Romanoff v Romanoff
2015 NY Slip Op 30156(U)
February 3, 2015
Supreme Court, New York County
Docket Number: 151160/14
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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NICHOLAS ROMANOFF, a minor, suing, pursuant to BCL § 626, in his capacity as a shareholder of NEW ROADS REALTY CORP. in the right of NEW ROADS REALTY CORP. as the sole shareholder of GHC NY CORP. suing in the right of GHC NY CORP., by his parent and natural guardian, ROBERT ROMANOFF,

Plaintiffs,

- against -

GERALD ROMANOFF, SHERYL ROMANOFF, MICHAEL A. ZIMMERMAN, 55 GANS JUDGMENT LLC as successor-in-interest to UNION CENTER NATIONAL BANK, 55 GANS LENDER LLC as successor-in-interest to CAPITAL ONE, NATIONAL ASSOCIATION (as successor by merger to NORTH FORK BANK), GRIFFON GANSEVOORT HOLDINGS LLC, GHC NY CORP., THE SHERYL ROMANOFF IRREVOCABLE GRANTOR TRUST by ROBERT ROMANOFF and FRANK PLATT as Trustees, NEW ROADS REALTY CORP., JOHN and JANE DOES "1" through "10" and ABC CORPS. "1" through "10," being the fictitious names of individuals and entities whose real names and identities are presently unknown to plaintiff,

Defendants.

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Index No. 151160/14

Motion Sequence Nos. 004, 005, 006 and 007

SINGH, J:

Motion sequence numbers 004, 005, 006 and 007 are consolidated for disposition.

Plaintiff Nicholas Romanoff, a minor, brings this derivative action pursuant to section 626 of the Business Corporation Law (BCL), by his father, Robert Romanoff, on behalf of New Roads Realty Corp., which is the sole shareholder of GHC NY Corp. (together with New Roads, Corporations). Plaintiff seeks damages and equitable relief against defendants Gerald Romanoff, Sheryl Romanoff, Michael A. Zimmerman, Frank Platt (Platt), 55 Gans Judgment LLC, 55 Gans Lender LLC, Griffon Gansevoort Holdings LLC, The Sheryl Romanoff Irrevocable Grantor

Trust, and individuals and corporations yet unknown to plaintiff. The six-count complaint asserts causes of action for: (1) breach of fiduciary duty against Gerald; (2) aiding and abetting breach of fiduciary duty against the Gans Defendants, Zimmerman and yet unknown individuals and corporations; (3) an accounting against Gerald and Sheryl; (4) rescission and setting aside of the transfer of the Property; (5) a declaration of the Corporations' right to redeem the Property and directing the Gans Defendants to state all amounts due; and (6) removal of Gerald as officer and director of the Corporations.

Platt now moves to dismiss the complaint (in motion sequence number 004), pursuant to CPLR 3211 (a) (7). Zimmerman moves to dismiss the complaint (in motion sequence number 005), pursuant to CPLR 3211 (a) (1), (3), (5) and (7), and CPLR 3016 (b). Gerald, Sheryl and the Corporations move to dismiss the complaint (in motion sequence number 006), pursuant to CPLR 3211 (a) (1), (3), (5) and (7). Plaintiff moves (in motion sequence number 007) for leave to serve and file the Proposed Second Amended Complaint (PSAC), pursuant to CPLR 3025.[1]

By decision and order, dated September 23, 2014, this court granted the Gans Defendants' motion to dismiss the fourth cause of action (motion sequence number 002), finding that plaintiff was not entitled to the equitable remedy of rescission because money damages provide adequate relief (Decision). The court also found that the doctrine of in pari delicto barred plaintiff from seeking rescission on behalf of the Corporations.

The underlying facts of this case were stated in detail in the Decision. The court, therefore, presumes the parties' familiarity with the facts, which are not stated here. Unless indicated otherwise, defined terms in the Decision have the same meaning when used herein.

[1] By stipulation, plaintiff withdrew the first amended complaint. Document number 100.

I. Defendants' Motions to Dismiss (Motion Sequence Numbers 004, 005 and 006)

A. Res Judicata

Defendants contend that the complaint should be dismissed and the motion for leave to amend denied because the 2012 Action, which arose out of the same transactions as those at issue in the instant suit, was dismissed with prejudice. Because Robert and Nicholas did not move to reargue and failed to appeal, defendants contend that the dismissal was final and that the instant action is barred by res judicata. Plaintiff counters that the 2012 Action was dismissed for Robert and Nicholas's lack of standing to bring claims in their individual capacities and that, therefore, the instant derivative action is not barred.

This court has already determined that "the dismissal of the 2012 Action was based on plaintiff's lack of standing and not on the merits." Decision at 19. The court concluded that because "[t]he instant action is a derivative suit . . . [it] is not precluded by the dismissal of the 2012 Action." *Id.* This determination "is the law of the case and may not be relitigated." *See Stroock & Stroock & Lavan v Beltramini,* 157 AD2d 590, 591 (1st Dept 1990). Therefore, to the extent plaintiff seeks to bring derivate claims on behalf of the Corporations, neither the instant action nor plaintiff's motion is barred by res judicata.

Defendants also argue that, prior to the Decision, this court decided that the dismissal of the 2012 Action has preclusive effect. In granting defendants' order to show cause, vacating the notice of pendency on the Property, the court considered plaintiff's opposing argument that the parties in the instant action are not identical to those in the 2012 Action, because in the previous action, Nicholas sued in his individual capacity, whereas, in the instant action, Nicholas sues derivatively. Venturini affirmation, exhibit U at 18. However, the court made no determination on the issue. It decided that both actions contained the same parties, but acknowledged that

"Nicholas' status may have changed in part." *Id.*, at 19. Therefore, the Decision was the first time this court decided whether the 2012 Action has preclusive effect on the instant suit.

B. Failure to State a Claim and Statute of Limitations

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *CBS Corp. v Dumsday*, 268 AD2d 350, 352 (1st Dept 2000). "[T]he pleadings must be liberally construed and the facts alleged accepted as true." *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 (1st Dept 1998). However, "allegations consisting of bare legal conclusions . . . are not entitled to any such consideration." *Maas v Cornell Univ.*, 94 NY2d 87, 91 (1999).

Where a motion to dismiss is based on documentary evidence, pursuant to CPLR 3211 (a) (1), dismissal "is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002) (internal quotation marks and citation omitted). The documentary evidence must "utterly refute[] plaintiff's factual allegations." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002).

A defendant moving to dismiss a claim as barred by the statute of limitations, pursuant to CPLR 3211 (a) (5), "bears the initial burden of proving, prima facie, that the time in which to sue has expired." *Singh v New York City Health & Hosps. Corp. (Bellevue Hosp. Ctr. & Queens Hosp. Ctr.)*, 107 AD3d 780, 781 (2d Dept 2013). Upon such a showing, the plaintiff must "raise a question of fact as to the applicability of an exception to the statute of limitations, as to whether the statute of limitations was tolled, or as to whether the action was actually commenced within the applicable limitations period." *Id.* (internal citations omitted).

