

**Plenitude Capital LLC v Clarkson Upreal LLC**

2020 NY Slip Op 34118(U)

December 10, 2020

Supreme Court, Kings County

Docket Number: 524480/18

Judge: Lawrence S. Knipel

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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 10<sup>th</sup> day of December, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X

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.,  
USC-KINGS, LLC, SILVERCUP SCAFFOLDINGS-1 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, distributes, 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.

-----X

-----X  
ECSI CONTRACTING CORPORATION,

Third-Party Plaintiff,

- against -

DAVID GOLDBERGER, EYAL YAGEV and JANE DOE  
No. 1 through 10,

Third-Party Defendants.  
-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_

161-172, 239-174-182 190-216 217-224 225-237 243-256, 259

Opposing Affidavits (Affirmations) \_\_\_\_\_

226-237

258, 262

Reply Affidavits (Affirmations) \_\_\_\_\_

241

Upon the foregoing papers in this action to foreclose a mortgage on the commercial property at 227 Clarkson Avenue in Brooklyn (Property), plaintiff Plenitude Capital LLC (Plenitude) moves (in motion sequence [mot. seq.] six) for an order: (1) confirming the February 7, 2020 Referee's Report of Amount Due (Referee's Report), as supplemented by the February 6, 2020 hearing testimony of Roy Gerstner on behalf of Plenitude, pursuant to CPLR 4403; (2) granting it a judgment of foreclosure and sale in the sum of \$2,535,569.18 through February 6, 2020, plus reasonable attorneys' fees and expenses incurred through the date of the closing, together with interest thereon; and (3) directing that the Property be sold in one parcel at public auction, subject to necessary restrictions, and that any party to this action may purchase the Property at the foreclosure.

sale.

Defendant Clarkson Upreal LLC (Clarkson Upreal) and nonparty New Upreal LLC (New Upreal) move (in mot. seq. seven) for an order, pursuant to CPLR 2304, 3103 (a) and 3124, quashing the March 10, 2020 subpoena duces tecum served upon Signature Bank and granting a protective order.

Defendant/third-party plaintiff ECSI Contracting Corporation (ECSI) moves (in mot. seq. eight) for an order, pursuant to CPLR 3215, granting it a default judgment against defendant Boaz Gilad (Gilad), third-party defendants David Goldberger (Goldberger) and Eyal Yagev (Yagev).

The law firm of Zelenitz, Shapiro & D'Agostino, P.C. (Zelenitz Law Firm) moves (in mot. seq. nine), by order to show cause, for an order permitting it to withdraw as counsel for defendant Clarkson Upreal.

Defendant/third-party plaintiff ECSI cross-moves (in mot. seq. ten) for an order, pursuant to CPLR 2308 (b), compelling compliance with its March 10, 2020 subpoena duces tecum served upon Signature Bank.

Defendant/third-party plaintiff ECSI moves (in mot. seq. 11), by order to show cause, for an order: (1) granting it leave to amend the third-party complaint to assert causes of action under Lien Law Article 3-A, New York Debtor and Creditor Law Article 10 and CPLR 5227 as against third-party defendant New Upreal; (2) compelling third-party defendant New Upreal to produce an interim accounting and banking records of all

Lien Law Article 3-A trust funds received and disbursed regarding the construction project at the Property, pursuant to Lien Law 77 (3) (a) (i); (3) terminating the authority of third-party defendant New Upreal to make any further disbursements of Lien Law Article 3-A trust funds without authorization of the court, pursuant to Lien Law 77 (3) (a) (iv); (4) requiring third-party defendant New Upreal to give security to ensure the proper distribution of the Lien Law Article 3-A trust funds, pursuant to Lien Law 77 (3) (a) (v); (5) ordering New Upreal to distribute Lien Law Article 3-A trust funds to ECSI in the amount of its judgment, and once it identifies all other available Lien Law Article 3-A trust funds, requiring New Upreal to either provide security to ensure the proper distribution of the Lien Law Article 3-A trust funds or to deposit the Lien Law Article 3-A trust funds into an escrow account outside of its control for future distributions pending the determination of the amounts due to other beneficiaries, pursuant to Lien Law 77 (3) (a) (v); and (6) directing third-party defendant New Upreal to turn over to third-party plaintiff ECSI, as judgment creditor, \$360,363.00 with interest from May 2, 2019, owed to it by judgment debtor Clarkson Upreal, and entering a judgment against New Upreal in favor of third-party plaintiff ECSI in the amount of any shortfall, pursuant to CPLR 5227.

### *Background*

#### *The Foreclosure Action*

On December 5, 2018, Plenitude commenced this action to foreclose commercial mortgages encumbering the Property by filing a summons, a verified complaint and a

notice of pendency against the Property. The mortgages were allegedly executed by defendant Clarkson Upreal to secure two separate promissory notes for \$800,000.00 and \$2.4 million in favor of Plenitude, as mortgagee/lender. Under the terms of the mortgages, Clarkson Upreal was required to hold the loan proceeds as trust funds that were intended to fund a construction project at the Property. Defendant Gilad, the manager of Clarkson Upreal, allegedly guaranteed the mortgages and notes. 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.

On January 7, 2019, defendant Silvercup Scaffolding 1 LLC interposed a notice of appearance. On January 11, 2019, defendant USC-Kings, LLC s/h/a USC-Kings (USC) answered the complaint and asserted cross claims. On February 1, 2019, defendants Clarkson Upreal and Gilad collectively answered the complaint. On February 28, 2019, defendant New York Pile & Concrete Structures Corp. (NY Pile) answered the complaint and asserted cross claims.

On April 29, 2019, defendant ECSI answered the complaint and asserted cross claims against Clarkson Upreal to confirm an arbitration award and to foreclose its mechanic's lien, and against Gilad for diversion of Lien Law Article 3-A trust funds.<sup>1</sup> Gilad failed to answer or otherwise respond to ECSI's cross claim.

---

1

ECSI alleges that, pursuant to Lien Law § 71, all funds received by Clarkson Upreal from Plenitude for construction at the Property constituted Lien Law Article 3-A trust funds.

5

On July 2, 2019, ECSI commenced a third-party action against Goldberger and Yagev seeking damages under New York Lien Law 3-A for alleged trust fund diversions in the amount of \$360,363.20. Clarkson Upreal allegedly has two members: (1) 227 Clarkson Investors LLC (227 Clarkson), and (2) Upreal Brooklyn LLC (Upreal Brooklyn). Gilad is allegedly the manager of Upreal Brooklyn. Goldberger and Yagev are allegedly the managers for 227 Clarkson. In June 2016, Gilad, Goldberger and Yagev allegedly executed a unanimous written consent authorizing Clarkson Upreal to take out the underlying mortgage loans secured by the Property. Essentially, ECSI's third-party complaint alleges that Gilad, Goldberger and Yagev diverted and stole the loan proceeds intended to pay the contractors on the construction project at the Property. On October 29, 2019 and November 6, 2019, ECSI served process upon Goldberger and Yagev, respectively, pursuant to the Hague Convention, since Goldberger and Yagev both reside in Israel.<sup>2</sup> Goldberger and Yagev failed to answer or otherwise appear in ECSI's third-party action.

By a November 19, 2019 order, the court (Vaughan, J.) granted ECSI's first cross claim against Clarkson Upreal to confirm an arbitration award and granted ECSI a \$360,363.20 judgment against Clarkson Upreal with interest running from May 2, 2019. The court also granted ECSI summary judgment on its second cross claim against

---

<sup>2</sup> By a March 6, 2020 order, this court (Knipel, J.) granted ECSI's motion for an extension of time to effect service of process upon Goldberger and Yagev.

Clarkson Upreal to foreclose on its \$259,994.99 mechanic's lien. The court held that ECSI's remaining cross claim against Clarkson Upreal for diversion of Lien Law Article 3-A trust funds is "severed and shall continue . . ."

The remaining defendants to this foreclosure action, Elevation Holdings, LLC, GZA Geoenvironmental, Inc. d/b/a GZA Geoenvironmental of New York, Guma Construction Corp. and New York City Environmental Control Board failed to answer or otherwise appear in this action.

***The Referee's Report***

By a December 23, 2019 order, the court (Vaughan, J.) granted Plenitude's motion for summary judgment against Clarkson Upreal, Gilad, NY Pile and USC, and issued an order of reference appointing a referee to compute the amount due to Plenitude on the mortgages and promissory notes. After a February 6, 2010 hearing, the referee issued the Referee's Report, which concluded that the sum of \$2,535,569.18 is due and owing to Plenitude through February 6, 2020, and that the Property should be sold in one parcel.

