

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

YONKERS CONTRACTING COMPANY INC.

Index No.: 61442/2014

Plaintiff,

-against-

K.J.C. WATERPROOFING INC. and SUPERIOR
GUNITE, ZURICH AMERICAN INSURANCE
COMPANY, NICHOLSON CONSTRUCTION CO., and
CITI STRUCTURE LLC,

Defendants.

**AFFIRMATION OF
MARTIN I. GOLD IN
SUPPORT OF MOTION
FOR NON-PARTY
DISCOVERY FROM THE
MTA**

MARTIN I. GOLD, an attorney duly admitted to practice law before the courts of this state, hereby affirms under the penalty of perjury:

1. I am the attorney for the defendant K.J.C, Inc. sued herein as K.J.C. Waterproofing, Inc. ("KJC").
2. This affirmation is submitted in support of KJC's motion seeking pre-trial discovery from a public agency, Metropolitan Transportation Authority ("MTA"), in the form of documents and deposition testimony.
3. This action arises out of the construction of a project known and referred to as the "Excavation/Mining/Lining of Vertical Shaft, E1 and E2 Inclined Tunnels, and T1 Connector Tunnel; and Construction of a Ventilation Building and Station Entrance Structure at Site J" (the "Project"). Essentially, the Project entails the construction of a new subway station and ventilation building for the "7-Line Extension," located at 34th St. and 11th Ave. in Manhattan, New York.

4. Generally, on or about October 13, 2010, Plaintiff Yonkers Contracting Company, Inc. (“Yonkers”) entered into contract with the MTA, under which Yonkers agreed to construct the Project as its general contractor. Yonkers subsequently entered into subcontracts with Defendants KJC and Superior Gunite (“Superior”) to perform certain waterproofing and concrete work, respectively, on the Project. The initial value of KJC’s subcontract was \$2,870,000, and the initial value of Superior’s subcontract was \$7,500,000.

5. Some of the main issues on the Project concern the placement of shotcrete (sprayed concrete) and water leaks on the Project.

6. To date, many thousands of discovery documents have been exchanged, interrogatories served and responded to, but no depositions have taken place.

7. Most of the documents requests in the *subpoena duces tecum* annexed hereto as Exhibit A are specifically targeted to understanding the causes of the water leaks at Site J and are therefore important to the defense of this action and the prosecution of KJC’s counterclaims.

8. Some documents requested in the *subpoena duces tecum* concern other sites adjacent to Site J, and/or which are also along the #7 Subway line extension. All these sites are being built by and/or behalf of the MTA, such as Site A, Site K, Site L and Site P. Upon information and belief, there are minimal leaks at those sites, compared to what is happening at Site J. I believe it is crucial to find out why, and the MTA can shed light on that mystery. Yonkers, the plaintiff and general contractor for Site J as it pertains to this lawsuit, was not the general contractor on the other Sites.

9. I have again specifically tailored my requests for the adjacent Sites so as not to seek every document or email, but have focused my requests on engineering reports, field reports and inspections at those sites concerning leaks, if any.

10. Further, I have requested that documents requested in the *subpoena duces tecum* be produced by the MTA sufficiently in advance of the non-party witness depositions of the MTA so that I may properly prepare for the depositions and not waste time at the depositions reviewing documents that may have just been produced.

11. The MTA, as owner of the Project, The MTA had engineers assigned to this project. Mike Kyraciou was/is the Chief Engineer. The MTA's Construction Manager on this Project was/is Ramesh Ramanathaiah, P.E. and Maher Mahmoud was/is the Resident Engineer for the MTA.

12. Based on my review of documents to date, including emails, installation inspection checklists, quality assurance reports and meeting minutes, to name a few of the categories of documents, the above-named individuals were actively involved in this building of this project and the issues surrounding the leaks at the Site.

13. The testimony of these individuals is vital to the discovery process. They all have knowledge of the facts surrounding the construction, the rebar, waterproofing and shotcrete installations as well as the leaks and the remediation of the leaks. Copies of the subpoenas for these individuals' deposition are annexed hereto as Exhibit B.

WHEREFORE, KJC respectfully requests that this motion be granted and that this Court issue an order

A. Pursuant to CPLR §2307 directing the non-party Metropolitan Transit Authority to produce records and documents pursuant to the annexed *Subpoena Duces Tecum*; and

B. Pursuant to CPLR §2302 (b) and §2310(2) and §3107, for the issuance of the annexed subpoenas to certain personnel of the MTA to appear for depositions as non-party witnesses to this action;

C. Together with such other further and different relief as this court deems proper.

Dated: New York, NY
November 5, 2015



Martin I. Gold