintiff with a detailed breakdown of monetary damages on August 2, 2013 (Strobel Aff. Ex. 2) and a letter on February 27, 2014 explaining that many costs have yet to be fully determined (Stepien Aff. Ex. 6). Yonkers cannot quantify the totality of its monetary damages until the information necessary to do so has been developed. (Strobel Aff. ¶ 24). Costs for remedial work continue to accumulate. Liquidated Damages, if any, have yet to be assessed by the MTA. Other incidental issues have surfaced — most of which Yonkers is not yet in a position to quantify in terms of damages. As to allegations by Mr. Canizio that there is no definitive proof that the continuing issues are related to Superior, one needs to go no further than to review documents in which MTA's Engineer indicated in Meetings with Yonkers and Superior that water leaks will stem from Superior's defective work. (Stepien Aff. Ex. 2). Until such time as Superior's work is deemed completed by way of the MTA issuing a Certificate of Final Completion, Yonkers cannot possibly predict the extent of damages that have been and continue to be caused by Superior's defective work and breach of contract.

III. Defendants have been unable to depose Ron Federico, Plaintiff's key witness.

Plaintiff claims in its Opposition that Defendants never served a Notice of Deposition for or witness list including Mr. Ron Federico. (Canizio Aff. ¶ 9). As explained in Defendants' Motion to Vacate, however, Defendants relied on Mr. Canizio's constant assurances in various discussions and conference calls with this Court (Id. ¶ 27-28) that Mr. Federico would be available for deposition, thereby obviating the need to serve Plaintiff with a Notice of Deposition. (McKenna Affirmation ¶ 27-29, 31). Presently, though Defendants had previously reached out to Mr. Canizio numerous times in an effort to schedule Mr. Federico's deposition (see emails attached as Exhibit E), it would not make sense to do so at this time since Mr. Federico's deposition will be necessary to address Plaintiff's defective work and relevant discovery with respect thereto is still in development. Regardless, the fact remains that Mr. Federico's deposition has not been taken, and discovery is therefore still not complete.

IV. The Court should Stay, rather than Sever, this Action.

During the Conference Call of January 13, 2014, the Court provided the parties with several options: (i) filing a Stipulation of Discontinuance without Prejudice; (ii) separating the action's claims; or (iii) staying the action for a defined period of time. (McKenna Affirmation ¶ 35). Plaintiff has refused to file a Stipulation of Discontinuance, leaving only two options: staying or severing.

Severing makes no sense as it would essentially mean this Court would essentially have to try this exact same case twice. Further, as the Court of Appeals has instructed, the court's discretion to sever actions should be exercised sparingly. Shanley v. Callanan Industries, Inc., 54 N.Y.2d 52, 57 (N.Y. 1981). "Where complex issues are intertwined. . .it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time. Fragmentation increases litigation and places an unnecessary burden on court facilities by requiring two separate trials instead of one." Id. Where actions involve common factual and legal issues, a single trial is appropriate in the interest of judicial economy and to avoid the possibility of inconsistent verdicts. Herrera v. Municipal Housing Authority of City of Yonkers, 107 A.D.3d 949, 949 (N.Y. App. Div. 2 Dept. 2013).

Recently, the MTA issued a Certificate of Substantial Completion for the Project on February 19, 2014. (Stepien Aff. Ex. 4). Assuming Yonkers is able to remediate the waterproofing issue caused by Superior's defective work in the near future, the issuance of a Certificate of Final Completion should be forthcoming. To temporarily stay this action until such issuance would surely not cause unnecessary delay or prejudice to Plaintiff, but would rather facilitate the production of necessary and remaining discovery information for both parties.

CONCLUSION

This case is simply not ready for trial. Discovery information that is necessary to resolve the issues of this case is still in development — a fact that Superior's counsel, Mr. Canizio, has expressly acknowledged in its own Opposition. No prejudice will be imposed upon Superior by vacating the Note of Issue, as it certainly shares an equal interest in obtaining discovery information related to its defective work before proceeding to trial. Proceeding to trial at this juncture would defeat the purposes of judicial economy by forcing the parties and the court to litigate many of the same complex issues in two separate trials. Accordingly, Yonkers hereby reiterates its request that this Court vacate the Note of Issue and impose a temporary stay of action for six months, with the intention that the parties reconvene thereafter in order to reevaluate this case's ability to move forward.

Respectfully submitted,

Michael F. McKenna

cc: Mark A. Canizio, Esq.
Encl.