

# Trust Fund Beneficiary Entitled to a Verified Statement of Trust Funds

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Most contractors and subcontractors are familiar with mechanic's liens and many of them can file a mechanic's lien without any assistance. A mechanic's lien, whether filed on a public or private project, is a great mechanism to enforce claims and put an owner of a project (and the world) on notice that a contractor and/or subcontractor has not been paid for its work or materials. This is especially important in cases where the contractor does not have a direct contractual relationship with the owner. A mechanic's liens, however, is not the only tool available to a contractor or subcontractor under the New York Lien Law.

The New York Lien Law, which is remedial in nature, was enacted for the most part to ensure that the individuals and entities that were performing the actual work or providing the materials for a construction project receive payment for their efforts. An often-underutilized tool is the ability, pursuant to Lien Law § 76, to examine the books and records of a lien law trustee or to receive a verified statement setting forth the entries with respect to the trust. Lien Law Article 3-A creates a statutory trust for funds received by owners (and upper tier contractors) in connection with construction projects. Lien Law § 76 permits a trust fund beneficiary to, not more than once a month, obtain an accounting from a trustee of all trust funds received and paid.

In a recent case, a contractor and subcontractor had completing claims for breach of contract. The general contractor claimed that the subcontractor breached the parties' agreement and "walked off" the job, while the subcontractor claimed the general contractor breached the contract by not paying the subcontractor for work properly performed. Litigation ensued to determine which party was responsible for the breach of contract. In connection with the litigation, the subcontractor sent a Lien Law § 76 demand for a verified statement to the general contractor and the general contractor furnished what it believed to be a good faith effort to comply with the spirit of the law by providing a detailed verified statement as to the general contractor's handling of trust funds from the owner for the purpose of paying the subcontractor on the project. The subcontractor objected to general contractor's verified statement and demanded that the general contractor comply with the law. When the general contractor refused, the subcontractor made a motion in court to compel the general contractor to furnish a Lien Law-compliant verified statement.

In order to determine whether the general contractor's verified statement complied with the Lien Law, the court examined the various statutory sections applicable to trusts, including a trustee's obligations and bookkeeping requirements. As explained by the court, "in Lien Law § 75, the Legislature has set forth booking requirements relative to trust funds which are receivable, payable, paid, transferred or assigned." The books and records of the trustee must contain, among other things, "names, addresses, dates of

payment or receipt, dates sums become due or are earned or become payable, conditions of payment, nature of claims paid, whether paid by check or cash, and numerous other relevant details.” As further explained by the court, “a failure of the trustee to keep the books and records required by Lien Law § 75 is presumptive evidence that the trustee has applied or consented to the application of trust funds actually received as money or an instrument for the payment of money for purposes other than a purpose of the trust as specified in Lien Law § 71.”

The court ultimately held that the document that the general contractor sent did not comply with all of the requirements of the Lien Law. The general contractor’s statement only related to the subcontractor, and did not contain the statutorily required entries regarding all trust assets receivable, trust accounts payable, trust funds received, trust payments made with trust assets, and transfers in repayment of or to secure advances made pursuant to a “Notice of Lending”, together with specific information underlying each trust transaction. Moreover, the statement did not set forth the names, addresses, dates of payment or receipt, dates sums become due or are earned or payable, conditions of payment, nature of claims paid, whether paid by check or cash, and other relevant detail as required by statute. Further, the court held that there is nothing in the Lien Law that authorizes a trustee to maintain separate trusts in connection with a construction project or to furnish a verified statement respecting only a portion of the required trust. Based upon these findings, the court ordered the general contractor to provide a verified statement within ten days of the order.

### Commentary

The Legislature has imposed strict obligations on a Lien Law trustee to maintain and account for all trust funds on a construction project. This recent case outlines the level of detail and information that must be maintained under the Lien Law with severe penalties imposed for non-compliance, including, but not limited to a presumption of Lien Law trust diversion. Contractors and subcontractors should also be mindful that if they, in turn, have lower tier subcontractors, the Lien Law trust obligations apply to them, as well.

The demand for a verified statement and/or ability to examine and copy a trustee’s books and records are important tools that should be utilized by a contractor and/or subcontractor looking to obtain past due payments. No trustee wants a lower tier contractor to come to their office to examine and scrutinize every entry in the books and records. This demand is an “either or” and it is the trust fund beneficiary’s choice. Depending on the climate of the particular project and the length of time that payment is overdue, the demand can be made every month.

Feel free to contact me to discuss Lien Law demands and other Lien Law tools available to contractors and subcontractors.