1. Breach of Fiduciary Duty (First Cause of Action)

Gerald contends that the first cause of action, alleging that he engaged in self-dealing, should be dismissed because: (1) plaintiff lacks capacity to sue on behalf of the Corporations for alleged wrongs that transpired before plaintiff became a shareholder; (2) it is barred by the statute of limitations; and (3) plaintiff cannot show damages. Plaintiff counters that: (1) he has capacity to bring the derivative suit because the core transactions occurred after he became a shareholder of New Roads; (2) the statute of limitations does not bar the claim because Gerald engaged in numerous acts of self-dealing within the prescribed period and dismissal would be inappropriate before parties have had an opportunity to engage in discovery; and (3) the complaint alleges damages, which are not limited to the inadequacy of the Property's sale price.

To state a breach of fiduciary duty claim, plaintiff must allege: (1) the existence of a fiduciary relationship between plaintiff and defendant; (2) misconduct by defendant; and (3) damages. *Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 (1st Dept 2011). When a claim is brought derivatively, "Business Corporation Law § 626 (b) mandates that [the] shareholder[] . . . must demonstrate that [he] owned stock both when the lawsuit was brought and at the time of the transaction(s) of which [he] complain[s]." *Pessin v Chris-Craft Indus.*, 181 AD2d 66, 70 (1st Dept 1992). The contemporaneous ownership rule "is to be strictly enforced." *Honzawa Holding Co. v Hiro Enter. USA*, 291 AD2d 318, 318 (1st Dept 2002). "[F]ailure to satisfy the . . . contemporaneous ownership requirement of § 626 (b) is such a fundamental lack of capacity that it results in failure to state a cause of action." *Roy v Vayntrub*, 15 Misc 3d 1127(A), 2007 NY Slip Op 50868(U), *6 (Sup Ct, Nassau County 2007), citing *Barr v Wackman*, 36 NY2d 371 (1975).

Where the plaintiff seeks a "purely monetary" remedy for breach of fiduciary duty, the

applicable statute of limitation is three years pursuant to CPLR 214 (4). *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 (2009). "Generally, a cause of action for breach of fiduciary duty accrues at the time of the breach . . . ." *See Kaufman v* Cohen, 307 AD2d 113, 121 n 3 (1st Dept 2002).

As a preliminary matter, the parties dispute when Nicholas became a one-percent shareholder of New Roads. Robert states that Nicholas became a shareholder on January 4, 2009 and submits two stock certificates showing the same. Robert aff, ¶ 10 and exhibit 2. Gerald contends that Robert has previously stated that Nicholas became a shareholder in "late 2009" (Venturini affirmation, exhibit T, ¶ 22) and that, on a separate occasion, Robert testified that he neither knew when Nicholas became a shareholder nor had any documentation relating to the transfer of New Roads stock. Venturini reply affirmation, exhibit 1 at 30, 47. Gerald challenges the genuineness of the stock certificates and argues that Robert's previous statements should be treated as informal judicial admissions. However, on a motion to dismiss for failure to state a claim, the facts alleged must be accepted as true, unless they are "flatly contradicted by documentary evidence." *Maas*, 94 NY2d at 91. Here, there is no evidence to substantiate the late 2009 date, and Robert's prior "statements are not conclusive." *See Wenger v DMR Realty Mgt., Inc.*, 90 AD3d 647, 648 (2d Dept 2011). The two stock certificates support the January 2009 date. Therefore, for purposes of the instant motions, the court considers January 4, 2009 as the date when plaintiff became a New Roads shareholder.

According to the complaint, in 2007, Gerald encumbered GHC with $15,000,000 in debt. Complaint, ¶¶ 28-31. Because plaintiff was not a shareholder at the time, he may not sue Gerald for breach of fiduciary duty based on these transactions. *See Pessin*, 181 AD2d at 70. Plaintiff argues that there is a significant difference between Gerald encumbering the Corporations, when

he and Sheryl were the sole owners, and defaulting on those obligations and incurring judgments at a time when Nicholas was also a shareholder. However, having incurred the debt, the Corporations had an obligation to repay it. Plaintiff could no more sue based on the payments than on the original loans, as the payments would be "indistinguishable from the original wrong" of incurring the debt. *See White v Phillips*, 185 Misc 960, 961 (Sup Ct, NY County 1945) (dismissing complaint upon finding that plaintiffs were not stockholders at the time of the original wrong, the corporation's payment of a debt it did not owe, and that the corporation's subsequent failure to recoup the improper payment was "indistinguishable from the original wrong in making the payment"). Barring allegations of additional wrongdoing, the judgments against the Corporations, resulting from their inability to pay, are likewise "indistinguishable from the original wrong." *Id.* Here, the complaint does not contain any factual allegations of Gerald's wrongdoing in defaulting on the loans. Therefore, to the extent plaintiff seeks to recover for the judgments entered against the Corporations, following defaults on obligations incurred before January 4, 2009, plaintiff lacks capacity to bring such claims. *Pessin*, 181 AD2d at 70; *Honzawa Holding Co.*, 291 AD2d at 318.

However, the complaint also alleges that Gerald wrongfully entered into the Settlement Agreement, in 2012, and "transferred title of the Property from GHC to defendant Griffon in exchange for a release of his personal obligations and liabilities" (complaint, ¶ 49), thereby "stripp[ing] [the Corporations] of all their assets for the benefit of Defendant Gerald." *Id.*, ¶ 74. In addition, the complaint alleges that by deed, dated April 24, 2013, Gerald transferred title of the property located at 501-511 Church Ave, Brooklyn, New York (Brooklyn Property) from GHC to a Gans Defendants affiliate for $975,000, and that GHC did not receive any consideration in connection with the sale. *Id.*, ¶¶ 62-64. Plaintiff was a shareholder at the time

of these transactions and, therefore, has capacity to pursue a derivative claim for breach of fiduciary duty. *See Kenney v Immelt*, 41 Misc 3d 1225 (A), 2013 NY Slip Op 51831 (U), *21 (Sup Ct, NY County 2013) (denying motion to dismiss for lack of standing, under BCL 626 [b], as to claims arising out of wrongs allegedly committed after plaintiff became a shareholder because "the alleged wrongful acts [were] sufficiently distinguishable" from wrongs allegedly committed before plaintiff became shareholder).

Because the breach of fiduciary duty cause of action seeks damages, to the extent the claim is premised on Gerald's actions prior to February 7, 2011, three years before commencement of the instant suit, it is time-barred. *See IDT Corp.*, 12 NY3d at 139. Plaintiff's conclusory argument, that the motion must be denied because issues of fact exist and discovery is necessary, does not satisfy plaintiff's burden to raise issues of fact as to the applicability of the statute of limitations. *See Singh*, 107 AD3d at 781. Therefore, to the extent the first cause of action is based on alleged wrongs committed before February 7, 2011, it is dismissed as time-barred.

