

Matter of Batirest 229, LLC (Pizzarotti IBC LLC)

2017 NY Slip Op 30111(U)

January 6, 2017

Supreme Court, New York County

Docket Number: 155916/2016

Judge: Joan B. Lobis

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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: IAS PART 6**

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In the Matter of the Application of

BATIREST 229, LLC,

Petitioner,

Index No. 155916/2016

**Decision, Order, and
Judgment**

for an Order Cancelling and Vacating a Certain
Mechanic's Lien Claimed by
PIZZAROTTI IBC LLC,

Respondent.

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JOAN B. LOBIS, J.S.C.:

This special proceeding arises out of a Mechanic's Lien in the amount of \$ 365,267 filed by respondent Pizzarotti IBC LLC (PIBC) for work it performed for petitioner Batirest 229 LLC (Batirest). In December 2013, Batirest and IBC Business Groups, LLC (IBC) entered into an agreement which IBC later assigned to PIBC. On August 25, 2015 PIBC filed a Notice of Mechanic's Lien, and on September 22, 2015 Batirest responded with a Demand for an Itemized Statement pursuant to Lien Law § 38. For the reasons stated below, the petition is granted and the lien is dismissed.

On November 30, 2015, Batirest brought a special proceeding to compel PIBC to provide an itemized statement pursuant to Lien Law § 38 (Section 38). Section 38 provides that if a lienor does not comply with a demand for such statement within five days, the person aggrieved may petition the Supreme Court to compel compliance. Section 38 further states that if the lienor does not comply with a Court order to provide such statement, the Court may cancel the lien. On

April 13, 2016, Justice Joan Kenney of this Court issued an order granting the petition and ordering respondent to immediately provide petitioner with an itemized statement in compliance with Section 38.

On July 15, 2016, petitioner brought this petition seeking dismissal of the lien on the ground that respondent still had not provided an itemized statement. On August 18, 2016, respondent submitted opposition papers arguing that it has now complied with the Justice Kenny's order by serving an itemized statement on August 17, 2016. It argues that the proceeding must be dismissed because it complied with the order in a timely fashion, and that the sufficiency of the statement is not at issue. It contends that although it did not include the terms of the contract, under which the items in its statement were furnished, the statement is still sufficient because the parties entered into a written contract the terms of which are not disputed. In support of its opposition, respondent submits the affidavit of PIBC's CEO, Rance MacFarland. Mr. MacFarland states that PIBC did not prepare the itemized statement before August 17 because PIBC's Chief Operating and Chief Information Officer, who was most familiar with the records for the construction project at issue, left PIBC in July 2016.

In reply, petitioner argues that the statement was untimely and petitioner failed to explain what information was not available or what specialized knowledge was required which prevented respondent from complying with the order. Additionally, petitioner contends that contrary to respondent's argument, the terms of the contract are disputed. Petitioner submits the affidavit of Batirest's managing member, John Landrum Bryant. Mr. Bryant states that he never saw the contract between Batirest and IBC, and that because the documents provided do not break

down the quantities, rates, and prices of the labor, equipment and materials used for work that respondent alleges it performed but was not paid for, petitioner is unable to ascertain what respondent is claiming in its lien.

In sur-reply, respondent submits another affidavit from Mr. MacFarland which purports to explain the contract between the parties and contends that respondent continued working for over a year after petitioner stopped paying and that it was forced to bring an action to foreclose its lien. Respondent cites to cases which hold that petitioner does not have an unrestricted right to an itemized statement, especially where the lien was based on a contract. See F.J.C. Cavo Const., Inc. v. Robinson, 81 A.D.2d 1005 (4th Dep't 1981); Associated Bldg. Services Inc. v. Pentecostal Faith Church, 112 A.D.3d 1130, 1131-32 (3rd Dep't 2013). Respondent argues that PIBC and petitioner agreed on a Schedule of Values which detailed the price for labor and materials to be provided on the project. Respondents further contend that petitioner will not be prejudiced by the dismissal of this action because petitioner may pursue its defenses and assert counterclaims in a foreclosure action.

In sur-sur-reply, petitioner argues that respondent's sur-reply arguments are untimely, procedurally improper, and inapplicable to the facts because they do not respond to petitioner's reply. Petitioner asserts that the Court allowed respondent to submit a sur-reply solely to show that its itemized statement complied with Section 38. Petitioner states that instead, respondent argues that petitioner is not entitled to any itemized statement. Petitioner further contends that it would be prejudiced if the Court dismisses the petition and forces petitioner to rely on a new proceeding to obtain the information it seeks. It states that respondents' delay has already

resulted in prejudice because its building has been on the market for several months and it cannot obtain lien discharge bonds without posting a bond for the entire amount of the lien. They alleged that respondent is not prejudiced if the petition is granted because it can pursue its causes of action for alleged breach of contract and unjust enrichment if its lien is vacated.

Respondent did not comply with the April 13 Court order directing it to provide petitioner with a statement in compliance with Lien Law § 38. Section 38 provides:

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.

Instead of setting forth the terms of the contract, respondent argues that it need not comply with that portion of Section 38 because the terms of the contract are not disputed. Respondent does not provide support for this assertion, and petitioner contends that the contract is disputed. When respondent failed to comply with the order, petitioner appropriately sought cancellation of the lien under Section 38.

Accordingly, it is

ORDERED that the petition is granted and the lien is cancelled. The Clerk of the Court is directed to enter judgment accordingly.

Dated: *Jan . 6*, 2017

ENTER:



JOAN B. LOBIS, J.S.C.