

# New York Lien Law

## § 1. Short title

## § 2. Definitions

1. Lienor. The term "lienor," when used in this chapter, means any person having a lien upon property by virtue of its provisions, and includes his successor in interest.

2. Real property. The term "real property," when used in this chapter, includes real estate, lands, tenements and hereditaments, corporeal and incorporeal, fixtures, and all bridges and trestle work, and structures connected therewith, erected for the use of railroads, and all oil or gas wells and structures and fixtures connected therewith, and any lease of oil lands or other right to operate for the production of oil or gas upon such lands, and the right of franchise granted by a public corporation for the use of the streets or public places thereof, and all structures placed thereon for the use of such right or franchise.

3. Owner. The term "owner," when used in this chapter, includes the owner in fee of real property, or of a less estate therein, a lessee for a term of years, a vendee in possession under a contract for the purchase of such real property, and all persons having any right, title or interest in such real property, which may be sold under an execution in pursuance of the provisions of statutes relating to the enforcement of liens of judgment, and all persons having any right or franchise granted by a public corporation to use the streets and public places thereof, and any right, title or interest in and to such franchise. The purchaser of real property at a statutory or judicial sale shall be deemed the owner thereof from the time of such sale. If the purchaser at such sale fails to complete the purchase, pursuant to the terms of the sale, all liens created by his consent after such sale shall be a lien on any deposit made by him and not on the real property sold.

4. Improvement. The term "improvement," when used in this chapter, includes the demolition, erection, alteration or repair of any structure upon, connected with, or beneath the surface of, any real property and any work done upon such property or materials furnished for its permanent improvement, and shall also include any work done or materials furnished in equipping any such structure with any chandeliers, brackets or other fixtures or apparatus for supplying gas or electric light and shall also include the drawing by any architect or engineer or surveyor, of any plans or specifications or survey, which are prepared for or used in connection with such improvement and shall also include the value of materials actually manufactured for but not delivered to the real property, and shall also include the reasonable rental value for the period of actual use of machinery, tools and equipment and the value of compressed gases furnished for welding or cutting in connection with the demolition, erection, alteration or repair of any real property, and the value of fuel and lubricants consumed by machinery operating on the improvement, or by motor vehicles owned, operated or controlled by the owner, or a contractor or subcontractor while engaged

exclusively in the transportation of materials to or from the improvement for the purposes thereof and shall also include the performance of real estate brokerage services in obtaining a lessee for a term of more than three years of all or any part of real property to be used for other than residential purposes pursuant to a written contract of brokerage employment or compensation.

5. Cost of improvement. The term "cost of improvement," when used in this chapter, means expenditures incurred by the owner in paying the claims of a contractor, an architect, engineer or surveyor, a subcontractor, laborer and materialman, arising out of the improvement, and in paying the amount of taxes based on payrolls including such persons and withheld or required to be withheld and taxes based on the purchase price or value of materials or equipment required to be installed or furnished in connection with the performance of the improvement, payment of taxes and unemployment insurance and other contributions due by reason of the employment out of which any such claim arose, and payment of any benefits or wage supplements or the amounts necessary to provide such benefits or furnish such supplements, to the extent that the owner, as employer, is obligated to pay or provide such benefits or furnish such supplements by any agreement to which he is a party, and shall also include fair and reasonable sums paid for obtaining building loan and subsequent financing, premiums on bond or bonds filed pursuant to section thirty-seven of this chapter or required by any such building loan contract or by any lease to be mortgaged pursuant thereto, or required by any mortgage to be subordinated to the building loan mortgage, premiums on bond or bonds filed to discharge liens, sums paid to take by assignment prior existing mortgages, which are consolidated with building loan mortgages and also the interest charges on such mortgages, sums paid to discharge or reduce the indebtedness under mortgages and accrued interest thereon and other encumbrances upon real estate existing prior to the time when the lien provided for in this chapter may attach, sums paid to discharge building loan mortgages whenever recorded, taxes, assessments and water rents existing prior to the commencement of the improvement, and also those accruing during the making of the improvement, and interest on building loan mortgages, ground rent and premiums on insurance likewise accruing during the making of the improvement. The application of the proceeds of any building loan mortgage or other mortgage to reimburse the owner for any payments made for any of the above mentioned items for said improvement prior to the date of the initial advance received under the building loan mortgage or other mortgage shall be deemed to be an expenditure within the "cost of improvement" as above defined; provided, however, such payments are itemized in the building loan contract and/or other mortgage other than a building loan mortgage, and provided further, that the payments have been made subsequent to the commencement of the improvement.

5-a. Benefits and wage supplements. The term "benefits and wage supplements" as used in this chapter means all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not "wages" within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay and life insurance.

6. Public corporation. The term "public corporation," when used in this chapter, means a municipal corporation or a district corporation or a public benefit corporation as such corporations are defined in section three of the general corporation law.

7. Public improvement. The term "public improvement," when used in this chapter, means an improvement of any real property belonging to the state or a public corporation; however, if the beneficial interest of an improvement is in an entity other than the state or a public corporation notwithstanding legal title being vested in an industrial development agency created under article eighteen-A of the general municipal law, then such improvement shall be considered an improvement of real property subject to mechanics' liens on real property as provided in section three of this chapter. Nothing contained in this section shall create or be deemed to create any liability upon any industrial development agency for the payment of the cost of any improvement, or otherwise. For the purposes of this subdivision the term "beneficial interest" shall mean the beneficial incidents of ownership of the improvement to include, but not be limited to, the right to possession, the right to claim tax benefits, if any, and the right to purchase or secure title to the improvement pursuant to an executory contract of sale, option agreement or lease.

8. Improvement of real property. The term "improvement of real property," when used in this chapter, means any improvement of real property not belonging to the state or a public corporation.

9. Contractor. The term "contractor," when used in this chapter, means a person who enters into a contract with the owner of real property for the improvement thereof, or with the state or a public corporation for a public improvement.

10. Subcontractor. The term "subcontractor" when used in this chapter, means a person who enters into a contract with a contractor and/or with a subcontractor for the improvement of such real property or such public improvement or with a person who has contracted with or through such contractor for the performance of his contract or any part thereof.

11. Laborer. The term "laborer," when used in this chapter, means any person who performs labor or services upon such improvement.

12. Materialman. The term "materialman" when used in this chapter, means any person who furnishes material or the use of machinery, tools, or equipment, or compressed gases for welding or cutting, or fuel or lubricants for the operation of machinery or motor vehicles, either to an owner, contractor or subcontractor, for, or in the prosecution of such improvement.

The expression "furnishes material" or other similar expression wherever used in this chapter, shall be deemed to mean and include the reasonable rental value for the period of actual use of machinery, tools or equipment, and the value of compressed gases furnished for welding or cutting, and the value of fuel and lubricants consumed by

machinery operating on, or by motor vehicles owned, operated or controlled by the owner, or a contractor or subcontractor while engaged exclusively in the transportation of materials to or from the improvement for the purposes thereof.

13. Building loan contract. The term "building loan contract," when used in this chapter, means a contract whereby a party thereto, in this chapter termed "lender," in consideration of the express promise of an owner to make an improvement upon real property, agrees to make advances to or for the account of such owner to be secured by a mortgage on such real property, whether such advances represent moneys to be loaned or represent moneys to be paid in purchasing from or in selling for such owner bonds or certificates secured by such mortgage upon such real property, providing, however, nothing herein contained shall be deemed to construe as a building loan contract a preliminary application for a building loan made by such owner and accepted by such lender if, pursuant to such application and acceptance, a building loan contract is thereafter entered into between the owner and the lender and filed as provided in section twenty-two of this chapter.

14. Building loan mortgage. The term "building loan mortgage," when used in this chapter, means a mortgage made pursuant to a building loan contract and includes an agreement wherein and whereby a building loan mortgage is consolidated with existing mortgages so as to constitute one lien upon the mortgaged property.

15. Subsequent financing. By the term "subsequent financing" is meant moneys borrowed upon the security of the improvement after the recording of a building loan contract and/or mortgage other than a building loan mortgage upon the premises to be improved and within four months after the completion thereof.

16. Prior mortgage. By the term "prior mortgage" is meant a mortgage on real property and/or leasehold recorded prior to the commencement of an improvement thereon.

17. Consideration. The term "consideration" when used in this chapter, includes real property as defined in section two hereof, and personal property as defined in section thirty-nine of the general construction law.

18. Advances. The term "advances" when used in this chapter, includes money, real property as defined in section two hereof and/or personal property as defined in section thirty-nine of the general construction law.

19. Funds. The term "funds" when used in this chapter, includes money, real property as defined in section two hereof and/or personal property as defined in section thirty-nine of the general construction law.

20. Persons. The term "persons" when used in this chapter, includes an individual, partnership, association, trust or corporation.

### **§ 3. Mechanic's lien on real property**

A contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, and any trust fund to which benefits and wage supplements are due or payable for the benefit of such laborers, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor, including benefits and wage supplements due or payable for the benefit of any laborer, or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter. Where the contract for an improvement is made with a husband or wife and the property belongs to the other or both, the husband or wife contracting shall also be presumed to be the agent of the other, unless such other having knowledge of the improvement shall, within ten days after learning of the contract give the contractor written notice of his or her refusal to consent to the improvement. Within the meaning of the provisions of this chapter, materials actually manufactured for but not delivered to the real property, shall also be deemed to be materials furnished.

### **§ 4. Extent of lien**

(1) Such lien shall extend to the owner's right, title or interest in the real property and improvements, existing at the time of filing the notice of lien, or thereafter acquired, except as hereinafter in this article provided. If an owner assigns his interest in such real property by a general assignment for the benefit of creditors, within thirty days prior to such filing, the lien shall extend to the interest thus assigned. If any part of the real property subjected to such lien be removed by the owner or by any other person, at any time before the discharge thereof, such removal shall not affect the rights of the lienor, either in respect to the remaining real property, or the part so removed. If labor is performed for, or materials furnished to, a contractor or subcontractor for an improvement, the lien shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing the notice of lien, and any sum subsequently earned thereon. In no case shall the owner be liable to pay by reason of all liens created pursuant to this article a sum greater than the value or agreed price of the labor and materials remaining unpaid, at the time of filing notices of such liens, except as hereinafter provided.

(2) Such lien shall not extend to the owner's right, title or interest in real property and improvements, existing at the time of filing the notice of lien if such lien arises from the failure of a lessee of the right to explore, develop or produce natural gas or oil, to pay for, compensate or render value for improvements made with the consent or at the request of such lessee by a contractor, subcontractor, materialman, equipment operator or owner, landscaper, nurseryman, or person or corporation who performs labor or furnishes materials for the exploration, development, or production of oil or natural gas or otherwise improves such leased property. Such lien shall extend to the improvements

made for the exploration, development and production of oil and natural gas, and the working interest held by a lessee of the right to explore, develop or produce oil and natural gas.

(3) Notwithstanding subdivision two if a property owner is also a developer of oil and gas resources and is a party to an agreement with a person or firm authorized to perfect a lien arising out of the failure of such developer to compensate or render value for improvements to the property upon which an oil or gas well is drilled or established, the lien shall extend to the owners' right or interest in such real property.

#### **§ 4-a. Insurance proceeds liable for demands Owner, contractor or subcontractor diverting proceeds, guilty of larceny**

The proceeds of any insurance which by the terms of the policy are payable to the owner of real property improved, and actually received or to be received by him because of the destruction or removal by fire or other casualty of an improvement on which lienors have performed labor or services or for which they have furnished materials, shall after the owner has been reimbursed therefrom for premiums paid by him, if any, for such insurance, be subject to liens provided by this act to the same extent and in the same order of priority as the real property would have been had such improvement not been so destroyed or removed.

The proceeds of any insurance which by the terms of the policy are payable to a contractor or subcontractor, and actually received or to be received by him because of the destruction or removal by fire or other casualty of an improvement on which he has performed labor or services or for which he has furnished materials, shall, after such contractor or subcontractor has been reimbursed therefrom for premiums paid by him, if any, for such insurance, be liable for the payment of demands for labor or services performed or materials furnished by his order and for which he is liable, in the same manner and under the same conditions as payments to him under his contract would have been had such improvement not been so destroyed or removed.

#### **§ 5. Liens under contracts for public improvements**

A person performing labor for or furnishing materials to a contractor, his or her subcontractor or legal representative, for the construction or demolition of a public improvement pursuant to a contract by such contractor with the state or a public corporation, and any trust fund to which benefits and wage supplements are due or payable for the benefit of such person performing labor, shall have a lien for the principal and interest of the value or agreed price of such labor, including benefits and wage supplements due or payable for the benefit of any person performing labor, or materials upon the moneys of the state or of such corporation applicable to the construction or demolition of such improvement, to the extent of the amount due or to become due on such contract, and under a judgment of the court of claims awarded to the contractor for damages arising from the breach of such contract by the state, or

awarded for furnishing labor or materials not contemplated by the provisions of said contract, upon filing a notice of lien as prescribed in this article, except as hereinafter in this article provided. Where no public fund has been established for the financing of a public improvement with estimated cost in excess of two hundred fifty thousand dollars, the chief financial officer of the public owner shall require the private entity for whom the public improvement is being made to post, or cause to be posted, a bond or other form of undertaking guaranteeing prompt payment of moneys due to the contractor, his or her subcontractors and to all persons furnishing labor or materials to the contractor or his or her subcontractors in the prosecution of the work on the public improvement.

## **§ 6. Liens for labor on railroads**

Any person who shall hereafter perform any labor for a railroad corporation shall have a lien for the value of such labor upon the railroad track, rolling-stock and appurtenances of such railroad corporation and upon the land upon which such railroad track and appurtenances are situated, by filing a notice of such lien in the office of the clerk of any county wherein any part of such railroad is situated, to the extent of the right, title and interest of such corporation in such property, existing at the time of such filing. The provisions of this article relating to the contents, filing and entry of a notice of a mechanic's lien, and the priority and duration thereof, shall apply to such liens. A copy of the notice of such lien shall be personally served upon such corporation within ten days after the filing thereof in the manner prescribed by the justice court act for the service of summons in actions in justices' courts against domestic railroad corporations.

## **§ 7. Liability for advance payments, collusive mortgages and incumbrances**

Any payment by the owner, contractor or subcontractor upon a contract for the improvement of real property, made prior to the time when, by the terms of the contract, such payment becomes due, for the purpose of avoiding the provisions of this article, shall be of no effect as against the lien of a subcontractor, laborer, or materialman under such contract, created before such payment actually becomes due. A conveyance, mortgage, lien or incumbrance made by an owner of real property, for the purpose of avoiding the provisions of this article, with the knowledge or privity of the person to whom the conveyance is made or in whose favor the mortgage, lien or incumbrance is created, shall be void and of no effect as against a claim on account of the improvement of such real property, existing at the time of the making of the conveyance or the creation of such mortgage, lien or incumbrance.

Nothing in this chapter shall subject the title of a purchaser of real property for value whose conveyance is recorded prior to the filing of a lien pursuant to this chapter to any such lien, provided the instrument of conveyance contains the provisions mentioned in subdivision five of section thirteen.

## **§ 8. Terms of contract may be demanded**

A statement of the terms of a contract made between an owner and a contractor, pursuant to which an improvement of real property is being made, and, of the amount due or to become due thereon shall be furnished upon demand in writing by the owner, or his duly authorized agent, to a subcontractor, laborer or material man performing labor for or furnishing materials to a contractor, or subcontractor, under such contract. If, within thirty days of such demand the owner refuses or neglects to furnish such statement or falsely states the terms of such contract or the amount due or to become due thereon, and a subcontractor, laborer or material man has not been paid the amount of his claim against a contractor or subcontractor, under such contract, and a judgment has been obtained and execution issued against such contractor or subcontractor and returned wholly or partly unsatisfied, the owner shall be liable for the loss sustained by reason of such refusal, neglect or false statement, and the lien of such subcontractor, laborer or material man, filed as prescribed in this article, against the real property improved for the labor performed or materials furnished after such demand, shall exist to the same extent and be enforced in the same manner as if such labor and materials had been directly performed for and furnished to such owner.

## **§ 9. Contents of notice of lien**

The notice of lien shall state:

1. The name and residence of the lienor; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state.

- 1-a. The name and address of the lienor's attorney, if any.

