

Level 5 Carpentry Corp. v 535 Constr. LLC
2021 NY Slip Op 30732(U)
March 9, 2021
Supreme Court, New York County
Docket Number: 156560/2020
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

LEVEL 5 CARPENTRY CORP.

Plaintiff,

- v -

535 CONSTRUCTION LLC,

Defendant.

-----X

INDEX NO. 156560/2020

MOTION DATE 08/19/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents, it is

ORDERED that the application of Petitioner Level 5 Carpentry Corp. (Motion Seq. 001) is granted, and it is further

ORDERED that Respondent 535 Construction LLC is directed to comply with the requirements of Petitioner’s Demand for a Verified Statement pursuant to Lien Law § 76 within twenty (20) days of this Order; and it is further

ORDERED that Respondent’s cross-petition is granted to the extent that Petitioner is directed to serve a revised Itemized Statement, and otherwise denied; and it is further

ORDERED that Petitioner is directed to comply with the requirements of Respondent’s Demand for an Itemized Statement pursuant to Lien Law § 38 within twenty (20) days of this Order; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this Order with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Lien Law special proceeding, Petitioner Level 5 Carpentry Corp. moves for an order pursuant to Lien Law § 76 (5) directing Respondent 535 Construction LLC to comply with the requirements of Petitioner's Demand for a Verified Statement within ten (10) days of said order.

Respondent opposes and cross-petitions for an order directing Petitioner to furnish a revised Itemized Statement of its mechanic's lien as required by Lien Law § 38 in the event that Petitioner's application is granted. Petitioner opposes Respondent's cross-petition in its entirety.

BACKGROUND FACTS

In October 2015, non-party Blonder Builders Inc. ("BBI") entered into a contract (the "Contract") with Respondent for construction services in connection with a renovation project at 535 4th Avenue in Brooklyn, New York (the "subject premises") (NYSCEF doc No. 1, ¶ 4). BBI subsequently assigned the Contract to Petitioner. Petitioner performed its services under the Contract and additional work orders, and contends it was owed compensation for the renovation project totaling \$1,667,043.32, of which Respondent only paid \$1,190,078.17, leaving a remaining balance of \$476,965.15 (*id.*, ¶ 7).

On March 5, 2019, Petitioner filed a Notice of Mechanic's Lien against the subject premises in Kings County (NYSCEF doc No. 3).

On June 26, 2019, Petitioner served Respondent a demand for a Verified Statement pursuant to Lien Law § 76 (NYSCEF doc No. 4). On July 8, 2019, Respondent served a Verified Statement that listed only the names and addresses of vendors who performed construction work at the subject premises and advised that "[a] detailed trust accounting will supplement this production" (NYSCEF doc No. 5).

On September 3, 2019, Respondent served a Supplemental Verified Statement of Account that included a “payment register” listing lump sum payment amounts to each vendor and lump sum payments received by Respondent (NYSCEF doc No. 6). Petitioner avers that the Supplemental Verified Statement was still deficient pursuant to Lien Law § 76 as it did not list, *inter alia*, “any dates such payments were made or received, the names and addresses of the person(s) who made or consented to the payments, any trust assets receivable or payable, the name and address of the bank or depository where funds were kept, the manner of payments or the purpose of each payment” (NYSCEF doc No. 1, ¶ 7).

Counsel for Petitioner notified Respondent’s counsel of the deficiencies in the Supplemental Verified Statement and requested a complete statement on December 13, 2019, and again followed up on January 15, 2020. Petitioner avers it received no response to either request (NYSCEF doc No. 1, ¶¶ 18-21).

In December 2019, Petitioner also commenced a plenary action in the Supreme Court, Suffolk County to recover its unpaid balances and foreclose on the lien (the “plenary action”). The plenary action remains ongoing in Suffolk County.¹

On August 18, 2020, Petitioner commenced the application currently before this Court, seeking an order directing Respondent to comply with the requirements of Petitioner’s demand for a complete Verified Statement.²

¹ Counsel for Petitioner advised the Court via email dated March 5, 2021 that as the Contract includes a venue provision requiring disputes to be resolved in New York County, the plenary action will likely be transferred to New York County once various open motions are resolved.

² Petitioner previously made an application for the same relief in Kings County. By Decision and Order dated July 16, 2020, the Honorable Robin K. Sheares dismissed the petition without prejudice to filing the case in New York County due to the Contract’s venue provision (NYSCEF doc No. 9).

Respondent opposes Petitioner's application on the grounds that as the plenary action is still pending in Suffolk County, this Court should not compel a Verified Statement as the matters addressed therein are subject to discovery in the plenary action (NYSCEF doc No. 14).

In the event that this Court grants Petitioner's application, Respondent cross-petitions the Court to also compel Petitioner to produce a supplemental Itemized Statement in response to Respondent's prior demand for the same pursuant to Lien Law ¶ 38. While Petitioner provided an Itemized Statement to Respondent in December 2019, Respondent maintains that the statement provided did not specifically identify the terms of the Contract under which the itemized purported materials and labor were furnished in accordance with Lien Law ¶ 38 (*id.*).

DISCUSSION

Petitioner's Application for a Verified Statement

Lien Law § 76 (4) gives a beneficiary holding a trust claim the right to demand a Verified Statement setting forth the entries with respect to the trust contained in the trustee's books and records, as well as the names and addresses of the person or persons who, on behalf of or as officer, director or agent of the trustee, made or consented to the making of the payments shown in such statement.

Lien Law § 76 (5) provides that if a trustee refuses to comply with the beneficiary's request, "the beneficiary may apply to such court for an order directing that the trustee comply with the request."

Respondent does not dispute that Petitioner is a beneficiary entitled to a Verified Statement but maintains that Petitioner's application before this Court is improper as "the Lien and disputes regarding the same are subject to the prescribed discovery procedures under Article 31 of the CPLR" and the details addressed in the Verified Statement are subject to discovery in

the plenary action (NYSCEF doc No. 14, ¶ 6). However, it is well settled that Lien Law § 76 (5) requires that an application for a Verified Statement be commenced in a separate, independent proceeding (*Tri-Cty. Plumbing & Heating Nassau, Inc. v Brooklyn Women's Hosp. Inc.*, 70 Misc. 2d 65, 66 [Sup. Ct. Kings County 1972]). Additionally, as a beneficiary has an unqualified right to examine books and records, courts have held that it is “irrelevant whether an examination request pursuant to Lien Law § 76 duplicates discovery requests” in pending actions (*Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers Local No. 26 Welfare Fund v. Hebert Indus. Insulation, Inc.*, 234 AD2d 930, 930 [4th Dept 1996]).

Therefore, the Court finds that notwithstanding the pending plenary action in Suffolk County, Petitioner was within its rights to commence a separate proceeding in support of its demand for a complete Verified Statement to which it is entitled under the Lien Law. The petition is granted accordingly.

Respondent's Application for an Itemized Statement

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”

Respondent contends that the Itemized Statement produced by Petitioner in November 2019 is insufficient as it lists various materials and their costs but does not “set forth the terms of the contract under which” the itemized purported materials and labor were furnished, and also does not specify the subcontractors and suppliers it has used and the applicable subcontracts. In reply, Petitioner insists that the Itemized Statement included all necessary information and

affirms that no subcontractors are listed as Petitioner did not use any subcontractors in connection with the work at the subject premises.

The Court has reviewed the November 2019 Itemized Statement (NYSCEF doc No. 17) and finds that while the statement does set forth each item of labor and/or material and the value thereof which made up the amount of its lien, the statement does not specifically identify the terms of the Contract under which each item was furnished as required by Lien Law § 38. The statement generally states that the labor and materials were furnished “pursuant to the parties’ agreement” but does not contain citations to the specific contract term (*id.*), and thus is not in full compliance with Lien Law § 38.

The Court thus finds that Respondent has demonstrated entitlement to a revised Itemized Statement that fully complies with the specificity requirements of Lien Law § 38.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the application of Petitioner Level 5 Carpentry Corp. (Motion Seq. 001) is granted, and it is further

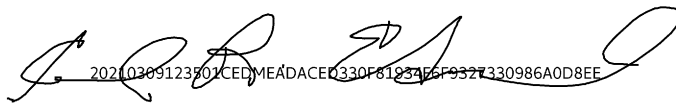
ORDERED that Respondent 535 Construction LLC is directed to comply with the requirements of Petitioner’s Demand for a Verified Statement pursuant to Lien Law § 76 within twenty (20) days of this Order; and it is further

ORDERED that Respondent’s cross-petition is granted to the extent that Petitioner is directed to serve a revised Itemized Statement, and otherwise denied; and it is further

ORDERED that Petitioner is directed to comply with the requirements of Respondent’s Demand for an Itemized Statement pursuant to Lien Law § 38 within twenty (20) days of this

Order; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this Order with notice of entry on all parties within twenty (20) days.



20210309123501CEDMEADACED0330F6123465F9327330986A0D8EE

3/9/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE