

WESTCHESTER INDEX # 61442/2014

ECF

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:14-cv-06451-JMF
Internal Use Only

Yonkers Contracting Company Inc. v. K.J.C. Waterproofing
Inc. et al
Assigned to: Judge Jesse M. Furman
Case in other court: State Court Supreme, 61442/2014
Cause: 28:1332 Diversity-Account Receivable

Date Filed: 08/13/2014
Jury Demand: None
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff

Yonkers Contracting Company Inc.

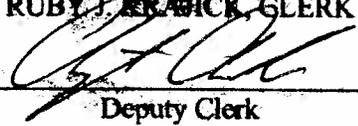
V.

Defendant

K.J.C. Waterproofing Inc.

represented by **Martin I. Gold**
Rosen & Tetelman, LLP
292 Madison Avenue
New York, NY 10017
(212) 447-4700
Fax: 212-889-8079
Email: martygoldlaw@aol.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

A CERTIFIED COPY
RUBY J. FRASICK, CLERK

BY 
Deputy Clerk

Defendant

Superior Gunite

represented by **Martin I. Gold**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
08/13/2014	<u>1</u>	NOTICE OF REMOVAL from Supreme Court, Case Number: 61442-14. (Filing Fee \$ 350.00, Receipt Number 465401102298). Document filed by Superior Gunite, K.J.C. Waterproofing Inc.. (Attachments: # <u>1</u> Exhibit A)(moh) (Entered: 08/18/2014)

08/13/2014		Magistrate Judge James C. Francis IV is so designated. (moh) (Entered: 08/18/2014)
08/13/2014		Case Designated ECF. (moh) (Entered: 08/18/2014)
08/13/2014	<u>2</u>	CIVIL COVER SHEET filed. (moh) (Entered: 08/18/2014)
08/19/2014	<u>3</u>	CONSENT MOTION to Remand to State Court . Document filed by K.J.C. Waterproofing Inc.. (Attachments: # <u>1</u> Text of Proposed Order Stipulation to Remand)(Gold, Martin) (Entered: 08/19/2014)
08/20/2014	<u>4</u>	STIPULATION WITHDRAWING NOTICE OF REMOVAL AND REMANDING TO STATE COURT: IT IS HEREBY STIPULATED AND AGREED, by and between the attorney for the plaintiff and the defendant K.J.C. Waterproofing, the only parties to appear in this action to date, that the action entitled Yonkers Contracting Company, Inc. v. K.J.C. Waterproofing Inc. and Superior Gunite, Index No. 61442/2014, in the Supreme Court of the State of New York, County of Westchester, Defendant, K.J.C. Inc., sued herein as K.J.C. Waterproofing, Inc. ("KJC"), by its attorneys, Bahn Multer LLP, having been removed to the United States District Court for the Southern District of New York by defendant KJC on August 13, 2014, be and the same be remanded to the Supreme Court of the State of New York, County of Westchester, without costs or attorneys' fees to any party. The Clerk of Court is directed to terminate Docket No. 3 and to close this case. SO ORDERED. (Signed by Judge Jesse M. Furman on 8/20/2014) (mro) (Entered: 08/20/2014)
08/20/2014		(Court only) ***Motion(s) terminated: <u>3</u> CONSENT MOTION to Remand to State Court . filed by K.J.C. Waterproofing Inc.. (mro) (Entered: 08/20/2014)
08/20/2014		Transmission to Docket Assistant Clerk. Transmitted re: <u>4</u> Stipulation and Order, to the Docket Assistant Clerk for case processing. (mro) (Entered: 08/20/2014)

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 08/20/2014

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YONKERS CONTRACTING COMPANY INC.

14 CIV 6451 (JMF)

KJC,

-against-

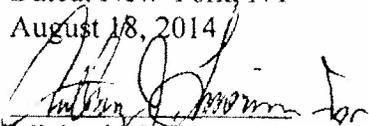
K.J.C. WATERPROOFING INC. and SUPERIOR
GUNITE,

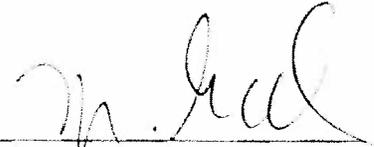
Defendants.

**STIPULATION
WITHDRAWING NOTICE
OF REMOVAL AND
REMANDING TO STATE
COURT**

IT IS HEREBY STIPULATED AND AGREED, by and between the attorney for the plaintiff and the defendant K.J.C. Waterproofing, the only parties to appear in this action to date, that the action entitled Yonkers Contracting Company, Inc. v. K.J.C. Waterproofing Inc. and Superior Gunite, Index No.: 61442/2014, in the Supreme Court of the State of New York, County of Westchester, Defendant, K.J.C. Inc., sued herein as K.J.C. Waterproofing, Inc. ("KJC"), by its attorneys, Bahn Multer LLP, having been removed to the United States District Court for the Southern District of New York by defendant KJC on August 13, 2014, be and the same be remanded to the Supreme Court of the State of New York, County of Westchester, without costs or attorneys' fees to any party.

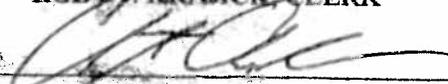
Dated: New York, NY
August 18, 2014


Michael McKenna, Esq.
Lewis & McKenna
82 East Allendale Road, Suite 6
Saddle River, NJ 07458
201-934-9800
Attorneys for Plaintiff


Martin I. Gold, Esq.
BahnMulter, LLP
555 Fifth Avenue, 14th Floor
New York, NY 10017
212-447-4700
Attorneys for Defendant KJC

A CERTIFIED COPY
The Clerk of Court is directed to terminate Docket No. 3 and to close this case.

RUBY J. KRABICK, CLERK

BY: 
Deputy Clerk

SO ORDERED. 

August 20, 2014

JUDGE FURMAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

YONKERS CONTRACTING COMPANY INC.

14 CV

64516th

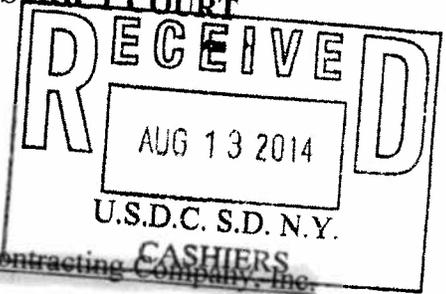
KJC,

-against-

K.J.C. WATERPROOFING INC. and SUPERIOR
GUNITE,

DEFENDANT K.J.C., INC.'S
s/h/a as K.J.C.
WATERPROOFING, INC.,
NOTICE OF REMOVAL TO
THE UNITED STATES
DISTRICT COURT

Defendants.



PLEASE TAKE NOTICE that the action entitled Yonkers Contracting Company, Inc. v. K.J.C. Waterproofing Inc. and Superior Gunite, Index No.: 61442/2014, in the Supreme Court

of the State of New York, County of Westchester, Defendant, K.J.C. Inc., sued herein as K.J.C. Waterproofing, Inc. ("KJC"), by its attorneys, BahnMulter LLP, has been removed to the United States District Court for the Southern District of New York.

Grounds for Removal

This Court has original jurisdiction of this action under diversity jurisdiction pursuant to 28 U.S.C. §1332. The action may be removed to this Court pursuant to 28 U.S.C. §1441(a)(b). A copy of said Notice of Removal is annexed hereto as Exhibit A.

Diversity Jurisdiction

On July 28, 2014, plaintiff filed suit against defendants in the Supreme Court of the State of New York, County of Westchester in an action entitled Yonkers Contracting Company, Inc. v. K.J.C. Waterproofing Inc. and Superior Gunite, Index No.: 61442/2014.

A CERTIFIED COPY
RUBY J. KRAJICK, CLERK

BY 
Deputy Clerk

This Notice of Removal is filed within the time allowed under 28 U.S.C. §1446(b) as thirty days have not yet expired since the defendant KJC first received, although not served with, a copy of the summons and complaint.

In accordance with 28 U.S.C. §1446(b) all of the process and pleadings obtained by defendant KJC in this action to date are attached to this Notice as Exhibit A.

This action is a civil suit alleging the breach of a construction contract between plaintiff and defendant arising out of a Metropolitan Transportation Authority (MTA) project in New York City.

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. KJC provides waterproofing and masonry services on new and rehabilitative construction projects.

Yonkers is a company organized under the laws of the State of New York with its principal place of business at 969 Midland Avenue, Yonkers, NY.

Defendant Superior Gunite is a California Corporation, according to the complaint.

The plaintiff and defendants have complete diversity as required under 28 U.S.C. §1332. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) in that the parties are citizens of different states and the amount in controversy exceeds \$75,000 exclusive of costs and interest.

Venue is proper under 28 U.S.C. § 1391(b)(2) as a substantial part of the events or omissions giving rise to the claims in this action occurred in this District, in the city, county and state of New York.

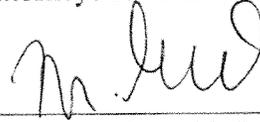
The United States District Court for the Southern District of New York is the district and division within which the state court action is pending.

Preservation of Defenses

By filing this Notice of Removal, defendant KJC does not waive any defense or claim(s) which may be available to it.

Dated: New York, NY
August 13, 2014

BAHN MULTER, LLP
Attorneys for Defendant K.J.C., Inc.



By: Martin I. Gold, Esq. (MIG-0476)
555 Fifth Avenue, 14th fl.
New York, New York 10017
212-447-4700

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

YONKERS CONTRACTING COMPANY,
INC.,

Index No.:

Plaintiff,

-against-

SUMMONS

KJC WATERPROOFING, INC. AND
SUPERIOR GUNITE,

Defendants.

