

Plenitude Capital LLC v Clarkson Upreal LLC

2022 NY Slip Op 30392(U)

January 12, 2022

Supreme Court, Kings County

Docket Number: Index No. 524480/18

Judge: Lawrence S. Knipel

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At an IAS Term, Part Comm 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of January, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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PLENITUDE CAPITAL LLC,

Plaintiff,

- against -

Index No. 524480/18

CLARKSON UPREAL LLC, ELEVATION HOLDINGS, LLC, BOAZ GILAD, GZA GEOENVIRONMENTAL, INC. d/b/a GZA GEOENVIRONMENTAL OF NEW YORK, ECSI CONTRACTING CORPORATION, NEW YORK PILE & CONCRETE STRUCTURES CORP., US-KINGS, LLC, SILVERCUP SCAFFOLDINGS I LLC, GUMA CONSTRUCTION CORP., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD and "JOHN DOE NO. 1" through "JOHN DOE NO. 100" inclusive, the name of the latter defendants being fictitious, the true names of said defendants being unknown to plaintiff, it being intended to designate persons or entities, unknown to the plaintiff, who may have a mechanic's lien, mortgage, judgment, warrant or other lien against the property, or against the owners thereof or other parties having or claiming an interest in or a lien upon the liened premises, if the aforesaid individual defendants are living, and if any or all of said individual defendants be dead, their heirs at law, next of kin, distributees, executors, administrators, trustees, committees, devisees, legatees, and the assignees, lienors, creditors and successors in interest of them, and generally all persons having or claiming under, by, through, or against the said defendants named as a class, of any right, title, or interest in or lien upon the property described in the complaint herein,

Defendants.

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ECSI CONTRACTING CORPORATION,

Third-Party Plaintiff,

- against -

DAVID GOLDBERGER, EYAL YAGEV and NEW UPREAL
LLC and JANE DOE
NO. 1 through 10,

Third-Party Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	<u>382-386, 387-404, 406, 408, 409-421</u>
Opposing Affidavits (Affirmations)	<u>410-421, 426-427, 428-429, 431-433, 435-458, 425</u>
Reply Affidavits (Affirmations)	<u>425</u>

Upon the foregoing papers in this action to foreclose a mortgage on the commercial property at 227 Clarkson Avenue in Brooklyn (Property), third-party defendant New Upreal LLC (New Upreal) and non-party New Brookland LLC (New Brookland) (collectively, the New Upreal Parties) move (in motion sequence [mot. seq.] 16) for a protective order, pursuant to CPLR 2304 and 3103 (a), quashing the September 27, 2021 subpoenas duces tecum served by defendant/third-party plaintiff ECSI Contracting Corp. (ECSI) upon non-party Signature Bank for the bank accounts relating to New Brookland LLC, New Upreal and ending in 6716 (September 2021 Subpoenas).

Defendant and third-party plaintiff ECSI moves (in mot. seq. 17), by order to show cause, for an order: (1) pursuant to CPLR 5239, declaring that any judgment obtained by

non-party 927 Atlantic Investors LLC as against New Upreal cannot be executed against the New York Lien Law Article 3-A trust fund assets (Trust Fund Assets) of defendant Clarkson Upreal LLC (Clarkson Upreal or borrower), for which ECSI is a statutory beneficiary and possesses a superior right, including the Trust Fund Assets in the possession of non-party Signature Bank and New Upreal, and especially those within Signature Bank account ending in 5845, in an amount no less than \$433,002.23; and (2) pursuant to Judiciary Law § 753, finding New Upreal, non-party Koffsky Schwalb LLC and non-party Signature Bank to be in contempt of the court's September 13, 2021 decision and order (the September 2021 Order, NYSCEF Doc No. 376) for New Upreal's failure to turn over to ECSI the \$433,002.23 which is owed by Clarkson Upreal "and the further actions taken by Non-Party Koffsky Schwalb LLC and Non-Part[y] Signature Bank to defeat and circumvent the [September 2021 Order]."

ECSI also cross-moves (in mot. seq. 18) for an order: (1) compelling compliance with the September 2021 Subpoenas served upon Signature Bank, pursuant to CPLR 2308 (b); (2) imposing sanctions upon the law firm of Koffsky Schwalb LLC, pursuant to 22 N.Y.C.R.R. 130-1.1 (Part 130); and (3) extending the "priority" of the September 2021 Order by 120 days for the turnover of Trust Fund Assets, pursuant CPLR 5240.

Background

On December 5, 2018, plaintiff Plenitude Capital LLC (Plenitude) commenced this action to foreclose two commercial mortgages encumbering the Property which were executed by Clarkson Upreal and secured two promissory notes for \$800,000.00 and \$2.4

million in favor of Plenitude, as lender. Under the terms of the mortgages, Clarkson Upreal was required to hold the loan proceeds as Trust Fund Assets to fund a construction project at the Property. Defendant Boaz Gilad (Gilad), the manager of Clarkson Upreal, guaranteed the mortgages. The remaining defendants, most of which are contractors who were involved in the construction project and filed mechanic's liens against the Property, are lien holders. Defendant ECSI is a foundation contractor that performed excavation, foundation and concrete work for Clarkson Upreal at the construction project.

On February 1, 2019, Clarkson Upreal and its manager, Gilad, collectively answered the complaint. On April 29, 2019, ECSI answered the complaint and asserted cross claims against Clarkson Upreal to confirm a May 2, 2019 arbitration award finding that Clarkson Upreal wrongfully terminated ECSI's contract and to foreclose ECSI's \$259,994.99 mechanic's lien filed against the Property. ECSI also asserted a cross claim against Gilad for diversion of Trust Fund Assets. ECSI alleged that, pursuant to Lien Law § 71, the funds received by Clarkson Upreal from Plenitude for construction at the Property were Lien Law Article 3-A Trust Fund Assets.

On July 2, 2019, ECSI commenced a third-party action against David Goldberger (Goldberger) and Eyal Yagev (Yagev) seeking damages under Lien Law 3-A for their alleged diversion of \$360,363.20 in Trust Fund Assets. Clarkson Upreal allegedly has two members: (1) 227 Clarkson Investors LLC (227 Clarkson), and (2) Upreal Brooklyn LLC (Upreal Brooklyn). Gilad is the alleged manager of both Clarkson Upreal and Upreal Brooklyn. Goldberger and Yagev are the alleged managers of 227 Clarkson. In June 2016,

Gilad, Goldberger and Yagev allegedly executed a unanimous written consent authorizing Clarkson Upreal to take out the underlying mortgages secured by the Property. Essentially, ECSI's third-party complaint alleges that Gilad, Goldberger and Yagev diverted and stole the mortgage proceeds, which were Trust Fund Assets intended to pay contractors, like ECSI, who worked on the construction project at the Property.

By a November 19, 2019 order entered on November 29, 2019, the court (Vaughan, J.) granted ECSI's cross claim against Clarkson Upreal to confirm the arbitration award and granted ECSI a \$360,363.20 judgment against Clarkson Upreal with interest from May 2, 2019 (*see* NYSCEF Doc No. 156). The court also granted ECSI summary judgment on its cross claim against Clarkson Upreal to foreclose its \$259,994.99 mechanic's lien. The court held that ECSI's remaining cross claim against Clarkson Upreal for diversion of Trust Fund Assets was "severed and shall continue . . ."

On or about December 12, 2019, ECSI served an information subpoena with restraining notice upon Signature Bank demanding that it restrain Clarkson Upreal's bank accounts. On or about February 5, 2019, ECSI delivered a property execution to the New York City Sheriff demanding a satisfaction of its judgment against Clarkson Upreal against funds held in Signature Bank accounts.

The March 2020 Subpoena

Thereafter, ECSI sought post-judgment discovery regarding the whereabouts of funds deposited into Clarkson Upreal's bank accounts. ECSI served a March 10, 2020 subpoena (March 2020 Subpoena) upon Signature Bank seeking:

“1. Any and all Signature Bank statements from January 1, 2016 to present for Signature Bank checking, brokerage, savings, interest-bearing or any other accounts held by New Upreal LLC or for which New Upreal LLC is a signatory or has an interest in.

2. Any and all Signature Bank statements for New Upreal LLC for the Signature Bank account held by New Upreal LLC with the account number ending in 5845, as stated on enclosed Check 1492 dated January 17, 2018.”

On May 4, 2020, Clarkson Upreal and New Upreal, a nonparty at the time,¹ moved for an order quashing the March 2020 Subpoena and granting Signature Bank a protective order on the ground that there was no basis for ECSI to obtain New Upreal’s bank statements to satisfy its judgment against Clarkson Upreal. ECSI cross-moved for an order compelling Signature Bank to comply with the March 2020 Subpoena. ECSI argued that New Upreal’s Signature Bank statements were relevant because bank records reflect that hundreds of thousands of dollars were transferred from Clarkson Upreal to New Upreal rendering Clarkson Upreal insolvent when it owed money to ECSI.

By a December 10, 2020 decision and order, this court granted ECSI’s cross motion compelling Signature Bank to comply with the March 2020 Subpoena which sought production of New Upreal’s Signature Bank statements “from January 1, 2016 to present” and denied Clarkson Upreal and New Upreal’s motion to quash the March 2020 Subpoena.

¹ On August 12, 2020, ECSI moved, by order to show cause, for leave to amend its third-party complaint to assert cross claims against New Upreal for: (1) diversion of Trust Fund Assets, pursuant to New York Lien Law Article 3-A; (2) enforcement of its judgment against New Upreal, pursuant to CPLR 5227; and (3) an injunction preventing New Upreal from transferring its property, pursuant to Lien Law § 77 (3) (a). ECSI’s motion was granted by the court’s December 10, 2020 decision and order.

This court held that the March 2020 Subpoena “seeks the production of New Upreal’s Signature Bank statements, which are relevant to ECSI’s claims that trust funds were diverted to New Upreal when Clarkson Upreal owed several hundred thousand dollars to various contractors who performed work at the Property including ECSI” (*see* NYSCEF Doc Nos. 268-273).

The April 2021 Subpoena

On or about April 28, 2021, ECSI served Signature Bank with a second post-judgment subpoena (April 2021 Subpoena) seeking Signature Bank statements for accounts held by New Upreal, Goldberger and Yagev from “March 2020 to present” and by Clarkson Upreal from “January 2020 to present” (*see* NYSCEF Doc No. 294).

On May 24, 2021, Clarkson Upreal and New Upreal moved for a protective order quashing the April 2021 Subpoena because it sought documents from 2020 to present when ECSI’s amended third-party complaint alleges that Clarkson Upreal made money transfers to New Upreal in 2018 and 2019. Koffsky Schwalb LLC, counsel for Clarkson Upreal and New Upreal, argued that “[t]his second Subpoena is palpably improper and is clearly a fishing expedition for documents that are completely irrelevant to ECSI’s claims herein.”

ECSI opposed the motion and cross-moved for an order compelling Signature Bank to comply with the April 2021 Subpoena. ECSI asserted that the March 2020 Subpoena sought all Signature Bank statements from New Upreal’s Signature Bank account ending in 5845 “from January 1, 2016 to present” and that the April 2021 Subpoena was merely an update to the prior discovery request. ECSI also cross-moved for summary judgment.

on its first cross claim against New Upreal for fraudulent conveyance and an order compelling New Upreal to turn over \$360,363.20 to ECSI with interest from May 2, 2019, which is owed by Clarkson Upreal. ECSI separately moved for an order declaring that its third-party action is a class action, pursuant to CPLR 901 and 902, on behalf of itself and all other contractors who performed work at the construction project.

The September 2021 Order

In the September 2021 Order, this court denied Clarkson Upreal and New Upreal's motion to quash the April 2021 Subpoena and granted ECSI's cross motion to compel Signature Bank's compliance. This court determined that the March 2020 and the April 2021 Subpoenas sought the exact same documents and that the April 2021 Subpoena was proper because it updated ECSI's prior document request in the March 2020 Subpoena.

The court also granted ECSI summary judgment on its cross claim against New Upreal, converted ECSI's cross motion into a special proceeding, pursuant to CPLR 103 (c), and directed New Upreal to turn over \$360,363.20 with interest from May 2, 2019 (minus \$4313.67 that ECSI already enforced) to ECSI as judgment creditor. Specifically, this court held that:

“ECSI has satisfied its prima facie burden of demonstrating that hundreds of thousands of dollars were improperly transferred from Clarkson Upreal, the judgment debtor, to New Upreal rendering Clarkson Upreal unable to pay its creditors, including ECSI . . . Notably, New Upreal, in opposition, failed to raise any factual issues that preclude summary judgment. ECSI documented several transfers of Trust Fund Assets from Clarkson Upreal's Signature Bank account to New Upreal's Signature Bank account, all of which were fraudulent

conveyances within the meaning of the New York Debtor and Creditor Law, and should, therefore, be used to satisfy ECSI's outstanding judgment against Clarkson Upreal in the amount of \$360,363.20 with interest from May 2, 2019 (less than \$4,313.67 already executed upon)" (see NYSCEF Doc Nos. 373-376 at 21).

The September 2021 Subpoenas

On September 27, 2021, ECSI served Signature Bank with three post-judgment subpoenas (September 2021 Subpoenas) seeking: (1) all Signature Bank statements for accounts held by New Brookland from "April 2021 to present" as well as the "signature card showing all individuals authorized to make changes" to any accounts held by New Brookland, including the account number ending in 5837; (2) all Signature Bank statements from "January 2018 to present" for the account ending in 6176 as well as the "signature card showing all individuals authorized to make changes" to the account ending in 6176; and (3) all Signature Bank statements for accounts held by New Upreal from "April 2021 to present" as well as the "signature card showing all individuals authorized to make changes" to any and all accounts held by New Upreal including the account number ending in 5845 (see NYSCEF Doc Nos. 384-386).

The New Upreal Parties' Motion to Quash the September 2021 Subpoenas

On October 18, 2021, the New Upreal Parties moved for a protective order quashing the September 2021 Subpoenas on the grounds that: (1) two of them pertain to non-party bank accounts and ECSI's assertion that there were fraudulent transfers to these nonparties does not justify intrusive discovery into third-party bank accounts, and (2) the September

2021 Subpoena regarding accounts held by New Upreal is duplicative because it is identical to the March 2020 and April 2021 Subpoenas, except that the September 2021 Subpoena calls for the production of signature cards.

*ECSI's Opposition to the New Upreal Parties'
Motion to Quash and Its Cross Motion to Compel*

ECSI opposed the New Upreal Parties' motion to quash and cross-moved to compel compliance with the September 2021 Subpoenas. ECSI argues that the court previously determined that Clarkson Upreal and New Upreal, their officers and other unknown agents fraudulently conveyed at least \$433,000.00 in Trust Fund Assets belonging to ECSI. ECSI's counsel asserts that an investigation into the bank statements of New Upreal and New Brookland reveals the following suspect transactions:

- (1) \$190,000.00 transferred from New Upreal's Signature Bank account to New Brookland's Signature Bank account on June 15, 2018;
- (2) \$42,000.00 transferred from New Upreal's Signature Bank account to New Brookland's Signature Bank account on August 10, 2018;
- (3) \$50,000.00 transferred from New Upreal's Signature Bank account to New Brookland's Signature Bank account on September 13, 2018;
- (4) \$100,000.00 transferred from New Upreal's Signature Bank account to a Signature Bank account ending in 6176 on December 31, 2020; and
- (5) \$50,000.00 transferred from New Upreal's Signature Bank account to a Signature Bank account ending in 6176 on February 2, 2021.

ECSI explains that the September 2021 Subpoena seeking New Brookland's bank records is merely an update to its April 2021 Subpoena, which was responded to without objection by Signature Bank and/or New Brookland on May 2, 2020. Regarding the September 2021 Subpoena seeking records regarding Signature Bank account ending in 6176, ECSI notes that no entity purporting to hold this bank account has objected to the April 2021 Subpoena and Koffsky Schwalb LLC, counsel for Clarkson Upreal and New Upreal, does not represent the entity that holds this bank account.

ECSI asserts that Koffsky Schwalb LLC's argument for quashing the September 2021 Subpoena (i.e., that the court has already ordered such records to be produced) is frivolous and warrants the imposition of Part 130 sanctions. ECSI argues that Koffsky Schwalb LLC's sole purpose for moving to quash subpoenas is to delay ECSI's ability to obtain information regarding the diversion of Trust Fund Assets which delays ECSI's ability to enforce its money judgment against Clarkson Upreal and its turnover order against New Upreal. ECSI thus seeks the imposition of a \$43,000.00 sanction upon Koffsky Schwalb LLC (10% of the \$433,000.00 that its clients have allegedly diverted) to deter future frivolous motion practice.

Lastly, ECSI seeks an order extending the "priority period" for that branch of the September 2021 Order which directed that certain assets of New Upreal be turned over to ECSI. ECSI explains that, pursuant to CPLR 5227, the September 2021 Order has a sixty-day period of priority over other money judgments held by others. ECSI seeks an extension of that "priority period" for an additional 120 days based on the issuance of a TRO on

November 8, 2021, which temporarily stayed “all judgment enforcement . . . as against New Upreal, LLC . . .” pending the hearing of ECSI’s order to show cause on December 2, 2021. ECSI contends that it needs additional time to defeat the efforts of Clarkson Upreal, New Upreal, Signature Bank, 927 Atlantic Investors LLC, Koffsky Schwalb LLC and unknown parties to secrete assets to which ECSI is entitled. Notably, however, ECSI’s notice of cross motion reflects that neither 927 Atlantic Investors LLC and/or its assignee, the 927 Atlantic Claims Trustee, were served with the cross motion regarding the extension of ECSI’s priority period.

***The New Upreal Parties’ Reply
and Opposition to ECSI’s Cross Motion***

The New Upreal Parties, in reply and in opposition to ECSI’s cross motion, argue that the September 2021 Subpoenas are defective and improper since two of them seek information about non-parties and the third subpoena is duplicative of ECSI’s prior subpoenas. Regarding that branch of ECSI’s cross motion seeking an extension of the “priority period,” the New Upreal Parties note that ECSI’s order to show cause seeks a determination that its money judgment has priority over a judgment held by 927 Atlantic Investors LLC, a non-party judgment creditor, which was not provided with notice of ECSI’s cross motion.

ECSI’s Order to Show Cause

Meanwhile, on October 26, 2021, ECSI moved, by order to show cause (signed on November 8, 2021, NYSCEF Doc No. 408), for an order: (1) pursuant to CPLR 5239,

declaring that any judgment obtained by non-party 927 Atlantic Investors LLC against New Upreal cannot be executed against the Trust Fund Assets held by Clarkson Upreal, including those Trust Fund Assets in New Upreal's Signature Bank account ending in 5845 because ECSI is a beneficiary of the Trust Fund Assets and possesses a superior right thereto; and (2) finding New Upreal and non-parties Koffsky Schwalb LLC and Signature Bank to be in contempt of this court's September 2021 Order. Notably, ECSI's order to show cause was only addressed to defendant Clarkson Upreal, third-party defendant New Upreal, Koffsky Schwalb LLC, non-party Signature Bank, non-party 927 Atlantic Investors LLC and the New York City Marshall. ECSI sought and obtained a TRO providing that:

“pursuant to CPLR 5240, all judgment enforcement be temporarily stayed as against New Upreal LLC, including the 927 Atlantic Investors judgment, as to those assets of Defendant Clarkson Upreal and Third-Party Defendant New Upreal within Signature Bank accounts especially the Signature Bank account ending in 5845, pending a hearing. . . of this motion [on December 2, 2021]” (emphasis added).

ECSI's counsel affirms that “[t]he Signature Bank statement for New Upreal's account ending in 5845 reveal that as of April 30, 2021, New Upreal Signature Bank account 5845 still contained the diverted Trust Fund Assets and then some, an amount of \$637,526.32 . . .” which is sufficient to satisfy the directive in the September 2021 Order that New Upreal shall turn over to ECSI, as judgment creditor, \$360,363.20 with interest from May 2, 2019 (\$76,952.75) minus \$4,313.67 that ECSI already collected for a total of \$433,002.23.

ECSI's counsel recounts that on September 16, 2021, he served Signature Bank with an information subpoena, a restraining notice and a copy of this court's September 2021 Order. By a September 16, 2021 letter, Signature Bank responded "**Please note: No funds available at time of service. Funds are being held from a previous judgment 07/28/21.**" ECSI's counsel affirms that he then sent a September 21, 2021 letter to Koffsky Schwalb LLC, counsel for New Upreal, "demanding that New Upreal comply with the September 2021 Order and turn over . . . \$433,002.33 to ECSI . . ."

ECSI's counsel affirms that he received an October 20, 2021 telephone call from Signature Bank's counsel, Ashley Newman, who informed him that there would be no turnover of funds "because the accounts of New Upreal had been restrained by 927 Atlantic Investors LLC, a judgment debtor of New Upreal, and that a property execution for those funds, including those in New Upreal account 5845, had been served upon Signature Bank by NYC Marshall Ronald Moses on or about September 28, 2021." Signature Bank's counsel advised that Signature Bank intended to disburse those funds in New Upreal's account ending in 5845 to 927 Atlantic Investors LLC. ECSI's counsel affirms that he then contacted Marshall Moses to confirm that the funds had not yet been executed upon.

ECSI's counsel affirms, upon information and belief, that non-party 927 Atlantic Investors LLC has sought to restrain and execute upon New Upreal's bank accounts based on a judgment it obtained in an unrelated action against New Upreal captioned *927 Atlantic Investors LLC, individually as well as derivatively on behalf of Atlantic Upreal LLC v Brookland Capital LLC, et al.*, Kings County index No. 507226/19 (927 Atlantic Action).

ECSI's counsel affirms that 927 Atlantic Investors LLC's \$4.1 million judgment against New Upreal in the 927 Atlantic Action is based on a November 10, 2020 settlement in which New Upreal consented to the entry of a judgment in favor of 927 Atlantic Investors LLC "without any sort of adjudication of merits and in resolution of unidentified claims." Notably, the settlement agreement in the 927 Atlantic Action specifically defined the term "Plaintiff" as "the party-plaintiff in the caption [927 Atlantic Investors LLC] as well as its successors and assignees, including GUY GISSIN, in his capacity as Claims Trustee for Brookland Upreal Limited" (see NYSCEF Doc No. 403 at Fn.1).

ECSI argues that 927 Atlantic Investors LLC cannot execute upon the Trust Fund Assets held in New Upreal's Signature Bank accounts to satisfy its judgment against New Upreal in the 927 Atlantic Action because: (1) the funds are Trust Fund Assets that are not subject to 927 Atlantic's restraining notice or levy because they do not belong to New Upreal, the trustee, and can only be paid to "legitimate Lien Law Trust Fund beneficiaries" like ECSI; (2) the funds in New Upreal's Signature bank account ending in 5845 do not belong to New Upreal because they were "fraudulent transfers that have been voided, thereby reverting the title to such monies back to Clarkson Upreal as of the date of the fraudulent transfers in September 2018"; and (3) ECSI "has a superior right to the specific assets of New Upreal at Signature Bank . . ." because ECSI filed notice of entry of this court's September 2021 Order on September 15, 2021, prior to 927 Atlantic Investors LLC's delivery of its order of execution to the Marshall on September 28, 2021. ECSI asserts that "[i]t is appropriate to hear this particular application in the instant action as the

September 2021 Order converted ECSI Contracting's cause of action *as against New Upreal* for a judgment pursuant to CPLR § 5227 into a special proceeding pursuant to CPLR 103 (c)" (emphasis added).

ECSI also seeks an order holding New Upreal, its defense counsel, Koffsky Schwalb LLC, and non-party Signature Bank in contempt of this court's September 2021 Order. ECSI asserts that New Upreal failed to comply with the September 2021 Order since it was served with notice of entry and letters demanding that it turn over the Trust Fund Assets. ECSI's counsel argues that "the managers of New Upreal, with the concerted assistance of Koffsky Schwalb LLC and Signature Bank are engaged in a further diversion of the Trust Fund Assets, this time in direct contravention [of] the September 2021 Order."

927 Atlantic Investors LLC's Opposition

Non-party 927 Atlantic Investors LLC, in opposition to ECSI's order to show cause, submits an attorney affirmation explaining that in July 2021, his office served a restraining notice on Signature Bank to restrain any accounts in New Upreal's name based on 927 Atlantic Investors LLC's judgment against New Upreal in the 927 Atlantic Action, and in September 2021, his office provided the New York City Marshal with a notice to levy the Signature Bank account in New Upreal's name. Counsel further affirms that "[o]n or about October 22, 2021, the Marshal sent a check for the proceeds of the levy in the amount of \$272,907.78, which my office received on or about November 1, 2021" and we disbursed the funds. In addition to his affirmation, 927 Atlantic Investors LLC's counsel submits a copy of the check that his office received from the Marshal.

927 Atlantic Investors LLC also submits a memorandum of law arguing that ESCI's order to show cause should be denied because: (1) it is "untimely" since the Marshal "already levied the funds of New Upreal and applied them to the satisfaction of the judgment in Atlantic Investors' Action" prior to the commencement of any special proceeding by ECSI against 927 Atlantic Investors LLC and/or its assignee, pursuant to CPLR 5239;² (2) ECSI's claims regarding the Trust Fund Assets are "invalid as a matter of law" because the September 2021 Order denied ESCI's motion for class action certification and, pursuant to Lien Law § 77 (1), ECSI's prosecution of its claims to Lien Law Trust Fund Assets "must be brought as a class action"; (3) 927 Atlantic Investors LLC "assigned its claim as against New Upreal to an unrelated party, Guy Gissin, in his capacity as Claims Trustee for Brookland Upreal Limited (the 'Claims Trustee'), who is not named in the instant action or ECSI's instant application, although the Claims Trustee is a necessary party"; and (4) "ECSI's counsel admits that New Upreal's account has funds in excess of the amount of ECSI's claim, and therefore those funds cannot possibly be entirely trust fund monies."

