

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18  
Justice

In the Matter of the Application x Index  
of Number 2525 2004  
  
PLUMBING SOLUTIONS, LTD. Motion  
Date April 14, 2004  
  
for an order directing  
  
JOSEPH WERZBERGER, Lienor, Motion  
Cal. Number 29  
  
to deliver the itemized statement  
of labor and material and the terms  
of the contract required by Lien Law  
§ 38.

x

The following papers numbered 1 to 19 read on this application by Plumbing Solutions, Ltd. For an order discharging certain mechanic's liens and on the petition of Joseph Werzberger for an order pursuant to Lien Law § 76 allowing him to examine books and records.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1-4
Notice of Petition - Affidavits - Exhibits .....	5-10
Answering Affidavits - Exhibits .....	11-19

Upon the foregoing papers it is ordered that the application is granted and the petition is dismissed.

On February 25, 2004, the parties executed a so-ordered stipulation whereby it was agreed that "the liens identified in the moving papers be and hereby are discharged unless respondent Joseph Werzberger provides itemized statements containing all information required by Lien Law § 38 on or before March 5, 2004 \*\*\*."

Petitioner Plumbing Solutions moves herein for an order pursuant to the stipulation discharging the mechanic's liens on grounds that the information provided by Wertzberger at 5 P.M. on March 5, 2004 was incomplete and not in compliance with the detail required under Lien Law § 38 (DePalo v McNamara, 139 AD2d 646 [1988]; Matter of Bundick Assoc. Owners Corp., 131 AD2d 672 [1987].)

In opposition to the motion, Wertzberger argues that the information produced was in "substantial compliance" with Lien Law § 38 and that the information sought is otherwise "ascertainable" by petitioner. In general, such tactics of burden shifting are not tolerated by the courts. (Fucci v Fucci, 166 AD2d 551 [1990].) Moreover, a review of Wertzberger's purported "Itemized Statement Pursuant to Lien Law § 38" provides none of the required information, such as the hours worked, hourly rates, materials furnished, and details as to the nature of the labor for each project. (DePalo v McNamara, supra; Matter of Bundick Assoc. Owners Corp., supra; 819 Sixth Ave. Corp. v T.A. Assocs., 24 AD2d 446 [1965].) Here, as in Bundick, a mechanic's lien will be properly cancelled where the leinor, in response to a conditional order, provided only information that was previously found to be inadequate. (Matter of Bundick Assoc. Owners Corp., supra and see, In re BK Venture Corp., \_\_\_ AD3d \_\_\_, 2004 NY Sup Op 04189.)

Moreover, petitioner correctly argues that the liens are also deficient under Lien Law §§ 12 and 21(7) where they fail to identify the particular public improvements upon which the labor was allegedly performed. (Matter of M.M.E. Power Enter., 205 AD2d 631 [1994]; Border v Cook & Sons, 24 App Div 476 [1934]; 17 Carmody-Wait 2d, Establishment, Discharge and Enforcement of Mechanic's Liens § 97:220.) It follows that a lien invalid on its face, for reasons such as failure to comply with Lien Law § 12, may properly be cancelled by the court upon a verified petition by the contractor or other party in interest. (Lien Law § 21(7); Matter of M.M.E. Power Enter., supra.)

The court is not unmindful of the jural effect of a certain agreement previously executed by Wertzberger whereby he released all claims against petitioner for payment of the sum of \$100,000. (Booth v 3669 Delaware, Inc., 92 NY2d 934 [1998].) The belated claims of fraud asserted herein to defeat the effect of that release are without effect as the allegations are conclusory and do not set forth the requisite elements of a fraud claim. (Booth v 3669 Delaware, Inc., supra; Glickman v Alper, 236 AD2d 230 [1997].)

Finally, the petition by Wertzberger brought pursuant to Lien Law § 76 is not only rendered moot by the discharge of the liens herein, Wertzberger also lacks standing to make such a request. It is undisputed that he was an employee of Plumbing Solutions, and that the only contract he executed with Plumbing Solutions was the aforementioned release of claims against it, and as such, Wertzberger is not a "beneficiary" within the meaning thereof. (Abjen Properties, L.P. v Crystal Run Sand & Sign Gravel, 168 AD2d 783 [1990].) The petition pursuant to Lien Law § 76 is accordingly dismissed.

Accordingly, the application is granted; the subject notices of mechanic's liens, dated October 28, 2003, are hereby canceled and discharged of record; and the clerk is directed to mark the records accordingly making reference to this decision and order.

Dated: July 9, 2004

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J.S.C.