

**New York Steel Erectors Inc. v Les Constr.  
Beauce-Atlas Inc.**

2009 NY Slip Op 31421(U)

June 24, 2009

Supreme Court, New York County

Docket Number: 103004/09

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **JUSTICE SHIRLEY WERNER KORNREICH** PART 54  
*Justice*

Index Number : 103004/2009  
**NEW YORK STEEL ERECTORS INC.,**  
vs.  
**LES CONSTRUCTIONS BEAUCE-ATLAS INC.**  
SEQUENCE NUMBER : # 001  
MECHANIC'S LIEN

INDEX NO. 103004-09  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. #001  
MOTION CAL. NO. \_\_\_\_\_

were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
1
2
3

Cross-Motion:  Yes  No

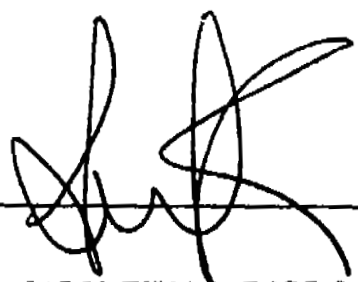
Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

**FILED**

JUN 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/26/09

  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
In the Matter of the Application of  
NEW YORK STEEL ERECTORS INC.,  
Petitioner,

Index No.: 103004/09

-against-

LES CONSTRUCTION BEAUCE-ATLAS INC.,  
Respondent

**FILED**

DECISION  
ORDER

JUN 30 2009

COUNTY CLERK'S OFFICE  
NEW YORK

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KORNREICH, SHIRLEY WERNER, J.:

This is an application by Petitioner, New York Steel Erectors Inc. (NYSEI), for an order, pursuant to Lien Law § 76(5), compelling the production of a verified statement from Respondent, Les Construction Beauce-Atlas Inc (CBA), in its action to foreclose on a mechanic's lien. This application is opposed by CBA who cross-petitions for an order, pursuant to Lien Law § 38, directing NYSEI to serve an itemized statement of lien. CBA also cross-moved to vacate NYSEI's demand for a verified statement. Lien Law § 76(5). NYSEI opposes.

*I. Background*

On July 6, 2006, CBA, entered into a contract with NCF Equities LLC (Owner) to construct a residential building. CBA then subcontracted with NYSEI for labor and material in connection with the erection of structural steel for the building, for an agreed price. NYSEI began performance on May 15, 2007 and completed all work on May 8, 2008.

Subsequently, on December 12, 2008, NYSEI filed a Mechanic's Lien Notice for the sum of \$306,619.03, the unpaid balance of the contract. On February 17, 2009, NYSEI demanded from CBA a Verified Trustee's Statement pursuant to Lien Law § 76, setting forth entries with respect to the books and records maintained for the Lien Law Trust. CBA did not comply with the request.

Instead, on February 24, 2009, CBA served NYSEI with a demand, pursuant to Lien Law § 38, to produce a statement in writing setting forth the items of labor, value and material comprising the amount of the lien. Additionally, CBA contended that no trust existed any longer since Owner had paid all monies owed to CBA under the general contract on October 7, 2008. CBA argues that NYSEI cannot obtain beneficiary status under Lien Law § 76 without the existence of a trust and lien fund.

## II. *Discussion and Rulings*

### A. *Motion for a Verified Statement and Cross-Motion to Vacate*

Article 3-A of New York's Lien Law makes it clear that a contractor "is a trustee (Lien Law, §§ 70, 72) for the benefit of subcontractors, laborers and materialmen (Lien Law, § 71), who necessarily, therefore, become *cestuis que trustent* or beneficiaries of such trusts." *Frontier Excavating, Inc. v. Sovereign Constr. Co.*, 30 A.D.2d 487, 489 (4th Dept. 1968). The statute provides in pertinent part that "funds received by a contractor or subcontractor and the rights of action with respect thereto, under or in connection with each contract or subcontract, shall be a separate trust and the contractor or subcontractor shall be the trustee thereof." Lien Law § 70. The purpose of the trust is to "protect those whose skill, labor and materials made possible the performance of a construction contract and who in fact, creating the improvement, actually gave rise to the owner's obligation to pay. The Legislature sought to assure that the funds received from an owner should 'reach [their] ultimate destination -- material and labor.'" *Aquilino v. United States*, 10 N.Y.2d 271, 278-279 (1961). "Only after all trust claims have been paid or discharged does a beneficial interest in the remaining balance vest in the trustee owner or contractor." *RLI Ins. Co. v. N.Y. State DOL*, 97 N.Y.2d 256, 263 (2002). Thus, when a building contractor has received money due under a contract it becomes a trustee pursuant to Lien Law §

70. A beneficiary of a trust is entitled, upon request and after thirty days from the date his trust claim became payable, to a verified statement of the entries contained in the trust's books or records. Lien Law § 76(1).

Here, for the purposes of Art 3-A, a trust was created in which CBA is the trustee and NYSEI the beneficiary. As a result, NYSEI is entitled to a verified trustee's statement setting forth the entries with the respect to the trust. Lien Law § 76(1). Allowing a subcontractor to examine the records of a trust is consistent with the purpose of article 3-A, to ensure that laborers receive payments from project funds. *Frontier Excavating, Inc.*, 30 A.D.2d at 489; see *Conforti & Eisele, Inc. v. R. Salzstein & Co.*, 56 A.D.2d 292, 294 (1st Dept. 1977). When CBA received monies due under the contract it became a trustee pursuant to § 70. See *Seaboard Surety Co. v. Massachusetts Bonding & Ins. Co.*, 232 N.Y.S.2d 809, 810 (1st Dept. 1962). The Court of Appeals has clearly stated that, "only after all trust claims have been paid or discharged does a beneficial interest in the remaining balance vest in the trustee owner or contractor." *RLI Ins. Co.*, 97 N.Y.2d at 263. Whether Owner paid CBA and was discharged from its obligation does not impair the trust created when CBA received payment.<sup>1</sup> Indeed, to reiterate, the purpose of allowing a demand for a verified statement is to determine the availability of funds for the payment of protected classes such as subcontractors. *Conforti & Eisele, Inc.*, 56 A.D.2d at 294.

*B. Cross-Petition for an Itemized Statement of Lien*

Lien Law § 38 provides:

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<sup>1</sup> Here, it is clear that NYSEI has no claim against Owner. Owner has no obligation to a subcontractor once the contractor has been paid in full. See *Electric City Concrete Co. v. Phillips*, 100 A.D.2d 1, 4 (3d Dept. 1984) ("[A] mechanic's lien will attach only to those funds due and owing to the general contractor at the time of its filing, or which may thereafter become due and owing"). The statute provides that, "the funds received by a contractor or subcontractor and the rights of action with respect thereto, under or in connection with each contract or subcontract, shall be a separate trust and the contractor or subcontractor shall be the trustee thereof." Lien Law § 70(2).

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.

However, the First Department has held that "itemization of labor and materials is not required with respect to a balance of an agreed price where . . . the contract has been substantially completed." *819 Sixth Ave. Corp. v. T. & A. Associates, Inc.*, 24 A.D.2d 446 (1st Dept. 1965); *see Application of Borysko*, 149 N.Y.S.2d 53, 54 (N.Y. Sup. Ct. 1956) ("Where the work has been completed, and the contract was for an *agreed price*, nothing would be accomplished by requiring the lienor to furnish an itemization of materials furnished and labor performed in performance of the contract.") (emphasis added). CBA and NYSEI entered into a contract for an agreed price. NYSEI began work on May 15, 2007 and completed performance on May 8, 2008. Thus, NYSEI need not provide an itemized statement. Accordingly, it is

ORDERED that the petition is granted and respondent Les Constructions Beauce-Atlas Inc. is directed to serve a verified trustee's statement upon New York Steel Erectors Inc. within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that respondent's cross-motion to vacate petitioner's demand is denied; and it is further

ORDERED that respondent's cross-petition for an itemized lien statement is denied.

ENTER:

Date: June 24, 2009  
New York, New York

**FILED**  
JUN 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK  
J.S.C.