

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY IAS COMMERCIAL PART 14

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JWP FOREST ELECTRIC CORP.,

INDEX NUMBER

Plaintiff,

26537/92

-against-

THE LEMA ORGANIZATION, INC.,

Defendant.

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WALTER H. SCHACKMAN, J:

The plaintiff, JWP Forest Electric Corp., moves for an order pursuant to CPLR 53126(3) striking the answer and directing judgment in favor of the plaintiff for defendant's refusal to serve a verified statement pursuant to Lien Law 5575 and 76, or, in the alternative, requiring the defendant to give security to ensure the proper distribution of the trust assets.

The plaintiff, JWP Forest Electric Corp., was the electrical subcontractor on a project at Memorial Sloan Kettering Cancer Center. The defendant, The Lema Organization, Inc., was the general contractor. This is an action for the contract price and to foreclose a lien.

In an order dated August 4, 1993, the Court directed the defendant to provide a verified statement in accordance with the requirements of the Lien Law. The defendant has failed to provide the verified statement within the time specified in the order. In response to this motion, the defendant has served papers which fall far short of the requirements set forth in the Lien Law.

The funds received by a contractor under a contract for an improvement of real property shall constitute assets of a trust and the

contractor shall be the trustee thereof (Lien Law §70). The trust assets of which a contractor is trustee shall be held and applied for the payment of claims of subcontractors (Lien Law §71(2)(a)). Any transaction by which any trust asset is transferred for any purpose other than a purpose of the trust is a diversion of trust assets (Lien Law §72(1)). Every trustee is required to keep detailed books or records with respect to each trust (Lien Law §75(2)). The books or records shall contain, inter alia, names and addresses of each person from whom funds constituting trust assets have been received, with a description of the form in which the funds were received; the date on which each payment was received; the amount received on such date; and, if such funds are deposited in a bank, the name and address of such bank. (Lien Law §75(3)(C)). The books or records shall also contain the name and address of each person to whom a payment for the purposes of the trust has been made, including the date when and place where each payment was made; the amount paid on each such date; and a statement of the nature of the trust claim or the nature of the expenditure other than payment of a trust claim sufficient to identify the payment as a payment for a trust purpose and to show whether it is for labor, materials, taxes, etc. If any such payment was made pursuant to contract, the date when such contract was made, whether it was oral or in writing, and the agreed price must be recorded. (Lien Law §75(3)(D)).

Any beneficiary of the trust is entitled to examine the books or records of the trustee and receive a verified statement setting forth the entries with respect to the trust. (Lien Law § 576).

A holder of a trust claim may bring an action to enforce the trust (Lien Law 577). The relief granted in any such action may include

an order requiring the trustee to give security to ensure the proper distribution of the trust assets. (Lien Law §77(3)(a)(v)).

It is obvious that the defendant is maneuvering to avoid payment of the plaintiff's claim. The defendant has failed to provide a valid excuse for ignoring the Court's order, and has failed to provide now the detailed statement called for by Lien Law §75

Accordingly, the motion is granted to the extent that the defendant is ordered to furnish security to ensure proper distribution of trust assets.

Settle order.

Dated: February 3 1994

WALTER H. SCHACKMAN, J:
J.S.C.

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