**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF WESTCHESTER**
**COMMERCIAL DIVISION**

**Present: HON. ALAN D. SCHEINKMAN,**
**Justice.**

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SUPERIOR GUNITE,

Plaintiff,

-against-

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

Defendants.

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Index No. 54272/2013

Motion Seq. # 001
Motion Date: March 14, 2014

**DECISION & ORDER**

Scheinkman, J:

Defendants Yonkers Contracting Company, Inc. ("Yonkers") and Zurich American Insurance Company ("Zurich") (together "Defendants") move pursuant to CPLR 2221(a) for an order vacating Plaintiff Superior Gunite's ("Plaintiff" or "Superior") Note of Issue and temporarily staying this action. Plaintiff opposes the motion.

## FACTUAL AND PROCEDURAL HISTORY

This action arising out Plaintiff's provision of concrete subcontracting services on a construction project for the Metropolitan Transit Authority ("MTA") to build the New York City subway 7-line extension from the current terminal at Times Square to 11th Avenue and 34th Street. Specifically, the construction of a ventilation building and station entrance and the excavation/mining/lining of a vertical shaft, E1 and E2 Inclined Tunnels and T1 Connection Tunnel at Site J of the 7-Line Extension (the "Project").

Plaintiff initiated this action by filing its Summons and Complaint on March 25, 2013. Plaintiff contends that Yonkers materially breached the subcontract entered into between the parties by failing to pay Plaintiff $3,199,239.00 despite Plaintiff's completion of its performance. Because there was another action filed by a different subcontractor entitled *Villa Construction v Yonkers Contracting Co.*, Index # 52991/2013 (the "Related Action"), this Court held a joint Preliminary Conference ("PC") on this case and the Related Action on July 25, 2013. At the PC, the Court stated that it was not consolidating the actions but they would proceed together for purposes of discovery. The Court signed PC Orders for both cases scheduling a discovery cut-off date of December 12, 2013 and a Trial Readiness Conference ("TRC") for December 13, 2013.

The Court was advised prior to the TRC that the Related Action settled and a Stipulation of Discontinuance without Prejudice was filed on December 10, 2013. A Stipulation of Discontinuance with Prejudice was filed on January 16, 2014. Thereafter, various discovery disputes ensued in this action resulting in an adjournment of the TRC to January 17, 2014. On January 13, 2014, the Court's Chambers was called with a request for a further adjournment of the discovery cut-off date because a secondary issue has arisen regarding Plaintiff's defective work that was not involved at the outset of this case.[1] In addition, Defendants' counsel stated that because Yonkers has continued to perform under its contract with the MTA, it may wish to assert additional counterclaims. In that phone conference, counsel were advised that because the case did not seem as though it was completely ripe for resolution, they should consider filing a stipulation of discontinuance without prejudice and enter into a standstill agreement staying the running of the statute of limitations. The other option provided was that the parties could agree to stay the action for a year and that the stay could be vacated sooner upon a letter application from either party.

At the TRC on January 17, 2014, the possibility of issuing a stay was discussed. However, the Court stated that it was only inclined to consider a stay if there was some agreement as to progress payments since Yonkers was holding a substantial retainage and Plaintiff is continuing to perform without getting paid. The conference was adjourned to January 28, 2014 so that counsel could try to come to some agreement as to this issue. On January 28, 2014, the Court was advised that the parties were unable to reach an agreement on a stay of this action. The Court stated that as far as it was concerned, discovery was complete or it had been waived. The Court signed the Trial Readiness Order and directed Plaintiff to serve and file its Note of Issue. At the TRC, Defendants' counsel objected to the filing of a Note of Issue because Defendants had not gotten the discovery they needed and could not certify that discovery was complete. The Court responded by noting that it had already granted two adjournments of the discovery cut-off and that Defendants could make a motion to vacate the Trial Readiness Order/Note of Issue. Plaintiff served and filed the Note of Issue and this motion ensued.

## DEFENDANTS' CONTENTIONS IN SUPPORT OF MOTION

In support of their motion to vacate the Note of Issue and stay the action, Defendants submit an affidavit from James Strobel, an affirmation from counsel Michael F. McKenna, Esq. (Lewis & McKenna) and a memorandum of law.

In his affidavit, Mr. Strobel states that he is Yonkers' Vice President for Construction and was directly involved in the work performed by Plaintiff on the Project. He attaches copies of letters from Defendant to the MTA, from the MTA to Defendant, and from Defendant to Plaintiff, concerning water testing being performed as well as a Stop Work

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[1]This allegedly defective work seems to be part and parcel of the information provided to this Court by Defendant's counsel by letter dated October 28, 2013 that the MTA had issued a stop work order with regard to issues involving work performed by Plaintiff – *i.e.*, questions concerning the structural integrity of concrete work performed for elevator shafts that will eventually take passengers up and down the escalator.

Order[2] from the MTA regarding work performed by Plaintiff (*i.e.*, that significant leaks were found in the E1 incline which Defendants assert was the result of Plaintiff's shotcreting operations) (Affidavit of James Strobel, sworn to February 19, 2014, at ¶¶ 1-6). Mr. Strobel explains that the original subcontract amount was $7,500,000. He avers that Plaintiff was required to install the concrete or shotcrete[3] based on the Project specifications so that it was compact and free of air voids (Strobel Aff. at ¶ 15).

Strobel explains the disputed items between the parties that were made a part of the pleadings or what he refers to as "Part A" of the case (*i.e.*, "claims for premium time pay, claims for extra work, and various backcharges") (Strobel Aff. at ¶ 16).

According to Strobel, after the filing of this lawsuit and while Plaintiff was continuing to perform, the MTA discovered water leaks in certain areas of Superior's shotcrete and in order to investigate the leaks, the MTA issued a stop work order and "[t]he MTA ... refused to accept the totality of work performed by Yonkers on the Project until the shotcrete installed by Superior was deemed acceptable. It was suspected that the leaks were the result of inconsistencies in either the waterproofing system [installed by another subcontractor] or Superior's installed shotcrete. The MTA's discovery of these new and unanticipated issues are referred to as 'Part B' of the case. Just as important, MTA refused to make further payments until the situation was resolved" (*id.* at ¶ 17).

Strobel describes the flood test performed as well as MTA's direction that Yonkers/Superior take core samples of the shotcrete for investigation to determine if it conformed to the design criteria in the Project's specifications. Strobel contends that the results came back that "Superior's installed shotcrete fell significantly short of the Project's design criteria" – *i.e.*, that it contained air voids throughout its volume which "reduced the

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[2]In the Stop Work Order dated July 17, 2013, the MTA advised that the Temporary Construction Permit has been withdrawn due to construction taking place that was not in compliance with the design drawings. Specifically,

> 1. Shotcrete (pneumaticaly applied concrete) was used in an overhead application on the arches located above escalators E1 and E2. This method is not what was specified in the signed drawings for which the Temporary Construction Permit was issued. A plan to address Code concerns was developed at a July 1, 2013 meeting and has been discussed and documented subsequently. This plan must be completed and the results must be acceptable to the required parties at NYCT.
> 2. Significant amounts of water leaks have been observed. Water infiltration issue must be addressed.
> The Stop Work Order concluding by stating that all work was to cease and no work could be commenced until the above conditions are complied with to the satisfaction of New York City Transit (Affidavit of James Strobel, sworn to February 19, 2014, Ex. 1).

[3]The concrete is referred to as shotcrete based on the method by which Superior installed the concrete, which was pneumatic in nature whereby the concrete was sprayed or shot out of a hose (Stobel Aff. at ¶ 11).

concrete's capacity for strength – thereby creating a risk of structural failure within the final shotcrete structure and any structures that it was intended to support" (*id.* at ¶ 19). He states that it also created issues with regard to waterproofing that will have to be remedied (*id.*).

He avers that while Superior finished performing its work on or about December 23, 2013 (returning for a couple of days in January), "the work still remains unaccepted by MTA and waterproofing work still continues" (*id.* at ¶ 22). According to Strobel, the MTA is continuing to analyze Superior's shotcrete and Defendant "anticipates that more information will be produced with respect to the MTA's analyses that will impact the various claims asserted in the pleadings – or Part A of this case ... The issues surrounding Part B ... inevitably involve Part A because both parts relate to the same scope of work performed by Superior under the Subcontract. Thus, Yonkers cannot accurately assess the totality of damages caused by Superior until such time as all information generated by the MTA with respect to Part B is produced – and both Superior and Yonkers are aware that this information is still in the development phase. Given the technical complexity of the issues involved, the availability of this information is imperative in order for Yonkers to determine the full extent of the damages caused by Superior ... Yonkers anticipates that it will be provided with the entire scope of the information related to Part B when Superior finishes its remedial work on the Project and the MTA deems Superior's work as completed" (*id.* at ¶¶ 24-25).

Strobel contends that once the MTA accepts Superior's work, Yonkers will be in a position to be paid its retainage, which is part of the monies being sought by Plaintiff but withheld by the MTA due to Superior's defective work. Finally, Strobel speculates as to potential claims the MTA may invoke such as liquidated damages or damages associated with the Stop Work Order - both of which Defendant believes would be inappropriate.

In counsel's affirmation, Mr. McKenna attaches the pleadings in this case and the Related Action, the Preliminary Conference Order, the Trial Readiness Order, the Note of Issue as well as various items of correspondence between the parties and with the Court.

Counsel explains (1) the significance of the Project at issue, (2) Plaintiff's claim asserted in its Complaint that it had completed all of its contract work and that its work was accepted (which Defendants contend is untrue), and (3) the answer/counterclaim[4] that had been prepared by Defendants' prior counsel, Veneruso, Curto, Schwartz & Curto LLP,[5] in which Defendants denied the material allegations, asserted affirmative defenses and interposed a counterclaim that Superior breached the Subcontract (Affirmation of Michael F. McKenna, Esq. dated February 21, 2014 ["McKenna Aff."] at ¶¶ 14-18). McKenna explains that four months into the case, the MTA issued the Stop Work Order involving the structural

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[4]Defendants' counterclaim asserts that Plaintiff breached the subcontract by failing to provide necessary material and equipment, labor and materialmen and material causing significant delay and failing to work in a timely and workmanlike manner despite due demand (Defendants' Answer and Counterclaim at ¶¶ 3-7). Defendants contend that as a result of Plaintiff's breach, "Yonkers performed work and provided labor, material and equipment to the Project to perform the work and services that were within the scope of the Superior Subcontract (*id.* at ¶ 10).

[5]There was a consent to change attorney filed on June 25, 2013.

integrity and waterproof nature of two inclines (slanted tunnels) that would be used to house the escalators (McKenna Aff. at ¶ 21) (Part B). He affirms that while the parties engaged in discovery concerning Part A, given the unknown nature of Part B, no documents or discovery has occurred concerning this part of the case (*id.* at ¶ 24).

Mr. McKenna points out that he alerted the Court by letter dated October 28, 2013 to the inability to complete discovery concerning Part B and that Defendants could not proceed with discovery when core issues had yet to be determined. He asserts that he and his opposing counsel had a number of conference calls with the Court's law clerk at the end of November to discuss the Defendants' position that they were unable to proceed with discovery while the facts were still unfolding. He asserts that they further brought to the Court's attention the difficulty they were having in obtaining the deposition of a former Superior employee, Ron Federico,[6] who had moved to California (*id.* at ¶ 27). He affirms that ultimately, the TRC was adjourned to January 17, 2014 to accommodate the deposition time frame for Mr. Federico proposed by Plaintiff's counsel (*id.* at ¶ 28). Counsel asserts that despite Plaintiff's counsel's representation in December that he would provide available dates for Federico's deposition, no dates were ever provided and Defendants were not provided with access to Federico to date, but that they did not make a major protest over it since they "would only have to take it a second time when the Part B aspect of the dispute is ready to proceed" (*id.* at ¶ 30).

He describes the ongoing production by both sides in December and January of additional documents as well as his efforts to get Plaintiff's counsel's agreement to one of the two options suggested by the Court (*i.e.,* the stipulation of discontinuance without prejudice or a stay of the case) without avail. He explains that he was opposed to the third option offered (filing a separate lawsuit over Part B) because that would require there being two lawsuits over the same contract. He further argues that it would be a waste of judicial economy because this Court would in effect be trying the same case twice, and he attaches a letter he wrote to Plaintiff's Counsel as Exhibit 9. McKenna asserts that Defendants' request made during a conference call with Chambers on January 27, 2014 to adjourn the Trial Readiness conference to try to come to a resolution with Plaintiff's counsel regarding a stay was denied. Finally, counsel asserts that despite his protestations at the TRC that the parties were not ready to proceed to trial and despite (1) his following this Court's requirements that all discovery disputes be brought to the Court's attention as soon as they arise, (2) his diligent provision of discovery to Plaintiff, this Court issued the TRO noting that all outstanding discovery was either completed or waived. He concludes by arguing that the Note of Issue is false in its assertions that "Discovery proceedings now known to be necessary completed" "There are no outstanding requests for discovery" and "There has been a reasonable opportunity to complete the foregoing proceedings" and "The case is ready for trial" (*id.* at ¶ 45).

The essence of Defendants' legal argument is that Plaintiff brought this action prematurely prior to the final acceptance of their work which is the subject of this action since the discovery of major issues concerning Plaintiff's work continues to unfold as Superior's work under the subcontract has yet to be deemed officially completed by the MTA (Defs' Mem. at 7). In this regard, Defendants point out that there is an ongoing generation of correspondence, engineering reports and construction data that must be discovered, there are outstanding discovery requests and Defendants have yet to depose Plaintiff's key witness Ron

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[6]According to Defendants, Mr. Federico is the key witness for Superior in this action.

Federico. Further, Defendants do not know the extent of any imposed liquidated damages because the MTA has yet to assess them (*id.* at 7). Defendants argue that at the TRC, they notified the Court that discovery was not complete and objected to the issuance of any Note of Issue and Plaintiff's filing of a Note of Issue stating discovery is complete is a blatant falsity. Defendants request that the Court vacate the Note of Issue and institute a temporary stay for six months so that all necessary discovery can be developed and that after the six month stay, the Court and the parties meet to "reevaluate this case's ability to move forward" (Defs' Mem. at 5). And even if the Court decides to deny the stay, Defendants request that the Court should nevertheless vacate the Note of Issue for purposes of judicial economy as a trial at this juncture would not resolve all of the issues in this case and a second trial of these same issues would have to occur on Defendants' yet unasserted counterclaims concerning Plaintiff's defective work (*id.* at 7). Defendants conclude by justifying their request for the vacatur of the Note of Issue and an issuance of a six month stay by arguing that "[t]o proceed with this matter in two separate parts involving one contract makes no legal, factual, or judicial sense" (*id.* at 12).

## PLAINTIFF'S OPPOSITION

In opposition, Plaintiff submits an affidavit from its counsel, Mark Canizio, Esq., together with its supporting exhibits.

In his affidavit, counsel argues that Defendants' motion must be denied because (1) the newly asserted defective work claim is not part of the present pleadings and has not been the subject of any discovery prior to the filing of the Note of Issue; (2) the claim is in its early stages and won't be fully developed for at least another year; and (3) Defendants had plenty of time to complete the discovery on the issues raised in the present pleading (Affidavit of Mark A. Canizio, Esq., sworn to March 7, 2014 at ¶ 3). Mr. Canizio proceeds to set forth Plaintiff's side of the case with regard to Plaintiff's having completed its performance and Yonkers' having been paid more than 99% of its general contract while Plaintiff has been paid only 66% of its subcontract. However, because Mr. Canizio fails to provide the basis for his personal knowledge of these facts, they have been disregarded for the purposes of this motion.

He characterizes Defendants' counterclaim posed in the present pleading as involving "last minute back charges for clean-up and scope disputes" (*id.* at ¶ 7). He refutes Defendants' attempt to place Plaintiff in a bad light with regard to its document production by pointing out that the lateness of the production was the result of Defendants' late demand to Plaintiff on October 11, 2013. Therefore, Plaintiff's first production on November 20, 2013 with a follow up of the electronic discovery 30 days later was entirely proper (*id.* at ¶ 8).

With regard to the Federico deposition, he first points out that Defendants never served a deposition notice on Plaintiff with regard to either Federico or any other of Plaintiff's witnesses. In any event, Canizio contends that, with Federico being a former employee living in California, as he advised this Court's law clerk during the conference call had on this issue, he had no ability to compel Federico to attend a deposition, but that he would attempt to obtain his voluntary appearance for deposition. He then secured three dates for Federico's deposition – December 30, December 31 or January 2 – but Defendants' counsel advised that none of those dates worked for them (*id.* at ¶ 12).

Mr. Canizio, once again, without providing any basis for his personal knowledge of the assertions he makes, argues that these new claims with regard to defective work being responsible for leaks are not only baseless (*i.e.,* whatever work Superior needed to do to address MTA's concerns over the shotcrete has been completed since December 2013 and the installation of the escalators and framing that will cover Superior's work has already begun), but also totally undeveloped and should be handled in a separate proceeding. Finally, he urges that the only issues that remain open between the MTA and Yonkers involve waterproofing which are the subject of a separate subcontract with a different subcontractor (*id.* at ¶ 9).

## DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION

In further support of their motion, Defendants submit an affidavit from Robert Stepien, P.E., Yonkers' project manager, and a reply letter brief.

In his affidavit, Mr. Stepien attaches various meeting minutes of meetings held among representatives of the MTA, Superior and Yonkers in October, correspondence between Yonkers and the MTA and a letter from Plaintiff to Yonkers dated March 12, 2014.

Stepien avers that with regard to the meeting minutes, at the October 14, 2013 meeting, the MTA's engineer indicated that the "voids within Superior's concrete posed the risk of puncturing the waterproofing system" (Affidavit of Robert Stepien, P.E., sworn to March 12, 2014 ["Stepien Aff."] at ¶ 13). According to Stepien, while the MTA has issued a Certificate of Substantial Completion on February 19, 2014 (Stepien Aff., Ex. 4), work on the project continues with regard to the remediation of water leaks, which the MTA has stated were "caused by the voids within Superior's concrete" (Stepien Aff. at ¶ 14 and Ex. 5). He contends that the MTA has "explained that at locations where the waterproofing membrane spans over the void locations, the risk [of] collapsing and puncturing is greatly increased" (*id.* and Ex. 4). To counter Plaintiff's contention in its opposition that any remaining problems stem from defects caused by the waterproofing subcontractor, Stepien avers that "the waterproofing membrane was both tested and approved after its installation by the MTA. It was only afterwards, when Superior's concrete was installed over the waterproofing system, that the watertightness of the system became subject to question" (*id.* at ¶ 14). Finally, Stepien describes the letter exchanges between Yonkers and Superior over this issue in February, in which Yonkers demanded that Superior repair the leaks or that Superior would be subject to backcharges and Superior's response on March 12, 2014 stating that there was no evidence that its work caused damage to the waterproofing system and refusing to repair any work (*id.* at ¶ 17 and Exs. 5-7). He concludes by stating that remedial work continues to date with regard to the water leaks and that they continue to hold discussions with the MTA concerning the issuance of a Certificate of Final Completion and assessment of potential liquidated damages (*id.* at ¶ 18).

