

**Matter of PDS Second Carroll, LLC v Regulator
Constr. Corp.**

2021 NY Slip Op 32878(U)

December 20, 2021

Supreme Court, Kings County

Docket Number: Index No. 512529/2020

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of December 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
In the Matter of the Application of
PDS SECOND CARROLL, LLC

Index No. 512529/2020

Petitioner,

DECISION AND ORDER

For an Order and Judgment pursuant to Lien Law § 38
requiring Respondent to provide a verified itemized
statement of mechanic's lien,

Motions Sequence #1

-against-

REGULATOR CONSTRUCTION CORP.,

Respondent.

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

	<u>Papers Numbered</u>
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	13, 1-4, 8-11,
Opposing Affidavits (Affirmations).....	17-18, 28-31,
Affirmation or Affidavit in Reply	19-22, 33-37,

After a review of the papers and oral argument the Court finds as follows:

Petitioner PDS Second Carroll, LLC (hereinafter the "Petitioner") moves (motion sequence #1) by Order to Show Cause as against Respondent Regulator Construction Corp. (hereinafter "the Respondent"), for an Order pursuant to New York Lien Law § 38, 1) requiring the Respondent to provide a verified itemized statement in relation to the Notice of Mechanic's Lien Under Lien Law filed with the office of the Clerk of the County of Kings against the property located at 497 Carroll Street, Brooklyn, New York, Block 448, Lot 65, as shown on the Land and Tax Map of the County

of Kings (the "Property"), setting forth the items of labor and/or materials and the value thereof that make up the amount for which Respondent claimed a lien in the amount of \$93,885.86 (the "Lien") within five (5) days; and (ii) cancelling and vacating of record Respondent's Lien if Respondent fails to provide a verified itemized statement in accordance the requirement of Section 38 of the Lien Law within such five (5) day period. Petitioner is the purported owner of the Property.

The Respondent opposes the instant application and contends that it should be denied. The Respondent has annexed as Exhibit 1 Respondent's Itemized Statement that is duly verified and sworn to by the Respondent on August 13, 2020. The Respondent contends that this statement provides the information required by Section 38 of the Lien Law since it provides an itemization of labor and other costs, and lists the employees involved and the costs associated with that labor.

Additionally, and on the consent of the parties during oral argument, the Court permitted the parties to file supplemental papers. Respondent prepared and filed what it contends to have satisfied the requirements of the statute. Petitioner disagrees and argues that the supplemental filings of the Respondent fail to satisfy the requirements of the statute and the Court should direct the respondent to file a further, more detailed statement, as provided for in the statute.

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 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.

Turning to the merits of the instant application, the Court finds that the Respondent has not provided an Itemized Statement that complies with Section 38 of the Lien Law. “Lien Law § 38 does not require any demonstration of need on the part of a property owner as a condition precedent to the lienor's statutory obligation to deliver ‘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.’” *In re BK Venture Corp.*, 7 AD3d 793, 794, 776 N.Y.S.2d 854, 855 [2d Dept 2004]. A Court has discretion regarding whether to cancel mechanic's lien due to the untimely nature of lienor's response to demand for an itemized and verified statement of lien. *See J. Sackaris & Sons, Inc. v. Terra Firma Const. Mgmt. & Gen. Contracting, LLC*, 14 A.D.3d 538, 538, 788 N.Y.S.2d 424, 425 [2d Dept 2005]. In order to satisfy the requirements of Lien Law Section 38, “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.” *819 Sixth Ave. Corp. v. T. & A. Assocs., Inc.*, 24 A.D.2d 446, 446, 260 N.Y.S.2d 984, 986 [1st Dept 1968].

The Court agrees that Respondent's initial response to Petitioner's demand did not meet the requirement of the statute. The original contract price for the work to be provided by Respondent was \$695,000. The lien amount is \$93,885.86. Consequently, any detailed itemization of the lien requires the lienor to provide what portions of the scope of work, Respondent purportedly performed, was not paid for. Respondent's response, containing seventy four pages, merely shows what is tantamount to an outstanding invoice and a copy of the contract between the Respondent and Petitioner's general contractor, non-party Kel-Mar Designs, Inc. (including additional conditions, list of drawings and specifications, Respondent's general scope of work and Progress Schedule) (NYSCEF Doc #11). This by no means details those items that the Respondent

is seeking payment for and fails to address labor and material costs, if any. In addition, the purported itemized statement provided by Respondent, does not comply with the requirements of the statute. It is verified, however, the remainder of the eight page document generally seems to reflect total amounts relating to labor and other unidentified categories and a list of names with numbers next to them in columns, without explanation, in addition to the first page of the contract and the invoice provided in the initial response of the Respondent. The statute requires significantly more detail than this. (NYSCEF Doc. #18). Although the Petitioner did appear to more fully understand the nature of the documentation, Petitioner is correct that it is insufficient.

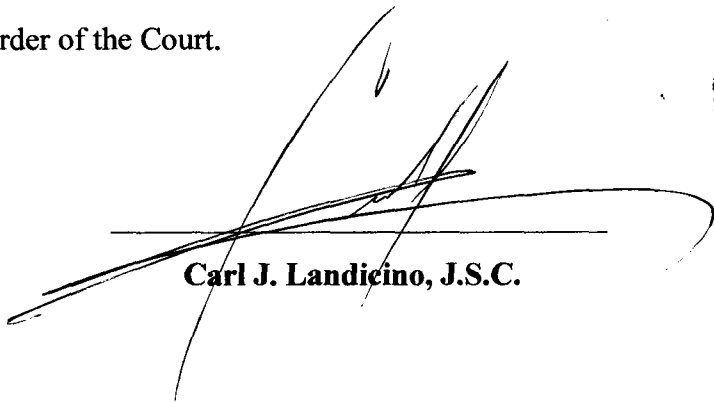
As stated, the parties consented, and the Court permitted Respondent to further supplement their papers and gave Petitioner an opportunity to Reply. Respondent represents that the outstanding amount related to labor costs only since no material was apparently provided. The breakdown consists of \$46,000.00 for waterproofing and \$47,885.86 for installation of brick. While the series of responses provided by the Respondent have increasing detail, the fact is that the information provided failed to comply with the statute, and the Respondent has not contended that no such itemization is required. There remains a lack of clarity as to the basis for the claim in accordance with the terms of the contract and the scope of work. *See 819 Sixth Ave. Corp. v. T. & A. Assocs., Inc.*, 24 AD2d 446, 446, 260 N.Y.S.2d 984 [1st Dept 1965]; *Plain Ave. Storage, LLC v. BRT Mgmt., LLC*, 165 AD3d 1264, 1265, 84 N.Y.S.3d 894 [2d Dept 2018]. In the instant proceeding, the totality of the statements provided and annexed by the Respondent does not satisfy the requirements of Lien Law 38. Accordingly, the Petitioner's application (motion sequence #1) is granted to the extent that Respondent shall have five business days to comply with Lien Law 38 after receipt of a copy of this Decision and Order with notice of entry from the Petitioner.

Based on the foregoing, it is hereby ORDERED as follows:

Petitioner's motion (motion sequence #1) is granted to the extent that the Respondent shall have five business days to comply with Lien Law 38 after receipt of a copy of this Decision and Order with notice of entry from the Petitioner.

This Constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

2022 JAN -6 AM 9:18
KINGS COUNTY CLERK
FILED