TO THE ABOVE NAMED DEFENDANTS:

PLEASE TAKE NOTICE THAT YOU ARE HEREBY SUMMONED to answer the complaint of the plaintiff herein and to serve a copy of your answer on the plaintiff at the address indicated below within twenty (20) days after the service of this Summons (not counting the day of service itself), or within thirty (30) days after service is complete if the Summons is not delivered personally to you within the State of New York.

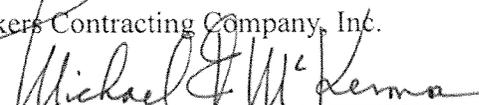
YOU ARE HEREBY NOTIFIED THAT should you fail to answer, a judgment will be entered against you by default for the relief demanded in the complaint.

Plaintiff designates Westchester County as the place of trial. The basis of this designation is that Plaintiff's main office and principle place of business is located at 969 Midland Avenue, Yonkers, New York 10704, in Westchester County.

Dated: July 28, 2014

Lewis & McKenna
82 E. Allendale Road, Suite 6
Saddle River, New Jersey 07458
(201) 934-9800
Co-Counsel for Plaintiff
Yonkers Contracting Company, Inc.

Veneruso, Curto, Schwartz & Curto, LLP
35 East Grassy Sprain Road, Suite 400
Yonkers, New York 10710
(914) 202-3047
Co-Counsel for Plaintiff
Yonkers Contracting Company, Inc.

By: 
Michael F. McKenna

Defendants' Addresses:

KJC Waterproofing, Inc.
39 W. Quackenbush Avenue
Dumont, New Jersey 07628

Superior Gunitite
12306 Van Nuys Boulevard
Lakeview Terrace, California 91342

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

YONKERS CONTRACTING COMPANY,
INC.,

Plaintiff,

-against-

KJC WATERPROOFING, INC. AND
SUPERIOR GUNITE,

Defendants.

Index No.:

**VERIFIED
COMPLAINT**

Plaintiff, Yonkers Contracting Company Inc., by and through Lewis & McKenna and Veneruso, Curto, Schwartz & Curto, LLP, co-counsel for Plaintiff, as and for its Verified Complaint against Defendants KJC Waterproofing, Inc. and Superior Gunite (collectively, "Defendants"), respectfully alleges as follows:

1. At all times relevant herein, Yonkers Contracting Company, Inc. ("Yonkers") was and is a corporation organized and existing under the laws of the State of New York and authorized to do business in the State of New York, with its place of business located at 969 Midland Avenue, Yonkers, New York 10704.

2. Upon information and belief, and at all times relevant herein, Defendant Superior Gunite ("Superior") was and is a domestic corporation organized and existing under the laws of the State of California and authorized to do business in the State of New York, with its principal place of business located at 12306 Van Nuys Boulevard, Lakeview Terrace, California 91342.

3. Upon information and belief, and at all times relevant herein, Defendant KJC Waterproofing, Inc. ("KJC") was and is a domestic corporation organized and existing under the

laws of the State of New Jersey, with its place of business located at 39 W. Quackenbush Avenue, Dumont, New Jersey 07628.

FACTS RELEVANT TO ALL COUNTS

4. On or about October 13, 2010, the Metropolitan Transportation Authority (“MTA”), as owner, entered into a contract, designated as Contract C-26510, with Yonkers (hereinafter, the “Contract”) under which Yonkers undertook certain duties and responsibilities as general contractor for the construction of a project identified 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 Structure at Site J”, located in New York, New York (hereinafter, the “Project”). The purpose of the Project was to construct a new subway station that would connect with and tie into other structures existing underground.

5. Yonkers subsequently entered into agreements with various subcontractors related to the performed of certain aspects of work on the Project.

The Superior Subcontract

6. On or about March 3, 2011, Yonkers entered into a subcontract, designated as S/C# 10-0212-18, with Superior (hereinafter, the “Superior Subcontract”) under which Superior undertook certain duties and responsibilities as a subcontractor to Yonkers on the Project.

7. The Superior Subcontract generally required Superior to perform underground work related to pneumatically applied concrete, or “shotcrete,” for the Project, specifically designating Superior’s scope of work as a “Complete Shotcrete Package.” Hence, Superior was to provide all of the labor, materials, and equipment necessary for the installation of shotcrete on the Project and in accordance with the Superior Subcontract.

8. The installation of shotcrete, or gunite, is different from conventionally forming and pouring concrete in that shotcrete is pneumatically installed by being “shot” out of a large hose. Generally, the purpose of the shotcrete on the Project was to provide a “smoothing layer” of concrete upon which to install the Project’s waterproofing system as well as to build the Project’s load-bearing structure, including, without limitation, structural walls, arches, columns, and other structural components.

9. In consideration for Superior’s fulfillment of obligations under the Superior Subcontract, Yonkers was to pay Superior the sum of Seven Million Five Hundred Thousand Dollars and Zero Cents (\$7,500,000.00).

10. Two Amendments were subsequently executed to the Superior Subcontract, collectively increasing its value from \$7,500,000 to \$8,650,813, or by \$1,150,813.

11. The Superior Subcontract stressed that “time is of the essence” in completing the Project and required Superior to coordinate and adjust the intensity of its workforce in order to maintain its schedule commitments — even if this meant working overtime without additional compensation. These same obligations were imposed upon all of Yonkers’ subcontractors on the Project, as well as on Yonkers, too.

The KJC Subcontract

12. On or about February 15, 2011, Yonkers also entered into a subcontract, designated as S/C# 10-0212-15, with KJC (hereinafter, the “KJC Subcontract”) under which KJC undertook certain duties and responsibilities as a subcontractor to Yonkers on the Project.

13. The KJC Subcontract generally required KJC to perform all work associated with the waterproofing system for the Project, specifically designating KJC’s scope of work as a “Complete Waterproofing System Installation.” Hence, KJC was to provide all of the labor,

materials, and equipment necessary for the installation of the waterproofing system on the Project in accordance with the KJC Subcontract.

14. Generally, the purpose of the waterproofing system was to prevent the infiltration of water into the interior space of the underground tunnels, stations, shafts, and other Project areas.

15. In consideration for KJC's fulfillment of obligations under the KJC Subcontract, Yonkers was to pay KJC the sum of Two Million Eight Hundred Seventy Thousand Dollars and Zero Cents (\$2,870,000.00).

16. Three Amendments were subsequently executed to the KJC Subcontract, collectively increasing its value from \$2,870,000 to \$3,043,801, or by \$173,801.

17. The KJC Subcontract stressed that "time is of the essence" in completing the Project and required KJC to coordinate and adjust the intensity of its workforce in order to maintain its schedule commitments — even if this meant working overtime without additional compensation. These same obligations were imposed upon all of Yonkers' subcontractors on the Project, as well as on Yonkers, too.

Shotcrete and the Waterproofing System

18. A certain order of operations had to take place on the Project in order for Superior to properly install shotcrete and KJC to properly install the waterproofing system. For instance, rock must first be drilled, blasted, and excavated in order to create the necessary underground space that would accommodate the Project's various tunnels, stations, shafts, and other structures.

19. Superior installed the shotcrete directly upon the exposed rock surface in order to provide a "smoothing layer" for the waterproofing system. The smoothing layer of shotcrete was to be installed to specific profiling requirements in order facilitate the installation of the waterproofing system upon it.

20. KJC installed the waterproofing system directly upon the smoothing layer of shotcrete. The waterproofing system could not be installed upon the exposed rock surface due to the inevitable risk of puncturing or rupturing of the waterproofing systems components. The shotcrete smoothing layer essentially eliminated the jagged profile of the rock surface and thereby the risk of puncturing or rupturing of the waterproofing system. In certain other areas above the rock strata where earth was instead exposed, the waterproofing system was installed directly upon plywood back-forms that were installed by Yonkers.

21. Once waterproofing system was installed upon Superior's shotcrete smoothing layer, Superior installed another layer of shotcrete over the waterproofing system — essentially “sandwiching” the waterproofing system between two layers of Superior's shotcrete and permanently embedding the waterproofing system behind the shotcrete. Thus, to visually inspect the waterproofing system would be impossible without removing all of the shotcrete installed by Superior. Given the MTA's contract demands and due to other MTA projects that followed the work in this contract, the MTA required the work in this contract to be performed in accord with a very aggressive schedule. The contract provided for Yonkers not only to complete the entire Project by a certain date, but to complete certain portions of work by certain milestone dates (hereinafter, the “Milestones”) established in the contract. If these Milestones were not met, then substantial Liquidated Damages could be imposed upon Yonkers.

22. As construction proceeded, both Superior and KJC failed to fulfill their obligations under their respective subcontracts.

Issues with Shotcrete and the Waterproofing System

23. During the course of performing work on the Project, the MTA discovered water leaks through the installed shotcrete surfaces of the Project (recall that the waterproofing system was embedded behind these concrete surfaces). Essentially, deficiencies in Superior's shotcrete and/or KJC's waterproofing system had enabled water to infiltrate into the interior areas of the Project's underground structures. Furthermore, the water leaks were not simply isolated to specific Project locations, but were discovered throughout the Project site.

24. On or about July 17, 2013, the MTA issued a Stop Work Order in order to investigate the causes and severity of the water leaks identified at Escalator Inclines E1 and E2 on the Project. As a result of the issuance of the Stop Work Order, the work of Skanska, a follow-on contractor on the Project who was to complete the Subway Station work, was halted. The MTA specifically noted in its Stop Work Order that the reasons for its issuance included concern about the adequacy of the installed shotcrete as well as the identification of significant amounts of water leaks on the Project.

25. Pursuant to the MTA's direction, Yonkers directed Superior to take core samples of the installed shotcrete for investigation. The testing results of the core samples revealed that Superior's installed shotcrete fell drastically short of the Project's imposed design criteria, as significant voids were discovered throughout the volume of the installed shotcrete — which in turn drastically reduced the shotcrete's capacity for strength. Thereafter, Superior performed remedial work to “fill in” the voids in the shotcrete with cementitious grout.

26. Yonkers also directed KJC to perform remedial work in order to rectify the water leak issues on the Project by injecting a polyurethane grout into the concrete walls. The intent was

to achieve the “dryness” requirements imposed by the MTA. Thereafter, KJC performed remedial work in an effort to stop the leaks and achieve the “dryness” criteria mandated by the MTA.

27. In a meeting on or about October 14, 2013, Dr. Horodniceanu, president of the MTA, and Parsons Brinckerhoff (“Parsons”), the MTA’s engineers, explained that the voids within Superior’s shotcrete caused the waterproofing membrane to rupture and contributed to the water leaks. More specifically, Dr. Horodniceanu and Parsons explained that water pressure at locations where the waterproofing system spanned over the voids in the shotcrete could cause the waterproofing system to collapse into the void areas and rupture. They believed that such circumstances had caused the water leaks on the Project.

28. On or about December 10, 2013, after extensive investigations, engineering analyses, and remedial work were performed, the MTA lifted the Stop Work Order. During the period of time in which the Stop Work Order was imposed, Yonkers’ work, Skanska’s work, and the Project Schedule were all adversely impacted. Furthermore, Yonkers incurred costs for providing support to the remedial work forces of both Superior and KJC.

29. Water leaks continue to surface on the Project and the MTA is currently assessing Liquidated Damages against Yonkers.

30. Superior failed to install shotcrete in accordance with the Superior Subcontract, as the voids in the shotcrete caused water leaks throughout the project. Furthermore, water leaks still continue at the Project, and the MTA has yet to acknowledge that the “dryness” requirements have been met and issue a certificate of Final Completion for the Project.

31. Superior failed to provide adequate manpower, supervision, and/or labor on the Project in order to efficiently perform its scope of work under the Superior Subcontract. Thus, Yonkers was forced to incur costs in order to perform the necessary leak repair work.

32. Despite Yonkers demands, Superior has refused to return to the Project site and complete the leak remediation work that it was deemed responsible for.

33. For the foregoing reasons, Superior breached the Superior Subcontract and caused damages to Yonkers.

KJC's Subsequent Agreement

34. On or about January 8, 2014, Yonkers and KJC entered into another agreement with KJC (the "KJC Agreement") in order to resolve outstanding waterproofing issues.

35. Under the KJC Agreement, KJC agreed to provide sufficient manpower and equipment to complete its original Scope of Work under the Subcontract — including remedial work necessary to meet the "dryness" requirements imposed by the MTA. The Agreement also provided that the terms of the KJC Subcontract remained valid and in full effect.

36. The KJC Agreement also obligated KJC to furnish certain bonds and warranties in addition to achieving certain "dryness" requirements on the Project imposed by the MTA. In exchange, Yonkers was to pay KJC \$100,000 in addition to retainage being withheld by way of defined installments.

37. KJC failed to furnish the required bonds under the KJC Agreement. Thus, Yonkers was forced to furnish them on its own. Furthermore, water leaks still continue at the Project, and the MTA has yet to acknowledge that the "dryness" requirements have been met and issue a certificate of Final Completion for the Project.

38. KJC also failed to provide adequate manpower, supervision, and/or labor on the Project in order to efficiently perform its scope of work under the KJC Subcontract and the KJC Agreement. Thus, Yonkers was forced to incur costs in order to supplement KJC's manpower and ensure that the leak repair work was completed in a timely manner.

39. KJC was given written notice of the need to increase manpower and its efforts towards achieving the MTA's dryness requirement.

40. When KJC did not, Yonkers was forced to supplement KJC's workforce and incurred costs in doing so.

41. For the foregoing reasons, KJC breached the KJC Subcontract, breached the KJC Agreement, and caused damages to Yonkers.

Yonkers' Damages

42. As a result of the Defendants' failures to fulfill their contractual obligations, Yonkers has incurred substantial damages.

43. Yonkers' damages include, without limitation, costs for performing the Defendants' work that they failed to perform, costs for materials supplied by Yonkers and then used by the Defendants, costs for supporting the Defendants' work on account of their failure to provide adequate manpower, costs for furnishing the bonds and warranties that KJC failed to furnish under the Agreement, Liquidated Damages imposed upon Yonkers that were caused by KJC's failure to install the waterproofing system and Superior's failure to install shotcrete in accordance with the MTA's requirements, and other costs that have yet to be determined and as discovery may reveal.

AS AND FOR A FIRST CAUSE OF ACTION AGAINST KJC
(Breach of Contract)

44. Yonkers repeats and reiterates the allegations set forth in Paragraphs 1 through 44 of its Verified Complaint as if fully set forth at length herein.

45. KJC failed to abide by the terms of the KJC Subcontract and the KJC Agreement. In effect, Yonkers was forced to incur significant costs in order to support KJC's work, mitigate

damages caused by KJC, mitigate Liquidated Damages imposed by the MTA caused by KJC, and recover time lost in the Project schedule by KJC.

46. KJC has materially breached the KJC Subcontract and the KJC Agreement with Yonkers in the following ways:

- a. Failing to install a waterproofing system in accordance with the Project requirements;
- b. Failing to adhere to the schedule imposed by the Subcontract and the Agreement;
- c. Failing to implement sufficient means and methods in which to perform KJC's work;
- d. Failing to provide the labor, equipment, and materials necessary to perform KJC's work in accordance with the KJC Subcontract and the KJC Agreement;
- e. Failing to provide adequate manpower to keep up with the Project's Schedule;
- f. Failing to remediate water leaks caused by deficiencies in KJC's installed waterproofing system;
- g. Impacting Yonkers' critical path Schedule;
- h. Failing to mitigate the time impacts caused by KJC on the Project;
- i. Failing to make decisions in a timely and efficient manner, resulting in further time impacts to the Project;
- j. Forcing Yonkers to incur costs in order to supplement KJC's work, accelerate work and recover time that was lost due to the fault of KJC;

- k. Failing to compensate Yonkers for the labor, material, and equipment support to KJC;
- l. Failing to act in good faith and deal with Yonkers in a fair and equitable manner; and
- m. Such other actions and inactions as discovery may reveal.

47. Due to KJC's numerous breaches of contract, including, but not limited to, those listed above, KJC has directly and proximately damaged Yonkers.

AS AND FOR A SECOND CAUSE OF ACTION AGAINST SUPERIOR
(Breach of Contract)

48. Yonkers repeats and reiterates the allegations set forth in Paragraphs 1 through 47 of its Verified Complaint as if fully set forth at length herein.

49. Superior failed to abide by the terms of the Superior Subcontract. In effect, Yonkers was forced to incur significant costs in order to support Superior's remedial work, mitigate damages caused by Superior, mitigate Liquidated Damages imposed by the MTA caused by Superior, and recover time lost in the Project schedule by Superior.

50. Superior has materially breached the Superior Subcontract with Yonkers in the following ways:

- a. Failing to install shotcrete in accordance with the Superior Subcontract and Project requirements;
- b. Failing to perform remedial work caused by Superior's defective shotcrete;
- c. Failing to adhere to the schedule imposed by the Superior Subcontract;

- d. Failing to implement sufficient means and methods in which to perform Superior's work;
- e. Failing to provide the labor, equipment, and materials necessary to perform Superior's work in accordance with the Superior Subcontract;
- f. Failing to provide adequate manpower to keep up with the Project's Schedule;
- g. Impacting Yonkers' critical path Schedule;
- h. Failing to mitigate the time impacts caused by Superior on the Project;
- i. Failing to make decisions in a timely and efficient manner, resulting in further time impacts to the Project;
- j. Forcing Yonkers to incur costs in order to supplement or remedy Superior's work, accelerate work and recover time that was lost due to the fault of Superior;
- k. Failing to compensate Yonkers for the labor, material, and equipment support to Superior;
- l. Failing to act in good faith and deal with Yonkers in a fair and equitable manner; and
- m. Such other actions and inactions as discovery may reveal.

51. Due to Superior's numerous breaches of contract, including, but not limited to, those listed above, Superior has directly and proximately damaged Yonkers.

AS AND FOR A THIRD CAUSE OF ACTION AGAINST KJC AND SUPERIOR
(Negligence)

52. Yonkers repeats and reiterates the allegations set forth in Paragraphs 1 through 51 of its Verified Complaint as if fully set forth at length herein.

53. Defendants were responsible for providing the requisite labor, materials, and equipment in order to perform and complete their scopes of work in a timely manner.

54. Defendants were responsible for their own means and methods in performing their work on the Project.

55. Defendants held themselves out as having the requisite skills to perform their scopes of work on the Project.

56. Defendants negligently performed their scopes of work, causing damages to Yonkers.

57. As a direct and proximate result of Defendants' negligence, Yonkers was forced to incur significant costs in order to provide support for Defendants' work, mitigate damages caused by Defendants, mitigate Liquidated Damages imposed by the MTA caused by Defendants, and recover time lost in the Project schedule caused by Defendants. Yonkers experienced additional costs in doing so for which it has not been compensated and is rightfully entitled to receive from Defendants.

AS AND FOR A FOURTH CAUSE OF ACTION AGAINST KJC AND SUPERIOR
(Unjust Enrichment)

58. Yonkers repeats and reiterates the allegations set forth in Paragraphs 1 through 57 of its Verified Complaint as if fully set forth at length herein.

59. Yonkers has performed all its obligations pursuant to the KJC Subcontract, the KJC Agreement, and the Superior Subcontract.

60. Yonkers provided labor, equipment, and materials to support Defendants' work that were necessary to mitigate the additional costs and time impacts caused by Defendants, as well as to ensure that the Project was completed on time.

61. Yonkers performed necessary work that was supposed to be performed by Defendants under their respective subcontracts and/or agreements.

62. Defendants have received, accepted, and enjoyed the benefits of the labor, equipment, materials, and support provided by Yonkers.

63. Yonkers has not been properly or fairly compensated by Defendants for the reasonable and fair market value that it is entitled to for providing its labor, materials, equipment, and support.

64. Unless Defendants tender such payment to Yonkers, Defendants will be unjustly enriched.

AS AND FOR A FIFTH CAUSE OF ACTION AGAINST KJC AND SUPERIOR
(Quantum Meruit)

65. Yonkers repeats and reiterates the allegations set forth in Paragraphs 1 through 64 of its Verified Complaint as if fully set forth at length herein.

66. Yonkers has performed all its obligations pursuant to the KJC Subcontract, the KJC Agreement, and the Superior Subcontract.

67. Yonkers provided labor, equipment, and materials to support Defendants' work that were necessary to mitigate the additional costs and time impacts caused by Defendants, as well as to ensure that the Project was completed on time.

68. Yonkers performed necessary work that was supposed to be performed by Defendants under their respective subcontracts and/or agreements.

69. Defendants have received, accepted, and enjoyed the benefits of the labor, equipment, materials, and support provided by Yonkers.

70. By retaining the benefits conferred by Yonkers without paying for those benefits, Defendants should pay Yonkers the reasonable value of its work.

71. It would be inequitable for Defendants to retain the benefits of the work performed and costs incurred by Yonkers without payment of the reasonable value of same, entitling Yonkers to recover on a quantum meruit basis.

AS AND FOR A SIXTH CAUSE OF ACTION AGAINST KJC AND SUPERIOR
(Breach of the Covenant of Good Faith and Fair Dealing)

72. Yonkers repeats and reiterates the allegations set forth in Paragraphs 1 through 71 of its Verified Complaint as if fully set forth at length herein.

73. Every contract in the State of New York imposes a covenant of good faith and fair dealing on the contracting parties.

74. Defendants had a covenant to act with Yonkers in good faith and fair dealing.

75. Defendants engaged in the acts and omissions enumerated herein, including, but not limited to, the failure to adhere to the Project schedule, the failure to perform its scope of work, the failure to provide adequate manpower, and the imposition of additional costs and time impacts upon Yonkers.

76. Defendants have acted and continue to act in bad faith towards Yonkers and has thereby breached and continue to breach the covenant of good faith and fair dealing.

77. As a direct and proximate result thereof, Yonkers has suffered and continues to suffer financial injury.

WHEREFORE, Plaintiff Yonkers Contracting Company, Inc. demands judgment against Defendants KJC Waterproofing, Inc. and Superior Gunitite as follows:

- 1) On the First Cause of Action in the amount of at least Two Million Nine Hundred Thousand Dollars (\$2,900,000), together with interest thereon, costs, and reasonable attorneys' fees, along with such other and further relief as this Court may deem just and proper under the circumstances;
- 2) On the Second Cause of Action in the amount of at least Two Million Nine Hundred Thousand Dollars (\$2,900,000), together with interest thereon, costs, and reasonable attorneys' fees, along with such other and further relief as this Court may deem just and proper under the circumstances;
- 3) On the Third Cause of Action in the amount of at least Two Million Nine Hundred Thousand Dollars (\$2,900,000), together with interest thereon, costs, and reasonable attorneys' fees, along with such other and further relief as this Court may deem just and proper under the circumstances;
- 4) On the Fourth Cause of Action in the amount of at least Two Million Nine Hundred Thousand Dollars (\$2,900,000), together with interest thereon, costs, and reasonable attorneys' fees, along with such other and further relief as this Court may deem just and proper under the circumstances;
- 5) On the Fifth Cause of Action in the amount of at least Two Million Nine Hundred Thousand Dollars (\$2,900,000), together with interest thereon, costs, and reasonable attorneys' fees, along with such other and further relief as this Court may deem just and proper under the circumstances

- 6) On the Sixth Cause of Action in the amount of at least Two Million Nine Hundred Thousand Dollars (\$2,900,000), together with interest thereon, costs, and reasonable attorneys' fees, along with such other and further relief as this Court may deem just and proper under the circumstances; and
- 7) For such other and further relief as the Court may deem just, proper, and equitable under the circumstances.

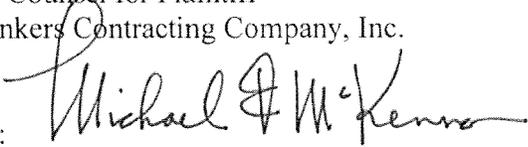
Dated: July 28, 2014

Lewis & McKenna

82 E. Allendale Road, Suite 6
Saddle River, New Jersey 07458
(201) 934-9800
Co-Counsel for Plaintiff
Yonkers Contracting Company, Inc.

