

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

PRESENT: BERNARD J. FRIED
Justice

PART 60

WINCHESTER GLOBAL TRUST COMPANY LIMITED, as Trustee of The Factored Receivables Trust,

Petitioner,

- v -

PRIVATE CAPITAL GROUP, LLC.

Respondent.

E-FILE

INDEX NO. 602752/2009

MOTION DATE _____

MOTION SEQ. NO. 001

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

This motion is decided in accordance with the accompanying Memorandum Decision.

SO ORDERED.

RECEIVED

MAR 02 2010

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 3/2/10

Bernard J. Fried
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):

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

E-FILE

----- X
WINCHESTER GLOBAL TRUST COMPANY, LIMITED,
as Trustee of the Factored Receivables Trust,

Petitioner,

- against -

Index No.602752/2009

PRIVATE CAPITAL GROUP, LLC,

Respondent,

and THOMAS B. DONOVAN,

Intervenor-Respondent

----- X

APPEARANCES:

Attorneys for the Petitioner:

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New York, NY 10166

By: Daniel R. Milstein, Esq.

Attorneys for the Respondent:

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New York, NY 10016

By: John F. Cambria, Esq.
Michael P. De Simone, Esq.
Matthew K. Fleming, Esq.

Attorneys for the Intervenor-Respondent:

SCHLAM STONE & DOLAN LLP
26 Broadway
New York, NY 10004
By: Richard M. Dolan, Esq.
David J. Katz, Esq.

Fried, J.:

In this special proceeding, brought pursuant to CPLR §§ 5225 and 5227, Petitioner, Winchester Global Trust Company Limited (“Winchester”), seeks an order requiring Respondent, Private Capital Group LLC (“PCG”) to turn over all monies that are presently owing or which may, in the future, become due to or on behalf of Winchester’s judgment debtor, Thomas B. Donovan (“Donovan”). By Motion Sequence No. 001, Winchester seeks a preliminary injunction that would enjoin PCG from paying any such sums pending the resolution of the special proceeding.

Intervenor-Respondent, Donovan,¹ opposes Winchester’s motion for preliminary injunctive relief, and cross-moves to dismiss the Petition as a matter of law. Donovan further moves, by Motion Sequence No. 002, for an order vacating the restraining notice served by Winchester upon PCG, which sought to restrain any property in which Donovan had an interest.

The motion for a preliminary injunction and the corresponding cross-motion to dismiss, as well as the motion to vacate the restraining notice, are consolidated for disposition.

Because this special proceeding is another close relative of the extended Ficus family, familiarity with all of the decisions rendered thus far in the related actions is presumed.²

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Donovan’s unopposed motion to intervene was granted during the proceedings of September 3, 2009.

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The other, currently active members of the Ficus family of litigation are as follows: *Ficus Investment v. Private Capital Management*, Index No. 600926/2007 (the “Main Action”); *Banque Portfolio Corp. v. Torchio*, Index No. 650339/2007; *New York Holding v. PCG REA LLC*, Index No. 602795/2007; *422 East 84th Street v. PCG REA LLC*, Index No. 602839/2007; and *Private Capital Group LLC v. Donovan*, Index No. 650338/2007. *Ficus Investments v. CSH Capital Group*, Index No. 650105/2009 was voluntarily discontinued by stipulation

This decision incorporates only such procedural history as is necessary to discussion on the present motions.

In September, 2003, after a bench trial in Nassau County, Winchester was awarded a judgment of approximately \$22 million against two entities controlled by Donovan and his wife, Pamela Donovan. The Donovans were subsequently held in civil contempt, first, for their failure to comply with an order directing them to disclose information about certain loan proceeds, which were the subject of the bench trial, and then, for their failure to answer an information subpoena. In 2004, Winchester prevailed in its attempt to pierce the corporate veil and hold the Donovans personally liable for the September 2003 judgment. (These two proceedings are referred to collectively as the “Riverside Actions.”) On February 26, 2009, a judgment of approximately \$33 million was entered in favor of Winchester and against the Donovans. There is no dispute that none of this judgment has been satisfied.

In 2007, Ficus and PCG commenced the Main Action, in which Donovan was named, individually, as a defendant. By Decision and Order dated April 24, 2008 (the “Advances Order”), I determined that PCG was obligated to advance litigation expenses to Donovan, in accordance with the PCG Operating Agreement.³ The Advances Order also put into place a Protocol to govern the process by which Donovan’s demands for litigation would proceed, and referred to Special Referee Marilyn Dershowitz the issue of the reasonableness of the litigation expenses demanded by Donovan. (Advances Order at 23-25.) In her July 7, 2009

dated February 9, 2010.

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The Advances Order was affirmed by the Appellate Division, First Department in January 2009. *See Ficus Investments, Inc. v. Private Capital Management, LLC*, 61 A.D.3d 1, 10 (1st Dep’t 2009).

report, Special Referee Dershowitz concluded that approximately \$1.8 million of the \$4 million in advances sought by Donovan were appropriately subject to advancement. By Order dated December 22, 2009, I confirmed the July 7, 2009 report of Special Referee Dershowitz and ordered Ficus and PCG to advance \$1,852,594.62 to Schlam Stone & Dolan LLP (“Schlam Stone”), the law firm representing Donovan.

Winchester asserts that these “Advanced Funds” constitute a debt, and that Donovan’s right to the advancement of future funds constitutes an assignable contract right.⁴ Winchester contends that both of these are subject to levy under CPLR § 5201. It therefore brings this special proceeding, under CPLR §§ 5225 and 5227 in an effort to levy upon the Advanced Funds, and the right thereto, in partial satisfaction of its judgment against Donovan. Winchester moves for a preliminary injunction that would preserve any such funds held by PCG, pending the resolution of the special proceeding.

Donovan cross-moves for the dismissal of the Petition, asserting, primarily, that the Advanced Funds are not property belonging to Donovan. Donovan argues that I have already concluded as much, and that therefore, Winchester is barred by collateral estoppel and res judicata from relitigating this issue in a special proceeding. Donovan’s motion to vacate the restraining notice is made on the same grounds.

I turn, first, to the contention that the Petition is barred by collateral estoppel and res judicata. Donovan contends that Winchester has appeared twice to argue that it has a right

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The approximately \$1.8 million referred to in the July 7, 2009 Report of Special Referee Dershowitz has already been advanced. (Affirmation of Richard H. Dolan in Opposition to Petitioner’s Motion for a Preliminary Injunction and in Support of Intervenor-Respondent Thomas B. Donovan’s Cross-Motion to Dismiss, September 18, 2009 ¶ 6.) The “Advanced Funds” referred to encompass not only this amount, but also future amounts that are determined to be subject to advancement.

to the Advanced Funds, and that I concluded, twice, that it has no such right. Donovan, however, is mistaken. First, the purported appearances cited by Donovan were on January 21, 2009, by letter, and then on February 4, 2009, in connection with an order to show cause filed by Donovan. (See Sept. 3, 2009 Dolan Affirm.⁵ ¶¶ 3-4, Ex. 3.) The judgment that this special proceeding seeks to enforce was not entered until February 26, 2009. (See Ex. B to the Sept. 3, 2009 Order to Show Cause.) Thus, neither the issue of Winchester's rights, as a judgment creditor, nor the question of whether the Advanced Funds are subject to levy under CPLR §§ 5225 and 5227, has yet been litigated in this forum. Collateral estoppel therefore does not apply. See, e.g., *Liddle, Robinson & Shoemaker v. Shoemaker*, 309 A.D.2d 688 (1st Dep't 2003) ("The doctrine of collateral estoppel precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point. Preclusion applies to issues that were actually litigated, squarely addressed and specifically decided") (internal quotes and citations omitted). Moreover, there has been no final judgment on the merits with regard to Winchester's right to the Advanced Funds, so the Petition is not barred by res judicata. See, e.g., *Sunoco, Inc. v. Home Insurance Co.*, 300 A.D.2d 19 (1st Dep't 2002) (denial of a motion to dismiss on the basis of res judicata was proper where there was no final judgment on the merits).

Since the Petition, itself, is not barred by res judicata or collateral estoppel, I turn, now, to the merits of Winchester's application for a preliminary injunction.

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Affirmation of Richard H. Dolan in Opposition to Petitioner's Motion for a Temporary Restraining Order, September 3, 2009.

The provisional relief of a preliminary injunction is intended to preserve the status quo until the matter proceeds to trial and may be heard on the merits. *Morris v. Port Authority of N.Y. and N.J.*, 290 A.D.2d 22, 26 (1st Dep't 2002). Whether to issue such relief is a decision that is left to the discretion of the trial court. *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839 (2005). To establish its right to the provisional remedy it seeks, Winchester must demonstrate that it is likely to succeed on the merits of the underlying Petition, that it will suffer irreparable injury if the injunctive relief is not granted, and that the balance of the equities tips in its favor. *Doe v. Axelrod*, 73 N.Y.2d 748 (1988); *Bishop v. Rubin*, 228 A.D.2d 222 (1st Dep't 1996).

