

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

PRESENT: Fried Justice

E-FILE PART 60m

Lawrence A. Cline

INDEX NO. 650117/09

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

Thomas J. Donovan

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 ...

PAPERS NUMBERED

Answering Affidavits – Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED
May 29 2009
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

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

This motion is decided in accordance with the accompanying memorandum decision.

Petitioner is directed to retrieve Exhibit B (Filed under Seal pursuant to Confidentiality Order) to Kristin Meister Affirmation from the Part Clerk by c.o.b., Monday, June 1, 2009, or it will be discarded.

SO ORDERED

Dated: 5/27/09

B. J. Fried
HON. BERNARD J. FRIED /s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

----- X

LAWRENCE A. CLINE, as a Member of Private
Capital Management, LLC, and PCM INTEREST
HOLDING, LLC as a Beneficial Holder of Part of
the Economic Interest in Private Capital
Management, L.L.C.,

Index No. 650117/09

Petitioners,

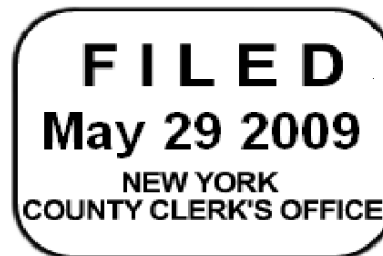
for an order and judgment dissolving the limited
liability company, Private Capital Management,
L.L.C., pursuant to New York Limited Liability
Company Law Section 702,

-against -

THOMAS B. DONOVAN,

Respondent.

----- X



APPEARANCES:

Attorneys for Petitioner PCM1H:

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26 Broadway
New York, New York 10004

FRIED, J.:

Motion Sequence Numbers 001 and 002 are consolidated for disposition. In Motion 001, Lawrence A. Cline moves, pursuant to Article 4 of the CPLR and New York Limited Liability Company Law § 702, for judicial dissolution of Private Capital Management, LLC (PCM). In Motion 002, Thomas B. Donovan moves, pursuant to CPLR 404 and 406 (a), for dismissal of the verified petition with prejudice for failure to state a claim upon which relief can be granted.

The parties - Cline and Donovan - are involved in protracted litigation; this proceeding is related to, among others, the actions entitled *Ficus Investments, Inc. v PCM* (Index Number 600926/07) (*Ficus* Action), *Donovan v Schancupp* (Index Number 650365/08), and *PCG & Ficus v Donovan et al.* (Index Number 650338/07), all of which are also before me. To date, there have been approximately 70 motions made in the *Ficus* Action, an action commenced less than three years ago.

Briefly summarizing the dispute, Ficus Investments, Inc. (Ficus) is the 80% owner and managing member of Private Capital Group, LLC (PCG), a limited liability company organized under the laws of Florida, the purpose of which is to purchase, manage, and sell non-performing real estate mortgage loans. Cline, a former defendant in the *Ficus* Action, and now third-party defendant in that action, and Donovan, a defendant in the *Ficus* Action, are the owners and managing members of PCM, also a defendant in the *Ficus* Action and the 20% member of PCG. Ficus and PCG allege that Donovan and Cline, and other named defendants, wrongfully withdrew substantial amounts of money from PCG through unauthorized loans, and by the transfer or diversion of funds to third parties under their

control.

In July 2007, Cline settled with Ficus and PCG, and plaintiffs in the *Ficus* Action discontinued the action against him. Cline reappeared in that action when, in October 2007, Donovan answered the third-amended complaint, and, individually and derivatively on behalf of PCG and PCM, commenced a third-party action against Cline and others.

The petition in this proceeding alleges as follows: PCM was formed as a New York limited liability company on November 16, 2005, solely to hold the shared 20% minority interest of Cline and Donovan in, and in anticipation of a reorganization of, PCG. Cline and Donovan signed the PCG operating agreement as PCM's members. Ficus, as the manager of PCG, holds the remaining 80% interest in PCG.

In May 2007, Donovan and Cline concluded that their individual goals as to the *Ficus* Action were incompatible, and that each would seek out new and separate legal representation. In settling the *Ficus* Action, Cline conveyed to co-petitioner PCM Interest Holding, LLC (PCMIH), an entity owned by Ficus, his economic interest in PCM. Since July 2007, Donovan (a 50% member and beneficial owner of PCM) has been locked in an ever expanding array of litigations with Cline and Ficus (now a beneficial holder through PCMIH of the economic interest in Cline's 50% membership interest in PCM). As a result of the *Ficus* Action, ensuing settlements, the ever-expanding list of related actions, and the resulting adverse interest of Donovan and Cline, PCM is stalemated with its sole members in direct conflict with one another.

