

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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YONKERS CONTRACTING COMPANY, INC.,

Index No.: 61442/2014

Plaintiff,

-against-

KJC WATERPROOFING, INC., SUPERIOR GUNITE,
ZURICH AMERICAN INSURANCE COMPANY,
NICHOLSON CONSTRUCTION CO., NATIONAL
WELDING AND FABRICATION, KENSEAL
CONSTRUCTION, BARKER STEEL LLC,
STRUCTURE TECH NEW YORK INC., and CITI
STRUCTURE LLC,

**DEFENDANT SUPERIOR GUNITE'S
ANSWER, AFFIRMATIVE
DEFENSES, COUNTERCLAIM AND
CROSS-CLAIMS TO DEFENDANT
KJC WATERPROOFING, INC.'S
SUPPLEMENTAL
COUNTERCLAIMS AND CROSS
CLAIMS**

Defendants.

-----X

Superior Gunitite ("Gunitite"), by its attorneys Duane Morris, LLP, as and for its answer to the Verified Supplemental Counterclaims and Cross-Claims of Defendant K.J.C. Waterproofing, Inc. ("KJC"), alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted in paragraphs "1" through "35" of the Verified Supplemental Counterclaims and Cross-Claims.

**ANSWERING THE FIFTH COUNTERCLAIM FOR FORECLOSURE OF THE
MECHANIC'S LIEN AGAINST ALL DEFENDANTS**

2. Gunitite answers paragraph "55" of the Verified Supplemental Counterclaims and Cross-Claims by repeating and reasserting its responses to paragraphs "1" through "35" as though fully set forth at length herein.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted in paragraph “56” of the Verified Supplemental Counterclaims and Cross-Claims.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted in paragraph “57” of the Verified Supplemental Counterclaims and Cross-Claims.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted in paragraph “58” of the Verified Supplemental Counterclaims and Cross-Claims.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted in paragraph “59” of the Verified Supplemental Counterclaims and Cross-Claims.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted in paragraph “60” of the Verified Supplemental Counterclaims and Cross-Claims.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted in paragraph “61” of the Verified Supplemental Counterclaims and Cross-Claims.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted in paragraph “62” of the Verified Supplemental Counterclaims and Cross-Claims.

10. Denies the allegations asserted in paragraph “63” of the Verified Supplemental Counterclaims and Cross-Claims, and states that on or about September 9, 2014, pursuant to the

provisions of Article 2 Section 12 of the New York Lien Law, Gunite caused its mechanic's lien to be duly filed, in the amount of \$3,178,766, against the monies applicable to the construction of a public improvement project more fully described as the Excavation/Mining/Lining of Vertical Shaft, E1, E2, Inclined Tunnels, T1 Connector Tunnel, and the Construction of a Ventilation Building and Station Entrance at Site J located at 34th Street between 10th and 11th Avenues in the Borough of Manhattan in New York, New York, Contract No. C-26510 (hereinafter, the "Site J Project") in the office of the Metropolitan Transportation Authority ("MTA") and The New York City Transit Authority ("NYCTA"), and the same was duly received (hereinafter, the "Gunite Lien"). Gunite further states that, on or about August 20, 2015, pursuant to the provisions of Article 2 Section 18 of the New York Lien Law, Gunite caused its Mechanic's lien to be extended for a period of one year from the date of filing.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted in paragraph "64" of the Verified Supplemental Counterclaims and Cross-Claims.

**ANSWERING THE SIXTH COUNTERCLAIM FOR PAYMENT ON THE
PERFORMANCE BOND AGAINST ALL DEFENDANTS**

12. Gunite answers paragraph "65" of the Verified Supplemental Counterclaims and Cross-Claims by repeating and reasserting its responses to paragraphs "1" through "35" and paragraphs "55" through "64" as though fully set forth at length herein.

13. Denies knowledge or information sufficient to form a belief as to the truth of the allegations asserted in paragraph "66" of the Verified Supplemental Counterclaims and Cross-Claims, except states that on or about September 3, 2010, Zurich American Insurance Company ("Zurich"), as surety, and Yonkers, as principal, signed and executed a payment bond, Bond No. PRF09011946 (the "Payment Bond"), guaranteeing prompt payment of all monies due to persons

furnishing labor, supplies, materials or equipment used in the prosecution of the Site J Project, including the work performed pursuant to the subcontract agreement between Gunite and Yonkers, and that Gunite previously commenced an action against Yonkers and Zurich for breach of contract and against the Payment Bond for the amount of \$3,178,766 in the following captioned matter involving the Site J Project: Superior Gunite Superior Gunite v. Yonkers Contracting Company and Zurich American Insurance Company, Index 54272/2013, in the Supreme Court of the State of New York, County of Westchester.

**ANSWERING THE FIRST CROSS-CLAIM FOR INDEMNIFICATION
AGAINST SUPERIOR GUNITE**

14. Denies the allegations asserted in paragraph “101” of the Verified Supplemental Counterclaims and Cross-Claims.

**ANSWERING THE SECOND CROSS-CLAIM FOR CONTRIBUTION
AGAINST SUPERIOR GUNITE**

15. Denies the allegations asserted in paragraph “102” of the Verified Supplemental Counterclaims and Cross-Claims.

SEPARATE DEFENSES

AS AND FOR THE FIRST AFFIRMATIVE DEFENSE

16. KJC’s Counterclaims and Cross-Claims against Gunite fail to state a cause of action upon which relief can be granted.

AS AND FOR THE SECOND AFFIRMATIVE DEFENSE

17. KJC’s Counterclaims and Cross-Claims against Gunite are barred, in whole or in part, because Gunite has defenses based upon documentary evidence.

AS AND FOR THE THIRD AFFIRMATIVE DEFENSE

18. KJC has failed to name/serve necessary parties in its Counterclaims and Cross-Claims against Gunite.

AS AND FOR THE FOURTH AFFIRMATIVE DEFENSE

19. There is no causal connection between KJC's alleged damages and any purported fault on the part of Gunite. To the extent that KJC has sustained damages, such damages were caused by its own action or inaction, or the actions or inactions of parties other than Gunite.

AS AND FOR THE FIFTH AFFIRMATIVE DEFENSE

20. KJC is barred from recovery in this proceeding against Gunite by the doctrines of waiver, estoppel and/or unclean hands.

AS AND FOR THE SIXTH AFFIRMATIVE DEFENSE

21. KJC's purported damages and liability are voluntarily incurred, and as such, may not be recovered from Gunite.

AS AND FOR THE SEVENTH AFFIRMATIVE DEFENSE

22. KJC's claims against Gunite are barred, in whole or in part, by the doctrine of set-off.

AS AND FOR THE EIGHTH AFFIRMATIVE DEFENSE

23. KJC's claims against Gunite are barred, in whole or in part, by KJC's failure to mitigate its alleged damages and/or liability.

AS AND FOR THE NINTH AFFIRMATIVE DEFENSE

24. KJC failed to comply with the New York Lien Law with respect to the claimed mechanic's lien.

AS AND FOR THE TENTH AFFIRMATIVE DEFENSE

25. KJC's claims against Gunité are barred on the ground that there is no privity between Gunité and KJC.

AS AND FOR THE ELEVENTH AFFIRMATIVE DEFENSE

26. KJC's claims against Gunité are barred on the ground that Gunité owed no duty of care to KJC.

**AS AND FOR THE TWELFTH AFFIRMATIVE DEFENSE, COUNTERCLAIM
AGAINST YONKERS AND CROSS-CLAIM AGAINST ALL DEFENDANTS**

27. Gunité repeats and reiterates each and every allegation set forth in paragraphs "1" through "26" above as if fully set forth at length herein.

28. At all times relevant herein, Gunité was and is a corporation organized and existing under the laws of the State of California and authorized to conduct business within the State of New York.

29. Upon information and belief, Yonkers was and is a corporation organized and existing under the laws of the State of New York, with its principal place of business located at 969 Midland Avenue, Yonkers, New York.

30. Upon information and belief, at all times relevant herein, KJC is a corporation organized and existing under the laws of the State of New Jersey with its principal place of business at 36 West Quackenbush Avenue, Dumont, NJ 07628.

31. Upon information and belief, at all times relevant herein, Zurich was and is a surety company licensed and authorized to conduct business within the state of New York.

32. Upon information and belief, Nicholson Construction Co. ("Nicholson") is a company organized under the laws of the State of Pennsylvania with its principal place of business at 12 McClane Street, Cuddy, PA 15031.

33. Upon information and belief, National Welding and Construction Corp. (“National”) is a company organized under the laws of the State of New York with its principal place of business at 7025 Commerce Park Dr., Midvale, UT 84047.

34. Upon information and belief, Structure Tech New York, Inc. (“Structure”) is a company organized under the laws of the State of New York with its principal place of business at 90 W. Sandford Blvd., Mount Vernon, NY 10550.

35. Upon information and belief, Kenseal Construction Products Corp. (“Kenseal”), is a company organized under the laws of the State of New York.

36. Upon information and belief, Barker Steel, LLC (“Barker”) is a limited liability company organized under the laws of the State of Delaware, and is authorized to do business in the State of New York.

37. Upon information and belief, Citi Structure LLC (“Citi”) is a company organized under the laws of the State of New Jersey, with its principal place of business at 50 Harrison St., Hoboken, NJ 07030.

38. Upon information and belief, KJC, Nicholson, National, Barker and Kenseal, Structure and Citi are entities that have each filed a Notice Under Mechanics Lien Law Against A Public Improvement claiming a lien upon the monies applicable to the construction of the Site J Project.

39. Upon information and belief, KJC, Nicholson, National, Structure, Barker and Kenseal and Citi are necessary parties to a lien foreclosure action against the monies applicable to the Site J Project under the New York Lien Law.

40. Gunitite, as subcontractor, furnished labor and materials to Yonkers, as contractor, on the Site J Project pursuant to the terms of Subcontract Agreement No. 10-0212-18 dated March 3, 2011 (the "Subcontract").

41. On or about September 9, 2014, pursuant to the provisions of Article 2 Section 12 of the New York Lien Law, Gunitite caused its Gunitite Lien to be duly filed, in the amount of \$3,178,766, against the monies applicable to the Site J Project in the office of the MTA and NYCTA, and the same was duly received. A copy of the Gunitite Lien is attached hereto as **Exhibit A**.

42. Pursuant to Article 2 Section 11-c of the New York Lien Law, the Gunitite Lien was duly served upon Yonkers on September 9, 2014 prior to its filing at the MTA and NYCTA.

43. Pursuant to Article 2 Section 18 of the New York Lien Law, the Gunitite Lien was extended on or about August 20, 2015 for a period of one year from the date of filing.

44. The amount claimed by the Gunitite Lien has not been paid, cancelled or discharged and no other action or proceeding at law or in equity has been brought by Gunitite for the foreclosure thereof, except that the Gunitite Lien was discharged upon the filing of a lien discharge bond No. LPM09157346 by Zurich in the offices of the MTA and NYCTA on or about September 12, 2014 (the "Lien Discharge Bond").

45. KJC purports to have asserted a lien foreclosure cause of action to enforce its lien against the Site J Project as a counterclaim herein, and named KJC, Nicholson, National, Structure, Barker, Kenseal and Citi as necessary parties, but failed to name Gunitite as a necessary party to same.

46. If and to the extent that KJC has stated a cause of action to foreclose its mechanics lien pursuant to Article 2 Section 18 of the New York Lien Law, Gunite is a necessary party to the action.

47. Upon information and belief, no other parties have or claim to have any lien or interest in or upon the Site J Project monies superior to Gunite.

WHEREFORE, Defendant Superior Gunite demands judgment as follows:

A. Dismissing the Counterclaim and Cross-Claims of KJC against Superior Gunite in their entirety, together with costs, disbursements and attorneys' fees;

B. On the Twelfth Affirmative Defense, Counterclaim against Yonkers and Cross-Claim against all Defendants:

- i) Adjudicating the Gunite Lien as valid to the extent of \$3,178,766, plus interest, costs, disbursements and attorneys' fees;
- ii) That the Cross-Claim Defendants, and each of them, and all persons claims by, through or under them, or any of them, be forever foreclosed of all equity and redemption or other lien, claim or interest in and to the funds for the Site J Project; and
- iii) That judgment be rendered in form only against the Site J Project herein described. That defendant Zurich as surety of the aforesaid undertaking and Yonkers be adjudged to be liable to Gunite for the amount of the Gunite Lien, with interest thereon, and that Gunite recover judgment against them and each of them.

C. Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
September 1, 2015

DUANE MORRIS LLP

Attorneys for Superior Gunite

By: _____

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Co-Counsel for Yonkers Contracting Company

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Attn: Henry C. Chan, Esq.

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New York, New York 10119

Attn: Neal M. Eiseman, Esq

Attn: Joshua G. Oberman, Esq.

ATTORNEY VERIFICATION

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

BRIAN A. SHUE, an attorney duly admitted to practice law before the Courts of the State of New York, being duly sworn deposes and says:

I am a member of the firm of Duane Morris LLP, attorneys for Superior Gunite, the defendant in the within action; I have read the foregoing **ANSWER, VERIFIED DEFENSES, COUNTERCLAIM AND CROSS-CLAIMS** and know the contents thereof; the same is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

This Verification is submitted by me and not by defendant, Superior Gunite, for the reason that the defendant is not within the county where I have my office and I am familiar with the facts upon which the suit is based.

The grounds of my belief as to all matters not stated upon my knowledge are investigations and reports made to me.


BRIAN A. SHUE

Sworn to before me this
1st day of September 2015


NOTARY PUBLIC

Rosita Chan-Vicelich
NOTARY PUBLIC, State of New York
NO. 01CH6069558
Qualified in Kings County
Commission Expires Feb 4, 2018