

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
MARILYN B. DERSHOWITZ

PRESENT: Hon. SPECIAL REFEREE
Justice

PART 80R

Ficus
- v -
Private Capital Mgmt,
et al

INDEX NO. 600924/07
MOTION DATE _____
MOTION SEQ. NO. _____
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 _____

| PAPERS NUMBERED | |
|-----------------|-------|
| 1 | _____ |
| 2 | _____ |
| 3 | _____ |
| 4 | _____ |
| 5 | _____ |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion matters resolved
in accordance with annexed
report.

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED: _____
J.S.C.

FILED
Nov 12 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: November 12, 2009

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

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

Plaintiffs,

Index No.: 600926/07E
Referee Report

v.

PRIVATE CAPITAL MANAGEMENT, LLC, THOMAS
B. DONOVAN, et al.,

Defendants.

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

Counterclaim Plaintiffs,

v.

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

Counterclaim Defendants,

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

Nominal Defendants.

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

Third -Party Plaintiffs,

v.

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

Third-Party Defendants,

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

Nominal Defendants.

-----X
MARILYN B. DERSHOWITZ, Spec Ref:

Pursuant to the Order of the Honorable Bernard J. Fried, JSC, dated July 14, 2008 the following issues were referred to the undersigned for hearing and recommendations:

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 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,...., as to the appropriateness of the requested sanctions and remedies;...

The matter was heard before the undersigned on November 17, 19, 21, 2008, March 4, 5, June 9 and 10, and July 22, 2009. Final submissions were received in September, 2009.

BACKGROUND

This action has a long, acerbic, and convoluted history. This action, the main action which named as defendants, *inter alia*, Thomas Donovan and Larry Cline, was instituted in March, 2007. Mr. Cline settled with the plaintiff in July, 2007. Within weeks Mr. Donovan had instituted an action against Mr. Cline, and by November, 2007, he was involved in a total of seven related suits.

From November 15, 2007 to January 10, 2008 Thomas Donovan accessed Lawrence Cline's personal email account ten to fifteen times daily, except for November 24 and December 25, 2007. This account was a personal Earthlink email account that Mr. Cline had opened in August, 2001. The evidence made clear that Cline had paid for and maintained this account with his personal funds and used it only as a private account. This account was first linked to his phone after his business account was turned off in September, 2007. Mr. Donovan began to access this account only after he himself had changed his password, in early November, 2007.

Prior to the institution of this litigation Cline and Donovan had been in business together. While in business they each had email accounts through the business. Mr. Cline had opened Verizon accounts for them whereby each of them could access their business email accounts through their phones by use of a password, or by using a computer, their phone number and a password. Mr. Cline had shown Mr. Donovan how it was possible for Donovan to access his own account through his Verizon phone account. When the relationship of the parties ended in this litigation and Mr. Cline no longer had a business email account, he proceeded to use his old personal email account, but linked it, for the first time, to his phone.

It was this account that Mr. Donovan hacked into. It was an account that had nothing

whatsoever to do with the business accounts of the parties. It was an account that Donovan was never authorized to access. While it appears that on occasion Mr. Cline and Mr. Donovan did view one another's business emails, it was on rare occasion and for a specific purpose. However, nothing was offered to refute the credible testimony of Mr. Cline that his personal account had never before been accessed by Mr. Donovan.

According to the testimony Donovan acquired access to Mr. Cline's personal email account by computer, using Cline's phone number and the password "Verizon" which was a default password. Email on this account provided a constant stream of correspondence between Mr. Cline and his criminal counsel, the U.S. Attorney and civil counsel. Mr. Donovan did not disclose that he had accessed this account for months while all of the litigation was pending.