Gerald's argument that the first cause of action must be dismissed for failure to allege damages is unpersuasive. The complaint alleges that IGT secured several offers that would have benefitted IGT, including: (1) an offer from Richard Rumpf "to purchase the Property by assuming all mortgages thereon and making a payment of $2 million to the IGT" (Rumpf Offer) (complaint, ¶ 54 and exhibit A); (2) an agreement from Orbis 53-61 Gansevoort LLC ('Orbis') to purchase the property for $34 million" (Orbis Offer) (*id.*, ¶ 56); and (3) an offer from Antares Investment Partners for $35,000,000, which would have satisfied all obligations to the Gans Defendants and provided an additional $7,000,000 to the Corporations (Antares Offer) (*id.*, ¶¶ 59-61 and exhibit B). Gerald points out that the Rumpf Offer did not contain a total purchase

price for the Property (*id.*, exhibit A), and that Robert's prior attorney stated that the total purchase price was capped at $22,000,000. Venturini affirmation, exhibit I. In addition, Gerald submits the proposed joint venture agreement constituting the Orbis Offer, which stated that the purpose of the agreement was "to redeem the [First and Second] Mortgages." *Id.*, exhibit K at 3. According to the complaint, the First and Second Mortgages secured loans totaling $15,000,000. Complaint, ¶¶ 28-31. The Orbis Offer also provided that, to the extent the Property was not conveyed "free and clear of all liens and encumbrances . . . it [would] be the responsibility of GHC to pay, satisfy and clear all such liens." Venturini affirmation, exhibit K at 4. Gerald argues that, therefore, nothing in the Rumph Offer or the Orbis Offer supports plaintiff's allegations of $7,000,000 in damages, and the offers, in fact, contradict plaintiff's allegation that the Property was sold for less than its market value. With respect to the Antares Offer, which plaintiff allegedly secured on January 10, 2013 (complaint, ¶ 59), Gerald argues that this offer is irrelevant to the question of damages, because it was secured more than six months after the Settlement Agreement, when the Property was no longer facing the threat of foreclosure.

However, the evidence Gerald cites with respect to all of these offers fails to "utterly refute[] plaintiff's factual allegations" (*Goshen*, 98 NY2d at 326), and merely raises issues of fact with respect to the Property's fair market value at the time of the Settlement Agreement. Moreover, plaintiff argues that the offers primarily demonstrate that GHC stood ready to redeem the mortgages on the Property. According to plaintiff, the bulk of the damages "derive from the fact that of the $30 million in consideration flowing from the [Settlement Agreement], almost half flowed to the benefit of debt forgiveness for Gerald and Nebraska Meat." Robert aff, ¶ 23. Therefore, plaintiff adequately alleges damages. Plaintiff's alleged damages, if any, will be established at trial. *Lyon v Chemical Bank*, 118 AD2d 689, 690 (2d Dept 1986).

Gerald also argues, unpersuasively, that the first cause of action must be dismissed because plaintiff may not seek damages arising out of the Settlement Agreement or Gerald's decision not to seek indemnity from himself and the Nebraska Companies, as both decisions are protected by the business judgment rule.

> "[T]he business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. So long as the corporation's directors have not breached their fiduciary obligation to the corporation, the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient."

Levandusky v One Fifth Ave. Apartment, 75 NY2d 530, 537-538 (1990) (internal quotation marks and citations omitted); *see also Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 57 (1st Dept 2012). "However, where, as here, the complaint alleges that the corporate decisions of the directors lacked a legitimate business purpose or were tainted by a conflict of interest, bad faith or fraud, the business judgment rule may not be invoked to insulate the directors." *Amfesco Indus. v Greenblatt*, 172 AD2d 261, 264 (1st Dept 1991). "[I]t is well established that, as fiduciaries, board members bear a duty of loyalty to the corporation and 'may not profit improperly at the expense of their corporation.'" *S.H. & Helen R. Scheuer Family Found. v 61 Assoc.*, 179 AD2d 65, 70 (1st Dept 1992) (reversing dismissal for failure to state a claim where allegations were "sufficient to plead precisely the type of dual interest and potential for self-interest which would create an exception to the shield provided by the business judgment rule and render open to judicial scrutiny allegations of improprieties by the board"). The business judgment rule under Delaware law—which applies to "issues of corporate governance" affecting New Roads, a Delaware corporation (*Lerner v Prince*, 119 AD3d 122, 128 [1st Dept 2014])—is

identical. *See McMullin v Beran*, 765 A2d 910, 916-917 (Del 2000); *see also In re MFW Shareholders Litig.*, 67 A3d 496, 527 (Del Ch 2013), *affd Kahn v M & F Worldwide Corp.*, 88 A3d 635 (Del 2014). Because "no conflict exists . . . there is no reason to engage in a choice of law analysis." *Elson v Defren*, 283 AD2d 109, 114 (1st Dept 2001) (internal quotation marks and citation omitted).

Here, the complaint alleges that Gerald entered the Settlement Agreement "in exchange for a release of his personal obligations and liabilities" (complaint, ¶ 49), thereby "stripp[ing] [the Corporations] of all their assets for the benefit of Defendant Gerald." *Id.*, ¶ 74. In addition, the complaint alleges that Gerald sold the Brooklyn Property without compensating GHC. *Id.*, ¶¶ 62-64. Therefore, plaintiff alleges facts showing that Gerald acted in bad faith, rendering the presumption of the business judgment rule inapplicable, and stating a cause of action for breach of fiduciary duty. Notably, the outcome would be the same under Delaware law. *See Lichtenstein v Willkie Farr & Gallagher LLP*, 120 AD3d 1095, 1098 (1st Dept 2014) (applying Delaware's business judgment rule and finding that complaint adequately pleaded director was not disinterested and so outside the protection of the business judgment rule, "because his stewardship of [the corporation] was affected by a conflict between his fiduciary duties as a director of the company and his personal exposure to $100 million in liability").

For the foregoing reasons, the first cause of action is dismissed, as time-barred, to the extent it seeks recovery for alleged wrongs that occurred before February 7, 2011. In addition, the first cause of action is dismissed to the extent it seeks recovery for wrongs committed before January 4, 2009, for which plaintiff lacks capacity to sue.

2. Aiding and Abetting Breach of Fiduciary Duty (Second Cause of Action)

Platt argues that the complaint should be dismissed as against him, because it is devoid of any allegations of his wrongdoing.[2] Zimmerman argues that the complaint must be dismissed as against him, because it fails to allege the elements of aiding and abetting breach of fiduciary duty with requisite particularity. In addition, Zimmerman argues that the doctrine of in pari delicto precludes plaintiff's derivative claim for aiding and abetting breach of fiduciary duty. Plaintiff counters that Zimmerman and Platt, by failing to oppose Gerald's conduct, permitted Gerald to engage in self-dealing. Plaintiff also argues that Platt is a necessary party by virtue of being a co-trustee of IGT. With respect to Zimmerman, plaintiff alleges that, in providing Gerald legal advice relating to the Settlement Agreement, Zimmerman did more than merely provide legal advice to a breaching party. Plaintiff argues that Zimmerman also breached his obligations to plaintiff and GHC, which Zimmerman owed because: (1) as the trustee of IGT with the power to vote New Roads shares, Zimmerman was in essence a majority shareholder of New Roads and owed a fiduciary duty to minority shareholder Nicholas; (2) as the trustee of IGT, Zimmerman owed a fiduciary duty to Nicholas, the trust's contingent beneficiary; and (3) Zimmerman was GHC's attorney. Plaintiff also argues that the complaint sufficiently states the aiding and abetting claim, because it allows for a reasonable inference of alleged misconduct.

