

**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

**COUNTER-STATEMENT
OF MATERIAL FACTS**

Pursuant to Rule 19-a of Section 202.70 Rules of the Commercial Division of the Supreme Court, Westchester County, Defendants Yonkers Contracting Company, Inc. and Zurich American Insurance Company submit this Counter-Statement of Material Facts in support of its Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment.

1. Admitted, with explanation. The project at issue 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 (the "Project"). (Stepien Aff. ¶¶ 6, 9, Mar. 26, 2014.) The work involved the construction of a major transportation hub to provide access directly to the existing New York City Number 7 Subway line. (Id.)

2. Admitted, with explanation. Yonkers Contracting Company, Inc. ("Yonkers") entered into contract with the Metropolitan Transportation Authority ("MTA") for the base sum of \$116,211,000 (Id. ¶ 6.) and for purposes of undertaking responsibilities on the Project as general contractor. (Id. ¶¶ 4, 11.) Yonkers subcontracted various aspects of work on the Project out to

numerous specialty subcontractors, including Superior, who in turn were responsible for providing their own labor, materials, and equipment necessary to perform their respective aspects of work. (Id. ¶ 11.)

3. Admitted, with explanation. On or about March 3, 2011, Yonkers entered into contract with Superior Gunite (“Superior”), under which Superior undertook responsibilities for the Project as a subcontractor to Yonkers (the “Subcontract”). (See Bowers Aff. Ex. 4.) Superior was generally responsible, inter alia, to install a significant amount of concrete throughout the Project pertaining to vertical walls, horizontal surfaces, inclined surfaces, supporting structures, and overhead arches. (Id. ¶ 11; Stepien Aff. ¶ 12, Mar. 26, 2014.)

4. Disputed. While the total Subcontract base value amounted to \$7,500,000, payment to Superior was subject to approval of Superior’s work by Yonkers. (Bowers Aff. Ex. 4, § 4.11.) The Subcontract also entitled Yonkers to withhold retainage from Superior. (Id. § 4.2.) In addition, Yonkers and Superior executed two Amendments to the Subcontract that significantly increased its value. (Stepien Aff. ¶¶ 19, 25-26, Mar. 26, 2014.)

5. Disputed. Various factors contribute to over-excavation in mining of construction projects, or “overbreak.” (Id. ¶ 25.) As a result of overbreak on the Project, Superior agreed to perform work related to the installing concrete to “fill in” the certain overbreak areas. (Id.) Much of this overbreak work was addressed by way of Yonkers executing Amendment Nos. 1 and 2, which increased Superior’s Subcontract value by approximately \$1.15-million — more than 15%. (Id.)

6. Disputed. Superior submitted various change order requests to Yonkers, and fails to specify which change order requests it is referring to in its Undisputed Fact No. 6. Superior also fails to mention that Yonkers executed and approved approximately thirty (30) change order

requests by way of Amendment Nos. 1 and 2 alone. As for Superior's outstanding change order requests, Yonkers still agrees to pay certain of them pertaining to extra work so long as Superior provides ample and sufficient backup to support them. (Id. ¶ 27-29.) The remainder of these change order requests remain in dispute.

7. Disputed. The issuance of the two Amendments to the Subcontract was not the result of Yonkers "waiting" as Superior suggests. The nature of Superior's work was such that changes, deletions, and additions could be necessary to implement at any given and unanticipated time. As such, Superior generated change order requests on a frequent basis. Thus, and as Yonkers has explained, Superior's change order requests inevitably accumulated before Yonkers had the chance to negotiate them with Mr. Ron Federico of Superior, and such negotiation would take place over a period of time. (Id. ¶ 19.) The result, was the issuance and execution of two Amendments to the Subcontract, namely, Amendment No. 1 for \$674,813 and Amendment No. 2 for \$476,000. (Bowers Aff. Ex. 5.) The change order requests executed under these two Amendments were separate and distinct from any of the work claimed to have been performed by Yonkers in its requisitions to the MTA. (Stepien Aff. ¶ 57, Mar. 26, 2014.) Yonkers paid Superior for both of these Amendments. (Id. ¶ 19.)