² 927 Atlantic Investors LLC argues that this court's prior conversion of ECSI's cause of action against New Upreal into a special proceeding, pursuant to CPLR 103 (c), does not satisfy the statutory requirement under CPLR 5239 that ECSI commence a separate special proceeding "against *the judgment creditor or other persons with whom a dispute exists* to determine the rights in the property or debt" (emphasis added). 927 Atlantic Investors LLC notes that New Upreal is not a judgment creditor nor a person with whom ECSI has a dispute over the funds that were disbursed.

***Clarkson Upreal, New Upreal and Non-Party
Koffsky Schwalb LLC's Opposition to ECSI's Contempt Motion***

Clarkson Upreal, New Upreal and non-party Koffsky Schwalb LLC only oppose that branch of ECSI's order to show cause seeking to hold them in contempt of the September 2021 Order based on New Upreal's failure to turn over the Trust Fund Assets. They submit an attorney affirmation asserting that "ECSI acknowledges that these same funds were subject to a restraining order by another creditor, 927 Atlantic" and argue that the inability to comply with an order is a defense to contempt, as a matter of law. They further argue that the September 2021 Order "was directed solely to New Upreal" and that no order was directed at either Clarkson Upreal or Koffsky Schwalb LLC.

Signature Bank's Opposition to ECSI's Contempt Motion

Signature Bank also opposes that branch of ECSI's order to show cause seeking to hold it in contempt of the September 2021 Order. Signature Bank's counsel affirms that:

"On or about October 20, 2021, after Signature had disbursed funds to Marshal Moses (and prior to the filing of this Order to Show Cause or the Court signing any Order to stay the enforcement of the September 2021 Order), I contacted ECSI's counsel to advise that Signature had received a Levy and Final Demand from City Marshal Ronald Moses directing Signature to levy upon funds in New Upreal's accounts in connection with 927 Atlantic's judgment, which had priority. In response, ECSI's counsel advised there was a priority dispute and that the funds in New Upreal's account(s) did not belong to New Upreal, but were the result of fraudulent transfers and that the funds could not be restrained because they were allegedly trust funds assets. I advised counsel that Signature was not a party to ECSI's underlying litigation and had no knowledge of the dispute related to who the funds belonged to, any dispute as to

the propriety of the restraining notices, or an order specifically directing Signature to act.”

Signature’s counsel recounts that after learning of the dispute and reviewing correspondence from ESCI’s counsel, she contacted the Marshal’s office to advise of the dispute regarding the funds that were released by Signature Bank in response to the levy. Signature’s counsel explains that “[a]s the funds had been disbursed by Signature, I requested that upon receipt of the funds, that the Marshal hold the funds in escrow, pending a judicial determination as to which creditor is entitled to the levied funds.” Signature’s counsel asserts that “[d]espite our request that the levied funds be held in escrow (and an apparent phone call from ESCI’s counsel requesting same), we were advised that the Marshal had disbursed the levied funds to 927 Atlantic.”

Discussion

(1)

The New Upreal Parties’ Motion to Quash and ECSP’s Cross Motion to Compel

CPLR 3124 provides that “[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article . . . the party seeking disclosure may move to compel compliance or a response.” “In general, the supervision of disclosure is left to the broad discretion of the trial court, which must balance the parties’ competing interests” (*JPMorgan Chase Bank, Nat. Ass’n v Levenson*, 149 AD3d 1053, 1054 [2017] [internal quotation marks omitted]). “[A]n application to quash a subpoena should be granted only where ‘the futility of the process to uncover anything

legitimate is inevitable or obvious’ or where the information sought is ‘utterly irrelevant to any proper inquiry’” (*George v Victoria Albi, Inc.*, 148 AD3d 1119, 1119-20 [2017] [internal and external citations omitted]). “It is the one moving to vacate the subpoena who has the burden of establishing that the subpoena should be vacated under such circumstances” (*Matter of Kapon v Koch*, 23 NY3d at 39 [citations omitted]).

Under CPLR 3101 (a) (4), a party may obtain discovery from a nonparty upon notice stating the circumstances or reasons that such disclosure is sought or required (*Kondratick v Orthodox Church in Am.*, 73 AD3d 708, 709 [2010]). There is “no requirement that the subpoenaing party demonstrate that it cannot obtain the required disclosure from any other source. . .so long as the disclosure sought is relevant to the prosecution or defense of any action, it must be provided by the nonparty” (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]; CPLR 3101 [a] [4]).

Here, for the third time, the New Upreal Parties have failed to establish any basis to quash ECSI’s September 2021 Subpoenas, which seek bank account information from Signature Bank. Contrary to the New Upreal Parties’ arguments, the justification proffered on the face of the September 2021 Subpoenas is neither flimsy nor conclusory since it identifies the court’s September 2021 Order granting ECSI summary judgment against New Upreal in the amount of \$360,363.20 and holding that ECSI is entitled to information regarding New Upreal’s finances, including transfers of funds from New Upreal’s bank accounts to New Brookland’s account and the Signature Bank account ending in 6176. Considering this court’s December 2020 Order, which determined that then non-party New

Upreal's bank statements were relevant to ECSI's claims of trust fund diversions from Clarkson Upreal to New Upreal, there is no question that the Signature Bank statements of New Brookland and the bank account ending in 6176 are similarly relevant. Furthermore, the September 2021 Subpoena seeking New Upreal's Signature Bank statements is not duplicative of the April 2021 Subpoena since the September 2021 Subpoena seeks *updated* bank statements from April 2021 to the present as well as the signature card for New Upreal's bank accounts. For these reasons, the New Upreal Parties' motion to quash the September 2021 Subpoenas is denied and ECSI's cross motion to compel compliance with the September 2021 Subpoenas is granted.

That branch of ECSI's cross motion to impose Part 130 sanctions upon New Upreal's defense counsel, Koffsky Schwalb LLC, "for its continuing pattern of frivolous conduct" is denied because ECSI has not demonstrated that defense counsel's conduct was sufficiently egregious to warrant the imposition of sanctions.

(2)

*ECSI's Request for Relief Affecting
Non-Party 927 Atlantic Investors LLC*

ECSI moves (in mot. seq. 17), by order to show cause, for a judgment, pursuant to CPLR 5239, declaring that non-party 927 Atlantic Investors LLC cannot execute its judgment against New Upreal in the 927 Atlantic Action against the Trust Fund Assets of Clarkson Upreal that are held in New Upreal's Signature Bank accounts, including the Signature Bank account ending in 5845.

CPLR 5239, entitled “Proceeding to determine adverse claims,” provides that:

“[p]rior to the application of property or debt by a sheriff or receiver to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the property or debt. Service of process in such a proceeding shall be made by service of a notice of petition upon the respondent . . . and such other person as the court directs, in the same manner as a notice of motion . . . Where there appear to be disputed questions of fact, the court shall order a separate trial . . .” (emphasis added).

Here, ECSI has failed to commence a special proceeding against 927 Atlantic Investors LLC or its assignee, the 927 Atlantic Claims Trustee, to determine the parties’ rights to the funds in New Upreal’s Signature Bank accounts, as required by CPLR 5239. While the September 2021 Order may have converted ECSI’s first cross claim in the amended third-party complaint *against New Upreal* into a special proceeding, pursuant to CPLR 103 (c), 927 Atlantic Investors LLC and its assignee, the 927 Atlantic Claims Trustee, are not parties to that special proceeding.

Additionally, ECSI may no longer have the statutory right to commence a special proceeding against 927 Atlantic Investors LLC and its assignee, pursuant to CPLR 5239, because the Marshal levied the funds in New Upreal’s Signature Bank account ending in 5845 and those funds have already been applied to satisfy 927 Atlantic Investors LLC’s judgment in the 927 Atlantic Action. Indeed, in July 2021, prior to ECSI’s October 2021 order to show cause and TRO (staying all judgment enforcement as against New Upreal), 927 Atlantic Investors LLC served a restraining notice upon Signature Bank to restrain

New Upreal's bank accounts, and in September 2021, the Marsal levied New Upreal's Signature Bank account ending in 5845 and the funds were distributed to satisfy 927 Atlantic Investors LLC's judgment against New Upreal. Consequently, ECSI's motion for a judgment declaring that non-party 927 Atlantic Investors LLC cannot execute its judgment in the 927 Atlantic Action against the Trust Fund Assets in New Upreal's Signature Bank account ending in 5845 is denied as moot.

ECSI also cross-moves (in mot. seq. 18) for a 120-day extension of the "priority period" for it to enforce its money judgment against New Upreal based on the fact that a November 8, 2021 TRO temporarily stayed "all judgment enforcement . . . as against New Upreal, LLC . . ." pending the hearing of its order to show cause on December 2, 2021. However, ECSI is the one who sought the 29-day TRO from this court staying all judgment enforcement against assets of Clarkson Upreal and New Upreal at Signature Bank, including its own, pending the hearing of its order to show cause. Other than the existence of the 29-day TRO, which ECSI explicitly sought, ECSI has failed to provide any other reason for a *four-month* extension of the priority period. In any event, the four-month extension that ECSI seeks would affect New Upreal's other creditors, like 927 Atlantic Investors LLC and its assignee, the 927 Atlantic Claims Trustee, none of which were provided with notice of ECSI's cross motion and an opportunity to be heard. Accordingly, ECSI's cross motion for a 120-day extension of the priority period is denied.

(3)

ECSI's Motion for Contempt

ECSI moves for an order, pursuant to Judiciary Law § 253, holding New Upreal, its defense counsel, non-party Koffsky Schwalb LLC, and non-party Signature Bank in civil contempt of the September 2021 Order.

“In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect[,]” “[i]t must appear, with reasonable certainty, that the order has been disobeyed[,]” “the party to be held in contempt must have had knowledge of the court’s order [and] prejudice to the right of a party to the litigation must be demonstrated” (*McCormick v Axelrod*, 59 NY2d 574, 583, *amended*, 60 NY2d 652 [1983]). “A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court” (*Chambers v Old Stone Hill Rd. Assocs.*, 66 AD3d 944, 946 [2009]; *see also Penavic v Penavic*, 109 AD3d 648, 649 [2013] [same]).

As a preliminary matter, the September 2021 Order directed that “*New Upreal* shall turn over to ECSI, as judgment creditor, \$360,363.20 with interest from May 2, 2019 (minus \$4,313.67 that ECSI already enforced), which is owed by the judgment debtor Clarkson Upreal, pursuant to CPLR 5227” (emphasis added). Thus, the September 2021 Order explicitly ordered *New Upreal* to turn over the Trust Fund Assets to ECSI. Importantly, the September 2021 Order does not contain any order or mandate specifically

directed at either Signature Bank or Koffsky Schwalb LLC, and thus, there is no basis to hold those non-parties in civil contempt of this court's September 2021 Order.

New Upreal argues that it cannot be held in contempt of the September 2021 Order because it was unable to turn over funds in its Signature Bank account ending in 5845 to ECSI because those funds were already subject to a prior restraining order from its judgment creditor, 927 Atlantic Investors LLC. New Upreal relies on a Second Department case holding that “[i]nability to comply with an order is a defense to both civil and criminal contempt” (*Lueker v Lueker*, 166 AD3d 603, 604 [2018]) [holding that “in response to the defendant’s showing that she was prejudiced by the plaintiff’s knowing disobedience of a lawful order [that plaintiff post a \$150,000.00 bond as security for payment of his daughter’s tuition], the plaintiff proffered credible evidence of his inability to obtain the required bond”)]. Other than its alleged inability to comply with the September 2021 Order based on the restraint of its Signature Bank account ending in 5845, New Upreal presents no other defense.

In the September 2021 Order, this court determined that several transfers of Trust Fund Assets from Clarkson Upreal’s Signature Bank account to New Upreal’s Signature Bank account ending in 5845 were fraudulent conveyances and “should . . . be used to satisfy ECSI’s outstanding judgment against Clarkson Upreal.” The September 2021 Order granted ECSI summary judgment on its third cross claim against New Upreal for fraudulent conveyance and explicitly ordered that “New Upreal shall turn over to ECSI, as judgment creditor, \$360,363.20 with interest from May 2, 2019 (minus \$4,313.67 that

ECSI already enforced), which is owed by the judgment debtor Clarkson Upreal, pursuant to CPLR 5227.” Thus, the clear and unequivocal mandate in the September 2021 Order required New Upreal to turn over the amount of the diverted Trust Fund Assets to ECSI, as judgment creditor, pursuant to CPLR 5227, without any reference to the particular funds that were deposited in New Upreal’s Signature Bank account ending in 5845. For this reason, this court rejects New Upreal’s excuse for its noncompliance, especially since New Upreal does not claim that it had/has no other source of funds from which it could satisfy ECSI’s judgment. New Upreal’s opposition to ECSI’s contempt motion failed to raise a factual dispute warranting a contempt hearing (*see Shemtov v Shemtov*, 153 AD3d 1295, 1296 [2017]).

There is no question that New Upreal failed to comply with the clear and unequivocal mandate in the September 2021 Order, of which it had knowledge, and that ECSI’s right and ability to recover the Trust Fund Assets has been impaired as a result. Consequently, this court finds that New Upreal is in civil contempt of this court’s mandate in the September 2021 Order that it to turn funds over to ECSI, pursuant to CPLR 5227. “Civil contempt has as its aim the vindication of a private party to litigation and any sanction imposed upon the contemnor is designed to compensate the injured private party for the loss of or interference with the benefits of the mandate” (*McCain v Dinkins*, 84 NY2d 216, 226 [1994]). Under the circumstances presented here, “the court may impose upon the offending party the other party’s reasonable costs and expenses, including attorney’s fees” (*Glennon v Mayo*, 174 AD2d 600, 601 [1991]).

Conclusion

Accordingly, it is

ORDERED that the New Upreal Parties' motion (mot. seq. 16) for a protective order and quashing the September 2021 Subpoenas served by ECSI upon non-party Signature Bank is denied; and it is further

ORDERED that the branch of ECSI's motion (mot. seq. 17) for a judgment, pursuant to CPLR 5239, declaring that non-party 927 Atlantic Investors LLC's judgment against New Upreal in the 927 Atlantic Action cannot be executed against Trust Fund Assets held in New Upreal's Signature Bank accounts, including Signature Bank account ending in 5845 is denied; and it is further

ORDERED that the branch of ECSI's motion (mot. seq. 17) for an order, pursuant to Judiciary Law § 753, finding that New Upreal is in civil contempt of the September 2021 Order is granted, New Upreal shall pay ECSI its reasonable litigation costs and expenses that it incurred since the September 2021 Order was entered in an effort to enforce its fraudulent conveyance judgment against New Upreal, including reasonable attorneys' fees,

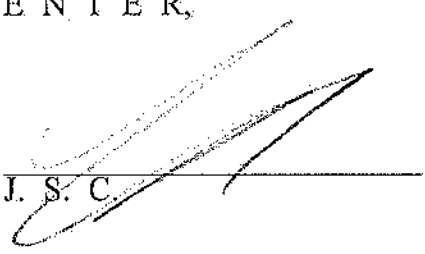
and the parties shall appear for a virtual hearing on before a Special Referee assigned to hear and report _____, ~~2022~~, to determine,

~~upon an evidentiary showing by ECSI,~~ the reasonable costs and fees which ECSI incurred as a result of New Upreal's failure to comply with the mandate in the September 2021 Order. ECSI's motion for a contempt order against non-parties Koffsky Schwalb LLC and Signature Bank is denied; and it is further

ORDERED that ECSI's cross motion (mot. seq. 18) is only granted to the extent that Signature Bank is compelled to comply with ECSI's September 2021 Subpoenas and shall do so within 20 days after service of this order with notice of entry upon all parties and Signature Bank; ECSI's cross motion is otherwise denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**