

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
SUPERIOR GUNITE,

Plaintiff,

Index No. 54272/2013

-against-

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

**AFFIDAVIT IN SUPPORT
OF PLAINTIFF'S MOTION
FOR PARTIAL SUMMARY
JUDGMENT**

Defendant.
-----X

STATE OF CALIFORNIA)
) ss.:
COUNTY OF LOS ANGELES)

DAVID E. BOWERS, being duly sworn, deposes and says:

1. I am a Vice President, Controller and Chief Financial Officer of Plaintiff Superior Gunite ("Gunite"), a nationally recognized leader in the structural shotcrete industry for almost sixty years. In that capacity, I was responsible for overseeing Gunite's applications for payment throughout the course of the Project. As such, I have personal knowledge or knowledge based on the books and records of the corporation, of the facts set forth herein.

2. This Affidavit is respectfully submitted in support of Gunite's motion for partial summary judgment in the sum of \$2,746,235.50 on Gunite's breach of contract claims against Yonkers Contracting Company ("Yonkers"), and its payment bond surety, Zurich America Insurance Company ("Zurich") (collectively, the "Defendants").

3. As is set forth more fully below, and in the accompanying memorandum of law submitted herewith, Yonkers routinely breached the payment terms of its subcontract with Gunite and the provision of the Prompt Payment Act by repeatedly making late payments, and failing to make any payments with respect to certain of Gunite's approved payment requisitions. As is demonstrated herein, even though Yonkers has been paid up to 95% of its general contract with Metropolitan Transportation Administration Capital Construction ("MTA"), it has paid Gunite only 66% of its adjusted subcontract price. As is shown below, Yonkers owes Gunite the sum of \$1,835,899 on its adjusted base contract, at least \$432,540.50 in retainage, and \$477,796 for extra work.

4. Attached as **Exhibit 1** is a true and correct copy of Gunite's Summons and Verified Complaint, filed on or about March 25, 2013.

5. Attached as **Exhibit 2** is a true and correct copy of Defendants' Verified Answer, Separate Defenses, and Counterclaim, filed on or about May 20, 2013.

6. Attached as **Exhibit 3** is a true and correct copy of Gunite's Verified Reply to Counterclaim, filed on or about June 10, 2013.

The Project:

7. Gunite commenced this action in or about March 2013, seeking to recover monies due and owing for shotcrete work it performed for Yonkers on an MTA project designated as Contract C-26510, or Site J. The Project included construction of a vertical shaft, a connector corridor, inclined tunnels (all made from reinforced concrete), and a ventilation building and station entrance located at 34th Street between 10th and 11th Avenues in the Borough of Manhattan (the "Project").

8. Yonkers entered into a general contract with the MTA for the sum of \$116,195,997, pursuant to which Yonkers agreed to provide all labor, materials and equipment necessary for the construction of the structures referenced above (the "Prime Contract").

9. On or about March 3, 2011, Yonkers entered into a subcontract with Gunitite, pursuant to which Gunitite agreed to construct various concrete structures including certain walls, portions of the vertical shaft, inclined tunnels, and arches on behalf of Yonkers (the "Subcontract"). Attached as **Exhibit 4** is a true and correct copy of the Subcontract.

10. The Subcontract required Yonkers to pay Gunitite the sum of \$7,500,000, including such other additions or deletions to the work as the parties might agree upon.

11. During the period of June 2011 through April 2012, due to the over excavation of the site by Yonkers, Gunitite was asked to perform additional shotcrete work. Gunitite submitted thirteen (13) change orders requesting additional compensation, and an adjustment of the Subcontract price.

12. Unfortunately, Yonkers refused to execute any of the thirteen (13) change order requests when submitted. Instead, Yonkers waited until April 2012, and then negotiated all of the Gunitite change requests at once. The result was the issuance of two change orders to the Subcontract, Amendment #1 for \$674,813, and Amendment #2 for \$476,000 (collectively, the "Amendments"). Attached as **Exhibit 5** are true and correct copies of the Amendments.

13. Upon execution of the Amendments in April 2012, Gunitite's Subcontract value was increased from \$7,500,000 to \$8,650,813 (**Exhibit 5**).

Amounts Billed Under the Subcontract:

14. The Subcontract required Gunite to submit monthly pay applications, and Yonkers to make monthly progress payments.

15. With respect to payment, Article 4.2 of the Subcontract, required Yonkers to make payments to Gunite within fifteen (15) days after Yonkers received payment from the MTA for Gunite's work. **(Exhibit 4)** While I am advised by counsel that this fifteen (15) day period violates the terms of the Prompt Payment Act which requires payments to be made no more than seven (7) days after receipt of payment from the owner, Yonkers routinely failed to make payment within either time period. More importantly, however, Yonkers failed to pay certain requisitions entirely, even though Yonkers received payment from the MTA for the very same work.

16. During the period June 2011 through completion of Gunite's Work in September 2012, Gunite submitted thirteen periodic payment requisitions to Yonkers (the "Monthly Requisitions"). Attached as **Exhibit 6** are true and correct copies of the Monthly Requisitions.

17. As of the last Monthly Requisition for the period ending September 30, 2012, Gunite billed the entire Subcontract amount of \$8,650,813, less the contractually required ten (10%) percent retainage, or \$7,785,732. **(Exhibit 6)**. At present, Yonkers has paid Gunite only \$5,949,834 or roughly 66% percent of the adjusted Subcontract price. Attached as **Exhibit 7** are true and correct copies of the payments made by Yonkers to Gunite. Thus, Yonkers failed to pay \$1,835,898 of the approved payments it received from the MTA.

18. To make matters worse, Yonkers continues to hold the full ten (10%) percent retainage of \$865,081, even though, upon information and belief, all retainage except for five (5%) percent has been released by the MTA. I am advised by counsel that under the Prompt Payment Act, a general contractor, like Yonkers, may not hold retainage in a greater percentage than the owner withholds from it.

19. Regarding payment from the MTA, I am advised by counsel that Yonkers' Project Manager, Robert Stepien, admitted at his deposition that the MTA paid all amounts due under the Prime Contract, with the exception of \$250,000, plus a holdback of five (5%) percent retainage. Mr. Stepien testified as follows:

Mr. Canizio: "Has Yonkers received final payment on this job, do you know?"

Mr. Stepien: "No"

Mr. Canizio: "Do you know how much remains outstanding against the contract and approved extras roughly?"

Mr. Stepien: "\$250,000"

Mr. Canizio: "Everything except retainage?"

Mr. Stepien: "And Retainage"

Mr. Canizio: "And what is retainage held at, five percent?"

Mr. Stepien: "Five percent."

(**Exhibit 8**, at 239:12-23). Attached as **Exhibit 8** is a true and correct copy of the relevant portion of the deposition transcript.

20. In fact, payment records from the MTA generated after Mr. Stepien's deposition indicate that, other than retainage, the amount unpaid to Yonkers has been reduced further to

\$49,502.19. (A copy of the MTA's last approved payment voucher is annexed hereto as **Exhibit 9**.)

21. Notwithstanding the foregoing, Yonkers repeatedly failed to pay Gunite's approved requisitions, and consistently owed Gunite a running balance from requisition to requisition. By April 2012, Yonkers owed \$1,618,802 on requisitions submitted between February 2012 and April 2012. Attached as **Exhibit 10** is a table of monthly amounts billed by Gunite to Yonkers and payments received on account of the same.

22. Yonkers' delinquency in payments became so large that in June 2012, Yonkers required a payment plan to address the past due amounts. Attached as **Exhibit 11** are true and correct copies of the Payment Plan correspondence. Notwithstanding Yonkers' efforts to meet its payment obligations, by October 2012, Yonkers owed Gunite the sum of \$1,835,899 against the base contract and approved amendments (exclusive of retainage and unapproved change orders). However, Yonkers failed to make any additional payments to Gunite after November, 2012.

23. Yonkers' failure to pay Gunite's Monthly Requisitions was without any justification because all Monthly Requisitions were approved by Yonkers and incorporated in Yonkers' payment requests to the MTA.

24. Accordingly, Gunite is entitled, to partial summary judgment in the sum of \$1,835,899 for its base Subcontract and approved extra work.

Retainage:

25. On February 28, 2013, having received no additional payments for more than six months after it completed its work, Gunite issued a Final Notice of Demand for Payment in Full (the "Final Demand"), in which it sought all amounts due under the Subcontract. Its demand

included: (1) amounts billed on the Monthly Requisitions (\$1,835,899); (2) retainage (\$865,081); and (3) change order requests submitted between March 2012 and September 2012 (\$477,796). Attached as **Exhibit 12** is a true and correct copy of Gunite's Final Demand.

26. With respect to retainage, it is clear based upon the MTA's most recent approved payment voucher and Mr. Stepien's testimony, that the MTA has released and paid Yonkers all retainage, except for five (5%) percent of the contract value. Accordingly, Gunite is entitled to summary judgment for at least half the ten (10%) percent retainage currently being withheld by Yonkers, or \$432,540.50 out of \$865,081, plus one (1%) percent interest per month. As is demonstrated in the accompanying memorandum of law, a general contractor may not hold retainage from a subcontractor in a percentage greater than that withheld by the owner. The penalty for doing so is one (1%) percent per month interest on the unpaid amount.

Extra Work:

27. Gunite's Final Demand also includes forty-one (41) extra work claims totaling \$477,797 for work performed on behalf of Yonkers between March 2012 and September 2012 that Yonkers neither rejected, nor disputed (the "Change Orders"). (**Exhibit 12**).

28. A substantial number of Gunite's Change Order Requests involved the cost of premium time for work outside the regular work day, or on Saturdays. The accelerated schedule was necessary to recover for earlier construction delays for which Gunite was not responsible. Significantly, at the same time that Yonkers was asking Superior Gunite to work overtime and weekends, it sought and received \$3.5 million dollars from the MTA for, among other things, the cost of accelerating the work. In fact, documents show that Yonkers sought more than \$379,000

from the MTA, specifically to pay for Superior Gunitite to work overtime and on weekends.
(Annexed as **Exhibit 13** is a copy of Yonkers proposal to the MTA.)

29. The following correspondence is indicative of Yonkers' approval and agreement to pay such Change Order Requests in advance of the performance of the work:

COR 13.4:

Gunitite COR 13.4 Request dated 6/15/12: "Rob, Please find the attached Change Order Request [COR 13.4] for premium time work on Saturday. Please reply with your acknowledgement today."

Yonkers' Response dated 6/15/12: "Kalo - YCC will cover Saturday pla[n]t opening and premium time for tomorrow's pour"

Attached as **Exhibit 14** is a true and correct copy of the relevant e-mails.

COR 13.5:

Gunitite COR 13.5 Request dated 6/25/12: "Rob, Please confirm whether this price [Change Order 13.5] is acceptable so we can confirm shotcrete placement for tomorrow (6/26/12)"

Yonkers' Response dated 6/25/12: "Yes, it is confirmed."

Attached as **Exhibit 15** is a true and correct copy of the relevant e-mails.

COR 14.1:

Gunitite COR 14.1 Request dated 7/3/12: "Yes. Sorry about that. Attached is the revised COR [COR 14.1]"

Yonkers' Response dated 7/6/12: "Yes, same terms as E2 pit walls."

Attached as **Exhibit 16** is a true and correct copy of the relevant e-mails.

COR 14.5:

Gunita COR 14.5 Request dated 7/12/12: "Rob, Please see the attached does [Change Order 14.5]. Let me know if we're ok to proceed with 2 crews work on Saturday."

Yonkers' Response dated 7/13/12: "Proceed with the Saturday work. Rob."

Attached as **Exhibit 17** is a true and correct copy of the relevant e-mails.

COR 14.6:

Gunita COR 14.6 Request dated 7/20/12: "Rob, please the attached change order request. Let me know if you're ok to proceed with tomorrow's 2 crew work." "Rob, please disregard the first email attachment. The cost is estimated on 10 hours of work".

Yonkers' Response dated 7/20/12: "Proceed with E2 north wall and resume E1 arch tomorrow, Saturday 7/21"

Attached as **Exhibit 18** is a true and correct copy of the relevant e-mails.

COR 14.13:

Gunita COR 14.13 Request dated 7/27/12: "Rob, Please see the attached change order request for premium time, tomorrow 7/28. Please confirm that two locations will be ready for shotcrete early Saturday morning".

Yonkers' Response dated 7/27/12: "Yes-two shotcrete locations will be ready-E1 incline wall and south wall vertical shaft. Send a wire crew in Sunday for Monday's work. See schedule on previous email".

Attached as **Exhibit 19** is a true and correct copy of the relevant e-mails.

30. In addition to premium time Change Order Requests, Yonkers admitted at the deposition of Robert Stepien, that Gunite is entitled to additional compensation for at least nineteen (19) other Change Orders numbered COR 12 - COR 16.01:

Mr. Canizio: "So for the CORs that you just referenced from CORs 12 to CORs 16.01, am I correct in stating there is no disagreement as the fact that there is an extra involved?"

Mr. Stepien: "Correct"

Mr. Canizio: "And any disagreement there may be is as to the value of that extra?"

Mr. Stepien: "Correct"

Stepien Dep., 62:2-63:3. Attached as **Exhibit 20** is a true and correct copy of the relevant portion of the deposition transcript.

31. Yonkers has not compensated Gunite for any of the extra work it performed from March 2012 through completion of Gunite's work in September 2012.