8. Disputed. The two Amendments to the Subcontract were executed on June 1, 2012, not in April 2012. (See Bowers Aff. Ex. 5.) Aside from the Amendments, various backcharges, claims, and disputes between Yonkers and Superior correspondingly diminished the amount that Superior now claims entitlement to under the Subcontract. (Stepien Aff. ¶¶ 36-37, Mar. 26, 2014.)

9. Disputed. It is admitted that Superior was required to submit applications for payment but Yonkers was only required to pay approved and valid applications.

10. Disputed. According to the Subcontract, Superior was to submit its Requisitions to Yonkers within three (3) days following the last day of the current pay period and in an acceptable form by Yonkers. (Bowers Aff. Ex. 4, § 4.4.) As correspondence from Superior evidences, the submission of these Requisitions was rarely, if ever, on time and within the three-day limitation imposed by the Subcontract. (Stepien Aff. ¶ 55, Mar. 26, 2014.) Moreover, disputes concerning the accuracy of Superior's submitted Requisitions further delayed the payment process. (Id. ¶ 56-57.) Superior's Requisitions underwent many revisions before they were ultimately processed by Yonkers.

11. Defendants dispute this fact. First, Superior's requisitions for payment were not always initially approved, and many of them contained errors in quantities claimed to have been installed and amount of payment entitled to. (Id.) These issues were discussed and resolved between Yonkers and Superior before processing them, sometimes leading to the involvement of several people over an extended period of time beyond the submission date imposed by the Subcontract. (Id.) In encountering such issues, the requisition and payment process was inevitably thrown off track until such issues were resolved, and only then would Yonkers be able to incorporate Superior's requisitions into the payment requests to the MTA. (Id. ¶ 57.) Second, Yonkers' own requisitions to the MTA only included work performed by Superior under the base Subcontract value — none of change order requests, including those for premium time and extra work, claimed by Superior were included in these submissions to the MTA. (Id.)

12. Disputed. Superior's truncated reference to the Subcontract strays from the context of the Subcontract from which it was taken. The first sentence of Section 4.2 of the Subcontract states in its entirety, "Contractor will pay Subcontractor within Fifteen (15) days after Contractor receives payment from the 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.” (Bowers Aff. Ex. 4, § 4.2.) Furthermore, Section 4.11 of the Subcontract states that payments are subject to the payment requisition procedures of Yonkers and ultimate approval of Superior’s work by Yonkers as well as compliance with the Contract documents. (Id. § 4.11.) Section 4.6 of the Subcontract also provides that final payment is subject to satisfactory proof that all claims and demands in connection with Superior’s work have been discharged. (Id. § 4.6.)

13. Disputed. Yonkers has received payment from the MTA for work that Superior billed to Yonkers in its requisitions concerning the base Subcontract value of \$7,500,000. (Stepien Aff. ¶ 57, Mar. 26, 2014.) Yonkers did not include within its applications for payment to MTA any work concerning Superior’s Amendments or change order requests, including Superior’s claims of alleged premium time and extra work, because these aspects of work were neither directed by nor pursuant to Yonkers’ contract with the MTA. (Id.)

14. Disputed. Payment records from the MTA indicate various amounts owed both to and from Yonkers, aside from retainage. Such records include, without limitation, amounts pertaining to remedial work performed to correct the voids within Superior’s defective concrete, the water leaks caused by Superior’s defective concrete, and the ongoing assessment of liquidated damages. (Id. ¶¶ 17-18.) In addition, the MTA is withholding approximately \$6 million from Yonkers in retainage. (Id. ¶ 59.) As remedial work on the Project is still ongoing and liquidated damages are assessed, the overall balance of payment owed to Yonkers continues to increase.

15. Disputed. Defendants refer to Material Fact No. 8, and reiterate that Yonkers withheld payment from Superior on account of various claims and backcharges asserted against Superior concerning its defective work and breaches of the Subcontract. (Id. ¶¶ 36-37.) Such payment was withheld in order satisfy claims against Superior that have not been suitably

discharged as well as on account of Superior's work not being approved by Yonkers and/or acceptable by the MTA. It was Superior's failure to abide by the Subcontract that led to Yonkers' withholding of payment.