To state a claim for aiding and abetting breach of fiduciary duty, plaintiff must allege: "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman*, 307 AD2d at 125. "A person knowingly participates in a breach of fiduciary duty only

[2] Although the second cause of action does not reference Platt, plaintiff's opposition papers implicate Platt in the aiding and abetting breach of fiduciary duty claim. Platt's motion to dismiss the complaint is addressed in this section of the analysis.

when he or she provides 'substantial assistance' to the primary violator." *Id.* at 126. "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *Id.* at 126 (internal citations omitted). "Actual knowledge, as opposed to merely constructive knowledge, is required and a plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty." *Global Mins. & Metals Corp. v Holme,* 35 AD3d 93, 101-102 (1st Dept 2006). A claim for aiding and abetting must be pled with particularity. CPLR 3016 (b) ("[w]here a cause of action . . . is based upon . . . breach of trust . . . the circumstances constituting the wrong shall be stated in detail"); *see also Shearson Lehman Bros. Inc. v Bagley*, 205 AD2d 467, 467 (1st Dept 1994) (applying the specificity requirement of CPLR 3016 [b] to a claim for aiding and abetting breach of fiduciary duty).

Here, the complaint fails to allege any wrongdoing against Platt, who did not become a trustee of IGT until June 22, 2012, after the Settlement Agreement was executed. The complaint treats Platt as a nominal defendant, stating that he is a "trustee[] of the IGT and [is] named as defendant[] herein solely by virtue of [his] capacit[y] as trustee[]," without asserting any substantive allegations against him. Complaint, ¶ 21. Significantly, by order dated October 28, 2011, Justice Mendez appointed Platt co-trustee for the limited purpose of "directing the defense of the trusts" in the Fraudulent Conveyance Action, when Robert "ceased to act as a trustee in his refusal to interpose an answer on behalf on the defendant trust." Bergson affirmation, exhibit J. To the extent plaintiff contends that Platt's role as trustee renders him a necessary party, that argument is without merit for reasons discussed below. Therefore, the complaint fails to state a claim against Platt.

The complaint's allegations against Zimmerman are devoid of factual detail. The complaint states that: (1) Zimmerman advised Gerald and Sheryl to accept the Settlement Agreement (*id.*, ¶¶ 48, 78); (2) the Settlement Agreement "took place pursuant to a design and conspiracy formed by Gerald, Zimmerman" and others (*id.*, ¶ 70); (3) "Zimmerman[] induced, aided and abetted defendant Gerald in his wrongful acts . . . by facilitating and participating in such acts" (*id.*, ¶ 77); and (4) "Zimmerman knowingly and willingly participated in defendant Gerald's wrongful acts against New Roads and GHC." *Id.*, ¶ 80. While compliance with CPLR 3016 (b) does not require plaintiff to plead in detail the circumstances giving rise to the claim where "such facts are necessarily peculiarly within the knowledge of [defendants]" (*Kaufman*, 307 AD2d at 121 [internal quotation marks and citation omitted]), a complaint must state facts that "permit a reasonable inference of the alleged misconduct." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009) (internal quotation marks and citation omitted).

Here, there are no facts in the complaint from which it could be inferred that Zimmerman knew of Gerald's intent to retain the benefits from the sales of the Property and the Brooklyn Property. Nor is there anything in the complaint to support the inference that Zimmerman "affirmatively assist[ed], help[ed] conceal or fail[ed] to act when required to do so, thereby enabling the breach to occur." *Kaufman*, 307 AD2d at 126. Plaintiff argues in his brief that "Zimmerman was admittedly attorney for GHC" (plaintiff's brief at 23), and, therefore, had a fiduciary duty to act, but this is not alleged in the complaint or Robert's affidavit in opposition to the motions to dismiss and Zimmerman makes no such admission. *See Rubin v Rubin*, 72 AD2d 536, 537 (1st Dept 1979) ("an affidavit by an attorney without personal knowledge of the facts has no probative value and should be disregarded" [internal quotation marks and citation omitted]); *see also Martinkowski v Carborundum Co./Electro-Min. Div.*, 108 Misc 2d 184, 187

(Sup Ct, Niagara County 1981) (attorney statement that is "unsworn and not based upon personal knowledge . . . is of no probative value"). Therefore, the complaint fails to state a claim against Zimmerman for aiding and abetting Gerald' breach of fiduciary duty. *See Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 464 (1st Dept 2007) (affirming dismissal of aiding and abetting breach of fiduciary duty cause of action "[i]n the absence of any allegations that the E & Y defendants had actual knowledge of the primary wrong or that these parties rendered substantial, as opposed to inadvertent, assistance to the underlying breach of fiduciary duty").

Moreover, to the extent the complaint alleges that Zimmerman provided Gerald with legal advice, enabling Gerald to breach his fiduciary duty to the Corporations, such allegations are insufficient as a matter of law. "[W]here one acts only in the execution of the duties of his calling or profession, and does not go beyond it, and does not actually participate in the trespass he is not liable, though what he does may aid another party in its commission." *Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 606 (1st Dept 2010), quoting *Ford v Williams*, 13 NY 577, 584 (1856). Therefore, Zimmerman's advice to Gerald regarding the Settlement Agreement, without more, is insufficient to sustain the aiding and abetting claim. *Compare Art Capital Group, LLC*, 70 AD3d at 606-607 (finding plaintiff failed to state aiding and abetting fraud and breach of fiduciary duty, where it alleged that attorneys facilitated a conspiracy to unfairly compete with and defraud plaintiff by negotiating loan transactions, offering legal advice and performing other acts within the scope of their duties as attorneys), *with Oster v Kirschner*, 77 AD3d 51, 57 (1st Dept 2010) (finding plaintiff adequately stated aiding and abetting fraud claim against attorneys by alleging that they drafted the private placement memoranda used to solicit funds for a Ponzi scheme and that attorneys knew that their clients were "banned from the securities industry for engaging in fraudulent investment schemes"); *see*

also Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker, 56 AD3d 1, 12 (1st Dept 2008) (finding aiding and abetting claim should have been dismissed where "[p]laintiff merely suggest[ed] that because defendant rendered legal advice to PIA during the time PIA sought to divert plaintiff's business to Legion, defendant must have been complicit in any breach of any fiduciary duty that plaintiff might have been owed").

