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Conduct That Falls Within the Doctrine of "In Pari Delicto"

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The doctrine of in pari delicto bars a party that has been damaged as a result of its own intentional wrongdoing from recovering those damages from "another party whose equal or lesser fault contributed to the loss." *Rosenbach v. Diversified Grp.*, 85 A.D.3d 569, 570 (1st Dep't 2011). The doctrine finds its roots in two rationales. First, courts are not inclined to interject and resolve "a dispute between two wrongdoers" as in pari delicto seeks to avoid the courts from becoming the "referee between thieves." *Kirschner v. KPMG*, 15 N.Y.3d 446, 464 (2010). Second, the doctrine denies judicial relief to the one engaged in illegal conduct. *Bateman Eichler, Hill Richards v. Berner*, 472 U.S. 299, 306 (1985). The term comes from the Latin maxim "*in pari delicto potior est conditio defendentis*," which means "in a case of equal or mutual fault … the position of the defending party … is the better one." While the doctrine's original focus was on illegal acts and illegal contracts, as discussed below, it has since been significantly expanded to other types of wrongdoing, including civil wrongs.

Appellate Precedent

The New York Court of Appeals addressed in pari delicto in *Kirschner v. KPMG*, 15 N.Y.3d 446 (2010). There, the trustee of a litigation trust, created in the Refco bankruptcy, brought suit against Refco's outside advisors for not preventing fraudulent schemes committed by Refco's own officers in orchestrating loans that concealed hundreds of millions of dollars of uncollected debt. The Court found the trustee's claims were precluded because they sought to recover for the injuries to Refco caused by Refco's own wrongdoings. Because the Court found the officers' conduct imputable to the corporation, the Refco trust could not sue Refco's advisors for fraudulent actions for which Refco itself was responsible. The Court likened the situation to "[a] criminal who is injured committing a crime" being unable to "sue the police officer or security guard who failed to stop him" or "the arsonist who is singed" being unable to "sue the fire department."

In *U-Trend N.Y. Inv. L.P. v. US Suite*, 186 A.D.3d 438, 439 (1st Dep't 2020) and *Rosenbach v. Diversified Grp.*, 85 A.D.3d 569, 571-72 (1st Dep't 2011), the Appellate Division, First Department, held that not all misconduct falls under the in

pari delicto doctrine. The court noted that "it is not every minor wrongdoing in the course of contract performance that will insulate the other party from liability." While plaintiff U-Trend had been found to have acted improperly in its dealings with one of the defendants, which resulted in the reduction of its damages, the First Department found that U-Trend's wrongful conduct could not be compared to "'commercial bribery or similar conduct' or other activities forbidden by law," thereby making the in pari delicto doctrine inapplicable. The court recognized that, while U-Trend had engaged in some misconduct, it did not rise to the level sufficient to negate its claims entirely under the doctrine.

In *Rosenbach v. Diversified Grp.*, the First Department held that the doctrine of in pari delicto was not applicable to claims for contribution where one wrongdoer, who allegedly paid more than its alleged equitable share of damages suffered by a third party, sought reimbursement from another wrongdoer that allegedly contributed to those damages. 85 A.D.3d 569, 571-72 (1st Dep't 2011). The court reasoned that contribution claims between tortfeasors are not barred because the injury in question is to a third party, not the fellow joint tortfeasor. The defendants seeking contribution were found to have defrauded the plaintiffs through a tax scheme. Certain defendants alleged that their codefendants contributed to the damages incurred by providing them with negligent tax advice. The court found that in pari delicto does not apply to claims for contribution, stating: "Ever since *Dole* was decided nearly 40 years ago, this state has permitted contribution claims 'among joint or concurrent tort-feasors regardless of the degree or nature of the concurring fault.'"

In *Burgers Bar Five Towns v. Burger Holdings*, the Appellate Division, Second Department, affirmed the determination that the plaintiff's claim was barred by the doctrine of in pari delicto. 118 A.D.3d 657 (2d Dep't 2014). The plaintiff sought to recover damages for defendants' alleged violations of the Franchise Sales Act (FSA), a statute intended to provide potential franchisees or investors with the material details of any franchise offering to "avoid detriment to the public interest" and prohibit fraud in the sale of franchises. N.Y. Gen. Bus. Law §680. The defendants allegedly had offered to sell what amounted to a franchise under FSA to multiple people at the same time, an FSA violation. The court noted that plaintiff had been aware of these alleged FSA violations, but entered into an agreement with the defendants anyway. As such, the court found the plaintiff, as a fellow wrongdoer, could not sue for an FSA violation when it was complicit in it.

In *Gobindram v. Ruskin Moscou Faltischek, P.C.*, the Second Department found the doctrine of in pari delicto barred a plaintiff's claims for legal malpractice, but not other claims. 175 A.D.3d 586 (2d Dep't 2019). Plaintiff sued defendants for legal malpractice, alleging that the defendants negligently prepared an inaccurate bankruptcy petition and failed to amend the bankruptcy petition when it became known that the initial petition was inaccurate. The court held the first claim of negligently preparing an inaccurate bankruptcy petition was barred by in pari delicto because the plaintiff had intentionally made fraudulent statements under oath in his statement of financial affairs appended to the petition. Having contributed to the initial filing of the petition, the plaintiff was barred from recovering for defendant's alleged negligence. The Second Department, however, reached a different result with respect to plaintiff's second claim for defendant's alleged legal malpractice in failing to amend the petition once the inaccuracies became known. The court noted that the bankruptcy court's findings on the deficiencies in the petition did not implicate any wrongdoing by the plaintiff with regard to the failure to amend. Because there was no evidence that the plaintiff's wrongful conduct contributed to the failure to amend, the court found that claim was not subject to dismissal under the doctrine of in pari delicto. A plaintiff's bad act on the core claim did not bar all claims asserted.

Recent Commercial Division Case

The Commercial Division recently addressed the doctrine of in pari delicto in *Seibel, FCLA, LP v. Ramsay*, No. 651046/2014, 2022 WL 1488839, at *6 (N.Y. Co. May 11, 2022). In *Seibel*, the plaintiff sued defendant celebrity chef Gordon Ramsay and G.R. US Licensing, LP over a business relationship involving the restaurant, The Fat Cow. The plaintiff sought damages, derivatively on behalf of The Fat Cow, for breach of contract and fiduciary duty.

The allegations involved a dysfunctional relationship between the parties when they owned a restaurant and worked together. That relationship ended when Ramsay and his team decided unilaterally to close the restaurant due to mounting

financial issues. Following this unilateral closure, Seibel brought suit for breach of the unanimous consent provision in the Fat Cow agreement.

Following a two-week trial, the court first found that plaintiff Seibel was not credible and disregarded his testimony entirely. The court then determined that plaintiff was an active wrongdoer of the harm for which he now sought to recover from the defendants. The evidence at trial established that plaintiff Seibel had taken money out of the business, even when the restaurant was financially performing poorly, which caused Ramsey, shortly before closure, to put his own funds into the restaurant to keep it running, funds which Seibel withdrew. The court found that, at times, Seibel refused to pay contractors, which ultimately caused additional costs for the business. Seibel would also actively stall contractors to demonstrate that he was in "control." As a result of these actions, an architect and a contractor filed liens against the restaurant for non-payment, which attracted adverse press focused on Ramsay. Plaintiff attracted other, significant negative press for the business. Further, Seibel refused to pay a restaurant manager and attempted to fabricate evidence of a false check to avoid that liability, which proved unsuccessful. Given this conduct, Justice Melissa Crane of the New York County Commercial Division held that Seibel's conduct fell under the in pari delicto doctrine, barring his claims in their entirety. Because Seibel had taken an active role in harming the restaurant and its finances, he could not recover for any harm that may have been caused by Ramsay and his teams' decision to unilaterally close Fat Cow.

Justice Elizabeth Emerson of the Suffolk County Commercial Division addressed the doctrine of in pari delicto in *DeCristofaro v. Nest Seekers E. End*, 54 Misc. 3d 1209(A) (Suffolk Co. 2017). In that case, the plaintiff had entered into an agreement with the defendant that contemplated the negotiation of subsequent agreements, which the court found imposed an obligation to negotiate in good faith. The court found neither party engaged in good faith negotiations to enter into the agreement before the required deadline. Because both parties were at fault for failing to meet the deadline and to act in good faith, Justice Emerson precluded plaintiff from recovering from the defendant under in pari delicto.

Conclusion

Application of the doctrine of in pari delicto to bar recovery requires that a plaintiff's bad acts contributed to the injury for which the plaintiff is attempting to recover. Not all bad acts by a plaintiff will rise to the level of fault required. The plaintiff's bad act must be one of equal or greater fault for the doctrine to apply. The exact line of what equates to equal or more fault is not always clear, but the post-*Kirschner* case law is instructive. In *U-Trend*, while the plaintiff's bad acts reduced its award, they were not sufficient to deny the claim. In *Seibel*, while Ramsay had unilaterally closed the restaurant in contravention of the agreement with the plaintiff, the plaintiff's wrongful actions contributed significantly to the restaurant's failure which foreclosed his claims. Where a plaintiff and a defendant participated equally in the same wrongdoing, the claim will likely be dismissed for in pari delicto.

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