

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

GATZ PROPERTIES LLC, et al.,)	
)	
Plaintiffs,)	C.A. No.: N13C-02-089 EMD
)	
v.)	
)	TRIAL BY JURY OF TWELVE
THOMAS P. PRESTON, ESQ., et al.,)	DEMANDED
)	
Defendants.)	

Submitted: January 6, 2014

Decided: April 15, 2014

Upon Defendants Thomas P. Preston, Esquire, Steven L. Caponi, Esquire
and Blank Rome LLP’s Motion to Dismiss

***GRANTED IN PART WITH LEAVE TO AMEND
AND GRANTED IN PART WITHOUT LEAVE TO AMEND***

Upon Defendants Thomas P. Preston, Esquire, Steven L. Caponi, Esquire
and Blank Rome LLP’s Motion to Strike Peconic Bay Golf LLC, as a Party

GRANTED

Kevin William Gibson, Esquire, Gibson & Perkins, P.C., Wilmington, Delaware, *Attorney for Plaintiffs.*

Joseph R. Slights, III, Esquire, Morris James, LLP, Wilmington, Delaware, and John G. Harkins, Jr., Harkins Cunningham LLP, Philadelphia, Pennsylvania *Attorneys for Defendants.*

DAVIS, J.

INTRODUCTION

This is a legal malpractice action brought by Plaintiffs William Gatz, Gatz Properties LLC (“Gatz Properties”) and Peconic Bay Golf LLC (“Peconic Bay”)¹ against Defendants Thomas P. Preston, Esq., Ronald J. Fisher, Esq., Steven L. Caponi, Esq., Millcrest Law LLP (“Millcrest Law”) and Blank Rome LLP (“Blank Rome”). This action arose out of Blank

¹ The Court will collectively refer to Mr. Gatz, Gatz Properties and Peconic Bay as “Plaintiffs.”

Rome's representation of Plaintiffs in connection with transactions and litigation surrounding Gatz Properties' acquisition of a long-term lease of a golf course from Peconic Bay.

In their Second Amended Complaint (the "Complaint"), Plaintiffs allege seven (7) causes of action based in negligence and legal malpractice. Now before the Court is (i) the Motion to Dismiss filed by Defendants Thomas P. Preston, Esquire, Steven L. Caponi, Esquire and Blank Rome (collectively, the "Moving Defendants"), and (ii) Defendants' Motion to Strike Peconic Bay as a party (the "Motion to Strike"). For the reasons stated in this Opinion, the Motion to Dismiss is **GRANTED in part with leave to amend and GRANTED in part without leave to amend**, and the Motion to Strike is **GRANTED**.

FACTUAL BACKGROUND

The following is the factual background of this action as it was alleged in the Complaint. In 1997, Gatz Properties and Auriga Capital Corporation ("Auriga"), along with other minority investors, created Peconic Bay for the purpose of holding a long-term lease (the "Lease") on a property to develop a golf course.² The property had been owned by the Gatz family since the 1950s³ and was leased to Peconic Bay for an initial 40-year term starting on January 1, 1998.⁴

Peconic Bay was governed by an Amended and Restated Limited Liability Company Agreement (the "LLC Agreement"). Under the LLC Agreement, Peconic Bay was managed by Gatz Properties, which was managed and partially owned by Mr. Gatz.⁵ The LLC Agreement specified that the golf course would be operated by a third party.⁶

Peconic Bay entered into a Sublease (the "Sublease") with American Golf Corp. ("American Golf"), which ran for a term of 35 years but granted American Golf an early

² Sec. Am. Compl. at ¶ 8.

³ *Id.* at ¶ 9.

⁴ *Id.* at ¶ 13.

⁵ *Id.* at ¶ 11.

⁶ *Id.* at ¶¶ 15-16.

termination right after ten years of operation.⁷ The golf course's operations were never profitable, and by 2005 Gatz Properties became concerned that American Golf would terminate the Sublease in 2010.⁸

In anticipation of American Golf terminating the Sublease, Gatz Properties began creating a cash reserve under Section 11 of the LLC Agreement in 2005.⁹ The reserve had grown to \$1.5 million as of mid-2009.¹⁰ Gatz Properties also consulted Flushing Savings Bank ("FSB") about refinancing.¹¹ As a prerequisite to approving the refinancing, FSB commissioned an appraisal which valued the land with the golf course improvements at \$10.1 million and at \$15 million as vacant land available for development.¹²

In March of 2005, unhappy with the management of Peconic Bay, William Carr filed a lawsuit in New York, on behalf of Auriga, to have Mr. Gatz removed as the manager.¹³ The suit was dismissed. Then, in April 2006, Mr. Carr initiated a books and records examination of Peconic Bay, at which time Gatz Properties retained Blank Rome to secure a confidentiality agreement from Mr. Carr.¹⁴ The representation was handled by Mr. Preston, a partner at Blank Rome.