Moreover, plaintiff's aiding and abetting claim is barred by the doctrine of in pari delicto. This court has already held that Gerald's conduct is imputed to the Corporations, and that plaintiff may not pursue derivative claims against third parties who "merely aided and abetted his conduct." Decision at 16. This determination "is the law of the case and may not be relitigated." *See Stroock & Stroock & Lavan*, 157 AD2d at 591. Therefore, plaintiff's second cause of action is dismissed on the additional ground of in pari delicto.

For the foregoing reasons, the complaint is dismissed as against Zimmerman and Platt.

3. Accounting (Third Cause of Action)

Gerald, Sheryl and the Corporations contend that because the cause of action for an accounting is based on alleged wrongs committed before plaintiff became a shareholder, he lacks capacity to maintain the claim. In addition, they argue that to the extent plaintiff seeks derivative relief against Sheryl, he is precluded by the lack of a fiduciary relationship between Sheryl and the Corporations. These defendants also argue that plaintiff has failed to fulfill the procedural pre-requisites of Delaware's General Corporations Law (DGCL) § 220, which applies to New Roads. Lastly, they argue that plaintiff failed to make a demand on the Corporations, which requires dismissal of the accounting claim. Plaintiff counters that he sufficiently alleges the elements of a claim for an accounting and that DGCL § 220, which deals with a shareholder's right to inspect the corporate books, is distinct from, and irrelevant to, the third cause of action.

Although not addressed by the parties, "New York choice-of-law rules provide that substantive issues such as issues of corporate governance . . . are governed by the law of the state in which the corporation is chartered." *Lerner*, 119 AD3d at 127; *see also Zion v Kurtz*, 50 NY2d 92, 100 (1980) ("the generally accepted choice-of-law rule with respect to such 'internal affairs' as the relationship between shareholders and directors" is to apply the law of the state of incorporation). Therefore, New York law is applied in determining whether plaintiff states a cause of action for an accounting from Gerald and Sheryl in relation to GHC, and Delaware law is applied in relation to New Roads. *See Rubinstein v Bullard*, 285 AD2d 366, 367 (1st Dept 2001) (action seeking access to corporate books and records "essentially involve[d] corporate governance"); *see also Albert v Alex. Brown Mgt. Servs.*, 2005 WL 2130607, *11, 2005 Del Ch LEXIS 133, *40 (Del Ch, Aug. 25, 2005, Civil Action Nos. 762-N, 763-N) ("[a]n accounting is an equitable remedy that consists of the adjustment of accounts between parties").

New York's BCL § 642, which also deals with a shareholder's right to inspect a corporation's books and records, has been "deemed to work no substantive change in the law" entitling a stockholder to an accounting from his corporation. *O'Brien v O'Brien*, 75 AD2d 641 (2d Dept 1980) (internal quotation marks and citations omitted). Under New York law, "the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Adam v Cutner & Rathkopf*, 238 AD2d 234, 242 (1st Dept 1997) (internal quotation marks and citation omitted). Plaintiff must also allege that he demanded an accounting and a refusal of the demand. *Unitel Telecard Distrib. Corp. v Nunez*, 90 AD3d 568, 569 (1st Dept 2011).

The court has not found any authority, nor do defendants provide any, requiring an accounting claim to be treated as one pursuant to DGCL § 220 under Delaware law. Delaware law provides that an accounting "[is] not [a] claim[] in and of [itself], but [a] type[] of remed[y] dependent on the viability and outcome of the underlying causes of action . . . ." *Addy v Piedmonte*, 2009 WL 707641, *23, 2009 Del Ch LEXIS 38, *79 (Del Ch, Mar. 18, 2008, Civil Action No. 3571-VCP). There are three bases for seeking an accounting: "(1) where there are mutual accounts between the parties; (2) where the accounts are all on one side but there are circumstances of great complication; and (3) where a fiduciary relationship exists between the parties and a duty rests upon the defendant to render an account." *Lamplugh v Sheridan*, 2000 WL 128970, *8, 2000 Del Ch LEXIS 3, *23 (Del Ch, Jan. 19, 2000, No. C.M. 7239).

With respect to GHC, as explained above, the complaint sufficiently alleges that Gerald breached his fiduciary duty as an officer and director of the Corporations by obtaining releases from personal obligations and by improperly retaining funds from the dispositions of the Property and the Brooklyn Property. However, plaintiff fails to allege that he demanded an accounting. The complaint merely states that "Gerald and Sheryl have failed, refused and neglected to account" to the Corporations. Complaint, ¶¶ 88, 89. Therefore, to the extent the third cause of action seeks an account regarding GHC, it fails to state a claim and is dismissed. *See Walsh v Wwebnet, Inc.*, 116 AD3d 845, 848 (2d Dept 2014) (affirming "dismissal of the plaintiffs' derivative cause of action for an accounting, since they failed to allege that they demanded an accounting and that the corporation's directors refused to provide them with an accounting").

With respect to New Roads, having found that plaintiff has stated a claim for breach of fiduciary duty, there is no basis for dismissing plaintiff's request for an accounting at this time.

See Lynch v Vickers Energy Corp., 429 A2d 497, 501 (Del 1981) (stating that "a claim founded on a breach of fiduciary duty permits a different form of relief, that is, an accounting"), *overruled on other grounds by Weinberger v UOP, Inc.*, 457 A2d 701 (Del 1983); *see also Addy*, 2009 WL 707641 at *23, 2009 Del Ch LEXIS 38 at *79-80 (denying motion to dismiss plaintiff's request for an accounting, where plaintiff stated claims against moving defendants); *see also Albert*, 2005 WL 2130607 at *11, 2005 Del Ch LEXIS 133 at *41 (stating that, because "[an accounting] is a remedy, should the plaintiffs ultimately be successful on one or more of their claims, the court [would] address their arguments for granting an accounting").

With respect to Sheryl, an accounting is unavailable under both New York and Delaware law, because as a mere shareholder, she does not owe a fiduciary duty to the Corporations. *See Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 (1st Dept 2007); *see also Adam*, 238 AD2d at 242; *Arnold v Society for Sav. Bancorp, Inc.*, 678 A2d 533, 539 (Del 1996) ("[f]iduciary duties are owed by the directors and officers to the corporation and its stockholders"). Therefore, the third cause of action is dismissed in its entirety against Sheryl.

For the foregoing reasons, the third cause of action is dismissed against Sheryl in its entirety and against Gerald to the extent it seeks an accounting in relation to GHC. The third cause of action is also dismissed to the extent it seeks an accounting for transactions preceding January 4, 2009, based upon plaintiff's lack of capacity discussed above.

4. Rescission (Fourth Cause of Action)

Gerald, Sheryl and the Corporations argue that the fourth cause of action should be dismissed and incorporate the Gans Defendant's arguments on motion sequence number 002. While the instant motions were pending, this court resolved motion sequence number 002 and dismissed the fourth cause of action, because "damages provide plaintiff with an adequate

remedy and plaintiff may not seek the equitable remedy of recission."[3] Decision at 12. That holding is equally applicable to Gerald, Sheryl, and the Corporations, and it "is the law of the case and may not be relitigated." *See Stroock & Stroock & Lavan,* 157 AD2d at 591. Therefore, the fourth cause of action is dismissed in its entirety.

5. Right of Redemption (Fifth Cause of Action)

Gerald, Sheryl and the Corporations contend that fifth cause of action, asserting the right of redemption, must be dismissed because GHC's sale of the Property extinguished any redemption rights. Plaintiff counters that because Justice Sherwood ruled, in the Foreclosure Action, that a sale of the Property must be approved by him, the sale is not final and GHC retains the right to redeem the Property.

"[A]ny person with an interest in the mortgaged premises has a right to redeem the property at any time prior to the actual sale under a judgment of foreclosure." *First Fed. Sav. & Loan Assn. of Port Washington v Smith*, 83 AD2d 601, 602 (2d Dept 1981). However, this right is extinguished when a mortgagor "convey[s] all right, title and interest in the property to a subsequent grantee." *Id.*; *see also Bancplus Mtge. Corp. v Galloway*, 203 AD2d 222, 223 (2d Dept 1994) (finding that record owner, who "transferred her entire interest in the subject property during the pendency of the foreclosure action . . . lacked any standing . . . to seek redemption of the property").

Here, GHC transferred the Property to Griffon by deed dated July 20, 2012. Document number 58. The deed was recorded on August 14, 2012. *Id.* Therefore, plaintiff lacks standing to pursue a derivative cause of action for redemption. Plaintiff's argument that the sale is not

[3] The court also held that, as against the Gans Defendants, the doctrine of in pari delicto barred plaintiff from seeking rescission on behalf of the Corporations. Decision at 16.

final until approved by Justice Sherwood mischaracterizes Justice Sherwood's statements during a hearing in the Foreclosure Action, held on July 31, 2012. By order to show cause, Robert sought, among other things, a stay of the Foreclosure Action. Venturini affirmation, exhibit N. During oral arguments, in assessing whether there was a showing of irreparable harm, Justice Sherwood stated that "[mortgagees would have] to come before [him] to approve any sale," such that "[defendant would] have plenty of opportunity . . . to claim or assert [its] right of redemption." Robert aff, exhibit 10 at 14. Nothing in the transcript supports plaintiff's contention that Justice Sherwood ruled that the mortgagor must seek approval from him in order for a sale of the Property, outside a foreclosure sale, to be final. Therefore, the fifth cause of action is dismissed.

6. Removal of Gerald as Officer and Director of the Corporations (Sixth Cause of Action)

Gerald, Sheryl and the Corporations contend that the sixth cause of action must be dismissed because: (1) Nicholas, as a one percent shareholder of New Roads does not have the right to seek Gerald's removal as officer or director of New Roads; and (2) Nicholas is not a shareholder of GHC and, therefore, lacks standing to remove Gerald. Plaintiff counters that, because New Roads is the sole shareholder of GHC, it has the power to remove Gerald as director of GHC and that plaintiff may bring a derivative suit to compel New Roads to do so. As for plaintiff's ability to seek Gerald's removal from New Roads, plaintiff offers two theories. First, plaintiff argues that, because the proxies Gerald used to appoint himself officer and director were obtained as a result of the fraudulent conveyances, the proxies are void and so are Gerald's self-appointments. In the alternative, plaintiff contends that, because Justice Mendez's order, declaring the transfers of New Roads stock to IGT to be fraudulent conveyances

(Fraudulent Conveyance Order), was never entered or executed upon, the decision and order was abandoned. Plaintiff argues that, therefore, the New Roads shares are still the property of IGT and, as the holders of 100 percent of New Roads shares, Nicholas and IGT have the power to remove Gerald.

Because "New York choice-of-law rules provide that substantive issues such as issues of corporate governance . . . are governed by the law of the state in which the corporation is chartered" (*Lerner*, 119 AD3d at 128), Delaware law applies to Gerald's removal from New Roads, a Delaware corporation, and New York law applies to his removal from GHC, a New York corporation. Under Delaware law, "[a]ny director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors . . . ." DGCL § 141 (k). "Officers shall be chosen in such manner and shall hold their offices for such terms as are prescribed by the bylaws or determined by the board of directors or other governing body." *Id.*, § 142 (b). Under New York Law, directors of a corporation "may be removed for cause by vote of the shareholders" or by the action of the board, if such removal is provided for in the certificate of incorporation or "the specific provisions of a by-law adopted by the shareholders." BCL § 706 (a). "Any officer elected or appointed by the board may be removed by the board with or without cause. An officer elected by the shareholders may be removed, with or without cause, only by vote of the shareholders . . ." BCL § 716 (a). "An action to procure a judgment removing a director [or an officer] for cause may be brought by the attorney-general or by the holders of ten percent of the outstanding shares, whether or not entitled to vote." BCL §§ 706 (d), 716 (c).

Here, New Roads's bylaws provide that a director "may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors"

and that an officer may be removed by the board of directors. Venturini affirmation, exhibit G at art. II, ¶ 5, art. III. It is undisputed that plaintiff holds one percent of New Roads shares and the complaint does not allege that a vote by the majority of shareholders has taken place. Nor does the DGCL confer authority upon a stockholder to maintain an action for the removal of a director or officer. Therefore, plaintiff fails to state a claim for Gerald's removal as officer and director of New Roads.

With respect to GHC, an action to remove Gerald as officer and director may be brought by "the holders of ten percent of the outstanding shares," which Nicholas is not. BCL §§ 706 (d), 716 (c). Nor may plaintiff, as a shareholder of New Roads, bring a derivative suit to compel New Roads to vote its GHC shares to remove Gerald. *See Matter of Burkin (Katz)*, 1 NY2d 570, 573 (1956) (stating that the court may review stockholders' removal of director, but that "the court lacks power at the instance [sic] of a stockholder to compel the stockholders to do what they would have had power to do, but have not done, in the exercise of this traditional common-law right to remove a director [for cause]"); *cf Janklowicz v Landa*, 41 Misc 3d 1220 (A), 2013 NY Slip Op 51779 (U), *6 (Sup Ct, Kings County 2013) (applying statute for removal of a limited liability company's officer and finding that, "[u]nless there is a vote of a majority in interest of the members," as required by the statute, "this court is unaware of a legal basis for directing, ordering or adjudging that an LLC member be removed from a management position"). Therefore, plaintiff lacks standing to bring an action for judgment removing Gerald as director and officer of GHC.

The court notes plaintiff's argument that, because the proxies Gerald used to appoint himself officer and director of the Corporations are void, so are his appointments. This argument does not salvage plaintiff's sixth cause of action. As this court previously observed: "Assuming

the proxies are voided, Gerald's control over the entities reverts to what it was prior to the creation of the GRAT and IGT, and, in any event, it is undisputed that Gerald has always controlled and managed New Roads and GHC." Decision at 11.

Plaintiff's argument that IGT still controls 99 percent of New Roads shares is also without merit. First, assuming this were true, it is unclear how IGT's ownership of New Roads shares bolsters plaintiff's argument that he may seek Gerald's removal. More importantly, the transfer of New Roads shares to IGT is void. The Fraudulent Conveyance Order was entered on February 6, 2013 (Venturini reply affirmation, exhibit 8), and Robert's appeal of that order has been denied. By decision and order dated December 4, 2013, the First Department dismissed Robert's appeal from the Fraudulent Conveyance Order, finding that, "having failed to obtain the consent of the other co-trustee to pursue these appeals, [Robert] lacks standing to appeal." *55 Gans Judgment LLC v Romanoff*, __ AD3d __, 2014 NY Slip Op 08489, *2 (1st Dept 2014).

For the foregoing reasons, the sixth cause of action is dismissed in its entirety.

II. Plaintiff's Motion for Leave to Amend (Motion Sequence Number 007)

An amended pleading does not "automatically abate[ ] a motion to dismiss that was addressed to the original pleading." *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38 (1st Dept 1998). In their combined reply/opposition papers, the moving defendants address the new allegations and causes of action of the PSAC, without indicating whether their motions should be applied to the original complaint or the PSAC. The PSAC is substantially similar to the original complaint with respect to the allegations and causes of actions before the court on motion sequence numbers 004, 005 and 006. Therefore, to the extent the PSAC's allegations mirror the original complaint, the court's findings above apply. *Cf Aetna Life Ins. Co. v Appalachian Asset Mgt. Corp.*, 110 AD3d 32, 39 (1st Dept 2013) (addressing arguments of motion to dismiss

original complaint, which had been superseded by amended complaint, where "the new pleading [did] not substantively alter the existing causes of action"). To the extent the PSAC offers new allegations and advances four new causes of action, the court addresses these below.

Pursuant to CPLR 3025 (b) "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court." "A motion for leave to amend the complaint pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit." *Bishop v Maurer*, 83 AD3d 483, 485 (1st Dept 2011) (internal quotation marks and citations omitted).

Here, with respect to the first cause of action against Gerald for breach of fiduciary duty, the PSAC asserts additional allegations of wrongdoing and damages. Gerald allegedly provided Signature Bank, N.A. (Signature Bank) a guaranty by New Roads on a March 15, 2010 note, executed by Nebraska Meat Corp. PSAC, ¶ 67. On September 24, 2010, Signature Bank allegedly obtained judgment against Nebraska Meat Corp., in the amount of $1,456,441.21 (Signature Bank Judgment). *Id.* The PSAC also alleges that on "October 27, 2008, Gerald personally borrowed $200,000 from a company known as Arista, which obligation was never an encumbrance on the property of the Trusts, New Roads or GHC." *Id.*, ¶ 69. On September 9, 2011, allegedly to settle a lawsuit arising from the Arista loan, Gerald, "fraudulently representing himself to be President and 'sole shareholder' of GHC, entered into a Judgment of Confession . . . for $150,000, which acted as a judgment lien against the Property" (Arista Judgment). *Id.*, ¶ 70. According to the PSAC, by virtue of the Signature Bank Judgment and the Arista Judgment, Gerald caused damages to the Corporations. *Id.*, ¶¶ 68, 71.

Defendants contend that, because both obligations were incurred before plaintiff became a shareholder of New Roads, he lacks capacity to pursue a breach of fiduciary duty claim arising out of these transaction. Defendants submit a continuing guaranty on all loans for Nebraska Meat Corp., executed on behalf of New Roads in June 2001. Venturini reply affirmation, exhibit 3. Defendants also submit Gerald's affidavit, stating that GHC guaranteed the Arista loan in October 2008. Venturini affirmation, exhibit D, ¶ 15. Moreover, defendants argue, the claims are time-barred.

Plaintiff has capacity to pursue a derivative claim for breach of fiduciary duty in connection with the Signature Bank Judgment and the Arista Judgment. With respect to the Signature Bank Judgment, it is irrelevant that New Roads executed a continuing guaranty in 2001. The alleged wrong occurred in 2010, when New Roads incurred additional liability for the benefit of Nebraska Meat Corp., and "[was] sufficiently distinguishable" from the wrong allegedly committed in 2001. *See Kenney*, 41 Misc 3d at *21. With respect to the Arista Judgment, while it may be true that GHC guaranteed the $200,000 loan in 2008, before plaintiff was a shareholder, defendants fail to submit documentary evidence that "utterly refutes plaintiff's factual allegations." *Goshen*, 98 NY2d at 326. Gerald's affidavit does not "constitute[] the type of documentary evidence that may be considered on a motion pursuant to CPLR 3211 (a) (1)." *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 651 (1st Dept 2011). Therefore, plaintiff has capacity to pursue a derivative claim for breach of fiduciary duty in connection with the Arista Judgment and the Signature Bank Judgment. However, because the alleged wrong relating to the Signature Bank Judgment occurred prior to February 7, 2011, more than three years before commencement of the instant action, that claim is time-barred. *See IDT Corp.*, 12 NY3d at 139. Accordingly, leave to amend is granted with respect to allegations concerning the

Arista Judgment. Leave to amend is denied to the extent the PSAC seeks to allege additional breaches of fiduciary duty by Gerald in relation to the Signature Bank Judgment.

With respect to the second cause of action for aiding and abetting Gerald's breach of fiduciary duty, the PSAC adds Sheryl and Platt to the claim and contains a number of additional allegations to demonstrate substantial assistance and actual knowledge. However, this court has determined that derivative aiding and abetting claims against third parties are barred by the doctrine of in pari delicto. In addition, the PSAC's allegations continue to suffer from deficiencies. To the extent the PSAC alleges that Zimmerman sought to trick Robert into enabling Zimmerman, Gerald and Sheryl to revise documents for the Corporations and IGT (PSAC, ¶¶ 77-110), such allegations fail to state a claim for aiding and abetting breach of fiduciary duty because Robert admits that such efforts failed. Robert aff, ¶ 67, citing PSAC, ¶¶ 77-110. Therefore, plaintiff cannot demonstrate the necessary element of damages with respect to these acts. *Kaufman*, 307 AD2d at 125.

Moreover, the newly added allegations, detailing how the defendants planned to unjustly enrich Gerald, refer to events and communications that occurred in 2010 (PSAC, ¶¶ 77-124), more than three years before the commencement of the instant suit. Therefore, to the extent these acts give rise to plaintiff's aiding and abetting claim, they are time-barred. *See Ingham v Thompson*, 88 AD3d 607, 608 (1st Dept 2011) (finding aiding and abetting breach of fiduciary duty claim was time-barred and should have been dismissed, where none of the aiding and abetting allegations occurred within the actionable period for the primary breach).

In addition, paragraphs 100-103 and 113-120 of the PSAC refer to communications that have been held to be privileged in the Fraudulent Conveyance Action and the 2011 Action. For this reason, by stipulation dated September 24, 2014, the parties agreed that plaintiff "will file a

substitute proposed second amended complaint that deletes or redacts the allegations" contained in these paragraphs. Document number 314 at 2. For the foregoing reasons, plaintiff's motion for leave to amend the second cause of action is denied.

