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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NV-10-1494 PaDKi
)	
BECHARA VICTOR HONEIN,)	Bankr. No. 05-51094-GWZ
)	
Debtor.)	Adv. Proc. 05-05121-GWZ
_____)	
)	
MICHAEL HARRIS,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
BECHARA VICTOR HONEIN,)	
)	
Appellee.)	
_____)	

Argued and Submitted on June 15, 2012,
at Las Vegas, Nevada

Filed - June 27, 2012

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Gregg W. Zive, Bankruptcy Judge, Presiding

Appearance: Michael H. Ahrens of Sheppard, Mullin, Richter &
Hampton, LLP argued for appellant Michael Harris.
No appearance at argument for appellee Bechara
Honein.

Before: PAPPAS, DUNN and KIRSCHER, Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may have
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th
Cir. BAP Rule 8013-1.

1 Michael Harris ("Harris") appeals the bankruptcy court's
2 judgment denying his motion for a partnership accounting and
3 settling title to certain real property in his adversary
4 proceeding against chapter 11² debtor Bechara Victor Honein
5 ("Honein"). We AFFIRM.

6 **FACTS**

7 Unless otherwise noted, the parties do not dispute the
8 underlying facts in this appeal.

9 In 2002, Honein and Harris entered into an oral partnership
10 agreement to purchase real property on which a gas station would
11 be operated. The parties never prepared a written partnership
12 agreement. The partnership was to be equally owned by Honein and
13 Harris, with each partner to have an equal responsibility to
14 contribute the sums necessary to fund the partnership. While it
15 was intended that the partnership acquire and own the real
16 property, it would not own or operate the gas station business.

17 The parties agreed that, when acquired, title to the real
18 property would be placed in Honein's name, because Harris had
19 outstanding money judgments against him and was experiencing other
20 problems with his creditors:

21 COUNSEL FOR HONEIN: And, in fact, sir, you told
22 Mr. Honein that you could put nothing in your name
23 because of your problems with the creditors. Am I
24 correct?

25 HARRIS: Yes, sir.

26 ² Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. § 101-1330 and to
28 the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as in
force prior to the effective date (October 17, 2005) of the
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23 ("BAPCPA").

1 Trial Tr. 107:17-21, April 26, 2007. It was agreed that Honein,
2 alone, would own and operate the gas station business.

3 Harris' initial obligation to the partnership was to
4 contribute \$45,000, which the partners then expended on costs and
5 offers on properties that were not ultimately purchased. Harris
6 was also primarily responsible for obtaining the financing for any
7 real property purchase.

8 From 2002 to 2003, Honein and Harris inspected various
9 properties and made offers to acquire them. Ultimately, one offer
10 proposed by Honein was accepted for a property in Carson City,
11 Nevada (the "Property") owned by BP West Coast Products LLC
12 ("BP/ARCO").³ Honein and BP/ARCO executed a sale contract for
13 \$550,000. Although it is not clear in the record the date when
14 the offer was accepted, on March 25, 2003, BP/ARCO informed Honein
15 that if the sale of the Property did not close within five
16 business days, the sale contract would be rescinded. Harris was
17 unable to obtain commercial financing for this purchase. Instead,
18 Harris arranged for a short-term loan from his brother, Lee
19 Harris, in the amount of \$450,000 to close the sale. Honein alone
20 signed a promissory note in favor of Lee Harris, with no reference
21 to any partnership with Harris.

22 Although the parties do not dispute that the amount owed on
23 this promissory note was \$450,000, the note executed by Honein was
24 for \$850,000. The bankruptcy court later found that both Honein
25 and Harris intended that this false document would be used to

26
27 ³ BP West Coast Products LLC owns Atlantic Richfield
28 Corporation, which markets gasoline under the "ARCO" trade name in
ARCO service stations. Hence, the parties refer to the corporate
entity as BP/ARCO.

1 inflate the value of the Property to induce banks to provide a
2 much higher commercial loan. Then, through this scheme, after
3 paying off the \$450,000 to Lee Harris, the parties could pocket
4 the fraudulently obtained surplus in loan proceeds. See Amended
5 Findings of Fact no. 21, November 3, 2010.

6 The sale of the Property closed on May 23, 2003; all
7 documents were signed by Honein with no reference to a partnership
8 with Harris; title vested in Honein. At some point not clear in
9 the record, Honein gave a grant deed to Lee Harris for a 50
10 percent interest in the Property, which deed was never recorded.
11 Lee Harris, in turn, provided a quitclaim deed to Harris, again at
12 a time not clear in the record, which was also not recorded.

