

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
YONKERS CONTRACTING COMPANY, INC.,

Index No.: 61442/2014

Plaintiff,

-against-

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

**VERIFIED REPLY AND
AFFIRMATIVE DEFENSES TO
THIRD-PARTY DEFENDANT
J&E INDUSTRIES, LLC'S
COUNTERCLAIM**

Defendants

-----X
SUPERIOR GUNITE

Third-Party Plaintiff,

-against-

J&E INDUSTRIES, LLC,

Third-Party Defendant.
-----X

Defendant and Third-Party Plaintiff Superior Gunite (“Gunite”), by and through Duane Morris, LLP, counsel for Gunite, as and for its Verified Reply and Affirmative Defenses to the Verified Counterclaim of Third-Party Defendant J&E Industries, LLC (“J&E”), respectfully states as follows:

IN RESPONSE TO THE COUNTERCLAIM AGAINST GUNITE

1. Denies the allegations asserted in Paragraph “13” of J&E’s Verified Counterclaim against Gunite.

SEPARATE DEFENSES

AS AND FOR THE FIRST AFFIRMATIVE DEFENSE

2. J&E's Verified Counterclaim against Gunite fails to state a cause of action upon which relief can be granted.

AS AND FOR THE SECOND AFFIRMATIVE DEFENSE

3. J&E's Verified Counterclaim against Gunite is barred, in whole or in part, because Gunite has defenses based upon documentary evidence.

AS AND FOR THE THIRD AFFIRMATIVE DEFENSE

4. J&E has failed to name/serve necessary parties in its Verified Counterclaim against Gunite.

AS AND FOR THE FOURTH AFFIRMATIVE DEFENSE

5. There is no causal connection between J&E's alleged damages and any purported fault on the part of Gunite. To the extent that J&E 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

6. J&E 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

7. J&E's purported damages and liability are voluntarily incurred, and as such, may not be recovered from Gunite.

AS AND FOR THE SEVENTH AFFIRMATIVE DEFENSE

8. J&E's Verified Counterclaim against Gunite is barred, in whole or in part, by the doctrine of set-off.

AS AND FOR THE EIGHTH AFFIRMATIVE DEFENSE

9. J&E's Verified Counterclaim against Gunite is barred, in whole or in part, by J&E's failure to mitigate its alleged damages and/or liability.

AS AND FOR THE NINTH AFFIRMATIVE DEFENSE

10. J&E's Verified Counterclaim against Gunite is barred on the ground that there is no privity between Gunite and J&E.

AS AND FOR THE TENTH AFFIRMATIVE DEFENSE

11. J&E's Verified Counterclaim against Gunite is barred on the ground that Gunite owed no duty of care to KJC.

AS AND FOR THE ELEVENTH AFFIRMATIVE DEFENSE

12. J&E's Verified Counterclaim against Gunite is barred by the Statute of Frauds and General Obligations Law §5-701.

WHEREFORE, Defendant Superior Gunite demands judgment as follows:

- A. Dismissing J&E's Verified Counterclaim against Superior Gunite in its entirety, together with costs, disbursements and attorneys' fees; and
- C. Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
January 13, 2016

DUANE MORRIS LLP
Attorneys for Superior Gunite

By: 
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Counsel for Third-Party Defendant J&E Industries, LLC
Attn: Louis A. Ciffone

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 **VERIFIED REPLY AND DEFENSES** 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
13th the day of January 2016



NOTARY PUBLIC

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