

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

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SUPERIOR GUNITE

Index No. 54272/2013

Plaintiff,

-against-

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

VERIFIED ANSWER,  
SEPARATE DEFENSES,  
AND COUNTERCLAIM  
OF DEFENDANTS  
YONKERS CONTRACTING  
COMPANY, INC., AND  
ZURICH AMERICAN  
INSURANCE COMPANY

Defendants.  
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Yonkers Contracting Company, Inc. (“Yonkers”), and Zurich American Insurance Company (“Zurich”) (hereinafter sometimes collectively referred to as “Defendants”), by their attorneys, Veneruso, Curto, Schwartz & Curto, LLP, as and for their answer to the Verified Complaint dated March 25, 2013 of Superior Gunite (hereinafter referred to as “Plaintiff”), answer, allege and say as follows:

1. Upon information and belief, the Defendants admit the allegations set forth in Paragraph 1 of the Verified Complaint.
2. The Defendants admit the allegations set forth in Paragraph 2 of the Verified Complaint.
3. The Defendants admit the allegations set forth in Paragraph 3 of the Verified Complaint, except as to state that the correct name of Defendant is Zurich American Insurance Company.

**IN ANSWER TO THE FIRST CAUSE OF ACTION AGAINST YONKERS**

4. The Defendants repeat and reassert each and every answer to the allegations of Paragraphs 1 through 3 of the Verified Complaint as if fully set forth at length herein.
5. The Defendants admit that on or around March 3, 2011, Yonkers entered into a subcontract with the Plaintiff (“Subcontract”) for certain work relating to Metropolitan Transit

Authority (“MTA”) project identified as the Excavation/Mining/Lining of the Vertical Shaft E1, E2, Inclined Tunnels, T1 Connector Tunnel, and the Construction Ventilation Building and Station Entrance Structure at Site J, Contract No.: C-266510, located in at the south side of the intersection of 34<sup>th</sup> Street and 11<sup>th</sup> Avenue, in New York, New York (hereinafter the "Project"). The Defendants state that the Subcontract speaks for itself and deny knowledge or information sufficient to form a belief as to all other allegations set forth in Paragraph 5 of the Verified Complaint.

6. The Defendants admit that the Subcontract required Plaintiff to provide labor, materials and equipment necessary for the furnishing, installation and placement of certain shotcrete work at the Project and deny all other allegations set forth in Paragraph 6 of the Verified Complaint.

7. The Defendants admit that the Subcontract price was \$7,500,000, subject to additions and deletions, and state that the Subcontract speaks for itself and deny all other allegations set forth in Paragraph 7 of the Verified Complaint.

8. The Defendants state that the Subcontract speaks for itself and deny knowledge or information sufficient to form a belief as to all other allegations set forth in Paragraph 8 of the Verified Complaint.

9. The Defendants deny the allegations set forth in Paragraph 9 of the Verified Complaint, except as to admit that certain change orders were agreed to by the parties.

10. The Defendants deny the allegations set forth in Paragraph 10 of the Verified Complaint.

11. The Defendants deny the allegations set forth in Paragraph 11 of the Verified Complaint.

12. The Defendants deny the allegations set forth in Paragraph 12 of the Verified Complaint.

13. The Defendants deny the allegations set forth in Paragraph 13 of the Verified Complaint.

**IN ANSWER TO THE SECOND CAUSE OF ACTION AGAINST ZURICH**

14. The Defendants repeat and reassert each and every answer to the allegations of Paragraphs 1 through 13 of the Verified Complaint as if fully set forth at length herein.

15. Defendants admit that on or about September 3, 2010, Zurich as surety and Yonkers, as principal, executed Payment Bond No. PRF09011946 (the “Bond”) relating to the Project pursuant to the Contract between the MTA and Yonkers and Defendants state that the Bond speaks for itself. Defendants state that contrary to the allegations set forth in Paragraph 15 of the Verified Complaint, a copy of the Bond is not annexed to the Verified Complaint. Defendants deny all other allegations set forth in Paragraph 15 of the Verified Complaint.

16. The Defendants deny the allegations set forth in Paragraph 16 of the Verified Complaint except as to specifically admit that Plaintiff was a subcontractor, and did furnish labor and materials, on the Project.

17. Defendants deny the allegations set forth in Paragraph 17 of the Verified Complaint.

18. The Defendants deny knowledge or information sufficient to form a belief as to the allegations set forth in Paragraph 18 of the Verified Complaint and leave Plaintiff to its proof.

19. Defendants deny the allegations set forth in Paragraph 19 of the Verified Complaint.

20. Defendants deny the allegations set forth in Paragraph 20 of the Verified Complaint.

**AFFIRMATIVE DEFENSES**

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

The Complaint is barred, in whole or in part, by failure of conditions precedent.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

The Complaint is barred, in whole or in part, to the extent that it seeks payment of sums for work for which the MTA has yet to remit to Yonkers.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

The Complaint is barred, in whole or in part, by the terms of the Contract and/or the Subcontract.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

The Plaintiff has failed to name and/or properly identify a necessary party to this action.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE**

The Complaint is barred, in whole or in part, by the doctrine of set-off.

**AS AND FOR A SIXTH AFFIRMATIVE DEFENSE**

The Complaint is barred, in whole or in part, by material breach of contract on the part of Plaintiff.

**AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE**

The Complaint is barred, in whole or in part, by the doctrine of accord and satisfaction.

**AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE**

The Complaint is barred, in whole or in part, by the doctrine of waiver.

**AS AND FOR A NINTH AFFIRMATIVE DEFENSE**

The Complaint is barred, in whole or in part, by the doctrine of laches.

**AS AND FOR A TENTH AFFIRMATIVE DEFENSE**

The Complaint is barred, in whole or in part, by the doctrine of release.

**AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE**

The Complaint is barred, in whole or in part, by the doctrine of estoppel.

**AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE**

Plaintiff has been paid and has accepted all sums due and owing.

**AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE**

The Complaint is barred, in whole or in part, by Plaintiff's failure to mitigate its damages.

**AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE**

The Complaint is barred, in whole or in part, by Plaintiff's breach of the implied covenant of good faith and fair dealing.

**AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE**

The Plaintiff's asserted claim against the Bond is defective.

**AS AND FOR A SIXTEENTH AFFIRMATIVE DEFENSE**

The plaintiff's claims are barred by the terms and conditions of the Bond.

**AS AND FOR A COUNTERCLAIM AGAINST PLAINTIFF**  
**(Breach of Contract)**

Defendant Yonkers Contracting Company, Inc., ("Yonkers") as and for its counterclaim against Plaintiff, Superior Gunite ("Superior") states as follows:

1. On or about March 3, 2011, Yonkers entered into a written Subcontract with Plaintiff Superior pursuant to which Superior undertook to perform certain work relating to furnishing labor,

supplies, materials and equipment for certain shotcrete work on the Project for the initial agreed upon price of Seven Million Five Hundred Thousand and 00/100 Dollars (\$7,500,000.00).

2. Superior failed to timely and sufficiently perform its obligations, services and work and supply all necessary materials under the Subcontract.

3. In order to keep the Project on schedule and to timely finish the work on the Project, Yonkers had to provide material, men and perform and finish various aspects and work within Plaintiff's scope of the Subcontract.

4. Upon information and belief, Plaintiff failed to provide necessary material and equipment on the Project as required by the Subcontract.

5. Upon information and belief, Plaintiff failed to provide sufficient labor and materialmen and material on the Project at various times and thereby caused significant delay in the Project.

6. Upon information and belief, Plaintiff failed to adequately staff and provide supervisory personnel on the Project as required by the Subcontract.

7. Upon information and belief, Plaintiff failed to perform its work in a proper, timely and workmanlike manner, despite due demand.

8. Yonkers fully complied with all aspects of the Subcontract.

9. Plaintiff breached the Subcontract.

10. As a result of Plaintiff's failures of performance and breaches of duty and contract, and pursuant to the terms of the Subcontract, 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.

11. In addition to the foregoing and not in limitation thereof, as a result of the actions and

inactions of Plaintiff, Defendant Yonkers incurred damages.

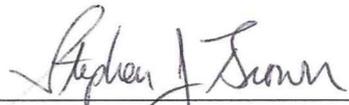
12. As a result of the foregoing, upon information and belief, Defendant Yonkers has been damaged and Plaintiff is liable therefor, for a sum in excess of \$1,700,000.00, the exact amount shall be proven at trial.

WHEREFORE, defendants Yonkers Contracting Company, Inc. and Zurich American Insurance Company demand judgment as follows:

- A. Dismissing the Verified Complaint, together with costs, disbursements and attorneys' fees; and
- B. Dismissing and striking the Plaintiff's claim against the Bond;
- C. Granting judgment in favor of Defendant Yonkers and against Plaintiff Superior on Defendant's Counterclaim, in connection with the breach of Plaintiff of the Subcontract, together with interest, costs and attorneys' fees;
- E. Granting such other and further relief as this Court deems just and proper.

Dated: Yonkers, New York  
May 20, 2013

VENERUSO, CURTO, SCHWARTZ  
& CURTO, LLP

By:   
Joseph R. Curto  
Stephen J. Brown  
*Attorneys for Defendants*  
*Yonkers Contracting Co., Inc., and Zurich*  
*American Insurance Company*  
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(914) 779-1100

To: Mark Canizio, Esq.  
Duane Morris LLP  
1540 Broadway  
New York, New York 10036  
*Attorneys for Plaintiff*

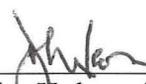
VERIFICATION

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

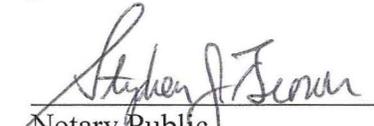
JOHN KOLAYA, P.E., being duly sworn, deposes and says:

Deponent is the President of Yonkers Contracting, Inc., has read the foregoing Answer, Separate Defenses and Counterclaim and swears that the contents of said Answer, Affirmative Defenses and Counterclaim are true to the knowledge of deponent, except as to those matters therein stated to be alleged on information and belief, and as to those matters, deponent believes the same to be true.

That the reason this verification is made by said party is that defendant is not a natural person and deponent is an authorized representative thereof, to wit: its President, and that his knowledge and information above is based upon the books and records of said party.

  
\_\_\_\_\_  
John Kolaya, President  
Yonkers Contracting Company, Inc.

Sworn to before me this  
20 day of May, 2013

  
\_\_\_\_\_  
Notary Public

STEPHEN J. BROWN  
Notary Public, State of New York  
No. 02BR6168810  
Qualified in Westchester County  
Commission Expires June 18, 2014 

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YONKERS CONTRACTING COMPANY INC., and  
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Defendants.  
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VERIFIED ANSWER, SEPARATE DEFENSES AND COUNTERCLAIM  
OF DEFENDANTS YONKERS CONTRACTING COMPANY, INC.,  
AND ZURICH AMERICAN INSURANCE COMPANY

VENERUSO, CURTO, SCHWARTZ & CURTO, LLP  
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