In support of the motion to dismiss the petition, Donovan contends that (1) PCMIH has no standing to petition for dissolution of PCM, because it is not alleged to be a member

of PCM, and (2) the assertions in the petition do not establish that it is no longer reasonably practicable to carry on PCM's business. Donovan also asks for permission to file an answer to the petition (asserting affirmative defenses and interposing counterclaims) in the event of the denial of his dismissal motion.

The petition is granted, the motion to dismiss the petition is denied, and the request to serve an answer is denied (CPLR 404; *Matter of Ford v Pulmosan v Safety Equip. Corp.*, 52 AD3d 710 [2d Dept 2008]). Donovan's motion to dismiss effectively constituted an answer (*Matter of Williamson v Williamson, Pickett, Gross*, 259 AD2d 362 [1st Dept 1999]).

As a preliminary matter, PCMIH, as an assignee of Cline's economic interest in PCM, does not have standing to join in the petition for dissolution. Limited Liability Company Law § 603 (a) (3) provides that "the only effect of an assignment of a membership interest is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled." Moreover, Limited Liability Company Law § 603 (a) (2) provides that "an assignment of a membership interest does not dissolve a limited liability company or entitle the assignee to participate in the management and affairs of the limited liability company or to become or to exercise any rights or powers of a member." Furthermore, Limited Liability Company Law § 604 (a) provides that "[e]xcept as provided in the operating agreement, an assignee of a membership interest may not become a member without the vote or written consent of at least a majority in interest of the members, other than the member who assigned or proposes to assign such membership interest."

Nevertheless, Cline has demonstrated entitlement to the relief sought by the petition.

Section 702 of the Limited Liability Company Law provides:

“On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement. A certified copy of the order of dissolution shall be filed by the applicant with the department of state within thirty days of its issuance.”

The record establishes that it is not reasonably practicable to carry on PCM's business in conformity with the articles of organization or operating agreement thereby warranting dissolution (*Matter of Extreme Wireless*, 299 AD2d 549 [2d Dept 2002]). That Cline and Donovan dispute whether there exists an operating agreement for PCM, and Cline asserts that the purported operating agreement for PCM that Donovan submitted is fraudulent, is indicative of the litigious nature of their relationship. Dissolution is warranted regardless of the validity of PCM's purported operating agreement.

According to Cline, in addition to the absence of a PCM operating agreement, PCM never followed corporate formalities, and it is merely an alter ego for Cline and Donovan. PCM's sole function is to hold their 20% interest in PCG. Thus, because of the acrimonious nature of the parties' business relationship, and the fact that dissolution will not interfere with an on-going business, dissolution is justified.

Donovan's contention that the purported operating agreement is legitimate militates in favor of dissolution. According to that agreement, PCM's stated purpose is “managing the purchase, and resolution of non-performing mortgage [sic] as agreed from time to time by the Managers” (i.e., Cline and Donovan). Hence, the stated purpose of the operating agreement, *presented by Donovan himself*, is inconsistent with Donovan's assertion that

PCM was formed merely as a passive investment entity, and it would entail even more cooperation between the members than would be the case under Cline's characterization of PCM's purpose. Either way, dissolution is warranted.

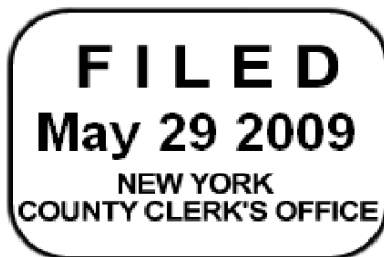
Accordingly, it is

ORDERED that the petition (001) for dissolution of Private Capital Management, LLC pursuant to New York Limited Liability Company Law § 702 is granted, and it is further

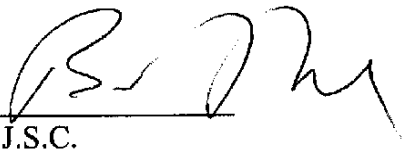
ORDERED that petitioner Lawrence A. Cline is directed to file a certified copy of the order of dissolution with the department of state within 30 days of the date hereof; and it is further

ORDERED that the motion (002) for dismissal of the petition is denied.

Dated: 5/27/09



ENTER:



J.S.C.

HON. BERNARD J. FRIED