SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

SUPERIOR GUNITE,

Plaintiff,

-against-

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

Defendants.

Index No.: 54272/13

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE PLAINTIFF'S NOTE OF ISSUE AND TO STAY ACTION

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Defendants Yonkers Contracting Company, Inc., and Zurich American Insurance Company ("Defendants") submit this Memorandum of Law in support oftheir Motion to Vacate the Note of Issue of Plaintiff Superior Gunite ("Superior" or "Plaintiff") and to temporarily stay the action.

PRELIMINARY STATEMENT

Simply stated, this case is not ready for trial because discovery is not currently completed; nor can it be completed at this time. Various issues surrounding discovery continue to evolve due to Superior's decision to commence this lawsuit prior to final acceptance of their work that is the subject of this litigation.

The underlying action is for an alleged breach of contract concerning Superior's performance of work on a mega-construction project (the "Project"). Superior's subcontract alone was originally for $7.5-million on this $100-million plus Project. The work on the Project entailed the construction of parts of a new subway station in the area of 34th Street and 10th Avenue in New York City. This subway station is massive and takes up nearly a full city block in New York City near the Jacob Javits Center. Yonkers was the General Contractor on the Project, and Superior was a subcontractor that was to perform "shotcrete" work. Shotcrete is essentially concrete that is "shot" out of a hose and pneumatically applied.

Superior instituted this action seeking roughly $3.2-million dollars, asserting purportedly wrongful contract deletions and backcharges, as well as claims for premium time pay and extra work. Thereafter, Defendant Yonkers filed a counterclaim against Superior for breach of contract,

asserting, inter alia, that Superior had not completed its work under the subcontract, had not performed work properly, and had delayed the Project.

About four months after this lawsuit was filed, the owner of the Project, the Metropolitan Transportation Authority ("MTA"), discovered major issues concerning the structural integrity of the concrete installed by Superior. These new issues continue to delay MTA's final acceptance of Superior's work, and thus, Defendants' ability to quantify the damages appropriately sought in their counterclaims against Superior. The ongoing evolution and analysis of these new issues continue to generate correspondence, engineering reports, and construction data that in turn continue to expand the breadth of available discovery information.

Indeed, due to these issues with Superior's shotcrete work, MTA has yet to issue a certificate of Final Completion for the Project, continues to withhold retainage, and has threatened to assert liquidated damages, rendering completion of discovery impossible at this time. At $10,000 per day, a liquidated damage assessment will significantly impact the absolute value of this matter's existing claims and generate vital discovery information. These issues are nothing new. Defendants have made the Court well aware of this situation through correspondence and numerous Conferences, both in person and on the telephone. While we understand the Court's desire to move cases along, this case simply is not ready. Obviously, Superior wants to ignore these facts and push this matter to Trial. Nevertheless, the fact of the matter is that this case is not ready and will not be ready for Trial until all discovery related to this breach of contract dispute can be determined, an opportunity is thereafter given to exchange documents and interrogatories, depositions can be taken, and expert reports prepared.

Defendants have done everything they can to promptly and continually alert the Court as to discovery issues that have affected this matter's ability to move forth to Trial – simply, this case

is not ready for Trial. Plaintiff, however, has filed a Note of Issue with an accompanying Certificate of Readiness that contrastingly and erroneously states that discovery is completed – a blatant falsity.

Defendants respectfully request that this Court vacate the Note of Issue and implement a temporary Stay of Action for a period of six months until all necessary discovery information has been developed and made available to the parties, and with the intention that the parties reconvene before the Court to reevaluate this case's ability to move forward. After such time, Defendants anticipate that significant events will have taken place so as to enable the parties to this lawsuit to move forward and efficiently resolve all outstanding issues in one single trial. To authorize the note of issue at this particular juncture will not promote expeditious management of this case, but rather prematurely thrust the parties into a trial that they are not prepared for. Further, any trial would not resolve all of the issues and much of this would wind up being tried a second time if the Note of Issue stands. This makes no sense for the Parties, nor, most importantly, for this Court. It makes much more sense to try this matter in one action/trial, rather than purposefully splitting causes of action.

Even if the Court denies Defendants' request to issue a temporary Stay of Action so that all issues can be resolved in one trial, the Court should vacate the Note of Issue. Because Plaintiff has failed to make its key witness available for deposition, despite numerous assurances to Defendants and the Court that it would do so, outstanding discovery obligations remain, and no issues are currently ready for trial.

LEGAL ARGUMENT

Point I. Defendants' Motion to Vacate Plaintiff's Note of Issue is timely submitted

Section 202.21(e) of the Rules and Regulations of the State of New York ("NYCRR") states, "Within twenty (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." 22 NYCRR § 202.21(e). Furthermore, if a party moves to vacate the note of issue within 20 days of its filing, the only requirement is that the movant submit an affidavit demonstrating why the case is not ready for trial. Audiovox Corp. v. Benyamini, 265 A.D.2d 135, 139 (2d Dep't 2000); See Mosley v. Flavius, 13 A.D.3d 346, 346 (2d Dep't 2004).

Pursuant to the Court's Pre-Trial Readiness Conference Order issued on January 28, 2014 (McKenna Affirmation Ex. 10), Plaintiff filed a Note of Issue and Certificate of Readiness on February 6, 2014. (Id. Ex. 11.) In accordance with NYCRR and well settled New York case law, Defendants' submission of this Motion to Vacate the Note of Issue is timely because it is filed within 20-days of Plaintiff's Note of Issue. Therefore, Defendants need only demonstrate that this case is not ready for trial in order to vacate the Note of Issue.

Point II. The Material Facts within the Certificate of Readiness are incorrect because they falsely indicate that this matter is ready for Trial

New York Appellate Courts have consistently and uniformly held that a Note of Issue should be vacated when it is based upon a Certificate of Readiness that contains erroneous facts, such as in stating that all pretrial discovery has been completed or waived. Cromer v. Yellen, 268

A.D.2d 381, 381 (1st Dep't 2000); Garofalo v. Mercy Hospital, 271 A.D.2d 642, 642 (2d Dep't 2000); Simon v. City of Syracuse Police Dept., 13 A.D.3d 1228, 1228 (4th Dep't 2004). These Courts have also vacated notes of issue solely where depositions had yet to be completed. See Savino v. Lewittes, 160 A.D.2d 176, 177 (1st Dep't 1990) (finding that note of issue should have been vacated where certificate of readiness contained an incorrect material fact in stating that discovery was completed when it was undisputed that the defendant still sought to depose the plaintiff); See also Cromer, 268 A.D.2d at 381 (granting motion to vacate note of issue where certificate of readiness wrongly indicated that outstanding depositions had been waived and all necessary discovery had been completed).

Plaintiff's Certificate of Readiness states, "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." (McKenna Affirmation Ex. 13.) Each of these material facts is wrong. Discovery information for this matter is still in development because Superior's work under the subcontract has yet to be deemed officially completed by the MTA. (McKenna Affirmation ¶ 44); (Strobel Aff. ¶ 22.) It is also imperative that Defendants know the extent of any imposed liquidated damages, and the MTA has yet to assess them. (Strobel Aff. ¶ 26.) Without this assessment, Defendants cannot accurately determine the true extent of damages caused by Superior. (Id. ¶ 24.)

Moreover, there are still outstanding requests for discovery. Defendants still seek to depose the key witness of Plaintiff, who was not produced and if produced, would only need to be produced a second time later when all of the issues are resolved. Moreover, Defendants have not waived their rights to further discovery. Indeed, at the Pre-Trial Readiness Conference, counsel for Defendants objected on the record to the issuance of any Note of Issue in this matter.

(McKenna Affirmation ¶ 44.) For these reasons, this case is not ready for trial, because necessary discovery has yet to be completed – at no fault of Defendants.

Lastly, Defendants have not been given reasonable opportunity to complete discovery, as facts relevant to the resolution of this case are still developing, even now.

i. The Development of Necessary Discovery Information is still in Progress and Cannot Yet be Determined

After the commencement of this litigation, the MTA discovered major issues with the concrete installed by Superior. (Id. ¶ 21.) The MTA then went on to issue a Stop Work Order on the Project. (Id. Ex. 6.) As time has revealed, the issues leading to the Stop Work Order are due to defects in Superior's work. (Strobel Aff. Ex. 2.) The investigation of these new issues effectively launched an entire new phase of discovery that was unanticipated by Yonkers and thrust upon Yonkers during this lawsuit. As the investigation of Superior's defective work continues, discovery information will likewise continue to develop until such time as the MTA officially accepts and signs off on the concrete work installed by Superior – an event that has yet to occur. (McKenna Affirmation ¶ 40); (Strobel Aff. ¶ 18-19, 23.) At present, Yonkers cannot tell the extent or nature of the damages that will be suffered because they are still on-going. (Strobel Aff. ¶ 23-24.) Yonkers also does not know if it will be assessed with liquidated damages (at $10,000 a day, per Yonkers' contract with MTA), which could be potentially in the millions of dollars, based on Project delay to Final Acceptance, or assessed with costs related to the follow-on contractor, who cannot work in this area until these issues are resolved. (McKenna Affirmation ¶ 44); (Strobel Aff. ¶ 26.) More specifically, ongoing engineering analyses and the development of construction data continue to develop and expand the breadth of discovery information related to Superior's work on the Project. (McKenna Affirmation ¶ 22, 25, 32, 40); (Strobel Aff. ¶ 23-25.) Yonkers

cannot accurately assess the totality of damages caused by Superior until all necessary discovery information is generated and made available – including the discovery information that is currently in development. (Strobel Aff. ¶ 23-25.)

The discovery issues of this case are not a novel concept to this matter. Defendants have taken great strides to ensure that the Court was informed of these discovery issues and their potential to impact the Court's imposed discovery schedule. Since the inception of this lawsuit, Defendants have informed this Court of these issues by letter (McKenna Affirmation Ex. 8), four conference calls (Id. ¶ 26, 28, 35, 43), and three court appearances (Id. ¶ 23, 40, 44). Defendants have acted in good faith and in accordance with the rules of the Court in order to promptly address and resolve these discovery issues well in advance of any potential impact that they might have upon the discovery schedule imposed by this Court. There is no valid reason to now foreclose discovery on the basis of a Certificate of Readiness that flagrantly depicts discovery as completed – especially when considering that this Court has known all along that discovery is still ongoing and incomplete. How can discovery be complete when the action is based on the very work under Superior's subcontract that has yet to be accepted by MTA?

ii. Defendants have not been Afforded the Opportunity to Depose Superior's Key Witness despite their good faith efforts to do so and Plaintiff's repeated Assurances to Produce the Witness

Plaintiff's Certificate of Readiness contains an incorrect material fact in stating that discovery for this matter is complete – it is not. Defendants have not been able to depose Mr. Ron Federico, the Superior employee and key witness who handled all significant correspondence, oversaw operations, and scheduled Superior's crews throughout the overwhelming majority of the Project. (Id. ¶ 27.) Since Mr. Federico left Superior's employment, he has resided in California.

(Id.) The Defendants have attempted to schedule the deposition of Mr. Ron Federico by contacting Superior on numerous occasions – all to no avail. (Id. ¶ 27-29, 31.) Despite repeated assurances by counsel for Superior to both Defendants and the Court that Mr. Federico would be available to testify, Superior never provided any definitive dates as to Mr. Federico's availability. Specifically, Superior assured the Court by conference call on November 27, 2013, that Mr. Federico would be available to testify by mid-January, thereby eliminating the need for a subpoena. (Id. ¶ 28.) While the Court adjourned the discovery end date from December 11, 2013, to January 16, 2014, in order to accommodate this assurance, it was never fulfilled by Superior. (Id.) Superior also assured the Defendants by phone conversations on December 3 and December 19 that Mr. Federico would be available – these assurances also went unfulfilled. (Id. ¶ 29, 31.) To the contrary, Defendants have cooperated with and accommodated Plaintiff in producing Yonkers' two witnesses for depositions – both of which have taken place prior to this matter's established discovery end date of January 16, 2014, and in accordance with the Court's orders. (Id. ¶ 29, 31, 33, 34, 35.)

Through its numerous assurances, Plaintiff has led Defendants into reasonably believing that Mr. Federico would be available for deposition testimony. In effect, Defendants have been kept at bay in reasonably anticipating that Mr. Federico would be available while the discovery clock has run out of time. At no fault of Defendants, discovery is incomplete due to this outstanding deposition.

iii. Defendants Have Not Waived their Rights to Further Discovery.

Defendants emphasize that at no point during the life of this lawsuit have they ever waived their rights to discovery. In fact, during the Pre-Trial Readiness Conference with this Court on January 28, 2014, counsel for Defendants objected on the Record to the issuance of a Trial

Readiness Order for the very purposes of preserving Defendants' rights to conduct further and necessary discovery. (Id. ¶ 44.)

Point III. The Action Should be Stayed until such Time as Discovery is completed.

This action should be temporarily stayed for the purposes of facilitating the development of necessary discovery information and maintaining judicial efficiency. As the development of vital discovery information is still ongoing, the parties to this action have yet to obtain discovery information that is essential to assess the totality of their respective claims and damages – especially considering that the magnitude of potential liquidated damages has yet to be determined by the MTA. Additionally, the deposition of Mr. Federico is still outstanding and would most sensibly take place after the production of all discovery information. To prematurely foreclose discovery and deem this matter ready for trial based on an erroneous Note of Issue would be a waste of time and efficiency, because the successful and complete resolution of this matter ultimately depends upon the production and availability of all discovery information. Otherwise, both this Court and the parties will senselessly be forced to revisit the same facts and issues a second time after the production of all such discovery information.

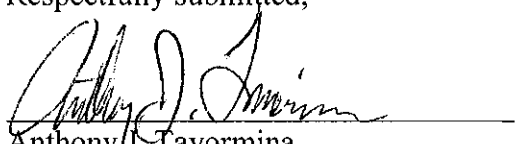
Defendants have consistently agreed with this Court's prior recommendations to stay this action (Id. ¶ 35, 40), and now respectfully request that this Court grant a temporary Stay of Action for a period of six months with the intention to reconvene thereafter in order to reevaluate this case's ability to move forward.

CONCLUSION

As evidenced in the foregoing paragraphs, this case is not ready for trial because discovery is incomplete and ongoing. To proceed with this matter in two separate parts involving one contract makes no legal, factual, or judicial sense. As such, Defendants respectfully request that Plaintiff's note of issue be vacated and this action temporarily stayed for a period of six months with the intention to reconvene thereafter in order to reevaluate this case's ability to move forward, together with other and further relief as this Court may deem just and proper.

Dated: February 21, 2014

Respectfully submitted,



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