

Matter of Chauve Enters. LLC
2016 NY Slip Op 30553(U)
March 17, 2016
Supreme Court, New York County
Docket Number: 162858/15
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 2

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 In the Matter of the PETITION OF CHAUVE
 ENTERPRISES LLC, Petitioner, for an Order
 pursuant to Lien Law § 59 vacating and cancelling
 the Notice of Lien Filed by BANNISTER BROTHERS
 CONSTRUCTION, INC., as Lienor,

DECISION AND ORDER
 Index No.: 162858/15
 Mot. Seq. No.: 001

Respondent.

-----X
KATHRYN E. FREED, J.S.C.

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
 THIS MOTION:

PAPERS	NUMBERED
VERIFIED PETITION	1 (Exs. 1-2)
ORDER TO SHOW CAUSE AND AFF. IN SUPP.	2-3 (Exs. 1-3)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Petitioner Chauve Enterprises LLC moves, pursuant to Lien Law § 59, to vacate a notice of
 lien filed by respondent Bannister Brothers Construction, Inc., as lienor. After oral argument, and
 after a review of petitioner's papers and the applicable statutes and case law the motion, which is
 unopposed¹, is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

Pursuant to a lease dated March 1, 2013, petitioner Chauve Enterprises LLC, as tenant, leased
 from Clinton Housing Development Company, as landlord, ground floor commercial space at 503

¹Although a representative of respondent twice appeared for oral argument and was
 afforded ample opportunity to retain counsel, respondent failed to do so and thus petitioner's
 motion went unopposed.

West 51st Street, New York, New York. Petition, at par. 2. On or about January 12, 2015, respondent Bannister Brothers Construction, Inc. filed a mechanic's lien in the amount of \$22,821.00. Ex. 1 to Ceriello Aff. The notice claimed a lien against Clinton Housing Development Company, as owner, as well as against petitioner and Michelle Roediger, as persons for whom construction work was allegedly performed and construction materials were allegedly provided at Block 1080, Lot 28, also known as 503 West 51st Street, New York, New York. Id.

On September 25, 2015, petitioner served respondent with notice, pursuant to Lien Law § 59, to commence an action to enforce its lien within thirty days or show cause why an order should not be entered vacating the lien. Exs. 2 and 3 to Ceriello Aff. Respondent did not respond to the notice. Petitioner commenced the instant proceeding by filing its verified petition on or about December 18, 2015 seeking to vacate the lien pursuant to Lien Law § 59.

POSITION OF THE PETITIONER:

Petitioner argues that, because respondent was served with a notice pursuant to Lien Law § 59 on September 25, 2015, it had until thirty days thereafter to commence an action to enforce its lien and that, because respondent took no action, the lien must be vacated.

LEGAL CONCLUSIONS:

Lien Law § 59 provides as follows:

A mechanic's lien notice of which has been filed on real property or a bond given to discharge the same may be vacated and cancelled or a deposit made to discharge a lien pursuant to section twenty may be returned, by an order of a court of record. Before such order shall be granted, a notice shall be served upon the lienor, either personally or by leaving it at his last known place of residence, with a person of

suitable age, with directions to deliver it to the lienor. Such notice shall require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed or the bond given should not be vacated and cancelled, or the deposit returned, as the case may be. Proof of such service and that the lienor has not commenced the action to foreclose such lien, as directed in the notice, shall be made by affidavit, at the time of applying for such order.

Where petitioner proves that service of the notice to enforce the lien has been made on the lienor, and that the lienor has failed to commence an action to foreclose the lien, the court may vacate and cancel the lien. *See Lien Law § 59; In re Application for the Cancellation of a Mechanic's Lien on Real Prop. at 81 Brookline Ave.*, 3 Misc3d 1105(A) (Sup Ct Albany County 2004). The decision whether to vacate the lien rests in the discretion of the court and depends on the facts of the case. *Id.*, citing *Kushaqua Estates, Inc. v Bonded Concrete, Inc.*, 215 AD2d 993 (3d Dept 1995). Unless good cause is shown, including why the lienor failed to prosecute the lien, the lien should be discharged. *Id.*

Under the circumstances herein, this Court finds that the lien filed by respondent should be vacated. Respondent was served with the notice to commence an action on September 25, 2015. Exs. 2 and 3 to Ceriello Aff. This allowed respondent thirty days to commence an action to enforce the lien. *See Lien Law § 59.* However, respondent not only failed to commence any such action within thirty days, but also failed to oppose the instant motion. Thus, respondent has failed to demonstrate any reason why the lien should not be vacated. *See Matter of Marple v Sorg*, 230 AD2d 858 (2d Dept 1996).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by petitioner Chauve Enterprises LLC to vacate the mechanic's lien filed by respondent Bannister Brothers Construction, Inc. is granted; and it is further,

ORDERED that the mechanic's lien filed by respondent Bannister Brothers Construction, Inc. on January 12, 2015 in the New York County Clerk's Office be vacated and cancelled upon the filing of proof of service of this order and decision upon Bannister Brothers Construction, Inc.; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: March 17, 2016

ENTER:



KATHRYN E. FREED, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**