

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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SUPERIOR GUNITE,

Plaintiff,

Index No. 54272/2013

-against-

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

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

Defendant.
-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ARMANDO RAMOS, being duly sworn, deposes and says:

1. I have been a project engineer for plaintiff Superior Gunite ("Gunite") since April 2012. I held that position with respect to the project which is the subject of this action from that date to the present. As such, I am fully familiar with the facts set forth herein.

2. This reply affidavit is respectfully submitted in further support of the motion for summary judgment by plaintiff, Gunite against defendant, Yonkers Contracting Company, Inc. ("Yonkers") and in reply to the opposition submitted by Yonkers.

3. In Gunite's moving papers, it was established that Yonkers paid Gunite only 66% of its subcontract price, even though Yonkers received payment of 95% of its Prime Contract from the MTA. In opposing Gunite's motion, Yonkers does not dispute the lopsided disparity between payments received from the MTA and those made to Gunite. Instead, Yonkers maintains that it has rightfully withheld payment because there are "leaks" in the structure,

caused by Gunite, and because it has back charges against Gunite which offset any unpaid balance.

A. Leaks In The Structure

4. As the Court is aware based on Yonkers separate motion to strike the note of issue and stay this action, and as I am advised by counsel, the issue of “leaks” at the Project was not raised by Yonkers pleadings and was not been the subject of discovery in this action. Indeed, as the pleadings reflect (Exhibits 1-3 to the Bowers Aff.), this action was commenced in or about March 25, 2013. Yonkers interposed its answer and counterclaim on or about May 20, 2013, and never amended its pleadings. Allegations concerning leaks at the Project did not arise until October 2013. In fact, if one looks at Yonkers’ August 7, 2013 statement of its claim (Ex. 23 to the Bowers Aff.), there are **no claims** relating to either leaks or liquidated damages.

5. Notwithstanding the fact that the Court previously advised Yonkers that it would not consider issues outside the pleadings, or evidence not produced in discovery, I am told that Yonkers has ignored this directive and advanced just such arguments in opposition to Gunite’s motion.

6. In any case, there is simply no evidence to suggest that the placement of shotcrete, which is not designed or intended to be a waterproof material, caused 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. In fact, the leaks at issue could be caused by any number of deficiencies in the waterproofing, which is the responsibility of Yonkers and its separate waterproofing subcontractor. As such, Yonkers reference to leaks is

merely an attempt to divert the Court's attention from Yonkers' breach of its payment obligations.

7. Likewise, Yonkers repeated reference to threatened liquidated damages by the MTA is another baseless argument. In fact, the MTA declared the Project to be substantially complete in mid-February 2014, and has not asserted any liquidated damages against Yonkers. Lastly, even if the MTA were to assert a claim that Gunite delayed the work, which it did not, such claims could be made in a separate action.

B. Back Charges To Superior Gunite's Subcontract

8. Yonkers's other argument is that amounts due to Gunite are offset by Yonkers' back charges for work it purportedly performed on Gunite's behalf. Yonkers maintains, even though it did not provide Gunite with any advanced written notice, that offsets of more than \$1.7 million are owed by Gunite, due to its failure to perform certain aspects of its Subcontract. However, Yonkers fails to offer any proof, in proper evidentiary form, to support these claims or to establish that it gave Gunite the contractually required notice. Indeed, Yonkers cannot establish that it satisfied the three day written notice requirement, which is a condition precedent to its right to correct Gunite's work.

9. The Subcontract provides at Article 10.1 as follows:

“vi) if the Subcontractor, in the opinion of the Contractor, shall violate any of the terms of this 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 for mailing, shall have the right, among other things, to:

(4) correct any unacceptable or deficient Work with its own forces or hire a substitute contractor with all resulting cost thereof to be borne by the Subcontractor.”

(Ex. 4 to the Bowers Aff. at Article 10.1)

10. Yonkers never provided Gunite with a three day notice for any of its back charges, never notified Gunite that it failed to perform any work, and never furnished Gunite with contemporaneous records of the costs allegedly incurred to correct it. To the present, Yonkers still has not provided a detailed itemization of its back charges.

11. On the contrary, the few e-mails referenced in Yonkers' opposition, evidence little more than routine project communications. None of these e-mails communicate that Yonkers was charging Gunite's account or compiling back charges in the magnitude of \$1.7 million dollars.

12. Likewise, there is no evidence as to when such back charges began, how much was charged during any particular period, or how Yonkers amassed such huge counterclaims. In fact, Yonkers' back charges are nothing more than a last minute attempt to avoid payment of a just debt.

C. Clean Up

13. With respect to Gunite's cleanup responsibilities, the Subcontract provides: "any and all waste concrete and material necessary to perform this Subcontract shall be neatly placed within the site area for removal by the Contractor." (Ex. 4 to the Bowers Aff. at 3.) Thus, the Subcontract contemplated that Yonkers, as general contractor, is required to remove debris from the site once it is neatly placed by Gunite. Gunite followed the procedure requested by Yonkers by cleaning up any waste concrete and placing it in canvas refuse bags. I was on the project from April 2012 until the end of the work, and Yonkers never provided Gunite with written notice that it intended to back charge Gunite for Yonkers costs of removing waste concrete

which was Yonkers' responsibility. The one email referenced by Yonkers in support of its claim (Exhibit 10 to the Stepien affidavit) is an email dated September 26, 2012, which references a single incident of an overfilled refuse bag. It bears noting that Gunite performed little or no work after this date. This e-mail hardly constitutes "advanced" notice required to support more than \$600,000 in back charges, which presumably go back to the beginning of the project. The reason a general contractor, like Yonkers, is required to give prior notice of back charges, is to give the subcontractor an opportunity to perform the work itself, or dispute the charges if the work is outside of its scope. Here, there clearly was no written notice of Yonkers' intention to charge Gunite with cleanup costs from the beginning of the project, until the end.

D. Water Stop

14. The same holds true with respect to Yonkers back charges for installing PVC water stop. Gunite's Subcontract provides in the "Exclusions" section that the installation of PVC water stop is specifically excluded from its scope of work. (Ex. 4 to Bowers Aff. at 3) Despite this clear exclusion, Yonkers seeks to back charge Gunite for the cost of installing the PVC water stop. Once again, however, there was no written notification provided by Yonkers in compliance with Article 10 of the Subcontract (Ex. 4 to the Bowers Aff.), that it was performing a scope of work required to be performed by Gunite. The two emails identified in Yonkers opposition (Ex. 12 to the Stepien Aff.) merely identify isolated complaints about the construction of certain key ways (indentations in the concrete) that were installed by Gunite. There is absolutely no notification of any intention to back charge Gunite for anything, much less \$445,000 for the cost of installing PVC water stop throughout the project.

E. Bulkheads

15. Yonkers back charges concerning bulkheads in the sum of \$200,042, was likewise raised almost one year after the work was completed, and is tied to the installation of PVC water stop. Pursuant to the plans and specifications, PVC water stop was required to be installed in each wall section so that one half of the water stop was embedded in the end of the wall section. The other half the water stop was designed to protrude from the concrete, with the protruding end being encased in concrete when the next section was formed. Because the installation of PVC water stop was not part of Gunite's scope of work, these back charges are likewise improper. Moreover, the email relied upon by Yonkers (Ex. 14 to the Stepien Aff.), makes no mention of Yonkers back charging Gunite for the cost of installing bulkheads. As such, there is no basis for this alleged offset.

F. Extra work

16. Yonkers maintains that it does not dispute Gunite's entitlement to change orders 12.1 through 16.7 (Stepien Aff. at ¶ 27), and that its only disagreement with Gunite is that it did not receive appropriate back up. Attached as Exhibit "24" hereto, is the revised back-up substantiating the costs incurred in the performance of these change orders.

17. In sum, the back charges asserted by Yonkers have no merit, first, because Yonkers failed to provide Gunite with notice of the allegedly omitted work, and second, because, as is shown above, the work was excluded from Gunite's scope of work. Lastly, I am advised by counsel that claims concerning liquidated damages or leaks at the are not part of the present pleadings. Accordingly, these arguments provide no defense to Yonkers in this action.

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



ARMANDO RAMOS

Sworn to before me this
2nd day of April, 2014



NOTARY PUBLIC

MARK CANIZIO
Notary Public, State of New York
No. 43-4886827
Qualified in Richmond County
Commission Expires ~~February 17, 10~~
June 9, 2015