

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

FICUS INVESTMENTS, INC. and PRIVATE
CAPITAL GROUP, LLC,

Index No. 600926/2007E

Plaintiffs,

-against-

PRIVATE CAPITAL MANAGEMENT, LLC,
THOMAS B. DONOVAN, GERARD M.
BAMBRICK, ESQ., BAMBRICK & RYAN, P.C,
CHRISTOPHER CHALAVOUTIS, CHALAVOUTIS
& CO. CPA'S P.C., VIRGINIA DONOVAN,
PAMELA DONOVAN, MICHAEL BODE, ESQ.,
SCOTT BURGWIN, ALISSA GLADSTONE, PETER
KAMRAN, JOHN KILEY, FIRST REO CORP.,
KIRBY ENTERPRISES I CORP., LANDPORT
EQUITIES, LTC REALTY CORP., M&O
ENTERPRISES, PGA EQUITIES, PLAZA
EQUITIES, PLAZA INVESTMENTS, PRIVATE
CAPITAL CORP., PRIVATE CAPITAL SERVICING
CORP., PRIVATE LENDER SERVICES CORP.,
PRIVATE LENDER WAREHOUSE CORP.,
PRIVATE CAPITAL MANAGEMENT GROUP OF
NY LLC, and JOHN DOES 1-10,

NOTICE OF ENTRY

Defendants.

THOMAS B. DONOVAN individually and
derivatively on behalf of PRIVATE CAPITAL
GROUP, LLC, PRIVATE CAPITAL
MANAGEMENT, LLC, and PRIVATE CAPITAL
MANAGEMENT CORP.,

Counterclaim Plaintiffs

-against-

FICUS INVESTMENTS, INC. and PRIVATE
CAPITAL GROUP, LLC,

Counterclaim Defendants,

-and-

PRIVATE CAPITAL GROUP, LLC, PRIVATE
CAPITAL MANAGEMENT, LLC, and PRIVATE
CAPITAL MANAGEMENT CORP.,

Nominal Defendants.

THOMAS B. DONOVAN individually and
derivatively on behalf of PRIVATE CAPITAL
GROUP, LLC and PRIVATE CAPITAL
MANAGEMENT LLC,

Third-Party Plaintiffs,

-against-

JOSEPH C. LEWIS, JEFFERSON R. VOSS, TYLER
V. PIERCY, THOMAS B. YOUTH, LAWRENCE A.
CLINE and PETER SCHANCUPP,

Third-Party Plaintiffs,

-and-

PRIVATE CAPITAL MANAGEMENT, LLC, and
PRIVATE CAPITAL MANAGEMENT CORP.,

Nominal Defendants.

PLEASE TAKE NOTICE, that annexed hereto is a true and accurate copy of the Court's
Order dated July 14, 2008 and entered and filed with the Clerk of Court on July 15, 2008.

DATED: New York, New York
July 15, 2008

COLE, SCHOTZ, MEISEL,
FORMAN & LEONARD, P.A.
A Professional Corporation

By: 

Nolan E. Shanahan
900 Third Avenue, 16th Floor
New York, NY 10022-4728
(212) 752-8000

and

GREENBERG FREEMAN LLP.
110 East 59th Street
29th Floor
New York, New York 10022
(212) 838-9738

Attorneys for Third-Party Defendant
Lawrence A. Cline

TO:

ALL COUNSEL OF RECORD

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED
Justice

PART 60

FICUS INVESTMENTS, INC.
And PRIVATE CAPITAL GROUP, LLC,
Plaintiffs,

INDEX NO. _____

E-FILE
600926/2007

MOTION DATE _____

- v -

MOTION SEQ. NO. 039

PRIVATE CAPITAL MANAGEMENT, LLC, et al.,
Defendants.

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED
JUL 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

Third-party Defendant, Lawrence A. Cline ("Cline"), joined by Plaintiff Ficus Investments, Inc. ("Ficus") moves, by way of order to show cause, for an order that would

- (1) dismiss the complaints, counterclaims, and third-party complaints filed by Defendant Thomas B. Donovan ("Donovan") and all parties acting in privity with him, in this action, as well as in three of the related actions pending in New York County;¹
- (2) restrain the use, disclosure or dissemination of any information obtained by

¹

The three related actions Cline refers to are: *New York Holding Corp. v. PCG REA LLC, et al.* (Index No. 602795/2007); *422 East 84th Street Holding Corp. v. PCG REA LLC, et al.* (Index No. 602839/2007); and *Thomas B. Donovan v. Ficus Investments, Inc., et al.* (Index No. 602715/2007).

The other related actions currently pending in this Court are *Banque Portfolio Corp. v. Daniel S. Torchio, et al.* (Index No. 650339/2007) and *Private Capital Group and Ficus Investments, Inc. v. Thomas B. Donovan, et al.* (Index No. 650338/2007).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Donovan from Cline's email account;

- (3) direct expedited discovery relating to the misappropriation, use and dissemination of any information obtained from Cline's email account;
- (4) direct the preservation of all evidence related to the unauthorized access of Cline's email account;
- (5) direct the immediate preservation and production of all computers used to access Cline's email account; and
- (6) stay the prosecution of all claims asserted by Donovan and those in privity with him against Lawrence A. Cline and Susan Cline in this action and the related New York County actions.

