[*1] SCANNED ON 10/7/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____ Justice

PART 2

11/5/9/09

INDEX NO. 115119/09

MOTION DATE _____

MOTION SEQ. NO. 005

Metropolitan Plaza, et al.,

-v-

Goetz Fitzpatrick, LLP, et ano.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). No motion

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is ~~for~~ for summary judgment/dismissing is decided in accordance with the accompanying decision.

FILED
OCT 07 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 9/30/13

_____, J.S.C.
LOUIS B. YORK

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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METROPOLITAN PLAZA WP, LLC f/k/a RIDGEMOUR MEYER PROPERTIES, LLC, RIDEGMOUR DEVELOPMENT CORPORATION, W&A DEVELOPMENT, LLC, WILLIAM A. MEYER and A.J. ROTONDE,

Plaintiffs,

-against-

GOETZ FITZPATRICK, LLP and DONALD J. CARBONE, ESQ.,

Defendants.

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Index Number 115519/2009

Motion Sequence Nos. 002 and 003

ORDER AND DECISION

HON. LOUIS B. YORK, J.S.C.:

The instant matter involves legal malpractice and related causes of action asserted by plaintiffs. The defendants are the law firm of Goetz Fitzpatrick, LLP (GF) and one of its partners, Donald J. Carbone, Esq. (Carbone) (collectively, Defendants). The complaint sets forth five causes of action: (1) violation of Judiciary Law § 487 (deceit); (2) violation of Judiciary Law § 487 (chronic pattern of legal delinquency); (3) legal malpractice; (4) breach of fiduciary duty; and (5) breach of contract.

In a prior decision, this court denied Defendants' motion for dismissal of the complaint. With discovery over, Plaintiffs move, pursuant to CPLR 3212, for partial summary judgment, as to liability only, (motion sequence number 002), and Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the

complaint (motion sequence number 003).

The two motions are consolidated for disposition. For the reasons set forth fully below, Plaintiffs' motion is denied and Defendants' motion is granted.

Background

Ridgemour Meyer Properties, LLC is a New York limited liability company formed to engage in the business of real estate development and leasing, and its members are Ridgemour Development Corporation ("RMP") and W&A Development, LLC ("W&A"). William A. Meyer and A.J. Rotonde are the respective principals of W&A and RDC. In 2003, RMP and nonparty Ginsburg Development Companies, LLC ("GDC") entered into a joint venture named Pinnacle-Westchester, LLC ("Pinnacle") for the purpose of acquiring and developing certain real estate in White Plains, New York. In 2005, disputes arose between the parties over the future of Pinnacle. While RMP wished to develop Pinnacle's three adjoining properties (collectively, Property), GDC wanted to dissolve the joint venture. GDC commenced an arbitration proceeding against RMP, Meyer and Rotonde, before the American Arbitration Association, which appointed Thomas Scarola (Scarola) as the arbitrator. Defendants represented Plaintiffs in the arbitration, pursuant to a retention agreement.

In the arbitration, after having conducted several days of hearing, Scarola sent an email to the parties which stated,

among other things: RMP incurred damages due to GDC's management of Pinnacle; control of the Property should be returned to RMP to allow for its development; and the parties should be prepared to discuss the methods of dissolving Pinnacle. The email also stated that the foregoing would not preclude assigning a value to the Property contributed by RMP and compensating GDC for its investment, with such issues to be determined after hearing the parties' damage claims and defenses. Thereafter, the parties discussed the issues regarding the transfer of control of the Property to RMP, and the protection of GDC's rights through a mortgage and a note of $14.629 million, with the understanding that the amount could rise or fall depending on the resolution of their claims and defenses. GDC's attorneys volunteered to draft the mortgages and other conveyance documents, and RMP's attorneys volunteered to draft the deeds for the Property. On June 25, 2006, Carbone sent to GDC's counsel, Jonathan Vuotto, draft warranty deeds that provided a space for Rotonde to sign on behalf of Pinnacle. On June 27th, Vuotto sent draft conveyance documents to Carbone, changed the draft warranty deeds to bargain and sale deeds, but left the signature line unchanged, with the understanding that even though Rotonde was not authorized to sign on behalf of Pinnacle, it did not matter because the signing of all documents would occur at the same time at closing. Scarola then sent an email to both sides which, among other things,

confirmed his earlier decision that Pinnacle should be dissolved, and addressed the issues of control and ownership of the Property. Scarola also wrote that if RMP chose to maintain control of the Property, "the contract" was to be executed by both parties.[1] On June 30th, the draft deeds were signed by Rotonde and notarized by Carol Dall (Dall), an attorney for RMP. The deeds were then filed with the Westchester County Clerk on July 1st, and recorded by the County Clerk on July 29th.

After the deeds were signed by Rotonde, apparently without giving any notice to GDC and Scarola, the parties continued to negotiate the terms of the mortgages and other related documents, including the so-called "interim award" to be issued by Scarola. On July 9, 2008, Scarola issued an interim award (Interim Award) which stated that: Pinnacle was to be dissolved; ownership of the Property was to be transferred and deeded from Pinnacle to RMP to provide it with the opportunity to develop same; a mortgage and note in the sum of $14.629 million was to be placed on the Property in favor of GDC, and the amount could be increased or decreased depending on the parties' damage claims and defenses; and RMP was to indemnify GDC and Pinnacle for all claims or liabilities arising from RMP's acts or omissions with respect to

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[1] In a subsequent hearing conducted in the Bankruptcy Court in October 2008, as discussed later, Carbone testified that the word "contract" referred to the "interim award," as discussed immediately below. However, the Bankruptcy Court opined that "contract" meant the Property conveyance documents.

its ownership of or attempts to develop the Property, which may arise after the date of the transfer or arising from RMP's actions prior to the date of the transfer.

After issuance of the Interim Award, the parties continued to negotiate the terms of the documents referenced therein. When they reached an impasse, GDC again asked Scarola to intervene and a conference call was scheduled for July 22, 2008. During the call, there was no discussion about the transfer of ownership of the Property, as it was understood by GDC and Scarola that the transfer had not yet occurred, and depended on the delivery of the mortgages and other documents. On July 31st, GDC's lawyers discovered that the draft deeds they sent to Carbone on June 27th were signed, without authorization, by Rotonde on June 30th and then recorded by the County Clerk on July 31st. GDC immediately informed Scarola in writing of what occurred. The next day, Carbone responded and argued that the Property transfer was consistent with the 6/18 email, 6/28 email, and the Interim Award. In particular, Carbone argued that because the paragraphs of the Interim Award were not interrelated, the transfer pursuant to the deeds was not contingent on the execution of the mortgages and related documents. He also argued that, because the draft language for the Interim Award was negotiated by him and Vuotto, GDC's counsel could have suggested or demanded that such language be included in the Interim Award, but Vuotto failed to do so.

On August 4, 2008, Scarola issued a decision that required RMP to execute the mortgages specified in the Interim Award by August 12th, and also to give GDC a $3.5 million letter of credit and $14.6 million in guarantees. On August 8th, GDC filed a notice of pendency against the Property and commenced an action against Plaintiffs in the Westchester Court. On August 11th, one day before the August 12th deadline, GDC pressed RMP for the documents specified in the 8/4 Decision. Carbone wrote to Scarola stating that his firm was working with GDC on the documents. Four hours later, RMP filed for Chapter 11 relief in the Bankruptcy Court, which automatically stayed the arbitration and the Westchester action. Defendants did not represent RMP or any of the Plaintiffs in the Chapter 11 case.

On August 25, 2008, GDC moved the Bankruptcy Court seeking to dismiss RMP's Chapter 11 case or to appoint a trustee to take over its management and operation. An evidentiary hearing was held by the Bankruptcy Court to investigate the circumstances surrounding the Property transfer. Many witnesses were called to testify, including, among others, Rotonde, Carbone and Dall. The Bankruptcy Court found that the management of the "debtor [RMP], its principal, Rotonde, and its lawyer, Carbone, acted dishonestly when they caused Pinnacle to transfer the Property secretly to the debtor, knowing that the delivery of a mortgage and other protections to GDC was a *quid pro quo* for the

conveyance ...." *In re Ridgemour Meyer Props., LLC*, 413 BR 101, 112 (Bankr. SD NY 2008). The Bankruptcy Court found that "[t]hey also acted with deceit when they failed to disclose the delivery or recordation of the deeds until GDC discovered what had occurred, and instead, stated or implied to the arbitrator and GDC's lawyers that the conveyance had not yet occurred." *Id.* It further held that Rotonde had breached his fiduciary duties to Pinnacle and its members, including GDC, and many of his actions that took place before and after the bankruptcy filing showed that he was untrustworthy. Thus, the Bankruptcy Court appointed an independent trustee to take over the debtor's management. It also rejected the debtor's belated request to dismiss its Chapter 11 case as an alternative.

While the bankruptcy case was pending, Defendants wrote to Scarola and stated that they were withdrawing as attorneys for Plaintiffs in the arbitration. Separately, GDC amended its complaint against RMP filed in the Westchester Court, to add Defendants herein as defendants in that action (Westchester Action). About 11 months later, on September 24, 2009, a settlement was entered into by and among GDC, the trustee and Plaintiffs, whereby Plaintiffs agreed to pay $5.7 million to GDC, in exchange for obtaining all rights and interests to the Property. In the settlement stipulation, the parties exchanged mutual releases of all claims asserted in the arbitration and

related state court actions, except with respect to the claims against Defendants herein. The settlement was approved by the Bankruptcy Court, the terms of which were later incorporated into RMP's Chapter 11 plan of reorganization.

In the Westchester Action, Defendants moved to dismiss GDC's amended complaint pursuant to CPLR 3211.[2] In a decision dated February 19, 2010, the Westchester Court refused to dismiss GDC's claims based on fraud, violation of Judiciary Law § 487, aiding and abetting breach of fiduciary duty and aiding and abetting fraud, but dismissed the legal malpractice claim due to the lack of an attorney-client relationship between GDC and Defendants. *Ginsburg Dev. Cos., LLC v Donald Carbone and Goetz Fitzpatrick, LLP*, Sup Ct, Westchester County, Feb. 19, 2010, Index No. 17369/2008. On appeal, the Second Department affirmed and modified the lower court's ruling, but only to the extent of re-instating the legal malpractice claim. *Ginsburg Dev. Cos., LLC v Carbone*, 85 AD3d 1110 (2d Dept 2011). Thereafter, the Westchester Court granted Defendants' summary judgment motion, to the extent of dismissing the claims based on fraud, aiding and abetting fraud and negligent misrepresentation, but denied the motion as to the claims based on violation of Judiciary Law § 487, legal malpractice, and aiding and abetting breach of

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[2] Defendants also filed a third-party complaint against Plaintiffs herein in the Westchester Action.

fiduciary duty. *Ginsburg Dev. Cos., LLC v Donald Carbone and Goetz Fitzpatrick, LLP*, Sup Ct, Westchester County, July 9, 2013, Index No. 17369/2008.

In the instant motions, while Plaintiffs seek partial summary judgment against Defendants as to liability only (with the issue of damages to be determined in a trial), Defendants seek summary judgment dismissing all claims of the complaint.

Applicable Legal Standards

In stating the standards for granting or denying a summary judgment motion, pursuant to CPLR 3212, the Court of Appeals noted in *Alvarez v Prospect Hosp.* (68 NY2d 320, 324 [1986]):

> As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such ... showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the Court of Appeals' guidance, the lower courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief should be granted or denied. *See Andre v Pomeroy*, 35 NY2d 361, 364 (1974)(because summary judgment "deprives the litigant of his day in court it is considered a drastic remedy which should only

be employed when there is no doubt as to the absence of triable issues"); *see also Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997)("in considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion" [citations omitted]). However, general allegations of a conclusory nature unsupported by evidence are insufficient to defeat a summary judgment motion. *Alvarez*, 68 NY2d at 325. Further, in order to prevail on a motion to dismiss based on documentary evidence, the documents relied upon must resolve all factual issues as a matter of law. *Weiss v Cuddy & Feder*, 200 AD2d 665, 667 (2d Dept 1994).

Discussion

In their papers, besides addressing the legal and factual issues for each cause of action in the complaint, the parties argue the applicability of various doctrines, principles or rules of law, including, among others: in pari delicto (in terms of summary dismissal of action); collateral estoppel (in terms of prior court findings and rulings); attorney-client privilege (in terms of disclosure of client secret); American Arbitration Association Rule 46 (in terms of appeal or modification of arbitration award); and General Obligations Law §15-108 (in terms of contribution claim against joint tortfeasors). The parties also submitted more than one hundred exhibits, including, among others, emails, as well as deposition and hearing transcripts.

Instead of addressing the multifarious arguments, applying two well-known doctrines will be sufficient to dispose of the instant motions and, indeed, this case, as discussed below.

Collateral Estoppel and In Pari Delicto

In their moving papers, Plaintiffs argue, principally, that their motion for partial summary judgment should be granted in their favor on the basis of collateral estoppel. Plaintiffs rely upon the Bankruptcy Decision and the rulings in the Westchester Action as support.[3] Plaintiffs' moving brief, at 22-24.

Application of the doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity." *Buechel v Bain*, 97 NY2d 295, 303 (2001), *cert denied* 535 US 1096 (2002)(citation omitted). The doctrine is applied to avoid "relitigation of a decided issue and the possibility of an inconsistent result." *Id.* (citation omitted). Two requirements must be met before the doctrine can be invoked: (1) "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action"; and (2) "there must have been a full and fair opportunity to contest the decision now said to be controlling." *Id.* at 303-304 (citation omitted). The doctrine

[3] As noted, GDC's action against Plaintiffs was discontinued after the Bankruptcy Court approved the settlement stipulation. However, in the Westchester Action, Defendants, as third-party plaintiffs, sued Plaintiffs herein as third-party defendants.

is to be applied in a flexible manner because "'the fundamental inquiry is whether relitigation should be permitted in a particular case in light of ... fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results.'" *Id.* at 304 (citation omitted).

In this case, Defendants do not oppose the application of collateral estoppel. Indeed, they contend, as follows:

> if Carbone, a nonparty to the bankruptcy who was unrepresented by counsel, can be criticized by the Bankruptcy Court, then RMP and Rotonde, who were parties to the bankruptcy and represented by experienced bankruptcy attorneys, should be bound those portions of the Bankruptcy Decision which set forth RMP's and Rotonde's own wrongdoings ....

Defendants' moving brief at 2; Defendants' opposition brief at 2. Defendants also point out, correctly, that Plaintiffs have selectively chosen to cite only those portions of the Bankruptcy Decision that are in their favor.

After conducting three days of evidentiary hearing during which it heard testimony of many witnesses (such as Rotonde, Carbone and Dall) and having reviewed numerous trial exhibits, the Bankruptcy Court found, as follows:

> I find that the debtor, its principal, Rotonde, and its lawyer, Carbone, acted dishonestly when they caused Pinnacle to transfer the Property secretly to the debtor, knowing that the delivery of a mortgage and other protections to GDC was a *quid pro quo* for the conveyance and that Rotonde lacked the authority to execute the deeds drafted by GDC as the agent for Pinnacle. They also acted with deceit when they failed to disclose the delivery or recordation of the deeds

> until GDC discovered what had occurred, and instead, stated or implied to the arbitrator and GDC's lawyers that the conveyance had not yet occurred.

In re Ridgemour Meyer Props., LLC, 413 BR at 112. Further, the Bankruptcy Court stated that:

> Rotonde's conduct is exacerbated by the position of trust he abused. He was a member of the management committee of Pinnacle, and owed the same duties that a director of a corporation owes to the corporation and the shareholders ... and [he] breached those duties by secretly transferring Pinnacle's assets to RDC.

Id. (internal citation omitted).[4] The Bankruptcy Court observed:

> [m]aking matters worse, the debtor had sold the Jomas Lot to Pinnacle, which had assumed a $3.5 million mortgage and paid the debtor over $3 million in cash. At the end of the day, Rotonde kept the cash and took the Jomas Lot back, without compensating Pinnacle. Under the circumstances, the appointment of a trustee is mandated ....

Id. Based on the foregoing, despite Plaintiffs' contention to the contrary, they (including RMP, RDC and Rotonde), as well as Defendants (who now reluctantly acknowledge wrongdoing on their part), were both found to have acted dishonestly in connection with the Property transfer and the subsequent coverup. These findings were the primary reason that resulted in the appointment of an independent trustee. As urged by Defendants, because Plaintiffs were parties in the Chapter 11 case and had a full and fair opportunity to argue their case, the findings and rulings against them by the Bankruptcy Court must be given collateral

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[4] As noted, RMP is a member of Pinnacle, and Rotonde is the sole principal owner of RDC, which is an equity holder of RMP.

estoppel effect. This court agrees. Because both parties were wrongdoers, they were in pari delicto.

Pursuant to the doctrine of in pari delicto, "courts will not intercede to resolve a dispute between two wrongdoers." *Kirschner v KPMG, LLP*, 15 NY3d 446, 464 (2010). In effect, application of the doctrine bars a plaintiff from recovery against a defendant when both parties are wrongdoers. *Concord Capital Mgt., LLC v Fifth Third Bank*, 2011 WL 10564345, *4 (Sup Ct, NY County 2011), *affd* 102 AD3d 406 (1st Dept 2013). "Traditional agency principles play an important role in an in pari delicto analysis." *Kirschner*, 15 NY3d at 465. Indeed, "[a]gency law presumes imputation [of bad acts to a corporation] even where the agent acts less than admirably, exhibits poor business judgment, or commits fraud." *Id.* Thus, all corporate acts, including fraudulent ones, are subject to the presumption of imputation. *Id.* at 466. However, where the corporation is a plaintiff, existence of an "adverse interest" is an exception to the doctrine, but in order for the exception to apply, "the [corporate officer] must have totally abandoned [the corporation's] interests and be acting entirely for his own or another's purposes ... because where an officer acts entirely in his own interests and adversely to the interests of the corporation, that misconduct cannot be imputed to the corporation." *Id.* at 460 (internal quotation marks and citations

omitted). In this case, it is apparent that Rotonde's interest and that of RMP and RDC were aligned because he is the owner of RDC which, in turn, holds the equity in RMP. Indeed, his wrongdoing benefitted himself, RDC and RMP (at least until the deceitful acts were discovered), but at the expense and to the detriment of Pinnacle and GDC, the joint venture partner. Thus, the adverse interest exception is inapplicable.

Yet, Rotonde asserted that "[o]n June 30, 2008, Carbone advised it was proper that I should go ahead and execute the Deeds on behalf of Pinnacle, in anticipation of filing them for recording, thereby consummating the Properties' return to RMP." Rotonde reply affidavit, ¶ 12. He also stated that "[b]ased *solely* upon Carbone's professional legal advice, I signed the draft Deeds that day." *Id.*, ¶ 13 (emphasis added). However, his assertion is neither supported nor corroborated by documentary or other evidence. On the other hand, there is ample circumstantial evidence which shows that Rotonde and Carbone were participants in the fraudulent scheme. For example, in an email dated June 24, 2008 (six days before Rotonde signed the deeds) from Dall (Plaintiffs' attorney) to Carbone (copying Rotonde and Meyer), Dall wrote: "I spoke with AJ [Rotonde]. I agree with him that it is not necessary and would not be prudent strategically to draft a proposed order for the arbitrator to sign relative to the transfer of the deeds ... I don't think we should complicate what amounts to a simple transfer of rights and title." Rosen

affirmation, exhibit D. Also, in an email to Carbone Rotonde wrote: "I am having Carol [Dall] revise the Citibank assignment ... do not send any documents until I have had the time to see all final drafts." *Id.*, exhibit G. Then, in an email to Carbone, Rotonde wrote: "we have to assume Vuotto is going to send the arbitrator his version of the June 18 ruling. Therefore, we may have no choice but to send out ours now. However, if we do, I have revised it as a re-statement of the previous order of June 18 ...." *Id.*, exhibit L. On June 27th, Rotonde wrote an email to the bankruptcy counsel (copying Carbone) that stated: "if the arbitrator changes his mine [sic] we have already signed the new deeds per his order. If he reverses this, we will have to file the chapter 11." *Id.*, exhibit O. In response to Carbone's email which indicated that "Scarola did not reverse himself," Rotonde wrote back and stated: "Please advise Scarlo [sic] in no other words other then [sic] 'RMP will maintain control of the property thank you.'" *Id.*, exhibit P. Moreover, Rotonde e-mailed Carbone, Meyer and Dall and stated: "Carol [Dall] is correct and makes a good point ... However, we should discuss not giving the deeds back if Scarlo [sic] does a flip flop. We could take the position that we have already accepted the deeds and have executed the leases to move the project forward as per his instructions. Therefore, you and I must be on the same page ...." *Id.*, exhibit Y. The foregoing

exhibits, among others, show that Rotonde actively worked with Carbone (and others) and knowingly participated in the deceitful scheme, despite his assertion that he was only following Carbone's advice. *Id.*, exhibits D-Z, AA-ZZ, AAA-DDD.

In an attempt to distinguish *Kirschner, supra*, Plaintiffs argue that the facts in this case are different, as they take the position that in pari delicto only applies to cases involving outright criminal acts. In particular, they argue that: "Here, the [D]efendants engaged in isolated, deceitful and fraudulent acts but not in any outright criminality. Furthermore, the underlying transactions were legal and legitimate." Michelen reply affidavit,[5] dated December 19, 2012, ¶ 55. The argument is unpersuasive, because the in pari delicto doctrine is applied not only in cases involving "outright criminality," but also frequently in cases involving commercial fraud.

For instance, in *Concord Capital, supra*, the plaintiff's executives concocted a fraudulent scheme in originating loans that did not satisfy underwriting standards but generated significant upfront fees for the corporation, which were later misappropriated by the executives. Defendants were loan servicers and collateral agents who allegedly failed to examine

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[5] Michelen, a lawyer, is retained by Plaintiffs as an expert witness. Notably, the assertion that Defendants engaged in isolated deceitful acts and that the underlying transactions were legal, significantly undercuts Plaintiffs' own allegations that Defendants engaged in a chronic pattern of legal delinquency, as well as claims alleging breaches of fiduciary duty and contract.

the loan documents to ensure compliance, and failed to monitor the collateral requirements. The court applied in pari delicto to dismiss the claims against the defendants, pursuant to CPLR 3211 (a) (1) and (7). The court also dismissed the breach of contract claim based on in pari delicto at the pleading stage. *Concord Capital*, 2011 WL 1056345, at *7-8. Significantly, the court quoted *Kirschner* to illustrate the breadth of the doctrine: "'[T]he principle that a wrongdoer should not profit from his own misconduct is so strong in New York that we have said the defense applies even in difficult cases and should not be "weakened by exceptions.'" *Id.* at *6, *quoting Kirschner*, 15 NY3d at 464 (quotation marks in original). The ruling was upheld on appeal. *Concord Capital*, 102 AD3d at 406 (doctrine of in pari delicto applies where both parties acted willfully). Similarly, the doctrine was applied to bar accounting malpractice claims which alleged that the defendant accountants and auditors failed to discover the fraud committed by the management of the plaintiff corporation. *Chaikovska v Ernst & Young, LLP*, 78 AD3d 1661 (4th Dept 2010). Likewise, malpractice claims against an attorney were dismissed based on in pari delicto. *Holtkamp v Parklex Assoc.*, 30 Misc 3d 1226, *8-9 (A), 2011 NY Slip Op 50208 (U) (Sup Ct, Kings County 2011) ("Assuming any merit to the allegations against the attorneys ... in this litigation, plaintiffs share the responsibility for any fraud upon the court and any resultant

adverse consequences to the partnership"), *affd* 94 AD3d 819 (2d Dept 2013). Because this case is similar to the above cases that involved fraud by both wrongdoers, application of the doctrine is warranted. In such regard, and on this basis alone, Defendants' motion seeking dismissal of the complaint should be granted.

