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PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted in support of Plaintiff Superior Gunite's ("Gunite" or "Plaintiff") motion for partial summary judgment in the sum of \$2,746,235.50, pursuant to CPLR 3212, on Gunite's breach of contract claims against Defendants Yonkers Contracting Company ("Yonkers"), and its payment bond surety, Zurich America Insurance Company ("Zurich") (collectively, the "Defendants").

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

As further set forth below, and in the accompanying Affidavit of David E. Bowers submitted herewith, Yonkers routinely breached the payment terms of its subcontract with Gunite and Sections 756 and 757 of the General Business Law by habitually making late payments, and from mid-November 2012 to the present, failing to make any payments due against Gunite's approved payment requisitions. In fact, Yonkers has been paid up to 99.9% of its contract with the MTA, less retainage. However, Yonkers has paid Gunite only 66% of its subcontract. As a consequence, Yonkers owes Gunite the sum of \$1,835,898 on its base contract. Yonkers also owes interest of 1% per month on the unpaid balance as provided for in Section 756-b(1)(b) of the General Business Law.

In addition, Yonkers owes Gunite half of the ten (10%) percent retainage currently being withheld by Yonkers, or \$432,540.50 out of \$865,081. The MTA is only holding five (5%)

percent retainage on Yonkers' contract. Under Section 756-c of the General Business Law, Yonkers is not permitted to hold more than the equivalent percentage on Gunite's contract. Accordingly, Yonkers owes Gunite \$432,540.50, plus interest of 1% per month as provided for in Section 756-c of the General Business Law.

Finally, Yonkers owes Gunite \$477,796 for extra work. Yonkers authorized and approved extra work during the course of the Project. As such, Gunite is entitled to partial summary judgment in the sum of \$2,746,235.50, which includes \$1,835,898 (unpaid requisitions), \$432,540.50 (retainage) and \$477,796 (extra work).

STATEMENT OF FACTS

For a complete statement of the relevant facts, the Court is respectfully referred to the Affidavit of David E. Bowers, sworn to March 7, 2014 (the "Bowers Affidavit"), including the exhibits annexed thereto.

ARGUMENT

POINT I

GUNITE IS ENTITLED TO PARTIAL SUMMARY JUDGMENT BECAUSE THERE IS NO TRIABLE ISSUE OF MATERIAL FACT

There is no triable issue of material fact concerning Gunite's right to payment of \$1,835,898, or Defendants' obligation to make such payment. A motion for summary judgment shall be granted in favor of the movant if "upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212(b). Summary judgment is proper when there is no dispute as to the material facts. *Town of Harrison v. County of Westchester*, 13 A.D.2d 708, 214 N.Y.S.2d

229 (2d Dept. 1961) (holding that summary judgment should be granted if the record contains a sufficient showing of undisputed facts to permit the issue to be determined as a matter of law).

Summary judgment must be granted if the opposing party fails to deny the moving party's factual allegations, or if the record of undisputed facts is sufficient for the court to resolve the case as a matter of law. *N.Y. Tele. Co. v. Telesystems Corp.*, 27 A.D.2d 866, 277 N.Y.S.2d 481 (3d Dept. 1967) (holding that summary judgment is a proper remedy where the controlling facts are undisputed and where the ultimate facts would not be changed by a further development of any of the other issues).

Any factual issues raised in opposition to a motion for summary judgment must be "material" or "substantial". The factual issues raised in opposition must be of consequence, bearing on the essence or the merit of the action, and related to a matter of substance, rather than form. *Mlcoch v. Smith*, 173 A.D.2d 443, 570 N.Y.S.2d 70 (2d Dept. 1991) (explaining that the "shadowy semblance of an issue of bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment"). Finally, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 598 (1980) requires that the "one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim".

Here, it is undisputed that Gunite is entitled to payment of \$1,835,898 based on the facts presented in the attached Affidavit of David E. Bowers, sworn to March 7, 2014 (the "Bowers Affidavit"), as well as the accompanying Statement of Undisputed Facts pursuant to Rule 19-A of Section 202.70 Rules of the Commercial Division of the Supreme Court. Accordingly, the court should resolve the issues presented in this motion for partial summary judgment as a matter of law.

POINT II

GUNITE IS ENTITLED TO PARTIAL SUMMARY JUDGMENT BASED ON YONKERS' FAILURE TO PAY GUNITE ACCORDING TO PAYMENT TERMS OF THE SUBCONTRACT AND SECTIONS 756 AND 757 OF THE GENERAL BUSINESS LAW.

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. (Bowers Aff., ¶ 3). Indeed, "[n]o other contract breach is more material to contracts (and their subcontractors and suppliers) than unjustified nonpayment of material amounts." *Bruner and O'Conner on Construction Law*, § 18.26 (West Pub. 2010); *See Paterno & Sons, Inc. v. Town of New Windsor*, 43 A.D.2d. 863 864, 351 N.Y.S.2d 445, 447 (2d Dept. 1974) (failure of Owner to make periodic payments to Contractor constituted a material breach).