In their reply letter brief, Defendants argue that counterclaims relating to Plaintiffs' defective work have long been a part of this action. Further, that Plaintiff has requested production from Defendants concerning its allegedly defective work and Plaintiff itself has provided documents concerning its defective work during the discovery in this action (Ex. D to Reply Letter Brief). According to Defendants, it is just the exact nature of the

defective work, and the extent of the damages, that have yet to be determined. Since Plaintiff does not contest that discovery concerning its defective work is complete, Defendants argue that the Note of Issue should be vacated and a temporary stay imposed until such time as discovery can be completed. Defendants further refute (based on the Stepien affidavit) Plaintiff's unsupported assertions set forth in their counsel's affirmation that the work has been completed. Defendants point out that even Plaintiff admits in its opposition that "the information related to Plaintiff's defective work is not yet 'fully developed'" (Defs' Reply Letter Brief at 3, *quoting* Canizio Opp. Aff. at ¶ 3). Responding to Plaintiff's contention that Defendants have not asserted a monetary claim for Plaintiff's allegedly defective work, Defendants argue that they have provided some detail on the damages they have incurred, but they cannot quantify the entirety of such damages until the information necessary to do so has been developed (*id.* at 4).

Defendants explain that Federico was not served with a deposition notice only because Plaintiff's counsel provided assurances that it was unnecessary and Federico would make himself available voluntarily. Further that they did not bother to take it yet because they would only have to retake it again with respect to the issues still in development. Finally, Defendants argue that the Court should stay rather than sever the action because "[w]here 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" (*id.* at 5, *quoting Herrera v Municipal Housing Authority of the City of Yonkers*, 107 AD3d 949 [2d Dept 2013]) and if the parties were required to go to trial at this juncture, the parties and the court would have to litigate many of the same complex issues in two separate trials. It is Defendants' position that "[n]o 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" (*id.* at 5).

## DISCUSSION

A motion to vacate a Note of Issue is provided for in 22 NYCRR 202.21 (e) as follows:

> *Vacating note of issue.* Within 20 days after service of a note of issue and certificate of readiness, any party to the action or special proceeding may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect. However, the 20-day time limitation to make such motion shall not apply to tax assessment review proceedings. After such period, except in a tax assessment review proceeding, no such motion shall be allowed except for good cause shown. *At any time, the court on its own motion*[7] *may vacate a note of issue if*

[7] It is well settled in this Department that courts have discretion to vacate a note of issue *sua sponte* (*see, e.g., Jones v Lynch*, 298 AD2d 499 [2d Dept 2002]).

> *it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.* If the motion to vacate a note of issue is granted, a copy of the order vacating the note of issue shall be served upon the clerk of the trial court" (22 NYCRR 202.21[e] [emphasis added]).

Based on the submissions provided, the Court reluctantly agrees the statement in the Note of Issue that all discovery has been completed is incorrect given that there is a whole other aspect to this action concerning Defendants' claims that there have been problems encountered in the shotcrete (*i.e.,* voids causing leaks in the waterproofing) which were only first revealed four months into this case and which were continuing to develop even up to the date of the TRC. The Court cannot fault Defendants' counsel for failing to complete discovery on a not yet fully developed record.

The Court further agrees that judicial economy will be fostered by having all the claims and counterclaims concerning Plaintiff's performance under its Subcontract with Yonkers tried in the same action. While the Court believes that the proposals it offered to counsel would have resolved this issue, it was unable to bring the parties to an agreement to either discontinue the action without prejudice with a standstill agreement tolling the statute of limitations or a voluntary stay.

The inability to complete discovery by the January 17, 2014 TRC was the function of the fact that the issues concerning Plaintiff's alleged defective work were the subject of ongoing investigations and remediation work. While Plaintiff is anxious to obtain the remaining 33% of the subcontract price it contends is due, Defendants are countering Plaintiff's claims with claims of their own concerning Plaintiff's work product and Plaintiff's refusal to remediate the alleged defects. The Court sees no use in severing this aspect of Defendants' counterclaim and having it proceed on separate discovery and trial tracks.

The prejudice Plaintiff faces is the continued loss of access to the money it claims is due. While that may ultimately be partly ameliorated through an interest recovery, the fact remains that Plaintifff has had to pay its workers and its materials in the interim. The Court must therefore develop a solution that will balance the rights of both parties.

It is undisputed that a critical witness to both Plaintiff and Defendants who would not be able to be compelled to appear for trial as he is currently a resident of California has not appeared for a deposition. While it is unclear exactly why the deposition of Federico[8] did not occur, it is understandable that there was a scheduling issue since the offer to produce him was for over the Christmas/New Years' holiday. Further, no document discovery on Part B had occurred and Defendants would need to depose him again once that discovery took place. Thus, it would have been premature to depose Federico on the dates proposed by Plaintiff.

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[8]Based on this Court's review of the documents submitted on this motion as well as Plaintiff's motion for partial summary judgment, it is clear that Federico is an essential witness to both Plaintiff and Defendants in this case.

The Court will not stay the action as that would prejudice Plaintiff and, indeed, Defendants' request for a stay, as articulated by Mr. McKenna, is internally inconsistent in that, on the one hand, he asks for a stay of the action and, on the other, suggests that the stay be for as long as required to complete discovery (*see* prayer for relief at end of his February 21, 2014 affirmation). Clearly, discovery cannot be completed if the action, including discovery is stayed.

Given the passage of time since the filing of this motion as well as the likelihood that the issue concerning Plaintiff's allegedly defective work is coming close to a conclusion, the Court will vacate the Note of Issue and allow the parties until October 1, 2014 to complete all discovery. The Court sets a Trial Readiness Conference for October 3, 2014 at 9:30 a.m. at which it will direct the re-filing of the Note of Issue. Counsel are advised that this date will not be adjourned absent the most extraordinary of circumstances and not to count on having any more time to complete discovery.

The Court also hereby notifies counsel that, upon the filing of the Note of Issue, the trial of this action will be set to commence on February 2, 2015 and to continue thereafter to conclusion The Court sets this date now: (a) so that counsel can notify their witnesses and experts accordingly; (b) to avoid any further delay and consequent prejudice to Plaintiff; and (c) to avoid the prospect that the case will be delayed by the intervening scheduling of other cases. The trial date has been selected taking into account the prospect that Defendants may move for summary judgment and sufficient time has been provided for such motions to be briefed and decided.

While not strictly before the Court, the Court addresses the issue of Federico's deposition. Obviously, if he is not longer employed by Plaintiff, Plaintiff cannot be compelled to produce him. On the other hand, the Court cannot ignore the possibility that Federico will voluntarily appear for trial (or give an affidavit) and Defendants will have not had the opportunity to take his deposition. Accordingly, counsel for Defendants shall proceed to seek his deposition in California by such means as may be available under California law. It appears that California has adopted the Uniform Interstate Deposition and Discovery Act (*see* CPLR 3119; *see Kapon v. Koch*, 23 NY3d 32 [2014]). The schedule provided by the Court likewise leaves sufficient time for diligent counsel to secure Federico's deposition, whether in New York or in California. In short, the Court expects that either the deposition will be taken or it will be waived.

## CONCLUSION

The Court has considered the following papers in connection with this motion:

1) Notice of Motion dated February 21, 2014; Affirmation of Michael F. McKenna, Esq. dated February 21, 2014 together with the exhibits annexed thereto;

2) Defendant's Memorandum of Law in Support of Motion to Vacate Plaintiff's Note of Issue and to Stay Action dated February 21, 2014;

3) Affidavit of Mark A. Canizio, Esq. in Opposition to Defendants' Motion to

Vacate Plaintiff's Note of Issue and to Stay Action, sworn to March 7, 2014, together with the exhibits annexed thereto; and

4) Reply Letter dated March 12, 2014.

Based on the foregoing, it is hereby

ORDERED that the motion by Defendants Yonkers Contracting Company, Inc. and Zurich America Insurance Company to vacate the Note of Issue and stay this action for six months is granted in part and denied in part; and it is further

ORDERED that the branch of Defendants' motion seeking to vacate the Note of Issue is granted and the Note of Issue dated February 7, 2014 and the Trial Readiness Order dated January 28, 2014 are hereby vacated; and it is further

ORDERED that the branch of Defendants' motion seeking to stay this action is denied; and it is further

ORDERED that the parties are directed to commence any and all remaining discovery proceedings forthwith and with all discovery to be completed by October 1, 2014; and it is further

ORDERED that counsel and shall appear at a Trial Readiness Conference on October 3, 2014 at 9:30 a.m. at which time the Court expects it will direct the filing of a further Note of Issue; and it is further

ORDERED that the above-referenced Trial Readiness Conference shall not be adjourned without the prior written consent of this Court; and it is further

ORDERED that, absent good cause arising hereafter, any discovery not completed by October 1, 2014 will be deemed waived; and it is further

ORDERED that, upon the filing of a Note of Issue, this action will be set down for trial to commence on February 2, 2015 and that this date will not be changed absent extraordinary cause.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
June 27, 2014

ENTER:

Alan D. Scheinkman
Justice of the Supreme Court

APPEARANCES:

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# SUPREME COURT OF THE STATE OF NEW YORK
# COUNTY OF WESTCHESTER
# COMMERCIAL DIVISION

**Present: HON. ALAN D. SCHEINKMAN,**
**Justice.**

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SUPERIOR GUNITE,

Plaintiff,

-against-

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

Defendants.