***Plenitude's Motion to Confirm and  
for a Judgment of Foreclosure and Sale***

On March 9, 2020, Plenitude moved to confirm the Referee's Report, for a judgment of foreclosure and sale in the sum of \$2,535,569.18 through February 6, 2020, and that the judgment include an award of reasonable legal fees based on the mortgages. Plenitude's counsel submits invoices reflecting that Plenitude incurred \$78,375.05 in attorneys' fees and costs in prosecuting this action and an affirmation providing an



overview of the legal work performed. Plenitude also submits an affidavit from Roy Gerstner, its servicing agent, who attests that the foreclosure can proceed notwithstanding the COVID-19 pandemic since the Property is “vacant and abandoned.”<sup>3</sup>

*Clarkson Upreal and New Upreal's  
Motion to Quash the March 10 Subpoena*

On May 4, 2020, defendant Clarkson Upreal and nonparty New Upreal moved for an order quashing a March 10, 2020 postjudgment subpoena duces tecum that ECSI served on Signature Bank (March 10 Subpoena) and granting Signature Bank a protective order. Movants assert that:

“[t]he Subpoena is not only facially defective because it fails to give the notice required by CPLR § 3101 (a) (4), but it is overbroad and seeks information wholly irrelevant to ECSI’s judgment against defendant Clarkson Upreal, *i.e.*, it seeks years of bank account statements from January 1, 2016 related to non-party New Upreal, not Clarkson Upreal.

“ECSI made no claims against New Upreal. ECSI’s judgment is against Clarkson Upreal. There is no basis for ECSI to obtain bank account statements for New Upreal, and there is no explanation in the subpoena for it seeking such documents and, therefore, the subpoena is facially deficient. The Court should quash the Subpoena and issue a protective order relieving Signature Bank of any obligation to produce any such documents.”

The March 10 Subpoena, a copy of which is in the record, seeks:

---

<sup>3</sup> See June 23, 2020 Memorandum of Chief Administrative Judge Lawrence K. Marks re: Procedure for Addressing Residential and Commercial Foreclosure Proceedings available at <http://www.nycourts.gov>.

“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.”

Movants admit that the check referenced in the second request was paid to ECSI by New Upreal in connection with the Property, yet argues that “the existence of a single 2018 payment from New Upreal is not a basis to obtain years of bank records relating to an entity from which ECSI has no judgment or relationship.”

***ECSI's Opposition and Cross Motion To Compel Compliance with the March 10 Subpoena***

ECSI opposes Clarkson Upreal and New Upreal's motion to quash the March 10 Subpoena and cross-moves for an order compelling Signature Bank's to comply. ECSI submits an affidavit from Dino Evangelista (Evangelista), its President, attesting that in January 2018, ECSI and Clarkson Upreal entered into an agreement where ECSI agreed to provide excavation, foundation and concrete superstructure work at the Property for the construction project. Evangelista further attests that ECSI received a payment for its services at the Property from New Upreal, an affiliate of defendant Clarkson Upreal, via check from New Upreal's Signature Bank account ending in 5845. Evangelista attests that Clarkson Upreal breached its contract with ECSI by failing to make further payments

and wrongfully terminating the contract. Evangelista recounts that an arbitration ensued, after which ECSI was awarded \$360,363.20 against Clarkson Upreal. By a September 23, 2019 order, the court (Vahghan, J.) granted ECSI's motion to confirm the arbitration award. On or about November 29, 2019, a \$379,011.83 judgment was entered in favor of ECSI and against Clarkson Upreal.

ECSI's counsel affirms that his law firm served a postjudgment information subpoena upon Signature Bank seeking Clarkson Upreal's bank statements, and "[t]he bank statements of Clarkson Upreal revealed that the proceeds of [Plenitude's] Loans were deposited in the Clarkson Upreal Signature Bank account ending in 4840" and that "as soon as the proceeds of the Bank Loans were deposited in the Clarkson Upreal Signature Bank account, they were transferred to a different Signature Bank account ending in 5845[,] which belongs to New Upreal. ECSI submits evidence that substantial sums were transferred from Clarkson Upreal's Signature Bank account to New Upreal's Signature Bank account, thereby rendering Clarkson Upreal insolvent. At that time, six separate contractors had filed mechanic's liens against the Property.

ECSI contends that New Upreal's Signature Bank statements are "highly relevant" to ECSI's claims because the bank records reflect "the transfer of hundreds of thousands of dollars from Clarkson Upreal to New Upreal at a time when Clarkson Upreal owed several hundred thousand dollars to ECSI[,] the transfers were made without fair consideration and that they rendered Clarkson Upreal insolvent. ECSI argues that

“[t]hese facts render the transfers fraudulent and subject to avoidance under New York Debtor and Creditor Law § 273.” ECSI further contends that Clarkson Upreal and New Upreal lack standing to quash the March 10 Subpoena because the March 10 Subpoena was not directed at them.

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

Clarkson Upreal and New Upreal, in opposition to ECSI’s cross motion and in further support of their motion to quash, argue that the March 10 Subpoena is “overbroad and seeks information wholly irrelevant to ECSI’s judgment against defendant Clarkson Upreal . . .” Essentially, movants argue that information about nonparties and their assets is not proper for discovery by a judgment creditor, and that there is no justification for ECSI seeking four years of bank statements. Clarkson Upreal and New Upreal contend that they have standing to seek a protective order and to quash the March 10 Subpoena upon Signature Bank because it seeks documents that concern them.

***ECSI’s Motion for a Default Judgment***

On May 14, 2020, ECSI moved for an order granting it a default judgment against defendant Gilad and third-party defendants Goldberger and Yagev. ECSI asserts that, in August 2019, it served Clarkson Upreal and Gilad with a discovery demand seeking copies of New York Lien Law 3-A trust accounts relating to contracts and subcontracts for the construction at the Property. Clarkson Upreal and Gilad failed to respond to the ECSI’s discovery request. ECSI asserts that Clarkson Upreal and Gilad’s failure to

produce such documents “establish that Clarkson Upreal and its managers, Gilad, Goldberger and Yagev, failed to keep the statutorily required books and records[,]” which is “presumptive evidence that Clarkson Upreal LLC and its managers . . . applied or consented to the application of trust funds for purposes other than a purpose of the trust.” ECSI thus seeks a default judgment against Gilad, Goldberger and Yagev in the amount of \$360,363.20 with interest from May 2, 2019.

***The Zelenitz Law Firm’s Motion To Withdraw  
As Defense Counsel to Clarkson Upreal***

On May 14, 2020, the Zelenitz Law Firm moved, by order to show cause, for an order permitting it to withdraw as defense counsel for Clarkson Upreal “as the firm was discharged . . .” Lavinia A. Acaru, Esq. submits an affirmation on behalf of the Zelenitz Law Firm, and affirms that she “would be happy to discuss the particulars with the court, ex parte, so as not to prejudice the rights of Defendant CLARKSON UPREAL LLC.”

More specifically, attorney Acaru affirms that:

“Your affirmant does not believe that it would be appropriate to divulge further details for fear of prejudicing the client *vis-à-vis* the Court’s perspective and for fear of disclosing confidential attorney-client information. However, if this Court deems it necessary, this office will provide further details in an affidavit to be filed with the Court for *in camera* review.”

The Zelenitz Law Firm asserts that under the Rules of Professional Conduct, “a request to withdraw as counsel may be granted on the grounds that ‘the lawyer is discharged.’”

***ECSI’s Motion for Leave To***

*Amend the Third-Party Complaint*

On August 12, 2020, ECSI moved, by order to show cause, for leave to amend its third-party complaint to assert causes of action against New Upreal for: (1) diversion of trust assets, pursuant to New York Lien Law Article 3-A; (2) enforcement of its money judgment against New Upreal, pursuant to CPLR 5227; and (3) a preliminary injunction preventing New Upreal from transferring its property, pursuant to Lien Law § 77 (3) (a). In addition, ECSI seeks: (1) an order directing New Upreal to provide an interim accounting, pursuant to Lien Law § 77 (3) (a) (i); (2) an order terminating New Upreal's ability to disburse any trust funds; (3) an order requiring New Upreal to provide security, pursuant to Lien Law § 77 (3) (a) (v); and (4) an order requiring New Upreal to distribute the trust funds to ECSI.

