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 OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

As the basis for its Motion for Partial Summary Judgment, Plaintiff, Superior Gunite (hereinafter sometimes "Superior") relies on a *wholly inapplicable statute* and further disregards Defendant Yonkers' express contractual and statutory rights to contest and assert offsets to Plaintiff's payment demands. Plaintiff's motion fundamentally mischaracterizes and misapplies the applicable law and contractual provisions; attempting to transform limited prompt payment provisions into obligations of absolute liability regardless of Superior's own breach of contract. However there is no provision in the parties' subcontract or in any law that requires Defendant Yonkers Contracting Co. Inc. (hereinafter "Yonkers") to make further payments to the Plaintiff where i) Yonkers is entitled to withhold payment for damages in excess of $2 million due to Plaintiff's defective work; and ii) there exist bona fide factual disputes over the entitlement and value of extra work that Plaintiff alleges it performed.

This is especially true in the context of a summary judgment motion wherein Superior asks the Court to ignore its own defective work despite the fact that Yonkers' claims far exceed the amounts allegedly due Superior. New York law and precedent has repeatedly rejected subcontractors' attempts to obtain payment summarily where a prime contractor such as Yonkers has incurred damages due to defective work.

FACTUAL BACKGROUND

The underlying action involves an alleged breach of contract concerning Superior's performance of work on a $116-million construction project for the expansion of the Number 7 subway in New York City (the "Project"). This was a public project, awarded to Yonkers, as the General Contractor, pursuant to a Notice of Award issued by the Metropolitan Transportation Authority ("MTA"), on or about October 13, 2010. (Stepien Aff. Ex. 9, Mar. 20, 2014.) The

Project generally entailed the excavation and lining of a utility shaft, mining and lining of two inclined tunnels, lining of an existing connector tunnel, construction of a four-story ventilation building, and construction of a station entrance structure located at the eastside of 11th Avenue, between West 33rd Street and West 34th Street in New York City, New York. On or about March 3, 2011, Yonkers and Superior executed a $7.5-million contract (the "Subcontract") under which Superior agreed to undertake certain obligations as a subcontractor to Yonkers on the Project. (Bowers Aff. Ex. 4.) Superior was generally responsible for concrete work on the Project. (Id. § 2.)

In addition to work performed under Superior's base Subcontract, on or about June 1, 2012, Yonkers executed two Amendments to the Subcontract in order to compensate Superior for extra work performed. (Stepien Aff. ¶¶ 19, 25-26.) These two Amendments increased the base contract value by a net amount of $1.15-million and encompassed, among other things, nearly thirty change order requests. (Id.) Yonkers has paid Superior for the work performed under these two Amendments. However, the Amendments did not resolve all of the issues surrounding Superior's work and performance, and many issues remain unresolved today.

As work on the Project proceeded, numerous issues developed between Superior and Yonkers concerning Superior's performance of work. More specifically, Yonkers has asserted and withheld backcharges against Superior only as a result of being forced to perform Superior's own work under the Subcontract as well as Superior's failure to adequately perform this work. (Id. ¶ 24.) Conversely – Superior has claimed that it is entitled to payment of those contract monies, as well as for extra work in addition to the base Subcontract. (Id. ¶ 20.) Yonkers and Superior still disagree as to the value of these issues.

As the aforementioned issues remained disputed and unresolved, Superior instituted this action on or about March 7, 2013, asserting that Yonkers breached the Subcontract and seeking approximately $3.2-million. (Bowers Aff. Ex. 1.) Thereafter, 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 its work properly, and had delayed the Project. (See Id. Ex. 2.)

The MTA has further discovered problems with Superior's installed concrete. In particular, significant "voids" were found to exist in the shotcrete throughout the site and MTA issued a Stop Work Order on the Project in order to investigate the voids. (Id. ¶¶ 51-53.) Even when the voids were subsequently filled in with grout, water leaks continue to plague the Project since the voids also caused waterproofing materials to rupture. MTA's engineers believe Superior's defective concrete is responsible for these conditions. (Id. ¶ 54.)

Presently, the MTA has yet to issue a certificate of Final Acceptance for the Project because of the issues concerning Superior's defective concrete, and has not released retainage to Yonkers. (Id. ¶¶ 16, 18, 60.) Moreover, as remediation efforts continue, the magnitude of Yonkers' claims against Superior correspondingly continues to increase. (Id. ¶ 17.) Due to delays on the Project caused by Superior's defective concrete and the water leaks, the MTA is now assessing liquidated damages against Yonkers at $72,500 per day and applying them against Yonkers' retainage. (Id.)

STANDARD OF REVIEW

On a motion for summary judgment, the party opposing the relief is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties. Myers v. Fir Cab Corp., 64 N.Y.2d 806, 808 (N.Y. 1985). Summary judgment is inappropriate where questions of fact or credibility are raised that require a trial.

Zuckerman v. City of New York, 49 N.Y.2d 557, 560 (N.Y. 1980); Glick & Dolleck v. Tri-Pac Export Corp., 22 N.Y.2d 439, 441 (N.Y. 1968). It is well established that "'summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue". Rotuba Extruders v. Ceppos, 46 N.Y.2d 223, 231 (1978). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once the movant has made this showing, the burden shifts to the party opposing the motion "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986).

LEGAL ARGUMENT

POINT I. NEW YORK GENERAL BUSINESS LAW ARTICLE 35-E DOES NOT APPLY TO THIS SUBCONTRACT.

As an initial matter Plaintiff's motion for Summary Judgment must fail as a matter of law. Superior contends that Yonkers breached Sections 756 and 757 of Article 35-E of the New York General Business Law and further claims entitlement to payment and penalties thereunder. (Pl.'s Mem. of Law in Supp. of Pl.'s Mot. for Partial Summ. J. 4.) Superior further claims that Article 35-E renders the Subcontract provisions for time of payment, retainage, and interest void and unenforceable. (Id. 5.) Superior also cites to W&W Glass, LLC v. 1113 York Ave. Realty Co., 113 A.D.3d 563 (1st Dep't 2014), in claiming entitlement to monthly interest on the balance of each payment requisition. (Pl.'s Mem. of Law in Supp. of Pl.'s Mot. for Partial Summ. J. 7.)

However, Superior's reliance upon New York General Business Law and the one case which it cites is without basis. Simply stated, Superior has relied upon an inapplicable statute.

Article 35-E, Section 756 of the New York General Business Law expressly defines the scope of agreements to which the law applies:

> **For purposes of this article a construction contract shall not include any such contract made and awarded by** the state, any public department, **any public benefit corporation**, any public corporation or official thereof, or a municipal corporation or official thereof **for construction, reconstruction, alteration, repair, maintenance, moving or demolition of any public works project nor any contract with a** contractor or **subcontractor which is part of such project** . . .

N.Y. Gen. Bus. Law § 756(1) (2014) (emphasis supplied).

The plain language of the statute makes the subsequent sections 756-a, 756-b, 756-c and 757, of Article 35-E, upon which the Plaintiff bases its motion, inapplicable to this matter. Each of those sections refers to and incorporates the definition of "construction contract" set forth in 756. That definition of *expressly excludes* both i) a public project contract awarded by a public benefit corporation and ii) any subcontract ("contract with a subcontractor") which is part of that public project. Id.; see generally, People v. Williams, N.Y.S.2d 629968 (N.Y. 2012) (statutes should be accorded the meaning of their plain language).[1]

Section 1263(1)(a)(1) of the New York Public Authorities Law establishes and expressly designates the MTA as a "public benefit corporation." N.Y. Pub. Authorities Law § 1263(1)(a)(1) (2014). Insofar as the prime contract was awarded by a public benefit corporation, neither the prime contract between the MTA and Yonkers, nor the subcontract between Yonkers and Superior,

[1] See also Duane Morris "Alerts and Updates", published March 5, 2010 –stating that the New York General Business Law was amended to ensure subcontractors are timely paid for work **on private construction projects.**

fall within the purview of Article 35-E. The scope of the New York General Business Law, Article 35-E is limited to private construction contracts and cannot provide a legal basis upon which summary judgment may be granted.[2] Accordingly, any and all of Superior's claims predicated on this Article must therefore be denied.

POINT II. NEW YORK STATE FINANCE LAW 139-f PROVIDES A STATUTORY BASIS FOR WITHHOLDING PAYMENT, PRECLUDING AN AWARD OF SUMMARY JUDGMENT.

While never asserted in Superior's Motion for Summary Judgment, to the extent that Superior intends to rely upon the payment statute that is applicable to the Project – State Finance Law 139-f, "Payment on Public Work Projects"- Superior cannot find alternative support for its motion.

A. Summary Judgment Is Inappropriate Insofar As Section 139-f(2) Allows Yonkers To Withhold For Claims Against Superior That Have Not Been "Suitably Discharged."

