

**CM and Assoc. Constr. Mgt. LLC v Barrier Group Inc.**

2019 NY Slip Op 30859(U)

March 28, 2019

Supreme Court, New York County

Docket Number: 158714/2018

Judge: William Franc Perry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

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INDEX NO. 158714/2018

CM AND ASSOCIATES CONSTRUCTION MANAGEMENT LLC

MOTION DATE N/A

Petitioners,

MOTION SEQ. NO. 001

- v -

BARRIER GROUP INC.,

**DECISION AND ORDER**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISCHARGE/CANCEL MECHANICS LIEN

Petitioners, CM and Associates Construction Management LLC, seek an order pursuant to Lien Law § 59, vacating, discharging and cancelling of record the Mechanic's Liens with prejudice against refileing, and discharging and cancelling of record the Bonds and releasing Petitioner and NGM Insurance Company from all liability arising out of the Bonds. Respondent, with leave of court, opposes the relief sought.

Petitioners seek to vacate, discharge and cancel a mechanic's lien (the "First Mechanic's Lien") filed by respondent, Barrier Group Inc. ("Respondent"), on or about September 14, 2017, with the New York County Clerk's Office for the sum of \$31,212.00, against the real property located at 591 3<sup>rd</sup> Avenue, New York, New York, and known and described as Block 919, Lot 5 (n/k/a Lots 1201-1275) (the "Premises"), on the tax map of the County of New York and (ii) vacate, discharge and cancel a second mechanic's lien (the "Second Mechanic's Lien"; and together with the First Mechanic's Lien, the "Mechanic's Liens") filed by Respondent on or about July 27, 2018, with the New York County Clerk's Office for the sum of \$20,272.92, against the

Premises. (NYSCEF Doc. Nos. 3 and 5).

Additionally, petitioners seek to release, discharge, vacate and cancel of record the mechanic's lien discharge bond (Bond No. S315225) issued by Petitioner, as principal, and NGM Insurance Company, as surety, in the sum of \$34,333.20, and filed with the New York County Clerk's Office on September 22, 2017, to discharge the First Mechanic's Lien from the Premises and (ii) release, discharge, vacate and cancel of record the mechanic's lien discharge bond (Bond No. S319783) issued by Petitioner, as principal, and NGM Insurance Company, as surety, in the sum of \$22,300.21, and filed with the New York County Clerk's Office on August 21, 2018 to discharge the Second Mechanic's Lien from the Premises. (NYSCEF Doc. Nos. 4 and 6).

Lien Law §59, provides that a lienor, must commence an action to foreclose its mechanic's lien within thirty (30) days of the service of a notice to commence an action or else its mechanic's lien should be discharged, vacated and cancelled of record and any bond filed to discharge such mechanic's lien should also be cancelled and released from liability. Here, respondent failed to commence an action to foreclose its mechanic's lien on or before September 14, 2018, as required by the Lien Law.

In opposing petitioners' motion, respondent contends that service of the Mechanic's Lien upon its property manager was improper as she is not authorized to accept service of process and thus requests that the court direct a traverse hearing. This argument is unavailing.

Unlike service of a summons under CPLR § 311, Lien Law § 59 authorizes service of a notice to commence on a person of suitable age at the lienor's place of business. Lien Law § 59 expressly provides, "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. Here, the record demonstrates that the Notices to Commence were properly served

upon respondent and that more than thirty (30) days have elapsed since service upon respondent. (NYSCEF Doc. Nos. 3, 5, 7 and 8). Respondent did not commence an action to foreclose the Mechanic's Liens in accordance with the requirements of Lien Law §59.

Respondent's request that this court exercise its discretion to excuse the untimely commencement of its action to foreclose the Mechanic's Liens, is likewise unavailing. While Lien Law § 59 affords Supreme Court the discretion to consider the equities of the situation, respondent has failed to sustain its burden as it has not provided the court with evidence sufficient to warrant a denial of petitioners' application to vacate the liens. (see, 76 NY Jur 2d, Mechanics' Liens, § 122, at 537), (see, 3 Warren's Weed, New York Real Property, Mechanics' Liens, § 7.01 [\*\*\*3] [d] [ii] [4th ed]).

Where, as here, a lienor fails to offer any evidence or excuse for its failure to timely commence an action to foreclose its mechanic's lien, equity is not warranted and the mechanic's lien should be discharged. Respondent has failed to demonstrate any reason why the lien should not be vacated. See *Matter of Marple v Sorg*, 230 AD2d 858, 646 N.Y.S.2d 543 (2d Dept 1996). Accordingly, it is hereby,

**ORDERED** that the motion by petitioners CM and Associates Construction Management LLC to vacate the mechanic's liens filed by respondent Barrier Group Inc. is granted; and it is further,

**ORDERED** that the mechanic's lien filed by respondent Barrier Group Inc. on or about September 14, 2017, with the New York County Clerk's Office for the sum of \$31,212.00, be vacated and cancelled upon the filing of proof of service of this order and decision upon Barrier Group Inc.; and it is further,

ORDERED that the mechanic's lien filed by respondent Barrier Group Inc. on or about July 27, 2018, with the New York County Clerk's Office for the sum of \$20,272.92, be vacated and cancelled upon the filing of proof of service of this order and decision upon Barrier Group Inc.; and it is further,

ORDERED that Bond No. S315225 issued by Petitioner, as principal, and NGM Insurance Company, as surety, in the sum of \$34,333.20, and filed with the New York County Clerk's Office on September 22, 2017, is discharged and canceled, releasing petitioner and NGM Insurance Company from liability arising out of the Bond; and it is further

ORDERED that Bond No. S319783 issued by Petitioner, as principal, and NGM Insurance Company, as surety, in the sum of \$22,300.21, and filed with the New York County Clerk's Office on August 21, 2018, is discharged and canceled, releasing petitioner and NGM Insurance Company from liability arising out of the Bond; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

3/28/19  
DATE

WFP  
W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE