UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2005

(Argued: May 19, 2006   Decided: August 31, 2006)

Docket Nos. 05-5243-cv(L), 05-5309-cv(XAP)

- X

BRANDAID MARKETING CORPORATION,

Plaintiff-Counter-Defendant-Appellant-Cross-Appellee,

- against -

STEVEN S. BISS,

Defendant-Third-Party-Plaintiff-Counter-Claimant-Appellee-Cross-Appellant.

CYBERIAN ENTERPRISES, LTD.,

Defendant-Third-Party-Plaintiff-Counter-Claimant-Appellee,

PETER MARKUS and PAUL SLOAN,

Third-Party-Defendants.

- X

Before: POOLER and MINER, *Circuit Judges*, and RAKOFF, *District Judge*.[*]

Appeal from a judgment of the United States District Court for the Southern District of New York, dismissing the action on the ground of *in pari delicto*. Vacated and remanded.

[*] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

1 PAUL W. SIEGERT, New York, NY,
2 for Plaintiff-Counter-Defendant-
3 Appellant-Cross-Appellee.
4
5 STEVEN S. BISS, Richmond, VA, pro se, for
6 Defendant-Third-Party-Plaintiff-Counter-
7 Claimant-Appellee-Cross-Appellant.
8
9
10 RAKOFF, District Judge:

11 Plaintiff BrandAid Marketing Corporation ("BrandAid"), which
12 at the time this action commenced was a publicly traded
13 corporation organized under Delaware law, appeals the dismissal
14 of its suit against Cyberian Enterprises, Ltd. ("Cyberian"), a
15 Hong Kong company, and against Cyberian's attorney, Steven S.
16 Biss, Esq. ("Biss"), who represented Cyberian during its
17 negotiations with BrandAid. Defendant Biss, for his part, cross-
18 appeals the district court's denial of his motion for summary
19 judgment.[1]

20 The pertinent facts, as found by the district court, are as
21 follows. On September 30, 2002, BrandAid authorized the issuance
22 of 80 million common shares of its company stock, and in November
23 2002, Cyberian contacted BrandAid to express interest in
24 purchasing 23,500,000 shares of BrandAid for $21 million. At the

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[1] Although Cyberian was properly served with the notice of this appeal, it failed to file a brief contesting the appeal. After being contacted by the Clerk's office regarding Cyberian's failure to file a brief, counsel for Cyberian orally advised that it was adopting the arguments presented by co-appellee Biss. Given the outcome of this appeal, infra, we have no occasion to consider whether this was adequate.

1 time, BrandAid was experiencing financial difficulties and needed
2 the cash to pay outstanding debts to its vendors. Cyberian, with
3 Biss' connivance, falsely assured BrandAid that it had sufficient
4 cash to finance the investment, that the source of the cash was
5 investments "currently placed in New York at one of the largest
6 USA banks," and that it had no plans to change BrandAid's board
7 of directors or management. BrandAid, for its part, failed to
8 disclose the full extent of its actual and contingent liabilities
9 and ongoing problems (such as lawsuits pending against it),
10 although its various SEC filings disclosed very serious
11 liabilities, few assets, and little cash. In addition, BrandAid
12 falsely represented to Cyberian that it was in good standing in
13 Delaware (whereas its corporate charter had been voided for non-
14 payment of corporate franchise taxes).
15 On November 14, 2002, BrandAid and Cyberian entered into a
16 Subscription Agreement to consummate the deal, and on December 9,
17 2002, BrandAid forwarded to Biss a certificate for 23,500,000
18 shares of its common stock to be held in escrow until Cyberian
19 paid for the shares. The shares were to be released only if the
20 money cleared; otherwise, the certificate was to be returned via
21 overnight priority mail. Cyberian, however, remained unable to
22 procure the funds necessary to close the deal.
23 Finally, in April 2003, after repeatedly assuring BrandAid
24 that it had the necessary funds and receiving several extensions

of the date by which the deal was to be closed, Cyberian acknowledged it did not have the necessary funds, and proposed instead a cashless exchange in which Cyberian would pay for the shares with Chinese real estate. When BrandAid rejected this proposal, Biss, on behalf of Cyberian, sought to effect a "cashless takeover" of BrandAid by voting the still-unpurchased escrowed shares.[2] Further, on May 23, Biss advised both Paul Sloan (Brandaid's Chair) and the SEC that the officers and directors of BrandAid had been dismissed and that a new slate of directors would be appointed. With the assistance of a new BrandAid Chair, Cyberian then sought to consummate the cashless exchange and file the appropriate forms with the SEC.

In response, BrandAid commenced this suit against Cyberian and Biss, alleging, inter alia, breach of contract, fraud, and violations of the federal securities laws. Cyberian, in turn, counter-claimed (and brought third-party claims against related parties) for fraud, tortious interference with contract, and breach of an implied covenant of good faith and fair dealing. After some discovery, Cyberian and Biss moved for summary

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[2] At oral argument, Biss maintained that he did not in fact vote the escrowed shares, but effected, or sought to effect, the takeover by voting shares belonging to other persons whose proxies he had solicited. However, the district court expressly found that on April 16, 2003, "Biss notified [BrandAid] that Cyberian intended to vote the escrowed shares in favor of the [proposed takeover] even though Cyberian had not paid for those shares."

1 judgment in their favor, but the district court reserved decision
2 and never decided the motion. Rather, the district court held a
3 three-day bench trial, following which the district court
4 dismissed all the claims against all of the parties pursuant to
5 the doctrine of in pari delicto (literally "in equal fault").[3]
6 Specifically, the district court determined that, even though
7 Cyberian and Biss repeatedly promised to pay BrandAid funds they
8 did not have, fraudulently attempted to take over BrandAid
9 without any investment, and voted or threatened to vote escrowed
10 BrandAid shares they did not own, BrandAid, for its part, "tried
11 to deceive Cyberian into investing in a company that was
12 practically worthless." We review the district court's findings
13 of fact for clear error and its conclusions of law de novo. See,
14 e.g., Rose v. AmSouth Bank, 391 F.3d 63, 65 (2d Cir. 2004).
15 The doctrine of in pari delicto means more than just "two
16 wrongs make a right." To begin with, application of the doctrine
17 requires that the plaintiff be "an active, voluntary participant
18 in the unlawful activity that is the subject of the suit."
19 Pinter v. Dahl, 486 U.S. 622, 636 (1988). Whatever
20 misrepresentations BrandAid may have made about its condition,
21 there is no suggestion that this in any way caused Cyberian to

[3] Even if Cyberian can be said to have joined in Biss' argument on this appeal, see note 1, supra, since only Cyberian brought claims against third-parties Cyberian cannot be said to have appealed the dismissal of those third-party claims.

1 use fraud and other unlawful conduct to attempt its purchase and
2 hostile takeover. But it is this fraud and other chicanery on
3 which BrandAid's claims are premised.
4 Another requirement for invocation of the doctrine of in
5 pari delicto is that the plaintiff's wrongdoing be at least
6 substantially equal to that of the defendant. See Bateman
7 Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310-11
8 (1985); Peltz v. SHB Commodities Inc., 115 F.3d 1082, 1090 (2d
9 Cir. 1997); Ross v. Bolton, 904 F.2d 819, 824-25 (2d Cir. 1990).
10 Here, the district court appears to have overlooked that
11 BrandAid, while it may not have adequately disclosed its
12 financial and legal difficulties during its direct negotiations
13 with Cyberian, did largely disclose them in its contemporaneous
14 SEC filings, which Cyberian could easily have checked. Thus, as
15 a practical matter, BrandAid's omissions pale in comparison to
16 defendants' fraudulent scheme.[4] Indeed, if it were otherwise,
17 swindlers who regularly prey on victims they know to be
18 financially strapped could readily avoid liability on the
19 pretense that they would never have defrauded a given victim if
20 that victim had completely disclosed just how bad its condition

[4] Because we find that, as a matter of law, plaintiff does not "bear at least substantially equal responsibility for the violations he seeks to redress," Eichler v. Berner, 472 U.S. 299, 310-11, we need not reach the question of whether "preclusion of this suit would . . . significantly interfere with the effective enforcement of the securities laws and protection of the investing public," id. at 311.

1 was.

2 Because, therefore, plaintiff's wrongdoing was far less
3 culpable than defendants' and because, in any event, plaintiff's
4 wrongdoing was not in any meaningful respect the cause of
5 defendants' fraud and misconduct, the doctrine of in pari delicto
6 is not here applicable. Accordingly, the judgment of the
7 district court is vacated, and the case remanded for further
8 proceedings consistent with this opinion.[5]

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[5] As to Biss' cross-appeal, the district court, as noted, never expressly acted on the motion but instead, proceeded to trial and judgment, thereby, as Biss argues, effectively denying the motion as moot. Since, however, we here vacate the district court's judgment, Biss' summary judgment motion, whether viewed as undecided or as denied, resumes its interlocutory status and thereby lies outside our jurisdiction. West v. Goodyear Tire & Rubber Corp., 167 F.3d 776, 781 (2d Cir. 1999).