----------X

Index No. 54272/2013

Motion Seq. # 002
Motion Date: April 4, 2014

**DECISION & ORDER**

Scheinkman, J:

Plaintiff Superior Gunite ("Plaintiff" or "Superior") moves pursuant to CPLR 3212 for an order granting Plaintiff partial summary judgment on its breach of contract claims against Defendants Yonkers Contracting Company, Inc. ("Yonkers") and Zurich American Insurance Company ("Zurich")[1] ("Defendants"). Defendants oppose the motion.

## FACTUAL AND PROCEDURAL HISTORY

The factual and procedural history is set forth in this Court's Decision and Order being issued simultaneously herewith granting in part and denying in par Defendants' motion to vacate the Note of Issue and stay the action (the "Note of Issue Decision"), which is incorporated herein by reference.

## PLAINTIFF'S CONTENTIONS IN SUPPORT OF ITS MOTION

In support of its motion, Plaintiff submits an affidavit from its Vice President, Controller and Chief Financial Officer, David E. Bowers, together with supporting exhibits, a Statement of Undisputed Facts, and a memorandum of law.

In his affidavit, Bowers authenticates the parties' Subcontract (Exhibit 4) in the amount of $7,500,000 (Affidavit of David E. Bowers, sworn to March 7, 2014 ["Bowers Aff."] at ¶¶ 9-10). He avers that rather than execute the thirteen change orders that Plaintiff submitted

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[1]Zurich is Yonkers' payment bond surety.

to Yonkers over the course of the period June 2011 through April 2012, Yonkers delayed the requests until April 2012 and then negotiated all of the change orders at once. This is said to have resulted in two Amendments to the Subcontract, Amendment #1 for $674,813 and Amendment #2 for $476,000, which are submitted as Exhibit 5 (Bowers Aff. at ¶¶ 11-12). Bowers contends that as a result of the change orders, the Subcontract amount increased to $8,650,813 (*id.* at ¶13).

According to Bowers, Superior was required to make monthly payment applications, Yonkers was required to make monthly progress payments, and pursuant to Article 4.2, Yonkers was required to pay Plaintiff within 15 days after Yonkers received payment from the MTA for Superior's work (*id.* at ¶15). He states that this 15 day period was contrary to the Prompt Payment Act,[2] which requires payments to be made no more than 7 days after receipt of payment from the owner (*id.*). In any event, Bowers asserts that Yonkers failed to make payments within either time frame and for some requisitions, Yonkers made no payment at all (*id.*).

Bowers asserts that during the period June 2011 to September 2012 (Superior's completion of its work), Superior submitted 13 payment requisitions, and he attaches those requisitions as Exhibit 6. He avers that Superior billed the entire Subcontract amount less the 10% retainage ($7,785,732), yet Yonkers has only paid Gunite $5,949,834 or 66% of the contract price, and he attaches the payments received as Exhibit 7. He asserts that Yonkers "failed to pay $1,835,898 of the approved payments it received from the MTA" (*id.* at ¶17). Plaintiff contends that "Yonkers' failure to pay [Superior's] Monthly Requisitions was without any justification because all Monthly Requisitions were approved by Yonkers and incorporated in Yonkers' payment requests to the MTA" (*id.* at ¶ 23).

Bowers further contends that contrary to the Prompt Payment Act,[3] which does not allow a general contractor to hold retainage in a greater percentage than the owner withholds from it, while Yonkers has held back a 10% retainage from Plaintiff, Yonkers is only the subject of a 5% retainage from the MTA (*id.* at ¶18).

Bowers sets forth the remaining amounts Plaintiff claims are owed – *i.e.,* (1) retainage in the amount of $865,081, and (2) change order requests ("CORs") submitted between March 2012 and September 2012 in the amount of $477,796 – which he contends were set forth in a Final Demand dated February 28, 2013 (Exhibit 12) (*id.* at ¶13). He explains this latter amount as involving the cost of premium for work outside of the regular work day or on Saturdays. He asserts that the need to work on this accelerated schedule was the result of delays for which Superior was not responsible. According to Bowers, Yonkers received from the MTA $3.5 million in connection with the need to accelerate the work, and he attaches invoices (Exhibit 13), which he contends show that Yonkers sought more than $379,000 from

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[2]In its memorandum of law, Plaintiff cites to Sections 756 and 757 of the General Business Law ("GBL") as the provisions governing this 7 day payment rule.

[3]In Plaintiff's memorandum of law, Plaintiff cites to Section 756-c of the GBL as the provision that prohibits a general contractor from retaining a greater percentage than the retainage withheld by the owner.

the MTA to pay for the overtime and weekend work that was being billed by Superior (*id.* at ¶28). To prove that Yonkers had agreed to pay for this overtime work, Plaintiff attaches various emails from Yonkers, which he contends show Yonkers' agreement to pay for these change order requests (*id.* at ¶ 29 and Exhibits 14-19).

With regard to Yonkers' agreement to pay with regard to another 19 change orders numbered COR 12-COR 16.01, Bowers relies on the deposition testimony from Yonkers' Project Manager for the project, Robert Stepien, wherein he agrees that there was no disagreement over these change orders or their amounts (*id.* at ¶ 30, *citing* Stepien Tr. at 62-63). Despite there being no dispute as to Yonkers' agreement as to the extra work performed, Bowers avers that Yonkers has not compensated Superior for the extra work performed (*id.* at ¶31).

Based on the foregoing, Bowers argues that Plaintiff is entitled to partial summary judgment in the sum of $1,835,899 for its base Subcontract, one half of the withheld retainage ($432,540.50) and $477,796 for the forty-one change order requests (*i.e.*, the approved extra work) (*id.* at ¶¶ 24, 33). Plaintiff is also seeking interest in the amount of 1% per month from October 2012 to the date of judgment (*id.* at ¶ 33). Bowers notes that Yonkers refused "to execute written Change Orders" which prevented Superior from billing Yonkers for this extra work "even though the amounts are noted on [Superior's] Monthly Requisitions" (*id.* at ¶ 32).

With regard to Zurich's liability, Bowers attaches the payment bond dated September 3, 2010 (Exhibit 21) in which Zurich guaranteed payment of all monies due all persons furnishing labor, supplies, materials, or equipment on the project, including the Subcontract, and he attaches the payment bond. He avers that on or about January 9, 2013, Superior made a claim on the payment bond, and he attaches the claim as Exhibit 22 (*id.* at ¶ 35 [Ex. 22]). Bowers asserts Plaintiff is seeking from Zurich $2,746,235.50 together with 1% monthly interest from October 2012 (*id.* at ¶36).

Bowers seeks to refute the amount of offsets Yonkers has claimed were due as set forth in a spreadsheet prepared by Yonkers and dated August 7, 2013 (Exhibit 23). He summarizes the offsets as: (1) $606,162 for clean up costs; (2) $445,000 for installing waterproofing materials; and (3) $200,042 for constructing bulkheads, which Bowers contends were excluded from the Subcontract. He points out that even based on Yonkers' spreadsheet, Yonkers admits that it owes Plaintiff $605,498 and retainage in the amount of $616,648 (*id.* at ¶ 37).

In its memorandum of law, Plaintiff contends that Yonkers breached the Subcontract and BGL §§ 756 and 757 when it failed to timely and fully pay Superior's payment requisitions (*id.* at 4). With regard to the Superior's requisitions for payment made from June 2011 to September 2012, Plaintiff contends that all of the amounts requested had been approved and submitted by Yonkers to the MTA (*id.*). Further, says Plaintiff, the Subcontract (Article 4.2) required Yonkers to pay Plaintiff within 15 days of its receipt of payment from the MTA. Plaintiff argues this provision violates GBL § 756-a(3)(a)(ii) and as such, is unenforceable pursuant to GBL § 757(4) (*id.* at 5). Nevertheless, Yonkers failed to pay and, accordingly, Plaintiff is entitled to summary judgment and to interest at the rate of 1% per month in accordance with GBL § 756-a(3)(a)(ii) beginning the day after payment was due on

each invoice as set forth in GBL § 756-b(1)(b) (*id.* at 7).

Plaintiff also contends that it is entitled to ½ of the retainage currently being held by Yonkers since GBL § 756-c only allows the general contractor to withhold the same retainage percentage as being held by the owner and here, since the owner is only holding a 5% retainage, Yonkers should be required to return to Plaintiff ½ of the 10% retainage being held – *i.e.,* $ 432,540.50 (*id.* at 7-8). And Plaintiff asserts that pursuant to GBL § 756-c, it is entitled to 1% monthly interest.

Plaintiff requests that it be awarded summary judgment on its claim concerning the 41 extra work claims in the amount of $477,796. Plaintiff argues that "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 payment requisitions" (*id.* at 9).

## DEFENDANTS' CONTENTIONS IN OPPOSITION

In opposition, Defendants submit an affirmation from Defendants' counsel, Anthony J. Tavormina, Esq. and its supporting exhibits, an affidavit from Robert Stepien, and a memorandum of law.

In his affidavit, Stepien avers that he was the Project Manager on the job. He sets forth his credentials as Professional Engineer who has worked in the heavy highway construction industry for 20 years. One of the main purposes of the Stepien affidavit is to describe the significance of the overall Project and the piece of the Project that was Plaintiff's responsibility. He avers that the work on the Project is completed and found to have been performed in compliance with the Contract plans and specifications except for one item – *i.e.,* "the MTA has yet to issue a certificate of Final Completion for the Project as a result of ongoing efforts to correct numerous leaks stemming from deficiencies in the work performed by Superior under the Subcontract" (*id.* at ¶ 16). According to Stepien, the MTA is withholding the 5% retainage that the MTA has stated will be diminished as the MTA assesses liquidated damages ($72,000 a day), which it will be entitled to do if Yonkers does not achieve completion of certain phases of the work by the dates set forth in the Contract (*id.* at ¶ 17). It is Stepien's position that the liquidated damages have now accumulated to $1.8 million based on remedial work that has had to be performed in the area of the inclines where Superior's work caused the predominant delay (*id.* at ¶18). He asserts that a significant, if not the exclusive, reason for the MTA's withholding the retainage relates to Superior's work (*id.*).

Stepien explains the crux of Defendants' defenses/counterclaims as being based on Plaintiff's defective performance (both in terms of skill and manpower), the result of which is that Yonkers has had to complete work that Superior failed to complete, and repair or rehabilitate work that Superior failed to perform in accordance with the Project's specifications, as well as clean up areas that were left with residual, mis-sprayed or oversprayed shotcrete (*id.* at ¶¶ 19-24).

Stepien avers that Yonkers does not dispute that Plaintiff performed the extra work set forth in the change order requests totaling $483,455 – Plaintiff just disputes that they have been submitted with adequate backup information. Stepien attaches the email correspondence on this issue as Exhibit 6. According to Stepien, Plaintiff never adequately

and accurately responded to Yonkers' demands for the back-up (*id.* at ¶¶ 27-29).[4]

With regard to the approximately 14 requests for additional compensation in the amount of $155,888 for premium time, Stepien avers that Yonkers disputes that it is required to pay this amount, and has consistently informed Plaintiff of this (emails attached as Exhibit 7), based on its position that the only reason Superior had to perform this premium time was the result of Plaintiff's own failure to keep up with the schedule. He contends that in the emails, Superior admits that it was unable to provide the required manpower to the Project (*id.* at ¶ 30). He asserts that Plaintiff's failure to provide proper manpower and supervision (*i.e.,* scheduling occurred from Superior's California site and Mr. Federico [the VP in charge] was rarely on the site) to the Project was a breach of Section 5.10 of the Subcontract (*id.* at ¶¶31-32). Stepien contends that Plaintiff was made aware that time was of the essence (Subcontract § 5.1), that it had to work so as not to delay the Project, and that it could not recover for overtime or weekend work if it was necessitated by its failure to meet the Project schedule (Subcontract § 5.4).

Stepien identifies several other items of dispute between the parties: (1) the amount of credit Yonkers should get from the deletion of certain concrete walls – Yonkers contends that $438,000 is the value of the deleted work and Plaintiff contends that its value is $161,547 (*id.* at ¶ 35); (2) the $1.8 million in back charges (Bowers Ex. 23), which does not include the $1,885,000 in liquidated damages being assessed by the MTA or the costs incurred in remediating the leaks caused by the voids in Plaintiff's shotcreting (as to these back charges, Stepien avers that Yonkers notified Plaintiff of its claims and back charges throughout the course of the Project)[5] (*id.* at ¶¶ 36-37).

Responding to Bowers' claims of slow payment, Stepien attaches email correspondence he contends shows that the slow payment was attributable to Superior's

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[4]As discussed *infra*, this assertion would appear to have merit since Plaintiff has annexed as an exhibit to its reply papers this backup, which had not been previously provided to Yonkers.

[5]These back charges consist of: (1) cleanup costs in the amount of approximately $606,162 (Stepien Opp. Aff. at ¶¶ 38-43 and Exs. 8-11 [photographs and emails over this clean up dispute]); (2) costs in the amount of approximately $445,000 Yonkers alleges it had to incur based on "Superior's failure to install adequate finished surfaces along the concrete interface locations ('construction joints' or 'keyways') that required the installation of 'waterstop' material" (*id.* at ¶¶ 44-46); (3) costs in the amount of approximately $200,000 to install bulkheads that Superior was unable to install because it had not consummated a collective bargaining agreement with the union that was required in order to install this formwork and Stepien attaches the email correspondence on this issue as Exhibit 14 (*id.* at ¶¶ 47-50); and (4) costs incurred by Yonkers concerning the leaks discovered in the Project alleged to be caused by the voids in the Plaintiff's shotcrete which "caused the flexible waterproofing system to span over extensive areas (*i.e.,* over the void areas) which it was not designed to span. In effect, the waterproofing system collapsed into the void areas and ruptured – thereby causing water to leak into and through the concrete" (*id.* at ¶¶ 52-54 and Exs. 15-19). Stepien avers that Yonkers believes the total amount to remediate Superior's defective work and the liquidated damages will exceed the entire amount Superior seeks in this action (*id.* at ¶ 37).

failure to submit the bills in a timely manner (*i.e.,* on the last day of each month) (Subcontract § 4.4) and its failure to provide accurate requisitions in the charges assessed (*id.* at ¶¶ 55-57 and Exs. 20, 21). Stepien asserts that contrary to Bowers'[6] representations, the amount the MTA has held back in its payments to Yonkers is not just $49,502. Instead, it is actually about $6,000,000 since Yonkers has not been paid on any requisitions since June 2013. He contends that the main reason for the hold back is the deficiencies in Superior's shotcrete work (*id.* at ¶ 59). Stepien further disputes Plaintiff's contention that it is wrongfully withholding monies from Superior by pointing out that Yonkers may withhold the retainage being withheld by the owner as well as the amount necessary to satisfy the claims of the general contractor (*id.* at ¶ 60).[7] Addressing the payment plan referenced by Bowers in his affidavit, he avers that it "was not established to cover delinquencies; on the contrary, the plan was set up for Superior's benefit in order to pay them for over $1 million in additional compensation under the Amendments ...." (*id.* at ¶ 61).

Addressing the emails attached to Plaintiff's moving papers concerning the premium work, Stepien avers that (1) "Superior was never required, or asked, to undertake an accelerated schedule involving extra work shifts"; and (2) the emails are taken out of context since Yonkers had to authorize its subcontractors to work during non-regular times and report the same to the MTA inspectors and project management; therefore, these emails simply evidence his authorization to work – not Defendant's agreement to pay for the premium work[8] (*id.* at ¶¶ 62-67). He avers that based on his conversations with Federico, Federico knew that Stepien would not authorize premium payments yet Superior proceeded to do the work even though it did not receive any executed change orders. Finally, Stepien refutes the math associated with Bowers' claim that even with Defendants' back charges, Plaintiff would be entitled to over $1 million since it gives credence to 100% of each and every claim made by Superior and neglects to take into account the liquidated damages issue and other offsets the MTA is taking and may continue to take prior to final acceptance (*id.* at ¶ 68).

The sole purpose of counsel's affirmation is to attach various excerpts from the depositions of Robert Stepien and James Strobel to attempt to refute the contentions made by Plaintiff.

For example, at his deposition, Stepien made clear that while there was no

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[6]Stepien avers that Bowers does not have the requisite personal knowledge because he was not involved in the Project, its operations, the interaction between the parties, and the work performed (*id.* at ¶ 58).

[7]The legal authority for this proposition is set forth in Defendants' memorandum of law wherein they argue that based on the express terms of Section 139-f of the New York State Finance Law (the prompt payment statute applicable to this public works project), Yonkers was permitted to withhold in excess of 5% based on its undischarged claims (Defs' Opp. Mem. at 9, n3).

[8]Stepien does admit to one instance where he agreed on Defendant's behalf to pay for the premium work, but he does not specifically identify which change order request is the subject of this agreed work.

disagreement with regard to COR 12.1 through 16.01, the back up showing manpower, labor rates, equipment and the time spent by that manpower to do the extra work was missing (Stepien Tr. at 62, 71, 82). Stepien also testified that Yonkers notified Superior many times that the rebound was not being cleaned up and placed in neat piles in accordance with the Subcontract (*id.* at 130). Strobel testified that with regard to the overtime and Saturday work, Superior had too many jobs going on at the same time and Plaintiff did not have enough manpower and had to work at night and on weekends to make up for the delays caused by insufficient staff and those categories did not fall in any of Yonkers' extra work claims made to the MTA (Strobel Tr. at 31-32).[9] He explains Stepien's emails telling Superior to proceed with work on Saturdays (rather than writing back telling Superior that it was not entitled to a change order) as Yonkers' need to get Superior to work and Stepien not wanting to get into a battle with Superior (*id.* at 54). Finally Strobel testifies that he had discussions with Federico on the phone concerning credits for the deletion of certain interior walls (*id.* at 68).

In their memorandum of law, Defendants set forth why Plaintiff's reliance on GBL §§ 756 and 757 is misplaced because the statute specifically provides that it does not apply to contracts involving a public contract awarded by a public benefit corporation (here the MTA) and any subcontract that is a part of the public project (Defs' Opp. Mem. at 5). Defendants argue that the payment statute applicable to the Project is State Finance Law § 139-f, which, while it provides for certain payment periods to make subcontractor payments, it expressly provides that the "contractor may withhold from a subcontractor 'an amount necessary to satisfy any claims, liens or judgments against the subcontractor ... which have not been suitably discharged'" (*id.* at 6, *quoting* N.Y. State Fin. Law § 139-f[2]). Thus, relying on *R.P. Brennan, General Contractors and Builders v Bovis Lend Lease LMB, Inc.* (2007 NY Slip Op 50972[U], 15 Misc 3d 1134[A] [Sup Ct, NY County 2007], *affd* 47 AD3d 499 [1st Dept 2008]), Defendants assert that to make out a *prima facie* case under the Prompt Payment Law, a subcontractor must not only show the contractor's failure to make payment but also the subcontractor's satisfactory completion of the work (*id.* at 7). Accordingly, the "'prime contractors certification of work to the defendant owner and receipt of payment from an owner do not conclusively establish a [subcontractor's] right to payment'" (*id.* at 8, *quoting R.P Brennan, supra*).

Defendants argue that contrary to Plaintiff's assertions, Plaintiff was notified of the nature of Yonkers' claims long before the start of this lawsuit (*id.* at 8-9). And based on the evidence set forth in Defendants' opposition showing (1) back charges in amount not less than $1,754,698, (2) liquidated damages in the amount of $1,885,000 to date, and (3) $300,000 for the remedial work necessary to repair the leaks from the voids, Defendants have established that they have withheld payment based on various undischarged claims against Superior, and there are material issues of fact precluding an award of summary judgment.

In addition to Section 139-f permitting Yonkers to withhold payment, Defendants argue that the Subcontract, Sections 4.11 and 4.6, also provide a basis for Yonkers'

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[9]Strobel further testified that Yonkers had a lot of difficulty in getting Superior to come and do the work when it was ready and Superior's lack of a superintendent on the job created problems as did Superior's lack of manpower, which is what caused Superior to have to work on Saturdays (*id.* at 44, 54).

withholding of such sums. And with regard to the $477,796 Plaintiff seeks on the change order requests that have not been approved by Yonkers, because these items remain in dispute, it is claimed that there is nothing in the Prompt Payment Law that requires Yonkers approve and pay these amounts summarily. Thus, pursuant to Section 22.3 of the Subcontract, "Superior was required to obtain a written executed change order as a prerequisite for additional compensation for extra work," which did not occur with respect to these change orders (*id.* at 11). Further, while Defendants dispute that the 6 emails on which Plaintiff relies concerning change order requests 13.4, 13.5, 14.1, 14.5, 14.6 and 4.23 constitute approval of the change orders, even if they did, they would only account for $159,754.

With regard to the $155,888 for premium work, Defendants dispute that the four emails on which Plaintiff relies support Plaintiff's contention that Defendants approved these change order requests. In addition, Defendants argue that Plaintiff cannot rely on the $3.5 million Yonkers obtained from the MTA with regard to compensation for acceleration and delays because (1) that amount "*did not* include any payment for Superior's work"; and (2) "the mere fact that Yonkers submitted any claim to the MTA does not constitute an admission that Superior was not at fault. Pursuant to Par. 6.1 of the Subcontract – any presentation of a claim to the Owner on the Subcontractor's behalf '*shall not be deemed an admission by the Contractor of the validity of the Subcontractor's claim nor shall such request be used by the Subcontractor at any time against the Contractor*'" (*id.* at 13, *quoting* Subcontract at § 6.1 [emphasis added]). Finally, Defendants point out that Plaintiff admits that it was unable to provide sufficient manpower based on demands from other projects.

With regard to Plaintiff's claims on its authorized extra work, Defendants refute Plaintiff's contention that Stepien admitted that the monies are due for this work since in other places, Stepien testified that there was a disagreement as to the value of the extra work and Plaintiff neglected to provide the backup required by Sections 22.2 and 6.2 of the Subcontract (*id.* at 14-15).

Defendants further argue that there are disputes between Superior and Yonkers concerning the credits due Yonkers set forth in CORs 17 and 17.02 – *i.e.,* there is a $277,253 difference between what Yonkers and Superior claims is due as a credit.

Defendants argue that the Court should deny Plaintiff's motion because Plaintiff failed to comply with Commercial Division Rule 19-a and this Court's rules since it failed to provide sufficient evidence in support of its statements so that Defendants could oppose such statements (*id.* at 16).

## PLAINTIFF'S REPLY

In further support of its motion, Plaintiff submits a reply memorandum of law and a reply affidavit from Armando Ramos.

In his reply affidavit, Mr. Ramos states that he has been a project engineer for Superior since April 2012. Mr. Ramos states, without providing any evidentiary foundation, that there is no evidence that the placement of the shotcrete caused the leaks at the Project. "Rather, defects in the waterproofing materials, which are placed behind both formed and pneumatically placed concrete, are the source of the problem" (Reply Affidavit of Armando

Ramos, sworn to April 2, 2014 at ¶ 6). He avers that to date, the MTA has not asserted any liquidated damages against Yonkers, but even if it did, such claims could be made in a separate action (*id.* at ¶ 7).

Ramos contends that based on Article 10.1 of the Subcontract, Yonkers cannot establish that it satisfied the condition precedent to its ability to assert back charges against Superior – namely three days advance written notice prior to performing on Superior's behalf. He avers that Yonkers never provided three day notice with regard to any back charges, never notified Superior that it failed to perform any work, and never furnished Superior with contemporaneous records of the costs incurred (*id.* at ¶ 10).

As an example, Ramos relies on the $600,000 in claimed clean up costs. Ramos asserts that under the terms of the Subcontract, Superior was merely required to put all waste concrete in bags within the site area to be removed by Yonkers and that Plaintiff did that by cleaning up any waste concrete and placing it in canvas refuse bags (*id.* at ¶ 13). He avers that he was on the Project from April 2012 until the end of the work and Yonkers never provided Superior with written notice that it intended to back charge Superior for the work Yonkers performed. The only notice it received concerning a problem with the clean up was an email dated September 26, 2012, which references a single incident of an overstuffed bag, and certainly does not detail a basis to withhold $600,000 in back charges (*id.* at ¶ 13). He asserts that "[t]he same holds true with respect to Yonkers' backcharges on the PVC water stop" (*id.* at ¶ 14). Although Plaintiff contends that the PVC water stop was excluded from the scope of work, even if it were a part of the Subcontract, there was no written notification in accordance with Article 10 (*id.* at ¶ 14). Ramos refutes the back charges on the bulkheads by first asserting that since the bulkheads were tied to the PVC water stop, and since the PVC water stop was excluded from the Project, the bulkheads were likewise excluded. Therefore, Yonkers' attempt to back charge on these bulkheads is likewise improper (*id.* at ¶ 15). Finally, in response to Yonkers' contention that it does not dispute Plaintiff's entitlement to change orders 12.1 through 16.7, and that its only disagreement is that it did not receive backup, Ramos attaches the requested backup as Exhibit 24 (*id.* at ¶ 17).

In its memorandum of law, Plaintiff concedes that Defendants are correct that Sections 756 and 757 of the General Business Law do not apply and that the applicable statute is New York State Finance Law § 139-f(2). However, Plaintiff asserts that the same arguments it made in its moving papers in reference to the GBL provision apply to the State Finance Law provision since that statute, like the GBL provisions earlier relied on by Plaintiff, requires a payment no later than seven days after receipt of payment from the owner. It is Plaintiff's position that Defendants had no right to withhold payment after receipt of the payment from the MTA because Section 139-f "does not permit a contractor to withhold payment from a subcontractor in circumstances where there are no identifiable claims at the time payment is withheld" (*id.* at 4). Plaintiff further argues that Yonkers has no claim for liquidated damages under Section 139-f(2) because the MTA has not assessed liquidated damages against Yonkers.

Plaintiff further argues that Yonkers never sent Superior any formal or informal document evidencing its back charges, and that Defendants have not submitted proof in proper evidentiary form to support their claim that such notice was provided. According to Plaintiff, this failure to provide written notification violated Article 10.1 of the Subcontract and

because the three days written notice was a condition precedent to any right by Yonkers to perform Superior's work and back charge Superior for the work performed which courts strictly enforce, Yonkers had no right to withhold these back charges (Pltf's Reply at 5-6).[10] Furthermore, Plaintiff asserts that to date, Yonkers has not provided either an actual back charge or a detailed summary to support these claims of $1.7 million in back charges (Pltf's Reply at 7).

Plaintiff argues that because the issues that Yonkers now raises with regard to the leaks were neither a part of the pleadings nor part of the discovery process, Yonkers should not be allowed to inject these issues now. In any event, it is Plaintiff's contention that Defendants have not provided proof in evidentiary form that the shotcrete (which is not designed nor intended to be waterproof material) caused the leaks. According to Plaintiff, it is the defects in the waterproofing materials, placed behind both formed and sprayed concrete that are the source of the problem (Pltf's Reply at 10).

## THE GOVERNING LEGAL STANDARDS

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Med. Ctr.*, 64 NY2d 851, 643-644 [1985];*Cendant Car Rental Group v Liberty Mut. Ins. Co.*, 48 AD3d 397, 398 [2d Dept 2008]; *Martinez v 123-16 Liberty Ave. Realty Corp.,* 47 AD3d 901 [2d Dept 2008]; *St. Luke's-Roosevelt Hosp. v American Tr. Ins. Co.*, 274 AD2d 511 [2d Dept 2000]; *Greenberg v Manlon Realty, Inc.*, 43 AD2d 968 [2d Dept 1974]).

Once the moving party has made a *prima facie* showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Tillem v Cablevision Sys. Corp.*, 38 AD3d 878 [2d Dept 2007]). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions (*Sun Yau Ko v Lincoln Sav. Bank*, 99 AD 2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]; *Zuckerman, supra; see also Pierson v Good Samaritan Hosp.,* 208 AD2d 513, 514 [2d

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[10]In this regard, the reason for the notice requirement is so that the subcontractor has the opportunity to perform the work itself, or dispute the charges if the work is outside of its scope. Plaintiff uses the $600,000 in claimed clean up costs as an example. Plaintiff contends that the only notice it received concerning a problem with the clean up was an email dated September 26, 2012, which references a single incident of an overstuffed bag and certainly does not detail a basis to withhold $600,000 in back charges (Pltf's Opp. Mem. at 7-8). The same holds true with respect to Yonkers' back charges on the PVC water stop. Although Plaintiff contends that the PVC water stop was excluded from the scope of work, even if it were a part of the Subcontract, there was no written notification in accordance with Article 10.

Dept 1994]).

The court's main function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The role of the Court is to determine if *bona fide* issues of fact exist, and not to resolve issues of credibility. As the Court stated in *Knepka v Tallman* (278 AD2d 811 [4th Dept 2000]):

> Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint ... Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present credibility issues for trial .... (*id.* at 811; *see also Yaziciyan v Blancato*, 267 AD2d 152 [1st Dept 1999] ["The deponent's arguably inconsistent testimony elsewhere in his deposition merely presents a credibility issue properly left for the trier of fact"]).

On the other hand, a party cannot successfully oppose summary judgment by offering an affidavit which reverses his or her prior deposition testimony for the purpose of avoiding the consequences of that testimony (*Colucci v AFC Constr.*, 54 AD3d 798 [2d Dept 2008]; *Israel v Fairharbor Owners, Inc.*, 20 AD3d 392 [2d Dept 2005]; *Smith v Taylor*, 279 AD2d 566 [2d Dept 2001], *lv denied* 96 NY2d 711 [2001]; *Bloom v La Femme Fatale of Smithtown, Inc.*, 273 AD2d 187 [2d Dept 2000]). But, this rule does not apply where the affidavit is not directly contradictory of the prior deposition testimony (*see O'Leary v Saugerties Cent. School Dist.*, 277 AD2d 662 [3d Dept 2000], amplifies the prior testimony (*Castro v New York City Tr. Auth.*, 52 AD3d 213 [1st Dept 2008], or provides a potentially meritorious explanation for any consistency (*see Mickelson v Babcock*, 190 AD2d 1037 [4th Dept 1993] [plaintiff claimed that she suffered from amnesia at time of deposition but had recovered memory by time of affidavit]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8 [1960]; *Sillman v Twentieth Century Fox Film Corp.*, *supra*). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (*Baker v Briarcliff School Dist.*, 205 AD2d 652, 661-662 [2d Dept 1994]).

## LEGAL ANALYSIS

The elements to be established for a breach of contract cause of action under New York law are: (1) that plaintiff and defendant made a contract; (2) that consideration existed; (3) that the plaintiff performed; (4) that the defendant breached the contract; and (5) that the plaintiff suffered damages as a consequence (4 *N.Y. Practice, Com. Litig. in New York State Courts,* § 59:12 [2d ed]; *see also Brualdi v IBERIA,* 79 AD3d 959, 960 [2d Dept 2010]; *Harsco Corp. v Segui,* 91 F3d 337, 338 [2d Cir 1996]; *WorldCom, Inc. v Sandoval,* 182

Misc 2d 1021, 1023 [Sup Ct NY County 1999]; *Samide v Roman Catholic Diocese of Brooklyn,* 194 Misc 2d 561, 573 [Sup Ct Queens County 2003]).

The primary predicate for Plaintiff's motion for summary judgment is that Defendant breached the Subcontract by (1) submitting in its requisitions for payment to the MTA the work performed by Superior, (2) receiving payment from the MTA for Superior's work, and (3) failing to timely remit such payment to Plaintiff in accordance with the requirements of the Prompt Payment Act and the Section 4.2 of the Subcontract. In addition, it is Plaintiff's contention that (1) with regard to the CORs submitted for the premium time, those CORs were approved as evidenced by the emails from Stepien, and (2) Defendant cannot use the back charges and other disputes raised in its opposition to thwart Plaintiff's right to summary judgment since Yonkers breached the parties' Subcontract with regard to these back charges which required that it provide Plaintiff with three day advance written notice of default so Plaintiff could decide whether or not it desired to perform the work itself.

While Plaintiff primarily relies on the Prompt Payment Statute as providing the predicate for its entitlement to summary judgment on its breach of contract claim[11], the Court does not read the statute as providing that the violation of its provisions entitles the Defendant to a recovery of the amount claimed due. Instead, the statute provides as its remedy for violation an award of interest in the amount of 1% per month accruing from the day following the expiration of the 7 day payment period.

New York State Finance Law § 139-f(2) provides, in pertinent part:

> Within seven calendar days of the receipt of such payment from the public owner, the contractor shall pay each of his subcontractors and materialmen the proceeds from the payment representing the value of the work performed and/or materials furnished by the subcontractor and/or materials furnished by the subcontractor and/or materialman and reflecting the percentage of the subcontractor's work completed or the materialman's material supplied in the requisition approved by the owner and based upon the actual value of the subcontract or purchase order less an amount necessary to satisfy any claims, liens or judgments against the subcontractor or materialman which have not been suitably discharged and less any retained amount ....
>
> * * *
>
> The contractor shall retain not more than five per centum of each payment to the subcontractor and/or materialman except that the contractor may retain in excess of five per centum but not more than ten per centum of each payment to the subcontractor provided that prior to entering into a subcontract with the contractor, the subcontractor is unable or unwilling to provide a performance bond

[11]Plaintiff argues that "Yonkers committed a material breach of provisions of the Subcontract and the New York Prompt Payment Act when it failed to timely or fully pay Gunite's approved payment requisitions" (Pltf's Mem. at 4).

> and a labor and material bond, both in the full amount of the subcontract, at the request of the contractor ....

Because the only remedy provided for by the statute is that there shall be an accrual of interest at a rate of 1% per month on the day following the expiration of the seven day accrual period, the Court does not see the violation of the statute as providing Plaintiff with the right to use such violation as the predicate for its entitlement to summary judgment on a breach of contract claim (*see, e.g., Donninger Constr., Inc. v C.W. Brown, Inc.*, 113 AD3d 724, 979 NYS2d 133 [2d Dept 2014][12] [defendant's failure to issue a written disapproval of the invoices within the 12 day time period set forth in the Prompt Payment Statute GBL § 756-a(2)(a)(ii) did not preclude defendant from asserting defenses since nothing in the Prompt Payment Statute provides that the contractor's failure to timely disapprove prevents the contractor from contesting that the amount set forth in the invoice is the sum due; instead, the remedy is an award of interest as provided for in the Prompt Payment Statute]; *see also W&W Glass, LLC v 1113 York Avenue Realty Co. LLC,* 113 AD3d 563 [1st Dept 2014], *lv dismissed* 2014 NY Slip Op 74043, 2014 WL 2522280 [2014]).

There is a contractual provision in the Subcontract, which required prompt payment, since it required Yonkers to pay Superior within 15 days after Yonkers received payment from the MTA for Superior's work (Subcontract § 4.2). However, because the obligation to make such payments was contingent upon, *inter alia*, "approval of the Subcontractor's Work by Yonkers Contracting Company, Inc., the Owner, and its representative, if any" and "compliance by Subcontractor with all other Contract Documents" (*id.* at § 4.11),[13] the mere fact of Yonkers' nonpayment is not *prima facie* evidence supporting Plaintiff's breach of contract claim since Plaintiff is still required, as part of its *prima facie* case, to show its due performance.

The need to show not only a failure to pay but also due performance has been expressly addressed in the context of the Prompt Payment Statute under the State Finance Law. In *R.B. Brennan General Contractors & Builders, Inc. v Bovis Lend Lease LMB Inc.*, (2007 NY Slip Op 50972[U], 15 Misc 3d 1134[A] [Sup Ct, NY County 2007]), *affd* 47 AD3d 499 [1st Dept 2008]), the Construction Manager (Bovis Land Lease LMB Inc. ["Bovis"]) entered into a contract with the City of New York to construct a New York Hall of Science in Queens, New York (the "project"). Bovis entered into a General Contractor contract with plaintiff, as well as an agreement for plaintiff to perform certain ornamental metal work. Plaintiff moved for partial summary judgment with regard to its claim that Bovis had submitted requisitions for payment to the City involving requisitions plaintiff had made to Bovis, and that Bovis had received payment from the City but had failed to remit the monies received from the City to plaintiff. In *Brennan,* as here, it was the plaintiff's contention that Bovis had breached the "pay-when-paid" clause of the parties' agreements as well as State Finance Law § 139-f.

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[12]In *Donninger*, at trial "defendant demonstrated that the full amount sought by plaintiff ... was subject to various deductions for, inter alia, 'back charges,' incorrect invoicing, and improper performance of some of the work" (*Donninger,* 979 NYS2d at 135).

[13]"Final payment to Subcontractor shall be made within forty-five (45) days after completion of Subcontractor's Work and Owner's acceptance of, and payment for, such work ..." (*id.* at § 4.6).

In denying plaintiff's motion for summary judgment, the court noted that "to demonstrate a prima facie right to payment ... [plaintiff] was required to come forward with evidence of failure to make payment in accordance with the terms of the contract but also satisfactory completion of the work" (*Brennan,* 2007 NY Slip Op 50972[U] at * 3). There, the plaintiff was relying on proof of due performance solely upon the fact that the signed certification statements appearing on the face of the payment requisition forms stated that "all work and material included in this estimate has been inspected by me or my duly authorized assistants and has been found to comply with the terms and conditions of ... [the agreements]" (*id.* at *1). The court found, however, that the evidence was rebutted by the clause in the parties' agreement that provided "[n]o certificate issued or payment made to Contractor ... shall be an acceptance of any Work not in accordance with the Contract Documents or be deemed evidence of proper performance of the Work ... or be construed as an acceptance of defective workmanship or improper materials" (*id.* at *4). Thus, the fact that Bovis signed the certifications authorizing payment on Brennan's requisitions was not conclusive evidence of satisfactory completion of the work, and Brennan failed to submit substantive evidence to demonstrate its own performance. In affirming the denial of summary judgment, the Appellate Division, First Department stated "Paragraphs 18.8 and 18.15 of the General Conditions to the subject contracts authorize defendant to withhold payments received from the owner where there is evidence of unsatisfactory performance, and provide that defendant's certification of work does not constitute evidence of proper performance or an acceptance of defective work" (*R.P Brennan General Contractors & Builders, Inc. v Bovis Lend Lease LMB, Inc.*, 47 AD3d 499, 499-500 [1st Dept 2008]).