16. Disputed. Consistent with the Subcontract and Defendants' Material Facts Nos. 8 and 15, Yonkers rightfully withheld certain payment from Superior in order to satisfy claims that have yet to be suitably discharged and on account of Superior's work not being approved. Specifically, deficiencies in Superior's work resulted in various backcharges, claims, and disputes being asserted against Superior. (Id.) These deficiencies also necessitated the ongoing remedial work and the MTA's assessment of liquidated damages against Yonkers—the costs of which continue to expand the magnitude of Yonkers' backcharges. (Id. ¶¶ 17-18.)

17. Disputed. Referring to Defendants' Material Fact Nos. 10-11, various issues surrounded the accuracy of Superior's submitted requisitions. Specifically, issues surrounding the quantities and monetary amounts that Superior submitted within its requisitions were often contested and resolved. (Id. ¶¶ 55-57.) This delayed the requisition process. (Id.) More importantly, and as also mentioned in Defendants' Material Fact Nos. 8, 15, and 16, various backcharges and claims had diminished the value of Superior's requisitions. (Id.) Therefore, the full amount of Superior's Requisitions was not necessarily the full amount "owed" to Superior as it states.

18. Disputed. In or around June of 2012, Defendants proposed a payment plan for Superior in order to address extra work. (See Bowers Aff. Ex. 11.) Yonkers did not "require" this payment plan as Superior states, but rather implemented the plan in order to provide a means of paying Superior for the executed Amendments to the Subcontract, which collectively amounted to about \$1.15 million. (Stepien Aff. ¶ 19, Mar. 26, 2014.)

19. Disputed. Yonkers does not owe Superior the sum of money it claims against the base Subcontract. Again, various aspects of Superior's work were disputed as backcharges and claims. (Id. ¶¶ 17-18.) In turn, they have diminished the value that Superior claims entitlement to against the base contract and approved amendments.

20. Disputed. As of November 20, 2012, Superior had installed all of its shotcrete on the Project—albeit, the shotcrete was defective. (Id. ¶¶ 51-54.) Additionally, many backcharges, claims, and disputes were still unresolved between Superior and Yonkers. A few months later, as said issues were still in deliberation and dispute, Superior filed this lawsuit against Yonkers. (See Bowers Aff. Ex. 1). Presently, the amount of money owed from Superior to Yonkers continues to expand as a result of growing costs related to ongoing remedial work and the assessment of liquidated damages caused by Superior's defective work. (Stepien Aff. ¶¶ 17-18, 23, 68, Mar. 26, 2014.)

21. Disputed. Superior billed for what Superior was asserting was due, but disputes what Superior describes as the Subcontract amount.

22. Disputed. Yonkers has paid Superior \$5,949,834 to date. As Defendants indicated in numerous points prior, Yonkers has not issued further payment to Superior because the aggregate total of various backcharges, claims, and disputed work between Yonkers and Superior evidences that Yonkers has actually overpaid Superior. (Id. ¶ 17-18.) Yonkers withheld payment from Superior in order satisfy claims against Superior that have not been suitably discharged as well as on account of Superior's work not being approved by Yonkers and/or acceptable by the MTA. (Id. ¶ 16.) Yonkers has also yet to receive nearly \$6 million in retainage that is being withheld by the MTA due to incurred costs and ongoing remedial work that were caused by

Superior's defective work. (Id. ¶ 17-18.) The MTA has informed Yonkers that this amount of retainage will be offset by its assessment of liquidated damages. (Id. ¶ 17.)

23. Disputed. The MTA is still withholding five percent (5%) retainage from Yonkers under the prime contract. (Id. ¶¶ 17-18.) This retainage is not immaterial, and amounts to approximately \$6 million. (Id.)

24. Disputed. Yonkers has and continues to withhold payment from Superior not entirely in the form of retainage, but on the basis of satisfying claims against Superior that have yet to be suitably discharged as well as on account of Superior's work not being approved by Yonkers. (Id. ¶¶ 37, 60.) Costs for such work continue to accumulate on account of the remedial work necessary to fix the water leaks caused by Superior's defective shotcrete as well as the MTA's assessment of liquidated damages. (Id. ¶ 17-18.)

