

Kelco Constr., Inc. v Earth Efficient LLC

2023 NY Slip Op 30197(U)

January 19, 2023

Supreme Court, New York County

Docket Number: Index No. 159204/2022

Judge: Erika M. Edwards

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ERIKA M. EDWARDS

PART 10M

Justice

-----X

INDEX NO. 159204/2022

KELCO CONSTRUCTION, INC.,

MOTION DATE 10/27/2022

Petitioner,

MOTION SEQ. NO. 001

- v -

EARTH EFFICIENT LLC,

**DECISION + ORDER ON
MOTION**

Respondent.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for MECHANICS LIEN

Upon the foregoing documents and for the reasons stated on the record during the oral argument held before this court on January 12, 2023, the court denies Petitioner Kelco Construction, Inc.'s ("Kelco") order to show cause filed under motion sequence 001, denies the relief requested in Kelco's Verified Petition and dismisses the Verified Petition as against Respondent Earth Efficient LLC ("Earth Efficient").

Kelco brought this proceeding against Earth Efficient seeking an order cancelling Earth Efficient's mechanic's lien in the amount of \$86,553.93, pursuant to Lien Law § 39-a, awarding attorneys' fees for willful exaggeration of the lien, or, in the alternative, for an order finding willful exaggeration and directing Earth Efficient to deliver to Kelco a verified itemized statement to support its mechanic's lien, pursuant to Lien Law § 38.

Kelco argues in substance that one of Kelco's subcontractors, Mendez Trucking, Inc. ("Mendez"), contracted with Earth Efficient for \$15,000.00 for Earth Efficient to provide consulting work on a public works project that Kelco was working on with the New York City

Department of Parks & Recreation. Since Kelco had to fire Mendez, the most Mendez would have owed Earth Efficient was \$15,000.00. Therefore, Kelco argues that Earth Efficient's lien for \$86,553.93 was willfully exaggerated and Earth Efficient is required to pay Kelco's attorneys' fees, pursuant to Lien Law § 39-a.

Earth Efficient opposes Kelco's order to show cause and filed an Answer to the Verified Petition denying many of the factual allegations in the Verified Petition. Earth Efficient argues that its itemized statement delivered to Kelco, along with its supplemental response, demonstrated that, pursuant to its oral agreement with Mendez, Earth Efficient arranged and paid for the disposal of almost four tons of soil at multiple landfills, in the sum of \$86,553.93. To date, it has not been paid by Mendez or Kelco. Earth Efficient further argues in substance that it provided adequate responses to Kelco's demand for an itemized statement and it included documents and a spreadsheet verifying the details and costs of each truck load which transported soil from the construction site to the landfills. Even after Kelco disputed the sufficiency of Earth Efficient's initial response, Earth Efficient supplemented its response by providing additional material. Earth Efficient also argues that a willful exaggeration claim can only be maintained in an action to foreclose on the lien and it cannot be resolved in a summary proceeding.

Based on Earth Efficient's opposition to Kelco's arguments regarding willful exaggeration, Kelco focused on the sufficiency of Earth Efficient's verified statement and not its willful exaggeration claim.

Pursuant to Lien Law § 38,

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. (Lien Law § 38).

Here, the court finds that Kelco failed to demonstrate that Earth Efficient's lien was willfully exaggerated or that Kelco was entitled to any of the relief requested. The court also finds that Earth Efficient's responses to Kelco's Demand for a Verified Itemized Statement were sufficient to satisfy the requirements of Lien Law § 38 and demonstrated that it did not willfully exaggerate the amount of its lien.

Therefore, the court denies Kelco's order to show cause, denies the relief requested in its Verified Petition and dismisses the Petition without costs to either party.

The court considered any additional arguments raised by the parties which were not specifically addressed herein and the court denies any additional requests for relief not expressly granted herein.

As such, it is hereby

ORDERED that the court denies Petitioner Kelco Construction, Inc.'s order to show cause filed under motion sequence 001, denies the relief requested in Kelco Construction's Verified Petition and dismisses the Verified Petition as against Respondent Earth Efficient LLC, without costs to either party.

This constitutes the decision and order of the court.


ERIKA M. EDWARDS, J.S.C.

1/19/2023
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: