

INTERROGATORIES

DEFENDING AGAINST MECHANICS' LIENS

Prepared by Guest Author, BRUCE J. BERGMAN*

1. Q. Are there special discovery procedures applicable to mechanic's lien matters?
A. While it is not stated in such a fashion, essentially the answer is yes, because pursuant to Lien Law § 38, the lienor may be required to deliver an itemized statement of his lien.
2. Q. How is this demand to be made?
A. An owner or contractor against whom a lien has been filed may demand the statement by a writing, which is a simple and easily obtainable form.
3. Q. How must the lienor respond to the demand?
A. Pursuant to an appropriate demand, the lienor *shall* deliver a verified statement in writing, which sets forth the items of labor and/or material together with the value thereof which comprise the lien. In addition, the lienor must cite the terms of the contract under which the items were furnished. As to this last requirement, the lienor typically annexes the entire contract, if it is a subcontract. Where it is a general contract it would normally be too cumbersome, in which event the specific terms would be delineated.
4. Q. Is there a time limit for the lienor's response?
A. Yes. Consonant with the short time limits of the Lien Law, the lienor's statement must be submitted within 5 days.
5. Q. What may the owner or contractor do if the lienor fails to submit the itemized statement?
A. If the lienor fails to respond within 5 days, or if the statement is insufficient, the owner or contractor may petition the Supreme Court, (or other court with requisite jurisdiction; Lien Law § 8) for an order directing the lienor to deliver the statement within a time period specified in the resultant order. Continuing with the short time limits in the Lien Law, the application requires only two days' notice. Service of the notice of application shall be in the manner of service of a summons.
6. Q. Aside from obvious deficiencies, what are some examples of insufficient "itemized" statements?
A. (1) Bare speculation of a sum for labor and another sum for material listed under a general description of "work performed."
(2) Copies of invoices which lienor asserted included all materials furnished together with lump sum statement of money attributable to labor furnished.
(3) Statement not specifying all items of skilled and unskilled labor furnished, number of hours, rates per hour, type of material supplied with quantity and cost of each.
7. Q. Assuming that the Court finds a failure to comply with the demand for the itemized statement, and issues an appropriate order, what may the owner or contractor do if the lienor still fails to respond?

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- A. Upon five days' notice to the Court, again with the requirements of a summons for service upon the lienor, the owner or contractor may apply for an order cancelling the lien. Thus, in addition to serving as a discovery device, the itemized statement of lien procedures under this section provide another method to discharge a lien, a technique not readily discernible from a reading of the more prominent sections of the Lien Law.
8. Q. If the procedures of Lien Law § 38 have not been carried to their ultimate conclusion and the lienor has submitted its itemized statement, can there be any special use of that statement?
- A. Yes. Unlike a personal injury case, for example, where the *ad damnum* clause invariably far exceeds the actual damages, in a lien foreclosure action there are heavy penalties, for wilful exaggeration of a mechanics' lien. Thus, the statement can serve as the basis to determine whether a counterclaim for wilful exaggeration is appropriate to interpose in the answer to the foreclosure complaint.
9. Q. What are the consequences of a wilfully exaggerated lien?
- A. If a lien is found upon the foreclosure trial to have been wilfully exaggerated, although the Courts are loath to deem overstatements to be "wilful", then the entire lien shall be declared void. (Lien Law § 39). Moreover, in such a situation, the lienor shall be liable for damages to include the amount of any premium for a bond to discharge the lien, or the interest on money deposited for that purpose, reasonable attorney's fees for services in securing the discharge and an amount equal to the difference between the exaggerated sum and the actual sum otherwise due.



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