ECSI asserts that the only payment it received for the construction project at the Property was issued by New Upreal, and that Clarkson Upreal's bank records obtained during postjudgment discovery reveal "large transfers of Lien Law Art. 3-A trust funds to [New Upreal]." Essentially, ECSI contends that "[i]nstead of using the Trust Fund Assets to pay contractors . . . , Clarkson Upreal diverted the Trust Fund Assets to New Upreal, which retained the Trust Fund Assets as ECSI . . . and other contractors . . . , went unpaid for their services." ECSI explains that because Plenitude's mortgages have priority over the mechanic's liens filed against the Property, "the inevitable outcome is that the workers at the . . . Project will not be paid unless the diverted Lien Law Art. 3-A funds

are recovered.” ECSI asserts that “New Upreal has overlapping ownership with Clarkson Upreal and has been aware of [its] potential claims for years, and cannot be said to be either prejudiced or surprised by the amendment.”

### *New Upreal's Opposition*

New Upreal, in opposition, contends that ECSI's motion for leave to amend its third-party complaint to assert claims against it should be denied because: (1) New Upreal's 2018 balance sheet reflects that ECSI has no trust fund claim because “the expenses paid for the Project exceeded the amount of the loan which ECSI claims constituted trust funds . . .”; (2) the accounting and security that ECSI seeks under the Lien Law from New Upreal, the alleged “transferee” of the trust funds, is only available from Clarkson Upreal, the alleged “trustee” of the trust funds; and (3) ECSI's proposed claim against New Upreal under CPLR 5227 can only be asserted in a special proceeding.

### *Discussion*

#### *(1)*

#### *Plenitude's Motion To Confirm the Referee's Report and for a Judgment of Foreclosure and Sale*

“The report of a referee should be confirmed whenever the findings are substantially supported by the record, and the referee has clearly defined the issues and resolved matters of credibility” (*Flagstar Bank, F.S.B. v Konig*, 153 AD3d 790, 790-791 [2017]). Here, the Referee's Report is substantially supported by the record, the referee

has clearly defined the issues and found that Plenitude's witness was credible.<sup>4</sup> Accordingly, Plenitude's motion to confirm the Referee's Report and for a judgment of foreclosure and sale is granted without opposition.

(2)

*Clarkson Upreal and New Upreal's Motion To  
Quash and ECSI'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]).

Here, ECSI is entitled to an order compelling Signature Bank to comply with the March 10 Subpoena because Clarkson Upreal's bank statements revealed that after the proceeds of the Plenitude loans were deposited in the Clarkson Upreal Signature Bank account, they were transferred to New Upreal's Signature Bank account ending in 5845. ECSI submits evidence of those transfers, which thereby rendered Clarkson Upreal insolvent. The March 10 Subpoena seeks the production of New Upreal's Signature Bank

---

<sup>4</sup> Although all parties received notice of the hearing, only Plenitude's counsel and Plenitude's witness appeared for the hearing before the referee.



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. Consequently, Clarkson Upreal and New Upreal's motion to quash the March 10 Subpoena and for a protective order is denied.

(3)

*ECSI's Motion for a Default Judgment  
Against Gilad, Goldberger and Yagev*

CPLR 3215 (a) provides, in relevant part, that "[w]hen a defendant has failed to appear . . . the plaintiff may seek a default judgment against him." ECSI has demonstrated that it served Gilad with its cross claims and Gilad failed to answer or otherwise respond to ECSI's cross claims. ECSI has also demonstrated that it served Goldberger and Yagev with its third-party complaint pursuant to the Hague Convention and those third-party defendants failed to answer or otherwise respond to the third-party complaint. ECSI's motion for a default judgment against defendant Gilad and third-party defendants Goldberger and Yasev is therefore granted without opposition.

(4)

*Zelenitz Law Firm's Motion to Withdraw  
As Defense Counsel to Clarkson Upreal*

"The decision to grant or deny permission for counsel to withdraw lies within the discretion of the trial court . . ." (*Cashdan v Cashdan*, 243 AD2d 598, 598 [1997]). Here,

since the Zelenitz Law Firm was discharged by Clarkson Upreal, the Zelenitz Law Firm's motion to withdraw as counsel to Clarkson Upreal is granted without opposition.

(5)

***ECSI's Motion For Leave To  
Amend the Third-Party Complaint***

CPLR 3025 (b) provides that “[a] party may amend his pleading, or supplement it . . . at any time by leave of court . . .” and “[l]eave shall be freely given upon such terms as may be just . . .” “While leave to amend a pleading shall be freely granted . . . a motion for leave to amend is committed to the broad discretion of the court” (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640 [2015]). “Generally, in the absence of prejudice or surprise to the opposing party, leave to amend pleadings should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit” (*id.*; see also *Rodgers v New York City Transit Authority*, 109 Ad3d 535, 536 [2013]).

Here, ECSI's motion for leave to amend its third-party complaint is only granted to the extent that: (1) New Upreal is added as a third-party defendant in the third-party action, and (2) ECSI may assert causes of action against New Upreal for diversion of New York Lien Law Article 3-A trust funds, fraudulent conveyance under the New York Debtor and Creditor Law and to enforce its money judgment pursuant to CPLR 5227.

ECSI has produced bank records evidencing that the proceeds of the Plenitude mortgage loans, which were specifically designated as New York Lien Law Article 3-A

trust funds intended to pay the contractors at the Property, may have been diverted from Clarkson Upreal to New Upreal, a related entity. ECSI sufficiently alleges in the proposed amended third-party complaint that such funds were transferred from Clarkson Upreal to New Upreal without fair consideration, that the transfer of such funds rendered Clarkson Upreal insolvent and was intended to defraud Clarkson Upreal's creditors, including ECSI. New Upreal, in opposition, has failed to establish that ECSI's proposed claims are palpably insufficient or patently devoid of merit. In addition, New Upreal has not demonstrated that it would be prejudiced or surprised by the foregoing amendments to the third-party complaint.

In addition to amending the third-party complaint, ECSI seeks other relief against New Upreal, including an injunction, an interim accounting and the posting of security, all pursuant to New York Lien Law § 77 (3) (a). The statute, however, expressly states that such relief can be obtained from the "trustee" of the trust, which is Clarkson Upreal. Such relief is not available from New Upreal, the alleged transferee of the trust funds. Furthermore, ECSI's motion for a judgment against New Upreal, pursuant to CPLR 5227, is premature, since New Upreal has not had an opportunity to answer or otherwise respond to the amended third-party complaint. Consequently, the remainder of ECSI's motion is denied. Accordingly, it is

**ORDERED** that Plenitude's motion (in mot. seq. six) for a judgment of foreclosure and sale against Clarkson Upreal and an order confirming the Referee's

Report and an award of attorneys' fees and costs is granted in its entirety without opposition, and Plenitude shall settle an order on notice; and it is further

**ORDERED** that Clarkson Upreal and New Upreal's motion (in mot. seq. seven) for an order quashing the March 10 Subpoena served upon Signature Bank and granting a protective order is denied; and it is further

**ORDERED** that ECSI's motion (in mot. seq. eight) for a default judgment against defendant Gilad and third-party defendants Goldberger and Yagev is granted without opposition in the amount of \$360,363.20 with interest from May 2, 2019, and ECSI shall settle an order on notice; and it is further

**ORDERED** that the Zelenitz Law Firm's motion (in mot. seq. nine) for leave to withdraw as counsel for defendant Clarkson Upreal is granted without opposition; and it is further

**ORDERED** that ECSI's cross motion (in mot. seq. ten) for an order compelling Signature Bank to comply with the March 10 Subpoena is granted, and Signature Bank shall comply with the March 10 Subpoena within 30 days after service of this order with notice of entry upon all parties and Signature Bank; and it is further

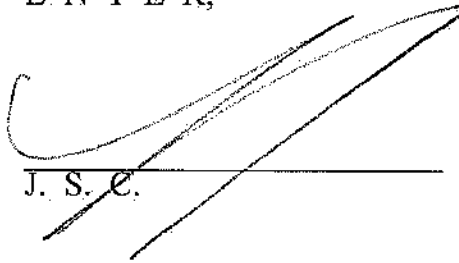
**ORDERED** that ECSI's motion (in mot. seq. 11) is only granted to the extent that ECSI is permitted to amend its third-party complaint in accordance with this decision and order to include New Upreal as a third-party defendant and to assert causes of action against New Upreal under Lien Law Article 3-A, New York Debtor and Creditor Law

and CPLR 5227; and ECSI's motion is otherwise denied; and it is further

**ORDERED** that ECSI shall serve and file its amended third-party complaint upon New Upreal and all appearing parties to the main and third-party actions within 30 days after service of this decision and order with notice of entry thereof.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

Justice Lawrence Knipel