13 A condition on title to the Property was that it be used to
14 operate a BP/ARCO service station. At closing of the sale, Honein
15 applied for a BP/ARCO franchise to operate a service station and
16 convenience store on the Property. Honein then attended and
17 successfully completed the mandatory franchise holder "training
18 school," paying the \$15,000 tuition, and was awarded the franchise
19 in his own name. Harris never attended the training school or
20 attempted to obtain the status of a franchise holder. Indeed,
21 because Harris never qualified as a BP/ARCO franchise holder, the
22 terms of the deed to the Property prevented him from ever owning
23 it.

24 Honein has owned and operated the service station and
25 convenience store since 2003. Harris was employed there at times,
26 receiving total wages of \$38,400.

27 The bankruptcy court would ultimately determine, and the
28 parties do not dispute, that the partnership between Honein and

1 Harris ended in June 2004. Harris alleges that Honein punched
2 him; Honein alleges that Harris threatened his children. Honein
3 obtained a restraining order against Harris.

4 Apparently in response to a continuing dispute with Lee
5 Harris over repayment of the \$450,000 loan, Honein filed a
6 chapter 11 petition on April 15, 2005. Honein's Schedule D lists
7 a disputed secured claim of \$450,000 in favor of Lee Harris.
8 Neither Honein's schedules nor statement of financial affairs
9 makes any reference to any partnership with Harris, or in any way
10 lists Harris as a creditor.

11 Harris filed a complaint commencing the subject adversary
12 proceeding against Honein on December 6, 2005. The complaint was
13 amended on June 19, 2006 (the "First Amended Complaint"). The
14 First Amended Complaint sought an order from the bankruptcy court
15 declaring that the Property was held in trust by Honein for the
16 benefit of Harris; adjudging Harris to have an equitable lien for
17 the value of 50 percent of the Property; quieting title to, and
18 determining that Harris is the beneficial and legal owner of,
19 50 percent of the Property; and monetary damages. Honein filed an
20 Answer and Counterclaim on September 15, 2006, seeking an award of
21 money damages from Harris for his alleged fraud, and a declaratory
22 judgment that Honein was the sole owner of the Property.

23 The bankruptcy court conducted a trial in the adversary
24 proceeding on April 26 and 27, 2007. Honein, Harris and Lee
25 Harris testified. At the end of trial, the bankruptcy court
26 orally ruled on the record that both parties were in pari delicto,
27 because they had established and pursued the partnership business
28 for an illegal purpose and, therefore, the bankruptcy judge

1 stated, "I am finding against both parties and all their claims
2 for relief." Trial Tr. 30:19-21, April 27, 2007. The bankruptcy
3 court entered Findings of Fact and Conclusions of Law on
4 January 6, 2009. Regarding the counterclaim, the court ruled that
5 Honein was prevented from recovery under the doctrine of in pari
6 delicto. As to Harris' claims, the court determined:

7 - Harris had breached the partnership agreement by failing to
8 contribute his 50 percent of the funds needed by the partnership,
9 and in fact "contributed nothing towards the purchase of the
10 Property, or its improvement and maintenance through June 2004."

11 - The grant deed from Honein to Lee Harris was intended for
12 security purposes only, and did not transfer any ownership
13 interest in the Property to him. As a result, the quitclaim deed
14 from Lee Harris to Harris also did not create an ownership
15 interest in the Property.

16 - Harris was not entitled to recover damages.

17 - The partnership was dissolved and neither the partnership,
18 Harris nor Lee Harris had any claim or ownership interest in the
19 Property.

20 The bankruptcy court made the following ruling at the end of
21 its conclusions, of importance in this appeal: "However, both
22 Harris and Honein are entitled to an accounting or a valuation of
23 their Partnership interests in this adversary proceeding pursuant
24 to the applicable provisions of the Nevada Revised Statutes."

25 In April 2010, apparently in response to the bankruptcy
26 court's indication that an accounting would be allowed, Harris
27 filed a Motion for an Accounting and Valuation of Partnership
28 Interests. Honein filed an opposition on August 27, 2010, arguing

1 that Harris was entitled to no relief under the court's finding
2 that he was in pari delicto, would not be entitled to any recovery
3 from an accounting, and that an extensive accounting had already
4 been provided to the court.

5 The bankruptcy court conducted a hearing on Harris' motion
6 for an accounting on September 10, 2010. After allowing brief
7 presentations by counsel, the court ruled that since the parties
8 were in pari delicto, neither of them were entitled to an
9 accounting, citing case law to support its position. Consistent
10 with its ruling, the bankruptcy court entered Amended Findings of
11 Fact and Conclusions of Law on November 3, 2010. While generally
12 consistent with the original findings and conclusions, the court
13 added two significant conclusions: "The doctrine of in pari
14 delicto prevents both Harris and Honein from recovering on their
15 Complaint and Counterclaim, because otherwise they would be
16 unjustly enriched." Conclusion of Law 9; and "Neither party is
17 entitled to an accounting based on the doctrine of in pari
18 delicto." Conclusion of Law 10.

19 Both of these conclusions were then incorporated in a
20 Judgment After Trial, entered by the bankruptcy court on
21 November 24, 2010. The Judgment also ruled that the Partnership
22 had been dissolved as of June 2004, and that the Property "shall
23 remain the sole and separate property of Bechara Victor Honein."
24 Harris filed this timely appeal of the Judgment on December 7,
25 2010.

26 JURISDICTION

27 The bankruptcy court had jurisdiction under 28 U.S.C.
28 §§ 1334(b) and 157(b)(2)(A), (C) and (O). We have jurisdiction

1 under 28 U.S.C. § 158.

2 **ISSUE**

3 Whether the bankruptcy court abused its discretion in denying
4 Harris' motion for a partnership accounting based on the doctrine
5 of in pari delicto.

6 **STANDARD OF REVIEW**

7 A partnership accounting under Nevada law is an equitable
8 proceeding. Oracle USA, Inc. v. Rimini St., Inc., 2010 U.S. Dist.
9 LEXIS 84254 * 19 (D. Nev. 2010); Bengoa v. Reinhart, 297 P. 506,
10 510 (Nev. 1931). A trial court's decision to grant or deny
11 equitable relief is reviewed for an abuse of discretion. Forest
12 Grove Sch. Dist. v. T.A., 523 F.3d 1078, 1084 (9th Cir. 2010).
13 In determining whether a bankruptcy court abused its discretion,
14 we review whether the bankruptcy court applied the correct rule of
15 law de novo. United States v. Hinkson, 585 F.3d 1247, 1262 (9th
16 Cir. 2009) (en banc). We then determine whether the court's
17 application of that rule was illogical, implausible, or without
18 support in inferences that may be drawn from the facts in the
19 record. Id. (quoting Anderson v. City of Bessemer City, N.C.,
20 470 U.S. 564, 577 (1985)).

21 **DISCUSSION**

22 **The bankruptcy court did not abuse its discretion in denying**
23 **Harris' motion for accounting based on the doctrine of in pari**
24 **delicto.**

25 In clear terms, the bankruptcy court indicated that "the
26 entire basis for my ruling is the [illegal] purpose of the
27 [partnership] agreement and the lack of credibility of these
28 witnesses and these parties. That's it." Hr'g Tr. 36:18-20. We
agree with the bankruptcy court that, on this record, and by

1 application of the doctrine of in pari delicto, Harris lacked any
2 right to an accounting from Honein.

3 The bankruptcy court determined that Honein and Harris had
4 both engaged in fraudulent activity in their partnership by
5 arranging with Lee Harris to execute a false promissory note to
6 indicate that they had borrowed \$850,000 instead of \$450,000.
7 They did this with the intention of scamming a bank to obtain a
8 commercial loan, paying off the \$450,000 note, and pocketing the
9 surplus in fraudulently obtained funds. The bankruptcy court
10 found that they had, in fact, contacted banking institutions for
11 that fraudulent purpose:

12 In an attempt to obtain 100% financing for the Property,
13 Harris and Honein had a secret agreement to overstate
14 the actual amount of the Lee Harris loan and attempt to
15 mislead any potential lender into believing that the
16 amount borrowed had been \$850,000 (instead of \$450,000),
17 and, together with the actual purchase price of
18 \$550,000, showed the value of the Property to be
approximately \$1.4 million. The buyer (the Partnership)
would then obtain a refund from the seller, thereby
inducing a bank to loan 100% of the actual purchase
price. Both Harris and Honein made representations to
banks that they knew were not true in order to secure a
loan.

19 Amended Findings of Fact and Conclusions of Law no. 21,
20 November 3, 2010. On this basis, the bankruptcy court determined
21 that the partnership of Honein and Harris had been engaged in
22 unlawful activities, and justified its application of in pari
23 delicto to deny Harris' motion for a partnership accounting.
24 Harris has not challenged the bankruptcy court's factual findings
25 that he and Honein were, in fact, wrongdoers, who attempted to use
26 their partnership for an unlawful purpose.

27 A trial court's authority to deny relief on the basis of the
28 doctrine of in pari delicto is a well-known equitable concept

1 applicable under both federal and Nevada state law. The Supreme
2 Court explained its application in Bateman Eichler, Hill Richards,
3 Inc. v. Berner, 472 U.S. 299 (1985):

4 The common-law defense at issue in this case derives
5 from the Latin, in pari delicto potior est conditio
6 defendentis: "In a case of equal or mutual fault . . .
7 the position of the [defending] party . . . is the
8 better one." The defense is grounded on two premises:
9 first, that courts should not lend their good offices to
10 mediating disputes among wrongdoers; and second, that
11 denying judicial relief to an admitted wrongdoer is an
12 effective means of deterring illegality. In its classic
13 formulation, the in pari delicto defense was narrowly
14 limited to situations where the plaintiff truly bore at
15 least substantially equal responsibility for his injury,
16 because "in cases where both parties are in delicto,
17 concurring in an illegal act, it does not always follow
18 that they stand in pari delicto; for there may be, and
19 often are, very different degrees in their guilt."
20 1 J. Story, EQUITY JURISPRUDENCE 304-305 (13th ed. 1886)
21 (Story). . . . Notwithstanding these traditional
22 limitations, many courts have given the in pari delicto
23 defense a broad application to bar actions where
24 plaintiffs simply have been involved generally in "the
25 same sort of wrongdoing" as defendants. Perma Life
26 Mufflers, Inc. v. International Parts Corp., 392 U.S.
27 [134, 138 (1968).]⁴

17 The Ninth Circuit recently reaffirmed its commitment to the
18 doctrine of in pari delicto:

19 Property delivered under an illegal contract cannot be

20 _____
21 ⁴ Indeed, the Supreme Court recognized that the doctrine
22 derives from the equity jurisprudence in effect before the
23 enactment of the Constitution.

23 The objection, that a contract is immoral or illegal as
24 between plaintiff and defendant, sounds at all times
25 very ill in the mouth of the defendant. It is not for
26 his sake, however, that the objection is ever allowed
27 The principle of public policy is this; ex dolo
28 malo non oritur actio [out of fraud no action arises]
29 It is upon that ground the Court goes; not for
30 the sake of the defendant, but because they will not
31 lend their aid to such a plaintiff.

28 Id. at n.12 (quoting Holman v. Johnson, 1 COWP. 341, 343, 98 Eng.
Rep. 1120, 1121 (K.B. 1775)).

1 recovered back by any party in pari delicto. The general
2 rule, in its full Latin glory, is in pari delicto potior
3 est conditio defendentis, or in case of equal fault the
4 condition of the party defending is the better one. The
5 doctrine has been restated to be that neither party to
6 an illegal contract will be aided by the court, whether
7 to enforce it or set it aside.

8 Kardoh v. United States, 572 F.3d 697, 700 (9th Cir. 2009)

9 (although in a criminal case, the doctrine was applied to resolve
10 a civil issue, that a party could not seek approval from the
11 district court to recover fees voluntarily paid in furtherance of
12 an illegal agreement).⁵

13 The Nevada Supreme Court has taken a position consistent with
14 the federal treatment of in pari delicto, in particular where, as
15 here, when faced with the request by a plaintiff for an accounting
16 arising from activities rooted in an illegal purpose:

17 When a party suffers injury from wrongdoing in which he
18 engaged, the doctrine of in pari delicto often prevents
19 him from recovering for his injury. The rationale
20 underlying the doctrine is that there is no societal
21 interest in providing an accounting between wrongdoers.

22 Kahn v. Dodds (In re AMERCO Derivative Litig.), 252 P.3d 681, 695
23 (Nev. 2011).⁶ However, the Nevada Supreme Court has articulated

24 ⁵ To apply in pari delicto, a trial court need not find that
25 a partnership or other agreement was criminal or prohibited by
26 statute. It is enough that the partnership, while engaged in
27 lawful business, conduct that business in an illegal manner (as
28 was the case here). AM. JUR.2D PARTNERSHIPS ¶ 679 (West Pub., 2d ed.,
2003); Simmons v. Benn, 96 A.D.2d 507 (N.Y. Sup. Ct. 2d Dep't
1983). Indeed, counsel for Harris acknowledged that this was
correct in the bankruptcy court. Trial Tr. 15:10-12, April 27,
2007.

