

York Restoration Corp. v Pedrol Contr. Inc.
2022 NY Slip Op 30976(U)
March 24, 2022
Supreme Court, New York County
Docket Number: Index No. 158553/2021
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL EDMEAD **PART** **35**

Justice

-----X

YORK RESTORATION CORP.

Petitioner,

- v -

PEDROL CONTRACTING INC.,

Respondent.

-----X

INDEX NO. 158553/2021

MOTION DATE 02/14/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33, 34, 35

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that Petitioner York Restoration Corp.’s application pursuant to CPLR 2221 for leave to reargue and resettle the Court’s January 3, 2022 Decision and Order (Motion Seq. 002) is denied in its entirety; and that it is further

ORDERED AND ADJUDGED hat the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Respondent Pedrol Contracting Inc. shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

MEMORANDUM DECISION

In this Lien Law special proceeding, Petitioner York Restoration Corp. moves for an Order pursuant to CPLR 2221 granting Petitioner (i) leave to reargue the portion of this Court's Decision and Order dated January 3, 2022 (the "January 2022 Decision") that made substantive holdings on a procedural Motion pursuant to Lien Law § 38, and upon reargument removing said portion; (ii) resettling the January 2022 Decision's conclusions on Petitioner's procedural Motion pursuant to Lien Law §38; and (iii) resettling the January 2022 Order and/or issuing an Amended Decision and Order to remove the portion of the January 2022 Order that appears to set forth factual conclusions on issues that are disputed and were not before the Court on Petitioner's procedural motion pursuant to Lien Law § 38, specifically the first full paragraph on page 4 of the January 2022 Order (Motion Seq. 002).

Respondent Pedrol Contracting Inc. opposes Petitioner's motion in its entirety.

BACKGROUND AND PROCEDURAL HISTORY

On September 16, 2021, Petitioner commenced the instant litigation seeking an order pursuant to Lien Law §38 directing Respondent to furnish a proper itemized statement for the material, labor, and value thereof that comprise the lien Respondent filed against Petitioner. On September 27, 2021, Petitioner moved by Order to Show Cause ("OSC") for such relief within ten (10) days (Motion Seq. 001).

On September 29, 2021, the Court initialized Petitioner's OSC and set a return date for October 29, 2021 (NYSCEF doc No. 6). The Court ordered Respondent to send a copy of its answering papers to Petitioner at least five days prior, by October 24, 2021, and directed that no reply was allowed. While Respondent missed the October 24, 2021 deadline, Respondent filed its opposition on October 28, 2021 (NYSCEF doc No. 9). On October 29, 2021, Petitioner filed a

“Notice of Rejection” asking the Court not to consider Respondent’s untimely opposition. By email that same day, the Court directed that it would consider the merits of Respondent’s opposition over Petitioner’s objection, given that it was filed only a few days late and prior to the return date.

By Decision and Order dated January 3, 2022, the Court ordered, “Petitioner York Restoration Corp.’s application by Order to Show Cause for an order pursuant to Lien Law § 38 directing Respondent Pedrol Contracting Inc. to comply with Petitioner’s Demand for an itemized statement (Motion Seq. 001) is denied” (NYSCEF doc No. 18). The Court determined that Petitioner was not entitled to a further itemized statement on two grounds.

First, the Court found that Lien Law §38 did not apply to Respondent’s lien. Citing *Solow v Bethlehem Steel Corp.*, 60 AD2d 826 [1st Dept 1978], the Court noted that under §38, itemized statements are only required for certain liens, such as ones based on complex contractual disputes or where parties dispute the underlying nature and value of the contract. The Court concluded that as the contract here called for a fixed price per month over the course of set contractual term, neither of which Petitioner challenged, §38 did not require a more particularized itemized statement of labor and materials. (*Matter of 819 Sixth Ave. Corp. v T. & A. Assocs.*, 24 AD2d 446 [1st Dept 1965].)

Second, the Court found that Respondent had already supplied Petitioner with information setting forth the basis for the lien and the terms of the Contract such that Respondent had satisfied §38’s “appraisal” requirement. Consequently, *assuming arguendo* that §38 applied to the instant lien, Respondent had already provided such information and Petitioner would not be entitled to a further statement. (NYSCEF doc No. 18.)

Petitioner now seeks leave pursuant to CPLR 2221 to reargue, and, upon reargument, “resettle” a portion of the Court’s January 2022 Decision. Petitioner maintains that the Court misapprehended the law and facts in denying its OSC. (NYSCEF doc No. 20 at ¶¶24-28.)

Petitioner specifically objects to the following portion of the Court’s decision:

The Contract called for a fix price per month that Petitioner does not challenge. Petitioner also does not dispute the length of the Contract term or the fact that Respondent sent a final invoice detailing outstanding payments due. Itemization of labors and materials is not required with respect to a balance of an agreed price where a Petitioner does not dispute that the contract has been substantially completed.

(NYSCEF doc No. 18.)

Petitioner argues that this section constitutes substantive legal findings and conclusions regarding the *validity* of the lien that are beyond the proper scope of §38. (*Id.*; NYSCEF doc No. 35 at ¶¶5.) Additionally, Petitioner maintains the Court, in reaching its conclusions, misconstrued or ignored Petitioner’s objection to the underlying nature and value of work and, therefore, the validity of the lien. (*Id.* at ¶¶49.) In sum, Petitioner’s motion for leave to renew or resettle focuses on the Court’s determination that the type of contract underlying Respondent’s lien is not one that requires a further itemized statement under §38, not the Court’s determination that Respondent sufficiently provided documentation as to the contents of the lien.¹ (*Id.* at ¶¶26.)

In opposition, Respondent maintains that the Court properly used its discretion to look into the underlying contract to assess whether Petitioner was entitled to an itemized statement under §38 (NYSCEF doc No. 33 at ¶¶12); that the Court’s only substantive finding related to Respondent’s obligations under §38, not on the validity of the lien itself (*Id.* at ¶¶11); and that

¹As Petitioner does seek to reargue the second prong of the Court’s January 2022 Decision, the Court notes that Petitioner’s OSC would still be denied *assuming arguendo* that it granted the instant motion.

Petitioner did not question the validity of the lien in its OSC, such that, even if the Court did rule as to the validity, it did so properly (*Id.* at 14). Consequently, Respondent argues that the Court correctly denied Petitioner's OSC.

DISCUSSION

CPLR 2221 (d) provides that a party may seek leave to reargue a prior motion based upon matters of fact or law the Court overlooked or misapprehended in determining the prior motion. A motion to reargue is not intended to provide the unsuccessful party a second opportunity to reargue issues previously decided. (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 28 [1st Dept 1992].) Nor is a motion to reargue designed to afford unsuccessful parties the opportunity to present alternative positions, new theories of the case, or arguments different from those originally asserted. (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979].)

In contrast, a motion to resettle is a procedural vehicle by which errors may be corrected or clarification made (*id.* at 566). A motion to resettle does not allege that the Court misapprehended matters of fact or law but rather that “there is an inconsistency between [the Court's] order and the decision upon which it is based.” (*Ansonia Assoc. v Ansonia Tenants Coalition*, 171 AD2d 411, 412 [1st Dept 1991].) Where such an inconsistency exists, the decision is controlling. (*Id.*; see also *Di Prospero v Ford Motor Co.*, 105 AD2d 49 [3d Dept 1984].)

After reviewing Petitioner's arguments, the Court finds that Petitioner is not entitled to the relief of reargument or resettlement.