In August 2007, Matthew Galvin of RDC Golf Group, Inc. ("RDC"), contacted Gatz Properties and expressed an interest in obtaining Peconic Bay's long-term lease.¹⁵ Mr. Gatz instructed Mr. Galvin to put his oral interest to acquire Peconic Bay in writing.¹⁶ In response, Mr. Galvin submitted a non-binding letter of intent to buy Peconic Bay's leasehold assets,

⁷ *Id.* at ¶ 17.

⁸ *Id.* at ¶¶ 21-22.

⁹ *Id.* at ¶ 24.

¹⁰ *Id.* at ¶ 24.

¹¹ *Id.* at ¶ 23.

¹² *Id.* at ¶ 23.

¹³ *Id.* at ¶ 25.

¹⁴ *Id.* at ¶ 26.

¹⁵ *Id.* at ¶ 28.

¹⁶ *Id.* at ¶ 29.

exclusive of any other assets or liabilities, for \$3.75 million, premised on a due diligence review of Peconic Bay's books and records.¹⁷

Mr. Gatz hired an attorney, Jack Wilson, to review the offer and advise Mr. Gatz regarding the negotiations with Mr. Galvin. Mr. Gatz also submitted the offer to Mr. Preston for review, with Mr. Wilson playing the larger role in the negotiations as Mr. Wilson had a lower hourly rate.¹⁸ The Peconic Bay members rejected Mr. Galvin's offer as well as another written offer for \$4.15 million, which was submitted in November of 2007.¹⁹

In December 2007, Mr. Gatz advised Mr. Galvin that Peconic Bay would not entertain any further offers unless they were "well north of six million."²⁰ In an email to Mr. Gatz on December 29, 2007, Mr. Galvin told Mr. Gatz that he might submit an offer north of \$6 million, but Mr. Galvin never made a formal offer.²¹ On the advice of Mr. Wilson to only convey formal written offers to the Peconic Bay members, Mr. Gatz did not share Mr. Galvin's December email with the minority members of Peconic Bay.²²

In January of 2008, Mr. Gatz decided that the Gatz family should attempt to buy out the interest of the LLC's minority members and, in a written offer dated January 14, 2008, proposed a cash payment to the minority of \$734,131.00 contingent on the offer being accepted by all of the minority members.²³ All but one minority member rejected the offer.

On August 1, 2008, Plaintiffs retained Mr. Preston and Blank Rome to fashion a way for the majority to buy out the interests of the minority members of Peconic Bay under Delaware

¹⁷ *Id.* at ¶ 30.

¹⁸ *Id.* at ¶ 32.

¹⁹ *Id.* at ¶ 33.

²⁰ *Id.* at ¶ 34.

²¹ *Id.* at ¶ 35.

²² *Id.* at ¶ 36.

²³ *Id.* at ¶ 39.

law.²⁴ A proposal to purchase each minority interest in Peconic Bay was conveyed by the Gatz family on August 7, 2008.²⁵ On August 29, 2008 Mr. Preston wrote a letter to the minority members of Peconic Bay, urging them to accept the proposal.²⁶ However the minority members still refused to accept the proposal.²⁷ After that, Mr. Fisher, another partner at Blank Rome, proposed selling Peconic Bay at auction where the Gatz family could bid in their interests as a means of eliminating the minority interests.²⁸ In December 2008, Mr. Fisher passed along the names of three auctioneers to Mr. Gatz for his consideration.²⁹ Subsequently, on January 22, 2009, Mr. Fisher interviewed all three auctioneers.³⁰

Mr. Gatz was of the opinion that Alan Kravets, one of the three auctioneers, would be the best choice. However, Mr. Fisher and Mr. Preston recommended Richard Maltz of Maltz Auctions, Inc. over Mr. Kravets.³¹ Mr. Fisher informed Mr. Gatz in an email that Mr. Kravets cautioned Mr. Fisher to make sure that Mr. Maltz was properly qualified to act as the auctioneer, particularly with regards to golf course experience.³² Before 2009, Mr. Maltz had never been involved in auctioning a golf course.³³ Mr. Gatz and Mr. Maltz entered into an agreement in late May of 2009, under which the golf course would be marketed for 90 days and the auction would take place on August 18, 2009.³⁴

²⁴ *Id.* at ¶ 41.

²⁵ *Id.* at ¶ 44.

²⁶ *Id.* at ¶ 44.

²⁷ *Id.* at ¶ 45.

²⁸ *Id.* at ¶ 46.

²⁹ *Id.* at ¶ 49.

³⁰ *Id.* at ¶ 50.

³¹ *Id.* at ¶¶ 51-52.

³² *Id.* at ¶ 52.

³³ *Id.* at ¶ 53.

³⁴ *Id.* at ¶ 54.

In June of 2009, Mr. Fisher left Blank Rome and became a partner at Millcrest Law.³⁵ Plaintiffs retained Mr. Fisher and Millcrest Law on June 19, 2009.³⁶ While employed at Millcrest Law, Mr. Fisher approved of Mr. Maltz using small-print classified advertisements in general circulation newspapers and magazines, online advertisements, and direct mailings to publicize the auction.³⁷ Mr. Fisher and Mr. Preston reviewed everything that Mr. Maltz prepared for the auction.³⁸ Although Mr. Fisher and Mr. Preston knew of Mr. Galvin's interest in Peconic Bay, neither Mr. Preston nor Mr. Fisher ever suggested that Mr. Maltz contact Mr. Galvin as a potential bidder.³⁹ Mr. Galvin learned of the action through third parties but, after conferring with Mr. Maltz, Mr. Galvin chose not to attend the auction.⁴⁰

On February 23, 2009, before the auction, the minority members of Peconic Bay filed a complaint in the Delaware Court of Chancery (the "Chancery Court") to enjoin Gatz Properties from proceeding with the auction.⁴¹ The Chancery Court denied the request for injunctive relief.⁴²

The Auction took place on August 18, 2009. On that day, Mr. Maltz informed Mr. Gatz that he would be the only bidder.⁴³ Mr. Gatz then bid and purchased Peconic Bay for \$50,000 cash plus assumption of Peconic Bay's debt.⁴⁴ The minority received \$20,985.00 from the proceeds of the auction.⁴⁵

³⁵ *Id.* at ¶ 55.

³⁶ *Id.* at ¶ 56.

³⁷ *Id.* at ¶ 57.

³⁸ *Id.* at ¶ 58.

³⁹ *Id.* at ¶¶ 60-61.

⁴⁰ *Id.* at ¶ 62.

⁴¹ *Id.* at ¶ 65.

⁴² *Id.* at ¶ 65.

⁴³ *Id.* at ¶ 67.

⁴⁴ *Id.* at ¶ 67.

⁴⁵ *Id.* at ¶ 68.

On August 28, 2009, the minority members renewed their request for injunctive relief and, again, the Chancery Court denied their request.⁴⁶ In 2010, the Peconic Bay minority members amended their complaint to add Mr. Gatz as a party and assert a cause of action against him for breach of fiduciary duty.⁴⁷ A trial was conducted before then-Chancellor Strine in the early fall of 2011.⁴⁸ Mr. Caponi, also a partner at Blank Rome, represented Plaintiffs at trial.⁴⁹

At the end of the trial, the Chancellor ruled in favor of the minority members of Peconic Bay, holding that Mr. Gatz had breached both his contractual and fiduciary duties to the minority members by virtue of the “sham” auction.⁵⁰ In his written opinion, the Chancellor stated:

Despite Gatz's repeated efforts to convince me otherwise, I believe the Auction process used by Gatz was a bad faith sham. The process used was so far short of minimally responsible as to render Gatz's continued defense of it frivolous and burdensome. At an earlier preliminary injunction hearing, I made a probabilistic determination to that effect, following the procedural rubric for such a motion, and encouraged Gatz to engage in a bona fide marketing effort. He and his counsel apparently did not view those findings and guidance as sound. I adhere to my earlier view, and the trial record clearly demonstrated that this sales process was one that no rational person acting in good faith could perceive as adequate. The Auction process was not a good faith effort to generate bids at a good price for Peconic Bay. Rather, the sham Auction was the culmination of Gatz's bad faith efforts to squeeze out the Minority Members. By failing for years to cause Peconic Bay to explore its market alternatives, Gatz manufactured a situation of distress to allow himself to purchase Peconic Bay at a fire sale price at a distress sale.⁵¹

Damages were awarded in the amount of \$776,515.00 plus prejudgment interest as well as \$660,000.00 awarded to the minority members for half of their requested attorney's fees and costs.⁵² On appeal, the Supreme Court affirmed the finding that Gatz Properties had breached its

⁴⁶ *Id.* at ¶ 65.

⁴⁷ *Id.* at ¶ 69.

⁴⁸ *Id.* at ¶ 70.

⁴⁹ *Id.* at ¶ 71.

⁵⁰ *Id.* at ¶ 73.

⁵¹ *Auriga Capital Corp. v. Gatz Properties*, 40 A.3d 839, 873 (Del. Ch.), *aff'd*, 59 A.3d 1206 (Del. 2012).