1. Gunite is Entitled to the Sum of \$1,835,898 on its Adjusted Base Contract, Including 1% Interest Per Month on the Amount Due, because Yonkers Breached Provisions of the Subcontract.

During the period of June 2011 through completion of Gunite's Work in September 2012, Gunite submitted a total of thirteen (13) periodic payment requisitions to Yonkers. (Bowers Aff., ¶ 16, at Exhibit 6). As of September 30, 2012, Gunite billed the entire approved Subcontract value of \$8,650,813, less ten (10%) retainage, or \$7,785,732. (Bowers Aff., ¶ 17, at Exhibit 6). All of the amounts requested were approved and submitted by Yonkers to the MTA. (Bowers Aff., ¶ 23).

The Subcontract required Yonkers to make progress payments within fifteen days after it received payment from the MTA. (Bowers Aff., ¶ 9, at Exhibit 4, Art. 4.2). Article 4.2 of the Subcontract provides, in pertinent part, as follows:

Contractor will pay Subcontractor within Fifteen (15) days after Contractor receives payment from Owner for Subcontractor's

Work based on the quantities approved and paid for by the Owner, and on the basis and in the manner stipulated in the Prime Contract. To the fullest extent permitted by law, such payment by the Owner shall be an express condition precedent to Contractor's obligation to make payment to Subcontractor.

(Bowers Aff., ¶ 9, at Exhibit 4, Subcontract, at Art. 4.2). The payment terms of the subcontract are prohibited by New York General Business Law §756-a(3)(a)(ii).

Payment provisions of a contract which differ from those established Section 756-a(3)(a)(ii) of the General Business Law are void and unenforceable under Section 757 of the General Business Law. Section 756-a(3)(a)(ii) of the General Business Law provides as follows:

The contractor must thereafter tender payment to its subcontractor or the proportionate amount paid by the owner for the subcontractor's work within seven days of having received payment for the work (emphasis added).

Also see Donninger Const., Inc. v. C.W. Brown, Inc., 113 A.D.3d 724, 724, 979 N.Y.S.2d 133, 134-35 (2d Dept. 2014) (contractor must tender payment to subcontractor within seven days of having received payment from the owner for the work). The parties may not change by contract the seven day payment period. *See* General Business Law §757(4) (“A provision, covenant, clause or understanding in collateral to or affecting a construction contract establishing payment provisions which differ from those established in subdivision three of section seven hundred fifty-six-a” . . . “shall be void an unenforceable”).

Here, Yonkers did not comply with the payment terms referenced in either the Subcontract or Section 756-a(3)(a)(ii) of the General Business Law. (Bowers Aff., ¶¶ 16-24). Instead, the payments Yonkers issued to Gunitite were routinely late. (Bowers Aff., ¶ 3). Yonkers repeatedly issued partial payments and carried a running balance of money owed to Gunitite from requisition to requisition. (Bowers Aff., ¶ 21). More importantly, however, Yonkers failed to pay certain requisitions entirely. (Bowers Aff., ¶ 17). Through September

2012, Yonkers paid Gunitite only \$5,949,834 or roughly 66% of the Subcontract value, leaving a balance of \$1,835,898 plus retainage of \$865,081. (Bowers Aff., ¶ 17, at Exhibit 10).

Yonkers failed to make payments to Gunitite despite having received payment from the MTA. (Bowers Aff., ¶¶ 19-20). Yonkers openly admitted at the deposition of its Project Manager Robert Stepien, Yonkers was paid by the MTA for all amounts due under its contract, with the exception of \$250,000, plus a holdback of five (5%) percent retainage. (Bowers Aff., ¶ 19, at Exhibit 8). Mr. Stepien testified as follows:

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

Mr. Stepien: "No"

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

Mr. Stepien: "\$250,000"

Mr. Canizio: "Everything except retainage"

Mr. Stepien: "And Retainage"

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

Mr. Stepien: "Five percent."

(Bowers Aff., ¶ 19, at Exhibit 8). In fact, approved payment records from the MTA generated after Mr. Stepien's deposition indicate that the amount unpaid to Yonkers has been reduced further to \$49,502.19, or roughly 99.9% of its contract, exclusive of retainage. (Bowers Aff., ¶ 20, at Exhibit 9). Notwithstanding the foregoing, Yonkers continues to hold \$1,835,899 on Gunitite's subcontract, plus the full ten (10%) percent retainage of \$865,081. (Bowers Aff., ¶ 16).