2. The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.

3. The name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials; or, if the lienor is a contractor or subcontractor, the person with whom the contract was made.

4. The labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price or value thereof.

5. The amount unpaid to the lienor for such labor or materials.

6. The time when the first and last items of work were performed and materials were furnished.

7. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known. A failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

## **§ 10. Filing of notice of lien**

1. Notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished; provided, however, that where the improvement is related to real property improved or to be improved with a single family dwelling, the notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within four months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished except that in the case of a lien by a real estate broker, the notice of lien may be filed only after the performance of the brokerage services and execution of lease by both lessor and lessee and only if a copy of the alleged written agreement of employment or compensation is annexed to the notice of lien, provided that where the payment pursuant to the written agreement of employment or compensation is to be made in installments, then a notice of lien may be filed within eight months after the final payment is due, but in no event later than a date five years after the first payment was made. For purposes of this section, the term "single family dwelling" shall not include a dwelling unit which is a part of a subdivision that has been filed with a municipality in which the subdivision is located when at the time the lien is filed, such property in the subdivision is owned by the developer for purposes other than his personal residence. For purposes of this section, "developer" shall mean and include any private individual, partnership, trust or corporation which improves two or more parcels of real property with single family dwellings pursuant to a common scheme or plan. The notice of lien must be filed in the clerk's office of the county where the property is situated. If such property is situated in two or more counties, the notice of lien shall be filed in the office of the clerk of each of such counties. The county clerk of each county shall provide and keep a book to be called the "lien docket," which shall be suitably ruled in columns headed "owners," "lienors," "lienor's attorney," "property," "amount," "time of filing," "proceedings had," in each of which he shall enter the particulars of the notice, properly belonging therein. The date, hour and minute of the filing of each notice of lien shall be entered in the proper column. Except where the county clerk maintains a block index, the names of the owners shall be arranged in such book in alphabetical order. The validity of the lien and the right to file a notice thereof shall not be affected by the death of the owner before notice of the lien is filed.

2. Where the county clerk indexes liens in a block index, every notice of lien presented to the clerk of a county of filing, in order to entitle the same to be filed, shall contain in the body thereof, or shall have endorsed thereon, a designation of the number of every block, on the land map of the county, which is affected by the notice of lien. The county clerk shall cause such notice of lien to be entered in the block index suitably ruled to contain the columns listed in the preceding paragraph, under the block number of every block so designated. In cases where a notice of lien shall have been filed without such designation or with an erroneous designation, the county clerk, on presentation of

proper proof thereof, shall enter such instrument in the proper index, under the proper block number of every block in which the land affected is situated, and shall, at the same time, make a note of such entry and of the date thereof in every place in which such instrument may have been erroneously indexed, opposite the entry thereof, and also upon the instrument itself, if the same be in his possession or produced to him for the purpose, and the filing of such instrument shall be constructive notice as to property in the block not duly designated at the time of such filing only from the time when the same shall be properly indexed.

A county clerk may adopt a new indexing system utilizing electro-mechanical, electronic or any other method he deems suitable for maintaining the indexes.

### **§ 11. Service of copy of notice of lien**

Within five days before or thirty days after filing the notice of lien, the lienor shall serve a copy of such notice upon the owner, if a natural person, (a) by delivering the same to him personally, or if the owner cannot be found, to his agent or attorney, or (b) by leaving it at his last known place of residence in the city or town in which the real property or some part thereof is situated, with a person of suitable age and discretion, or (c) by registered or certified mail addressed to his last known place of residence, or (d) if such owner has no such residence in such city or town, or cannot be found, and he has no agent or attorney, by affixing a copy thereof conspicuously on such property, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon; if the owner be a corporation, said service shall be made (i) by delivering such copy to and leaving the same with the president, vice-president, secretary or clerk to the corporation, the cashier, treasurer or a director or managing agent thereof, personally, within the state, or (ii) if such officer cannot be found within the state by affixing a copy thereof conspicuously on such property between the hours of nine o'clock in the forenoon and four o'clock in the afternoon, or (iii) by registered or certified mail addressed to its last known place of business. Failure to file proof of such a service with the county clerk within thirty-five days after the notice of lien is filed shall terminate the notice as a lien. Until service of the notice has been made, as above provided, an owner, without knowledge of the lien, shall be protected in any payment made in good faith to any contractor or other person claiming a lien.

### **§ 12. Notice of lien on account of public improvements**

At any time before the construction or demolition of a public improvement is completed and accepted by the state or by the public corporation, and within thirty days after such completion and acceptance, a person performing work for or furnishing materials to a contractor, his subcontractor, assignee or legal representative, may file a notice of lien with the head of the department or bureau having charge of such construction or demolition and with the comptroller of the state or with the financial officer of the public corporation, or other officer or person charged with the custody and disbursements of the state or corporate funds applicable to the contract under which the claim is made. The notice shall state the name and residence of the lienor, the name of

the contractor or subcontractor for whom the labor was performed or materials furnished, the amount claimed to be due or to become due, the date when due, a description of the public improvement upon which the labor was performed and materials expended, the kind of labor performed and materials furnished, and materials actually manufactured for but not delivered to such public improvement, and give a general description of the contract pursuant to which such public improvement was constructed or demolished. If the lienor is a partnership or a corporation, the notice shall state the business address of such partnership or corporation, the names of the partners, and if a foreign corporation, its principal place of business within the state. If the name of the contractor or subcontractor is not known to the lienor, it may be so stated in the notice, and a failure to state correctly the name of the contractor or subcontractor shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. The comptroller of the state or the financial officer of the public corporation or other officer or person charged with the custody and disbursements of the state or corporate funds applicable to the contract under which the claim is made shall enter the same in a book provided for that purpose, to be called the "lien book". Such entry shall include the name and residence of the lienor, the name of the contractor or subcontractor, the amount of the lien and date of filing, and a brief designation of the contract under which the lien arose.

#### **§ 12-a. Amendment**

1. Within sixty days after the original filing, a lienor may amend his lien upon twenty days notice to existing lienors, mortgagees and the owner, provided that no action or proceeding to enforce or cancel the mechanics' lien has been brought in the interim, where the purpose of the amendment is to reduce the amount of the lien, except the question of wilful exaggeration shall survive such amendment.

2. In a proper case, the court may, upon five days' notice to existing lienors, mortgagees and owner, make an order amending a notice of lien upon a public or private improvement, nunc pro tunc. However, no amendment shall be granted to the prejudice of an existing lienor, mortgagee or purchaser in good faith, as the case may be.

#### **§ 13. Priority of liens**

(1) A lien for materials furnished or labor performed in the improvement of real property shall have priority over a conveyance, mortgage, judgment or other claim against such property not recorded, docketed or filed at the time of the filing of the notice of such lien, except as hereinafter in this chapter provided; over advances made upon any mortgage or other encumbrance thereon after such filing, except as hereinafter in this article provided; and over the claim of a creditor who has not furnished materials or performed labor upon such property, if such property has been assigned by the owner by a general assignment for the benefit of creditors, within thirty days before the filing of either of such notices; and also over an attachment hereafter

issued or a money judgment hereafter recovered upon a claim, which, in whole or in part, was not for materials furnished, labor performed or moneys advanced for the improvement of such real property; and over any claim or lien acquired in any proceedings upon such judgment. Such liens shall also have priority over advances made upon a contract by an owner for an improvement of real property which contains an option to the contractor, his successor or assigns to purchase the property, if such advances were made after the time when the labor began or the first item of material was furnished, as stated in the notice of lien. If several buildings are demolished, erected, altered or repaired, or several pieces or parcels of real property are improved, under one contract, and there are conflicting liens thereon, each lienor shall have priority upon the particular part of the real property or upon the particular building or premises where his labor is performed or his materials are used. Persons shall have no priority on account of the time of filing their respective notices of liens, but all liens shall be on a parity except as hereinafter in section fifty-six of this chapter provided; and except that in all cases laborers for daily or weekly wages shall have preference over all other claimants under this article.

(1-a) Parties having assignments of moneys due or to become due under a contract for the improvement of real property, unless such assignments be set aside as diversions of trust assets as provided in article three-a of this chapter, shall have priority as follows:

An assignee of moneys or any part thereof, due or to become due under a contract for the improvement of real property, whose assignment is duly filed prior to the filing of a notice of lien or assignment of every other party to the action, shall have priority over those parties to the extent of moneys advanced upon such assignment before the filing of the notice of lien or assignment next subsequent to his assignment, but as to moneys advanced subsequent to a notice of lien or assignment filed and unsatisfied or not discharged such assignee for the purpose of determining his proportionate share of moneys available for distribution as provided in subdivision one of this section shall be treated as a lienor having a lien to the extent of moneys so advanced.

An assignee of moneys or any part thereof, due or to become due under a contract for an improvement of real property whose assignment is duly filed subsequent to the filing of the notice of lien or assignment of any other party shall for the purpose of determining his proportionate share of moneys available for distribution, as provided in subdivision one of this section be treated as a lienor having a lien to the extent of moneys actually advanced upon such assignment prior to the filing thereof.

(2) When a building loan mortgage is delivered and recorded a lien shall have priority over advances made on the building loan mortgage after the filing of the notice of lien; but such building loan mortgage, whenever recorded, to the extent of advances made before the filing of such notice of lien, shall have priority over the lien, provided it or the building loan contract contains the covenant required by subdivision three hereof, and provided the building loan contract is filed as required by section twenty-two of this chapter. Every mortgage recorded subsequent to the commencement of the improvement and before the expiration of the period specified in section ten of this chapter for filing of notice of lien after the completion of the improvement shall, to the extent of advances made before the filing of a notice of lien, have priority over liens

thereafter filed if it contains the covenant required by subdivision three hereof. The lien of a vendee under an executory contract for the sale of land and the improvement thereof by the construction of a building thereon shall, to the extent of amounts paid thereunder to the vendor before the filing of a notice of lien, have priority over liens filed after the contract or memorandum thereof is recorded as provided in section two hundred ninety-four of the real property law if the recorded contract or memorandum specifies the total amount of payments made by the vendee or required by the contract to be made by the vendee before conveyance of title.

(3) Every such building loan mortgage and every mortgage recorded subsequent to the commencement of the improvement and before the expiration of the period specified in section ten of this chapter for filing of notice of lien after the completion of the improvement shall contain a covenant by the mortgagor that he will receive the advances secured thereby and will hold the right to receive such advances as a trust fund to be applied first for the purpose of paying the cost of improvement, and that he will apply the same first to the payment of the cost of improvement before using any part of the total of the same for any other purpose, provided, however, that if the party executing the building loan contract is not the owner of the fee but is the party to whom such advances are to be made, a building loan contract executed and filed pursuant to section twenty-two of this chapter shall contain the said covenant by such party executing such building loan contract, in place of the covenant by the mortgagor in the building loan mortgage as hereinbefore provided. Nothing in this subdivision shall be considered as imposing upon the lender any obligation to see to the proper application of such advances by the owner; and nothing in this section, nor in that portion of section two of this chapter, defining "cost of improvement" shall be deemed to impair or subordinate the lien of any mortgage containing the covenant required by this subdivision. To the extent that the trust res consists of the right to receive advances as distinct from advances actually received, breach of the trust shall give rise to a civil action only. The covenant provided for herein shall be deemed to have been made and to be in full force and effect if, in lieu of the foregoing provisions, a statement in substantially the following form is contained in the mortgage or contract, "subject to the trust fund provisions of section thirteen of the lien law."

(4) Nothing in subdivision two or three of this section shall apply to any mortgage given by a purchaser for value from an owner making the improvement and recorded prior to the filing of a lien pursuant to this chapter, provided the instrument of conveyance contains the provisions mentioned in subdivision five herein.

(5) No instrument of conveyance recorded subsequent to the commencement of the improvement, and before the expiration of the period specified in section ten of this chapter for filing of notice of lien after the completion of the improvement, shall be valid as against liens filed within a corresponding period of time measured from the recording of such conveyance, unless the instrument contains a covenant by the grantor that he will receive the consideration for such conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and that he will apply the same first to the payment of the

cost of the improvement before using any part of the total of the same for any other purpose. Nothing in this subdivision shall be construed as imposing upon the grantee any obligation to see to the proper application of such consideration by the grantor. Nothing in this subdivision shall apply to a deed given by a referee or other person appointed by the court for the sole purpose of selling real property. Nothing in this subdivision shall apply to the consideration received by a grantor who, pursuant to a written agreement entered into and duly recorded prior to the commencement of the improvement, conveys to the person making such improvement, the land upon which such improvement is made. However, such a conveyance shall be subject to liens filed prior thereto, as provided by this chapter. To the extent that the trust res consists of the right to receive the consideration for such conveyance as distinct from the consideration actually received, breach of the trust shall give rise to a civil action only. The covenant provided for herein shall be deemed to have been made and to be in full force and effect if, in lieu of the foregoing provisions, a statement in substantially the following form is contained in the instrument of conveyance, "subject to the trust fund provisions of section thirteen of the lien law."

Except that this section shall not apply to any mortgage taken by the home owners' loan corporation, a corporation created under an act of congress, known as the "home owners' loan act of nineteen hundred thirty-three," and the "home owners' loan act of nineteen hundred thirty-three as amended," and said mortgage shall have priority over any and all liens filed subsequent to the date of the recording of said mortgage whether or not the cash and/or bonds for which said mortgage has been taken as security, shall have been advanced at the time of the execution of such mortgage or subsequent thereto, and it shall not be necessary to execute and file any building loan contract or any other contract, in compliance with this section or any part thereof.

(6) Every assignment of moneys, or any part thereof, due or to become due under a contract for the improvement of real property shall contain a covenant by the assignor that he will receive any moneys advanced thereunder by the assignee and will hold the right to receive such moneys as trust funds to be first applied to the payment of trust claims as defined in section seventy-one of the lien law, and that he will apply the same to such payments only, before using any part of the moneys for any other purpose.

(7) [Repealed]

#### **§ 14. Assignment of lien**

A lien, filed as prescribed in this article, may be assigned by a written instrument signed and acknowledged by the lienor, at any time before the discharge thereof. Such assignment shall contain the names and places of residence of the assignor and assignee, the amount of the lien and the date of filing the notice of lien, and be filed in the office where the notice of the lien assigned is filed. The facts relating to such an assignment and the names of the assignee shall be entered by the proper officer in the book where the notice of lien is entered and opposite the entry thereof. Unless such assignment is filed, the assignee need not be made a defendant in an action to

foreclose a mortgage, lien or other incumbrance. A payment made by the owner of the real property subject to the lien assigned or by his agent or contractor, or by the contractor of a public corporation, to the original lienor, on account of such lien, without notice of such assignment and before the same is filed, shall be valid and of full force and effect. Except as prescribed herein, the validity of an assignment of a lien shall not be affected by a failure to file the same.

## **§ 15. Assignments of contracts and orders to be filed**

1. No assignment of one or more contracts for the performance of labor or the furnishing of materials for the improvement of real property or of the money or any part thereof due or to become due therefor, nor an order drawn by a contractor upon the owner of such real property for the payment of such money, nor an order drawn by a subcontractor upon a contractor or subcontractor for such payment, nor an order drawn by an owner upon the maker of a building loan, nor an assignment of moneys due or to grow due under a building loan contract, shall operate to reduce the lien of a subcontractor, laborer or materialman, except as provided in sections thirteen and twenty-six of this chapter; nor shall any such assignment or order be valid for any purpose, unless a "Notice of Assignment" meeting the requirements of subdivision two of this section or the contract (other than a building loan contract) or a statement containing the substance thereof and such assignment or a copy of each or a copy of such order, be filed within ten days after the date of such assignment or such order, in the office of the county clerk of each county wherein real property improved or to be improved to which the assignment or order relates is situated and such assignment or order shall have effect and be enforceable from the time of such filing, and no such assignment or order shall have any validity until the same shall have been so filed, and every such assignment or order, not filed shall be absolutely void as against a subsequent assignee in good faith and for valuable consideration, whose assignment or order is first duly filed. Such clerk shall enter the facts relating to such assignment or order in the "lien docket" or in another book provided by him for such purpose. Each such assignment shall be indexed by the name of the assignor and each such order shall be indexed by the name of the drawer.

2. A "Notice of Assignment" filed pursuant to subdivision one of this section shall be used only in the case of money advanced or to be advanced to a contractor or subcontractor upon the assignment of one or more contracts for the performance of labor or the furnishing of materials for the improvement of real property, or of the money or any part thereof due or to become due therefor. The said notice shall contain (a) the names and addresses of the assignor and assignee, (b) the date of the assignment, and the date the assignment will terminate, which termination date shall not be more than two years after the date of the assignment, (c) the maximum balance of advances outstanding to be secured by the assignment, (d) a statement of each county wherein the real property involved in the contracts is or may be situated, and (e) either a specific description of the substance of the contract or contracts assigned, including an identification of the real property involved in each such contract, or a statement that the assignment covers all or a specified class of the assignor's accounts or contract rights.

If the contract or contracts assigned are described specifically the real property identification shall be sufficient if it includes the name of the record owner and the location of the real estate by street and number and town or city or, if the real estate is in the city of New York, by county, except that if the real estate is in the city of New York or counties of Nassau or Onondaga, where the block system of recording or registering and indexing conveyances is in use, the notice must also specify the block in which the real estate is situated.

3. A "Notice of Assignment" may be continued in effect beyond the stated termination date by filing within sixty days prior to the determination date a subsequent "Notice of Assignment" entitled "Second Notice of Assignment" or "Third Notice of Assignment", which identifies the prior "Notice of Assignment" to which it relates and otherwise conforms to the requirements of subdivision two of this section.

4. The term "Notice of Assignment" as used in this section includes any amendments but if any amendment extends the assignment to cover additional contracts it is effective as to the added contracts only from the date of the filing.

#### **§ 16. Assignment of contracts and orders for public improvement to be filed**

No assignment of a contract for the performance of labor or the furnishing of materials for a public improvement, or of the money, or any part thereof, due, or to become due, therefor, nor an order drawn by the contractor or sub-contractor upon the public corporation, or the head of the department or bureau having charge of the construction or demolition of such public improvement, or the financial officer of the public corporation, or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, shall be valid unless such assignment or order, or a copy thereof, be filed within twenty days after the date of such assignment of contract, or such assignment of money, or such order, with the head of the department or bureau having charge of such construction or demolition, and with the financial officer of the public corporation or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for such public improvement, and such assignment or order shall have effect and be enforceable from the time of such filing, and no such assignment or order shall have any validity until the same shall have been so filed, and every such assignment or order, not filed, shall be absolutely void as against a subsequent assignee in good faith and for valuable consideration, whose assignment or order is first duly filed. The financial officer of the public corporation, or other officer or person with whom the assignment order, or copy thereof, is filed, shall enter the facts relating to the same in the lien book or other book provided for such purpose.

#### **§ 17. Duration of lien**

No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, whether in a court of

record or in a court not of record, is filed with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien; or unless an extension to such lien, except for a lien on real property improved or to be improved with a single family dwelling, is filed with the county clerk of the county in which the notice of lien is filed within one year from the filing of the original notice of lien, continuing such lien and such lien shall be redocketed as of the date of filing such extension. Such extension shall contain the names of the lienor and the owner of the real property against whose interest therein such lien is claimed, a brief description of the real property affected by such lien, the amount of such lien, and the date of filing the notice of lien. No lien shall be continued by such extension for more than one year from the filing thereof. In the event an action is not commenced to foreclose the lien within such extended period, such lien shall be extinguished unless an order be granted by a court of record or a judge or justice thereof, continuing such lien, and such lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order. A lien on real property improved or to be improved with a single family dwelling may only be extended by an order of a court of record, or a judge or justice thereof. No lien shall be continued by court order for more than one year from the granting thereof, but a new order and entry may be made in each of two successive years. If a lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person. The provisions of this section in regard to continuing liens shall apply to liens discharged by deposit or by order on the filing of an undertaking. Where a lien is discharged by deposit or by order, a notice of pendency of action shall not be filed.

A lien, the duration of which has been extended by the filing of a notice of the pendency of an action as above provided, shall nevertheless terminate as a lien after such notice has been canceled as provided in section sixty-five hundred fourteen of the civil practice law and rules or has ceased to be effective as constructive notice as provided in section sixty-five hundred thirteen of the civil practice law and rules.

#### **§ 18. Duration of lien under contract for a public improvement**

If the lien is for labor done or materials furnished for a public improvement, it shall not continue for a longer period than one year from the time of filing the notice of such lien, unless an action is commenced to foreclose such lien within that time, and a notice of the pendency of such action is filed with the comptroller of the state or the financial officer of the public corporation with whom the notice of such lien was filed; or unless an extension to such lien is filed with the comptroller of the state or the financial officer of the public corporation with whom the notice of such lien was filed within one year from the filing of the original notice of lien, continuing such lien and such lien shall be

redocketed as of the date of filing such extension. Such extension shall contain the names of the lienor and the contractor or subcontractor for whom the labor was performed or materials furnished, a description of the public improvement upon which the labor was performed and materials expended, the amount of such lien, and the date of the filing of the notice of lien. No lien shall be continued by such extension for more than one year from the filing thereof. In the event an action is not commenced to foreclose the lien within such extended period, such lien shall be extinguished unless an order be granted by a court of record or a judge or justice thereof, continuing such lien, and a new docket be made stating such fact. No lien shall be continued by such order for more than one year from the granting thereof, but a new order and entry may be made in each of two successive years. If a lienor be made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued. The provision of this section in regard to continuing liens shall apply to liens discharged by deposit or by order on the filing of an undertaking. This section is hereby declared to be a remedial statute and is to be construed liberally to secure the beneficial interests and purposes thereof.

#### **§ 19. Discharge of lien for private improvement**

A lien other than a lien for labor performed or materials furnished for a public improvement specified in this article, may be discharged as follows:

(1) By the certificate of the lienor, duly acknowledged or proved and filed in the office where the notice of lien is filed, stating that the lien is satisfied or released as to the whole or a portion of the real property affected thereby and may be discharged in whole or in part, specifying the part. Upon filing such certificate, the county clerk in the office where the same is filed, shall note the fact of such filing in the "lien docket" in the column headed "Proceedings had" opposite the docket of such lien.

(2) By failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from the time of filing the notice of lien, unless an action be begun within the same period to foreclose a mortgage or another mechanic's lien upon the same property or any part thereof and a notice of pendency of such action is filed according to law, but a lien, the duration of which has been extended by the filing of a notice of the pendency of an action as herein provided, shall nevertheless terminate as a lien after such notice has been cancelled or has ceased to be effective as constructive notice.

(3) By order of the court vacating or cancelling such lien of record, for neglect of the lienor to prosecute the same, granted pursuant to section fifty-nine of this chapter.

(4) Either before or after the beginning of an action by the owner or contractor executing a bond or undertaking in an amount equal to one hundred ten percent of such lien conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien:

a. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be sufficient; and where a certificate of qualification has been issued by the superintendent of insurance under the

provisions of section one thousand one hundred eleven of the insurance law, and has not been revoked, no justification or notice thereof shall be necessary. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking. Any such bond or undertaking shall be filed with the clerk of the county in which the notice of lien is filed, and a copy shall be served upon the adverse party. The undertaking is effective when so served and filed. If a certificate of qualification issued pursuant to subsections (b), (c) and (d) of section one thousand one hundred eleven of the insurance law is not filed with the undertaking, a party may except, to the sufficiency of a surety and by a written notice of exception served upon the adverse party within ten days after receipt, a copy of the undertaking. Exceptions deemed by the court to have been taken unnecessarily, or for vexation or delay, may, upon notice, be set aside, with costs. Where no exception to sureties is taken within ten days or where exceptions taken are set aside, the undertaking shall be allowed.

b. In the case of bonds or undertakings not executed pursuant to paragraph a of this subdivision, 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. A copy of the undertaking, with notice that the sureties will justify before the court, or a judge or justice thereof, at the time and place therein mentioned, must be served upon the lienor or his attorney, not less than five days before such time. Upon the approval of the undertaking by the court, judge or justice an order shall be made by such court, judge or justice discharging such lien.

c. If the lienor cannot be found, or does not appear by attorney, service under this subsection may be made by leaving a copy of such undertaking and notice at the lienor's place of residence, or if a corporation at its principal place of business within the state as stated in the notice of lien, with a person of suitable age and discretion therein, or if the house of his abode or its place of business is not stated in said notice of lien and is not known, then in such manner as the court may direct. The premises, if any, described in the notice of lien as the lienor's residence or place of business shall be deemed to be his said residence or its place of business for the purposes of said service at the time thereof, unless it is shown affirmatively that the person servicing the papers or directing the service had knowledge to the contrary. Notwithstanding the other provisions of this subdivision relating to service of notice, in any case where the mailing address of the lienor is outside the state such service may be made by registered or certified mail, return receipt requested, to such lienor at the mailing address contained in the notice of lien.

d. Except as otherwise provided in this subdivision, the provisions of article twenty-five of the civil practice law and rules regulating undertakings is applicable to a bond or undertaking given for the discharge of a lien on account of private improvements.

(5) Upon filing in the office of the clerk of the county where the property is situated, a transcript of a judgment of a court of competent jurisdiction, together with due proof of service of due notice of entry thereof, showing a final determination of the action in favor of the owner of the property against which the lien was claimed.

(6) Where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, or where for any other reason the notice of lien is invalid by reason of failure to comply with the provisions of section nine of this article, or where it appears from the public records that such notice has not been filed in accordance with the provisions of section ten of this article, the owner or any other party in interest, may apply to the supreme court of this state, or to any justice thereof, or to the county judge of the county in which the notice of lien is filed, for an order summarily discharging of record the alleged lien. A copy of the papers upon which application will be made together with a notice setting forth the court or the justice thereof or the judge to whom the application will be made at a time and place therein mentioned must be served upon the lienor not less than five days before such time. If the lienor can not be found, such service may be made as the court, justice or judge may direct. The application must be made upon a verified petition accompanied by other written proof showing a proper case therefor, and upon the approval of the application by the court, justice or judge, an order shall be made discharging the alleged lien of record.

## **§ 20. Discharge of lien after notice of lien filed by payment of money into court**

A lien specified in this article, other than a lien for performing labor or furnishing materials for a public improvement, may be discharged after the notice of lien is filed at any time before an action is commenced to foreclose such lien, by depositing with the county clerk, in whose office the notice of lien is filed, a sum of money equal to the amount claimed in such notice, with interest to the time of such deposit. After such deposit is made and the lien is discharged the county treasurer or any other officer with whom the money is deposited shall, within ten days thereafter, send a notice by mail to the lienor, at the address given in the lien, that such lien has been discharged by deposit. After action to foreclose the lien is commenced it may be discharged by a payment into court of such sum of money, as, in the judgment of the court or a judge or justice thereof, after at least five days' notice to all the parties to the action, will be sufficient to pay any judgment which may be recovered in such action. Upon any such payment, the county clerk shall forthwith enter upon the lien docket and against the lien for the discharge of which such moneys were paid, the words "discharged by payment." A deposit of money made as prescribed in this section shall be repaid to the party making the deposit, or his successor, upon the discharge of the liens against the property pursuant to law. All deposits of money made as provided in this section shall be considered as paid into court and shall be subject to the provisions of law relative to the payment of money into court and the surrender of such money by order of the court. An order for the surrender of such moneys to the lienor or depositor may be made by any court of record having jurisdiction of the parties. If no action is brought in a court of record to enforce such lien, such order may be made by any judge of a court of record. If application for such order is made by lienor it shall be on notice to the depositor; if made by the depositor then on notice to the lienor.

## **§ 21. Discharge of lien for public improvement**

A lien against the amount due or to become due a contractor from the state or a public corporation for the construction or demolition of a public improvement may be discharged as follows:

1. By filing a certificate of the lienor or his successor in interest, duly acknowledged and approved, stating that the lien is discharged.

2. By lapse of time as follows:

(a) When one year has elapsed since the filing of the notice of lien or an extension thereof, unless, before the expiration thereof, either an extension or an order continuing said lien has been filed in the office where the notices are filed, or a notice of the pendency of an action to enforce said lien has been filed as provided in section eighteen of this article.

(b) When the period of time for which the lien has been continued by order has expired, unless, before the expiration thereof, either an order continuing said lien for a further period of time has been filed in the offices where the notices are filed, or a notice of the pendency of an action to enforce said lien has been filed as provided in section eighteen of this article.

3. By satisfaction of a judgment rendered in an action to enforce the lien.

3-a. Under the provisions of subdivisions four, five and six of this section a discharge of lien shall only operate to relieve the comptroller of the state or the financial officer of the public corporation or the officer or person with whom the lien is filed of any and all liability imposed upon such officer by reason of the filing of the lien. Such lien shall be a valid and subsisting lien for all other purposes until discharged as prescribed by the provisions of the other subdivisions of this section.

4. By the contractor applying without notice to the supreme court of this state or to any justice thereof or to the county judge of any county for an order discharging such lien and depositing with the comptroller of the state or the financial officer of the public corporation, or the officer or person with whom the notice of lien is filed, such a sum of money as is directed by a judge or a justice of the court, which shall not be less than the amount claimed by the lienor, with interest thereon for the term of one year from the time of making such deposit, and such additional amount as the judge or justice deems sufficient to cover all costs and expenses. The amount so deposited shall remain with the comptroller or such financial officer or other officer or person until the lien is otherwise discharged as prescribed in this section.

(5) Either before or after the beginning of an action by a contractor or subcontractor executing a bond or undertaking in an amount equal to one hundred ten percent of such lien conditioned for the payment of any judgement which may be recovered in an action to enforce the lien:

a. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be sufficient; and where a certificate of qualification has been issued by the superintendent of insurance under the provisions of section one thousand one hundred eleven of the insurance law, and has not been revoked, no justification or notice thereof shall be necessary. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a

certified copy of which resolution, under seal of said company, shall be filed with each bond or undertaking. Any such bond or undertaking shall be filed with the state or the public corporation with which the notice of lien is filed and a copy shall be served upon the adverse party. The undertaking is effective when so served and filed. If a certificate of qualification issued pursuant to subsections (b), (c) and (d) of section one thousand one hundred eleven of the insurance law is not filed with the undertaking, a party may except, to the sufficiency of a surety and by a written notice of exception served upon the adverse party within ten days after receipt, a copy of the undertaking. Exceptions deemed by the court to have been taken unnecessarily, or for vexation or delay, may, upon notice, be set aside, with costs. Where no exception to sureties is taken within ten days or where exceptions taken are set aside the undertaking shall be allowed.

b. In the case of bonds or undertakings not executed pursuant to paragraph a of this subdivision, the owner or contractor shall execute an undertaking with two or more sufficient sureties, who shall be free holders, to the state or public corporation with which the notice of lien is filed. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking, with notice that the sureties will justify before the court, or a judge or justice thereof, at the time and place therein mentioned, must be served upon the lienor or his attorney, not less than five days before such time. Upon the approval of the undertaking by the court, judge or justice an order shall be made by such court, judge or justice discharging such lien.

c. If the lienor cannot be found, or does not appear by attorney, then service under this subsection may be made as prescribed in paragraph c of subdivision four of section nineteen of this article for the service of an undertaking with notice of justification of sureties. Notwithstanding the other provisions of this subdivision relating to service of notice, in any case where the mailing address of the lienor is outside the state such service may be made by registered or certified mail, return receipt requested, to such lienor at the mailing address contained in the notice of lien.

d. Except as otherwise provided in this subdivision, the provisions of article twenty-five of the civil practice law and rules regulating undertakings is applicable to a bond or undertaking given for the discharge of a lien on account of public improvements.

6. Where a contractor has to his credit with the state or with a public corporation, a sum of money by reason of an estimate due and payable to him, and where payment of such estimate is withheld because a notice of lien has been filed against his interest in said money, and where said money is in excess of the amount claimed in the notice of lien, the contractor may apply without notice to the supreme court of this state or to any justice thereof or to the county judge of any county, for an order discharging such lien and directing the comptroller of the state or the financial officer or person with whom the lien is filed, to retain from such estimate a sum of money, which shall not be less than the amount claimed by the lienor, with interest thereon for one year and such additional amount as the judge or justice deems sufficient to cover all costs and expenses and to immediately pay over the balance of such estimate to the contractor. The amount so retained shall be held by the comptroller or such financial officer or other officer or person until the lien is otherwise discharged as provided in this section. The application for the order may be made upon an affidavit of the contractor or his attorney and where there is of record an assignment of all moneys the written consent of such assignee must be presented to the court showing a proper case therefor.

6-a. Where a contractor has to his credit with the state, or with a public corporation, a sum of money by reason of an estimate due and payable to him, and where payment of such estimate is withheld because a notice of lien has been filed against his interest in said money, and where the amount due and payable under said estimate is at least one and one-half times in excess of the amount stated to be due in said notice of lien, the comptroller of the state or the financial officer or person with whom the notice of lien is filed, may pay said estimate, after deducting therefrom a sum which shall be one and one-half times the amount stated to be due in said notice of lien, and said sum so deducted shall be withheld until said lien is otherwise discharged, as provided in this section.

7. Where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished and for which a lien is claimed, or where the notice of lien is invalid by reason of failure to comply with the provisions of section twelve of this article, or where it appears from the public records that such notice has not been filed in accordance with the provisions of section twelve of this article, the contractor or any other party in interest, may apply to the supreme court of this state, or to any justice thereof, or to the county judge of the county in which the notice of lien is filed, for an order summarily discharging of record the alleged lien. A copy of the papers upon which application will be made together with a notice setting forth the court or the justice thereof or the judge to whom the application will be made at a time and place therein mentioned must be served upon the lienor not less than five days before such time. If the lienor can not be found, such service may be made as the court, justice or judge may direct. The application must be made upon a verified petition accompanied by other written proof showing a proper case therefor, and upon the approval of the application by the court, justice or judge, an order shall be made discharging the alleged lien of record.

8. By order of the court vacating or canceling such lien of record, for neglect of the lienor to prosecute the same, granted pursuant to section twenty-one-a of this article.

### **§ 21-a. Vacating lien for a public improvement, by order of court**

A lien against the amount due or to become due a contractor from the state or a public corporation, for the construction or demolition of a public improvement, may be vacated and canceled by an order of the supreme court. Before such order shall be granted, a notice shall be served upon the lienor personally or, in such manner as the court may direct. Such notice shall require the lienor to commence an action to enforce the lien within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of the supreme court in the judicial district embracing the county wherein the notice of lien is filed, at a time and place specified therein, why the notice of lien should not be vacated and canceled of record. Proof of such service and that the lienor has not commenced the action to foreclose such a lien, as directed in the notice, shall be made by affidavit, at the time of applying for such order.

### **§ 22. Building loan contract**

A building loan contract either with or without the sale of land, and any modification thereof, must be in writing and duly acknowledged, and must contain a true statement under oath, verified by the borrower, showing the consideration paid, or to be paid, for the loan described therein, and showing all other expenses, if any, incurred, or to be incurred in connection therewith, and the net sum available to the borrower for the improvement, and, on or before the date of recording the building loan mortgage made pursuant thereto, to be filed in the office of the clerk of the county in which any part of the land is situated, except that any subsequent modification of any such building loan contract so filed must be filed within ten days after the execution of any such modification. No such building loan contract or any modification thereof shall be filed in the register's office of any county. If not so filed the interest of each party to such contract in the real property affected thereby, is subject to the lien and claim of a person who shall thereafter file a notice of lien under this chapter. A modification of such contract shall not affect or impair the right or interest of a person, who, previous to the filing of such modification had furnished or contracted to furnish materials, or had performed or contracted to perform labor for the improvement of real property, but such right or interest shall be determined by the original contract. The county clerk is entitled to a fee of twenty-five dollars, except in counties within the city of New York where the fee shall be fifty dollars, for filing such a contract or modification. Except where the county clerk maintains a block index, such contracts and modifications thereof shall be indexed in a book provided for that purpose, in the alphabetical order of the names of the persons to whom such loans shall be made. No assignment of the moneys due or to become due under a building loan contract, under the provisions of section twenty-six of this article, nor any payment to the holder of such assignment, shall be or be construed to be a modification of a building loan contract within the meaning of this section, and the execution and delivery of a bond and mortgage, under the provisions of section twenty-six of this article, or payments thereunder, shall not be or be construed to be the making of a building loan contract within the meaning of this section.

Except that this section shall not apply to any mortgage taken by the home owners' loan corporation, a corporation created under an act of congress, known as the "home owners' loan act of nineteen hundred thirty-three" and the "home owners' loan act of nineteen hundred thirty-three as amended," and said mortgage shall have priority over any and all liens filed subsequent to the date of the recording of said mortgage whether or not the cash and/or bonds for which said mortgage has been taken as security, shall have been advanced at the time of the execution of such mortgage or subsequent thereto, and it shall not be necessary to execute and file any building loan contract or any other contract, in compliance with this section or any part thereof.

Where the county clerk indexes liens in a block index, every building loan contract presented to the clerk for filing, in order to entitle the same to be filed, shall contain in the body thereof, or shall have endorsed thereon, a designation of the number of every block, on the land map of the county, which is affected by the building loan contract. The county clerk shall cause such building loan contract to be entered in the block index, under the block number of every block so designated. In cases where a building loan contract shall have been filed without such designation or with an erroneous

designation, the county clerk, on presentation of proper proof thereof, shall enter such instrument in the proper index, under the proper block number of every block in which the land affected is situated, and shall, at the same time, make a note of such entry and of the date thereof in every place in which such instrument may have been erroneously indexed, opposite the entry thereof, and also upon the instrument itself, if the same be in his possession or produced to him for the purpose, and the filing of such instrument shall be constructive notice as to property in the block not duly designated at the time of such filing only from the time when the same shall be properly indexed.

A county clerk may adopt a new indexing system utilizing electro-mechanical, electronic or any other method he deems suitable for maintaining the indexes.

### **§ 23. Construction of article**

This article is to be construed liberally to secure the beneficial interests and purposes thereof. A substantial compliance with its several provisions shall be sufficient for the validity of a lien and to give jurisdiction to the courts to enforce the same.

### **§ 24. Enforcement of mechanic's lien**

The mechanics' liens specified in this article may be enforced against the property specified in the notice of lien and which is subject thereto and against any person liable for the debt upon which the lien is founded, as prescribed in article three of this chapter.

### **§ 25. Priority of liens and assignments under contracts for public improvements. Parity of liens of same class**

In an action to enforce a lien under a contract for a public improvement, or an assignment of moneys, or any part thereof, due or to become due under such contract, parties having liens and parties having assignments unless such assignments be set aside as diversions of trust assets as provided in article three-a of this chapter shall have priority as follows:

(1) Except as provided in section five an assignee of moneys, or any part thereof, due or to become due under a contract for public improvement, whose assignment is duly filed prior to the filing of a notice of lien or assignment of every other party to the action, shall have priority over those parties to the extent of advances made upon such assignment before the filing of the notice of lien or assignment next subsequent to his assignment, but as to advances made subsequent to a notice of lien or assignment filed and unsatisfied or not discharged such assignee for the purpose of determining his proportionate share of moneys available for distribution as provided in subdivision four of this section shall be treated as a lienor having a lien to the extent of advances so made.

(2) An assignee of moneys or any part thereof, due or to become due under a contract for a public improvement whose assignment is duly filed subsequent to the filing of the notice of lien or assignment of any other party shall for the purpose of determining his proportionate share of moneys available for distribution, as provided in

subdivision four of this section be treated as a lienor having a lien to the extent of advances actually made upon such assignment prior to the filing thereof.

(3) Laborers for daily or weekly wages having liens under a contract for a public improvement, shall have preference as a class for the full amount of their unpaid wages over all other lienors having liens arising under the same contract and without reference to the time when such laborers shall have filed their notices of liens.

(4) There shall be no priority among labor lienors, as a class or among other lienors as a class, and any moneys available for distribution among lienors of any class shall be distributed pro rata in accordance with their respective valid liens.

(5) Every assignment of moneys, or any part thereof, due or to become due under a contract for a public improvement shall contain a covenant by the assignor that he will receive any moneys advanced thereunder by the assignee and will hold the right to receive such moneys as a trust fund to be first applied to the payment of trust claims as defined in section seventy-one of the lien law, and that he will apply the same to such payments only, before using any part of the moneys for any other purpose.

(6) [Repealed]

(7) [Repealed]

## **§ 26. Subordination of liens after agreement with owner**

In case an owner of real property shall execute to one or more persons, or a corporation, as trustee or trustees, a bond and mortgage or a note and mortgage affecting such property in whole or in part, or an assignment of the moneys due or to become due under a contract for a building loan in relation to such property, and in case such mortgage, if any, shall be recorded in the office of the register of the county where such real property is situated, or if such county has no register then in the office of the clerk of such county, and in case such assignment, if any, shall be filed in the office of the clerk of the county where such real property is situated; and in case lienors having mechanics' liens against said real property, notices of which have been filed up to and not later than fifteen days after the recording of such mortgage or the filing of such assignment, and which liens have not been discharged as in this article provided, shall, to the extent of at least fifty-five per centum of the aggregate amount for which such notices of liens have been so filed, approve such bond and mortgage or such note and mortgage, if any, and such assignment, if any, by an instrument or instruments in writing, duly acknowledged and filed in the office of such county clerk, then all mechanics' liens for labor performed or material furnished prior to the recording of such mortgage or filing of such assignment, whether notices thereof have been theretofore or are thereafter filed and which have not been discharged as in this article provided, shall be subordinate to the lien of such trust bond and mortgage or such trust note and mortgage to the extent of the aggregate amount of all certificates of interest therein issued by such trustee or trustees, or their successors, for moneys loaned, materials furnished, labor performed and any other indebtedness incurred after said trust mortgage shall have been recorded, and for expenses in connection with said trust mortgage, and shall also be subordinate to the lien of the bond and mortgage or note

and mortgage, given to secure the amount agreed to be advanced under such contract for a building loan to the extent of the amount which shall be advanced by the holder of such bond and mortgage or such note and mortgage to the trustee or trustees, or their successors, under such assignment. The provisions of this section shall apply to all bonds and mortgages and notes and mortgages and all assignments of moneys due, or to become due under building loan contracts executed by such owner, in like manner, and recorded or filed, from time to time as hereinbefore provided. In case of an assignment to trustees under the provisions of this section, the trustees and their successors shall be the agents of the assignor to receive and receipt for any and all sums advanced by the holder of the building loan bond and mortgage or the building loan note and mortgage under the building loan contract and such assignment. No lienor shall have any priority over the bond and mortgage or note and mortgage given to secure the money agreed to be advanced under a building loan contract or over the advances made thereunder, by reason of any act preceding the making and approval of such assignment.

#### **§ 27. [Repealed]**

#### **§ 28. Lien of certain judgments postponed**

Upon the filing of the written instrument or instruments of approval under section twenty-six of this article, the lien of all money judgments and attachments affecting such real property, or the moneys due under a contract, and all claims and liens acquired in any proceedings upon any money judgment, shall be subordinate in like manner and to like extent as provided in said section for the subordination of mechanics' liens, and any attachment issued or money judgment recovered upon a claim, which, in whole or in part, was not for materials furnished, labor performed or moneys advanced for the improvement of such real property or for the public improvement, shall be subordinate to all mechanics' liens thereon and shall also be subordinate to all judgments recovered upon and attachments issued upon claims for materials furnished, labor performed or moneys advanced for the improvement of such real property.

#### **§ 29. Subordination of liens to subsequent mortgage**

In case an owner of real property upon which an improvement is being or has been made, desires to obtain a loan by executing and delivering a bond or bonds or note or notes secured by a mortgage upon such real property, or any part thereof, and in case lienors having mechanics' liens against such real property, or any part thereof, notices of which have been filed prior to the recording of such mortgage, and which said liens have not been discharged as in this article provided, shall, to the extent of at least fifty-five per centum of the aggregate amount for which notices of such liens have been so filed, by an instrument or instruments in writing, duly acknowledged, designate and authorize one or more persons to consent to the execution and delivery of such bond and mortgage or note and mortgage, and in case the consent in writing, duly acknowledged, of such person or persons to the execution and delivery of such bond and bonds and mortgage or note and notes and mortgage shall be filed in the office of

the clerk of the county where such real property is situated, together with such instrument or instruments of designation, then all mechanics' liens for labor performed and materials furnished prior to the recording of such mortgage whether notices thereof have been theretofore or are thereafter filed, shall be subordinate to the lien of such bond or bonds and mortgage or note or notes and mortgage to the extent of the full amount which shall be advanced thereunder provided such mortgage contains the covenant prescribed in subdivision three of section thirteen of this chapter. In case such person or persons so designated and authorized shall so consent to the execution and delivery of such bond and mortgage or note and mortgage but on condition that a sum of money be deposited with the clerk of such county, and such sum is so deposited, the county clerk, upon such payment, shall forthwith enter upon the lien docket, indexed with the name of the owner, the facts relating to such payment. A deposit of money made as prescribed in this section shall be repaid to such owner or his assignee upon the discharge or release of all mechanics' liens, judgments and attachments against the property. All deposits of money made as provided in this section shall be considered as paid into court and shall be subject to the provisions of law relative to the payment of money into court and the surrender of such money by order of the court. The court shall in any action brought to foreclose any of such liens, or in any action brought to recover such deposit or any part thereof, direct the payment of such sum so deposited to the persons whose mechanics' liens, judgments, or claims secured by attachment shall have been established on the trial and the amount so paid shall be credited upon such mechanics' liens, judgments and claims. Upon such filing of such consent, as hereinbefore provided, the lien of all judgments and attachments affecting such real property and all claims and liens acquired in any proceedings upon such judgments shall be subordinate in like manner and to like extent as hereinbefore in this section provided for the subordination of mechanics' liens, and any attachment issued or judgment recovered upon a claim, which, in whole or in part, is not for materials furnished, labor performed or moneys advanced for the improvement of such property shall be subordinate to all mechanics' liens thereon, and shall also be subordinate to all judgments recovered upon and attachments issued upon claims for materials furnished, labor performed or moneys advanced for the improvement of such real property. Any lienor having a mechanic's lien against real property may subordinate such lien to any subsequent mortgage thereon by a certificate duly acknowledged or proved stating that such lien is subordinated, which certificate shall be filed in the office where the notice of lien is filed. Upon filing such certificate, the county clerk in the office where the same is filed shall note the fact of such filing in the "lien docket" in the column headed "proceedings had," opposite the docket of such lien.

### **§ 30. Subordination of notices of lis pendens**

In case of subordination pursuant to the provisions of sections twenty-six, twenty-eight or twenty-nine of this article all actions and proceedings upon such mechanics' liens and all notices of pendency of actions in any action brought to foreclose the same and all proceedings upon judgments and attachments, shall be subordinate in like manner and to like extent as provided in said sections, respectively, for the subordination of mechanics' liens, judgments and attachments.

### **§ 31. Discharge of liens on sale of real property**

In case an owner of real property upon which an improvement is being or has been made, desires to convey or transfer an interest in such real property or any part thereof, and in case lienors having mechanics' liens against such real property, or any part thereof, notices of which were filed prior to the making of the deposit hereinafter in this section mentioned, and which said liens have not been discharged as in this article provided, shall, to the extent of at least fifty-five per centum of the aggregate amount for which such liens have been so filed, by an instrument or instruments in writing, duly acknowledged, designate and authorize one or more persons to consent to the execution and delivery of a deed or deeds conveying said real property or any part thereof, and in case the consent in writing, duly acknowledged, of such person or persons to the execution and delivery of such deed or deeds, and which said consent shall be conditioned for the deposit of a specified sum of money with the clerk of such county, shall be filed in the office of the clerk of the county where such real property is situated, together with such instrument or instruments of designation, then on the deposit of such specified sum with such county clerk all mechanics' liens, judgments and attachments, and all claims and liens acquired in any proceeding upon such judgments or under such attachments against such real property shall from the time of such deposit cease to be liens or encumbrances upon such real property, and such real property shall thenceforth be free and discharged from the same, and the same shall thenceforth be liens upon such sum so deposited and said county clerk upon such deposit being made shall forthwith enter upon the lien docket, indexed with the name of such owner, the facts relating to such deposit. A deposit of money made as prescribed in this section shall be repaid to such owner or his assignee upon the discharge or release of all such mechanics' liens, judgments and attachments. All deposits of money made as provided in this section shall be considered as paid into court and shall be subject to the provisions of law relative to the payment of money into court and the surrender of such money by order of the court. The court shall in any action brought to foreclose any of such liens or in any action brought to recover such deposit or any part thereof, direct the payment of such sum so deposited to the persons whose mechanics' liens, judgments, or claims secured by attachment shall have been established upon the trial, and the amount so paid shall be credited upon such mechanics' liens, judgments and claims. Upon such deposit being made as hereinbefore provided the lien of all judgments and attachments affecting such real property, and all claims and liens acquired in any proceedings upon such judgments or under attachments shall be liens upon such deposit. All judgments recovered upon the attachments issued upon a claim which, in whole or in part, is not for materials furnished, labor performed or moneys advanced for the improvement of such real property, shall be subordinate as a lien upon such sum so deposited to all mechanics' liens thereon, and shall also be subordinate to all judgments recovered upon and attachments issued upon claims for materials furnished, labor performed or moneys advanced for the improvement of such real property. In case such consent shall be conditioned also for the giving to one or more persons or a corporation as trustee or trustees any other property real or personal then any cash thereafter from time to time tendered by such trustee or trustees to such

county clerk shall be received and held by such county clerk as though the same were part of the specified sum of money for the deposit of which such consent was conditioned, and for the same purposes and subject to the same provisions as in this section provided therefor.

### **§ 32. Certain liens and claims not to be affected**

The amendments contained in this act shall not apply to mechanics' liens, building loan contracts, mortgages, assignments and orders referred to in section fifteen, attachments, judgments, or to claims or liens acquired in any action or proceeding upon such mechanics' liens, building loan contracts, mortgages, assignments and orders, attachments or judgments, filed, recorded, docketed, entered or obtained, or to contracts for the improvement of real property made, prior to the date when this chapter, as amended, takes effect.

### **§ 33. Certain sections not to apply to laborers' liens**

None of the provisions contained in sections twenty-six, twenty-eight, twenty-nine and thirty-one of this article shall apply to liens of laborers for daily or weekly wages.

### **§ 34. Waiver of lien**

Notwithstanding the provisions of any other law, any contract, agreement or understanding whereby the right to file or enforce any lien created under article two is waived, shall be void as against public policy and wholly unenforceable. This section shall not preclude a requirement for a written waiver of the right to file a mechanic's lien executed and delivered by a contractor, subcontractor, material supplier or laborer simultaneously with or after payment for the labor performed or the materials furnished has been made to such contractor, subcontractor, material man or laborer nor shall this section be applicable to a written agreement to subordinate, release or satisfy all or part of such a lien made after a notice of lien has been filed.

### **§ 35. Waiver of arbitration; arbitrators' award conclusive**

The filing of a notice of lien shall not be a waiver of any right of arbitration of a contractor, subcontractor, materialman or laborer secured to him by his contract to furnish labor or materials. In case the arbitrators, in any arbitration proceeding had pursuant to any such contract, shall determine the value or price of labor performed or material furnished, their award shall be conclusive as between all parties to the arbitration in any action to foreclose the lien.

### **§ 36. [Repealed]**

### **§ 37. Bond to discharge all liens**

(1) The owner or contractor between whom a contract exists for the improvement of real property may, either before or after the commencement of the improvement, execute as a principal, a bond to the county clerk of the county where the premises are situated in such amount as the supreme court of this state, or any justice thereof, or the county court or the county judge of such county may direct, which shall not be less than the amount then unpaid under such contract, conditioned for the payment of any judgment or judgments which may be recovered in any action brought for the enforcement of any and all claims, notices of which may be filed as in this section provided, arising by virtue of labor performed or materials furnished in or about the performance of any such contract. As many such bonds may be executed as there are contractors employed upon the improvement.

(2) Such a bond must be executed as a surety by a fidelity or surety company authorized to do business in this state, and to which a certificate of solvency has been issued and is unrevoked pursuant to section one thousand one hundred eleven of the insurance law.

(3) Such bond shall recite the name of the owner, the name of the contractor, the name of the surety company, the date and amount of the contract, and shall contain a description of the real property upon which the improvement is to be made, is being made, or has been made; such description shall be sufficient if it complies with the requirements in respect thereto prescribed for a notice of lien.

(4) Upon the approval of any such bond by such court, judge or justice thereof and upon the filing of such bond with the county clerk of the county where the real property is situated, an order shall be made by such court, judge or justice discharging such property from the lien of each and every contractor, subcontractor, material man or laborer performing labor or furnishing materials in or about the performance of the contract described in such bond. After the filing of such bond, the owner and the contractor named therein shall no longer be obligated to comply with the provisions of section eight of this chapter insofar as said provisions may relate to or in any way affect the contract, described in said bond, or the rights of any person performing labor or furnishing materials in or about the performance thereof.

(5) A contractor, subcontractor, laborer or material man who performs labor or furnishes materials in or about the performance of the contract described in such bond shall have a claim, which shall attach against and be secured by such bond, for the principal and interest of the value, or the agreed price, of such labor and materials. Within the meaning of the provisions of this section, materials actually manufactured for but not delivered to the real property, shall also be deemed to be materials furnished.

The claimant in order to perfect his claim shall within the time prescribed in this chapter for the filing of a notice of lien, file a notice of claim in the office of the clerk of the county where such bond is filed. Any such claimant who has so perfected his claim may bring an action on the bond for the enforcement thereof in any court where an action might have been brought if such claim were a lien filed against such real property.

(6) The notice of claim shall state: (1) The name and residence of the claimant; and if the claimant is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state; (2) the names of the owner, contractor and surety named in the bond; (3) the name of the person by whom the claimant was employed or to whom he furnished or is to furnish materials; (4) the labor performed or materials furnished, including also materials actually manufactured for but not delivered to the real property, and the agreed price or value thereof; (5) the amount unpaid to the claimant for such labor or materials; (6) a description of the real property such as is required for a notice of lien.

The notice of claim shall be verified by the claimant or his agent in the form required for the verification of notices in section nine of this chapter.

(7) The plaintiff in such an action must, prior to the commencement thereof, file in the office of the clerk of the county where the bond is filed, the summons and complaint in such action and shall join as parties defendant, the principal and surety on the bond, the contractor, and all claimants who have filed notices of claim prior to the date of the filing of such summons and complaint. In case a claimant files his notice of claim on or after the date of such filing of such summons and complaint he may be brought in by amendment at any time up to and including the time and in the manner and under the conditions that a lienor may be brought into an action to foreclose a lien pursuant to section sixty-two of this chapter.

(8) The court may adjust and determine the equities of all the parties to the action and render an appropriate judgment. In case a counterclaim is set forth by any defendant, such defendant shall be deemed to have waived a trial by jury of the issues raised thereby.

(9) An action upon such a bond shall be begun within one year after the completion of the improvement, or if the work thereon is abandoned, then within two years after the last item of work was performed or the last item of materials was furnished by the claimant. The beginning of the action by the plaintiff-claimant shall be deemed a bringing of the action by each defendant-claimant made a party thereto.

(10) The county clerk of each county shall provide and keep a book called the "lien bond docket," which shall be suitably ruled in columns headed "owner," "contractor," "claimant," "property," "surety," "amount of bond," "time of filing," "amount of claim," "proceedings had," in each of which he shall write the particulars of the notice of claim property belonging therein. The date, hour and minute of the filing of notice of each claim and of the filing of the summons and complaint in any action commenced on said bond shall be entered in the proper column. The names of the owners shall be arranged in such book in alphabetical order. The validity of the claim and the right to file a notice thereof shall not be affected by the death of the principal before notice of the claim is filed.

(11) In the event that notwithstanding the provisions of this section a contractor, subcontractor, material man or laborer, whose lien has been discharged in the manner provided in this section, shall thereafter file a notice of lien against the real property, then upon application of the owner or contractor to the supreme court of this state or any justice thereof or the county court or the county judge of the county where such notice of lien is filed and upon proof that the bond approved and filed as in this section provided secures the payment of the claim set forth in any such notice of lien, the court, justice or judge thereof shall make an order discharging such lien. In any such case a copy of the bond and notice of the time and place of making such application for such order to discharge any such lien shall be served upon the lienor or his attorney not less than two days before such time.

(12) A claim which has been perfected by the filing of a notice of claim may be discharged as follows: (1) By the certificate of the claimant duly acknowledged or proved and filed in the office where the notice of claim is filed, stating that the claim is satisfied and may be discharged; (2) By failure to begin an action as and within the time provided in this section.

### **§ 38. Itemized statement may be required to lienor**

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. The statement shall be verified by the lienor or his agent in the form required for the verification of notices in section nine of this chapter. If the lienor shall fail to comply with such a demand within five days after the same shall have been made by the owner or contractor, or if the lienor delivers an insufficient statement, the person aggrieved may petition the supreme court of this state or any justice thereof, or the county court of the county where the premises are situated, or the county judge of such county for an order directing the lienor within a time specified in the order to deliver to the petitioner the statement required by this section. Two days' notice in writing of such application shall be served upon the lienor. Such service shall be made in the manner provided by law for the personal service of a summons. The court or a justice or judge thereof shall hear the parties and upon being satisfied that the lienor has failed, neglected or refused to comply with the requirements of this section shall have an appropriate order directing such compliance. In case the lienor fails to comply with the order so made within the time specified, then upon five days' notice to the lienor, served in the manner provided by law for the personal service of a summons, the court or a justice or judge thereof may make an order cancelling the lien.

### **§ 39. Lien wilfully exaggerated is void**

In any action or proceeding to enforce a mechanic's lien upon a private or public improvement or in which the validity of the lien is an issue, if the court shall find that a

lienor has wilfully exaggerated the amount for which he claims a lien as stated in his notice of lien, his lien shall be declared to be void and no recovery shall be had thereon. No such lienor shall have a right to file any other or further lien for the same claim. A second or subsequent lien filed in contravention of this section may be vacated upon application to the court on two days' notice.

#### **§ 39-a. Liability of lienor where lien has been declared void on account of wilful exaggeration**

Where in any action or proceeding to enforce a mechanic's lien upon a private or public improvement the court shall have declared said lien to be void on account of wilful exaggeration the person filing such notice of lien shall be liable in damages to the owner or contractor. The damages which said owner or contractor shall be entitled to recover, shall include the amount of any premium for a bond given to obtain the discharge of the lien or the interest on any money deposited for the purpose of discharging the lien, reasonable attorney's fees for services in securing the discharge of the lien, and an amount equal to the difference by which the amount claimed to be due or to become due as stated in the notice of lien exceeded the amount actually due or to become due thereon.

#### **§ 39-c. Repossession of materials not used**

If for any reason after the work of a private or a public improvement or real property is abandoned by an owner, a contractor or a subcontractor before the completion thereof by such owner, contractor or subcontractor, or if, after the same is completed, materials delivered are not used therefor, a person who has delivered materials for the improvement which have not been incorporated therein and for which he has not received payment may repossess and remove such materials; and thereupon he shall have no lien on the real property or improvements against persons secondarily liable, for the price thereof, but he shall have the same rights in regard to the materials as if he had never parted with the possession. This right to repossess and remove the materials shall not be affected by their sale, encumbrance, attachment, or transfer from the site of the improvement, except that, if the materials have been so transferred, the right to repossess them shall not be effective as against a purchaser or encumbrancer thereof in good faith whose interest therein shall have arisen since such transfer from the site of the improvement, or as against a creditor attaching after such transfer. The right to repossession and removal given by this section shall extend only to materials whose purchase price does not exceed the amount remaining due to the person repossessing; but where materials have been partly paid for, the person delivering them may repossess them as allowed in this section on refunding the part of the purchase price which has been paid less the cost of removal.

#### **§ 41. Enforcement of mechanic's lien on real property**

A mechanic's lien on real property may be enforced against such property, and against a person liable for the debt upon which the lien is founded, by an action, by the

lienor, his assignee or legal representative, in the supreme court or in a county court otherwise having jurisdiction, regardless of the amount of such debt, or in a court which has jurisdiction in an action founded on a contract for a sum of money equivalent to the amount of such debt.

#### **§ 42. Enforcement of a lien under contract for a public improvement**

A lien for labor done or materials furnished for a public improvement may be enforced against the funds of the state or the public corporation for which such public improvement is constructed or demolished, to the extent prescribed in article two of this chapter, and against the contractor or subcontractor liable for the debt, by a civil action, in the same court and in the same manner as a mechanic's lien on real property.

#### **§ 43. Action in a court of record; consolidation of actions**

The provisions of the real property actions and proceedings law relating to actions for the foreclosure of a mortgage upon real property, and the sale and the distribution of the proceeds thereof apply to actions in a court of record, to enforce mechanics' liens on real property, except as otherwise provided in this article. If actions are brought by different lienors in a court of record, the court in which the first action was brought, may, upon its own motion, or upon the application of any party in any of such actions, consolidate all of such actions.

#### **§ 44. Parties to an action in a court of record**

In an action in a court of record to enforce a lien against real property or a public improvement, the following are necessary parties defendant:

1. All lienors having liens notices of which have been filed against the same real property or public improvement, or any part thereof, prior to the filing of the notice of lis pendens in such action, where by law the filing of a notice of lis pendens is proper or required.

2. All persons having subsequent liens or claims against such real property, by judgment, mortgage or otherwise, filed, docketed or recorded prior to the filing of the notice of lis pendens, where by law the filing of a notice of lis pendens is proper or required.

3. All persons appearing by the records in the office of the county clerk or register to be owners of such real property or any part thereof.

4. Where by law, a notice of lis pendens may not be filed in such action, all lienors having liens notices of which have been filed against the same real property, and all persons having subsequent liens or claims against such real property, by judgment, mortgage or otherwise.

5. Every defendant who is a lienor shall, by answer in the action, set forth his lien, or he will be deemed to have waived the same, unless the lien is admitted in the complaint, and not contested by another defendant. The allegations in the answer of a

defendant lienor shall be deemed denied by the other lienors in said action without the necessity of serving replies. Two or more lienors having liens notices of which have been filed against the same real property or public improvement, or any part thereof, may join as plaintiffs.

6. The state, when the lien is one filed against funds of the state for which the public improvement is constructed or demolished. In such a case, the summons must be served upon the attorney-general, who must appear in behalf of the people.

#### § 44-b. Necessary parties; lien against public or private improvement

Notwithstanding any inconsistent provision of section forty-four of this article, any private owner or the state or a public corporation with which a notice of lien is filed shall not be a necessary party defendant in an action to enforce the lien if, either before or after the commencement of the action, a contractor or subcontractor, (a) in the case of a public improvement, executes a bond or undertaking, in accordance with subdivision five of section twenty-one of this chapter, to the state or the public corporation with which the notice of lien is filed conditioned for the payment of any judgment that may be recovered in an action to enforce the lien or, (b) in the case of a private improvement, executes a bond or undertaking in accordance with subdivision four of section nineteen of this chapter, to the county clerk with which the notice of lien is filed conditioned for the payment of any judgment that may be recovered in an action to enforce the lien.

#### § 45. Equities of lienors to be determined

The court may adjust and determine the equities of all the parties to the action and the order of priority of different liens, and determine all issues raised by any defense or counterclaim in the action. But in no case shall the court determine any issue between the state and the contractor where a claim has been or can be submitted to the court of claims for adjudication and in case a counterclaim is set forth by any defendant in his answer, such defendant shall be deemed to have waived a trial by jury of the issues raised thereby.

#### § 46. Action in a court not of record

If an action to enforce a mechanic's lien against real property is brought in a court not of record, it shall be commenced by the personal service upon the owner of a summons and complaint verified in the same manner as a complaint in an action in a court of record. The complaint must set forth substantially the facts contained in the notice of lien, and the substance of the agreement under which the labor was performed or the materials were furnished. The form and contents of the summons shall be the same as provided by law for the commencement of an action upon a contract in such court. The summons must be returnable not less than twelve nor more than twenty days after the date of the summons, or if service is made by publication, after the day of the last publication of the summons. Service must be made at least eight days before the return day.

#### **§ 47. How summons served, when personal service cannot be made**

If personal service of the summons cannot be made upon a defendant in an action in a court not of record, by reason of his absence from the state, or his concealment therein, such service may be made by leaving a copy thereof at his last place of residence and by publishing a copy of the summons once in each of three successive weeks in a newspaper in the city or county where the property is situated.

#### **§ 48. Proceedings on return of summons; answer; judgment by default**

At the time and place specified in the summons for the return thereof, in a court not of record, issue must be joined, if both parties appear, by the defendant filing with the justice a verified answer, containing a general denial of each allegation of the complaint, or a specific denial of one or more of the material allegations thereof; or any other matter constituting a defense to the lien or to the claim upon which it is founded. If the defendant fail to appear on the return-day, on proof by affidavit of the service of the summons and complaint, judgment may be rendered for the amount claimed, with costs.

#### **§ 49. Issue, how tried; judgment**

If issue is joined in such action in a court not of record, it must be tried in the same manner as other issues in such court, and judgment entered thereon, which shall be enforced, if for the plaintiff, in the manner provided in the following section. If for the defendant, in the same manner as in an action on contract in such court.

#### **§ 50. Execution**

Execution may be issued upon a judgment obtained in an action to enforce a mechanic's lien against real property in a court not of record, which shall direct the officer to sell the title and interest of the owner in the premises, upon which the lien set forth in the complaint existed at the time of filing the notice of lien.

#### **§ 51. Appeals from judgments in courts not of record**

An appeal may be taken from such judgment rendered in a court not of record, according to the provisions of law regulating appeals from judgments in actions on contract in such courts.

#### **§ 52. Transcripts of judgments in courts not of record**

When a judgment is rendered in a court not of record, the justice or judge of the court in which it is tried, or other person authorized to furnish transcripts of judgments therein, shall furnish the successful party a transcript thereof, which he may file with the clerk of the county with whom the notice of lien is filed. The filing of such transcript has the same effect as the filing of a transcript of any other judgment rendered in such courts.

### **§ 53. Costs and disbursements**

If an action is brought to enforce a mechanic's lien against real property in a court of record, the costs and disbursements shall rest in the discretion of the court, and may be awarded to the prevailing party. The judgment rendered in such an action shall include the amount of such costs and specify to whom and by whom the costs are to be paid. If such action is brought in a court not of record, they shall be the same as allowed in civil actions in such court. The expenses incurred in serving the summons by publication may be added to the amount of costs now allowed in such court.

### **§ 54. Judgment in case of failure to establish lien**

If the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this article, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action.

### **§ 55. Offer to pay money into court, or to deposit securities, in discharge of the lien**

At any time after an action is brought under the provision of this article, the owner may make and file with the clerk with whom the notice of lien is filed, if in a court of record, and if in a court not of record, with the court, an offer to pay into court the sum of money stated therein, or to execute and deposit securities which he may describe, in discharge of the lien, and serve upon the plaintiff a copy of such offer. If a written acceptance of the offer is filed with such clerk, or court, within ten days after its service, and a copy of the acceptance is served upon the party making the offer, the court, upon proof of such offer and acceptance, may make an order, that on depositing with such clerk, or court, the sum so offered, or the securities described, the lien shall be discharged, and that the money or securities deposited shall take the place of the property upon which the lien existed, and shall be subject to the lien. If the offer is of money only, the court, on application and notice to the plaintiff may make such order, without the acceptance of the offer by the plaintiff. If such action is brought in a court not of record, such order may be made by the county court of the county where such action is brought upon notice, and upon filing such order and depositing such sum of money or securities with the county clerk of such county, he shall forthwith discharge said notice of lien, by writing upon the margin of the record thereof, the words "discharged by payment." Money or securities deposited upon the acceptance of an offer pursuant to this section shall be held by the clerk or the court until the final determination of the action, including an appeal.

### **§ 56. Preference over contractors**

When a laborer, subcontractor or material man shall perform labor or furnish materials for an improvement of real property or for a public improvement, for which he is entitled

to a mechanic's lien, the amount due to him shall be paid out of the proceeds of the sale of such property or out of the moneys of the state or public corporation applicable to the construction or demolition of the public improvement, under any judgment rendered pursuant to this article, before any part of such proceeds is paid to the person for whom he has performed such labor or furnished such materials. If several notices of lien are filed for the same claim, as where the contractor has filed a notice of lien, for the services of his workmen, and the workmen have also filed notices of lien, the judgment shall provide for but one payment of the claim which shall be paid to the parties entitled thereto. Payment voluntarily made upon any claim filed as a lien shall not impair or diminish the lien of any person except the person to whom the payment was made.

#### **§ 57. Judgment may direct delivery of property in lieu of money**

If the owner has agreed to deliver bills, notes, securities or other obligations or any other species of property, in payment of the debt upon which the lien is based, the judgment may direct that such substitute be delivered or deposited as the court may direct, and the property affected by the lien cannot be sold, by virtue of such judgment, except in default of the owner to so deliver or deposit within the time directed by the court.

#### **§ 58. Judgment for deficiency**

If upon the sale of the property under judgment in a court of record there is a deficiency of proceeds to pay the plaintiff's claim, judgment may be docketed for the deficiency against any person liable therefor, who shall be adjudged to pay the same in like manner and with like effect as in judgments for deficiency in foreclosure cases.

#### **§ 59. Vacating of a mechanic's lien; cancellation of bond; return of deposit, by order of court**

A mechanic's lien notice of which has been filed on real property or a bond given to discharge the same may be vacated and cancelled or a deposit made to discharge a lien pursuant to section twenty may be returned, by an order of a court of record. Before such order shall be granted, a notice shall be served upon the lienor, either personally or by leaving it as his last known place of residence, with a person of suitable age, with directions to deliver it to the lienor. Such notice shall require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed or the bond given should not be vacated and cancelled, or the deposit returned, as the case may be. Proof of such service and that the lienor has not commenced the action to foreclose such lien, as directed in the notice, shall be made by affidavit, at the time of applying for such order.

#### **§ 60. Judgment in action to foreclose lien on account of public improvement**

If, in an action to enforce a lien on account of a public improvement, the court finds that the lien is established, it shall render judgement directing the state or the public corporation to pay over to the lienors entitled thereto for work done or material furnished for such public improvement, to the extent of the sums found due the lienors from the contractors, so much of the funds or money which may be due from the state or public corporation to the contractor, as will satisfy such liens, with interest and costs, not exceeding the amount due to the contractor. If it appears in any proceeding in which the state is a party that a claim has been or can be filed against the state in the court of claims, or if it is alleged upon the part of the state that the contractor has breached the contract, then the court may render judgment only to the extent of determining the establishment of the lien or liens, and the amount or amounts thereof.

### **§ 61. Judgment in action to foreclose a mechanic's lien on property of a railroad corporation**

If the lien is for labor done or materials furnished for a railroad corporation, upon its land, or upon or for its track, rolling stock or the appurtenances of its railroad, the judgment shall not direct the sale of any of the real property described in the notice of the lien, but when in such case, a judgment is entered and docketed with the county clerk of the county where the notice of lien is filed, or a transcript thereof is filed and docketed in any other county, it shall be a lien upon the real property of the railroad corporation, against which it is obtained, to the same extent, and enforceable in like manner as other judgments of courts of record against such corporation.

### **§ 62. Bringing in new parties**

A lienor who has filed a notice of lien after the commencement of an action in a court of record to foreclose or enforce a mechanic's lien against real property or a public improvement, may at any time up to and including the day preceding the day on which the trial of such action is commenced, make application upon notice to the plaintiff or his attorney in such action, to be made a party therein. Upon good cause shown, the court must order such lienor to be brought in by amendment. If the application is made by any other party in said action to make such lienor or other person a party, the court may in its discretion direct such lienor or other person to be brought in by like amendment. The order to be entered on such application shall provide the time for and manner of serving the pleading of such additional lienor or other person and shall direct that the pleadings, papers and proceedings of the other several parties in such action, shall be deemed amended, so as not to require the making or serving of papers other than said order to effectuate such amendment, and shall further provide that the allegations in the answer of such additional lienor or other person shall, for the purposes of the action, be deemed denied by the other parties therein. The action shall be so conducted by the court as not to cause substantially any delay in the trial thereof. The bringing in of such additional lienor or other person shall be without prejudice to the proceedings had, and if the action be on the calendar of the court, same shall retain its place on such calendar without the necessity of serving a new note of issue and new notices of trial.

### **§ 63. Service of answer on state or public corporation**

In an action to foreclose a lien for a public improvement each defendant named in the original summons shall within forty days after the service of the complaint on him serve upon the state or public corporation, a copy of his answer. When the city of New York is a party such service shall be made on the corporation counsel.

### **§ 64. Award of personal judgment by court or referee**

A court or referee in any action heretofore or hereafter brought may at any time award a money judgment in favor of any party. This shall not preclude the rendition of other judgments in the action. Any payment made on account of either judgment in favor of a party shall be credited on the other judgment.

### **§ 65. Arrears/past due support**

1. The New York state office of temporary and disability assistance, or a local social services district, or its authorized representative, on behalf of persons receiving services under title six-A of article three of the social services law, shall have a lien against real property owned by a support obligor when such support obligor is or was under a court order to pay child support or combined child and spousal support to a support collection unit and such support obligor has accumulated support arrears/past due support in an amount equal to or greater than the amount of support due pursuant to such order for a period of four months. Such lien shall be in an amount sufficient to satisfy the support arrears/past due support. Such lien shall be enforceable upon filing a notice of lien in the office of the clerk of the county in which real property subject to any such lien is situated. In the event the real property is located in more than one county, filing shall occur in the office of the clerk in each county where the real property is situated. The county clerk of each county shall accept and maintain the notice of lien as part of a comprehensive index of liens against real property. If a child support obligor against whom a lien is filed subsequently acquires an interest in real property, the lien shall be perfected and have effect upon the recording or filing of the instrument by which such interest is obtained. The filing of notice of lien or a release of lien may be done by electronic means and without payment of a fee.

2. Said lien shall terminate upon payment in full of all support arrears/past due support. The office of temporary and disability assistance or a social services district or its authorized representative may file a release of lien against specified property, which action shall not of itself discharge a lien arising by operation of law.

3. The state shall accord full faith and credit to liens which arise in another state when such state agency, party or other entity seeking to enforce such a lien complies with the procedural rules relating to filing or serving liens pursuant to this section and section one hundred eleven-u of the social services law. Such rules may not require judicial notice or hearing prior to enforcement of such a lien.

4. For the purposes of determining whether a support obligor has accumulated support arrears/past due support for a period of four months, the amount of any retroactive support, other than periodic payments of retroactive support which are past due, shall not be included in the calculation of arrears/past due support pursuant to this section; however, if at least four months of support arrears/past due support have accumulated subsequent to the date of the court order, the entire amount of any retroactive support may be collected pursuant to the provisions of this section or as otherwise authorized by law.

## **§ 66. [Repealed]**

## **§ 70. Definition of trusts**

1. The funds described in this section received by an owner for or in connection with an improvement of real property in this state, including a home improvement loan, or received by a contractor under or in connection with a contract for an improvement of real property, or home improvement, or a contract for a public improvement in this state, or received by a subcontractor under or in connection with a subcontract made with the contractor for such improvement of real property including a home improvement contract or public improvement or made with any subcontractor under any such contract, and any right of action for any such funds due or earned or to become due or earned, shall constitute assets of a trust for the purposes provided in section seventy-one of this chapter.

For the purposes of this section: (a) any right to receive payment at a future time shall be deemed a right of action therefor and an asset of the trust even though it is contingent upon performance or upon some other event, but the fact that the right is a trust asset does not enlarge the right or excuse any performance or condition upon which it depends; (b) "contract" and "subcontract" shall include any modification of the contract or subcontract to which reference is made; and (c) funds due or earned under a contract or subcontract shall include any funds payable to the contractor or subcontractor in addition to the contract price by reason of any transaction, event or circumstance in the making or in the performance of the contract or subcontract.

2. The funds received by an owner and the rights of action with respect thereto, for or in connection with each improvement, shall be a separate trust and the owner shall be the trustee thereof. 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.

3. Every such trust shall commence at the time when any asset thereof comes into existence, whether or not there shall be at that time any beneficiary of the trust. The trust of which the owner is trustee shall continue with respect to every asset of the trust until every trust claim arising at any time during the improvement has been paid or discharged, or until all such assets have been applied for the purposes of the trust. The trust of which a contractor or subcontractor is trustee shall continue with respect to

every asset of the trust until every trust claim arising at any time prior to the completion of the contract or subcontract has been paid or discharged, or until all such assets have been applied for the purposes of the trust. Upon termination of the trust by payment or discharge of all the trust claims, the beneficial interest in any remaining assets shall vest in the owner, contractor or subcontractor, as the case may be.

4. The trusts described in this section shall arise whether or not a covenant declaring or acknowledging the trust, as required in article two of this chapter, has been executed.

5. The assets of the trust of which the owner is trustee are the funds received by him and his rights of action for payment thereof

(a) under a building loan contract;

(b) under a building loan mortgage or a home improvement loan;

(c) under a mortgage recorded subsequent to the commencement of the improvement and before the expiration of four months after completion of the improvement;

(d) as consideration for a conveyance recorded subsequent to the commencement of the improvement and before the expiration of four months after the completion thereof;

(e) as consideration for, or advances secured by, an assignment of rents due or to become due under an existing or future lease or tenancy of the premises that are the subject of the improvement, or of any part of such premises, if the assignment is executed subsequent to the commencement of the improvement and before the expiration of four months after the completion of the improvement or if it is executed before the commencement of the improvement and an express promise to make an improvement, or an express representation that an improvement will be made, is contained in the assignment or given in the transaction in which the assignment is made;

(f) as proceeds of any insurance payable because of the destruction of the improvement or its removal by fire or other casualty, except that the amount thereof required to reimburse the owner for premiums paid by him out of funds other than trust funds shall not be deemed part of the trust assets;

(g) under an executory contract for the sale of real property and the improvement thereof by the construction of a building thereon.

6. The assets of the trust of which a contractor is trustee are the funds received by him and his rights of action for payment thereof

(a) under the contract for the improvement of real property, or home improvement or the public improvement;

(b) under an assignment of funds due or earned or to become due or earned under the contract;

(c) as proceeds of any insurance payable because of destruction of the improvement of real property including a home improvement or public improvement or its removal by fire or other casualty, except that the amount thereof required to reimburse the contractor for premiums paid by him out of funds other than trust funds shall not be deemed part of the trust assets.

7. The assets of the trust of which a subcontractor is trustee are the funds received by him and his rights of action for payment thereof

(a) under the subcontract;

(b) under an assignment or order for the payment of moneys due or earned or to become due or earned under the subcontract;

(c) as proceeds of any insurance payable because of the destruction of the improvement of real property or public improvement or its removal by fire or other casualty, except that the amount thereof required to reimburse the subcontractor for premiums paid by him out of funds other than trust funds shall not be deemed part of the trust assets.

8. For the purposes of this article, the term "home improvement contract" shall have the meaning ascribed to it by section seven hundred seventy of the general business law, and the term "home improvement loan" shall mean any loan obtained for the purpose of financing a home improvement. The term "home improvement" shall mean the repairing, remodeling, altering, converting, or modernizing of, or adding to residential property, including but not limited to the construction, erection, replacement, or improvement of driveways, swimming pools, siding, insulation, roofing and windows, terraces, patios, landscaping, fences, porches, garages, solar energy systems, flooring, basements, and other improvements of the residential property and all structures or land adjacent to it.

## **§ 71. Purpose of the trust; "trust claims"; "beneficiaries"**

1. The trust assets of which an owner is trustee under subdivisions five(a) to five(f), inclusive, of section seventy of this chapter shall be held and applied for payment of the cost of improvement. The trust assets of which an owner is trustee under subdivision five(g) of section seventy of this chapter shall be held and applied for payment of the cost of improvement and, in addition, for the purposes of the further trust provided in section seventy-one-a of this chapter.

2. The trust assets of which a contractor or subcontractor is trustee shall be held and applied for the following expenditures arising out of the improvement of real property, including home improvement or public improvement and incurred in the performance of his contract or subcontract, as the case may be:

(a) payment of claims of subcontractors, architects, engineers, surveyors, laborers and materialmen;

(b) payment of the amount of taxes based on payrolls including such persons and withheld or required to be withheld and taxes based on the purchase price or value of materials or equipment required to be installed or furnished in connection with the performance of the improvement;

(c) payment of taxes and unemployment insurance and other contributions due by reason of the employment out of which such claims arose;

(d) payment of any benefits or wage supplements, or the amounts necessary to provide such benefits or furnish such supplements, to the extent that the trustee, as employer, is obligated to pay or provide such benefits or furnish such supplements by any agreement to which he is a party;

(e) payment of premiums on a surety bond or bonds filed and premiums on insurance accrued during the making of the improvement, including home improvement, or public improvement;

(f) payment to which the owner is entitled pursuant to the provisions of section seventy-one-a of this chapter.

3. (a) With respect to the trust of which an owner is trustee, "trust claims" means claims of contractors, subcontractors, architects, engineers, surveyors, laborers and materialmen arising out of the improvement, for which the owner is obligated, and also means any obligation of the owner incurred in connection with the improvement for a payment or expenditure defined as cost of improvement.

(b) With respect to the trusts of which a contractor or subcontractor is trustee, "trust claims" means claims arising at any time for payments for which the trustee is authorized to use trust funds as provided in subdivision two of this section.

(c) No claim acquired by the trustee by assignment or otherwise shall be a trust claim after it has been so acquired.

4. Persons having claims for payment of amounts for which the trustee is authorized to use trust assets as provided in this section are beneficiaries of the trust whether or not they have filed or had the right to file a notice of lien as provided in article two of this chapter or shall have recovered a judgment therefor. Where an owner becomes obligated to incur an expenditure as part of the cost of improvement, any person to whom he is so obligated is a beneficiary.

5. For the purposes of this article, every trust claim shall be deemed to be in existence from the time of the making of the contract or the occurrence of the transaction out of which the claim arises and, except as provided in section seventy-six and section seventy-seven, the rights of each member of the class of beneficiaries accrue at the making of the contract or the occurrence of the transaction out of which the claim arises.

#### **§ 71-a. Further trust of funds received or receivable by owner under executory contract for the sale and improvement of real property**

1. As used in this section,

(a) A "contract of sale" is an executory contract for the sale of real property and the improvement thereof by the construction of a building thereon.

(b) "Advances" include funds received by the owner and his rights of action for payment thereof.

2. (a) Advances made by or on behalf of a vendee of real property to the owner under or pursuant to a contract of sale shall constitute assets of a trust, as defined in this section, of which the owner is trustee, notwithstanding that such advances may also be assets of a trust defined in section seventy of this chapter.

(b) Such advances shall be held and applied by the owner for the payment of the cost of improvement. The trust claims defined in subdivision three(a) of section seventy-one of this chapter shall have priority over trust claims which the vendee has under the further trust provided in this section. Advances shall cease to be subject to the further trust provided in this section after they have been applied by the owner for payment of the cost of improvement, provided that no part of the advances shall be applied or be deemed applied for payment of the cost of improvement until all trust assets, as defined in subdivisions five(a) to five(f), inclusive, of section seventy of this chapter, which have been received by the owner from all other sources, have been exhausted.

(c) Such advances, or any portion thereof remaining after application of such advances for payment of the cost of improvement, shall continue to be held in trust by the owner for the benefit of the vendee, until the trust is terminated (i) by the owner's performance of the terms of the contract of sale, or (ii) by a default of the vendee excusing the owner's performance of the terms of the contract of sale, or (iii) by release or discharge of the owner's liability to refund such advances to the vendee.

(d) Until the further trust is terminated as provided in this section, such advances shall not be applied by the owner for any purpose other than payment of the cost of improvement and satisfaction of any liability of the owner to refund such advances, or any part thereof, to the vendee. Upon termination of the said trust, the beneficial interest in such advances or any portion thereof remaining in the hands of the owner shall vest in the owner, provided that all trust claims applicable to such advances have been paid or discharged.

(e) Any provision whereby the vendee waives the provisions of this section, whether contained in the contract of sale or otherwise, shall be absolutely void.

(f) Subject to the provisions of this section, the rights and remedies which may be exercised by a holder of trust claims with respect to assets of a trust defined in section seventy of this chapter may be exercised, in the same manner and to the same extent, by the vendee with respect to such advances.

(g) The enforcement of the trust provided in this section shall not be deemed to prohibit the vendee from seeking to enforce such additional or alternative remedies provided by law as shall afford the vendee complete relief.

3. (a) The initial advance pursuant to a contract of sale which by its terms provides for or is incidental to a contract providing for the construction on the subject real property of

residential condominium unit or any structure designed solely for residential occupancy of not more than two families living separately, on property to be purchased shall, at the vendee's option, be deposited within five business days thereafter by the recipient in an interest bearing escrow account in a bank, trust company, savings bank, state or federal savings and loan association, located in this state. Such deposit, together with the interest accumulated thereon, shall remain the property of the vendee except as otherwise provided herein. The recipient shall advise the vendee in writing of the name of the depository where the funds have been placed within ten business days after such deposit has been made.

(b) In lieu of making the deposit of such moneys in an escrow account as provided in paragraph (a) of this subdivision, the recipient may post with the vendee a bond or contract of indemnity, issued by a surety company licensed to execute such an instrument in this state, guaranteeing the return of the moneys which otherwise would be required to be deposited in such escrow account, in which case the recipient shall not be required to deposit such money in an escrow account. Said bond or contract of indemnity shall be delivered to the vendee within ten business days after receipt of the initial advance.

(c) At any time after making the deposit of such moneys in the escrow account, the recipient may post with the vendee a bond or contract of indemnity issued by a surety company licensed to execute such an instrument in this state guaranteeing the return of such moneys, in which case the recipient shall not be required to maintain the deposit of such moneys in such account.

(d) Such advance shall be retained in the escrow account or such bond or contract of indemnity continued in effect until the trust is terminated (i) by the recipient's performance of the terms of the contract of sale, or (ii) by default of the vendee excusing the recipient's performance of the terms of the contract of sale, or (iii) by release or discharge of the recipient's liability to refund such advance to the vendee, or (iv) upon transfer of title of the real property to the vendee.

(e) Every contract of sale which by its terms provides for or is incidental to a contract providing for the construction on the subject real property of a residential condominium unit or a structure designed solely for the residential occupancy by not more than two families living apart, shall contain a statement advising the vendee of the provisions of this subdivision. Such statement shall be printed in bold type which is at least two points larger than any other printing contained thereon and shall read as follows:

**"YOU, AS THE PURCHASER OF THIS RESIDENCE, MAY REQUIRE THE RECIPIENT OR CONTRACTOR TO DEPOSIT THE INITIAL ADVANCE MADE BY YOU IN AN ESCROW ACCOUNT. IN LIEU OF SUCH DEPOSIT, THE RECIPIENT OR CONTRACTOR MAY POST A BOND OR CONTRACT OF INDEMNITY WITH YOU GUARANTEEING THE RETURN OF SUCH ADVANCE."**

4. (a) Under a home improvement contract, payments received from an owner by a home improvement contractor prior to the substantial completion of work under the contract shall be deposited within five business days thereafter by the recipient in an escrow account in a bank, trust company, savings bank, or state or federal savings and

loan association, located in this state. No depository institution acting on the instructions or otherwise dealing with a home improvement contractor shall be obliged to inquire into the validity or propriety of any deposits to or withdrawals from any escrow account established by the home improvement contractor in compliance with this subdivision or to insure that any withdrawals from such account are applied for any specific purpose or purposes by the home improvement contractor. Such deposit or deposits shall remain the property of such owner except as otherwise provided herein. Unless the home improvement contract specifies the name of the depository where the funds will be placed, no later than ten business days after the deposit has been made, the recipient shall advise the owner in writing of the name of the depository where the funds have been placed. The recipient shall not be required to keep in separate depository accounts the funds of the separate owners from whom payments have been received, provided his books of account shall clearly show the allocation to each owner of the funds deposited in his general or special depository account or accounts.

(b) In lieu of making the deposit of such payment or payments in an escrow account as provided in paragraph (a) of this subdivision, the recipient may post with the owner a bond or contract of indemnity, issued by a surety company licensed to execute such an instrument in this state, or an irrevocable letter of credit issued by a bank, trust company, savings bank, or state or federal savings and loan institution located in this state, guaranteeing the return of the payments, or the proper application of the payments to the purposes of the contract, which otherwise would be required to be deposited in such escrow account, in which case the recipient shall not be required to deposit such payments in an escrow account. Said bond or contract of indemnity or irrevocable letter of credit shall be delivered to the owner within ten business days after receipt of the payment.

(c) At any time after making the deposit of such payment or payments in the escrow account, the recipient may post with the owner a bond or contract of indemnity issued by a surety company licensed to execute such an instrument in this state, or an irrevocable letter of credit issued by a bank, trust company, savings bank, or state or federal savings and loan institution located in this state, guaranteeing the return or proper application of such payment to the purposes of the contract, in which case the recipient shall not be required to maintain the deposit of such payment in such account.

(d) Such deposit or deposits shall remain the property of the owner or such bond or contract of indemnity or irrevocable letter of credit continued in effect until (i) the proper payment, transfer or application of such deposits by the contractor to the purposes of the home improvement contract under the schedule of payments provided therein; or (ii) the default or breach of the owner excusing the recipient's performance of the terms of the home improvement contract, but only to the extent of any reasonable liquidated damage amount as defined in section 2-718 of the uniform commercial code and set forth in the contract, and only after seven days prior written notice to the owner; or (iii) substantial performance of the contract.

(e) The recipient shall not withdraw deposits from the escrow account in excess at any time of the total amount shown in the schedule of payments in the home improvement contract. The amount of any such progress payments shall bear a

reasonable relationship to the amount of work to be performed, materials purchased, or expenses for which the contractor would be obligated.

(f) If the home improvement contract provides that the home improvement contractor will be paid on a specified hourly or time basis for work that has been performed or charges for materials that have been supplied prior to the time that payment is due, this subdivision shall not apply to such payments for such work or materials.

(g) Failure to place customer deposits in escrow, except as provided herein, shall constitute a violation of this section.

## **§ 72. Diversion of trust funds**

1. Any transaction by which any trust asset is paid, transferred or applied for any purpose other than a purpose of the trust as stated in subdivision one or subdivision two of section seventy-one, before payment or discharge of all trust claims with respect to the trust, is a diversion of trust assets, whether or not there are trust claims in existence at the time of the transaction, and if the diversion occurs by the voluntary act of the trustee or by his consent such act or consent is a breach of trust.

Nothing in this article affects the rights of a holder in due course of a negotiable instrument or of a purchaser in good faith for value and without notice that a transfer to him is a diversion of trust assets.

2. Trust assets shall not be levied upon or subject to a restraining notice issued pursuant to section fifty-two hundred twenty-two of the civil practice law and rules as the individual property of the trustee.

3. In any action or proceeding in which it is sought to apply trust assets for a purpose other than a purpose of the trust as stated in subdivision one or subdivision two of section seventy-one

(a) it shall be the duty of the trustee, if he is a party, to defend the trust against such application, and if he knows of the action or proceeding but is not a party, to make application for intervention therein for the purpose of defending the trust;

(b) any beneficiary of the trust having a trust claim may intervene in the action or proceeding to defend the trust against such application.

## **§ 73. Affirmative defense in action against transferee of trust assets or to charge trustee in certain cases; "Notice of Lending"**

1. In any action against a person to whom trust assets have been transferred, to recover assets diverted from the trust or to recover damages for the diversion, a transferee named in a "Notice of Lending" filed as provided in subdivision three of this section shall be entitled to show by way of defense that the transfer was made as security for or in consideration of or in repayment of advances made to or on behalf of the trustee in accordance with such notice of lending and that prior to the making of such advances the transferee procured from the trustee the written agreement of the

trustee that he will receive the advances and will hold the right to receive such advances as trust funds to be first applied to the payment of trust claims as defined in section seventy-one of this chapter, and that he will apply the same to such payments only, before using any part of such advances for any other purpose. Subject to subdivision four of this section, if such defense is established, the transferee shall be entitled to a credit for the amount of the advances with respect to which it is so established, to the extent that such amount does not exceed the maximum amount specified in the notice of lending filed as provided in subdivision three.

2. In any action in which it is sought to charge a trustee personally with liability by reason of a diversion of trust assets, the trustee shall be entitled to show by way of defense that the transfer constituting the diversion was made to a transferee named in a "Notice of Lending" filed as provided in subdivision three and that the transfer was made as security for or in consideration of or in repayment of advances made to him as trustee or on his behalf as trustee in accordance with such notice of lending, and that such advances were actually applied for a purpose of the trust as stated in subdivision one or subdivision two of section seventy-one of this chapter. Subject to subdivision four of this section, if such defense is established, the trustee shall be entitled to a credit against any personal liability by reason of such transfer, for the amount of the advances with respect to which it is established, to the extent that such amount does not exceed the maximum amount specified in the notice filed as provided in subdivision three.

3. (a) If funds are advanced to or on behalf of a trustee, for the purposes of the trust, either the trustee or the person advancing the funds may file a "Notice of Lending" as provided in this subdivision. In the case of advances to an owner or to a contractor or subcontractor for one or more projects for the improvement of real property including a home improvement, the notice shall be filed in the office of the county clerk of each county where the real property improved or to be improved to which the notice relates is situated. Such clerk shall enter the facts relating to the notice in the "lien docket" or in another book provided by him for such purpose. Each such notice shall be indexed by the name of the trustee to whom or on whose behalf the advances are made. In the case of advances to a contractor or subcontractor for one or more projects involving a public improvement, the notice shall be filed with the head of each department or bureau having charge of construction of an improvement to which the notice relates and with the financial officer of each public corporation or other officer or person charged with the custody and disbursement of the corporate funds applicable to the contract for each such public improvement.

(b) A notice filed pursuant to this section is effective for the purposes of this section with respect to advances made on the day of filing or subsequently, or made not more than five days before the date of filing. The notice must contain: (1) a statement of the name and address of the person making the advances, (2) a statement of the name and address of the person to whom or on whose behalf they are made, and whether he is owner, contractor or subcontractor, (3) in the case of advances relating to one specific project for the improvement of real property including a home improvement or one specific public improvement, a description, sufficient for identification, of the improvement and of the real property involved for which the advances are made, and in

the case of a notice of lending relating to several or undetermined projects for the improvement of real property including a home improvement or for public improvements, a statement of each county wherein the real property is or may be situated, (4) the date of any advance made on or before the date of filing for which the notice is intended to be effective, (5) in the case of a notice of lending relating to several or undetermined projects, the date the notice will terminate, which termination date shall not be more than two years after the date the notice is filed, and (6) the maximum balance of advances outstanding to be permitted by the lender pursuant to the notice. If real property is required to be specifically identified hereunder, the identification shall be sufficient if it includes the name of the record owner and the location of the real estate by street and number and town or city or, if the real estate is in the city of New York, by county, except that if the real estate is in the city of New York or counties of Nassau or Onondaga, where the block system of recording or registering and indexing conveyances is in use, the notice must also specify the block in which the real estate is situated.

(c) A "Notice of Lending" may be continued in effect for advances made beyond the stated termination date by filing within sixty days prior to the termination date a subsequent notice entitled "Second Notice of Lending" or "Third Notice of Lending", which identifies the prior notice to which it relates and otherwise conforms to the requirements of paragraph (b) of subdivision three of this section. The term "Notice of Lending" as used in this section includes any amendments but if any amendment increases the maximum balance of advances outstanding to be permitted by the lender, it is effective as to the increased amount only with respect to advances made not more than five days before the date of filing the amended notice or thereafter.

(d) A "Notice of Assignment" meeting the requirements of subdivision two of section fifteen of this chapter and filed pursuant to subdivision one of said section shall be deemed for all purposes a "Notice of Lending" complying with the requirements of this section.

4. Notwithstanding that the transferee, or the trustee, establishes a defense as provided in subdivision one or subdivision two of this section, he shall be allowed no credit by reason of such defense if it is shown that a written demand by a trust beneficiary for a verified statement of the amount of advances actually made to the trustee was served personally or by registered or certified mail on the transferee, or the trustee as the case may be, and that he failed to comply therewith within ten days after receipt of the demand, provided, that if either the transferee or the trustee complies with a demand so served on him, such compliance shall be sufficient as to the other.

5. Notwithstanding any provision of this chapter or of any other law to the contrary, moneys received pursuant to a notice of lending by an owner, contractor or subcontractor shall be deemed to be trust assets.

#### **§ 74. Authority of trustee in administering trust funds**

1. Subject to subdivisions two and three of this section, the trustee is authorized to determine the order and manner of payment of any trust claims and to apply any trust asset to any purpose of the trust.

2. The authority of the trustee provided in this section shall terminate with respect to any trust assets as to which an order for distribution is made as provided in section seventy-seven and before the making of an order for distribution may be terminated or limited by order of the court pursuant to subdivision three of section seventy-seven.

3. This section does not limit the effect of any proceeding or order therein by which jurisdiction of the trust assets, or any of them, is vested in a court or by which a particular application of any asset or of all trust assets is enforced or directed.

### **§ 75. Deposit of funds of trust; books or records to be kept**

1. If the trustee deposits trust funds in a bank or other depository they shall be deposited in his name.

The trustee shall not be required to keep in separate bank accounts or deposits the funds of the separate trusts of which he may be trustee under this article, provided his books of account shall clearly show the allocation to each trust of the funds deposited in his general or special bank account or accounts.

2. Every trustee shall keep books or records with respect to each trust of which he is trustee and, if funds of separate trusts are deposited in the same bank account, shall keep a record of such account showing the allocation to each trust of the deposits therein and withdrawals therefrom.

3. The books or records with respect to each trust shall contain the following entries:

A. Trust assets receivable. (1) The name and address of each person from whom the trustee has a right to receive funds constituting assets of the trust, or will have a right to receive such funds upon or in the course of performance of a contract or subcontract or upon some other condition, with a statement sufficient to identify the contract or other transaction by reason of which such moneys will become payable; (2) the amount of each payment or advance from each such person that has become due or earned or otherwise payable; and (3) the date upon which it became due, earned or payable.

B. Trust accounts payable. (1) The name and address of each person to whom the trustee has incurred an obligation constituting a trust claim, whether or not such claim is then due, with a statement sufficient to identify the contract or transaction out of which the trust claim arises; (2) the amount of each trust claim that has become due, earned or otherwise payable; and (3) the date upon which it became due, earned or payable.

C. Trust funds received. (1) The name and address of each person from whom funds constituting trust assets have been received in the form of cash, check or other instrument for the payment of money, bank credit or drawing account, or similar form

available for immediate application to trust purposes, including any instrument in form payable to a trust beneficiary and any moneys paid directly to a trust beneficiary on behalf of the trustee, with a description of the form in which the funds were received; (2) the date on which each payment or remittance from such person was received; (3) the amount received on such date; and (4) if such funds are deposited in a bank or other depository, the name and address of such bank or depository.

D. Trust payments made with trust assets. (1) The name and address of each person to whom a payment for the purposes of the trust has been made, with moneys or other assets constituting trust assets, including payments made directly to such person on behalf of the trustee by a person from whom trust assets are receivable; (2) the date when and place where each payment was made; (3) the amount paid on each of such dates and a statement whether the payment was made in cash or by check and the manner of payment if made by some other person on behalf of the trustee; (4) with respect to each such payment a statement of the nature of the trust claim or if the owner is trustee the nature of the expenditure other than payment of a trust claim, for which the payment is made, sufficient in any case to identify the payment as a payment for a trust purpose and to show whether it is for labor, materials, taxes, insurance, performance under contract or subcontract, interest charges on mortgages, or other particular trust claim or item of cost of improvement; (5) if any such payment was made pursuant to contract between the trustee and the recipient of the payment, the date when such contract was made, whether it was oral or in writing, and the agreed price named therein; (6) if any such payment upon a contract or subcontract relates to a particular item or items of the improvement, or if any such payment for materials or services relates to materials furnished, or services, other than daily or weekly labor, rendered for or upon a particular item or items of the improvement, a description of such item or items; (7) if any such payment was made with funds received under an assignment of funds due or earned or to become due or earned under the contract or subcontract, a statement of the amount of such funds so used together with the name and address of the assignee and the date of the assignment.

E. Transfers in repayment of or to secure advances made pursuant to a "Notice of Lending." If the trustee has assigned, paid or otherwise transferred any trust asset in consideration of or as security for or in repayment of advances applied or to be applied for a purpose or purposes of the trust, (1) the name and address of the person to whom the asset was so transferred; (2) the date of the transfer; (3) a description of the asset transferred; (4) the amount thereof; (5) the amount of the consideration therefor or of the advances secured or repaid thereby; (6) the date or dates when such consideration was paid or such advances were made and the manner in which the payment or advance was made.

4. Failure of the trustee to keep the books or records required by this section shall be presumptive evidence that the trustee has applied or consented to the application of trust funds actually received by him as money or an instrument for the payment of money for purposes other than a purpose of the trust as specified in section seventy-one of this chapter.

## **§ 76. Right of beneficiaries to examine books or records and make copies, or to receive statement**

1. Any beneficiary of the trust holding a trust claim shall be entitled, upon request, after the expiration of thirty days from the date his trust claim became payable, and thereafter not oftener than once in each month, (a) to examine the books or records of the trustee with respect to the trust, and to make copies of any part or parts thereof relating to the trust; or (b) at the beneficiary's option to receive a verified statement setting forth the entries with respect to the trust contained in such books or records.

2. Request for such examination and to make such copies, or for such verified statement, shall be made in writing served personally or by registered or certified mail. The request shall contain a statement of the name and address of the beneficiary, a description of the improvement of real property, or home improvement, or the public improvement sufficient to identify it and to identify the trust, and a statement of the nature of the trust claim sufficient to identify it, the amount then due and unpaid, and the due date thereof.

3. Unless otherwise agreed, the examination and copying shall be had within ten days after service of the request, at a place within the county in which the improvement, or home improvement, or public improvement is situated, designated by the trustee within such ten days, and at a time during usual business hours, so designated by the trustee. The examination and copying may be made by the beneficiary or by his agent duly authorized in writing.

4. Within ten days after service of a request for a verified statement, the trustee shall serve upon the beneficiary named in the request a statement, subscribed by the trustee or an officer thereof and verified on his own knowledge, setting forth the entries with respect to the trust contained in the books or records kept by the trustee pursuant to section seventy-five and the names and addresses of the person or persons who, on behalf of or as officer, director or agent of the trustee, made or consented to the making of the payments shown in such statement.

5. A trustee to whom a request is made for examination of books or records and for copying therefrom or for a verified statement of entries in books or records may apply to any court having jurisdiction of an action to enforce the trust, to vacate such request on the ground that the person making the request is not entitled to such examination and copying or to receive such verified statement. If a trustee on whom a request for examination and copying or for a verified statement is served as provided in this section shall refuse to comply therewith or shall fail to comply therewith within ten days, or shall apply to the court for an order to vacate the request, the beneficiary may apply to such court for an order directing that the trustee comply with the request. Such application may be made in either case on three days' notice and may be determined summarily upon affidavits of the parties.

6. This section does not limit the power of the court in an action pursuant to section seventy-seven of this chapter or in any other action or proceeding affecting trust assets or involving trust claims or the administration of the trust, to give directions with respect to production or examination of any books or records of the trustee.

### **§ 77. Action to enforce trust**

1. A trust arising under this article may be enforced by the holder of any trust claim, including any person subrogated to the right of a beneficiary of the trust holding a trust claim, in a representative action brought for the benefit of all beneficiaries of the trust. An action to enforce the trust may also be maintained by the trustee. In any such action, except as otherwise provided in this article, the practice, pleadings, forms and procedure shall conform as nearly as may be to the practice, pleadings, forms and procedure in a class action as provided in article nine of the civil practice law and rules; provided, however, that in determining whether the prerequisites of a class action have been satisfied, the provisions of paragraph one of subdivision (a) of section nine hundred one of such law and rules may be waived at the discretion of the court.

2. Such action may be maintained at any time during the improvement of real property, or home improvement, or public improvement and successive actions may be maintained from time to time during the improvement provided no other such action is pending at the time of the commencement thereof. No such action shall be maintainable if commenced more than one year after the completion of such improvement or, in the case of subcontractors or materialmen, after the expiration of one year from the date on which final payment under the claimant's contract became due, whichever is later, except an action by the trustee for final settlement of his accounts and for his discharge.

3. (a) The relief granted in any such action may include any or all of the following:

(i) Relief to compel an interim or final accounting by the trustee; to identify and recover trust assets in the hands of any person together with interest accrued thereon from the time of the diversion. Interest shall be computed at the rate equal to the underpayment rate set by the commissioner of taxation and finance pursuant to subsection (e) of section one thousand ninety-six of the tax law, minus two percentage points; to set aside as a diversion any unauthorized payment, assignment or other transfer, whether voluntary or involuntary; to enjoin a diversion; to recover damages for breach of trust or participation therein;

(ii) Enforcement on behalf of the trust of any right of action constituting a trust asset;

(iii) Determination of the existence and amount of any trust asset or of any trust claim;

(iv) An order terminating or limiting the authority of the trustee in the application of trust assets or of any trust asset, or directing the time and manner of application of a trust asset or part thereof;

(v) An order requiring the trustee to give security to ensure the proper distribution of the trust assets, either during the pendency of the action or thereafter, or to furnish assurance therefor in any other manner, if it appears that there is danger that such assets or asset will be dissipated before judgment or diverted from trust purposes;

(vi) An order for distribution of any trust assets available for distribution, either with respect to the entire trust or with respect to particular assets of the trust, or for retention of particular assets for future distribution. Where the holder of any trust assets is a trustee or a transferee who received the assets with the knowledge that they were trust funds, an order for distribution and retention for future distribution of any trust assets shall include the amount of diverted funds plus interest from the time of the diversion to the date of such order;

(vii) Settlement of the interim or final account of the trustee;

(viii) Final discharge of the trustee at the termination of the trust, or discharge of the trustee with respect to the application of specific trust assets;

(ix) Such other and further relief as to the court may seem necessary and proper;

(x) Any provisional or ancillary relief incident to any of such relief.

(b) Any relief pursuant to subparagraphs (i), (ii), (iii), (iv), (v), (ix), or (x) of paragraph (a) shall be deemed to be for the benefit of the entire class of trust beneficiaries, including persons who may become trust beneficiaries at any time before the termination of the trust. Except as provided in subdivision four of this section, relief pursuant to subparagraph (vi) shall also be deemed to be for the benefit of such entire class, but unless the court shall otherwise direct, only those persons shall be entitled to share in any distribution of the trust assets who are trust beneficiaries at the time of entry of the judgment under which distribution is to be made and who have appeared in the action or filed their claims in such manner and within such time as the court shall direct, and whose claims are due and payable at the date for distribution as set by the order of the court and either are undisputed by the trustee or have been determined in the action.

4. If an action to enforce a trust of which the owner is trustee is commenced before the completion or abandonment of the improvement of real property, or home improvement, or if an action to enforce a trust of which a contractor or subcontractor is trustee is commenced before the completion or abandonment of the performance by the trustee under the contract or subcontract, the judgment therein may provide for distribution of the assets then available for distribution among trust beneficiaries whose claims are then payable, and who have appeared in the action or who file their claims within such time as the court shall direct, and the judgment shall so provide unless the court shall determine that in the circumstances equity requires that distribution be deferred to await maturity of other trust claims.

5. If the action to enforce a trust of which a contractor or subcontractor is trustee is brought after the completion or abandonment of the performance of the contract or subcontract but before the completion of the improvement the court may direct that the action be continued to await events by reason of which additional trust assets may become available.

6. For the purposes of any distribution of trust assets, the court may direct that trust claims shown upon a schedule or schedules filed by the trustee shall be deemed to have been filed in the action.

7. An action brought under this article shall not be compromised or discontinued nor dismissed by consent, by default or for failure to prosecute, except with the approval of the court. On any application for such approval notice shall be given in such manner as the court shall direct.

8. Subject to subdivisions three and four of this section, in any distribution of trust assets pursuant to order or judgment in an action to enforce a trust, the following classes of trust claims shall have preference, in the order named: (a) trust claims for taxes and for unemployment insurance and other contributions, due by reason of employments, and for amounts of taxes withheld or required to be withheld; (b) trust claims of laborers for daily or weekly wages; (c) trust claims for benefits and wage supplements; (d) claims for any amounts of wages of laborers for daily or weekly wages (other than claims for amounts of taxes deducted and withheld, constituting trust claims for such amounts) actually deducted from payments thereof, pursuant to law or agreement, for remittance to any person on behalf of the laborer or in satisfaction of his obligation, to the extent that such person is entitled to assert, as a trust claim, the claim the laborer would otherwise have for such amount.

Except as provided in this subdivision, trust claims entitled to share in any distribution of trust assets pursuant to order of the court shall share pro rata.

#### **§ 78. Relief after judgment on obligation constituting trust claim**

If a trust beneficiary shall recover judgment against the trustee upon the obligation constituting the trust claim: (except in the enforcement of a lien as provided in articles two and three of this chapter)

(a) execution upon the judgment shall not be levied upon any trust asset;

(b) to the extent of trust assets affected by proceedings to enforce the judgment, the proceedings shall be deemed to be for the benefit of all trust beneficiaries who would, at the time the proceeding is instituted, be entitled to maintain an action to enforce the trust, and the provisions of section seventy-seven of this chapter shall apply in any such proceedings.

#### **§ 79. Liens not affected**

Nothing in this article shall prevent the enforcement of any lien as provided in articles two and three of this chapter and neither such lien nor any satisfaction obtained thereby, shall be deemed a diversion of trust assets or an unauthorized preference. For the purposes of determining the share of any trust beneficiary upon any distribution in an action to enforce the trust, the trust claim of a trust beneficiary shall not be reduced by reason of any lien to which he is entitled or by reason of any rights under any bond to which he is entitled by reason of his lien.

#### **§ 79-a. Misappropriation of funds of trust**

1. Any trustee of a trust arising under this article, and any officer, director or agent of such trustee, who applies or consents to the application of trust funds received by the trustee as money or an instrument for the payment of money for any purpose other than the purposes of that trust, as defined in section seventy-one, is guilty of larceny and punishable as provided in the penal law if

(a) such funds were received by the trustee as owner, as the term "owner" is used in article three-a of this chapter, and they were so applied prior to the payment of all trust claims as defined in such article three-a, arising at any time; or

(b) such funds were received by the trustee as contractor or subcontractor, as such terms are used in article three-a of this chapter, and the trustee fails to pay, within thirty-one days of the time it is due, any trust claim arising at any time; provided, however, that if the trustee who received such funds as contractor or sub-contractor disputes in good faith the existence, validity or amount of a trust claim or disputes that it is due, the application of trust funds for a purpose other than a trust purpose, or the consent to such application, shall not be deemed larceny by reason of failure to pay the disputed claim within thirty-one days of the date when it is due if the trustee pays such claim within thirty-one days after the final determination of such dispute.

2. Notwithstanding subdivision one of this section, if the application of trust funds for a purpose other than the trust purposes of the trust is a repayment to another person of advances made by such other person to the trustee or on his behalf as trustee and the advances so repaid were actually applied for the purposes of the trust as stated in section seventy-one, or if the trustee has made advances of his personal funds for trust purposes and the amount of trust funds applied for a purpose other than the trust purposes of the trust does not exceed the amount of advances of personal funds of the trustee actually applied for the purposes of the trust, such application or consent thereto shall be deemed justifiable and the trustee, or officer, director or agent of the trustee, shall not be deemed guilty of larceny by reason of such application or by reason of his consent thereto.

3. Failure of the trustee to keep the books or records required by section seventy-five shall be presumptive evidence that the trustee has applied or consented to the application of trust funds received by him as money or an instrument for the payment of money for purposes other than a purpose of the trust as stated in section seventy-one.

4. Notwithstanding any other provision of law, no act of the trustee in relation to the assets of the trust shall, by reason of any express covenant as provided in section thirteen or section twenty-five of this chapter, be deemed larceny in a case in which it is not declared by subdivision one of this section to be larceny or in a case in which the act is deemed justifiable as provided in subdivision two of this section.