⁵² Sec. Am. Compl. at ¶ 74.

fiduciary duty to the minority members and the damages awarded.⁵³ After Auriga Capital executed on the damages award, Gatz Properties filed for Chapter 11 Bankruptcy.⁵⁴ On June 24, 2013 the golf course was sold off at auction for a total of \$6 million.⁵⁵

PARTIES' CONTENTIONS

In the Complaint, Plaintiffs have asserted seven claims for relief based in negligence for legal malpractice. In the Motion to Dismiss, the Moving Defendants seek to dismiss four of those claims: (i) Claim Two -- failing to advance an advice of counsel defense; (ii) Claim Three - - failing to call the Honorable Bruce Kasold as a witness; (iii) Claim Four -- failing to advance the argument that Mr. Gatz had no personal liability; and (iv) Claim Five -- negligence in failing to advise Plaintiffs that Defendants were conflicted as counsel. In summary form, the Motion to Dismiss contends that Claim Two, Claim Three and Claim Four should be dismissed as the purported "failures" to act would not have led to a different result at trial. As for Claim Five, the Moving Defendants argue that this claim should be dismissed because it does not amount to a cause of action.

Plaintiffs oppose dismissal. First, Plaintiffs contend that the Chancery Court would not have found that Mr. Gatz had acted in bad faith if a fulsome advice of counsel defense had been pursued by Plaintiffs' counsel during the litigation. This, the Plaintiffs argue, would have changed the result at trial or on appeal. Likewise, Plaintiffs argue that the testimony of Judge Kasold would likely have changed the Chancery Court's findings that Mr. Gatz acted in bad faith. With regards to Mr. Gatz's personal liability, Plaintiffs maintain that Mr. Caponi should have argued that under the LLC Agreement Mr. Gatz had no personal liability. Plaintiffs also contend that Mr. Caponi and Blank Rome are liable for legal malpractice for failing to inform

⁵³ *Id.* at ¶ 75.

⁵⁴ *Id.* at ¶ 76.

⁵⁵ *Id.* at ¶ 77.

Mr. Gatz of the inherent conflict presented by Blank Rome's representation of Gatz Properties in the transactions which lead to this litigation.

In the Motion to Strike, the Moving Defendants have moved to have Peconic Bay stricken as a party. The Moving Defendants contend that Peconic Bay was merged into Gatz Properties on September 21, 2009, and therefore no longer existed as a separate entity when it was named as a party. Plaintiffs did not address this contention in their Response and conceded to striking Peconic Bay as a party at the hearing held on January 6, 2014.

STANDARD OF REVIEW

Upon a motion to dismiss, the Court (i) accepts all well pleaded factual allegations as true, (ii) accepts even vague allegations as well pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) will only dismiss a case where the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.⁵⁶ However, the court must “ignore conclusory allegations that lack specific supporting factual allegations.”⁵⁷

“Matters extrinsic to a complaint generally may not be considered in a ruling on a motion to dismiss.”⁵⁸ However, “there is an exception to the rule in a case where the complainant refers to the other proceeding or judgment, and specifically bases his right of action, in whole or in part, on something which appears in the record of the prior cause.”⁵⁹ “In such case, the Court, in passing on a demurrer to the complaint, will take judicial notice of the matters appearing in the record in that case without formal proof.”⁶⁰ In this case, the Court will take judicial notice of the

⁵⁶ *Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Academy*, 09C-09-136, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).

⁵⁷ *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

⁵⁸ *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 320 (Del. 2004).

⁵⁹ *Frank v. Wilson & Co.*, 27 Del. Ch. 292, 299, 32 A.2d 277, 280 (1943).

⁶⁰ *Id.*

litigation before the Chancery Court between Plaintiffs and the minority members of Peconic Bay, including the thorough and extremely detailed opinion issued by the Chancellor, *Auriga Capital Corp. v. Gatz Properties, LLC*, 40 A.3d 839 (Del. Ch.), *aff'd*, 59 A.3d 1206 (Del. 2012).

DISCUSSION

The claims that Plaintiffs have asserted against the Moving Defendants are all based in legal malpractice. In order to make out a claim for legal malpractice a plaintiff must establish three elements. The plaintiff must establish: “a) the employment of the attorney; b) the attorney's neglect of a professional obligation; and c) resulting loss.”⁶¹ With regards to the final element in a case involving previous litigation, a plaintiff must show “that the underlying action would have been successful but for the attorney's negligence.”⁶² Unless Plaintiffs’ can demonstrate all three of these elements, they cannot succeed on their claims.

A. THE AFFIDAVIT OF MR. GATZ

In their Response Brief, Plaintiffs rely on an affidavit of Mr. Gatz (the “Affidavit”) in their arguments. The Moving Defendants contend that as the Affidavit was not referenced by or incorporated into Plaintiff’s Complaint, it cannot be considered by the Court on a motion to dismiss. The Delaware Supreme Court has held that on a motion to dismiss a trial court cannot consider materials that are “neither attached to, nor incorporated by reference into, the complaint.”⁶³ “Matters extrinsic to a complaint generally may not be considered in a ruling on a motion to dismiss.”⁶⁴ “[T]he Court may consider documents that are ‘integral’ to the complaint, but documents outside the pleadings may be considered only in ‘particular instances and for

⁶¹ *Flowers v. Ramunno*, 27 A.3d 551, *2 (Del. 2011).

⁶² *Id.*

⁶³ *Wal-Mart Stores, Inc.*, 860 A.2d at 320.

⁶⁴ *Id.* (citing *In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 68 (Del.1995)).

carefully limited purposes.’’⁶⁵ Therefore, in making its rulings, this Court has not considered the Affidavit or facts in the Affidavit that were not included in Plaintiffs’ Complaint.

B. CLAIM TWO: ADVICE OF COUNSEL DEFENSE

The Moving Defendants claim that even if an advice of counsel defense were raised, the result at trial and on appeal would not have changed. The Moving Defendants support this contention with four arguments: (i) the safe harbor provision under 6 Del. C. § 18-406 would not have been available due to the Chancellor’s findings of bad faith; (ii) even if the defense had been raised, Plaintiffs would not have satisfied the entire fairness test due to the Chancellor’s finding that Plaintiffs paid an unfair price; (iii) the advice of counsel defense was before the Court of Chancery, however, it was not pursued because Plaintiffs would have been forced to waive attorney-client privilege; and (iv) Plaintiffs have not alleged facts that support the contention that an advice of counsel defense would have lead to a different result at trial.

With regards to the first argument, the unavailability of the safe harbor provision under 6 Del. C. § 18-406 due to bad faith, the Chancellor may not have found that Mr. Gatz acted in bad faith if an advice of counsel defense had been offered. At trial, the Chancellor found that Mr. Gatz breached his fiduciary duties through four instances of bad faith conduct.

Thus, for all these reasons, I conclude that Gatz breached his fiduciary duty of loyalty and his fiduciary duty of care by: (1) his bad faith and grossly negligent refusal to explore any strategic alternatives for Peconic Bay from the period 2004–2005 forward when he knew that American Golf would terminate its lease; (2) his bad faith refusal to consider RDC’s interest in a purchase of Peconic Bay or a forward lease; (3) his bad faith conduct in presenting the Minority Members with misleading information about RDC’s interest and his own conduct in connection with his buyout offers in 2008; and (4) his bad faith and grossly negligent conduct in running a sham Auction process that delivered Peconic Bay to himself for \$50,000.⁶⁶

⁶⁵ *Id.* (quoting *In re Santa Fe Pacific Corp. S’holder Litig.*, 669 A.2d 59, 68 (Del.1995)).

⁶⁶ *Auriga Capital Corp.*, 40 A.3d at 875.

With regards to these instances of bad faith conduct, the complaint alleges that: Mr. Wilson and Mr. Preston were involved and completely informed throughout the negotiations with Mr. Galvin and RDC;⁶⁷ Mr. Gatz only conveyed formal written offers to the LLC member based on the advice of Mr. Wilson;⁶⁸ and Mr. Gatz decided to hire Mr. Maltz based on the recommendations from Mr. Preston and Mr. Fisher.⁶⁹ Accepting these allegations as true, had Mr. Caponi argued that Mr. Gatz acted in reliance on the advice of counsel with regards to each of these instances, the Chancellor may not have found that Mr. Gatz had acted in bad faith. In fact, the Chancellor states that the advice of counsel defense was, in part, rejected because it had not been disclosed fully.⁷⁰ Therefore, section 18-406 might have been available.

Based on these arguments, it is also clear that Plaintiffs have in fact alleged sufficient facts to support the contention that the Chancery Court would have reached a different result had the defense been argued. Therefore, the Moving Defendants' fourth argument – that Plaintiffs have not alleged that there would have been a different result at trial – also fails.

With regards to the second and third arguments, Plaintiffs rely on the Affidavit of Mr. Gatz in their response. In response to the second argument, failure to pay a fair price, Plaintiffs argue that Mr. Gatz acted on the advice of his counsel with regards to the auction price as well. Plaintiffs point to paragraph 22 of the Affidavit where Mr. Gatz states that he relied on the advice of Mr. Fisher when making his \$50,000 bid. Further, Plaintiffs argue that had the bid seemed low to Mr. Fisher, Mr. Fisher should have taken Mr. Gatz aside and told him that he should make a higher bid.

⁶⁷ Sec. Am. Compl. ¶¶ 31-38.

⁶⁸ *Id.* at ¶ 35-38.

⁶⁹ *Id.* at ¶ 52.

⁷⁰ *Auriga Capital Corp.*, 40 A.3d at 881, n. 178.

In response to the third argument – waiving the attorney-client privilege – Plaintiffs again rely on the Affidavit. In the Affidavit, Mr. Gatz states that he had no input and was not properly informed about whether the advice of counsel defense should be waived.⁷¹ Mr. Gatz states that if Mr. Caponi had fully informed him of what would have been discoverable under a waiver of attorney-client privilege, Mr. Gatz would have told Mr. Caponi to produce the related documents and pursue the advice of counsel defense.⁷²

The Moving Plaintiffs' second and third arguments would only fail if this Court relies upon the facts set out in the Affidavit. This is a motion to dismiss and not a motion for summary judgment. The standards are different. Because this Court cannot consider the Affidavit on a motion to dismiss, the Second Claim must be dismissed. However, the Court would have reached a different result *on a motion to dismiss* as to Claim Two had Plaintiffs pled the facts set out in the Affidavit. Therefore, the Motion to Dismiss to dismiss Claim Two is hereby **GRANTED**. Under the circumstances, however, the Court will grant Plaintiff leave to file an amended complaint within fifteen (15) days to allege facts consistent with the Affidavit.

C. CLAIM THREE: FAILURE TO CALL JUDGE KASOLD AS A WITNESS

Plaintiffs allege that Defendants were negligent in failing to call Judge Kasold, who is the brother-in-law of Mr. Gatz, as a witness at trial. Plaintiffs state in their complaint that Judge Kasold participated in many strategy discussions that took place among Mr. Gatz, Mr. Preston and Mr. Fisher.⁷³ Plaintiffs further argue that they have a right to support the contention that Judge Kasold should have been called as a witness through expert testimony.⁷⁴

⁷¹ Pltf.'s Resp., Ex. A, ¶¶ 14-15.

⁷² Pltf.'s Resp., Ex. A, ¶ 15.

⁷³ Sec. Am. Compl. ¶ 26.

⁷⁴ Pltfs.' Resp. at 16.

The Moving Defendants have urged this Court to adopt the “judgmental immunity doctrine” – a doctrine not previously addressed by a Delaware court. There is no need for this Court to make a decision based on a theory of first impression. Here, Plaintiffs have not and cannot allege facts sufficient to satisfy the causation element of a legal malpractice claim as to Claim Three.

To satisfy the causation element in an action for legal malpractice, a plaintiff must show that but for the attorney’s negligence, the underlying action would have been successful.⁷⁵ Here, Plaintiffs plead no facts which would support a reasonable inference that the Chancery Court would have come to a different result had Judge Kasold testified at trial. Plaintiffs fail to allege, in either the Complaint, their Response Brief or at oral argument that Judge Kasold would have testified to any additional facts that had not already been brought out at trial through Mr. Gatz’s testimony.

Further, Plaintiffs cannot show “that the underlying action would have been successful” had Judge Kasold been called as a witness.⁷⁶ Plaintiffs have made no allegations that Judge Kasold would have testified to any additional facts at trial. Instead, Plaintiffs contend that the Chancellor would have been more likely to accept Mr. Gatz’s version of the facts had Judge Kasold testified. This contention is purely speculative and well beyond what can be reasonably inferred based on the facts alleged.

Moreover, Plaintiffs’ theory is not supported by a fair reading of the Chancellor’s decision after trial. The decision in the *Auriga* litigation does not turn on whether the Chancellor accepted Mr. Gatz’s version of the facts. Rather, the Chancellor determined that the facts as testified to – whether by one or two or twenty witnesses – during the trial did not support a

⁷⁵ *Flowers*, 27 A.3d at *2.

⁷⁶ *Id.*

conclusion that Plaintiffs engaged in an adequate sales process that arrived at a fair price for the asset under applicable Delaware law.⁷⁷

As the Third Claim cannot meet the causation element required in a legal malpractice action, the Motion to Dismiss is hereby **GRANTED** as to Claim Three without leave to amend.

D. CLAIM FOUR: FAILURE TO ARGUE THAT MR. GATZ HAD NO PERSONAL LIABILITY

Plaintiffs allege that Mr. Caponi failed to argue that Mr. Gatz had no personal liability during trial. The Court has read the Chancellor's decision and notes that this issue was thoroughly addressed by the Chancellor in his decision after trial.