It was only in January, 2008 that Mr. Cline learned that his email had been accessed. In late December he experienced a problem receiving emails. He went on line to clean out his account but could not get to the Web page. In January, 2008 he experienced a similar problem. He then called Verizon who gave him detailed instructions to allow him to gain access. Verizon at this juncture informed him that his account had been accessed multiple times. He asked them how and who had accessed the account. He was told a subpoena was required to receive the information. He notified the police and immediately turned off the email account. Because he previously had been a victim of a scam involving his Pay Pal internet account he initially believed that this problem related to that scam. Soon, however, he began to suspect that Donovan and his cohort, Chalavoutis, might be the culprits. In March, 2008, because of questions asked of him during his deposition in the related Copperfield action, Mr. Cline's suspicions about Donovan having accessed his email became stronger.

Only in May, 2008 did Mr. Cline learn through a letter by Donovan's counsel that it was Donovan who had accessed his emails. Donovan acknowledged that he had copied all the emails as well. When the plaintiff demanded a turnover of the information, Donovan initially refused. And, although counsel for Mr. Donovan had learned of the access by Donovan in March, 2008 he failed to notify the other side until May, 2008, and, all the while litigation proceeded, including the taking of the deposition of Mr. Cline.

Clearly, litigation strategy and general thinking were within these 1857 pages of email communications (plus attachments) which were accessed by Mr. Donovan. The materials included privileged matter, attorney work product and discussions relating to the joint defense agreement between the plaintiff and Mr. Cline, none of which Mr. Donovan had any right to.

Mr. Donovan argues that Mr. Cline had no reasonable expectation of privacy in his personal emails, or alternatively that he waived the privilege by allowing access to his email. However, the testimony at the hearing was quite to the contrary. To the extent that he claims that Cline should have known that he had access to his email, proof is wanting. And, in any event, his continued viewing of Cline's email which began after the parties had severed their relationship and were engaged in bitter litigation against one another makes clear that he had no excuse for his behavior. He had to have understood that his acts were wrongful. Donovan's argument that Cline waived any privilege in his email because he should have known of the access is preposterous. Indeed, it is clear that the attorney/client privilege is not waived through disclosure of a stolen privileged document. (*Sackman v Ligget Group*, 173 FRD 358 [EDNY 1997])

The first witness in the hearing was Mr. Cline. His unrefuted testimony was that he had never given his personal Earthlink password to Mr. Donovan. The only way that Mr. Donovan

had accessed the account was by computer using Mr. Cline's cell phone number and the password "Verizon". Indeed despite Donovan's protestations that he and Cline had shared emails he did not dispute that he had never accessed this account before the parties became adversaries.

In the days before email, this regular access (10-15 times a day) would have been tantamount to Mr. Donovan having repeatedly snuck into Mr. Cline's office, (or listened to his telephone calls) and copied all that he heard or saw including correspondence and draft pleadings and papers with markings by Cline and his attorneys.

The next witness was Thomas B. Donovan. His character was immediately put in issue based on a guilty plea relating to a real estate venture some years ago. Indeed he was charged with falsifying loan applications submitted to the U.S. Government (33 Ev). In his allocution on November 4, 1991 (34 Ev, p.17, l.9) he stated that he "conspired... to submit mortgage applications that were insured by HUD for residential mortgages for real estate investment purposes. We submitted the mortgages in order to make a profit on the real property and obtain certain tax deductions, benefits. In the course of doing that, we elected to use straw or fraudulent buyers to obtain the subject mortgages. And, in addition, I was aware of and conspired to submit mortgage applications that enhanced the credit worthiness of the applicants and that information was not correct." This allocution evidenced dishonest mendacious acts perpetrated against the United States government, for personal gain. In addition, evidence made clear that Mr. Donovan had been held in contempt three times relating to the *Riverside* action in the Second Department, again calling into question his character.

Indeed, during his testimony in this proceeding Donovan often equivocated and

dissembled. He answered questions as he chose to, rather than responding appropriately. Often he launched a campaign to tell his story, unrelated to the questions put to him. His demeanor on the witness stand can only be described as waffling, resulting in frequent objections and requiring the trier of fact to caution him repeatedly. Indeed Donovan ultimately confirmed in his testimony that his affidavit (Tr, 6/10/09, p.1282, l.12) that "Computer passwords were no secret at the office where Cline and I worked together" all the while asserting that Cline had violated his privilege in these very emails. And, in testimony he continued to claim ownership of corporations until repeatedly challenged by counsel who demonstrated that many of the corporations which Donovan claimed to own were owned by others including Mr. Donovan's wife, Sam Beretta and a Mr. Stein. Apparently the ownership interests in the corporations were designed by Mr. Donovan to suit his needs. Still based on his claims of ownership Mr. Donovan sought to assert a privilege in the emails. In fact it became crystal clear that there were a plethora of corporate entities all housed at 2 Jericho and all sharing passwords and emails housed on the server at issue here.

Despite his history, Mr. Donovan described a long and seemingly successful business career in mortgages, foreclosures, workouts and real estate. Mr. Donovan testified that he and Mr. Cline had been in business together and had shared phones, cell phones, laptops, and the like. He described Mr. Cline as his "guru" when they first acquired "websync" a feature which allowed the download of emails to or from the phone to a computer. He claimed that they had shared passwords but he offered no evidence of this other than his self-serving statement. He described his use of Cline's telephone number and "verizon" not any discrete password. Mr. Donovan acknowledged that he had printed out the Cline emails but, quite incredibly, claimed he

had engaged in this activity because he believed they were disappearing and that it was necessary that they be preserved for the bankruptcy and state proceedings. That he (and his counsel, though admittedly informed) kept their existence secret for months belies his self righteous motive. Of course, even if his motive was righteous, his actions surely were not.

Evidence of many emails from Mr. Cline to Mr. Donovan was produced (40 Ev), as proof that the parties did not share emails, despite Mr. Donovan's claim to the contrary. Obviously if they habitually did share email, as Mr. Donovan claimed, there would have been no need for Mr. Donovan to send emails to Mr. Cline. Mr. Donovan also insisted that Cline had no expectation of privacy, even while he conceded that some of the emails may have been privileged. Yet he claimed that Mr. Cline had waived any privilege because, in the past, email had been shared. Conveniently he failed to distinguish between business and personal accounts. Donovan averred that, in any event, he had not shown the prosecutor any emails, and that his purpose in accessing the emails was "To find my assets" (Tr, March 5, 2009, p17, 21), to "protect my assets and get a recovery. Protect myself from further theft, yes." (Tr, March 5, p.18, 2-3)

The follow up to this testimony was that Mr. Donovan did not tell his lawyers about the email access until after Mr. Cline had turned off his email account in late February or early March, 2008, and Donovan conceded that over the period when he had accessed Mr. Cline's email account he had seen emails to and from lawyers, John Cambria and Sanford Greenberg, and was well aware that they were counsel to the plaintiff and to Mr. Cline, respectively. Moreover he conceded that he had printed and analyzed the emails and attachments and categorized them. By no account can these be construed as idle chatter about the weather.

Once testimony on the illicit access to Cline's emails was completed the defendants

proceeded with argument and testimony on their cross claims, claims first raised in response to the email violations alleged in the motion.

Defendants assert that 1)the server which was used at 2 Jericho Place, 2)Bambrick boxes left at 2 Jericho and 3)a computer, used by Mr. Donovan, but purchased by the company and left in the company-owned house in Florida all belonged to Thomas Donovan. He now contends that they each contained privileged and confidential information including attorney/client communications, and that plaintiffs have violated that privilege. It is undisputed that Justice Fried gave the plaintiffs access to the server at issue more than one year before the instant claims. Yet the defendants now, for the first time, assert that privileged documents were on the server. Plainly this claim is an echo of that of Cline's, and is raised in response to objections to Donovan's having helped himself to Cline's emails.

Of course, the server at issue was indisputedly used by the corporations, and to the extent any claim of privilege is properly raised, it is for the benefit of a particular corporation, if at all. It is simply not possible for Donovan to claim that the server contained privileged communications in light of the fact that many corporations and persons used the server, passwords were shared by various corporate personnel and the server was used as a quasi public email provider. Effectively use of this company server obviates any possible claim of personal privilege. Additionally, the defendants have now, for the first time, asserted this claim and requested the return of the documents, although Judge Fried had afforded the plaintiffs full access to the server an entire year before.

In sum plaintiffs assert that the cross claims are nothing more than a sham and an effort to obfuscate. Ironically, in opposition to the main motion the defendants had asserted that Mr.

Donovan and Mr. Cline had shared email while in the cross claim Mr. Donovan asserts a claim of privilege to the contents of the server and its email, a blatant manifestation by Mr. Donovan of a lack of appreciation of just how egregious his behavior was.

Mr. Donovan asserts that he had developed a particular algorithm, that the algorithm was on his laptop in Florida, that the laptop was taken and given to the plaintiff. In the past he made no claims about the "algorithm" and here he offered no proof about it so as to support a claim that a thing of value that was confidential was taken from him, or for that matter, that the "algorithm" was his personal property. Additionally he claims there was confidential material on the company computer which he had used in the company Florida house. All testimony contradicts the notion that a confidential algorithm existed, and that there was any confidential material on the computer. That anyone ever had any confidentiality agreement so as to shield the "algorithm", if it existed at all was never advanced.

As for the so-called confidential materials within the Bambrick boxes the testimony of Mr. Bambrick laid to rest any claims of breach of confidentiality with regard to the boxes. Gerald Bambrick was the third witness. Gerald Bambrick, over a period of seven years, had represented companies in litigations in which Thomas Donovan had an interest, including, *In re Santiago*, *In re Fulton*, *Riverside*, and *Secured Capital Corporation*. Mr. Bambrick was general counsel to PCG,NV and two other companies, as well. He occupied an office in the southwest corner of 2 Jericho where he kept his files. With regard to claims by Donovan that there were personal and confidential files contained within his files, he testified that on a singular occasion he had written a letter on behalf of Mr. Donovan and his wife, personally, wherein they were threatening legal action against a car company. In all other regards, Mr. Bambrick's lawyering was focused on the

companies in which Mr. Donovan was involved, never on actions involving Mr. Donovan personally. No evidence whatsoever was evinced to support the notion that Mr. Bambrick was personal counsel to Mr. Donovan. To the contrary, his office was within the premises leased by and paid for by the corporate entities. His testimony was that as general counsel his efforts were devoted to real estate related activities on behalf of the many entities housed at 2 Jericho.

Clearly, Thomas Donovan's secretive, unauthorized access to Larry Cline's private Earthlink email via a verizon portal afforded the defendants an ongoing overview of litigation strategy in the seven ongoing litigations. While the sealed Affirmation of Mr. Silverman (an attorney hired by Mr. Donovan to review and categorize the emails for this litigation) places the emails in a number of categories, it concedes that a significant number of the documents which were viewed and copied by Donovan were privileged. When a party has secured broad scale unauthorized access to the emails of his adversary there can be no requirement that the individual whose email was hacked into demonstrate how individual bits of emails were used. The entirety of the thievery obviously provided to the thief an inappropriate, unwarranted "leg up".

Insofar as the Cline emails accessed by Donovan are concerned, claims that only minuscule parts of the emails were used in litigation and that similar knowledge may have been obtained by others fails to address the larger more serious problem. And in any event, the emails may well have served to confirm information.

In sum I credit that Donovan stole nearly 2000 pages of email from Cline, and that innumerable pages of the emails were privileged. It is self-evident that Donovan's access of Cline's personal email account was never authorized, that there were communications therein which were privileged is not disputed (even by the Silverman Affirmation), and there has been no

demonstration that Cline waived any privilege. Indeed the testimony of Cline makes clear that as soon as he learned that his email account had been accessed he turned off the account.

With regard to the claims of the cross motion, Donovan has failed to demonstrate that he or his personally owned company owned either the servers or the computers so as to warrant his personal claim of privilege. Moreover, the testimony demonstrates that the information thereon was accessed by the plaintiffs with court authorization. Indeed plaintiffs rightfully accessed the property of the company in which they had purchased an eighty percent interest.

