

**Matter of 2269 First Ave Owner LLC v BDM  
Solutions LLC**

2019 NY Slip Op 31823(U)

June 24, 2019

Supreme Court, New York County

Docket Number: 158699/18

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 37

In the Matter of the Application of  
2269 FIRST AVE OWNER LLC,

Index No.: 158699/18

*Petitioner,*

*against*

DECISION/ORDER

BDM SOLUTIONS LLC,

*Respondent,*

For an Order compelling production of an Itemized Statement of Lien pursuant to Section 38 of the Lien Law for certain Mechanic's Liens filed by Respondent against premises at which it is alleged that Petitioner 2269 FIRST AVE OWNER LLC is the Owner, and known and described as 2269 First Avenue, New York, New York, said premises designated as Block 1688, Lot 30, on the Land and Tax Map of the County of New York.

**ENGORON, A., J.,**

In this special proceeding, petitioner 2269 First Ave Owner LLC (Owner) seeks an order pursuant to Lien Law § 38 compelling respondent BDM Solutions (BDM) to provide an itemized statement of labor and materials supporting the amount claimed by BDM in a mechanic's lien filed against property owned by petitioner.

Petitioner is the owner of real property in New York City commonly known as 2269 First Avenue, New York, New York (the property). In or around May 2014, petitioner and respondent BDM, as general contractor, entered into a written contract for the construction of a project known as PS 85 Development Project (the project) on the property. See Contract, NYSCEF Doc. No. 22. Petitioner alleges that, in May 2018, it terminated its contract with respondent based on

respondent's alleged breaches of the contract, including abandoning the project. Verified Petition, NYSCEF Doc. No. 1, ¶ 5.

On July 27, 2018, BDM filed a notice of mechanic's lien (lien) against the property in the amount of \$2,061,713.18, which BDM claimed was due for labor and material supplied and used at the property for "gut renovation and/or construction of new building, including storm drainage, utility connections, asbestos removal, demolition, piles, foundations, structural steel, docking, carpentry, framing, drywall, taping, flooring, tiling, kitchen cabinets and accessories, bathroom vanities and accessories, countertops, appliances, painting, masonry, stucco, plumbing, electrical, HVAC, roofing, waterproofing, doors, windows, and all associated work." See Notice Under Mechanic's Lien Law, NYSCEF Doc. No. 3. The lien states that work on the project was last performed on or about April 1, 2018. *Id.*

On August 14, 2018, Owner served a demand for an itemized statement detailing the labor and materials, and the value of each, that form the basis for the lien. BDM responded, on or about August 27, 2018, by providing a statement annexing a list of payments made to vendors and subcontractors, dates payments were made, and balances due to subcontractors. See Itemized Statement, NYSCEF Doc. No. 5. BDM claims it paid \$21,771,549.17 to vendors and subcontractors, and owes a balance to them of \$1,318,768.48; and that BDM was paid \$21,028,604.47 and is owed \$742,944.70; and the lien represents the combined amounts owed to BDM and owed to the vendors and subcontractors. *Id.*; see Affidavit of Dionyssios Maroulis in Opposition to Petition (Maroulis Aff.), NYSCEF Doc. No. 17, ¶ 4.

Claiming that the statement served by respondent was wholly inadequate and failed to comply with the requirements of the Lien Law, petitioner commenced this proceeding pursuant

to Lien Law § 38 to compel BDM to provide a further itemized statement, by a date certain, or for cancellation of the lien if respondent fails to comply. Petitioner complains that BDM's statement "lacks any detail concerning the description, quantity or costs of the materials for which any vendor was paid, or the nature of labor, time spent, and hourly or other rate of labor charges" (Verified Petition, NYSCEF Doc. No. 1, ¶12), and does not contain sufficient information to permit petitioner to "determine what the vendors or subcontractors were paid for or what they are owed." *Id.*, ¶ 14. Petitioner also claims that the statement is inaccurate, as it lists amounts paid to subcontractors which are "less than the amounts certain of the subcontractors verify as being paid" (*id.*, ¶ 15), and does not include terms of the contract or information on change orders. *Id.*, ¶¶ 15, 21. Respondent opposes the petition on the grounds that it has provided sufficient information.

Lien Law § 38 provides, in pertinent part, that

"[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 purpose of the itemization is to apprise the owner of the details of the lienor's claim" (*F.J.C. Cavo Constr., Inc. v Robinson*, 81 AD2d 1005, 1005 [4<sup>th</sup> Dept 1981]) and "to enable the petitioner to check the claim." *Matter of 819 Sixth Ave. Corp. v T. & A. Assocs.*, 24 AD2d 446, 446 (1<sup>st</sup> Dept 1965); see *Associated Bldg. Servs., Inc. v Pentecostal Faith Church*, 112 AD3d 1130, 1131 (3d Dept 2013); *Matter of Solow v Bethlehem Steel Corp.*, 60 AD2d 826, 826 (1<sup>st</sup> Dept 1978). While Lien Law § 38 does not establish "an absolute right to an itemized

statement” in all circumstances (*F.J.C. Cavo Constr.*, 81 AD2d at 1005; see *Matter of Solow*, 60 AD2d at 826 ), it does require an itemized statement where, as here, the claim is based on *quantum meruit* and there is a dispute as to the work performed or the value of the work performed. See *Matter of Plain Ave. Stor., LLC v BRT Mgt., LLC*, 165 AD3d 1264, 1265-1266 (2d Dept 2018); *Matter of Burdick Assocs. Owners Corp.*, 131 AD2d 672, 672 (2d Dept 1987); *Matter of Solow*, 60 AD2d at 826; *Matter of 819 Sixth Ave. Corp.*, 24 AD2d at 446.

When an itemized statement is required, “to enable the petitioner to check the claim, the statement served by the lienor should set forth the description, quantity and costs of various kinds of materials and the details as to the nature of labor, time spent and hourly or other rate of the labor charges.” *Matter of 819 Sixth Ave. Corp.*, 24 AD2d at 446 (citations omitted); see *Matter of Sperry v Millar*, 254 AD 819 (4<sup>th</sup> Dept 1938); *Matter of Maxwell Partners, LLC v L.G.B. Development, Inc.*, 2006 WL 8085000 (Sup Ct, NY County 2006); *Matter of Seid v Hanco Co.*, 31 Misc 2d 316, 317 (Sup Ct, Onondaga County 1961). “The burden of producing an adequate statement rests on the lienor.” *Matter of Maxwell Partners, LLC*, 2006 WL 8085000, at \*3; see *Matter of 819 Sixth Ave. Corp.*, 24 AD2d at 446; *Matter of Seid*, 31 Misc 2d at 317. “Mere copies of invoices . . . [and] [g]eneral summaries or lump sum statements do not meet the requirements of Lien Law § 38.” *Matter of Maxwell Partners, LLC*, 2006 WL 8085000, at \*3.

BDM does not dispute that Owner is entitled to an itemized statement, but contends that the statement it provided, together with eleven binders containing additional information, which were previously provided to petitioner and subsequently provided to petitioner’s attorneys in response to this petition, is sufficient to meet the requirements of Lien Law § 38.

The initial itemized statement supplied by BDM consisted of a three-page “Financial

Overview” spreadsheet, identifying amounts paid to subcontractors, amounts owed to subcontractors, and “miscellaneous invoices” outstanding. It does not, however, separately detail labor and materials; it neither sets forth a description of materials, their quantity and cost, nor the trade, hours, and cost for labor. The listing of lump sum amounts due to various vendors and subcontractors under general categories of work performed on the project is not sufficiently itemized to permit petitioner to check the claim, and does not meet the requirements of Lien Law § 38. See *Matter of Plain Ave. Stor., LLC*, 165 AD3d at 1266; *Matter of De Palo v McNamara*, 139 AD2d 646, 647 (2d Dept 1988); *Matter of Scorpion Fitness, Inc.*, 2017 WL 3115035 (Sup Ct, NY County 2017); *Matter of Pineda v AB Painting & Constr., Inc.*, 2015 WL 5470165 (Sup Ct, NY County 2015).

To the extent that respondent argues that the eleven binders separately provided to petitioner support the initial statement and sufficiently detail the claim, the excerpts submitted to the court in opposition to the petition, apparently a small portion of the thousands of pages included in the binders, are not self explanatory and do not clarify what items of labor and materials are in dispute or how the lien is supported, and do not even seem to correlate to the amounts claimed in the lien. Respondent otherwise does not explain how the binder materials support the claim or where such support would be found, and neither petitioner nor the court should be required to “make out a statement” from the voluminous materials. See *Matter of Seid*, 31 Misc 2d at 317. Further, petitioner submits evidence that there are discrepancies between amounts claimed due in the initial statement and the amounts shown in the binder materials to have been paid.

Accordingly, it is

ORDERED that the petition to compel a more itemized statement in compliance with Lien Law § 38 is granted to the extent that it is

ORDERED that, within 45 days after service upon it of a copy of this decision and order, BDM shall serve and file a properly itemized statement in accordance with Lien Law § 38 and this decision and order, setting forth the items of labor and/or materials and the cost thereof, which form the basis for the lien; and it is further

ORDERED that the branch of the petition seeking cancellation of the lien is denied without prejudice to renewal, if so advised, in the event that BDM does not comply with this order.

Dated: 6/24/19

ENTER:



ARTHUR ENGORON, J.S.C.