Corporate Officer Held Personally Liable to Unpaid Subcontractor

By Karl Silverberg

Suffolk County Supreme Court Justice Thomas Whalen recently ruled that a general contractor's corporate officer was personally liable to an unpaid subcontractor. The basis for the ruling was New York State's Lien Law Article 3-A, known as the trust fund statute. The case is, *Marcor Construction v. Bil-Ray Aluminum Siding and Charles LePorin*.

The subcontractor, Marcor, installed roofs for a general contractor, Bil-Ray. The general contractor went out of business leaving an unpaid balance owed to the subcontractor.

The subcontractor brought a lawsuit to hold the general contractor's owner, Charles LePorin, personally liable under the trust fund statute.

The trust fund statute is a powerful tool, and not all states have a trust fund statute. Under the trust fund statute, any funds that a general contractor ("GC") receives from a project owner are considered trust funds. The GC is required to hold the trust funds in trust for the trust fund beneficiaries. The beneficiaries are the subcontractors and material suppliers. Only after all trust fund beneficiaries have been paid do any remaining funds vest in the trustee-GC.

FOCUS ON
COMMERCIAL LAW
SPECIAL EDITION

The key aspect of the trust fund statute is that it opens the door to hold corporate officers personally liable for breach of trust. As stated by Justice Whalen: "Officers and directors of a corporate trustee are under a duty to the beneficiaries of a trust administered by the corporation not to cause the corporation to misappropriate trust property and will be personally liable for participation in a breach of trust. Corporate officers may thus be held liable for trust funds otherwise diverted by their corporation provided that the corporate officer charged knowingly participated in the diversion by the corporation."

Karl Silverberg

Without the trust fund statute, Marcor's only remedy would have been to sue a defunct business.

The court analyzed the facts to determine if Bil-Ray's owner, Charles LePorin, knowingly diverted trust funds. The court noted: "Such proof included the affidavits submitted by . . . a former employee of defendant Bil-Ray detailing the existence of trust assets in the hands of the corporate defendant and the voluntary diversion thereof on the part of its officer, director and/or employee, Charles LePorin, who failed to pay the plaintiff out of such trust assets [the] amount due for work it performed under the terms of its subcontract." Further: "[T]he opposing papers submitted by the defendants . . . included nothing but innuendo, surmise and self-serving conclusory assertions that someone other than defendant LePorin was responsible for the diversion of trust assets. These assertions were insufficient to raise a question of fact regarding an absence of knowing participation on the part of defendant LePorin in the conduct constituting the improper diversion of trust assets."

This case shows New York's trust fund statute in operation. It is a powerful tool for New York's subcontractors and material suppliers.

This author represented Marcor Construction in the above matter.

Note: Karl Silverberg focuses his practice on construction law at Silverberg P.C. Prior to law school Mr. Silverberg worked as a civil engineer for eight years on public sector transportation projects, and is a licensed professional engineer. Mr. Silverberg can be reached at (631) 778-6077 or ksilverberg@silverbergpclaw.com.