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

PRESENT: BERNARD J. FRIED **PART** 60
Justice

E-FILE

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

- v -

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

INDEX NO. 600926/2007
MOTION DATE
MOTION SEQ. NO. 082
MOTION CAL. NO.

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

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

By this motion, Defendant, Thomas B. Donovan ("Donovan") seeks an order that would require Plaintiffs, Ficus Investments, Inc. ("Ficus") and Private Capital Group, LLC ("PCG" or the "Company"), to continue advancing funds in accordance with several previously issued Orders of this Court and of the Appellate Division, First Department. Defendant further seeks a determination that nothing in my Decision and Order dated October 5, 2009 (the "October 5 Order") relieves Plaintiffs of their obligation to advance litigation expenses. Plaintiffs oppose this motion on the ground that there have been judgments entered which preclude further advancement.[1]

As always, I presume familiarity with all previously issued Decisions and Orders in this and the related actions.

Plaintiffs' obligation to advance litigation expenses arises out of the Private Capital Group LLC Limited Liability Company Operating Agreement (the "Operating Agreement"). There is no dispute that the Operating Agreement is governed by Florida law, specifically, the Florida Limited Liability Company Act

[1] Plaintiffs also cross-move for an order staying decision on this motion until several other decisions have been rendered, or, alternatively, directing that this motion be heard in conjunction with the motions to confirm and reject the November 12, 2009 Report of Special Referee Marilyn Dershowitz (the "November 12 Report."). I did hear oral argument on this motion in conjunction with argument on the motions to confirm and reject the November 12 Report, and I have already filed decisions in the other motions referred to by Plaintiffs. However, my conclusions set forth below do not rest upon the conclusions reached in any of those decisions, and the cross-motion is denied as moot.

(the "Florida LLC Act"). More specifically, Section 3.4.3 of the Operating Agreement, which provides for the advancement of litigation expenses, conditions such advancement on the furnishing, by the person seeking advancement, of an undertaking"to repay any advances if it is ultimately determined that he or she is not entitled to indemnification under this Section 3.4 or the Florida Act." (Operating Agreement § 3.4.3(a).[2]) Thus, a determination that Donovan is not entitled to indemnification under the Operating Agreement or under the Florida LLC Act would abrogate the advancement obligation. The question raised by this motion is whether there has been such a determination.

Section 608.4229 of the Florida LLC Act provides that indemnification or advancement shall not be made

> if a judgment or other final adjudication establishes that the [officer's] actions, or omissions to act, were material to the cause of action so adjudicated and constitute[s] . . . (d) Willful misconduct or a conscious disregard for the best interests of the limited liability company in a proceeding by or in the right of the limited liability company to procure a judgment in its favor or in a proceeding by or in the right of a member.

F.S.A. § 608.4229.

By the October 5 Order, I concluded that Donovan and co-defendant, Christopher Chalavoutis ("Chalavoutis"), were liable for their contempt of my Orders dated March 6 and April 3, 2008 (together, the "Escrow Order"[3]). The Escrow Order directed both Donovan and Chalavoutis, along with several other parties and non-parties to this action, to provide an accounting of monies they had received in connection with or relating to certain mortgages, and to deliver the monies, themselves, to an escrow agent. After Chalavoutis failed to purge this contempt, judgment was entered against him, and in favor of Plaintiffs. (Order and Judgment dated January 4, 2010, filed January 6, 2010.[4]) Similarly, after Donovan failed to purge his individual contempt and that of the Donovan Family TR LLC ("DFTR"), an entity he controls, judgment was entered against him and in favor of Plaintiffs. (Order and Judgment dated April 1, 2010, filed April 14, 2010; *see also* Decision and Order dated April 1, 2010).

There can be no dispute that the "judgment" contemplated by the Florida LLC

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A copy of the Operating Agreement is annexed to the October 28, 2009 Affirmation of Richard Dolan [hereafter the Dolan Affirm.] at Ex. 11.

3

The March 6 and April 3 Orders were affirmed in their entirety by the Appellate Division, First Department. *Ficus Investments, Inc. v. Private Capital Management, LLC*, 61 A.D.3d 1 (1st Dep't 2009).

4

Also entered on January 6, 2010 was a judgment against Chalavoutis, to which he stipulated, in connection with a finding of contempt for his violation of my Order dated December 21, 2007. (*See* Judgment, dated January 6, 2010.)

Act includes a judgment on the basis of contempt. I am not persuaded by Donovan's arguments to the contrary. Moreover, this action arises out of the allegation that Donovan converted, dissipated, and misappropriated monies and assets belonging to the Company. The judgments entered January 6 and April 14 established that he and Chalavoutis failed to deposit with a court-appointed escrow agent funds which they had received in connection with certain mortgages – mortgages which originated with the Company. I am thus satisfied that these judgments are material to the causes of action asserted and constitute both willful misconduct and a conscious disregard for the best interests of the limited liability company.

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Accordingly, it is

ORDERED that Defendant's motion is DENIED; and it is further

ORDERED that Plaintiffs' cross-motion is DENIED as moot.

Dated: 4/29/2010

J.S.C.

HON. BERNARD J. FRIED

Check one: ☒ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**