Yonkers failure to pay Gunitite's payment requisitions is without justification because all payment requisitions were approved by Yonkers and incorporated into Yonkers' payment

requests to the MTA. (Bowers Aff., ¶ 23). Yonkers was obligated to make payments to Gunite within seven (7) days or, at the latest, fifteen (15) days after receipt of payment from the MTA. *See* General Business Law §756-a(3)(a)(ii). Yonkers failed to do so and, accordingly, Gunite is entitled to summary judgment of \$1,835,899 for its base subcontract work and approved extra work.

If a contractor fails to timely pay invoices within the time frame set forth in Section 756-a(3)(a)(ii) of the General Business Law, interest at the rate of 1% per month accrues beginning the day after payment is due on each invoice as set forth under Section 756-b(1)(b) of the General Business Law; *See also W&W Glass, LLC v. 1113 York Ave. Realty Co.*, 113 A.D.3d 563, 563, 979 N.Y.S.2d 318, 320 (1st Dept. 2014). Under Section 757(4) of the General Business Law, the parties may not change by contract the obligation to pay interest. Gunite is entitled to 1% interest per month on the balance of each payment requisition.

2. Gunite is Entitled to a Portion of its Retainage in the Sum of \$432,540.50, including 1% Interest Per Month on the Amount Due.

The Subcontract allowed Yonkers to withhold ten (10%) percent retainage on each of Gunite's approved payment requisitions. (Bowers Aff., ¶ 9, at Exhibit 4, Subcontract, at Art. 4.2). Article 4.2 of the Subcontract provides, in pertinent part, as follows:

Progress payments shall be made on the basis of ninety (90%) percent of the value of Subcontractor's Work, as determined by the Owner, or its representative, if any, at the prices stipulated herein.

(Bowers Aff., ¶ 9, at Exhibit 4, Subcontract, at Art. 4.2). Section 756-c of the General Business Law provides that amounts withheld by contractor from payments to its subcontractor, as retainage, may not exceed the actual percentage that owner retains from payments to contractor. Section 756-c of the General Business Law provides, in pertinent part, as follows:

A contractor or subcontractor may also retain a reasonable amount for retainage so long as the amount does not exceed the actual percentage retained by the owner.

It is clear, based upon the MTA's payment records, that the MTA has released all retainage to Yonkers except for five (5%) percent of the contract value. (Bowers Aff., ¶ 20, at Exhibit 9). Yonkers is not entitled to withhold ten (10%) percent retainage on its subcontract with Gunitite. *See* General Business Law §756-c. Accordingly, Gunitite is also entitled to partial summary judgment for at least one half of the retainage currently being withheld by Yonkers, or \$432,540.50 out of \$865,081. (Bowers Aff., ¶ 26).

Section 756-c of the General Business Law further provides for interest on retainage sums wrongfully withheld, in pertinent part, as follows:

In the event that an owner fails to release retainage as required by this article, or the contractor or subcontractor fails to release a proportionate amount of retainage to the relevant parties after receipt of retainage from the owner, the owner, contractor, or subcontractor, as the case may be, shall be subject to the payment of interest at the rate of one percent per month on the date retention was due and owing.

Accordingly, Gunitite seeks interest of one (1%) percent per month on the above-reference retainage.

3. Gunitite is Entitled to Payment in the Sum of \$477,796 for Approved Extra Work Performed on Behalf of Yonkers.

Gunitite is also entitled to payment of \$477,796 for forty-one (41) extra work claims performed on behalf of Yonkers between March 2012 and September 2012, that Yonkers neither rejected nor disputed (the "Change Orders"). (Bowers Aff., ¶ 27, at Exhibit 12). Yonkers has not compensated Gunitite for any of the extra work despite having authorized and approved the work. (Bowers Aff., ¶¶ 29-30, at Exhibits 14-19). Likewise, Yonkers' refusal to execute written Change Orders prevented Gunitite from billing Yonkers for such extra work even though the

amounts are noted on Gunite's payment requisitions. (*Compare* Bowers Aff., ¶ 32, and Bowers Aff., ¶ 16, at Exhibit 6). Accordingly, Gunite is entitled to partial summary judgment in the sum of \$477,796 for approved extra work performed by Gunite at the Project.

CONCLUSION

As a result of Yonkers material breach of provisions of the Subcontract and Sections 756 and 757 of the General Business Law, and for the reasons set forth in this Motion for Partial Summary Judgment, Gunite is entitled to partial summary judgment of the following:

1. Partial summary judgment in the sum of \$1,835,898 on its adjusted base contract, including 1% interest per month on the amount due;
2. Partial summary judgment in the sum of \$432,540.50 of its retainage, including 1% interest per month on the amount due; and
3. Partial summary judgment in the sum of \$477,796 for approved extra work performed by Gunite at the Project.

Accordingly, Gunite is entitled to partial summary judgment in the total sum of \$2,746,235.50.

Dated: New York, New York
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