While New York State Finance Law Section 139-f(2) provides certain time frames in which contractors are to make subcontract payments, it expressly provides that a 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." N.Y. State Finance Law, §139-f(2).

The Southern District of New York has had cause to examine this statute, and has stated, "the only practical and sensible interpretation of this grant is that it permits the contractor to withhold such payments beyond the date otherwise due in circumstances where the contractor has identifiable claims, liens or judgments against the subcontractor and the claims, liens or judgments

[2] Superior's citation to W&W Glass therefore provides no support either, as it similarly involves a breach of a private (not public) contract claim.

have not been suitably discharged." Pottstown Fabricators, Inc., v. Manshul Construction Corp., 927 F. Supp. 756, 757 (S.D.N.Y. 1996).

In the Pottstown case, closely analogous to the one at hand, the plaintiff subcontractor, in a motion for summary judgment, argued that the defendant contractor was required to make payments under Section 139-f. By submitting an affidavit attesting that it began registering complaints with the plaintiff within four months of the plaintiff's commencing performance on the job, the defendant contractor successfully raised an issue of fact as to whether or not the plaintiff had identifiable claims against its subcontractor. "Such factual disputes preclude an award of summary judgment." Id. at 758.

The Court correctly recognized that New York's prompt payment statutes do not, as Plaintiff argues, create an absolute duty to remit payment. Rather, New York law recognizes that the existence of claims by the Contractor permits withholding of payment from a subcontractor.

This issue was similarly addressed in the matter of R.P. Brennan General Contractors & Builders, Inc. v. Bovis Lend Lease LMB, Inc., 15 Misc.3d 1134(A) (N.Y. Co. Sup. Ct. 2007). In that case, a subcontractor on a state project asserted claims against the prime contractor for non-payment – seeking summary judgment, as Superior does, based on a prompt payment law and subcontract requiring payment within seven days of payment from the owner. Id. at *3. In denying the subcontractor summary judgment, the Court noted:

> In order to demonstrate a prima facie right to payment, however, [the subcontractor] was not only 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**.

Id. (emphasis supplied).

The Court further noted that, in opposition to the subcontractor's summary judgment, the general contractor had alleged and submitted evidence that the subcontractor had not been paid due to substantial default under the contracts. While the subcontractor claimed that the "self-serving allegations of default are a ruse to avoid payment," the Court nevertheless held that the prime contractor had raised sufficient allegations and that issues of credibility put the matter beyond the scope of a motion for summary judgment. Id. at *4. This decision was later affirmed by the Appellate Division which stated that 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." R.P. Brennan, General Contractors and Builders v. Bovis Lend Lease LMB, Inc., 47 A.D. 3d499 (NY A.D. 1st Dept. 2008).

All of the above precedent reinforces the reasonable and fair rule that prompt payment statutes allow contractors such as Yonkers to withhold payment where a subcontractor has failed to perform its contractual obligations. A subcontractor seeking summary judgment on its claims cannot merely rely on its billing or owner payment – rather it must additionally show that there exists no disputed fact as to the sufficiency of its performance. Superior cannot do so.

B. Yonkers Has Asserted Bona Fide Identifiable Claims Against Superior That Preclude Summary Judgment.

In the instant case, Yonkers' evidence and allegations of Superior's default are beyond any mere ruse. As described above and in the attached affidavit of Rob Stepien, Yonkers has attested that it withheld payment from Superior in order to satisfy claims against Superior concerning its defective work and breach of the Subcontract which had not, and have not, been suitably discharged. (Stepien Aff. ¶¶ 37, 60, Mar. 20, 2014.) Yonkers notified Superior of said claims (Id. ¶¶ 41, 45, 50) and explained in detail the factual bases of same (Id.). Superior was notified of the

initiation of backcharges long before the initiation of this lawsuit – contrary to Superior's claims. Id.

The aggregate total of Yonkers' backcharges are not less than $1,754,698. Moreover in furtherance of its earlier notice to Yonkers of liquidated damages, the MTA has now indicated it intends to impose additional liquidated damages for delays in completion in amount $72,500 per day for twenty-six days, for an additional $1,885,000 in damages to date; and ii) an withhold $300,000 for the leaks caused by voids in Superior's concrete work. (Id. ¶ 17.) Clearly the claims against Superior far exceed Superior's own claims for both the contract balance and retainage.[3] Thus, as in Pottstown, Brennan, and under New York State Finance Law, Yonkers has, at a minimum, presented sufficient, credible evidence that it withheld payment on the basis of various undischarged claims against Superior resulting from its defective work and delays to the Project.

