

Henry L. Goldberg
Chair
Construction Practice Group

Lien Law §38 Is A Valuable Tool

by: Henry L. Goldberg

A recent New York appellate court decision highlights the danger of contractors, subcontractors and suppliers not having a complete understanding of Section 38 of the Lien Law.

It allows the party against whom a mechanic's lien is filed to compel the lienor to produce a sworn, Itemized Statement as to both the specific items, and value of the labor and materials, which constitute the alleged value of its lien. Specifically, 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.

Once served with a demand for an Itemized Statement, too many lienors only superficially comply with the demand in an attempt to avoid the possibility of their lien being cancelled. However, not only must they respond within five days, they must respond adequately.

Initial Review

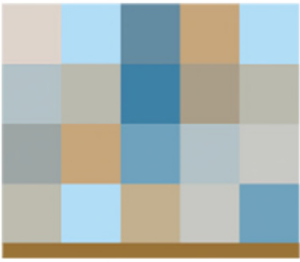
Despite the "shall on demand" language of Section 38, a lienor who is served with a demand must first determine whether it is, in fact, required to respond with an Itemized Statement. There are limited exceptions.

While the language of Section 38 appears to confer an unrestricted right of a GC or owner to an Itemized Statement, this is not the case. An Itemized Statement is only required to apprise the owner or contractor of the details of the lienor's claim. If the owner already knows the details of the lien, an Itemized Statement under Section 38 would be superfluous and, if so, not required. For example, if the lien is premised upon seeking contract balances and retainage under a lump sum contract, an Itemized Statement under Section 38 would serve no useful purpose and would not be required.

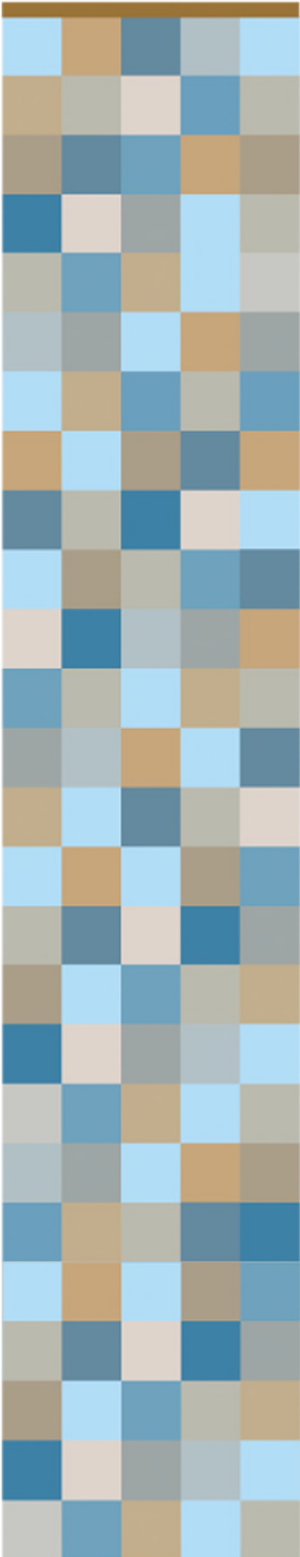
However, whether itemization under Section 38 is required is a fact-specific issue which should not be casually decided upon. If in doubt, a lienor is wise to consult with counsel. Losing its lien is, in most cases, simply not worth the risk.

Responding Under Lien Law §38

If an informed decision is made that the lienor is required to provide a Section 38 Statement, the Lienor must do so completely, or, again, run the risk of its lien being cancelled.



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For a lien to be cancelled for the lienor's failure to comply, or, failure to adequately comply, Section 38 of the Lien Law provides that:

The court or a justice or judge thereof shall hear the parties and upon being satisfied that the Lienor has failed, neglected or refused to comply with the requirements of this section shall have an appropriate order directing such compliance. 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.

In a recent New York appellate case, the parties entered into a guaranteed maximum price contract and the lienor had, at the time it filed its mechanic's lien, not completed all of its work under the contract.

