

Matter of PDS Second Carroll LLC v Triple C Glass Corp.
2021 NY Slip Op 32743(U)
December 21, 2021
Supreme Court, Kings County
Docket Number: Index No. 503367/2021
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

**In the Matter of the Application of
PDS SECOND CARROLL LLC,**

DECISION / ORDER

Petitioner,

Index No. 503367/2021

Motion Seq. No. 02

-against-

Date Submitted: 10/28/2021

TRIPLE C GLASS CORP.,

Respondent.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of petitioner's motion to cancel respondent's mechanics lien.

Papers	NYSCEF Doc.
Order to Show Cause, Affirmation and Exhibits	<u>11-19</u>
Affirmation in Opposition and Exhibits.....	<u>20-24</u>
Reply Affirmation.....	<u>25</u>

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

This is a special proceeding arising out of a mechanic's lien that was filed on September 17, 2020 by respondent (a subcontractor) against the property owner, the petitioner. Petitioner served a "Demand for Itemized Statement of Lien Pursuant to Lien Law § 38" on September 30, 2020. A similar special proceeding was commenced by petitioner against the general contractor, under Ind. 515372/2020, which has been settled. Respondent extended the lien, as reduced and partially released, [Doc 24] for one additional year, by filing an extension on September 2, 2021 [Doc 23] pursuant to Lien Law section 17. An action to foreclose on the lien has not been commenced.

Petitioner PDS Second Carroll LLC ("PDS") filed this special proceeding on February 10, 2021, for an order, pursuant to Lien Law § 38, directing respondent Triple C Glass Corp. ("TCG") to provide a Verified Itemized Statement of its Mechanic's Lien, specifically, "(i) the items of labor and/or materials and the value thereof that make up the amount for which Respondent claimed a lien against the premises, and (ii) the terms of the contract under which the items were furnished." A copy of the demand and the affidavit of service were annexed to the petition. The petition was granted by decision and order dated March 29, 2021, and TCG was ordered to provide a response to the Demand at E-File Doc 3, "by e-filing, within twenty days from the date of this order, a verified statement in writing setting forth the items of labor and/or materials and the value thereof which make up the amount for which respondent claims a mechanic's lien . . . against the property located at 497 Carroll Street, Brooklyn, New York, Block 448, Lot 65. The said verified statement in writing shall also set forth the terms of the Contract under which the items were furnished."

TCG submitted a response on April 15, 2021 (Doc. 10), comprising 76 pages, with a verification from Charles Squillante, Jr., President of respondent corporation, stating that "The above-described materials and work product was furnished by the undersigned pursuant to a signed letter of intent with Kel-Mar Designs, Inc., dated May 14, 2018, and thereafter a contract dated thereafter, as the agent of PDS SECOND CARROL LLC, the owner of the above-described real property, which contract provided that TRIPLE C GLASS CORP. was to install certain Windows, Doors, Storefront materials, and provide labor, materials and supplies pursuant thereto and as described therein."

Now, in Motion Sequence 2, petitioner moves for an order vacating and

cancelling TCG's mechanic's lien pursuant to Lien Law § 38 for TCG's failure to provide the itemized verified statement in accordance with this court's March 29, 2021 order. Counsel for petitioner claims [¶13 of aff in support-Doc 12] that respondent's "purported itemization (the "Itemization"), which remains deficient and fails to comply with the requirements of Lien Law Section 38." He states that it "moreover, is riddled with inaccuracies and conflicting information which renders it impossible to comprehend and calls into question the validity of the Lien." He avers that the itemization does not break out the labor from the materials [¶16]. He also claims that work stopped when the City "shut down" due to Covid-19 on March 20, 2020, so that is when the costs should stop. Finally, he points out that respondent signed a lien waiver [Doc 19] on August 12, 2020, which reflects a sum due of \$100,143.63¹, but filed the lien a month later for twice that amount, demonstrating that the respondent "willfully exaggerated its Lien."

Respondent opposes the motion, and states that its itemized statement satisfied the requirements of Lien Law § 38, so the motion should be denied. Counsel states "It was petitioner's own doing in making payments direct to suppliers that caused confusion. To be clear, at the time of the filing of the original lien, the figure liened at that time was true and accurate as far as from Respondent's perspective."

Discussion

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 materials and the value thereof which make up the amount for

¹ The document actually reflects a payment in this sum, and a balance due of \$124,100. The lien filed states \$204,159.61 was due, which was reduced to \$142,999.02 on August 25, 2021 [Doc 24].

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 [4th 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 [1st 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 [1st Dept 1978]).

If an itemized statement is necessary “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]). The burden of producing an adequate statement rests on the party that filed the lien (see *Matter of 819 Sixth Ave. Corp.*, 24 AD2d at 446; see also *2269 First Ave Owner LLC v BDM Sols. LLC*, 2019 NY Slip Op. 31823[U], 3-6 [NY Sup Ct, New York County 2019]). “General summaries or lump sum statements do not meet the requirements of Lien Law § 38” (*Matter of Maxwell Partners, LLC*, 2006 WL 8085000, at *3).

Courts have cancelled liens where an itemized statement pursuant to Lien Law § 38 was found to be insufficient (*Plain Ave. Stor., LLC v BRT Mgt., LLC*, 165 AD3d 1264, 1265-1266 [2d Dept 2018]), though whether to cancel a lien is addressed to the discretion of the court and the court may, for instance, direct the lienor to submit a revised statement (e.g. *2269 First Ave Owner LLC*, 2019 NY Slip Op. 31823[U], *3-6).

Here, the itemized statement was prepared to support the original lien filed (9/20), for \$204,159.61, and the extension of lien (9/21) is for \$142,999.02, while the

lien waiver dated August 12, 2020 states the balance due is \$124,100. There is no explanation in the partial release of lien [Doc 24] what the reduction in the amount due was based on. Further, the itemization does include \$128,000 for “mobilization and Re-Mobilization (COVID)”, on Page 1 of 76, with no further supporting documentation for this line item. This makes no sense, as if the petitioner had to stop the work as a result of the COVID-19 shut-down in March 2020, and in fact terminated the general contractor “for cause on May 6, 2020” [Doc 12 ¶6] along with the sub-contractors, which would include respondent, this sum should not be due to respondent from the property owner. It was not included in any agreement for goods and services.

Accordingly, it is **ORDERED** that the respondent lienor shall provide petitioner with a **revised response** to its Demand (E-File Doc 3) by e-filing, within thirty days from the date of this order, a verified statement in writing setting forth the items of labor and/or materials and the value thereof which make up the amount for which respondent claims a mechanic’s lien, in the sum \$142,999.02, as represented by the Extension of Mechanic’s Lien [Doc 23] filed on or about September 2, 2021 in the Office of the Kings County Clerk, against the property located at 497 Carroll Street, Brooklyn, New York, Block 448, Lot 65. The said verified statement in writing shall also set forth the terms of the Contract under which the items were furnished.

This constitutes the decision and order of the court.

Dated: December 21, 2021

ENTER:



Hon. Debra Silber, J.S.C.