The PSAC seeks to add a seventh cause of action, brought in Nicholas's individual capacity as a minority shareholder of New Roads, for violations of DGCL § 271 and BCL § 909, which provide procedures for proper disposition of substantially all of a corporation's assets. To the extent the 2012 Action was dismissed with prejudice and on the merits, "such merits extend only to the propriety of the [non]derivative action . . . ." *Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 177 (1st Dept 2013) (finding that res judicata did not preclude plaintiff's claim where previous dismissal "was premised on lack of standing to bring a derivative claim on behalf of [nonparty corporation], and not on the relevant merits"). While plaintiff may sue derivatively, plaintiff is now barred from pursuing a direct cause of action arising out of the same transactions as the 2012 Action (*see* Venturini affirmation, exhibit C, ¶¶ 329-344), "despite the fact that the claims are based on a different theory or seek a different remedy." *Thomas v City of New York*, 239 AD2d 180, 180 (1st Dept 1997). Therefore, the proposed seventh cause of action is barred by res judicata.

Moreover, with respect to the DGCL § 271 claim, defendants submit documentary evidence that Sheryl and Gerald, as 99 percent shareholders of New Roads, consented to and approved the sale of the Property as part of the Settlement Agreement. Venturini affirmation, exhibit 4. By letter dated June 27, 2012, defendants' attorney sent Nicholas copies of the "Written Consents of Shareholders of New Roads Realty Corp.," executed by Gerald and Sheryl on June 21, 2012, whereby they consented to the terms of the Settlement Agreement. *Id.* This

letter satisfies the "consents in writing" requirement of DGCL § 228 (a), which states, in relevant part, that:

> "any action required by this chapter to be taken at any annual or special meeting of stockholders of a corporation . . . may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. . . ."

See also Klotz v Warner Communications, Inc., 674 A2d 878, 881 (Del 1995) (finding that plaintiff's argument that DGCL required merger approval to take place at a meeting of shareholders was refuted, because "[s]ection 228 allows approval by written consent for *any* action which is required to be taken at a meeting of shareholders"). Therefore, the PSAC's proposed seventh cause of action "is patently devoid of merit." *Bishop*, 83 AD3d at 483.

The PSAC's remaining causes of action also fail to state a claim or are without merit. The proposed eighth cause of action alleges that Zimmerman, as trustee and attorney to the trusts, breached his fiduciary duty to the trusts. The proposed ninth cause of action alleges that Platt, as trustee, also breached his fiduciary duty to the trusts. To the extent that the proposed eighth cause of action is based on acts that allegedly transpired in 2010 (PSAC, ¶¶ 77-123, 260-268) and seeks damages, it is time-barred. *See IDT Corp.*, 12 NY3d at 139.

More importantly, plaintiff, as a contingent beneficiary of the trusts, lacks standing to pursue these causes of action. This court so held, with respect to Robert, in the 2011 Action, in which Robert pursued claims against Gerald and Zimmerman for breach of fiduciary duty to the trusts. On October 9, 2013, this court granted Zimmerman's motion to dismiss the complaint in the 2011 Action, finding that:

> "Robert Romanoff submitted a sworn statement in the [Fraudulent Conveyance Action] stating, quote 'If the transfer of New Roads shares are voided, the trusts are eliminated,' end of quote, and the basis for this statement is that if the trusts are terminated, then the trust would no longer have any standing in the action."

Venturini affirmation, exhibit S at 23-24. The court found that Robert was "judicially estopped" from taking a contrary position and that "there [was] nothing left in the trust for this action to survive" as a result of the Fraudulent Conveyance Order. *Id.* at 24. The court also considered and rejected Robert's argument that the trusts were seeded with cash. *Id.* Thus, the PSAC's attempt to preserve the trusts, by alleging that they "were also seeded with cash" (PSAC, ¶ 41), is without merit.

The court allowed that if the Fraudulent Conveyance Order was reversed on appeal, then Robert would be permitted to pursue these claims. Venturini affirmation, exhibit S at 24. As discussed above, the First Department dismissed Robert's appeal of the Fraudulent Conveyance Order. Nicholas, as a contingent beneficiary of IGT, is in privity with Robert. *See Watts v Swiss Bank* Corp., 27 NY2d 270, 277 (1970) (stating that persons in privity with a party to a prior action "may be bound by a prior judgment to which he was not a party of record," including persons "who are successors to a property interest" and "those whose interests are represented by a party to the action"). Plaintiff is, therefore, bound by this court's determination in the 2011 Action and lacks standing to pursue claims against Platt and Zimmerman. Accordingly, the PSAC's proposed eighth and ninth causes of action, and the related allegations (*see* PSAC, ¶¶ 39-41, 142-148, 152-168, 173, 189), are without merit.

In the proposed tenth cause of action, Nicholas asserts various derivative claims, on behalf of the trusts, against "Gerald and the other defendants." *Id.*, ¶ 278. As explained above, plaintiff lacks standing to bring such a claim on behalf of the terminated trusts. Moreover, the

proposed tenth cause of action fails to plead the elements of the claim so as "to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR 3013.

For the foregoing reasons, plaintiff's motion for leave to amend the complaint is granted to the extent it seeks to supplement the first cause of action with allegations of post-February 7, 2011 wrongdoing. The motion is otherwise denied.

Accordingly, it is hereby

ORDERED that the motions of defendants Frank Platt (motion sequence number 004) and Michael A. Zimmerman (motion sequence number 005) to dismiss the complaint herein are granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion of defendants Gerald Romanoff, Sheryl Romanoff, New Roads Realty Corp. and GHC NY Corp. to dismiss the complaint herein (motion sequence number 006) is granted to the extent of dismissing:

(1) the complaint in its entirety as against Sheryl Romanoff, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant;

(2) those portions of the first cause of action that seek recovery for wrongs that occurred before February 7, 2011;

(3) those portions of the third cause of action that seek recovery against Gerald Romanoff in relation to GHC and for transactions preceding January 4, 2009;

(4) the fourth, fifth and sixth causes of action; and

the motion is otherwise denied; and it is further

ORDERED that the action is severed and continued against the remaining defendants: Gerald Romanoff, 55 Gans Judgment LLC, 55 Gans Lender LLC, Griffon Gansevoort Holdings LLC, The Sheryl Romanoff Irrevocable Grantor Trust, New Roads Realty Corp., GHC NY Corp. and individuals and corporations yet unknown to plaintiff; and it is further

ORDERED that the plaintiff's motion for leave to amend the complaint (motion sequence number 007) is granted to the extent that the first cause of action seeks to add allegations of post-February 7, 2011 wrongdoing against Gerald Romanoff, and the motion is otherwise denied; and it is further

ORDERED that the plaintiff is directed to file and serve a second amended complaint consistent with this decision and the parties' stipulation, dated September 24, 2014, upon all parties within 20 days of service of a copy of this decision and order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on April 1, 2015, at 9:30 AM.

Dated: February 3, 2015

ENTER:

ANIL C. SINGH