The Court finds this case to be analogous to *Brennan* in that while Plaintiff has submitted evidence showing that Yonkers submitted requisitions to the MTA for payment based on work performed by Superior, and that Yonkers received payment from the MTA for the work so performed, the Subcontract here, like the agreement in *Brennan*, makes clear that the right for Superior to collect the payments received by Yonkers from the MTA based on the Superior work requisitioned to the MTA, was not only contingent upon payment from the MTA, but also, *inter alia,* Superior's compliance with all the contract documents (Subcontract § 4.11). Thus, Plaintiff must also show its compliance with all the contract documents – *i.e.,* its due performance of the Subcontract. The Court finds that Plaintiff's moving papers fall short of establishing, *prima facie*, its due performance of all terms under the Subcontract.

Even if Plaintiff had established *prima facie*, both that Yonkers received payments made by the MTA for work performed by Superior, and that Superior fully performed all of its obligations under the Subcontract, in opposition, Defendants have submitted evidence creating triable issues of fact as to Plaintiff's performance as evidenced by (1) notices of default and back charges for defective work alleged to have been performed by Plaintiff or work Plaintiff was required to perform but failed to perform requiring Yonkers to perform on its behalf totaling $1,754,698 (Stepien Aff., Exs.10, 12, 13, 14]; and (2) defective work in connection with the voids in the shotcrete which have caused leaks in Project and requiring remediation work in an amount totaling $300,000 [Stepien Aff., Exs. 15-19]). Indeed, these same back charges justify Yonkers' failure to timely pay the requisitions submitted by Plaintiff under Section 139-f(2) since that statute specifically permits a contractor to withhold from the subcontractor an amount necessary to satisfy any claims by the contractor against the subcontractor that have not been suitably discharged.

The Court does not agree that Yonkers' claims had not been asserted as of the time the payment for the requisitions were due. Thus, a review of the emails outlining the various disputes and back charges between the parties date back to October 2011. Because there "is an issue of fact as to whether or not [Yonkers] had identifiable claims against [Superior] at the time that it withheld such payments. Such factual disputes preclude an award of summary judgment" (*Pottstown Fabricators, Inc. v Manshul Constr. Corp.*, 927 F Supp 756, 757-758 [SD NY 1996]).

Turning to the branch of Plaintiff's motion which seeks a return of 50% of the 10% retainage being held by Yonkers as violative of Section 139-f (*i.e.*, as a matter of law, because the MTA only held a 5% retainage, the maximum retainage Yonkers could hold against Plaintiff was 5%), because Yonkers is permitted to withhold monies it contends are owed as a result of Plaintiff's defective or omitted work, and Yonkers has provided evidence raising a triable issue of fact that the amount that it is currently withholding based on Plaintiff's alleged defaults exceeds the amount Plaintiff claims is due, the Court sees no basis to grant this branch of Plaintiff's motion.

Addressing Plaintiff's argument that by failing to send a three day written notice of default as required by Section 10.1 of the Subcontract, Defendants' counterclaim for back charges is deficient as a matter of law for failure to satisfy a condition precedent, the Court disagrees that there was an obligation by Yonkers to serve on Superior a three day notice to cure for any defective or omitted work. The provision relied upon by Plaintiff is entitled "Termination," and provides, in essence, that should the Subcontractor fail to perform in accordance with the Subcontract, "the Contractor, at its option, may **terminate** this Agreement upon three (3) days written notice mailed to the Subcontractor at its above address and upon expiration of such three (3) days from mailing, shall have the right, among other things, to .... (2) charge the cost of such completion [of the Subcontractors' work] to the Subcontractor ... (4) Correct any unacceptable or deficient Work with its own forces or hire a substitute subcontractor with all resulting costs thereof to be borne by this Subcontractor" (Subcontract § 10.1 [emphasis added]). Plaintiff has provided no evidence that Yonkers terminated the Subcontract and, indeed, it is undisputed that Superior was providing remediation work four months into this lawsuit. Accordingly, as Plaintiff has not established, *prima facie*, Yonkers' failure to comply with some three-day written notice provision before it could charge Superior against defective or omitted work, Superior has not established any basis to preclude Yonkers from asserting its counterclaims based on these back charges and credits for omitted work.[14]

The branch of Plaintiff's motion which seeks a recovery based on the unsigned CORs in the amount of $477,796 ($155,888 for premium work and $488,455 for extra work less a credit of $161,547) must likewise be denied as the Court finds that Plaintiff has not established, *prima facie,* its entitlement to summary judgment on this claim.

Superior's attempt to use the claim made by Yonkers to the MTA with regard to Superior's premium overtime as evidence that such overtime was not the fault of Superior and

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[14]Of course, Plaintiff may well establish the frivolity of some of Yonkers' back charges (*e.g.*, the $600,000 for a single incident of an overfilled refuse bag or its attempt to back charge for work Superior did not do that was actually excluded from the Subcontract).

that Yonkers approved such overtime is misplaced given the parties' agreement. Thus, Section 6.1 of the Subcontract precludes Plaintiff from relying on any such submission to the MTA by Yonkers since it provides, in pertinent part

> In the event that the Contractor at the Subcontractor's request makes any claims against the Owner in connection with the performance of this Agreement, that fact shall not be deemed an admission by the Contractor of the validity of the Subcontractor's claim nor shall such request be used by the Subcontractor at any time against the Contractor (Subcontract § 6.1).

Thus, the parties agreed that a claim made by Yonkers to the MTA at the request of Superior could not be used as an admission of the validity of the Subcontractor's claim as against Yonkers. As in *Brennan, supra*, this agreement vitiates Plaintiff's ability to rely on Yonkers submission of the claim for premium time to the MTA as evidence of the validity of Plaintiff's premium time claim. Accordingly, Plaintiff did not establish its *prima facie* entitlement to summary judgment on its claim for premium work based on Yonkers' request for additional monies for acceleration of the Project.[15]

Plaintiff's attempt to use the email correspondence as proof of Yonkers' approval of Superior's CORs is misplaced, as the language of the Subcontract precludes any such argument since it explicitly states that "Subcontractor shall not be entitled to receive any additional compensation for changes in the Work unless a written Contract Amendment is signed by the Contractor's Vice President of Procurement, or another authorized representative of Contractor" (Subcontract § 22.3).[16] Because Plaintiff has not provided evidence that the emails were the functional equivalent of an executed written Contract Amendment (Change Order ) or that even the signatory of the emails was Yonkers' Vice President of Procurement or another authorized representative of Yonkers, Plaintiff has not established, *prima facie*, its entitlement to recover for extra work contained in the unexecuted CORs.

With regard to the branch of Plaintiff's motion seeking to recover the amounts set forth in the executed change orders, Yonkers is correct that Plaintiff was required to provide back up in order to recover for the amount charged (*e.g.,* daily vouchers for verification and signature of an authorized representative of Contractor, showing labor performed and

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[15]While Yonkers contends that it did not receive payment for Superior's premium time work because it was only awarded $3,500,000 out of the $6,478,000 sought, this assertion falls short of establishing that no part of the $3,500,000 recovered stemmed from the Superior claim since the application to accelerate the schedule specifically includes a claim for $379,000 for Superior's premium time work (Bowers Aff., Ex. 13).

[16]From the signature on the Subcontract and the Amendment, it appears that Dennis J. Capolino was Yonkers' VP of Procurement (Bowers Aff., Exs. 4 & 5). While Plaintiff relies on emails from Stepien allegedly authorizing such extra work, Plaintiff has failed to establish that Stepien was the person who executed the written change orders that are only the subject of dispute with regard to the sufficiency of the back charges (Ramos Reply Aff., Ex. 24).

materials furnished" as well as a copy of bills for materials furnished) (Subcontract § 22.2). Moreover, while Stepien testified that Plaintiff had some entitlement with regard to these executed change orders, he further testified that there were disputes as to these change orders both based on the value of the extra work and based on Plaintiff's failure to provide the required back up (Stepien Tr. at 62, 71, 82 and Stepien Opp. Aff. at ¶ 27). Indeed, by providing such back up in its reply to Defendants' opposition, Plaintiff has conceded the accuracy of Defendants' position. Accordingly, as there are triable issues of fact as to the sufficiency of the backup, and the charges sought in connection with these executed change orders, this branch of Plaintiff's motion shall also be denied.

For all the foregoing reasons, Plaintiff's motion for partial summary judgment shall be denied.

**CONCLUSION**

The Court has considered the following papers in connection with this motion:

1) Notice of Motion for Partial Summary Judgment dated March 7, 2014; Affidavit of David E. Bowers, sworn to March 7, 2014 together with the exhibits annexed thereto;

2) Plaintiff's Rule 19-a Statement dated March 7, 2014;

3) Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment dated March 7, 2014;

3) Affirmation of Anthony J. Tavormina, Esq. in Opposition dated March 26, 2014 together with the exhibits annexed thereto; Counterstatement of Material Facts dated "March __, 2014";

4) Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment dated March 26, 2014;

5) Affidavit of Robert Stepien, sworn to March 26, 2014 together with the exhibits annexed thereto;

6) Reply Affidavit of Armando Ramos in Support of Plaintiffs' Motion for Partial Summary Judgment, sworn to April 2, 2014, together with the exhibit annexed thereto; and

7) Reply Memorandum of Law dated April 3, 2014.

Based on the foregoing, it is hereby

ORDERED that the motion by Plaintiff Superior Gunite for an order granting it partial summary judgment against Defendants Yonkers Contracting Company, Inc. and Zurich

America Insurance Company is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
June 27, 2014

ENTER:

Alan D. Scheinkman
Justice of the Supreme Court

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