

**Matter of Red Hook 160 LLC v Borough Constr.
Group LLC**

2022 NY Slip Op 34311(U)

December 12, 2022

Supreme Court, Kings County

Docket Number: Index No. 524909/2018

Judge: Leon Ruchelsman

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insufficient. The petitioner presents three reasons why such the documents are improper. First, they argue the respondent has engaged in a document dump without providing proper "substance, structure and organization" (see, Memorandum of Law, page 2 [NYSCEF Doc. No. 139]). Second, the itemization employs an improper total cost approach and lastly, the itemization includes amounts in excess of respondent's written admissions.

The respondent contends that the "Revised Lien Itemization, including the April 18 Bauer Affidavit, breaks down category by category, trade by trade, line item by line item, the amounts sought in the Lien to the penny in the amount of \$2,542,806.20, and contains substantiating documentary proof such as payment requisitions, materials invoices, labor sign-in sheets, and detailed payroll summaries showing the laborers and their rate of pay" (see, Affirmation in Support, §27 [NYSCEF Doc. No. 163]). Thus, the respondent argues they have sufficiently itemized the lien sought.

Conclusions of Law

It is well settled that upon demand the lienor is required to furnish an itemized statement detailing the disputed amounts (DePalo v. McNamara, 139 AD2d 646, 527 NYS2d 283 [2d Dept., 1988]). Thus, clearly, the lienor need only furnish documentation concerning amounts in dispute rather than the entire project (Solow v. Bethlehem Steel Corp., 60 AD2d 826, 401

NYS2d 227 [1st Dept., 1978]). As the court stated "Section 38 of the Lien Law does not establish an absolute right to a detailed statement from a lienor as to all the items of labor and/or material and the value thereof for which he claims a lien but does require a statement from a lienor as to items in dispute" (id).

In FPG Maiden Lane LLC v. Pizzarotti LLC, 2022 WL 142085 [Supreme Court New York County 2022] the court explained that "the legislative intention of the Lien Law is to provide itemization that allows the owner to check the items claimed in the lien...The lienor must provide the description, quantity, costs, and rates for materials and labor charged" (id). Therefore, in FPG Maiden Lane (supra) the court held that it was improper to merely subtract the total amount paid from the total amount of material and labor charges because the total amount of material and labor could have included amounts already paid. The court stressed that "the lien cannot be for amounts already paid, but the Owner has no way to check the math" (id). Therefore, the respondent must provide itemization concerning which items have not been paid. The court concluded the respondent must provide documentation "that enables the owner to clearly identify the charges that actually sum to the amount of the lien" (id).

Therefore, a review of the documents submitted reveals that the amount sought for unpaid labor and materials is

\$1,007,364.32. That amount is gleaned from NYSCEF Document Numbers 100, 101 and 102 which consist of labor sign in sheets, payroll summaries and trade materials. There is a further request for retainage in the amount of \$139,633.80 (see, Affidavit of Michael Bauer, ¶ 16 [NYSCEF Doc. No. 94]). Mr. Bauer's affidavit further states there are reimbursable expenses due in the amount of \$138,214.19 with reference to documents supporting that amount and general condition reimbursements in the amount of \$289,165.48 and a construction manager fee of \$700,000. Lastly, the respondent seeks recovery of \$268,518.41 for June 2018 payment shortfall. Again, the Bauer affidavit references all the documents supporting the amounts sought. The amounts noted add up to \$2,542,896.20 which is a negligible \$90 different than the amount sought, namely \$2,542,806.20.

Thus, the respondent has segregated the amounts into six distinct categories undermining any argument the respondent has merely engaged in a document dump without organizing or explaining how the documents relate to the final amount sought. The petitioner argues the information submitted is insufficiently itemized. For example, the petitioner points out that the June 2018 shortfall amount of \$268,518.41 is not itemized and the petitioner has no way of knowing whether the shortfall is due to general conditions, trade costs, fees or reimbursable expenses. However, that amount is comprised by considering the amount

sought \$2,351,072.47 less the amount of \$2,082,554.06 actually paid. Further, the respondent has produced a document which contains wire transfers from the petitioner to the respondent which equals \$2,082,554.06 (see, NYSCEF Doc. No. 113). Thus, in addition to the documents already submitted the petitioner is aware of the amounts it paid and the nature of the amount still owing.

In truth, the primary basis there has been insufficient itemization stems from the June 2018 shortfall amount of \$268,518.41. Therefore, while the information provided is sufficient, in efforts to resolve this matter the respondent should provide supplemental information further supporting this shortfall.

Moreover, whether there are items within the lien that are improper is not a matter to be dealt with considering a motion regarding itemization alone. There is no argument presented that there was no justification for the filing of the lien at all (see, Strongback Corp., v. N.E.D. Cambridge Avenue Development Corp., 25 AD3d 392, 808 NYS2d 654 [1st Dept., 2006]). Thus, any questions whether the lien has been overstated or exaggerated cannot be decided at this time. That determination is properly done in an action to foreclose a Mechanic's Lien and while such determination can be decided via a summary judgement motion concerning wilful exaggeration (Marinelli v. Shifrin, 260 AD2d

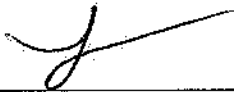
227, 688 NYS2d 72 [1st Dept., 1999]) the papers before the court do not contain such a motion and the court cannot deem it as such (see, Santagata v. Vinegar Hill Group, LLC, 41 AD3d 576, 837 NYS2d 342 [2d Dept., 2007]). Moreover, that standard requires proof that the respondent deliberately and intentionally misstated the amount of the lien (J. Sackaris & Sons, Inc., LLC v. Terra Firma Construction Management & General Contracting LLC, 14 AD3d 538, 788 NYS2d 424 [2d Dept., 2005]). Therefore, while such proof might be forthcoming, at this juncture the court cannot consider the cancellation of the lien. The respondent has prima facie demonstrated, through the abundance of evidence submitted, the adequate itemization of the liens.

Therefore, the motions are held in abeyance pending the supplemental submission noted above. Upon the submission of that information the court will then definitively rule upon the motions.

So ordered.

ENTER:

DATED: December 12, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC