

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

YONKERS CONTRACTING COMPANY,
INC.,

Plaintiff,

-against-

KJC WATERPROOFING, INC., SUPERIOR
GUNITITE, ZURICH AMERICAN
INSURANCE COMPANY, NICHOLSON
CONSTRUCTION CO., NATIONAL
WELDING AND FABRICATION,
STRUCTURE TECH NEWYORK INC., AND
CITI STRUCTURE LLC.

Index No.: 61442/2014

**VERIFIED REPLY AND
AFFIRMATIVE DEFENSES TO
DEFENDANT SUPERIOR GUNITITE'S
COUNTERCLAIMS**

Plaintiff, Yonkers Contracting Company Inc. ("Yonkers"), and Counterclaim Defendant, Zurich American Insurance Company ("Zurich"), by and through Lewis & McKenna and Veneruso, Curto, Schwartz & Curto, LLP, co-counsel for Yonkers and Zurich, as and for their Verified Reply and Affirmative Defenses to the Verified Counterclaims and Cross-Claims of Defendant Superior Gunitite ("Superior"), respectfully state as follows:

**IN RESPONSE TO SUPERIOR'S TWELFTH AFFIRMATIVE DEFENSE,
COUNTERCLAIM AGAINST YONKERS, AND CROSS-CLAIM AGAINST ALL
DEFENDANTS**

1. Paragraph 27 of Superior's Twelfth Affirmative Defense, Counterclaim against Yonkers, and Cross-Claim against All Defendants does not require a response. To the extent that any response is required, Yonkers and Zurich (hereinafter, the "Responding Parties") deny the allegations of Paragraph 27.

2. The Responding Parties lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 28, and leave Superior to its proofs.

3. The Responding Parties admit the allegations of Paragraph 29.

4. The Responding Parties lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 30, and leave Superior to its proofs.

5. The Responding Parties deny the allegations of Paragraph 31, except to admit that Zurich is a corporation organized and existing under the laws of the State of Illinois and authorized to do business in the State of New York.

6. The Responding Parties lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 32, and leave Superior to its proofs.

7. The Responding Parties lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 33, and leave Superior to its proofs.

8. The Responding Parties lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 34, and leave Superior to its proofs.

9. The Responding Parties lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 35, and leave Superior to its proofs.

10. The Responding Parties lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 36, and leave Superior to its proofs.

11. The Responding Parties lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 37, and leave Superior to its proofs.

12. The Responding Parties deny the allegations of Paragraph 38.

13. The Responding Parties lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 39, and leave Superior to its proofs.

14. The Responding Parties deny the allegations of Paragraph 40, except to admit that on or about September 9, 2014, Yonkers received a copy of a Notice under Mechanic's Lien Law against a Public Improvement that was filed by Superior.

15. The Responding Parties deny the allegations of Paragraph 41, except to admit that on or about September 12, 2014, Lien Discharge Bond No. LPM09157346 was filed by Zurich.

16. The Responding Parties lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 42, and leave Superior to its proofs.

17. The Responding Parties lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 43, and leave Superior to its proofs.

18. The Responding Parties lack the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 44, and leave Superior to its proofs.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Counterclaims and Cross-Claims fail to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

The Counterclaims and Cross-Claims are barred to the extent that they were not filed within the applicable statutes of limitation and/or administrative filing periods.

THIRD AFFIRMATIVE DEFENSE

The Counterclaims and Cross-Claims are barred, in whole or in part, by the principles of waiver and/or estoppel.

FOURTH AFFIRMATIVE DEFENSE

The Counterclaims and Cross-Claims are barred, in whole or in part, by the principle of setoff, and all of Superior's subcontracts with Yonkers contain identical setoff provisions that expressly allow for Yonkers to exercise its right of setoff.

FIFTH AFFIRMATIVE DEFENSE

The Counterclaims and Cross-Claims are barred to the extent that Superior failed to timely and properly exhaust all necessary administrative, statutory, and/or jurisdictional prerequisites for the commencement of this action.

SIXTH AFFIRMATIVE DEFENSE

Yonkers and Zurich reserve the right to assert any and all other affirmative defenses as allowed by the CPLR or the orders of the Court.

SEVENTH AFFIRMATIVE DEFENSE

To the extent the causes of action asserted in the Counterclaims and Cross-Claims are in equity, they are barred on the grounds of unclean hands.

EIGHTH AFFIRMATIVE DEFENSE

To the extent that the Counterclaims and Cross-Claims allege that Superior is due payment of monies from Yonkers under any subcontract, such monies have been withheld as necessary to satisfy any claims, liens, and/or judgments against Superior that have yet to be suitably discharged.

NINTH AFFIRMATIVE DEFENSE

Due to the complex nature and necessary closeout procedures of the project at issue, Yonkers is currently unable to determine how much, if any, monies are due and owing to Superior.

TENTH AFFIRMATIVE DEFENSE

Yonkers' obligations to pay Superior commence no earlier than payment by the Owner to Yonkers for work performed by Superior.

ELEVENTH AFFIRMATIVE DEFENSE

Superior has failed to join all necessary and indispensable parties pertaining to its Counterclaims and Cross-Claims.

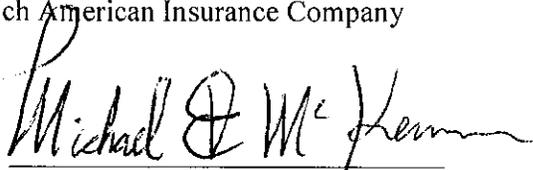
WHEREFORE, Plaintiff Yonkers Contracting Company, Inc. and Defendant by Counterclaims Zurich American Insurance Company demand judgment dismissing the Counterclaims and Cross-Claims of Defendant Superior Gunite as against them, and such other and further relief as the Court deems just and proper.

Dated: December 10, 2014

Lewis & McKenna
82 E. Allendale Road, Suite 6
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Yonkers Contracting Company, Inc. and
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Zurich American Insurance Company

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Zurich American Insurance Company

By:


Michael F. McKenna

ATTORNEY VERIFICATION

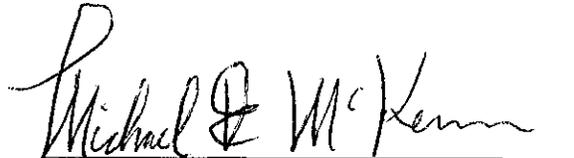
STATE OF NEW YORK)
) SS.:
COUNTY OF WESTCHESTER)

MICHAEL F. McKENNA, an attorney duly admitted to practice law before the Courts of the State of New York, being duly sworn, deposes and says:

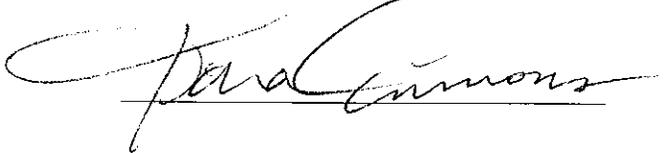
I am a member of the firm of Lewis & McKenna, co-counsel for Yonkers Contracting Company, Inc., the plaintiff in the within action, and Zurich American Insurance Company, a defendant by counterclaims in the within action; I have read the foregoing Verified Reply and Affirmative Defenses to the Counterclaims and Cross-Claims of Superior Gunite 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.

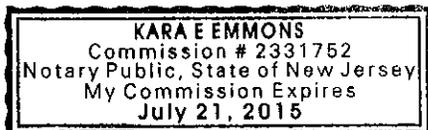
This Verification is submitted by me and not by plaintiff Yonkers Contracting Company, Inc. or defendant by counterclaims Zurich American Insurance Company, and on behalf of co-counsel Veneruso, Curto, Schwartz & Curto, LLP, for the reason that the plaintiff and defendant by counterclaims are not within 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.


Michael F. McKenna

Sworn to before me this
10 day of December, 2014





**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

AFFIDAVIT OF SERVICE BY ELECTRONIC FILING

Anthony J. Tavormina, being duly sworn, deposes and says: that deponent is not a party to this action, that he is 18 years and upwards; that he is employed by Lewis & McKenna, co-counsel for Plaintiff Yonkers Contracting Company, Inc. and Counterclaim Defendant Zurich American Insurance Company in the above captioned action; that the address of said attorneys is 82 East Allendale Road, Suite 6, Saddle River, New Jersey 07458.

On December 10, 2014, deponent served the within Verified Reply and Affirmative Defenses to Defendant Superior Gunite's Counterclaims and Cross-Claims upon:

**ALL PARTIES AS APPEARED ON THE SUPREME COURT
STATE OF NEW YORK ELECTRONIC FILING WEBSITE.**

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Anthony J. Tavormina

Sworn to before me
December 10, 2014