Veneruso, Curto, Schwartz & Curto, LLP

35 East Grassy Sprain Road, Suite 400
Yonkers, New York 10710
(914) 202-3047
Co-Counsel for Plaintiff
Yonkers Contracting Company, Inc.

By: 

Michael F. McKenna

ATTORNEY VERIFICATION

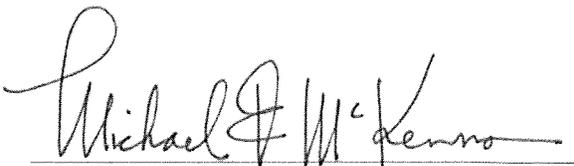
STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

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; I have read the foregoing Complaint 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.

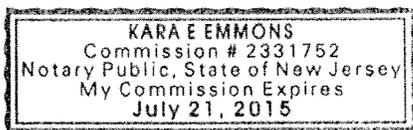
This Verification is submitted by me and not by plaintiff, Yonkers Contracting Company, Inc., and on behalf of co-counsel Veneruso, Curto, Schwartz & Curto, LLP, for the reason that the plaintiff is not within the county where I have my office and I am familiar with the facts upon which the suit is based.

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


Michael F. McKenna

Sworn to before me this
28 day of July, 2014





SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

YONKERS CONTRACTING COMPANY,
INC.,

Index No.:

Plaintiff,

-against-

KJC WATERPROOFING, INC. AND
SUPERIOR GUNITE,

Defendants.

To: KJC Waterproofing, Inc.
39 W. Quackenbush Avenue
Dumont, New Jersey 07628

Superior Gunitite
12306 Van Nuys Boulevard
Lakeview Terrace, California 91342

NOTICE OF COMMENCEMENT OF ACTION
SUBJECT TO MANDATORY ELECTRONIC FILING

PLEASE TAKE NOTICE that the matter captioned above, which has been commenced by filing of the accompanying documents with the County Clerk, is subject to mandatory electronic filing pursuant to Section 202.5-bb of the Uniform Rules for the Trial Courts. This notice is being served as required by Subdivision (b)(3) of that Section.

The New York State Courts Electronic Filing System ("NYSCEF") is designed for the electronic filing of documents with the County Clerk and the court and for the electronic service of those documents, court documents, and court notices upon counsel and self-represented parties. Counsel and/or parties who do not notify the court of a claimed exemption (see below) as required by Section 202.5-bb(e) must immediately record their representation within the e-filed matter on the Consent page in NYSCEF. Failure to do so may result in an inability to receive electronic notice of document filings.

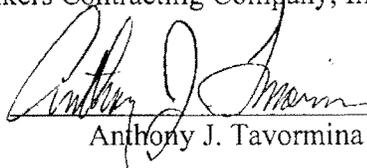
Exemptions from mandatory e-filing are limited to: 1) attorneys who certify in good faith that they lack the computer equipment and (along with all employees) the requisite knowledge to comply; and 2) self-represented parties who choose not to participate in e-filing. For additional information about electronic filing, including access to Section 202.5-bb, consult the NYSCEF website at www.nycourts.gov/efile or contact the NYSCEF Resource Center at 646-386-3033 or efile@courts.state.ny.us.

Dated: July 28, 2014

Lewis & McKenna
82 E. Allendale Road, Suite 6
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(201) 934-9800
Co-Counsel for Plaintiff
Yonkers Contracting Company, Inc.

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(914) 202-3047
Co-Counsel for Plaintiff
Yonkers Contracting Company, Inc.

By:



Anthony J. Tavormina

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

YONKERS CONTRACTING COMPANY,
INC.,

Plaintiff,

-against-

KJC WATERPROOFING, INC. AND
SUPERIOR GUNITE,

Defendants.

Index No.:

VERIFIED COMPLAINT

LEWIS & McKENNA
Attorneys for Plaintiff
Yonkers Contracting Company, Inc.
82 East Allendale Road, Suite 6
Saddle River, New Jersey 07458
(201) 934-9800



United States District Court
Southern District of New York
500 Pearl Street, Room 200
New York, New York 10007
(212) 805-0136

DATE: 08/20/2014

CASE CAPTION: Yonkers Contracting v. SDNY DOCKET NO.: 1:14-cv-06451-JMF
REMANDED TO: Westchester Supreme RELATED CASE NO.: Index# 61442/2014

The above referenced matter has been remanded to your Court. Should you have any questions or concern regarding the above remand, please give us a call before returning the documents to the Southern District Court of New York. We may be able to resolve the issue via telephone.

The documents noted below are enclosed:

Certified SDNY docket sheet

Certified Order of Remand issued by SDNY

Other:

Notice of Removal and associated paperwork