Therefore, the existence of these material issues of fact precludes an award of summary judgment against Yonkers for withholding payment from Superior. See Pottstown, 927 F. Supp. at 757-58. That Superior merely disputes these backcharges, disagrees with any calculations, or questions their ultimate merits is not sufficient to overcome its burden on summary judgment. Id; see Brennan, 15 Misc.3d 1134(A) at *4.

POINT III. YONKERS HAS MADE ALL PAYMENTS REQUIRED PURSUANT TO THE TERMS OF THE SUBCONTRACT.

Plaintiff further contends that Section 4.2 of the subcontract gives rise to summary judgment insofar as Yonkers is required to make payments within fifteen (15) business days after

[3] Notwithstanding Superior's claims that Yonkers was not permitted to withhold retainage in excess of 5% -- the terms of 139-f expressly allow Yonkers to withhold payment for undischarged claims and retainage – providing Yonkers with an independent basis to withhold funds in excess of 5%. See, generally, C.O Falter Const. Corp. v. NYS Thruway Auth., 19 Misc.3d 1127(A) (NY Ct. Claims 2008) (payment of retainage is still contingent upon contract performance).

receipt of payment from the MTA. (Bowers Aff. ¶ 9). This argument both ignores applicable law and key provisions of the subcontract. As previously argued – the provisions of Section 139-f expressly permit the Contractor to withhold payments for claims on public projects such as this. See Point II supra; Pottstown, 927 F.Supp. at 757-58; Brennan, 15 Misc.3d 1134(A) at *3-4. Moreover, the terms of the Subcontract provide additional basis for Yonkers' withholding of payments to Superior.

- Section 4.11 of the Subcontract states "Payments of the Subcontract Price, including final payment, shall be subject to the following...(ii) approval of the Subcontractor's work by Yonkers Contracting Company, Inc.....(v) compliance by Subcontractor with all other Subcontract documents." Insofar as Superior's work failed to comply with the provisions and specifications of the Subcontract and the Prime contract – and Yonkers further refused to approve such work as a result then these conditions precedent failed and Yonkers was under no obligation to make payment.

- Section 4.6 provides that Final Payment shall be made "after satisfactory proof that all claims and demands in connection with the Subcontractor's Work have been discharged."

Thus, both the Subcontract and case law offer support for Yonkers' withholding of payment from Superior on account of outstanding claims against Superior that have not been suitably discharged.

Moreover, Superior's contentions that Yonkers regularly paid in belated manner overlooks its own failures in the requisition process. Superior acknowledges that Mr. David Bowers was responsible for overseeing its applications for payment throughout the course of the Project, but numerous other Superior employees were also involved with such oversight — most, if not all, of whom were based out of California. (Stepien Aff. ¶¶ 32, 55.) Superior's communications with Yonkers further indicate that Superior regularly provided miscalculated quantities (Id. ¶ 56), inaccurate costs (Id.), and delays in the submission of its requisitions for payment (Id. ¶ 55).

Yonkers was under no obligation under the Subcontract to make payments to Superior unless the information and requisitions provided conformed to the Subcontract requirements to allow for timely payment. (Bowers Aff. Ex. 4, ¶ 4.4)

POINT IV. MATERIAL ISSUES OF FACT EXIST CONCERNING SUPERIOR'S ALLEGED ENTITLEMENT TO PAYMENT FOR OUTSTANDING CHANGE ORDER REQUESTS.

In addition to the preceding offsets and backcharges, Yonkers further disputes Superior's right to an affirmative recovery on change order requests in excess of the claimed contract balance. Specifically, Superior claims entitlement to $477,796 as a result of certain requests. (Bowers Aff. ¶¶ 3, 33.) This figure represents $155,888 allegedly owed to Superior for "premium time" work and $483,455 owed to Superior for "extra" work, less a $161,547 credit. Critically, these figures are claims based on change order requests – i.e. extra or additional work that Yonkers has not approved and remains in dispute, either with respect to entitlement or the amount due. As such, there is nothing in any prompt payment law or the Subcontract that demands Yonkers approve and pay these summarily. Rob Stepien's affidavit attests to substantial factual disputes regarding these additional sums as more fully set forth below.

A. Yonkers Did Not Approve or Authorize Superior's Extra Work.

Pursuant to Par. 22.3 of the Subcontract, Superior was required to obtain a written, executed change order as a prerequisite for additional compensation for extra work. While Yonkers previously executed change orders in connection with Amendments 1 & 2 for an additional $1.15 million in changes – *no such executed change orders exist* with respect to Superior's claims for the disputed change order requests.