This claim of privilege was only raised in response to the motion by the plaintiffs, and it was raised one year after the defendants were aware that the servers and computers were in the possession of the plaintiffs. Insofar as the Bambrick boxes of files left at 2 Jericho, the testimony of Bambrick was clear and convincing that these had been abandoned by Thomas Donovan when he left the premises after they had been under his control for months. Thus Donovan's newly raised claims of attorney/client privilege regarding these documents are a sham at best, and in any event irrelevant to this litigation since no information therein related to this matter.

Here, as in *Lipin v Bender*, 84 NY2d 562 (1994) there is no realistic alternative but dismissal of the claims against Larry Cline and related parties. The venal interception of Cline's personal email by Donovan over a period of months and the retention of the information for four months after while the parties were engaged in acrimonious litigation cannot be condoned. His continued overview of the emails, which included privileged communications incorporating the strategy of counsel as well as drafts of papers plainly put the parties on an uneven playing field. And, that counsel became aware of the intrusion and did nothing for two months constitutes a further sanctionable act. Humpty Dumpty cannot be put back together. The improper disclosure

obtained by Donovan has plainly orchestrated prejudiced litigation. He has perpetrated a fraud on the court by his distortion of the process.

As pointed out by Professor Siegel, CPLR 3103 “is at hand to confer judicial discretion in an adjustment in an abuse of discretion.” (Siegel, Practice Commentaries, McKinney’s Cons Laws of NY book, 7B, CPLR c31032:1, at 356) It is not unduly harsh “to require that civil litigants gather information to prosecute or defend their action in conformity with the applicable CPLR provisions.” (*Mtr of Weinberg*, 129 AD2d 126, 136 [1st Dept 1987]) Where it is apparent that the integrity of the judicial process has been compromised, it is appropriate to impose sanctions.

RECOMMENDATION

Claims herein and in related actions, which Donovan has brought against Mr. Cline and related others should not be permitted to proceed. Costs, including attorney’s fees incurred in these litigations as of the date of Mr. Donovan’s intrusion into Mr. Cline’s email up to the date of dismissal of all claims should be reimbursed by Mr. Donovan to the plaintiffs and to Mr. Cline, on account of these violations. (CPLR §3103) Further, within 30 days of the date of confirmation of this report all materials taken by Mr. Donovan should be destroyed. Both Mr. Donovan and his counsel shall be required to certify that no copies of the materials have been retained.

These acts of Mr. Donovan were willful and persistent far worse than the singular act in *Lipin*, where dismissal was sanctioned. That there is no possible cure because of the scope of these violations mandates dismissal and imposition of costs incurred by these unwarranted invasions. This case does not contain just one look at documents as in *Perna v Electronic Data Corp*, 916 F Supp 388 (DNJ, 1995). Rather, here, Mr. Donovan daily monitored and copied the

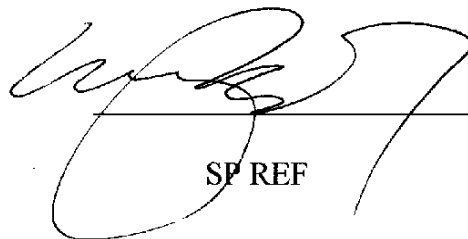
entire email correspondence between Mr. Cline, the plaintiffs and his defense counsel and then retained the files for a period of four months while the litigation was ongoing. The “orderly and fair administration of justice” (916 F Supp at 401) was plainly interfered with.

CONCLUSION

In sum I conclude that the actions of Mr. Donovan did so interfere with process that his claims should be dismissed, and he should be required to reimburse Cline and the plaintiff with whom he had a joint defense agreement for all costs incurred.

Thus I recommend that pursuant to CPLR§4403 that this report be confirmed in its entirety and that sanctions should be imposed consistent with the hearing and evidence set forth herein.

Dated: November 12, 2009



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