

**Matter of Planet Hollywood Broadway, LLC v Acura  
Constr., Inc.**

2014 NY Slip Op 32116(U)

August 7, 2014

Sup Ct, New York County

Docket Number: 151823/14

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

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In the Matter of the Application of PLANET HOLLYWOOD  
BROADWAY, LLC,

Index No. 151823/14

Petitioner,

Mot. seq. no. 001

for an Order Pursuant to Lien Law § 38

**DECISION AND ORDER**

- against -

ACURA CONSTRUCTION, INC., DONALD MCGEACHY  
INC., FINE INTERIORS INC., and P & R INFINITY AIR  
CORP.,

Respondents.

-----X  
BARBARA JAFFE, J.:

**For petitioner:**  
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Malapero & Prisco, LLP  
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New York, NY 10017  
212-661-7300

**For respondents:**  
Andrew G. Kao, Esq.  
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New York, NY 10018  
646-278-6730

Petitioner moves pursuant to Lien Law § 38 for an order directing respondents to furnish verified itemized lien statements of the labor and/or material and the value thereof comprising the amounts claimed in their respective notices of mechanic's lien, along with the terms of the contracts under which such items were furnished. Respondents oppose.

I. BACKGROUND

In December 2012, petitioner, lessee of premises located at 1540 Broadway, contracted with nonparty general contractor CDC Construction Corporation, who thereafter contracted with respondents to perform work on the premises. In August 2013, respondents each filed a notice of mechanic's lien against the property for labor, materials, and improvements to the premises, claiming various sums owed. (NYSCEF 4). On February 20, 2014, petitioner served respondents

with demands for written and verified itemizations of the labor and material furnished and the terms of the pertinent contracts. (NYSCEF 5). On or about February 28, 2014, following respondents' failure to respond to the demands, petitioner commenced this proceeding. (NYSCEF 1, 2).

Petitioner's attorney verifies that the contents of the petition are true to his own knowledge, based on discussions with, and documents provided by his client, except for those matters attested to on information and belief. (NYSCEF 2).

## II. CONTENTIONS

Petitioner's counsel, in a section of his affirmation, entitled "Argument," states that as petitioner has no documentation demonstrating what work was completed, the statements demanded are crucial to apprise it of the details of respondents' claims. (NYSCEF 3).

Respondents argue that only premises owners or those who contract with lienors may demand itemized statements, and consequently, petitioner, who is bound by the acts of CDC, lacks standing to commence this proceeding. According to respondents, itemization is not required when the amounts owed are not in dispute, when there are agreed-upon prices, and when the contract has been substantially completed. Respondents also observe that petitioner fails to furnish affidavits of those with personal knowledge of the circumstances of the petition or the contracts between respondents and CDC, and does not dispute the amounts claimed in the liens. They also seek reasonable attorney fees. (NYSCEF 8).

In reply, petitioner argues that, as a lessee, it is an owner under the Lien Law. Counsel alleges that as CDC, in violation of its contract with petitioner, failed to obtain petitioner's approval of costs for the work, petitioner never agreed to any costs, and thus, the amounts owed

to respondents are all in dispute. Petitioner also denies that it is required to furnish a lienor's contract terms as part of its petition. (NYSCEF 9).

### III. ANALYSIS

Pursuant to Lien Law § 38, an owner or contractor may demand from a lienor a statement setting 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. . . . If the lienor shall fail to comply with such a demand within five days . . . , the person aggrieved may petition the supreme court . . . for an order directing the lienor within a time specified in the order to deliver to the petitioner the statement required by this section.

The purpose of the itemization is to “apprise the owner of details of the lienor’s claim.” (*F.J.C. Cavo Const., Inc. v Robinson*, 81 AD2d 1005 [4<sup>th</sup> Dept 1981]). An owner includes “a lessee for a term of years.” (Lien Law § 2[3]).

Here, absent any dispute that petitioner is a lessee for a term of years, petitioner has standing to commence this proceeding. *Matter of Solow v Bethlehem Steel Corp.*, 60 AD2d 826 [1<sup>st</sup> Dept 1978], *lv denied* 46 NY2d 836, is inapposite. There, the Court held that an owner in his individual capacity was not entitled to an itemized statement, as he had authorized his own development company to contract with another entity, who thereafter contracted with the lienor, circumstances not present here.

That the petition is verified by petitioner’s attorney, one without personal knowledge of all of the facts set forth therein, does not constitute a defect, as there is no statutory requirement that the petition be verified nor must petitioner demonstrate need as a condition precedent to a lienor’s obligation to comply (*Matter of BK Venture Corp. v Harrison Summerfield Assoc., LP*, 7

AD3d 793, 794 [2d Dept 2004]; *see* 11 West's McKinney's Forms Real Property Practice § 7:56 [2014]). Consequently, hearsay allegations set forth by counsel in the petition need not be considered.

As the purpose of an itemized statement is to apprise the owner of the lienor's claims, which includes the disclosure of the terms of the contracts the lienor seeks to enforce (*see* Lien Law § 38 [lienor shall set forth terms of contract in itemized statement]), petitioner has no obligation, nor does the statute require, that it submit the contracts.

Given this result, respondents are not entitled to attorney fees.

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that respondent Acura Construction, Inc., lienor, shall within five days after service of a copy of this order with notice of entry thereof upon it in the manner required for the service of a summons, serve a verified statement in writing that shall set forth the items of labor and/or material and the value thereof that make up the amount for which it claims a mechanic's lien, and that shall also set forth the terms of the contract under which such items were furnished; it is further

ORDERED, that respondent Donald McGeachy Inc., lienor, shall within five days after service of a copy of this order with notice of entry thereof upon it in the manner required for the service of a summons, serve a verified statement in writing that shall set forth the items of labor and/or material and the value thereof that make up the amount for which it claims a mechanic's lien, and that shall also set forth the terms of the contract under which such items were furnished; it is further

ORDERED, that respondent Fine Interiors Inc., lienor, shall within five days after service of a copy of this order with notice of entry thereof upon it in the manner required for the service of a summons, serve a verified statement in writing that shall set forth the items of labor and/or material and the value thereof that make up the amount for which it claims a mechanic's lien, and that shall also set forth the terms of the contract under which such items were furnished; and it is further

ORDERED, that respondent P & R Infinity Air Corp., lienor, shall within five days after service of a copy of this order with notice of entry thereof upon it in the manner required for the service of a summons, serve a verified statement in writing that shall set forth the items of labor and/or material and the value thereof that make up the amount for which it claims a mechanic's lien, and that shall also set forth the terms of the contract under which such items were furnished.

ENTER:

  
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Barbara Jaffe, JSC

DATED: August 7, 2014  
New York, New York