

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

YONKERS CONTRACTING COMPANY,  
INC.,

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  
NEWYORK INC., AND CITI STRUCTURE  
LLC.

Index No.: 61442/2014

**VERIFIED REPLY AND  
AFFIRMATIVE DEFENSES TO  
DEFENDANT SUPERIOR GUNITE'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 Gunite ("Superior"), respectfully state as follows:

**IN RESPONSE TO THE FIRST COUNTERCLAIM AGAINST YONKERS**

1. Yonkers denies the allegations of Paragraph 91 in Superior's Counterclaim against Yonkers.

**IN RESPONSE TO THE SECOND COUNTERCLAIM AGAINST ZURICH**

2. Paragraphs 1 through 91 of Superior's Verified Answer, Defenses, Counterclaims and Cross-Claims do not apply to Zurich, and as such a response is not required, or to the extent it is required, they are denied.

3. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 93, and leaves Superior to its proofs.

4. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 94, and leaves Superior to its proofs.

5. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 95, and leaves Superior to its proofs.

6. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 96, and leaves Superior to its proofs.

7. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 97, and leaves Superior to its proofs.

8. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 98, and leaves Superior to its proofs.

9. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 99, and leaves Superior to its proofs.

10. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 100, and leaves Superior to its proofs.

11. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 101, and leaves Superior to its proofs.

12. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 102, and leaves Superior to its proofs.

13. Zurich denies the allegations of Paragraph 103, 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.

14. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 104, and leaves Superior to its proofs.

15. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 105, and states that the Prime Contract speaks for itself as to its requirements.

16. Zurich admits the allegations of Paragraph 106.

17. Zurich denies the allegations of Paragraph 107, except to admit that on or about April 30, 2009, Zurich, as surety, executed Payment Bond No. PRF08957796 with Yonkers, as principal, relating to the project referred to as “Contract CM004, 44<sup>th</sup> Street Vent Pant 245 Park Avenue Entrance for the East Side Access Project.”

18. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 108, and leaves Superior to its proofs.

19. Zurich lacks the knowledge and information sufficient to form a belief as to the truth of the allegations contained in Paragraph 109, and leaves Superior to its proofs.

20. Zurich denies the allegations of Paragraph 110.

21. Zurich denies the allegations of Paragraph 111.

22. Zurich denies the allegations of Paragraph 112.

23. Zurich denies the allegations of Paragraph 113.

24. Zurich denies the allegations of Paragraph 114.

25. Zurich denies the allegations of Paragraph 115.

26. Zurich denies the allegations of Paragraph 116.

27. Zurich denies the allegations of Paragraph 117.

**IN RESPONSE TO THE THIRD COUNTERCLAIM AGAINST YONKERS**

28. Yonkers repeats and realleges its responses to Paragraphs 1 through 117 to the extent that these Paragraphs pertain to and require a response from Yonkers.

29. Yonkers denies the allegations of Paragraph 119, except to admit that on or about November 18, 2010, Superior and Yonkers entered into an agreement through which Superior undertook certain duties and responsibilities as a subcontractor to Yonkers on the 44<sup>th</sup> St. Project. Yonkers states that the 44<sup>th</sup> St. Subcontract speaks for itself as to the as to the responsibilities and requirements of Superior on the 44<sup>th</sup> St. Project.

30. Yonkers denies the allegations of Paragraph 120 and states that the 44<sup>th</sup> St. Subcontract speaks for itself as to the responsibilities and requirements of Superior on the 44<sup>th</sup> St. Project.

31. Yonkers denies the allegations of Paragraph 121 and states that the 44<sup>th</sup> St. Subcontract speaks for itself as to the responsibilities and requirements of Superior on the 44<sup>th</sup> St. Project.

32. Yonkers denies the allegations of Paragraph 122 and states that the 44<sup>th</sup> St. Subcontract speaks for itself as to the responsibilities and requirements of Superior on the 44<sup>th</sup> St. Project.

33. Yonkers denies the allegations of Paragraph 123, except to admit that a series of change orders adjusted the value of the 44<sup>th</sup> St. Subcontract to \$1,300,273.00, of which Yonkers has paid \$835,325.18.

34. Yonkers denies the allegations of Paragraph 124.

35. Yonkers denies the allegations of Paragraph 125.

36. Yonkers denies the allegations of Paragraph 126.

37. Yonkers denies the allegations of Paragraph 127.

**IN RESPONSE TO THE FOURTH COUNTERCLAIM AGAINST YONKERS**

38. Yonkers repeats and realleges its responses to Paragraphs 1 through 127 to the extent that these Paragraphs pertain to and require a response from Yonkers.

39. Yonkers denies the allegations of Paragraph 129, except to admit that on or about April 22, 2010, Superior and Yonkers entered into an agreement through which Superior undertook certain duties and responsibilities as a subcontractor to Yonkers on the PATH Tunnels Project. Yonkers states that the PATH Tunnels Subcontract speaks for itself as to the as to the responsibilities and requirements of Superior on the PATH Tunnels Project.

40. Yonkers denies the allegations of Paragraph 130 and states that the PATH Tunnels Subcontract speaks for itself as to the responsibilities and requirements of Superior on the PATH Tunnels Project.

41. Yonkers denies the allegations of Paragraph 131 and states that the PATH Tunnels Subcontract speaks for itself as to the responsibilities and requirements of Superior on the PATH Tunnels Project.

42. Yonkers denies the allegations of Paragraph 132 and states that the PATH Tunnels Subcontract speaks for itself as to the responsibilities and requirements of Superior on the PATH Tunnels Project.

43. Yonkers denies the allegations of Paragraph 133, except to admit that a series of change orders adjusted the value of the PATH Tunnels Subcontract to \$111,000.00, of which Yonkers has paid \$0.00.

44. Yonkers denies the allegations of Paragraph 134.

45. Yonkers denies the allegations of Paragraph 135.

46. Yonkers denies the allegations of Paragraph 136.

47. Yonkers denies the allegations of Paragraph 137.

### **AFFIRMATIVE DEFENSES**

#### **FIRST AFFIRMATIVE DEFENSE**

The Counterclaims fail to state a claim upon which relief may be granted.

#### **SECOND AFFIRMATIVE DEFENSE**

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

#### **FOURTH AFFIRMATIVE DEFENSE**

The Counterclaims 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 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 are in equity, they are barred on the grounds of unclean hands.

**EIGHTH AFFIRMATIVE DEFENSE**

To the extent that the Counterclaims 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.

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

Dated: November 4, 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. and  
Counterclaim Defendant  
Zurich American Insurance Company

**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. and  
Counterclaim Defendant  
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:

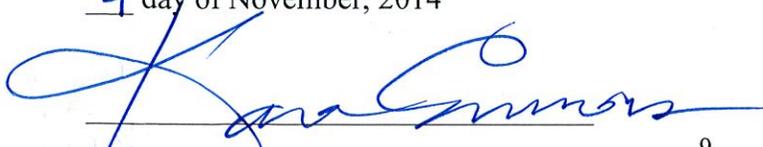
I am a member of the firm of Lewis & McKenna, co-counsel for Yonkers Contracting Company, Inc., the plaintiff in the within action, and Zurich American Insurance Company, a defendant by counterclaims in the within action; I have read the foregoing Verified Reply and Affirmative Defenses to Counterclaims 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  
4 day of November, 2014

  
\_\_\_\_\_

KARA E EMMONS  
Commission # 2331752  
Notary Public, State of New Jersey  
My Commission Expires  
July 21, 2015

**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.

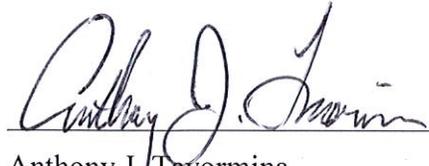
On November 4, 2014, deponent served the within Verified Reply and Affirmative Defenses to Defendant Superior Gunite's Counterclaims upon:

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

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*Counsel for Defendant  
Citi Structure LLC*

  
Anthony J. Tavormina

Sworn to before me  
November 4, 2014



KARA E EMMONS  
Commission # 2331752  
Notary Public, State of New Jersey  
My Commission Expires  
July 21, 2015