⁶ The AMERCO court was referring to an accounting in
derivative litigation between a corporation and shareholders,
rather than an accounting between partners. However, both
proceedings are equitable in nature, where the courts adjudicate
the amounts due the separate parties. And the common principle is
that illegality of the agreement bars equitable relief.

1 guidelines for its trial courts in considering whether to apply in
2 pari delicto:

3 [T]he courts should not be so enamored with the Latin
4 phrase "in pari delicto" that they blindly extend the
5 rule to every case where illegality appears somewhere in
6 the transaction. The fundamental purpose of the rule
7 must always be kept in mind, and the realities of the
8 situation must be considered. Where, by applying the
9 rule, [1] the public cannot be protected because the
transaction has been completed, [2] where no serious
moral turpitude is involved, [3] where the defendant is
the one guilty of the greatest moral fault and [4] where
to apply the rule will be to permit the defendant to be
unjustly enriched at the expense of the plaintiff, the
rule should not be applied.

10 Shimrak v. Garcia-Mendoza, 912 P.2d 822, 827 (Nev. 1996) (quoting
11 Magill v. Lewis, 333 P.2d 717, 719 (Nev. 1958)).

12 The bankruptcy court explicitly acknowledged and reviewed
13 these Magill factors in reaching its decision to apply in pari
14 delicto in this case.

15 First, "[w]here, by applying the rule, the public cannot be
16 protected because the transaction has been completed." The
17 bankruptcy court observed that both parties were seeking damages
18 through the date of trial, and thus the "transaction" has not been
19 completed. Trial Tr. 23:19-20, April 27, 2007. Indeed, the
20 fraudulent transaction contemplated by the partners never was
21 consummated, despite their efforts.

22 Second, "where no serious moral turpitude is involved." Here
23 the bankruptcy court made an explicit finding that "there is
24 serious moral turpitude on behalf of both parties." Trial
25 Tr. 23:21-23. The court's finding of moral turpitude based on the
26 intent to defraud third party banking institutions is consistent
27 with Ninth Circuit law. Anastas v. Am. Sav. Bank (In re Anastas),
28 94 F.3d 1280, 1287 (9th Cir. 1996) ("Actual fraud is the type

1 involving moral turpitude, or intentional wrong.").

2 Third, "where the defendant is the one guilty of the greatest
3 moral fault." The bankruptcy court declined to find that either
4 party had greater moral fault than the other. Trial Tr. 24:10-11
5 ("I am not prepared to find that either has greater moral fault
6 than the other."). Of course, this is not a finding that Honein
7 had greater moral fault, either. Moreover, a fair reading of the
8 record shows that the bankruptcy court would not hold Honein in
9 greater moral fault. The court consistently used stronger
10 language in describing the actions of Harris:

11 THE COURT: I found Michael Harris's testimony to be
12 unreliable and untrustworthy. I found Mr. Honein's
testimony to be incredible in certain respects[.]

13 Hr'g Tr. 4:13-15, September 10, 2010.

14 THE COURT: [After finding that Honein repaid the Lee
15 Harris loan on his own] Michael [Harris] only put in
\$45,000, most of which, if not all, he's been repaid.
16 He hasn't suffered any economic injury that's been
proven to me.

17 Hr'g Tr. 6:15-17.

18 THE COURT: I specifically found that Michael Harris was
19 in breach of his duties to Mr. Honein under any oral
contract.

20 Hr'g Tr. 7:8-10.

21 THE COURT: To have a party [Harris] who was engaged in
22 this type of conduct who has suffered no financial
injury that has been proven to me, that failed to act in
23 accord with the oral agreement, just think would be
entitled to anything, much less \$475,000 is, as I have
24 said at the time of trial, a step through the looking
glass.

25 Hr'g Tr. 7:19-24.

26 THE COURT: [Harris] would never really answer whether
27 or not he had funds to be able to make his capital
contributions which he had promised to make at the time
28 they entered into this agreement, even though he did
acknowledge a repeated request by Mr. Honein to do

1 so. . . . And I don't believe he ever intended to. And
2 that's an express finding. He fully expected to be able
3 to turn the Property around, pay off his brother, and
4 pocket the difference.

4 Hr'g Tr. 16:6-19.

5 THE COURT: I think the truth and reality is something
6 that to Mr. Mike Harris [] there's only a fleeting
7 relationship.

7 Hr'g Tr. 19:5-7.

8 THE COURT: Based on what he said, Michael Harris
9 brought nothing to this [Partnership]. And then
10 basically Mr. Harris is nothing more than a financial
11 parasite.

11 Hr'g Tr. 25:8-10.

12 While the bankruptcy court held that Honein was equally
13 guilty of fraudulent activity, it did not apply the strong terms
14 used to describe Harris' behavior. Based on our review of the
15 record, we can confidently conclude that, although the bankruptcy
16 court declined to hold one party in greater moral fault, these
17 observations, based on credibility determinations at trial, would
18 not support a conclusion that Honein was at greater moral fault.
19 Therefore, this Magill factor does not bar application of in pari
20 delicto in this case.

21 Finally, "where to apply the rule will be to permit the
22 defendant to be unjustly enriched at the expense of the
23 plaintiff." The bankruptcy court reasoned, correctly in our view,
24 that under the facts of this case, a failure to apply in pari
25 delicto to bar the claims of both parties would itself result in
26 unjust enrichment:

27 I think that finding that Mike Harris has some type of
28 basis for the recovery of damages as a result of the
partnership agreement, when he engaged in the acts and

1 conduct, would unjustly enrich him. Likewise, I think
2 if I were not to impose the doctrine of in pari delicto
3 to preclude recovery on the counterclaim that Mr. Honein
4 would be unjustly enriched. He certainly went forward
5 from June of 2004 on the basis that there was no
6 partnership. Those expenses [damages he sought in the
7 counterclaim] were his.

8 Hr'g Tr. 25:3-7.

9 At one point, the bankruptcy court appeared to side with
10 Harris' argument that Honein would be unjustly enriched by leaving
11 the Property in the hands of Honein:

12 THE COURT: [Unjust enrichment] is the strongest factor
13 in Harris' favor not to have the Court apply the [in
14 pari delicto] doctrine.

15 Hr'g Tr. 24:18-19. Indeed, Harris seems to argue that, since he
16 arranged for the original financing through his brother, he is
17 entitled to some return from the partnership. However, under
18 these facts, it is clear that Harris is not entitled to any return
19 from the partnership because: (1) Harris failed to arrange for
20 permanent financing, something he was obliged to do as his
21 contribution to the partnership; (2) Honein eventually paid off
22 the Lee Harris loan from his own resources and loans on which he
23 was solely obligated; (3) Honein arranged for, and was solely
24 obligated, on the permanent financing; (4) Harris never made any
25 other capital contributions to the partnership for which he was
26 obligated, and, as found by the court, never intended to do so.

27 In sum, under the Magill factors, the bankruptcy court was
28 not precluded from applying in pari delicto as grounds for its
29 decision to decline to require a partnership accounting.

30 In challenging the bankruptcy court's application of in pari
31 delicto, Harris argues that, in Nevada, there is an absolute right
32 to an accounting whenever a partnership is dissolved. For

1 support, Harris cites to Rasmussen v. Thomas, 644 P.2d 1030 (Nev.
2 1982) for the proposition that "a court may not distribute
3 partnership assets without requiring a proper accounting among the
4 partners." Harris Op. Br. at 8. On the contrary, there is
5 nothing in the Rasmussen decision that requires a trial court to
6 order an accounting on demand. Rasmussen acknowledged the
7 optional nature of a party's entitlement to an accounting when it
8 wrote, "Ordinarily, actions between partners with respect to
9 partnership business are not maintainable until there has been an
10 accounting or settlement of the partnership affairs." Rasmussen,
11 644 P.2d at 1031 (emphasis added). The Rasmussen court ordered an
12 accounting under the facts of that case when it could not
13 determine on the record before it "accurate money judgment awards"
14 to the partners. Id.

15 The bankruptcy court considered the Rasmussen case, and
16 properly distinguished it from the case on appeal:

17 Rasmussen v. Thomas. I've studied at length. . . . It
18 doesn't even address in pari delicto. It doesn't
19 address the equitable issues. . . . There was no issue
20 regarding the purpose of the partnership. There was no
21 issue regarding illegality or violation of public
22 policy.

23 Hr'g Tr. 12:16-25, September 10, 2010.⁷

24 ⁷ Harris also cites to a more recent California court
25 decision for the proposition that "upon the dissolution of a
26 partnership formed for the purpose of acquiring and holding real
27 property, it is appropriate for the court to order the partnership
28 assets to be sold and the proceeds divided following an
accounting." Harris Op. Br. at 8 (citing Navarro v. Perron,
122 Cal. App. 4th 797, 800-01 (Cal. Ct. App. 2004)). We first
note that Harris' own words, "it is appropriate," do not imply
that an accounting is mandatory. Moreover, there is no reference
at all in Navarro to an accounting and no request for any relief

(continued...)

1 To support his position, Harris also cites to cases applying
2 Nevada law where the courts refused to apply in pari delicto in
3 partnership accounting actions. In Shimrack, cited above, the
4 plaintiff was a private investigator suing a law firm to recover
5 money for services. The trial court dismissed the action on the
6 grounds that the investigator's agreement with the law firm
7 purported to share legal fees with a nonlawyer in contravention of
8 public policy. Id. at 803. The Nevada Supreme Court reversed the
9 trial court's decision to apply in pari delicto. However, unlike
10 here, the Shimrack court found that all four of the Magill factors
11 applied:

12 All four of the Magill factors are present in this case.
13 SCR 188 is entitled "Professional independence of a
14 lawyer." At least one court has recognized that the
15 purpose of the prohibition of fee-splitting is to
16 protect the independence of the judgment of lawyers.
17 Gassman v. State Bar, 18 Cal. 3d 125, 553 P.2d 1147,
18 1151, 132 Cal. Rptr. 675 (Cal. 1976). The public would
19 not be protected by refusing to enforce this contract,
20 because Garcia has already exercised her judgment in the
21 cases covered by the contract. Indeed, not to enforce
22 this contract would actually endanger the public,
23 because it would allow lawyers to enter into such
24 contracts and then get out of them by invoking SCR 188.
25 The first Magill [factor] is therefore satisfied. As to
26 the second factor, there is no serious moral turpitude
27 involved here. Third, the Garcia-Mendoza firm member
28 [the defendant] must be seen as being guilty of the
greatest moral fault since she is the one who violated a
professional rule. Finally, not enforcing the contract
would unjustly enrich the [defendant] law firm at
Shimrak's expense, because he has already performed his
part of the agreement. Using the Magill factors, it is
clear that the doctrine of in pari delicto should not be

25 ⁷(...continued)
26 that could be considered an accounting. The court's ruling was
27 simply, "The judgment is reversed with instructions to order the
28 property sold, the proceeds applied to pay the obligations of the
partnership and any surplus distributed to the partners in cash."
Navarro, 122 Cal. App. 4th at 802. The court did not provide any
direction on how the cash payments were to be determined.

1 applied to deny Shimrak agreed-upon compensation for
2 services rendered.

3 Shimrack, 912 P.2d at 822.

4 The second principal case cited by Harris was Locken v.
5 Locken, 650 P.2d 803 (Nev. 1982). This case focuses upon a
6 dispute between a father and son over the ownership of land. In
7 satisfaction of certain indebtedness owed to the father by a third
8 party, the father agreed to accept an assignment of two patent
9 applications for separate parcels of land. Since the Desert Land
10 Act, 43 U.S.C. § 321 (1964), prohibited the father from making
11 more than one entry in his own name, at the suggestion of his son,
12 the parties verbally agreed to place one of the applications in
13 the son's name. Under this agreement, the father was to make
14 improvements upon the land, and after the patent was granted, the
15 son was to convey the property to his father. The father
16 fulfilled his part of the agreement, expending considerable time,
17 effort and money on land improvement, yet the son refused to
18 convey the property as agreed. The father brought suit to impose
19 a constructive trust on the land in father's favor.

20 We are puzzled why Harris cites this case because, once
21 again, the Nevada Supreme Court ruled that in pari delicto could
22 not be applied because all four Maqill factors were present.

23 Even assuming arguendo that the agreement was illegal or
24 against public policy, the rule that such agreements are
25 not to be enforced by the courts will not be applied in
26 this instance where: (1) the public interest cannot be
27 restored because of the completed transaction; (2) no
28 serious moral turpitude is involved; (3) the son
[defendant] is guilty of greater moral fault than the
father; and (4) application of the rule would permit the
son [defendant] to be unjustly enriched at the expense
of his father. Maqill v. Lewis, 74 Nev. 381, 333 P.2d
717 (1958).

1 In short, the only two cases cited by Harris from the Nevada
2 Supreme Court hold that, where the Magill factors are present, the
3 doctrine of in pari delicto should not be applied by the courts.
4 Even so, this is completely consistent with the bankruptcy court's
5 decision in this case, where none of the Magill factors were
6 present to preclude the application of in pari delicto.

7 As to non-Nevada cases, Harris criticizes the bankruptcy
8 court for citing Norwood v. Judd, 93 Cal.App.2d 276 (1949),
9 arguing that Norwood denied the application of in pari delicto.⁸
10 Norwood involved a partnership in the contracting business, where
11 the partnership failed to obtain the required license, and the
12 dispute arose whether a partnership accounting should be allowed
13 under the in pari delicto rule. It is true that the court in
14 Norwood declined to apply in pari delicto, but relied on the
15 following now familiar grounds:

16 Where, by applying the rule, the public cannot be
17 protected because the transaction has been completed,
18 where no serious moral turpitude is involved, where the
19 defendant is the one guilty of the greatest moral fault,
and where to apply the rule will be to permit the
defendant to be unjustly enriched at the expense of the
plaintiff, the rule should not be applied.

20 Id. at 289. Norwood was, in fact, cited by the Magill court and
21 is the source of the later Magill factors. For our purposes, it
22 is sufficient to note that the Norwood court declined to apply in
23 pari delicto because the Magill factors were present. But of even
24 greater importance to our analysis, the Nevada Supreme Court
25 adopted the Magill factors from Norwood, a case granting a

27 ⁸ It does not appear that the bankruptcy court in this
28 appeal relied on Norwood, only citing it as part of its background
research.

1 partnership accounting following dissolution of the partnership
2 where the Magill factors were present. Again, this is consistent
3 with the bankruptcy court's rulings in this appeal that in pari
4 delicto can be applied where those factors are absent.

5 As the bankruptcy court correctly observed, the doctrine of
6 in pari delicto has frequently been applied in other states to bar
7 equitable relief in partnership accounting and similar
8 proceedings. Graham v. Shooke, 482 P.2d 446 (Ariz. 1971) (denied
9 partnership accounting where veterinary firm was operated by
10 medically unlicensed partners); Johnston v. Senecal, 109 N.E.2d
11 467 (Mass. 1952) (denied partnership accounting where partnership
12 was properly engaged in selling parking meters, but also engaged
13 in exerting improper influence on public officials who purchased
14 such meters); Nahan v. George, 99 N.E.2d 898 (Ohio 1951)
15 (partnership accounting denied where partner violated liquor
16 licensing laws); Pendarvis v. Berry, 52 S.E.2d 705 (S.C. 1949)
17 (partnership accounting denied where one store operated by
18 partnership was unlicensed); Demayo v. Lyons, 216 S.W. 436 (Mo.
19 1948) (partnership accounting denied where restaurant partnership
20 attempted to sell liquor without a license); Breiford v. Stoll,
21 26 N.E.2d 159 (Ill. Ct. App. 1940) (partnership accounting denied
22 where purpose of partnership was gambling in violation of
23 statutes); see also OCA, Inc. v. Hassell, 389 B.R. 469 (E.D. La.
24 2008) (accounting denied where agreement provided for practice of
25 dentistry by a corporation, in violation of statutes).

26 Given the unchallenged factual findings of the bankruptcy
27 court in this action, the court did not abuse its discretion when
28 it declined to grant Harris' motion for an accounting based on the

1 doctrine of in pari delicto. It applied the correct rule of law,
2 and its conclusions were not illogical, implausible, or without
3 support in inferences that may be drawn from the facts in the
4 record.⁹

5 **CONCLUSION**

6 We AFFIRM the bankruptcy court.
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18 ⁹ For the most part, Harris' briefs attack the bankruptcy
19 court's decision to deny the accounting. However, he ends his
20 Opening Brief with a short challenge to the bankruptcy court's
21 decision to favor the defending party, Honein, by leaving the
22 Property titled in Honein. In Harris' words,

21 Perhaps had the trial court found that Honein had made
22 100% of the contributions to the Partnership, and that
23 Harris had never contributed anything, the trial court
24 might have been able to justify its one-sided
25 allocation.

24 Harris' Op. Br. at 17. As discussed above, however, that is
25 precisely what the bankruptcy court found. Harris had his \$45,000
26 contribution returned, Honein paid off the Lee Harris loan and
27 arranged for, and was solely obligated on, the commercial
28 financing for the Property. Whatever value might attach to
Harris' obtaining funding from his brother (which was in fact paid
off by Honein) is offset by his numerous failures, and indeed in
some instances, his refusal, to honor his financial commitments
and other obligations to the partnership.