25. Disputed. Superior erroneously designates its change order requests as "change orders." Superior requests compensation for change order requests submitted to Yonkers, amounting to a net total of \$477,797. (See Bowers Aff. Ex. 23.) These change order requests involved certain claims for "premium time" and "extra" work performed, less certain credits owed to Yonkers. (Id.) While certain change order requests continue to remain in dispute, Yonkers had paid for approximately thirty (30) change order requests pursuant to Amendment Nos. 1 and 2. (Id. ¶ 19.)

26. Disputed. Certain of Superior's submitted change order requests to Yonkers pertain to work performed outside of the normal work day on the Project, including work on Saturdays. Under the Subcontract, Superior was required to increase its workforce without additional compensation if such work was necessary to maintain the Project schedule on account of delays caused by and/or attributable to Superior. (Bowers Aff. Ex. 4, § 5.4.) Superior's claims for the

costs of such extra work were denied by Yonkers on this basis — because they were the result of Superior’s inability to provide the necessary manpower and supervision required in order to adhere to the Project schedule. (Stepien Aff. ¶¶ 30-33, Mar. 26, 2014.) Superior’s workforce in the New York City area was spread drastically thin, to the extent that it could not adequately manage its work on the Project and inevitably necessitated work during premium time hours in order to keep up with the Project schedule. (*Id.*) As Superior’s own correspondence indicates, it was unable to provide required manpower on numerous occasions. (*Id.*) Further hindering Superior’s ability to perform was the fact that Mr. Ron Federico, Superior’s own employee in charge of the Project, was based remotely in California and was seldom present on the Project site. (*Id.*)

27. Disputed. Yonkers originally sought approximately \$6.5 million from the MTA in its Delay Mitigation Proposal. (Bowers Aff. Ex. 13.) In turn, the MTA rejected the request and instead issued a settlement agreement under which Yonkers was paid a lump sum of \$3.5 million—a fraction of the requested amount—in order to accelerate work and resolve remaining claims and disputes.

28. Disputed. Superior’s failure to keep up with the Project schedule necessitated its premium time work. As previously mentioned, Superior was required to increase its workforce without additional compensation if such work was necessary to maintain the Project schedule on account of delays caused by and/or attributable to Superior. (*Id.* Ex. 4, § 5.4.)

29. Disputed. Within Yonkers’ Delay Mitigation Proposal, a line item of \$379,000 was listed within the approximate \$6.5 million sought from the MTA for Superior. (*Id.* Ex. 13.) This \$6.5 million, as explained, was rejected by the MTA, and an agreement for a lump sum of \$3.5 million was issued thereafter. Superior did not accelerate its work. As for its change order requests for overtime and weekend work, they were rejected on the basis that such work was necessitated

as a result of delays caused by and/or attributable to Superior, and the Subcontract expressly prohibits Superior from being compensated on such grounds. (Id. Ex. 4, § 5.4.)

30. Disputed. Superior submitted various change order requests to Yonkers relating to “extra” work allegedly performed. (Stepien Aff. ¶¶ 27-29, Mar. 26, 2014.) Yonkers does not dispute that certain of Superior’s claims for extra work do, in fact, concern extra work. (Id.) It does, however, dispute the fact that Superior has not provided sufficient and adequate backup information in support of said claims. (Id.) Yonkers is willing to compensate Superior for its change order requests for extra work as long as Superior provides ample and sufficient backup information along with them. (Id.) Without sufficient backup information, Yonkers does not admit that Superior is entitled to additional compensation for these change order requests. As for Superior’s claims for premium time work, and consistent with Defendants’ Material Fact No. 26, Yonkers rejects these claims in accordance with the Subcontract on the grounds that said work was necessitated as a result of Superior’s own failures to keep up with the Project schedule. (See Bowers Aff. Ex. 4, § 5.4.)

31. Disputed. Yonkers does not admit that Superior is entitled to additional compensation for Superior’s change order requests for extra work. Concerning Superior’s change order requests for extra work, Yonkers agrees with Superior that they appropriately concern extra work. (Id.) Nevertheless, Yonkers has rejected these change order requests on account of Superior’s failure to provide adequate backup information in support of the quantities and costs requested therein. (Id.) Yonkers does not admit that Superior is entitled to additional compensation for these change order requests, and has requested that Superior provide adequate backup information in order to be compensated for same. (Id.)

32. Disputed. As expressed in Material Fact Nos. 30 and 31, much of Superior's change order requests for extra work remain outstanding simply because Superior has failed to provide adequate back-up information in support of its claimed extra work. (Id.) On June 1, 2012, Yonkers did execute two Amendments to Superior's Subcontract under which Superior was paid \$1.15 million for work performed under certain change order requests. (Id. ¶ 26.)

33. Disputed. On or about February 28, 2013, Superior sent a final notice of demand for payment in full to Yonkers. (Bowers Aff. Ex. 12.) Yonkers notes that the MTA has yet to issue a certificate of Final Completion on the Project (Stepien Aff. ¶ 16, Mar. 26, 2014) and continues to withhold retainage from Yonkers (Id. ¶¶ 17-18, 60). Furthermore, the Subcontract permits Yonkers to withhold amounts from final payment to Superior to the extent that claims and demands in connection with Superior's work have yet to be suitable discharged. (See Bowers Aff. Ex. 4, § 4.6.)

34. Disputed. The costs requested in Superior's final demand are subject to various claims and backcharges asserted against Superior. (Stepien Aff. ¶¶ 36-37, Mar. 26, 2014.) Furthermore, and as previously mentioned, the Subcontract expressly provides that final payment is conditional upon "satisfactory proof that all claims and demands in connection with [Superior's] Work have been discharged." (Bowers Aff. Ex. 4, § 4.6.)

35. Disputed. Zurich American Insurance Company ("Zurich") issued Bond No. PRF09011946 to Yonkers in order to indemnify unpaid proven claims asserted against Yonkers on the Project, not to indemnify unproven or otherwise invalid claims asserted by subcontractors. (Id. Ex. 21.)

36. Disputed. Superior made a claim against the Bond on or about January 3, 2013. Said claim, however, demands payment on the erroneous basis that Superior furnished labor and

materials in furtherance of the Project and in the amount of \$3,275,630 for which Superior claims it is owed. As disputed between the parties, this amount continues to be offset by various backcharges and claims against Superior concerning its defective work and breach of the Subcontract. (Stepien Aff. ¶ 36-37, Mar. 26, 2014.)

DEFENDANTS' ADDITIONAL MATERIAL FACTS

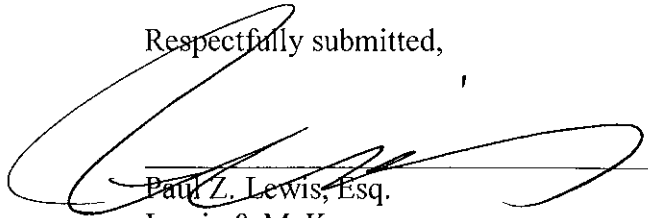
37. Upon the MTA's discovery of Superior's defective work, or the voids within its installed concrete, Superior performed remedial work in order to essentially "fill in" the voids. (*Id.* ¶¶ 37, 51-54.) Superior's remedial work would, in turn, entail various costs related to engineering analyses, concrete sampling and testing, and labor performed by Yonkers and others. These costs that Yonkers has had to incur, continue to mount, and will be included in Yonkers' backcharges against Superior once they are definitively established.

38. In meetings with Superior present, the MTA's engineers expressed their firm belief that the water leaks on the Project were caused by Superior's defective work. (*Id.* ¶¶ 53-54.) Specifically, the MTA's engineers explained that at locations where the waterproofing system spanned across the voids in Superior's concrete, it collapsed into the void areas and ruptured — thereby leading to the water leaks. (*Id.*)

39. As a result of the ongoing efforts to remediate the water leaks caused by Superior's defective work, the MTA has yet to issue a certificate of Final Completion for the Project. (*Id.* ¶ 16.) Additionally, the MTA is assessing Liquidated Damages against Yonkers in the amount of \$72,500 per day. (*Id.* ¶ 17.) Yonkers' backcharges against Superior will continue to expand until such time as the remedial work stemming from Superior's defective work is completed and the MTA issues a certificate of Final Completion for the Project.

Dated: March __, 2014

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Paul Z. Lewis', is written over a horizontal line.

Paul Z. Lewis, Esq.

Lewis & McKenna

82 East Allendale Road, Suite 6

Saddle River, New Jersey 07458

(201) 934-9800

Attorneys for Defendants

Yonkers Contracting Company, Inc. and

Zurich American Insurance Company