

<b>Matter of 51 White St. LLC v AVO Constr. LLC</b>
2020 NY Slip Op 30136(U)
January 21, 2020
Supreme Court, New York County
Docket Number: 152104/2019
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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In the Matter of the Application of

Index No.  
152104/2019

51 White Street LLC,

Petitioner,

**Decision and  
Order**

For an Order directing lienor, to deliver an itemized  
Statement of a certain Notice Under Mechanic’s Lien  
Law pursuant to Lien Law 38,

Mot. Seq. 3

- against -

AVO Construction LLC,

Respondent.

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner filed an Order to Show Cause to cancel the Lien on the grounds that Respondent failed to comply with Lien Law § 38 and Respondent exaggerated the Lien in violation of Lien Law §§ 30 and 39-A.

There is a related case entitled *AVO Construction LLC v. 51 White Street LLC, et.al.*, Index No. 152667/2019, Supreme Court, New York County before Justice Saunders which is a foreclosure action brought by Respondent.

Relevant Procedural Background

On October 18, 2017, Petitioner hired Respondent to perform general contracting services for a project at 51 White Street, New York, New York 10013 (the “Property”).

On January 22, 2019, Respondent filed a Notice Under Mechanic’s Lien Law (“the Lien”) in the sum of \$655,553.63 against the Property.

On February 27, 2019, Petitioner filed a Petition (Motion Sequence #1) seeking an Order pursuant to Lien Law § 38 directing Respondent to furnish an itemized statement.

On March 22, 2019, Respondent moved pursuant to CPLR §§ 3211(a)(1), (7), and (8) to dismiss the Petition (Motion Sequence #2). Petitioner opposed the motion.

On July 21, 2019, Petitioner and Respondent entered into a Stipulation that resolved Motions Sequence #1 and #2. The Stipulation provided that Respondent would provide a supplemental detailed itemization of the Lien. Specifically, Respondent was directed to supplement the items listed under the heading "This Period" (items 46, 47, 64, 70 and 84-94). The Stipulation provided that "absent compliance with Lien Law 38 and this Order, [Petitioner] make an application to the Court for, among other things, the discharge of the Mechanic's Lien."

On July 23, 2019, Respondent provided Petitioner's counsel with a supplemental detailed itemization

On September 16, 2019, Petitioner filed the pending motion. Respondent opposes the motion. The parties requested an adjournment of oral argument on the motion when it was previously scheduled.

#### Parties' Contentions

Petitioner claims that that Respondent's supplemental itemization is deficient because no itemization is provided with respect to: (1) Respondent's "Overhead and Profit" which constitutes 50% of the Lien amount; (2) Respondent's "Contingency" which constitutes 20% of the Lien amount; and (3) Respondent's "Change Orders" which constitutes 30% of the Lien amount. Petitioner also argues that the parties' contract bars Respondent from claiming the full amount of its overhead and profit before the construction on the Project was completed. Petitioner further argues that claims prior to December 12, 2018 were released pursuant to the Lien Waiver and Release of Claims.

Respondent argues that it has complied with the Lien Law § 38 and the parties' Stipulation.

Petitioner also claims that Respondent has filed an exaggerated Lien. Petitioner contends:

Here, the Contractor filed a Mechanic's Lien in the sum of \$655,553.63. However, as detailed in the Friedman Affidavit and above, (a) under the terms of the Contract, (i) the Contractor is not entitled to \$330,556.19 of the Overhead and Profit which sum represent 50% of the Mechanic's Lien, (ii) the Contractor is not entitled to \$130,000.00 for Contingency, which sum represents 20% of the Mechanic's Lien; and (b) the Contractor is not entitled to the remaining approximately \$195,000 because, among other reasons, such sums include claims that were (i) never approved by Owner, (ii) released pursuant to the Lien Waiver and Release of Claims, and (iii) already paid by the Owner (\$35,665.61). In other words, the Mechanic's Lien on its face is grossly exaggerated and, for the same reasons why the Mechanic's Lien should be discharged under Lien Law § 38, it should also be summarily discharged because the Contractor filed an exaggerated Mechanic's Lien under Lien Law §§ 39 and 39-a.

Respondent argues that since this case is not the foreclosure case, Petitioner has no remedy under Lien Law 39 and Lien 39-A in this proceeding.

### Relevant Law

Lien Law § 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. 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... 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.

Lien Law §39 states:

In any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice.

Lien Law §39-a states:

Where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. The damages which said owner or contractor shall be entitled to recover, shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due

as stated in the notice of lien exceeded the amount actually due or to become due thereon.

Discussion

The Court finds Respondent's second itemization is sufficient to satisfy Lien Law § 38.

Wherefore it is hereby

ORDERED that Petitioner's Order to Show Cause to discharge the Lien is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: JANUARY <sup>21</sup>~~20~~, 2020

  
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Eileen A. Rakower, J.S.C.