In the opinion, the Chancellor found that section 15 of the LLC Agreement specifically imposed fiduciary duties on Mr. Gatz:

Because the terms of § 15 only apply to Affiliate Agreements, and because these terms address the duty owed by Gatz to the Minority Members as to Affiliate Agreements, they distill the traditional fiduciary duties as to the portion of the Minority Members' claims that relates to the fairness of the Auction and Merger into a burden to prove the substantive fairness of the economic outcome.⁷⁸

The Chancellor then goes on to determine that Mr. Gatz breached his fiduciary duties. The Delaware Supreme Court upheld this determination on appeal. Therefore, the Chancellor's opinion makes it clear that he specifically considered Mr. Gatz's fiduciary duties under the LLC Agreement and held that Mr. Gatz, as an individual, breached these duties.

In their Response Brief, Plaintiffs contend that Mr. Caponi should have made the Chancery Court and the Delaware Supreme Court aware that Mr. Gatz had no personal liability under the exculpation provision in section 16 of the LLC Agreement. However, it is quite clear that the Chancery Court considered that provision. By way of example:

⁷⁷ See, e.g., *Auriga Capital Corp.*, 40 A.3d at 873 (“I adhere to my earlier view, and the trial record clearly demonstrated that this sales process was one that no rational person acting in good faith could perceive as adequate.”)

⁷⁸ *Id.* at 858.

Thus, by the terms of § 16, Gatz may escape monetary liability for a breach of his default fiduciary duties if he can prove that his fiduciary breach was not: (1) in bad faith, or the result of (2) gross negligence, (3) willful misconduct or (4) willful misrepresentation. Also, in order to fall within the terms of § 16, a Covered Person must first be acting “on behalf of the company” and “in a manner reasonably believed to be within the scope of authority conferred on [him] by [the LLC Agreement].”⁷⁹

The Chancellor also found that, based on Mr. Gatz’s bad-faith conduct, the exculpation provision did not apply:

Thus, § 16 only insulates a Covered Person from liability for authorized actions; that is, actions taken in accordance with the other stand-alone provisions of the LLC Agreement. So, to the extent that the Auction and the follow-on Merger were effected in violation of the arms-length mandate set forth in § 15 (which, as I shall find, they were), such a breach would not be exculpated by § 16. Moreover, even if I were to find that § 16 operated to limit Gatz’s liability for actions taken in contravention of the terms of § 15, I find that his actions related to and in consummation of the Auction and follow-on Merger were taken in bad faith such that he would not be entitled to exculpation anyway.⁸⁰

Furthermore, it is very clear from the language of section 16 of the LLC Agreement that the exculpation provision would only have applied if Mr. Gatz had acted in good faith:

No Covered Person⁸¹ shall be liable to the Company, any other Covered Person or any other person or entity who has an interest in the Company for any loss, damage or claim incurred by reason of any act or omission performed or omitted by such Covered Person *in good faith* in connection with the formation of the Company or on behalf of the Company and in a manner reasonably believed to be within the scope of the authority conferred on such Covered Person by this Agreement, except that a Covered Person shall be liable for any such loss, damage or claim incurred by such Covered Person by reason of such Covered Person’s gross negligence, willful misconduct or willful misrepresentation.⁸²

Moreover, Mr. Gatz admitted to personally owing fiduciary duties to the members of Peconic Bay in his testimony at trial:

Q. And you understood that you personally had a fiduciary duty to all members of Peconic Bay; right?

⁷⁹ *Id.* at 858.

⁸⁰ *Id.* at 858-59.

⁸¹ Section 16 of the LLC Agreement defines “Covered Person” as “the Organizer, the Members, and the Manager and the officers, equity holders, partners and employees.”

⁸² *Pltfs.’ Resp., Ex. A, at Ex. B.*

A. Yes.⁸³

Q. And at that time, you thought you owed a fiduciary duty to your family members; right?

A. Yes.

Q. And at that time, you were the manager of Gatz Properties?

A. Yes.

Q. Which in turn was the manager of Peconic Bay; right?

A. Yes.

Q. So in that capacity, you understood that you had a fiduciary duty to all the members of Peconic Bay?

A. Yes.⁸⁴

Mr. Gatz's personal liability under the LLC Agreement was specifically before both the Chancery Court and the Delaware Supreme Court.⁸⁵ As such, Plaintiffs cannot now show that there would have been a different result had that argument been made. As Plaintiffs cannot satisfy the causation element of legal malpractice based on the facts alleged, the Motion to Dismiss is hereby **GRANTED** as to Claim Four without leave to amend.

E. CLAIM FIVE: FAILURE TO INFORM PLAINTIFFS OF CONFLICT OF COUNSEL

Claim Five asserts that Blank Rome and Mr. Caponi committed legal malpractice because they failed to inform Plaintiffs of Blank Rome's conflict of interest due to the firms prior representation of Plaintiffs in the transactions leading up to the litigation in *Auriga*. The Moving Defendants argue that violations of the Delaware Rules of Professional conduct do not in themselves create civil causes of action. As stated above there are three elements of legal

⁸³ *Auriga Capital Corp. v. Gatz Properties*, C.A. No. 4390-CS, at 512:4-7 (Del. Ch. Sept. 19, 2011) (TRANSCRIPT).

⁸⁴ *Id.* at 579:3-15.

⁸⁵ *See Auriga Capital Corp.*, 40 A.3d at 874 (“The LLC in this case is Peconic Bay LLC (“Peconic Bay” or the “Company”). The “Manager” of Peconic Bay is defendant Gatz Properties, LLC, an entity which is itself managed, controlled, and partially owned by defendant William Gatz. Because William Gatz as a person was the sole actor on behalf of Gatz Properties at all time, I typically refer to “his” actions or “him,” because that is what best tracks how things happened.”).

malpractice: “a) the employment of the attorney; b) the attorney's neglect of a professional obligation; and c) resulting loss.”⁸⁶

The Moving Defendants contend that a breach of the Rules of Professional conduct cannot be used to show that an attorney has breached a professional obligation, in order to satisfy the second element of legal malpractice. In support, the Moving Defendants point to the preamble of the Rules:

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.⁸⁷

The Moving Defendants also cite to the Superior Courts opinion in *Flaig v. Ferrara* as support for their argument: “The Rules were not intended to support independent claims of legal malpractice nor establish legal duties on the part of attorneys. Violation of the Rules does not establish civil liability or constitute negligence per se.”⁸⁸ However, in *Flaig* the Court went on to hold that although the Rules cannot be used to show breach of an independent duty, the Rules may be used as evidence that an attorney breached a common law duty.⁸⁹

In this case, the plaintiff has specifically alleged negligence on the part of [the attorney] in his representation of her claims. Therefore, the Rules may be used, to the extent relevant, to support or show-that [the attorney] may have breached a common law duty to the plaintiff. However, the use of the Rules as a legal

⁸⁶ *Flowers*, 27 A.3d at *2.

⁸⁷ Del.R.Prof.C. Scope.

⁸⁸ *Flaig v. Ferrara*, 90C-11-095 WTQ, 1996 WL 944860, *2 (Del. Super. Apr. 15, 1996).

⁸⁹ *Id.* at *3.

standard to show an independent breach of a duty would be directly contrary to Delaware Supreme Court precedent and the Scope of the Rules.⁹⁰

Thus the Court held that “the plaintiff may introduce the Rules as evidence that [the attorney] may have breached his common law duty in her action for negligence.”⁹¹ Therefore, Plaintiffs may introduce the Delaware Rules of Professional Conduct as evidence that Defendants breached a common law duty owed to Plaintiffs.

In their Response, Plaintiffs appear to argue that a violation of the Delaware Rules of Professional Conduct gives rise to an independent cause of action. The Complaint, however, is not pled that way. The Complaint uses the purported violation as support for the alleged malpractice. Plaintiffs allege that if they had been timely notified of the conflict then Plaintiffs would have hired new counsel. Plaintiffs then allege that new counsel would have properly advanced an advice of counsel defense and the result at trial would have been different. Thus, assuming that Claim Two is properly re-pled in the timeframe accorded under this decision, Plaintiffs can allege facts supporting the second element of their legal malpractice claim in Claim Five. However, as the Court has granted the Motion to Dismiss as to Claim Two, the Court **GRANTS** the Motion to Dismiss as to Claim Five. The Court will also provide Plaintiffs leave to amend Claim Five (i.e., reassert Claim Five in a newly amended complaint) if Plaintiffs choose to amend Claim Two.

F. MOTION TO STRIKE PECONIC BAY AS A PARTY

The Moving Defendants have asserted that, as Peconic Bay did not exist at the time they were named as party in this litigation, Peconic Bay should be stricken as a party. The Moving Defendants have provided a Certificate of Merger that indicates Peconic Bay was in fact merged into Gatz Properties on September 21, 2009, almost four years before Peconic Bay was named as

⁹⁰ *Id.*

⁹¹ *Id.*

a party in the Complaint.⁹² Further, Plaintiffs conceded at oral argument that Peconic Bay should be stricken as a party. Therefore, the Motion to Strike Peconic Bay as a Party is hereby **GRANTED**.

CONCLUSION

For the reasons stated above, the Motion to Dismiss with respect to Claim Two and Claim Five is **GRANTED** with leave for Plaintiffs to file an amended complaint which includes the facts alleged the Affidavit of Mr. Gatz; the Motion to Dismiss with respect to Claim Three and Claim Four is **GRANTED** without leave to amend; and the Motion to Strike Peconic Bay as a Party is **GRANTED**.

IT IS SO ORDERED.

/s/ Eric M. Davis _____

Eric M. Davis
Judge

⁹² Defs.' Opening Br., Ex. F.