

<b>Kelco Constr. Inc. v Mendez Trucking, Inc.</b>
2022 NY Slip Op 33873(U)
November 16, 2022
Supreme Court, New York County
Docket Number: Index No. 159202/2022
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. ARLENE P. BLUTH **PART** **14**

*Justice*

-----X

KELCO CONSTRUCTION, INC.

Petitioner,

- v -

MENDEZ TRUCKING, INC.,

Respondent.

-----X

**INDEX NO.** 159202/2022

**MOTION DATE** N/A

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1 - 12, 13, 14 were read on this motion to/for MECHANICS LIEN.

The petition is granted in part as described below.

**Background**

Petitioner claims it is a contractor and on November 15, 2021, it entered into an agreement with respondent (a subcontractor) for various construction services. It alleges that in exchange for a subcontract price of \$3,312,038.00, respondent was to provide all labor, material and equipment for soil transport work. Petitioner maintains that when the cost to respondent to dispose of certain materials increased, respondent asserted it could not perform the scope of the work without an increase in price of the subcontract. Petitioner contends it denied this request and then respondent purportedly slowed down its work and started creating large mounds of material at the worksite instead of transporting it away. Petitioner then terminated respondent from the project.

Respondent then filed a mechanic’s line for \$252,857.54 on September 12, 2022 and petitioner subsequently served a demand for an itemized statement pursuant to the Lien Law on

September 16, 2022. Petitioner maintains that on September 22, 2022, it filed a bond that discharged the lien. It contends that respondent willfully exaggerated the lien.

Respondent's "response" to petitioner's demand claimed that "Once payment is made, Mendez shall gladly turn over all itemized documentation which would include all countersigned manifests and scale tickets that [the] New York City Department of Parks and Recreation surely requires to complete the remediation of the project" (NYSCEF Doc. No. 8).

In opposition to the petition, respondent submits only a memorandum of law in which it argues that the question of willful exaggeration of a mechanic's lien must be determined at a trial. It asserts that petitioner does not assert that the lien is facially invalid and so there is no basis to discharge it.

## **Discussion**

Lien Law § 38 provides 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. If the lienor shall fail to comply with such a demand within five days after the same shall have been made by the owner or contractor, or if the lienor delivers an insufficient statement, the person aggrieved may petition the supreme court of this state or any justice thereof, or the county court of the county where the premises are situated, or the county judge of such county for an order directing the lienor within a time specified in the order to deliver to the petitioner the statement required by this section. Two days' notice in writing of such application shall be served upon the lienor. Such service shall be made in the manner provided by law for the personal service of a summons. The court or a justice or judge thereof shall hear the parties and upon being satisfied that the lienor has failed, neglected or refused to comply with the requirements of this section shall have an appropriate order directing such compliance. In case the lienor fails to comply with the order so made within the time specified, then upon five days' notice to the lienor, served in the manner provided by law for the personal service of a summons, the court or a justice or judge thereof may make an order canceling the lien."

Here, there is no dispute that respondent failed to send a sufficient response to the demand for an itemized statement to justify the amount of the lien. Asserting that petitioner should pay first and then respondent would send over the supporting evidence is ludicrous. And although, for some reason, respondent failed to include anything from the respondent itself (it only included a memorandum of law in opposition), the Court must follow the Lien Law in this decision. Lien Law § 38, as cited above, provides that petitioner was entitled to bring the instant proceeding for on order directing the production of an itemized statement. Because respondent utterly failed to comply with the requirements of Lien Law § 38 by not providing any support for its claimed amount, the Court will issue an order directing respondent to comply with petitioner's demand and actually turn over evidence to support the amount of the lien.

Respondent must furnish a detailed itemized statement to petitioner on or before December 1, 2022. If respondent fails to respond or provide a sufficient response, then petitioner may, as provided above, make the appropriate application to cancel the lien (*see e.g., DePalo v McNamara*, 139 AD2d 646, 527, NYS2d 283 [2d Dept 1988] [cancelling a lien pursuant to Lien Law § 38 after the lienor failed to submit a sufficient statement as directed by the Court]). The Court declines to cancel the lien pursuant to Lien Law § 39 or award petitioner the premium costs associated with the bond as requested by petitioner at this time because there has not yet been a finding that the lien was willfully exaggerated. The Court observes that the petition requests, in the alternative, that the Court order respondent to serve a proper verified itemized statement. That relief is granted.

The Court also denies the request for legal fees as petitioner did not cite a sufficient basis to be awarded those fees; the cited basis was Lien Law § 39-a, a section upon which this decision does not rely.

Accordingly, it is hereby

ORDERED that the petition is granted only to the extent that respondent is directed to furnish a detailed and verified itemized statement that justifies the amount claimed in the subject lien pursuant to Lien Law § 38 on or before December 1, 2022 and the Clerk is directed to enter judgment accordingly in favor of petitioner and against respondent along with costs and disbursements upon presentation of proper papers therefor.

11/16/2022

DATE



ARLENE P. BLUTH, 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