

At Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22nd day of July, 2011.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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In the Matter of the Application of MYRTLE OWNER LLC,

Petitioner,

**DECISION  
AND  
ORDER**

Index No. 21200/10

For an Order Discharging and Cancelling of Record Three Notices of Mechanic’s Liens, dated February 5, 2010, filed by RO-SAL PLUMBING AND HEATING INC.,

Respondent.

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The following papers numbered 1 to 7 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits(Affirmations)Annexed	1,3
Opposing Affidavits (Affirmations)	
Reply Affidavits(Affirmations)	5
Affidavits(Affirmations)	
Other Papers (Memoranda of Law / Affidavit of Service)	2, 4, 6, 7

Petitioner moves to discharge and cancel three notices of mechanic’s lien filed by respondent against the petitioner’s property. Respondent opposes the petition and cross-moves to amend the liens, *nunc pro tunc*, pursuant to Lien Law § 12-a.

**BACKGROUND**

The petition alleges that the petitioner is the sponsor and developer of the Toren Condominium which includes 239 residential apartment units and four commercial units (“Condominium”). According to the declaration establishing a plan for the condominium ownership, the street address of the property is 150 Myrtle Avenue, Brooklyn, NY (“Condominium Property”). Paul Romano, vice-president of the respondent, stated in his affidavit in support of the cross-motion that the respondent performed work on the Condominium Property pursuant to three separate

contracts between the respondent and “Myrtle Avenue Builders, LLC”, petitioner’s contractor.<sup>1</sup>

On March 11, 2010, respondent filed three separate notices of mechanic’s lien dated February 5, 2010 (“Liens”) with respect to the work allegedly performed pursuant to each of the contracts. According to the Liens, work was performed between July 2, 2007 and December 14, 2009. The first lien was for a claimed amount of \$427,591.00 and the “labor performed and material furnished was: Supplied and installed materials for Sewers & Domestic Water Service, Water/Sanitary Piping, Storm Piping, Gas Piping systems respectively, Roof Tank, Respective Pipe Insulation, Pumps and Installation only of Fixtures”. The second lien was for a claimed amount of \$135,291.00 and the “labor performed and material furnished was: Supplied and installed materials for Heating and Hot Water piping systems, Respective Pipe Insulation, Boilers and Hot Water Heaters and Installation only for P-Tac units”. The third lien was for a claimed amount of \$141,470.00 and the “labor performed and material furnished was: Supplied and installed materials for Sprinkler Piping and Fire Standpipe Piping systems, Sprinkler Heads, Pumps and Sprinkler Water Service”.

In all three Liens, the property subject to the Liens is identified as, “Premises known as 150 Myrtle Avenue, Brooklyn, New York, more particularly described and as set forth in Exhibit “A” attached and Exhibit “B” pages 1-18 attached.” Exhibit “A” of the Liens identifies two commercial units in the Condominium by block, lot, and unit number while exhibit “B” of the Liens identifies the two remaining commercial units and each of the 239 block, lot, and unit numbers associated with the residential condominium units followed by the description, “SINGLE RESIDENTIAL CONDO UNIT.” Exhibit “B” of the Liens also includes Block 2060, Lot 22 and is followed by the description, “APARTMENT BUILDING.” Although neither party addressed the issue in their respective motions, the address for lot 22 in exhibit “B” of the Liens is identified as “245 FLATBUSH AVENUE” while the remaining units identify the address as “150 MYRTLE AVE”. It is not clear what relation, if any, the 245 Flatbush Avenue address has to this action as it appears to be located approximately one mile away from the Condominium Property. This address

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<sup>1</sup> Although the relationship between “Myrtle Avenue Builders, LLC” and the petitioner, “Myrtle Owner, LLC”, is unclear to the court at this time, it is noted that both entities maintain the same business address of 325 Gold Street, Brooklyn, NY 11201 according to the “owner-contractor agreement” submitted in support of the cross-motion.

identification for lot 22 was also included in the original condominium declaration recorded on March 9, 2009 by “Toren Condominium”, but was removed from the list of lots included in the amended condominium declaration recorded by the petitioner on February 1, 2010, four days before the respondent’s vice president signed the Liens on February 5, 2010. It appears that respondent may have merely copied the list of units from the original declaration which included this apparent error. It is also noted that in a prior proceeding, (*In the Matter of Myrtle Owner, LLC*, Sup Ct, Kings County, Index No. 285/10) the Condominium Property was identified as being located at “225 Flatbush Avenue Extension, Brooklyn, NY.” However, “Flatbush Avenue Extension” is a different block than “Flatbush Avenue.”

Petitioner contends that prior to the respondent’s filing of the Liens, 36 of the residential units had been sold by the petitioner. Petitioner does not provide any documentation of the purported sales, other than a list of the of the unit numbers, tax lot numbers, and dates on which the sale of the units purportedly closed; however, Respondent acknowledges that, according to the Records of the City Register of the City of New York, 26 of these 36 units were transferred and their deeds were recorded prior to the filing of the Liens, and has supplied the documentary proof of transfer. However, respondent argues that the deeds for nine of the 36 allegedly sold units were not recorded prior to the filing of the Liens and that one of the 36 allegedly sold units was never actually transferred by petitioner. Petitioner did not respond to these representations and the court thus deems them established. Respondent also argues that although the Liens included Block 2060, Lot 22, according to the City Register and the Declaration and Amended Declaration of the Toren Condominium, “Lot 22 did not exist at the time the Liens were filed since that Lot had already been subdivided into Lots 1001-1244 and the Liens, accordingly, could not, and did not attach to the non-existent Lot 22.” Petitioner does not dispute this contention. The cover of the petitioner’s declaration, dated January 21, 2009, identifies the “land affected by the [declaration]” as, “Section 7, Block 2060, F/K/A Lot 22, N/K/A 1001-1244.” The cover of the petitioner’s “First Amendment to Amended and Restated Declaration”, dated January 21, 2010, identifies the land as, “Block 2060, Lots 1001-1244.” However, petitioner argues that because the Liens specify the address “150 Myrtle Avenue”, the Liens were not limited to specific condominium units in which petitioner retained an interest and were therefore “blanket liens.”

The petition seeks discharge and cancellation of the Liens as “blanket liens” improperly filed against the entire property, claiming that the Liens improperly included 36 residential units that were not owned by the petitioner at the time the Liens were filed. In its memorandum of law in support of the petition, petitioner also claims that the Liens failed to segregate the allegedly unpaid amounts for labor from the allegedly unpaid amounts for materials furnished and should therefore be discharged. Respondent opposes the petition to discharge the Liens and cross-moves to amend the Liens pursuant to Lien Law §12-a, *nunc pro tunc*, by eliminating the Liens as to the non-existent lot 22 and the lots that the respondent acknowledges were transferred by petitioner and recorded prior to the filing of the Liens.<sup>2</sup>

### DISCUSSION

A “blanket lien” is created with respect to a condominium development when the description of the property subject to the lien is not limited to the particular units of a condominium which are owned by the party liable to the lienor, thereby creating a lien on the entire property (*see Advanced Alarm Technology, Inc. v Pavilion Associates*, 145 AD2d 582, 584 [2d Dept 1988]; Real Property Law §339-1). A blanket lien, “which is not valid as against the individual units, including the unsold units retained by the petitioner, or the common elements of the condominium”, should be summarily canceled pursuant to Lien Law § 19(6) since it fails to adequately describe the property pursuant to Lien Law § 9(7) in conformity with Real Property Law §339-1 (*Westage Towers Assocs. v ABM Air Conditioning & Refrigeration, Inc.*, 187 AD2d 600 [2d Dept 1992]; *see Matter of Bridge View Tower, LLC v Roco G.C. Corp.*, 69 AD3d 711, 712 [2d Dept 2010]; *Advanced Alarm Technology*, 145 AD2d at 584). However, as the Liens here clearly identify the individual units the respondent sought to encumber, petitioner’s argument that the identification of “150 Myrtle Avenue” resulted in the formation of a “blanket lien” is unavailing. However, the court must address whether the inclusion of the superceded lot 22, which previously had identified the entire Condominium

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<sup>2</sup> In the cross-motion, respondent lists lot 22, the purportedly non-existent lot, and 25 other individual lots that it seeks to release from the Liens due to the transfer and recording prior to the filing of the Liens. However, it is noted that the list does not include Block 2060, Lot 1059 which, based on its own exhibit and affirmation, respondent appears to acknowledge was sold and recorded prior to filing the Liens. The omission of this lot appears to be a typographical error or oversight.

Property, invalidates the Liens.

Where a lienor has filed a “blanket lien”, without separately identifying the block and lot numbers of the unsold condominium units retained by the owner, and thus has included within the lien the common areas and units which have been sold to others, the Second Department Appellate Court has consistently vacated the lien pursuant to Lien Law § 19(6) and denied the lienor’s motion to amend the notice of lien because such lien was invalid *ab initio* and Lien Law § 12-a, which permits amendment, “presupposes the existence of a valid lien and may not be construed to revive an invalid notice of lien” (*Bridge View Tower*, 69 AD3d at 712-713; *see Westage Towers*, 187 AD2d at 600; *see also In re M.M.E. Power Enters.*, 205 AD2d 631 [2d Dept 1994]). The First Department has similarly invalidated liens where the lienor described the property by the former superseded lot number for the entire condominium site without identifying the individual condominium units (*see Northeast Restoration Corp. v K & J Constr. Co., L.P.*, 304 AD2d 306, 307 [1st Dept 2003]; *In re Atlas Tile & Marble Works*, 191 AD2d 247 [1st Dept 1993]; *Diamond Architecturals, Inc. v EFCO Corp.*, 179 AD2d 420, 421 [1st Dept 1992] (holding that where a “blanket lien” was filed against the superseded lot number of a condominium building, and 267 of the 411 individual units had already been sold by the petitioner prior to the filing of the lien, the lien was invalid and not subject to amendment, “insasmuch as the notice at issue contains more than one defect, it cannot be said that there has been substantial compliance warranting such an amendment”)). Petitioner relies on these cases in resisting respondent’s motion to amend the Liens.

Although “a more stringent rule applies to liens on ‘the unique legal identity created by the Condominium Act’” with respect to the property description requirement of Lien Law § 9(7) (*Westage Towers*, 187 AD2d at 600), the present situation is distinguished from the prior Appellate Division decisions relied upon by petitioner that have invalidated “blanket liens” on condominium properties. In *Westage*, *Advanced Alarm* and *Bridge View*, the lien property descriptions solely listed the entire condominium property and did not identify specific lot numbers (*Westage*, 187 AD2d at 600 (condominium property described solely as “Westage Towers East”); *Advanced Alarm Technology*, 145 AD2d at 583 (described entire condominium property as subject to the lien without limiting the lien to particular units); *Bridge View*, 69 AD3d at 712 (condominium property described solely as “189 Bridge Street”)). In *Northeast*, *Atlas* and *Diamond*, the liens were filed solely against

a superceded single lot number for the entire condominium building and did not identify the separate lot numbers assigned to each unit at the time of the lien filing (*Northeast*, 304 AD2d at 307; *Atlas*, 191 AD2d at 247; *Diamond*, 179 AD2d at 420). In *M.M.E.*, although the lien identified subplots within the condominium development, the “blanket lien” was also filed against a non-superceded lot number that encompassed the entire condominium property, including the common elements, in violation of Real Property Law §339-1(1) (*M.M.E.*, 205 AD2d at 632). Here, each unit has been separately identified by block and lot number and the Liens do not purport to include common areas, although respondent has listed lots that were not subject to its Liens by virtue of having been sold to third parties.

Other courts have also similarly distinguished the Appellate Division decisions relied upon by petitioner while granting leave to amend liens *nunc pro tunc* or invalidating the liens only as to the common areas. In *JKT Construction Inc. v Rose Tree Management & Development Co.* (2009 NY Slip Op 31019[U], \*9 [Sup Ct, New York County 2009]), the Supreme Court held that where a lienor “identified the individual condominium unit[ lot numbers] as well as the superseded single lot number”, the notice of lien was valid as against the lots still owned by the original owner against whom the lien had been filed even though six of the eight units identified in the lien had been sold by the original owner prior to the filing of the lien.<sup>3</sup> The court indicated that *Westage* and *Diamond* were distinguishable as the lienor in *JKT Construction*, like respondent here, identified the individual condominium units as well as the superseded single lot number in the lien (*id.*). In *343-349 E.50th Street, LLC v W. Designe, Inc.* (2008 NY Slip Op 31955[U], \*6 [Sup Ct, New York County 2008]), the court permitted the amendment of a lien filed against a superceded condominium lot number and noted that *Westage*, *Northeast*, and *Atlas* were distinguishable because in those cases, the lienor “failed to properly describe the specific units sought to be encumbered . . .” In *SGS Assoc., LLC v R.A. German Constr., Corp.* (15 Misc 3d 1135A, \*5 [Sup Ct, Kings County 2007]), the court noted that neither *Atlas* nor *Advanced* “established a *per se* rule that the use of superseded block and lot

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<sup>3</sup> The original lot “was subdivided into four separate single residential condominium units with four appurtenant storage units. Each was given its own lot designation.” Prior to the lien filing, “three of the four units, with the appurtenant storage units, were sold to individual owners . . .” (*JKT Construction Inc. v Rose Tree Management & Development Co.*, 2009 NY Slip Op 31019[U], \*3 [Sup Ct, New York County 2009]).

numbers is a fatal defect. Rather, the aforementioned cases stand for a rule that a Notice of Lien must describe the subject property sufficiently enough that the lien is limited on its face to that property which the lienor seeks to encumber.”