Turning to the first prong of this familiar test, the likelihood of Winchester's success on the merits of its Petition turns on whether the Advanced Funds, themselves, and/or Donovan's right to the receipt of such funds in the future, constitutes property or a debt subject to levy under Article 52 of the CPLR. Donovan contends that the Advanced Funds are not an asset belonging to him, and that the right to continued advancement is not assignable because the funds go directly from PCG to Schlam Stone and are not ever in the possession of Donovan, himself. He therefore argues that Winchester cannot succeed on the underlying Petition and the application for a preliminary injunction must be denied.

Article 52 of the CPLR provides for the enforcement of money judgments. Section 5201(a) provides that a money judgment can be enforced against a debt, "which is past due, or which is yet to become due, certainly or upon demand of the judgment debtor," and 5201(b) provides for enforcement against "any property which could be assigned or transferred, whether it consists of a present or future right or interest and whether or not it

is vested.” A judgment creditor may obtain such debt or property through the special proceedings described in §§ 5225 and 5227.⁶

Winchester brings the special proceeding under both Sections, and I note that, in the context of this particular fact pattern, the distinction between the debt contemplated by § 5227 and the property provided for in § 5225(b) is one without a difference. As set forth below, Donovan’s contractual right to receive the Advanced Funds if he incurs litigation expenses is a property right. Upon his demand and the accompanying reasonableness determination, the Advanced Funds also constitute a debt owed to him by PCG. Under either interpretation, Winchester is entitled to levy upon the Advanced Funds.

Donovan’s right to the Advanced Funds is created by the PCG Operating Agreement.⁷ Section 3.4.3 provides that PCG must advance funds to pay for or reimburse the reasonable expenses incurred by an officer or former officer, and § 3.4.12 expressly provides that the right to such advancement is a contract right. The funds that are advanced by PCG must be used to pay for or reimburse Donovan’s litigation expenses, but there is nothing in the PCG Operating Agreement that prevents Donovan from assigning his right to those funds. Because there is no restriction on the right to reimbursement, this renders it a leviable

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Section 5225(b) provides that, “Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, . . . where it is shown that the judgment debtor is entitled to possession of such property,” the court shall order the person in possession to pay the money over to the judgment creditor. Similarly, § 5227 provides that upon commencement of a special proceeding against a person who is or may become indebted to the judgment debtor, the court may require such person to pay the debt, upon maturity, over to the judgment creditor.

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A copy of the PCG Operating Agreement is annexed to the September 3, 2009 Order to Show Cause at Exhibit C.

property interest under CPLR § 5201(b).

Donovan argues that the right to receive the Advanced Funds does not belong to him, since, under the Protocol, the monies are to be delivered directly to Schlam Stone, and are never actually in Donovan's possession. However, the Protocol was designed only to facilitate the process by which Donovan's demands would be addressed and satisfied. The Protocol does not change the nature of the contractual provision that gives him the right to the Advanced Funds, and, as set forth above, the contractual right includes reimbursement. In any event, irrespective of the requirement that the monies be paid over directly to counsel, there can be no dispute that the Advanced Funds are paid by PCG for the benefit of Donovan - it is these funds that enable Donovan to mount his defense to the claims asserted against him in the Main Action and its brethren. Where a judgment debtor does not take possession of certain assets, but where he nonetheless derives a benefit therefrom, the assets are not shielded from the judgment creditor. *Ray v. Jama Productions, Inc.*, 74 A.D.2d 845, 845-46 (2d Dep't 1980).

In light of the foregoing, I am satisfied that Petitioner has demonstrated a substantial likelihood of success on the merits. I am similarly satisfied that Petitioner will be irreparably harmed if the injunctive relief is not granted, as Donovan has alleged that he lacks the ability to satisfy the judgment against him, and if the Advanced Funds are dissipated, Winchester will have no other recourse for the satisfaction of its judgment. The balance of the equities favors Winchester insofar as Donovan has acted in bad faith and twice been held in contempt in connection with the Riverside Actions. While I recognize the practical implications of placing a restraint on the Advanced Funds, to wit: Donovan's ability to continue defending

against the claims asserted against him may be severely limited, this does not provide a sufficient basis for the denial of this motion.

Accordingly, it is

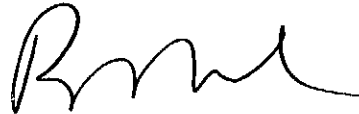
ORDERED that Winchester's Motion for a Preliminary Injunction (Motion Sequence No. 001) is GRANTED; and it is further

ORDERED that Donovan's Cross-Motion to Dismiss the Petition is DENIED; and it is further

ORDERED that Donovan's Motion to Vacate the Restraining Notice (Motion Sequence No. 002) is DENIED.

Dated March 2, 2010

ENTER:



J.S.C.

HON. BERNARD J. FRIED