

**Adams v Taddeo Constr. Corp.**

2014 NY Slip Op 30316(U)

January 31, 2014

Sup Ct, New York County

Docket Number: 159586/13

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN  
J.S.C Justice

PART 55

JOHN ADAMS  
- v -  
TADAS Construction Inc

INDEX NO. 159586/13  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/31/14

CYNTHIA S. KERN  
J.S.C. J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
JOHN W. ADAMS,

Petitioner,

Index No. 159586/13

-against-

**DECISION/ORDER**

TADDEO CONSTRUCTION CORP.,

Respondent.

-----X  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u>      </u>
Answering Affidavits to Cross-Motion.....	<u>      </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner John W. Adams has brought the instant petition by Order to Show Cause seeking an Order pursuant to New York Lien Law (“Lien Law”) § 38 (1) directing respondent Taddeo Construction Corp. (“Taddeo”) to furnish a specific itemized statement of its mechanic’s lien; and (2) directing that if such statement is not served, the mechanic’s lien be vacated and set aside. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner is the owner of the condominium apartment 18A located at 340 West 57<sup>th</sup> Street, New York, New York, Section 1, Block 1047, Lot 1166 (the “property”). In or around 2012, petitioner hired respondent to perform renovation work on the

property pursuant to a written contract (the "Contract"). Petitioner later entered into change order agreements (the "Change Orders") with respondent for the performance of additional work. On or about July 31, 2013, petitioner terminated the contract on the ground that "substantial parts of the contract work...were not completed and much of what was done was defectively performed and left uncorrected." On or about August 6, 2013, Taddeo filed a notice of mechanic's lien (the "Lien") against the property in the amount of \$128,470.00. On August 20, 2013, petitioner, by his attorneys, made a written demand on Taddeo pursuant to Lien Law § 38, demanding that it furnish a statement in writing, within five days after receipt of the demand, that sets forth the items of labor and the value thereof and the items of material and the value thereof that make up the amount for which the lien was claimed. Taddeo has refused to comply with petitioner's demand for said statement. Thus, petitioner brought the instant petition by Order to Show Cause requesting the above relief.

Pursuant to Lien Law § 38,

A lienor who has filed a notice of lien shall, on demand in writing, deliver to the owner or contractor making such demand a statement in writing which shall set forth the items of labor and/or material and the value thereof which make up the amount for which he claims a lien, and which shall also set forth the terms of the contract under which such items were furnished. The statement shall be verified by the lienor or his agent in the form required for the verification of notices in section nine of this chapter. If the lienor shall fail to comply with such a demand within five days after the same shall have been made by the owner or contractor..., the person aggrieved may petition the supreme court of this state...for an order directing the lienor within a time specified in the order to deliver to the petitioner the statement required by this section...In case the lienor fails to comply with the order so made within the time specified, then upon five days' notice to the lienor,...the court...may make an order canceling the lien.

However, "section 38 of the Lien Law requires an itemization of materials and labor only in a

case where the lien is based on *quantum meruit*.” *Matter of Borysko*, 2 Misc.2d 621, 622 (Sup. Ct. Kings Cty. 1956); *see also F.J.C. Cavo Constr. v. Robinson*, 81 A.D.2d 1005 (4<sup>th</sup> Dept 1981)(“[as]...this is a breach of express contract action in which the issue is performance of the contract and not the cost of materials, defendants [do not have] an absolute right to an itemized statement of lien. Although the language of section 38 of the Lien law appears to confer an unrestricted right to an itemization of labor and materials, such is not the case.”) Further, “[i]temization of labor and materials is not required with respect to a balance of an agreed price where...it is claimed that the contract has been substantially completed.” *See Matter of 819 Sixth Ave. Corp. v. T. & A. Assoc.*, 24 A.D.2d 446 (1<sup>st</sup> Dept 1965). This is because “[t]he purpose of the itemization is to apprise the owner of the details of the lienor’s claim.” *F.J.C. Cavo Constr.*, 81 A.D.2d at 1005. Therefore, in cases where “the claim is based on an express contract for a specific sum,...[i]t would serve no purpose to require the plaintiffs to serve a redundant itemization.” *Id.*

Here, petitioner’s petition for an Order directing respondent to furnish a specific itemized statement of its mechanic’s lien and directing that if such statement is not furnished, the lien be vacated and set aside is denied as petitioner has not demonstrated his entitlement to such relief. As an initial matter, it is undisputed that the work was performed pursuant to the Contract for an agreed price, namely, a lump sum of \$200,000.00 and not in *quantum meruit*. It is also undisputed that any work performed by respondent above and beyond the Contract was performed pursuant to Change Orders, the amount of which was previously agreed to. Additionally, respondent has contended that the work pursuant to the contract and the Change Orders has been substantially completed. Thus, petitioner is not entitled to an itemization