Yet, and as noted above, Plaintiffs also rely upon the court rulings in the Westchester Action and argue that they be given collateral estoppel effect. In essence, Plaintiffs contend that their complaint should not be dismissed because the Westchester Court rulings against Defendants are based on the same facts as alleged in the complaint. Plaintiffs' reliance is misplaced. For instance, in the decision dated July 8, 2013, the Westchester Court denied, inter alia, Defendants' motion seeking summary judgment dismissing the aiding and abetting breach of fiduciary duty claim. To sustain such claim, a plaintiff must show that the defendant "knowingly participates in a breach of fiduciary duty only when he or she provides *substantial assistance to the primary violator.*" *Palmetto Partners, L.P. v AJW Qualified Partners, LLC,* 83 AD3d 804, 808 (2d Dept 2011)(citation omitted; emphasis added). The inference that can be logically drawn from the Westchester Court ruling is that, if Defendants were found to have aided and abetted a breach of fiduciary duty, they did so only by "providing substantial assistance to the primary violator," which, in this case, would be Plaintiffs. Thus, if Defendants were liable to GDC on the aiding and abetting claim,

it would only indicate that Plaintiffs were wrongdoers in that they, as the primary violator, breached the fiduciary duty owed to Pinnacle and GDC. *Ginsburg Dev. Cos., LLC v Carbone*, 2010 WL 3073781, *1 (Sup Ct, Westchester County, May 17, 2010)("that Plaintiff [GDC] settled such claims against certain former Defendants does not establish that Plaintiff will not be able to prove such former Defendants' breach of fiduciary duty and fraud at trial.") Therefore, the Westchester Court's ruling in fact reinforces the application of the doctrine.

On a different issue, even though Plaintiffs allege that they followed Defendants' advice in filing RMP's bankruptcy case and that Defendants violated their loyalty and fiduciary duties by insisting upon the payment of outstanding legal fees, such allegation is mitigated or discredited by their own exhibits they rely upon for support. For example, in an email dated July 24, 2008 from Rotonde to Robert Rattel (bankruptcy counsel) and Donald Carbone, Rotonde wrote: "Good morning Bob, I am surprise [sic] that you asked Donald to participate on the call today, after I stated to you yesterday that you and I would discuss the plan first, and then we would call Donald once we had a clear picture on what our options were." *See* exhibits for use in Plaintiffs' motion for partial summary judgment, exhibit Q1. The foregoing shows, at least inferentially, that Rotonde was the one who made the ultimate decision as to whether RMP should file for bankruptcy relief. Moreover, [in an email dated August 29,

2008] from Carbone to Rotonde, he wrote, in relevant part: "It is true that I did suggest that RMP declare bankruptcy because I thought that was in RMP's best interest. I made that recommendation regardless of the fact that I knew RMP's bankruptcy filing would make the payment of my [outstanding] legal fees more complicated. Therefore, I was willing to put RMP (your best interest) in front of GF's best interest." *Id.*, exhibit Q7. This email shows there is an issue of fact as to whether Defendants breached their fiduciary duty or that they were the sole cause of Plaintiffs' alleged loss. Based on the foregoing exhibits, among others, there are issues of fact that preclude the grant of partial summary judgment in Plaintiffs' favor. Therefore, their motion for relief is denied.

Conclusion

Accordingly, based on all of the foregoing, it is

ORDERED that plaintiffs' motion for partial summary judgment (motion sequence number 002) is denied; and it is further

ORDERED that defendants' motion for summary judgment (motion sequence number 003) is granted, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 9/30/13

ENTER:

J.S.C.

FILED

OCT 07 2013

COUNTY CLERK'S OFFICE
NEW YORK

LOUIS B. YORK
J.S.C.