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

**PRESENT:** HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

*Justice*

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FIFTHCNYC LLC.,

Plaintiff,

- v -

NY DEVELOPERS AND MANAGEMENT INC.,BLUE ROCK CONTRACTING INC.,SAFETY FIRE SPRINKLER CORP., CITY PAINTING SERVICES INC, BEST MECHANICAL SERVICES INC, CROWN MILL WORK CORP, ON TARGET SHEETMETAL CORP, MCWI INC.,SPARK LIGHTING CORP., BIG APPLE DESIGNERS INC.,QUALITY FACILITY SOLUTIONS CORP., DAVIDS FLOORING OF NY INC.,CP STEEL ERECTORS LLC.

Defendant.

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**INDEX NO.** 159017/2019

**MOTION DATE** 11/20/2019

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 39, 40, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for MISC. SPECIAL PROCEEDINGS.

In this special proceeding commenced by order to show cause, petitioner FIFTHCNYC LLC ("petitioner") seeks an order, pursuant to Lien Law § 38, directing each of the above-captioned respondents to deliver, by a deadline set by this Court, itemized statements for mechanic's liens filed and claimed against the real property leased by petitioner and located at 800 Fifth Avenue, New York, NY ("the premises") (Doc. 39). Respondents oppose the application (Doc. 42-44). After a review of the parties' contentions, as well as the relevant statutes and case law, the petition is decided as follows.

**FACTUAL AND PROCEDURAL HISTORY:**

In August 2017, respondent NY Developers and Management Inc. ("NY Developers"), a construction manager, as well as its subcontractors, respondents Blue Rock Contracting Inc. ("Blue Rock"), Safety Fire Sprinkler Corp. ("Safety Fire Sprinkler"), City Painting Services Inc. ("City Painting"), Best Mechanical Services Inc. ("Best Mechanical Services"), Crown Mill Work Corp. ("Crown Mill Work"), On Target Sheetmetal Corp. ("On Target Sheetmetal"), MCWI Inc. ("MCWI"), Spark Lighting Corp. ("Spark Lighting"), Big Apple Designers Inc. ("Big Apple"), Quality Facility Solutions Corp. ("Quality Facility Solutions"), David's Flooring of NY Inc. ("David's Flooring") and CP Steel Erectors LLC. ("CP Steel") (collectively "subcontractor respondents"), filed mechanic's liens against the premises for construction work allegedly performed at the said property (Docs. 3 ¶ 5; 4-5, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34). In July 2018, the mechanic's liens were duly extended pursuant to Lien Law § 17 (Doc. 4). On October 25, 2018, before the mechanic's liens expired, respondents commenced a related action in this Court against several defendants, including petitioner, by filing a summons, complaint and notice of pendency to foreclose on the mechanic's liens ("the foreclosure action") (*NY Developers and Management Inc. et al. v 800 Fifth Avenue Associates LLC et al.*, Sup Ct, NY County, Index No. 159925/2018). On September 4, 2019, after joinder of issue, respondents moved for summary judgment in the foreclosure action, seeking, *inter alia*, to foreclose on the mechanic's liens.

In August and September 2019, petitioner served demands on respondents, pursuant to Lien Law § 38, for itemized statements pertaining to the mechanic's liens filed (Docs. 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35). On September 17, 2019, following respondents' alleged failure to respond or to provide a sufficient response to said demands, petitioner filed this application seeking an order directing respondents to provide itemized statements for the following

liens: (1) NY Developers' lien for $14,093; (2) NY Developers' lien for $26,800; (3) NY Developers' lien for $525,000; (4) Blue Rock's lien for $16,000; (5) Safety Fire Sprinkler's lien for $59,900; (6) City Painting's lien for $42,150; (7) Best Mechanical Services' lien for $42,775; (8) David Flooring's lien for $106,900; (9) On Target Sheetmetal's lien for $226,000; (10) MCWI's lien for $170,000; (11) Spark Lighting's lien for $170,000; (12) Big Apple's Lien for $170,180; (13) Quality Facility Solutions' lien for $118,791.44; (14) CP Steel's lien for $34,000; and (15) Crown Mill Work's lien for $10,479.67 (Doc. 1 ¶ 3-67). These itemized statements, argues petitioner, are necessary to defend against respondents' motion for summary judgment in the foreclosure action (Doc. 3 ¶ 6-7).[1] On October 11, 2019, after respondents conceded on the record that petitioner was entitled to certain statements, this Court (Crane, J.) issued an interim order directing respondents to provide itemized statements for five of the mechanic's liens (Doc. 43).[2]

In opposition to petitioner's application, respondents contend that petitioner's request pursuant to Lien Law § 38 must be denied insofar as (1) the mechanic's liens relate to work substantially completed under a contract (or change orders) for an agreed price; (2) the details of respondents' mechanic's liens are amply set forth in the motion for summary judgment filed in the foreclosure action; and (3) to the extent petitioner is entitled to itemized statements, they have already been provided pursuant to the interim order (Doc. 42 ¶ 11-18).

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[1] Although petitioner maintains that the requested itemized statements are necessary to defend against respondents' motion for summary judgment in the foreclosure action, petitioner has since submitted papers in opposition to that motion and, with only reply papers remaining, the motion will soon be fully submitted.

[2] Itemized statements were provided to petitioner for the following liens (Doc. 44): David's Flooring Inc.'s lien for $106,900 (Doc. 20); NY Developers' lien for $14,093 (Doc. 5); NY Developers' lien for $26,800 (Doc. 8); Quality Facility Solutions' lien for $118,791.44 (Doc. 30); and Spark Lighting LLC's lien for $141,352.98 (Doc. 26).

In its reply papers, petitioner argues, *inter alia*, that respondents' reliance on the existence of a valid written contract is misplaced because it contradicts their position in the foreclosure action that the subject agreement, which was a joint venture agreement, was "unexecuted," "never signed," and was "abandoned by the parties" (Doc. 46 ¶ 11). In support of this argument, petitioner submits the affidavit of Yoel Gruber ("Gruber"), president of NY Developers, which was submitted in support of respondents' motion for summary judgment in the foreclosure action (Doc. 47).

Gruber avers, in pertinent part, that, although the project was initially "conceived as a joint venture," petitioner and NY Developers later "decided not to proceed with the [c]onstruction [p]roject as a joint venture, but rather as a standard contract agreement whereby NY Developers would provide the same construction development services set forth in the [joint venture] [a]greement in exchange for cash payment, rather than credit for contribution to the joint venture" (Doc. 47 ¶ 6, 8). The agreement, affirmed Gruber, was signed only by petitioner, "evidencing [petitioners'] agreement to the value of the services/materials to be provided by NY Developers" (Doc. 47 ¶ 7). Prior to commencing the project, petitioner allegedly consented orally to operating under a standard contract, and Gruber represented that it "further indicated its acceptance of the revised agreement through [its] conduct in allowing the [c]onstruction [p]roject to proceed despite NY Developers[']' refusal to execute the [joint venture agreement]" (Doc. 47 ¶ 8).

Petitioner argues that Gruber's affidavit highlights the alleged inconsistency in respondents' representation that there was a valid written agreement between NY Developers and petitioner, belying respondents' position that petitioner is not entitled to itemized statements relating to NY Developers' lien for $525,000 (Doc. 46 ¶ 12). Assuming, *arguendo*, that the joint venture agreement was disregarded, as Gruber avers, petitioner claims that NY Developers fails to

demonstrate that the agreement falls within the exemption carved out for work substantially completed under a contract (Doc. 46 ¶ 7, 14).

Further, petitioner submits its verified answer from the foreclosure action to argue that the remaining lienors, the subcontractor respondents, must provide itemized statements because a dispute exists as to whether the construction work was substantially completed (Doc. 48). In its verified answer, co-defendant Platte River Insurance Company ("Platte") counterclaims against the subcontractor respondents that, "upon information and belief, some or all of the claimed mechanic['s] liens include charges for work that was not completed, defectively performed, or not authorized" (Doc. 48 ¶ 239).

**LEGAL CONCLUSIONS:**

Lien Law § 38 provides, in relevant part, 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 [she, or it] claims a lien, and which shall also set forth the terms of the contract under which such items were furnished." However, the statute does not "confer an unrestricted right to an itemization of labor and materials" and "is instead required only when it is necessary to apprise the owner of the details of the lienor's claim" (*Associated Bldg. Services, Inc. v Pentecostal Faith Church*, 112 AD3d 1130, 1131 [3rd Dept 2013], *quoting F.J.C. Cavo Constr., Inc. v Robinson*, 81 AD2d 1005, 1005 [4th Dept 1981]).

It is well-settled that "[i]temization of labor and materials is not required with respect to a balance of an agreed price where . . . it is claimed that the contract has been substantially completed" (*Matter of 819 Sixth Ave. Corp. v T. & A. Associates, Inc.*, 24 AD2d 446, 446 [1st

Dept. 1965]; *see Associated Bldg. Servs., Inc. v Pentecostal Faith Church*, 112 AD3d at 1131; *NY Steel Erectors Inc. v Les Constrs. Beauce-Atlas Inc.*, 2009 NY Slip Op 31421[U], 2009 NY Misc LEXIS 5936, *6 [Sup Ct, NY County 2009]; *Matter of Borysko,* 2 Misc 2d 621, 622 [Sup Ct, Kings County 1956] ["Where the work has been completed, and the contract was for an agreed price, nothing would be accomplished by requiring the lienor to furnish an itemization of materials furnished and labor performed in performance of the contract"]). However, a petitioner is entitled to itemized statements pursuant to Lien Law § 38 when there is a dispute as to "the nature and cost of the work performed under the contract" (*Matter of Plain Ave. Stor., LLC v BRT Mgt., LLC*, 165 AD3d 1264, 1265 [2d Dept 2018]; *Matter of Burdick Assoc. Owners Corp.*, 131 AD2d 672, 673 [2d Dept 1987]). Moreover, an itemized statement is required where, "the claim is based on *quantum meruit* and there is a dispute as to the work performed or the value of the work performed" (*Matter of 2269 First Ave Owner LLC v BDM Solutions LLC*, 2019 NY Slip Op 31823[U], 2019 NY Misc LEXIS 3422, *4 [Sup Ct, NY County 2019]).

As an initial matter, this Court rejects respondents' argument that the petition should be denied solely on the basis that the details of the filed mechanic's liens are available to petitioner in the exhibits attached to respondents' summary judgment motion. "Lien Law § 38 does not require any demonstration of need on the part of a property owner as a condition precedent to the lienor's statutory obligation to deliver [itemized statements]. Nor may this statutory obligation be obviated upon proof that the information requested might be available to the property owner from some other source" (*Matter of BK Venture Corp.*, 7 AD3d 793, 794 [2d Dept 2004]). Nevertheless, this Court is constrained to deny the petition.

Although petitioner challenges the validity of the agreement relied upon by NY Developers, it does not dispute respondent's contention that NY Developers' purported agreement

sets the agreed price for the work substantially performed at the premises, nor does it raise a specific dispute with respect to the fact that work was performed or the value of the work performed. Thus, in its view, this Court finds that petitioner has failed to demonstrate that an itemized statement is necessary "to apprise [it] of the details of [NY Developers'] claim" (*F.J.C. Cavo Constr., Inc. v Robinson*, 81 AD2d at 1005; *see Associated Bldg. Servs., Inc. v Pentecostal Faith Church*, 112 AD3d at 1131-1132; *Solow v Bethlehem Steel Corp.*, 60 AD2d 826, 826 [1st Dept 1978]). While this Court concedes, based on the very limited proof presented, that there might be a question of fact as to the validity of the underlying agreement and, by extension, the lien, it is well-settled that "any dispute regarding the validity of the lien must await trial of the foreclosure action" (*see Coppola Gen. Contr. Corp. v Noble House Constr.*, 224 AD2d 856, 857 [3d Dept 1996] [internal quotation marks and citation omitted]; *see Marson Contr. Co., Inc. v All Rock Crushing Inc.*, 2008 NY Slip Op 32559[U], 2008 NY Misc LEXIS 10498, *7 [Sup Ct, NY County 2008]). Therefore, as petitioner concedes (Doc. 46 ¶ 14 n 2), any determination with respect to the validity of the agreement between petitioner and NY Developers is best reserved for the foreclosure action.

This Court also rejects petitioner's argument that itemized statements are required for the liens of the remaining subcontractor respondents. Despite petitioner's attempt to demonstrate a dispute as to the substantial performance by these respondents, the broadly pleaded counterclaim that "*some or all* of the claimed mechanic['s] liens" relate to work that was not completed, defectively performed, or not authorized fails to identify which of the subcontractor respondents' work is at issue (Doc. 48 ¶ 239). Thus, petitioner had failed to establish its entitlement to such relief.

Lastly, this Court agrees, and petitioner does not dispute, that this application is rendered moot with respect to that branch of the petition seeking itemized statements for the five mechanic's liens that were previously provided (*Old Post Rd. Assocs. v Lrc Constr. Llc*, 2018 NYLJ LEXIS 1840, *11 [Sup Ct, Westchester Cty 2018]).

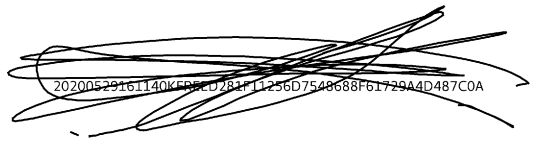
The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

**ORDERED and ADJUDGED** that that branch of petitioner FIFTHCNYC LLC's application seeking, pursuant to Lien Law § 38, itemized statements relating to David's Flooring of NY Inc.'s lien for $106,900 (Doc. 20); NY Developers and Management Inc.'s liens for $14,093 and $26,800 (Docs. 5, 8); Quality Facility Solutions Corp.'s lien for $118,791.44 (Doc. 30); and Spark Lighting Corp.'s lien for $141,352.98 (Doc. 26) is moot, and the application is otherwise denied; and it is further

**ORDERED** that, within twenty days of the entry of this order, counsel for respondents shall serve a copy of this order, with notice of entry, on petitioner; and it is further

**ORDERED** that this constitutes the decision, order and judgment of this Court.




5/29/2020
DATE

KATHRYN E. FREED, J.S.C.

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| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
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