Donovan cross-moves for an order that would:

- (1) permit Donovan to use, in connection with this action and any related proceedings, certain email communications obtained from Cline's email account; and
- (2) dismiss the complaints, counterclaims and third-party complaints filed by Ficus, Cline, and any parties acting in privity with them, in this and all related actions pending before this Court;
- (3) restrain the use, disclosure and dissemination of any information or documents obtained from the email servers of Donovan or Private Capital Management Group, LLC ("PCMG"), or from Cline, Peter Schancupp or Gerard Bambrick;
- (4) direct expedited discovery related to the misappropriation, use, and dissemination of privileged or otherwise confidential information obtained by Cline, Ficus, and any parties acting in privity with them;

- (5) direct the immediate production and preservation of all evidence related to the unauthorized access of privileged or confidential information;
 - 6) direct the immediate preservation and production of all computers used to access such information; and
- (7) stay the prosecution of all claims asserted by Cline, Ficus, and anyone acting in privity with them, in this and all related actions pending in New York County.

Cline's motion arises out of his learning that Donovan has, since November 2007, been accessing a Verizon email account (the "Verizon Account"), which Cline asserts is his private account, but which Donovan contends was an account shared between the two former business partners. According to Cline, Donovan's access to the Verizon Account and the emails contained therein was unauthorized, and Donovan's misappropriation of attorney-client communications within the Verizon Account is grounds for a protective order pursuant to CPLR § 3103, as well as for the ultimate sanction, dismissal of all Donovan's claims, counterclaims, and third-party claims asserted in this and the related actions.

Donovan, however, argues that the email account was shared, his access to it was authorized, and, by virtue of such authorized access, Cline had no expectation of privacy, and the attorney-client privilege therefore never attached to the communications contained within the Verizon Account. Even if the privilege did attach to the communications between Cline and his attorney, Donovan contends that Cline waived the privilege by failing to take immediate remedial action upon learning of Donovan's access.

Donovan's cross-motion arises out of his contention that Cline and Ficus have

likewise misappropriated privileged or otherwise confidential information from computers and servers belonging to non-party Realty Advisory Group, LLC, as well as from Peter Schancupp and Gerard Bambrick, attorneys who formerly represented Donovan or entities in which he has or had a beneficial interest, but who have, since the onset of this and the related actions, settled with Ficus. Donovan contends that any remedy that may be found to apply to his alleged improper acts ought to apply also to the allegedly improper acts committed by Ficus.

At oral argument, held July 3, 2008, I articulated my belief that this motion could not be decided on the papers because there were issues of fact sufficient to require an evidentiary hearing.

Accordingly, it is

ORDERED that the following issues are referred to Special Referee Marilyn B. Dershowitz² to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by C.P.L.R. § 4317, Special Referee Dershowitz shall determine the following issues:

- (1) whether Donovan's access of the Verizon Account was authorized by Cline, thereby eradicating any expectation of privacy and rendering those email communications between Cline and his counsel non-confidential and thus not protected by the attorney-client privilege; and
- (2) if the access was not authorized, and the email communications were indeed protected by the attorney-client privilege, whether Cline waived this privilege

²

The parties have requested that, if this motion and cross-motion are referred to a special referee, they be sent to Special Referee Dershowitz, who is presently handling other motions in this litigation.

by failing to take affirmative, remedial action promptly after learning of Donovan's access; and

- (3) to the extent that any email communications between Cline's counsel and Ficus's counsel were protected by the attorney-client privilege pursuant to the Cline-Ficus joint defense agreement, whether that privilege may also have been waived by Cline's (or Ficus's) failure to take action promptly after discovering that the communications had been accessed by Donovan; and
- (4) regarding the cross-motion, whether the information obtained by Ficus and Cline or parties acting in privity with them, from computers or servers allegedly owned by Donovan or entities under his control, and from Peter Schancupp or Gerard Bambrick, was protected by the attorney-client privilege; and
- (5) if Special Referee Dershowitz concludes that any of the parties have misappropriated and used privileged information, she shall also make a recommendation, included in her report, or a determination, as to the appropriateness of the requested sanctions and remedies; and it is further

ORDERED, in accordance with the proceedings of July 3, 2008, all of the above issues shall be referred to Special Referee Marilyn B. Dershowitz; and it is further

ORDERED that the box of confidential materials, submitted by counsel to Cline for *in camera* review, will be delivered to Special Referee Dershowitz upon her request; and it is further

ORDERED that this motion shall be held in abeyance pending receipt of the report and recommendations of Special Referee Dershowitz and a motion, pursuant to C.P.L.R. § 4403, or upon receipt of the determination of Special Referee

Dershowitz; and it is further

ORDERED that a copy of this Order with notice of entry shall be served on the Special Referee Clerk (Room 119) to arrange a date for the reference to Special Referee Dershowitz.

FILED
JUL 15 2008
COUNTY CLERKS OFFICE
NEW YORK

Dated: 7/14/08


J.S.C.

HON. BERNARD J. FRIED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE