

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

PRESENT: BERNARD J. FRIED
Justice

PART 60

FICUS INVESTMENTS, INC., individually and
derivatively on behalf of PRIVATE CAPITAL GROUP, LLC
Plaintiffs,

INDEX NO. 600926/2007

MOTION DATE _____

- v -

PRIVATE CAPITAL MANAGEMENT, LLC,
LAWRENCE A. CLINE, ESQ.
THOMAS B. DONOVAN, et al.
Defendants,

FBEM

MOTION SEQ. NO. 016

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

Cross-Motion: Yes No

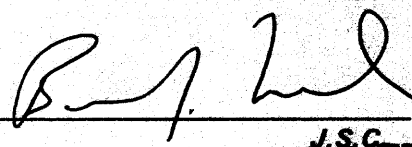
Upon the papers submitted, it is

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

SO ORDERED

FILED
NOV 14 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/13/07



HON. BERNARD J. FRIED
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIV. PART 60

----- X
FICUS INVESTMENTS, INC., individually, and
derivatively on behalf of PRIVATE CAPITAL GROUP, LLC,

Plaintiff,

- against -

FBEM

Index No. 600926/2007

PRIVATE CAPITAL MANAGEMENT, LLC,
LAWRENCE A. CLINE, ESQ.,
THOMAS B. DONOVAN, et al.,

Defendants.

----- X

APPEARANCES:

Attorneys for the Plaintiffs:

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New York, NY 10178-0081

Fried, J.:

Plaintiff Ficus Investments, Inc. ("Ficus") brings this motion to hold Defendants Thomas B. Donovan and Christopher Chalavoutis in civil contempt for their alleged violation of my Orders dated March 26, 2007, April 12, 2007, and May 1, 2007. Defendants cross-move for the imposition of sanctions against Ficus and its counsel on the grounds that the motion for contempt is frivolous and that the moving papers contain certain material

factual misrepresentations.

The events giving rise to the underlying matter need not be discussed at great length here. Briefly, Plaintiff is the majority (80%) and managing member of Private Capital Group, LLC (“PCG” or the “Company”), 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. Defendants Mr. Donovan and Lawrence A. Cline (who has since reached a settlement agreement and been released from this action) are the owners and managing members of Defendant Private Capital Management, LLC (“PCM”), a New York limited liability company, which is the minority (20%) member of PCG. Mr. Donovan served as the chief executive officer of PCG, and Mr. Cline as the Company’s president. Mr. Chalavoutis is the former Chief Financial Officer of PCG.

Ficus accuses Defendants Donovan and Cline of withdrawing, with the aid of the other named defendants, substantial sums of money from the Company coffers via the receipt of unauthorized and undocumented “loans,” and also by the transfer or diversion of funds to third parties and other entities under the control of Messrs. Cline and/or Donovan.

At the outset of this litigation, I granted a motion by Ficus for a temporary restraining order prohibiting the Defendants (and anyone acting in concert with them) from “taking or facilitating in any way any other transfers or distributions outside the normal operating costs and expenses from the Company or its accounts” and from “removing, destroying, damaging, concealing, altering or otherwise modifying any of the books and records of the Company or any documents pertaining to the Company business affairs, assets, or transactions wheresoever located.” (TRO, Mar. 26, 2007 [hereafter March TRO].)

On April 12, I granted a second TRO against Defendants, which, inter alia, provided Ficus with “immediate possession and control of: (a) any and all of the Company’s day-to-day operations; (b) any and all of the Company’s corporate assets, wheresoever located; and (c) any and all of the Company’s corporate offices or any premises appurtenant thereto...”. (TRO Apr. 12, 2007 [hereafter April TRO].) The April TRO further provided that Defendants “cooperate with Plaintiff ... and provide all information requested as to the affairs, books, records, and operations of the Company with regard to Copperfield Investments, Inc.¹ and return and restore any and all records, belonging to the Company, that have been removed from the premises located at Two Jericho Plaza, ... or altered, changed, damaged or destroyed in any way.” (*Id.*)

At a hearing held in early May, I converted both of those TROs into a preliminary injunction (the “May PI”). (H’rg Tr. 31, May 1, 2007.) I refused, however, to grant Ficus’s proposed order enjoining the transfer, sale, encumbrance, withdrawal, etc. of approximately \$9 million that Ficus alleges Defendants took from PCG until June 6, 2007, when I ordered another preliminary injunction to that effect. (Prelim. Inj., June 6, 2007 [hereafter June PI].)

Plaintiff contends that Defendants violated the March and April TROs and the May PI, first, with respect to the transfer of certain funds, and second, with respect to the removal from Company offices of certain books and records and the failure to provide certain information to Ficus representatives and agents. I will address the issues surrounding the funds first, followed by those regarding the books and records.

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Copperfield Investments is an entity that is owned and controlled by Lawrence A. Cline. (Cline Aff. ¶ 6.) Although the April TRO refers to “Copperfield Investments, Inc., Mr. Cline describes it as an LLC. (*Id.*) Further details about this entity are not relevant to the present motion.