Inasmuch as the work on the project was not completed when the lien was filed and the nature and course of the work performed in the contract was in dispute, an Itemized Statement was (particularly) necessary to enable the owner to review the contractor's claim. However, the revised Itemized Statement provided by the contractor failed to comply with the requirements of Lien Law §38. The Itemized Statement, among other things, failed to sufficiently set forth "the items and cost of labor, or the items and cost of materials." Accordingly, the appellate court affirmed the lower court's determination to grant the owner's motion to cancel the mechanic's lien.

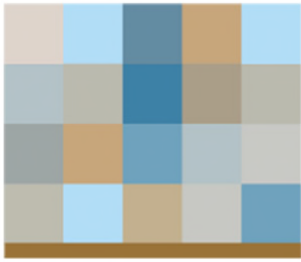
The ramifications were significant. The original notice of lien filed by the contractor was in the sum of \$5,899,493.31. In these specific circumstances, the court concluded not only that an Itemized Statement was required, but, that the statement furnished by the lienor failed to properly apprise the Owner of the details of the lienor's claim and, as such, did not comply with Section 38.

In this case, in response to the Section 38 demand, the lienor merely served upon the owner a spreadsheet highlighting the unpaid balances due its subcontractors and vendors which formed the basis of its mechanic's lien.

This limited information, only provided in chart form, gave little detail as to the specific nature and extent of the labor/materials provided/furnished and the time frame when the work was performed.

The Itemized Statement also failed to identify: (a) the labor allegedly performed by the Subcontractors/Vendors; (b) the materials allegedly provided by the Subcontractors/Vendors; (c) the description, quantity and costs of materials allegedly provided; (d) the details as to the nature of labor, time spent and hourly or other rate of labor charges included in the lien; and (e) the contracts and/or terms of the contracts upon which such materials and labor were provided, all of which are required under Section 38 of the Lien Law.

Case law in New York interpreting the Lien Law has clearly established that Section 38 requires that the Itemized Statement served by a lienor must set forth the description, quantity and costs of



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the various kinds of materials provided and the details as to the nature of labor, time spent and hourly or other rate of the labor charges. In fact, nothing short of such level of detail will satisfy the statutory requirements of Section 38 and will likely expose the lienor to an application in court for the cancellation of its lien.

MHH Commentary

We have often stated that a mechanic's lien is a uniquely powerful tool for a number of reasons. It creates a lien, simply by its filing, against private property and/or public funds that would ordinarily require a full blown trial or other adjudication. However, by filing a lien, a subcontractor or supplier assumes certain, often disregarded, responsibilities. This case should give pause to any subcontractor or supplier¹ which regularly avails itself of the power and authority of the mechanic's lien provisions of the Lien Law. While the Lien Law provides an effective mechanism, it cannot be abused without ramifications. (Damages for an "exaggerated" lien present another "detail-deficiency" risk, but that's for another article.) You have a responsibility to assure that you are not simply "filling out a lien form," but are providing adequate details, whether you draft your mechanic's liens in house, by an outside agency, or by your attorney.

The cancellation of a mechanic's lien is a rare occurrence, and one that should be wholly avoidable. It may be that GCs and CMs are not typically aware of their rights, such as the ability to challenge a lien and put the lienor to its proof, under oath.

As a sub or supplier, don't expose yourself to this risk. As a GC or CM, know your rights upon receiving a mechanic's lien on your project. The viability and enforceability of a mechanic's lien may make or break the ability of the lienor's company to be properly paid. Be certain, whichever side you're on, to be adequately and properly advised in the workings of this important Lien Law provision.

Mr. Goldberg, a partner of the firm, chairs the firm's Construction Practice Group where he handles all facets of complex construction law related matters.

Brian P. Craig, counsel to the firm, assisted with the preparation of this Alert. Mr. Craig concentrates his practice on construction law and litigation matters.

Any issues raised in this Alert may be addressed to Mr. Goldberg who can be reached at: (516) 873-2000 or by email at hgoldberg@moritthock.com.



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¹ This case is somewhat atypical in that the lienor was a design-build contractor filing against an owner. GCs can file a mechanic's lien against private property, but not against public property. On public projects, a mechanic's lien is filed against public funds, not real property.