In its motion, Superior tersely asserts that it is nevertheless entitled to these additional sums, because Yonkers failed to dispute the work, and then further states that Yonkers authorized and approved the work. (Plaintiff's Memo of Law, pg. 8) (Bowers Aff. ¶ 27). The only evidence that Superior offers in support are six (6) emails which relate to change order requests 13.4, 13.5, 14.1, 14.5, 14.6 and 4.13 – the total value of which is $159,754 (Bowers Aff. Ex. 23). None of these change orders were executed by Yonkers. While Yonkers disputes that the content of these emails constitutes approvals of the amounts sought (Stepien Aff. ¶¶64-67), in fact, there are *no* properly executed change orders that could show how Superior is entitled to payment an additional $479,589.[4] Or that these change order requests for $159,000 could somehow be used to justify $479,589 or that these allegations are undisputed. Contrary to Superior's unsupported statements, Yonkers and Superior have regularly and consistently disputed the value and entitlement to the change order requests at issue.

B. Yonkers Has and Continues to Dispute Superior's Right to Recover for Premium Time Work.

Superior claims entitlement to $155,888 for "premium time" work it alleges to have performed during overtime hours and weekends, thereby entitling Superior to premium rates of pay. (Stepien Aff. Ex. 30, Mar. 26, 2014.) Nevertheless, this premium time was performed on account of Superior's inability to provide adequate manpower during normal weekday hours. (Id. ¶¶ 30-33.) In furtherance of its argument, Superior cites to four emails concerning this work. (Bowers Aff. ¶ 29.) These emails, however, are far removed from their full context, which reveals that Yonkers refused to compensate Superior for premium time work because it was caused by

[4] This excludes the disputed change order requests 17.00 and 17.02 that concern credits to Yonkers for work deleted from Superiors' subcontract.

delays attributable to Superior and therefore non-compensable under the Subcontract. (Stepien Aff. ¶¶ 31, 33, Mar. 26, 2014.)

Superior distorts the events surrounding Yonkers' proposal to the MTA in regards to compensation for acceleration and delays. (Bowers Aff. 28). Superior correctly states that Yonkers initially sought additional funds on behalf of its subcontractors as part of its May 2, 2012, $6,478,000 proposal to the MTA. However, that proposal was ultimately rejected by the MTA. Yonkers received only $3,500,000 for acceleration costs that *did not* include payment for Superior's work. (Stepien Aff. ¶ 63, Mar. 26, 2014). Moreover, 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.*" (Bowers Aff. Ex. 4, ¶ 6.1).

The combined testimony of both Mr. Stepien and Mr. James Strobel reinforce the fact that Superior failed to provide necessary manpower on the Project because its resources were spread drastically thin throughout other ongoing projects in New York City. (Stepien Aff. ¶¶ 31-32, Mar. 26, 2014.) Furthermore, this is a point that Superior essentially admits in its correspondence, as it had even informed Yonkers that it was unable to provide manpower on account of the demands of its other projects. (Id. ¶ 30.)

Accordingly, it remains disputed whether Superior provided adequate manpower, supervision, and management on the Project. Yonkers has refused to pay Superior for premium time pay on the grounds that the Subcontract requires Superior to absorb these costs, because they were directly caused by Superior's delays. (Bowers Aff, Ex. 4, ¶ 5.4).

C. Superior Has Failed To Provide The Requisite Backup In Support Of The Remaining Extra Work.

In support of its claims of authorized extra work, Superior further relies upon specific testimony of Mr. Robert Stepien — this time in order to show that Yonkers agreed to certain extra work performed by Superior. (Bowers Aff. ¶ 30.) In doing so, Superior prematurely and erroneously jumps to the conclusion that "Yonkers admitted . . . that [Superior] is entitled to additional compensation" for its change order requests. (Id.) Even assuming that Mr. Stepien admitted there is some entitlement, his testimony clearly indicates there exists a dispute over the value of that extra work and compensation that Superior is entitled to:

> Mr. Canizio: And any disagreement there may be is as to the value of the extra?
> Mr. Stepien: Correct.

Id.

It is completely incongruous for Superior to assert that it is entitled to payment for extra work where its own affidavit shows there remains a dispute over the value of that work. Conspicuously absent is any legal basis or evidence as to why Superior's proposed value for the work should be accepted by the Court where the issue remains in dispute between the parties.

Moreover, had Superior included the full context of Mr. Stepien's testimony, then it would have been obvious that a disputed issue existed as to Superior's backup information in support of its change order requests:

> Mr. Stepien: "Well COR 12.1 through 16.01, we're in agreement, we're just missing backup.
>
> Mr. Canizio: "When you say Yonkers is in agreement but is just missing backup, what backup is Yonkers referring to?"
>
> Mr. Stepien: "Previously Superior, when they handed us a change order request, it included manpower, labor rates, equipment and then the time spent by that manpower to perform that extra work. I believe that change order request 12,

Superior changed their format of their change order requests and didn't include all of that information."

(Tavormina Affirmation Ex. 2.) While Yonkers agrees that extra work was performed, it further disputes its obligation to pay the requests until Superior has provided the necessary backup. (Stepien Aff. ¶¶ 27-29, Mar. 26, 2014). Under Sections 22.2 and 6.2 of the Subcontract, Superior is obligated to provide backup for its changes and claims. Yonkers is under no obligation to pay any such claim or change until such time as Superior has substantiated its claims. Accordingly, both the Subcontract and Mr. Stepien's testimony directly contradicts the notion that Yonkers has approved the change orders where it has not been provided the documentation to confirm the value of the work.

Yonkers had previously notified Superior of this issue (Id. ¶ 27), but Superior has repeatedly ignored Yonkers' requests for backup. It now attempts to twist the facts in order to cast a shadow upon the fact that the adequacy of its backup information was disputed. As material issues of fact exist concerning the sufficiency and conformity of Superior's backup information for its claims of extra work, summary judgment must be denied as it pertains to same.

D. Yonkers Disputes Superior's Valuation of Deleted Work.

As previously noted, COR's 17 and 17.02 concern credits to Yonkers for deletion of work from Superior's Subcontract. Superior claims that it only owes Yonkers $161,547, while Yonkers contends that it is owed $438,800. (Id. ¶¶ 34-35). The $277,253 difference between Yonkers' and Superior's claims for deleted work basically pertain to disputed facts concerning whether certain aspects of work were included within Superior's scope of work under the Subcontract as well as the appropriate prices to apply for work deleted from the Subcontract. Again, Superior offers no evidence as to why its valuation is beyond factual dispute and the Court should forthwith accept

its position. Because these material issues of fact exist, summary judgment in Superior's favor for this deleted work should be precluded.

E. Yonkers Was Never Paid by the MTA for Superior's Change Order Requests.

None of Superior's change order requests in issue were submitted within Yonkers' requisitions to the MTA, because they did not involve compensable claims to the MTA under the prime contract for which Yonkers was being paid. (Id. ¶ 57.)[5] Insofar as MTA's payments to Yonkers did not pertain to any work included within Superior's change order requests for premium time work, extra work, or deleted work, Yonkers cannot be obligated to pay Superior based on those payments. (Id.)

POINT V. PLAINTIFF'S MOTION FOR SUMMARY JUDMGMENT SHOULD BE DENIED BECAUSE IT FAILS TO COMPLY WITH RULE 19-a OF THE NEW YORK SUPREME COURT COMMERCIAL DIVISION.

As the Court is aware, pursuant to NYCRR 202.70, Rule 19-a(d), a movant's statement of undisputed facts is required to contain citations to the evidence submitted in support of its motion. In its motion papers, Superior has failed to comply with the Rule and has therefore failed to provide sufficient evidence in support and further denied Yonkers with sufficient basis to oppose those statements. Further, pursuant to this Court's Practice Guide to the Commercial Division for cases before Judge Scheinkman:

All motions for summary judgment shall be accompanied by a Statement of Undisputed Facts Pursuant to Rule 19-a of the Commercial Division Rules. A motion for summary judgment which lacks such a statement may be rejected.

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[5] Even if MTA had received, approved, and paid for these change orders – this would still not give rise to an absolute duty to pay where the subcontractor had failed to meet its obligations under the contract. Brennan, 849 N.Y.S.2d 545 (N.Y.A.D. 1st 2008).

Accordingly, the Plaintiff's motion for summary judgment should be denied for failure to comply with this Court's rules.

CONCLUSION

Accordingly, for all of the foregoing reasons, Defendants respectfully request that Superior's Motion for Partial Summary Judgment be denied in its entirety, together with such other and further relief as this Court may deem just and proper.

Dated: March 26, 2014

Respectfully submitted,

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