32. Likewise, Yonkers' refusal to execute written Change Orders prevented Gunite from billing Yonkers for such extra work even though the amounts are noted on Gunite's Monthly Requisitions.

33. Accordingly, Gunite is entitled to (1) \$1,835,899 due against the base Subcontract; (2) \$432,540.50 for one half of Gunite's unpaid retainage; and (3) \$477,796 for the forty-one Change Order Requests. In total, Gunite is entitled to summary judgment in the sum of \$2,746,235.50, plus interest at the rate of one (1%) percent per month from October 2012 to the date of judgment.

The Payment and Performance Bond:

34. Zurich, as surety for Yonkers, as principal, signed and executed a payment bond dated September 3, 2010, Bond No. PRF09011946, guaranteeing 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 Gunita and Yonkers (the "Bond"). Attached hereto as **Exhibit 21** is a true and correct copy of the Bond.

35. On or about January 9, 2013, Gunita made a claim against the Bond for payment of the money due and owing under the Subcontract. Attached hereto as **Exhibit 22** is a true and correct copy of the Bond claim.

36. For the reasons set forth above, Gunita is entitled to summary judgment against Zurich as well, in the sum of \$2,746,235.50, plus interest at the rate of one (1%) percent per month from October 2012 to the present.

Yonkers Purported Basis For Non Payment:

37. Despite having received Gunita's final demands for payment in February 2013, Yonkers waited until August 7, 2013, to issue its updated analysis of Gunita's account, and to assert, for the first time, back charges against Gunita in the sum of \$1,754,698, and purported credits in the sum of \$438,800. A copy of the spreadsheet summarizing Yonkers claims is attached as **Exhibit 23**. In an effort to develop counterclaims that would offset its delinquent payments, Yonkers asserted, that it was owed, among other things, \$606,162 for purported clean-up costs it incurred, even though it provided Gunita with no prior notice that it was purportedly incurring these costs and no opportunity to contest or mitigate them. Other back charges included \$445,000 for installing waterproofing materials, and \$200,042 for constructing

bulkheads that were plainly excluded from Gunité's scope of work. Even after compiling all of these spurious charges, Yonkers own "Analysis" of Gunité's account still shows a balance due to Gunité in the sum of \$605,498, and retainage of \$616,648. Thus, by Yonkers own admission the sum of \$1,222,146 is still due to Gunité even after taking Yonkers' bogus eleventh hour charges into account.

WHEREFORE, your deponent respectfully requests that this Court issue an order granting summary judgment in Gunité's favor on its breach of contract claims in the sum of \$2,746,235.50 and awarding plaintiff interest at the rate of one (1%) percent per month, and granting Gunité such other and further relief as the Court may deem just and proper.



DAVID E. BOWERS

Sworn to before me this
7th day of March, 2014



NOTARY PUBLIC

See Attached

CALIFORNIA JURAT WITH AFFIANT STATEMENT

- ☒ See Attached Document (Notary to cross out lines 1-6 below)
☐ See Statement Below (Lines 1-5 to be completed only by document signer[s], not Notary)

1 _____
2 _____
3 _____
4 _____
5 _____
6 _____

Signature of Document Signer No. 1 _____ Signature of Document Signer No. 2 (If any) _____

State of California

County of Los Angeles

Subscribed and sworn to (or affirmed) before me on this

26th day of March, 2014, by
Date Month Year

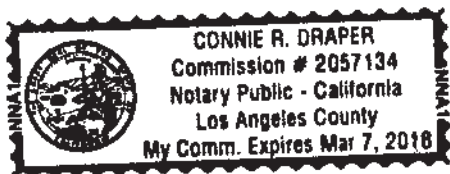
(1) David Bowers
Name of Signer

proved to me on the basis of satisfactory evidence
to be the person who appeared before me (.) (.)

(and)
(2) _____
Name of Signer

proved to me on the basis of satisfactory evidence
to be the person who appeared before me.)

Signature Connie R. Draper
Signature of Notary Public



Place Notary Seal Above

OPTIONAL

Though the information below is not required by law, it may prove
valuable to persons relying on the document and could prevent
fraudulent removal and reattachment of this form to another document.

Further Description of Any Attached Document

Title or Type of Document: Affidavit in Support of Plaintiff's Motion for Partial Summary Judgment

Document Date: March 7, 2014 Number of Pages: twelve

Signer(s) Other Than Named Above: me

RIGHT THUMBPRINT
OF SIGNER #1
Top of thumb here

RIGHT THUMBPRINT
OF SIGNER #2
Top of thumb here