

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 8m

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input checked="" type="checkbox"/>

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Item 1241 Castle Hill LLC Pet
for an ORDER pursuant to Lien Law § 59
vacating & cancelling notice of Lien
filed by LEBOW RESIDENT SUPPORT FUND
as Lienor Respondent

Index No. 26434/17E
 Hon. Donald Miles
 Justice:

The following papers numbered 1 to _____ Read on this motion.
Noticed on _____ and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Answered		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion is decided in accordance
with memorandum decision filed
herewith

Motion is Respectfully Referred to:
Justice:
Dated:

Dated AUG 28 2017

Hon. [Signature]
J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 8**

Index No.26434/2017E
Motion Calendar No.13
Motion Date: 8/28//17

In the Matter of the Petition of **1241 Castle Hill LLC**,
Petitioner, for an Order pursuant to Lien Law § 59
vacating and cancelling the Notice of Lien filed by
LEBRON RESTAURANT SUPPLY, INC., as lienor,
Respondent.

DECISION/ ORDER
Present:
Hon. Donald A. Miles
Justice, Supreme Court

Recitation, as required by C.P.L.R. 2219(a), of the papers considered in the review of this
Petition to vacate and cancel lien

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause, Affirmation in Support and Exhibits thereto.....	1

*Upon the foregoing papers and after due deliberation, following oral argument, the
Decision/Order on this motion is as follows:*

This proceeding has been commenced by Petitioner seeking an order and judgment vacating
and cancelling the lien filed by Respondent Lebron Restaurant Supply on or about October 7, 2015,
in the amount of \$45,828.63, with the Bronx County Clerk against property owned by Petitioner
1241 Castle Hill, LLC, known as 1247 Castle Hill Avenue, Bronx, New York. On or about February
3, 2016, Petitioner filed with the County Clerk an undertaking to discharge the lien by Washington
International Insurance Company, as surety. On or about May 9, 2017, Petitioner served Respondent
with notice, pursuant to Lien Law § 59, to commence an action to enforce its lien within 30 days or
show cause why an order should not be entered vacating the lien. Respondent did not respond and
has not commenced an action as requested. Petitioner now moves, by Order to Show Cause for
discharge of the lien on the grounds that the lien is defective as the materials upon which the lien is
based, were allegedly provided to a former tenant of Petitioner, El Sabor Casero, LLC, to which
Petitioner never consented. Petitioner contends, *inter alia*, that none of the materials provided
comprise permanent improvements to the building, as defined by the Lien Law. Respondent has not
opposed the motion or appeared at the calendar call.

In 2003, Lien Law § 19 was amended to allow for the discharge of mechanics' liens by bond without a court order. *Sanco Mechanical, Inc. v. DKS General Contractors & Construction Managers, Inc.*, 34 A.D.3d 271, 272 (1st Dept 2006). Lien Law § 19(4)(a) now provides that a lien may be discharged without a court order where the owner or contractor executes a bond or undertaking equal to 110% of the lien amount from a surety authorized to do business in New York. *Sanco Mechanical*, 34 A.D.3d at 273; Lien Law 19(4)(a). In the absence of a bond issued by a surety authorized to transact business in New York, a court order is required to discharge the lien. *Id.*, Lien Law 19(4)(b). In such a case, "the owner or contractor shall execute an undertaking with two or more sufficient sureties, who shall be free holders, to the clerk of the county where the premises are situated. The sureties must together justify, in at least double the sum named in the undertaking." Lien Law 19(4)(b). The procedures outlined in the Lien Law must be strictly adhered to and the court has no discretion to excuse a party's noncompliance. *Sanco Mechanical*, 34 A.D.3d at 274, citing *HMB Acquisition Corp. v. F&K Supply*, 209 A.D.2d 412 (2nd 1994). Here, Petitioner has offered information as to the identity of the surety that executed the undertaking necessary to release the lien, in compliance with the procedures outlined in Lien Law § 19(4). Hence, the branch of the petition seeking discharge of the Lien should be granted.

Lien Law § 59 requires that a lienor, upon being served with notice, must commence an action to enforce its lien within 30 days from the date of service, or show cause why the lien should not be canceled or vacated. *See* Lien Law 59; *In re Application for the Cancellation of a Mechanic's Lien on Real Prop. at 81 Brookline Ave.*, 2004 NY Slip Op 50426U (Sup Ct, Albany County 2004). Upon proof that service of the notice was made on the lienor, and that the lienor failed to commence an action to foreclose the lien, the court may grant an order to vacate and cancel the lien. *Id.* Whether the court should use its discretionary power to vacate a mechanic's lien depends on the facts of each case. *Id.*, citing *Kushaqua Estates, Inc. v. Bonded Concrete, Inc.*, 215 A.D.2d 993 (3rd Dept 1995); *In Re Weeks*, 73 Misc. 242, 243 (Sup Ct, Queens County 1911). The lien should be discharged unless some contrary cause is shown. *Id.*, citing *In Re Weeks*, 73 Misc. at 243. Sufficient cause should include a reason why the lienor failed to prosecute the lien. *Id.*

Here, the Lien should be vacated. Respondent was served with notice on or about May 9, 2017, to commence a lien enforcement action within 30 days and has failed to initiate any such

action. In addition, Respondent defaulted on this motion. Therefore, no sufficient cause has been shown as to why the lien should not be vacated. Accordingly, it is

ORDERED that the petition to discharge the mechanics lien filed by Respondent is granted; and it is further

ORDERED that the branch of the petition to vacate and cancel the lien filed by Respondent is granted. The court hereby orders that the mechanic's lien filed by Respondent on October 7, 2015 in the Bronx County Clerk's Office be vacated and cancelled upon the filing of proof of service of this order and decision upon Respondent; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

AUG 28 2017

DATE



HON. DONALD A. MILES
Justice Supreme Court