The Second Department has also held that where a lien “description included too much property, but nevertheless included and identified all the property on which the lien could properly be claimed, the defect was not fatal, as the lien would be limited and restricted only to that part against which it could properly be enforced” (*East Coast Mines & Materials Corp. v Golf Course Props. Co.*, 228 AD2d 545, 546 [2d Dept 1996]; *see also Metro Masonry, Inc. v West 56th Street Assoc.*, 147 Misc 2d 565, 568 [Sup Ct, New York 1990] (holding, that “[a]lthough [the lienor] filed the lien against more property than permissible, it has been held that the fact that a description includes more property than was directly benefitted by the improvement is not necessarily fatal to the validity of the lien”). The Second Department also noted in *East Coast Mines* that, “[t]o invalidate the lien based upon such a technical defect ‘would do violence to Lien Law § 23, which provides that such law ‘is to be construed liberally to secure the beneficial interests and purposes thereof’ and that, ‘substantial compliance with its several provisions shall be sufficient for the validity of a lien’” (*East Coast Mines*, 228 AD2d at 546 (internal citation omitted); *see Metro Masonry*, 147 Misc 2d at 568).

Here, although the respondent did file each of the Liens against the entire superseded lot number, the respondent also identified the individual condominium units in the Liens and thereby sufficiently identified the property properly subject to the Liens so as to satisfy the requirements of Lien Law § 9(7) (*see JKT Construction*, 2009 NY Slip Op 31019[U] at \*9). While at least 26 of the 243 lots originally owned by the petitioner had been sold and recorded prior to the filing of the Liens, the Liens substantially complied with Lien Law § 9(7) and the amendment of the Liens, *nunc pro tunc*, so as to eliminate the lots conveyed prior to the filing of the Liens will not prejudice any existing lienor or purchaser<sup>4</sup> (*see JKT Construction*, 2009 NY Slip Op 31019[U] at \*9; *In the Matter of Heidi Construction Corp.*, 20 Misc 2d 58, 59 [Sup Ct, Westchester County 1959] (holding that

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<sup>4</sup> Respondent has submitted proof of service of its application upon the owners of the transferred condominium units. No one has appeared or filed any opposition to the cross-motion to amend.

“[t]he lienor substantially complied with the statute when it filed its lien against the owner of 21 of the 24 lots upon which the improvements were made” and granted petitioner leave to file a motion to amend the lien *nunc pro tunc* pursuant to Lien Law §12-a); *Mussen v Franklin Sq. Assoc., V., LLC*, 22 AD3d 1022, 1023 [3d Dept 2005] (holding that a “blanket lien”, where 13 of the 20 condominium units were sold prior to the filing of the notice of lien, was invalid as to the condominium building, but remained valid, pursuant to Lien Law § 23, as to the parcels retained by the owner at the time of the filing of the notice of lien as the property description adequately identified the owner’s property)).

Although respondent argues that any amended liens should include the units purportedly transferred by the petitioner prior to the filing of the Liens, but not recorded until after the filing of the Liens, respondent has not cited any legal authority for this contention which appears to contravene Lien Law § 4(1) and Real Property Law §339-l(2). Pursuant to Lien Law § 4(1), a “lien shall extend to the owner’s right, title or interest in the real property and improvements, existing at the time of filing the notice of lien, or thereafter acquired, except as hereinafter in this article provided.” Lien Law § 2(3) defines “owner” as including, “the owner in fee of real property” and, pursuant to Real Property Law § 244, “[a] grant takes effect, so as to vest the estate or interest intended to be conveyed, only from its delivery . . .” Accordingly, if the deeds at issue were transferred from the petitioner prior to the filing of the Liens, then the petitioner would not have been an “owner” of the units when the Liens were filed regardless of when the transfers were recorded. Therefore the Liens upon transferred units would be invalid under Lien Law § 4(1).

Real Property Law §339-l(2) provides that, “[l]abor performed on or materials furnished to a unit shall not be the basis for the filing of a lien pursuant to article two of the lien law against the unit of any unit owner not expressly consenting to or requesting the same, except in the case of emergency repairs.” In *Country Village Heights Condominium (Group I) v Mario Bonito, Inc.*, 79 Misc 2d 1088, 1090 [Sup Ct, Rockland County 1975], the court noted:

It seems clear from the language in [Real Property Law § 339-l(2)] that the Legislature has chosen to distinguish between the rights of those performing labor on or furnishing materials to individual unit owners in a condominium, and the rights of those performing labor on or furnishing materials to the common elements of a condominium. In the case of labor performed or materials furnished to any unit owner, there can be no lien unless the unit owner expressly consents to the lien or unless the lien is for emergency repairs to such unit.

As a number of the condominium units were transferred by the petitioner prior to the filing of the Liens, and there are no allegations that the new owners consented to the Liens, the work was for emergency repairs, or that the labor and services allegedly provided by respondent were requested by the new owners, the Liens may not encumber the units transferred prior to the filing of the Liens even where the recording of the transfers occurred after the filing of the Liens (*see* Real Property Law § 339-1(2); *Country Village*, 79 Misc 2d at 1090; *Matter of 406-408 W. 45th St. Holdings LLC v Crystal Window & Door Sys., Ltd.*, 2008 NY Slip Op 33578U, \*8 [Sup Ct, New York County 2008]; *compare A.C. Green Elec. Contrs. v Sau Liong Fu*, 240 AD2d 243, 244 [1st Dept 1997] (although the court reinstated a lien where there was no proof that the new individual unit owner expressly consented to or requested the labor at issue, *A.C. Green* is distinguished from the present action in that the court based its decision on the presence of allegations including work that was done before and *after* the individual owners purchased their units and that the new owners were ‘alter egos’ of the petitioner)). Clearly, as respondent concedes, the Liens do not and cannot encumber units that had been sold by petitioner prior to the filing of the Liens, and the error in the Liens, as filed, should be expeditiously corrected.

Leave to amend the Liens is further warranted in this case as the delay in recording the petitioner’s transfer of condominium units would have prevented the respondent from accurately describing the property to be liened and filing the Liens as to only those units owned by the petitioner at the time of the filing. Even if the respondent had conducted a search of the records of the city register on March 11, 2010, the same date that the Liens were filed, the transfers of at least nine units that had previously been transferred by the petitioner were not recorded as of that date. The transfers of two units, Block 2060 Lot 1024 and Block 2060 Lot 1068, that occurred prior to the filing of the Liens, were not recorded until more than two months after the Liens were filed. As petitioner itself argues that respondent “could at any time (and should have previously) voluntarily discharge [sic] such liens pursuant to Lien Law § 19(1)”, and considering that it would have been impossible for the respondent to determine which units had been sold and therefore encumber *only* those units owned by the petitioner at the time of filing the Liens, the invalidation of the Liens based upon technical defects would place an unreasonable burden on respondent in violation of the purpose of Lien Law § 23.

In petitioner’s memorandum of law in support of the petition, petitioner argues that section five of the Liens improperly “lumps together the amount allegedly owed for labor and the amount

allegedly owed for materials.” However, in a prior proceeding, (*Myrtle Avenue Builders, LLC v Rosal Plumbing & Heating, Inc.*, Sup Ct, Kings County, Index No. 11521/10), petitioner moved pursuant to Lien Law § 38 for a statement itemizing the items of labor and materials which make up the amount claimed by the respondent. A review of the papers submitted in support of the present motions establishes that the respondent responded to the petitioner’s demand for an itemized statement pursuant to Lien Law § 38, although the exhibits to the response were not included in the present motions and are not before this court. In any case, petitioner’s contention is without merit as the Liens clearly identify the work performed under each respective contract and “Lien Law § 9(4) does not require the cost for material and labor to be stated separately in the Notice of Mechanic’s Lien. A total sum for the combination of all material and labor furnished constitutes sufficient compliance” (*Matter of Superior Maintenance Group*, 2009 NY Slip Op 31041[U], \*17 [Sup Ct, New York County 2009]; see *Felgenhauer v Haas*, 123 AD 75, 77 [2d Dept 1907] (holding, “[t]he defendant claims that the notice of lien is defective because it does not state separately the value of the materials furnished and labor performed. This is not necessary.”)). Accordingly, petitioner’s motion to discharge the lien for insufficient identification of the labor performed or materials furnished is denied.

### CONCLUSION

Accordingly, it is

Ordered that the petition to invalidate the liens is denied; and it is further

Ordered that the respondent’s cross-motion to file Amended Notices of Lien *nunc pro tunc* pursuant to Lien Law § 12-a is granted, consistent with this decision. Petitioner is directed to provide respondent with proof of the transfer of lot 1135 (unit 1807), to the extent it exists, within 10 days of this order. Respondent is directed to file amended Notices of Lien within 20 days of this order.

The foregoing constitutes the decision and order of the court.

E N T E R :

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J.S.C.