The Transfer of Funds

For the sake of clarity, a brief discussion of some background information is in order. According to the affidavit of Mr. Cline, on March 22, “a series of transfers were made” into an account in the name of Private Lender Warehouse Corp. (“PLW”), an entity controlled by Mr. Donovan. (¶ 6.) The transferred funds included monies from two Company accounts, as well as from the accounts of other entities, including PCM and Copperfield Investments. (*Id.*) As of March 23, 2007, there was a total of about \$15 million in the PLW account.² (*Id.* ¶ 8.)

Mr. Donovan then closed that PLW account and transferred the \$15 million into another PLW account, located at Commerce Bank. (*Id.* ¶ 9.) About \$12.5 million was withdrawn on March 24, 2007 and, to the best of Mr. Cline’s knowledge, retained by Mr. Donovan. (*Id.* ¶ 10; *see also* Contempt Hr’g Tr. 18-19, Oct. 23, 2007.) Plaintiff alleges that the \$12.5 million was deposited into an account in the name of PCM on May 9, 2007. (Cambria Aff. ¶ 24.) Meanwhile, the \$3 million or so remaining in the PLW account was disbursed, between March 26 and April 27, to “various professionals engaged to defend the litigation with Ficus.” (Cline Aff. ¶ 11.)

These two “streams” of funds - the \$12.5 million stream and the \$3 million stream - give rise to two separate bases for Ficus’s motion for contempt. Plaintiff argues that the

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For the purposes of this contempt motion, and this motion only, Defendants have conceded, *arguendo*, Plaintiff’s version of events as they pertain to the funds in the PLW account. (Def. Mem. in Opp. 1, fn. 1; *see also* Contempt Hr’g Tr. 27, Oct. 23, 2007.) Any statements regarding these funds and the transfer thereof should not be construed as findings of fact.

disbursement, after March 26, of the \$3 million to “various professionals” was a direct violation of the March TRO, which enjoined the transfer or distribution of any funds “from the Company or its accounts.” (Cambria Aff. ¶ 24.) Although the PLW account is not technically a “Company account,” Plaintiff argues, the transfers nonetheless were “from the Company” because they were originally Company funds. (See Cline Aff. ¶¶ 5-12, D’Amelio Aff. ¶¶ 37-39, and D’Amelio Aff. Exh. D, tracing the funds as they were transferred into, and subsequently out of, the PLW account.)

Plaintiff further asserts that the \$12.5 million stream, which was removed from the PLW account prior to the issuance of the March TRO, nonetheless implicates the April TRO, which provided that Ficus “be granted immediate possession and control” of the Company’s corporate assets, “wheresoever located.” Plaintiff argues that this language requires Defendants to “give the Company” any assets, wherever located. (Cambria Aff. ¶ 33.) Defendants’ failure to hand over the \$12.5 million, and their deposit of those funds into a PCM account on May 9, 2007, thus amounted to a “crystal clear violation of the first decretal paragraph” of the April TRO and the May PI. (*Id.*; see also Contempt H’rg Tr. 17, Oct. 23, 2007.)

Defendants respond, first, by noting that the March TRO was not applicable to any funds already withdrawn from Company accounts. (Def. Mem. in. Opp. 4.) The March TRO prohibited the transfer of funds “from the Company or its accounts,” and did not mandate that any funds already transferred from the Company or its accounts be frozen. (*Id.* at 19.) Defendants’ distribution of already transferred funds therefore cannot be read to be a violation of this Order.

Furthermore, with regard to the alleged violation of the April TRO, Defendants point out that the language of that Order does not require Mr. Donovan or Mr. Chalavoutis to affirmatively turn over any monetary assets to Ficus, but rather, only to grant to Ficus “possession and control” of corporate assets. (*Id.* at 6, 19-20.) In other words, because the Order did not mandate an affirmative act on the part of the Defendants, the failure of Mr. Donovan and Mr. Chalavoutis to give the funds to Ficus cannot possibly be understood to be a violation of the Order.

In order to hold a litigant in civil contempt, it is necessary that the order alleged to have been violated clearly expressed an unequivocal mandate. *McCormick v. Axelrod*, 59 N.Y.2d 574, 583 (1983); *Lubitz v. Mehlman*, 187 A.D.2d 97, 103 (1st Dep’t 1993). To find the Defendants in contempt for violation of the March TRO, I would thus have to be certain that the mandate of that Order was unequivocally to prevent Defendants from transferring funds from an account other than a Company account. The clear language of the Order, however, prohibits only the “transfers or distributions ... from the Company or its accounts.” The \$3 million stream, which, according to Plaintiff, had been transferred away from the Company before the issuance of the March TRO, was thus not transferred or distributed from the Company or its accounts. As there is nothing in this Order to require Defendants to freeze any assets already in their possession, the distribution of the \$3 million stream cannot have been a violation of the March TRO. Plaintiff’s indignation at this reading of the March TRO notwithstanding (*see* Pl. Reply Mem. 3-4), I cannot hold a litigant in contempt for taking action that is not expressly and unequivocally prohibited by the clear language of the Order. *See Lubitz*, 187 A.D.2d at 103 (reversing an order of contempt on the grounds that the

order in question was ambiguous).

Similarly, the April TRO, granting to Plaintiff immediate possession and control of Company assets, wheresoever located, does not expressly require Defendants to turn those assets over to the Plaintiff. In other words, as Defendants argue, the language of the April TRO is not the language of an order unequivocally requiring the turnover of assets. Defendants' failure to affirmatively turn the \$12.5 million over to Ficus or its representatives cannot be understood as a violation of the April TRO, and Plaintiff's motion to hold Defendants Donovan and Chalavoutis in contempt on the basis of their actions with regard to the funds discussed supra, is therefore denied without prejudice.

The Books & Records

Plaintiff alleges that Defendants, along with other parties acting in concert with them, have also violated the March and April TROs and the May PI by removing or otherwise rendering unavailable to Plaintiff certain Company books and records. Specifically, Plaintiff asserts that Defendants Donovan and Chalavoutis removed PCG books, records, and assets from the Company's Jericho, NY offices prior to March 26, 2007, and thereafter concealed them from Ficus and its representatives, violating the March TRO and the May PI. (Cambria Aff. ¶ 24.) Furthermore, Plaintiff alleges that Mssrs. Donovan and Chalavoutis violated the April TRO and May PI by failing to give to Ficus possession and control of Company assets, including accounts payable, personnel and human resources records, and by not providing requested information and computer back-up tapes to Ficus's forensic accountants. (*Id.*)

Each of the parties has submitted sworn affidavits from several people with personal

knowledge of the Company, its books and records, and the events giving rise to the present motion. And, not surprisingly, the set of “facts” presented by either side is flatly contradicted by the set of “facts” submitted by the other. As such, it appears that there are disputed issues of fact sufficient to require an evidentiary hearing on the question of whether Defendants Donovan and Chalavoutis violated the March and April TROs and the May PI. *See Pinto v. Pinto*, 120 A.D.2d 337, 338 (1st Dep’t 1986) (“Contempt is a drastic remedy which should not be granted absent a clear right to the relief. When the papers on a motion for contempt raise any factual dispute not capable of resolution on the papers, a hearing must be held before a party can be adjudicated in contempt.”).

Therefore, the issue of whether Defendants Donovan and Chalavoutis should be held in contempt for violation of the provision of the March TRO and May PI prohibiting the removal, concealment, etc. of PCG books and records, and for violation of those parts of the April TRO and the May PI pertaining to the provision of information, records, and computer back-up tapes to Ficus and its representatives, shall be and is hereby referred to a Special Referee to hear and report. Insofar as counsel to Mr. Donovan has withdrawn and all proceedings in this matter have been stayed until November 30 in order to give Mr. Donovan a chance to retain new counsel,³ this matter shall be referred, but there shall be no appearance scheduled prior to that date. Decision on this motion is hereby stayed, pending the hearing before and report of the Special Referee.

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In open court on November 1, 2007, I granted Defense counsel’s motion to withdraw, made by order to show cause, on the record. (Hr’g Tr. 4, Nov.1, 2007.) During that hearing, I also stayed all proceedings in both the *Ficus v. Donovan* (No. 600926/2007) and the *Donovan v. Ficus* (No. 602715) actions. (*Id.* at 5.) Excepted from the stay, however, were all fully submitted motions, including the present motion for contempt. (*Id.* at 5-6.)

Defendants' cross-motion for sanctions is denied.

For the reasons set forth above, it is hereby:

ORDERED that Plaintiff's motion to hold Defendants Thomas B. Donovan and Christopher Chalavoutis in civil contempt for violation of the provisions of the TROs of March 26, 2007 and April 12, 2007, and the Preliminary Injunction of May 1, 2007 is denied without prejudice with regard to the provisions of those Orders pertaining to the transfer of funds; and it is further

ORDERED that the issue of whether Defendants Thomas B. Donovan and Christopher Chalavoutis are in contempt of the provisions of my Orders dated March 26, 2007, April 12, 2007, and May 1, 2007, pertaining to the removal, concealment, provision, etc. of PCG books and records, accounts payable, computer backup tapes, and other information concerning PCG's operations, is referred to a Special Referee 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 CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

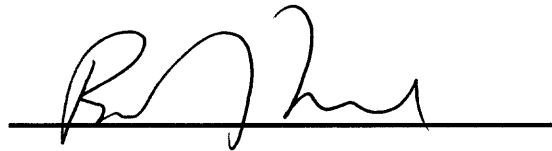
ORDERED that this motion shall be marked off the calendar, without prejudice to either party's right to move to restore it after receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403, or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office to arrange a date for the reference to a Special Referee, but such appearance shall not be scheduled until after November 30, 2007; and it is further

ORDERED that Defendants' cross-motion for sanctions is denied.

Dated November 13, 2007

ENTER:

A handwritten signature in black ink, appearing to read "Bernard J. Friedman", is written over a solid horizontal line.

J.S.C.

HON. BERNARD J. FRIED

FILED

NOV 14 2007

**COUNTY CLERK'S OFFICE
NEW YORK**