Petitioner's Motion for Reargument

In support of its motion for leave to reargue, Petitioner maintains that the Court made substantive determinations of fact and law as to the *validity* of the lien in contravention of §38—

determinations that are based on a misunderstanding of Petitioner’s position. Petitioner argues that §38 does not allow the Court to look into the validity of the lien; it only allows the Court to direct either compliance with a demand for an itemized statement or, if lienor refuses to comply with the directive, to cancel the lien. After a lienor has complied with §38, the entity that requested the itemized statement may then move pursuant to Lien Law §59 for a determination on the merits of the lien. Here, Petitioner interprets the Court’s January 2022 Decision as making conclusions as to the validity of the lien on its §38 motion, not, as required, on a §59 motion. (*See* NYSCEF doc No. 20 at ¶42.) The Court compounded this error, Petitioner alleges, by misconstruing or ignoring Petitioner’s objections to the lien—specifically, that it did dispute the nature and value of the work performed and allege that portions of the lien are “false” (NYSCEF doc No. 35 at ¶ 10-11). Petitioner also notes that the Court did not permit it to submit a reply to challenge Respondent’s allegations with respect to the validity of the lien (*id.* at ¶ 3).

Respondent disputes Petitioner’s interpretation of §38, contending that it does allow the Court to determine the validity of the lien. It acknowledges that Petitioner claimed certain information contained in the lien was “false,” but argues that Petitioner “failed to elaborate the allegations to support the statement that the information contained therein was false.” (NYSCEF doc No. 33 at ¶14.) Further into its opposition papers, Respondent notes that Petitioner’s OSC did not dispute the existence of a contract between the parties for scaffolding services or that the contract ran for the time period alleged. (*Id.* at ¶19.) Consequently, Respondent argues the Court properly grounded the January 2022 Decision on the fact that Petitioner did not dispute the validity of the lien. (*Id.*) Alternatively, Respondent argues that the Court did not make *any* substantive determinations on the lien’s validity but properly limited its January 2022 Decision to Petitioner’s rights under §38. (NYSCEF doc No33 at ¶11.) To that end, Respondent contends

the Court properly interpreted *Matter of 819 Sixth Ave. Corp.* (24 AD2d 446): that Petitioner's failure to challenge the nature and value of the contract in its OSC limited its rights to an itemized statement under §38.

After reviewing the parties' respective submissions, the Court finds that it properly applied the provisions of §38 to Petitioner's OSC and limited its January 2022 Decision to Petitioner's rights under under §38. Petitioner's papers in support of its OSC (NYSCEF doc No. 1) disputed the validity of the lien, but did *not* dispute the length of the underlying contract or that the contract called for a fixed price, and did not dispute that Respondent provided it invoices upon the contract's expiration. For that matter, it did not express any other grounds upon which to dispute the contract. While Petitioner now contends it disputes the details of the contract, as noted *supra*, Petitioner is precluded from introducing arguments different from those originally asserted on its prior motion (*Roche*, 68 AD2d 558, 567).

Courts have routinely held that the issues of the underlying work are to be looked at, not for the validity of the lien, but for whether §38 requires an itemized statement. (*Matter of 819 Sixth Ave. Corp.* 24 AD2d 446, 446 [1st Dept 1965]; *Solow v Bethlehem Steel Corp*, 60 AD2d 826, 826 [1st Dept 1978]; *Matter of Plain Ave. Stor., LLC v BRT Mgt., LLC*, 165 AD3d 1264, 1266 [2d Dept 2018]; *Associate Bldg. Servs., Inc. v Pentecostal Faith Church*, 112 AD3d 1130, 1131-1132 [3d Dept 2013].) The fact that the Court did not make substantive determinations on the lien's validity can more clearly be demonstrated by considering Petitioner's allegation that the lien incorrectly described "15 East 26th Street, New York, New York" as the appropriate address. The Court's January 2022 Decision did not address this aspect of Petitioner's OSC.² The

² While this dispute did not factor into the Court's holdings, the Court notes that Respondent refuted this allegation with its submission of a copy of its application for a suspended scaffold its approved Suspended Scaffold Application with the Department of Buildings that lists the location address as 15 East 26th Street (NYSCEF doc No. 14).

Court did not make any determination as to the validity of Petitioner's allegations as such an issue does not implicate §38, which is only concerned with whether Petitioner received an adequate 'appraisal' of the value and material of the contract. Petitioner's allegation that Respondent listed the wrong address on the lien would be properly considered on a Lien Law §19 motion³.

Accordingly, the Court's January 2022 Decision did not make any substantive determinations as to the lien's validity, and Petitioner has not demonstrated that the Court misapprehended §38 such that leave to reargue is proper.

Petitioner's Motion for Resettlement

Petitioner's Notice of Motion seeks to resettle the portions of the January 2022 Decision that made factual conclusions and substantive holdings upon reargument. Given the Court's finding that Petitioner is not entitled to reargument, the Court is precluded from granting Petitioner's motion for resettlement. Nonetheless, the Court will address Petitioner's resettlement arguments.

Petitioner argues that, in the Court's January 2022 Decision, there is a "clear conflict between one portion that states the documentation set forth by Respondent constitutes a valid Statement of Lien and another portion... that a statement of lien is not required here." (NYSCEF doc No. 35 at ¶18.) Petitioner then relies on *Anasonia*, 171 AD2d at 412, for the proposition that resettlement is proper where there is a conflict between the Decision and the Order. (*See* NYSCEF doc No. 35 at ¶17, Plaintiff's Affirmation in Support of Motion.) Yet, even applying Petitioner's understanding of the January 2022 Decision, *Anasonia* is inapplicable to the instant

³ §19 provides that a lien may be discharged on the ground that it is invalid based on a failure to comply with §9. §9 is entitled "Contents of notice of lien" and subsection (7) provides that the notice shall state "[t]he property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known".

motion. Petitioner does not cite any conflict between the January 2022 Decision and the accompanying *orders*. Petitioner, in fact, recognizes that the Decision accords with the order denying it an itemized statement. (*See* NYSCEF doc No. 20 at ¶26 [Petitioner recognizes the Court’s discretion to determine the sufficiency of an Itemized Statement of Lien and does not seek leave to reargue].) Instead, Petitioner merely alleges that the Decision itself was internally inconsistent. Such an argument is not a basis to resettle parts.

Furthermore, the Court does not find, as Petitioner alleges, its Decision and the orders therein to be in conflict or inconsistent with one another. While the Court may not have placed enough emphasis on the point in its original January 2022 Decision, the Court provided two separate reasons for denying Petitioner’s motion. As discussed *supra*, the Court found that based on structure of lien’s underlying contract—a fixed price for goods over a set period of time—§38 did not require an itemized statement to be furnished. (NYSCEF doc No. 18.) Separately, the Court determined that even if an itemized statement was required, the documentation that Respondent had already provided satisfied the ‘appraisal’ requirement of §38 such that it was not required to provide Petitioner with further information (*id.*) These two separate grounds for denying Petitioner’s OSC, read in tandem, are not in conflict at all. Consequently, Petitioner’s motion for resettlement must be denied.

Lastly, with respect to Petitioner’s argument that it did not receive a chance to reply to Respondent’s opposition or dispute the sufficiency of Respondent’s verified submissions, the Court rarely allows parties moving through Orders to Show Cause to submit a reply. Pursuant to 202.8-d of the Uniform Civil Rules for the Supreme Court, “absent advance permission of the court, reply papers shall not be submitted on orders to show cause.” Here, the Court specifically

ordered that “no reply is allowed” when it initialized Petitioner’s OSC and Petitioner did not make any advance request to submit a reply.

The Court concludes by noting that its January 2022 Decision in no way precludes Petitioner from seeking further relief against Respondent pursuant to the applicable Lien Law provisions discussed herein. Regardless, Petitioner’s motion for reargument or resettlement must be denied.

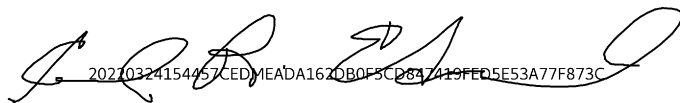
CONCLUSION

Based pm the forgoing, it is hereby

ORDERED AND ADJUDGED that Petitioner York Restoration Corp.’s application pursuant to CPLR 2221 for leave to reargue and resettle the Court’s January 3, 2022 Decision and Order (Motion Seq. 002) is denied in its entirety; and that it is further

ORDERED AND ADJUDGED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Respondent Pedrol Contracting Inc. shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.



3/24/2022
DATE

CAROL EDMED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE