To be Argued by: Fred L. Seeman, Esq.
(Time Requested: 15 Minutes)

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New York Supreme Court
Appellate Division – First Department

Appellate Case Nos.: 2020-02671 2020-03659

SAGE SYSTEMS, INC.

Plaintiff-Respondent,

-against-

MICHAEL LISS, as Executor of the Estate of Robert Liss

Defendant-Appellant.

BRIEF FOR PLAINTIFF-RESPONDENT

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COUNTER QUESTIONS PRESENTED

1. Whether the Motion Court properly held that Robert Liss' bad faith conduct triggered the indemnification provision in the governing Partnership Agreement.

Answer: Yes. The Motion Court properly held that Robert Liss acted in bad faith by commencing the Dissolution Action with unclean hands, and without evidentiary support, as held by the Court in the Dissolution Action.

2. Whether the Motion Court properly held that the subject indemnification provision includes direct claims between the partners.

Answer: Yes. The Motion Court properly held that the subject indemnification provision is broad and unrestrictive, thereby applying to direct claims between the partners.

3. Whether the Motion Court properly held that the subject indemnification provision includes the recovery of legal fees.

Answer: Yes. The Motion Court properly held that the broad indemnification provision allows for the recovery of attorneys' fees.

PRELIMINARY STATEMENT

The Plaintiff-Respondent, Sage Systems, Inc. (hereinafter "Sage") hereby submits this brief in support of the affirmance of the Decision and Order of the Honorable Barbara Jaffe dated May 8, 2020 [R. 4-14][1] and the subsequent Money Judgment filed on August 18, 2020 [R. 16-21]. The Motion Court should be affirmed because the Partnership Agreement's broad indemnification provision in was triggered by Robert Liss' bad faith commencement of the Dissolution Action which, as held by Justice James in the Dissolution Action, was done with unclean hands and without supporting evidence. Moreover, the Motion Court properly held that the indemnification provision applies to claims between the parties for attorneys' fees.

COUNTER STATEMENT OF FACTS

A. S-L Properties and the Governing Partnership Agreement

In 1984, Sage and Robert Liss entered into a partnership agreement, dated as of February 17, 1984 (hereinafter the "Partnership Agreement") to create S-L Properties (hereinafter the "Partnership") [R. 52-75]. Pursuant to Section 1.03 of the Partnership Agreement, the express purpose of the Partnership was to purchase a commercial cooperative unit on the 10th floor of the building located at 246 West 38th Street, New York, New York (hereinafter the "Premises") [R. 56]. Sage and Liss

1 Refers to record on appeal.

were each assigned a "use area" within the Premises, pursuant to Section 6.01 of the Partnership Agreement, to be used for commercial office space [R. 61-62].

Section 13.02(b) of the Partnership Agreement sets forth the indemnification obligations of the Partners and the Partnership, providing, in pertinent part, that:

> (b) The Partnership and the other Partners shall be indemnified and held harmless by each Partner from and against any and all claims, demands, liabilities, costs, damage, expenses and causes of action of any nature whatsoever arising out of or incidental to any act performed by a Partner which is not performed in good faith or is not reasonably believed by such Partner to be in the best interests of the Partnership and within the scope of authority conferred upon such Partner under this Agreement, or which arises out of the fraud, bad faith, willful misconduct or negligence of such Partner. [R. 72].

This provision also applies to the Estate of Robert Liss, pursuant to Section 13.07 of the Partnership Agreement [R. 73].

B. **The Dissolution Action**

In January, 2006, Robert Liss commenced a lawsuit against Sage entitled *Robert Liss v. Sage Systems, Inc., Index No.: 100205/2006* (hereinafter the "Dissolution Action") wherein Robert Liss sought the judicial dissolution of the Partnership [R. 78-85]. Ultimately, by Decision and Order dated February 10, 2009, Hon. Debra A. James, J.S.C., granted Sage summary judgment and dismissed the Dissolution Action [R. 86-90]. Justice James' Decision was based upon the finding that (i) Robert Liss failed to present any evidence in support of his claim for judicial dissolution and (ii) that he sought judicial dissolution with "unclean hands". [R. 89].

C. **Procedural History and the Decision Below**

Sage commenced this action by filing a Summons and Complaint on or about June 23, 2010 [R. 28-34]. The Complaint's sole cause of action seeks indemnification from Robert Liss, under Section 13.02 of the Partnership Agreement, based upon Robert Liss' commencement of the Dissolution Action, which caused Sage to incur $80,848.04 in legal fees in connection with the defense thereof [R. 49; 93-122]. Robert Liss filed an Answer on or about July 21, 2010 [R. 35-42]. Robert Liss subsequently died on February 2, 2011 [R. 51].

On August 29, 2019, Sage moved for summary judgment and to amend the caption to name "Michael Liss, as Executor of the Estate of Robert Liss" as the Defendant, in the place of Robert Liss [R. 43-122]. On September 20, 2019, the Estate cross-moved for summary judgment dismissing the complaint [R. 123-128].

By Decision and Order dated May 8, 2020, the Honorable Barbara Jaffe, J.S.C., granted Sage's application for summary judgment and to amend the caption. [R. 4-14]. Justice Jaffe also denied the Estate's application in its entirety [R. 4-14]. Specifically, the Motion Court held that, upon the finding by Justice James that Robert Liss acted with unclean hands, Robert Liss' conduct "constitutes bad faith, thereby triggering the defendant's duty to indemnify plaintiff" [R. 13]. The Motion Court also held that the indemnification provision "applies to direct claims between the partners, and defendant raises no triable issues in opposition" [R. 12].

The Estate filed a Notice of Appeal of Justice Jaffe's May 8, 2020 Decision and Order on June 11, 2020 [R. 3]. Sage was subsequently awarded a money judgment against the Estate, in the amount of $80,608.04, on August 18, 2020 (hereinafter the "Money Judgment") [R. 16-21]. The Estate filed a Notice of Appeal of the Money Judgment on September 3, 2020 [R. 15] and thereafter perfected the Appeals.

ARGUMENT

POINT I

MOTION COURT PROPERLY HELD THAT ROBERT LISS' CONDUCT TRIGGERED THE INDEMNIFICATION PROVISION

A. Robert Liss' Commencement of the Dissolution Action With Unclean Hands Constitutes Bad Faith

Justice James, in dismissing the Dissolution Action, held that "plaintiff [Robert Liss] has unclean hands with respect to his demand for equitable relief of dissolution" [R. 89]. In making such finding, Justice James reasoned that:

> Plaintiff testified…that the sublease agreements, under which he sublet 90% of his portion of the Unit, are each for less than one year in duration, and the board 'does not consider [any such agreement] a real lease'. Therefore, even assuming arguendo the existence of a 51% provision in the Proprietary Lease, it would be plaintiff, who would be persisting in placing the partnership in violation of the Proprietary Lease provision. [R. 89].

It cannot be disputed that the Partnership Agreement's indemnification provision is triggered by conduct undertaken by a Partner in bad faith [R. 72]. Caselaw is clear that "an unclean hands defense requires a finding of bad faith". *839 Cliffside Ave. LLC v. Deutsche Bank National Trust Company, 2016 WL 5372804, *1 (E.D.N.Y. 2016); Obabueki v. International Business Machines Corp., 145 F. Supp 2d 371, 401 (S.D.N.Y. 2001) aff'd 319 F3d 87 (2d Cir. 2003) cert. denied 540 U.S. 940 (2003)*. Indeed, as the *Obabueki* Court held:

> The unclean hands doctrine closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the

> matter in which he seeks relief, however improper may have been the behavior of the defendant (internal citations omitted). *Obabueki* at 401.

Thus, Justice James' holding led the Motion Court to properly find that Robert Liss' commencement of the Dissolution Action:

> despite his unclean hands…constitutes bad faith, thereby triggering defendant's duty to indemnify plaintiff for its expenses incurred in defending itself in that action (emphasis added) [R. 13].

The Estate, for the first time on appeal, and nearly twelve (12) years after Justice James rendered her Decision, is apparently seeking to challenge Justice James' finding of unclean hands, claiming such finding was merely *dicta* and should be disregarded. *See, Defendant-Appellant's Brief, p. 24*. However, where, as here, Justice James' finding of unclean hands "was not casual but carefully and thoroughly reasoned", such finding is binding. *Garofano Const. Co. v. City of New York, 180 Misc. 539, 540 (AT 1st Dept. 1943) aff'd 266 AD 960 (1st Dept. 1943)*. Accordingly, Justice James' finding of unclean hands should not be disregarded.

Moreover, the Estate's failure to appeal Justice James' Decision precludes the Estate from raising such challenges now. *22 NYCRR §1250.10(a); Diarrassouba v. Consolidated Edison Co. of New York Inc., 123 AD3d 525 (1st Dept. 2014)*; *see also, Meak v. Properties Pursuit, Inc., 186 AD3d 701 (2nd Dept. 2020)*. Indeed, the Court in *Meak* held that:

> none of the four prior appeals were perfected and all were dismissed by decision and order on motion of this Court or deemed dismissed pursuant to 22 NYCRR 1250.10(a). Insofar as PPI's present contentions were either raised or could have been raised on the prior appeals, the dismissal of PPI's appeals for failure to perfect constituted an adjudication of those issues on the merits, and this Court declines to review those issues on this appeal. *Id.* At 702.

Finally, the Estate's failure, before the Motion Court, to dispute Justice James' finding of unclean hands, precludes the Estate from doing so on this appeal. *61 West 62nd Owners Corp. v. Harkness Apartments Owners Corp., 202 AD2d 345 (1st Dept. 1994)* ("Appellant's argument…was not raised in the IAS court and may not be considered for the first time on appeal"); *see also, Lichtman v. Grossbard, 73 NY2d 792, 794 (1988)* ("It is well settled that when a case has been pleaded and tried on one theory, this court cannot grant recovery on another theory").

Accordingly, the Motion Court properly held that Robert Liss' commencement of the Dissolution Action, with unclean hands, constituted bad faith, thereby triggering the Partnership Agreement's indemnification provision.

B. Robert Liss' Commencement of the Dissolution Action Without Any Supporting Evidence Constituted Bad Faith

In determining that Robert Liss acted in bad faith, the Motion Court also considered the fact that the Dissolution Action was "meritless and unsupported" [R. 12]. Indeed, Justice James had previously held that Robert Liss failed to:

> come forward with any evidence of any prejudice or lack of reasonable practicality of carrying out the partnership's

> business that the sublets pose or that defendant [Sage] has placed the Partnership in violation of any local or state building codes [R.89].

Lawsuits are often considered frivolous and in bad faith if they "lack any reasonable basis in law or fact". *See, Smullens v. MacVean, 183 AD2d 1105, 1107 (3rd Dept. 1992) lv. app. denied 85 NY2d 995 (1995); Nyitray v. New York Athletic Club in City of New York, 274 AD2d 326 (1st Dept. 2000); Entertainment Partners Group, Inc. v. Davis, 155 Misc2d 894, 904 (Sup. Ct. NY Co. 1992) aff'd 198 AD2d 63 (1st Dept. 1993); 22 NYCRR §130-1.1; §CPLR 8303-a*.

Here, Robert Liss' commencement of the Dissolution Action, without any supporting evidence whatsoever, undeniably constitutes a bad faith act. The Motion Court properly held that bad faith existed by virtue of "defendant's commencement of the dissolution action, without having evidence to support its allegations [R. 13]".

Accordingly, the Motion Court should be affirmed as Robert Liss acted in bad faith by commencing the Dissolution Action without any supporting evidence, thereby triggering the Partnership Agreement's indemnification provision.

POINT II

THE MOTION COURT PROPERLY HELD THAT THE PARTNERSHIP AGREEMENT'S INDEMNIFICATION PROVISION APPLIES TO CLAIMS BETWEEN THE PARTNERS

A. The Indemnification Provision Applies to Claims Between the Partners

Caselaw is clear that a "written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms". *Greenfield v. Philles Records Inc. 98 NY2d 562, 569 (2002)*. Summary judgment based upon an interpretation of an agreement is, therefore, appropriate "where the intent of the parties can be ascertained from the face of their agreement…" *85th Street Restaurant Corp. v. Sanders 194 AD2d 324, 326 (1st Dept. 1993).* With respect to contractual indemnification provisions, such provisions shall be deemed to include claims between the parties where:

> [t]he parties chose to use highly inclusive language in their indemnification provision, which they chose not to limit by listing the types of proceedings for which indemnification would be required. *Crossroads ABL LLC v. Canaras Capital Management, LLC, 105 AD3d 645, 646 (1st Dept. 2013)*.

Indeed, if the indemnification provision is not "limited to a specific list of items" and the parties did not "explicitly limit indemnification to third-party claims" then the provision shall necessarily include claims between the parties. *Crown Wisteria, Inc. v. Cibani, 178 AD3d 524 (1st Dept. 2019)*.

Here, the Partnership Agreement requires one partner to indemnify the other:

> from and against any and all claims, demands, liabilities, costs, damage, expenses and causes of action of any nature whatsoever arising out of or incidental to any act performed by a Partner which is not performed in good faith or is not reasonably believed by such Partner to be in the best interests of the Partnership and within the scope of authority conferred upon such Partner under this Agreement, or which arises out of the fraud, bad faith, willful misconduct or negligence of such Partner (emphasis added). [R. 72].

Inasmuch as this provision does not set forth "an exhaustive list of actions for which indemnification is required", it must necessarily be deemed to include claims between Sage and Robert Liss. *Crossroads ABL LLC v. Canaras Capital Management, LLC, 105 AD3d 645, 646 (1st Dept. 2013)*.

The cases relied upon by the Estate are not controlling here inasmuch as they include indemnification provisions that, in contrast to the Partnership Agreement's indemnification provision, are narrowly tailored to limit their applicability. For example, the indemnification provision in *Gotham Partners, L.P., v. High River Ltd. Partnership, 76 AD3d 203 (1st Dept. 2010), lv. app. denied 17 NY3d 713 (2011)* was limited to costs that the plaintiff incurred "*with respect to Hallwood*, as opposed to defendant's inaction with respect to its contractual duties to plaintiff (emphasis in original)". *Id* at 207. In other words, since the indemnification provision specifically limited its application to the conduct with respect to a third-party, it was inapplicable to direct claims between the parties.

The remaining cases cited by the Estate are similarly not controlling as they also include limited indemnification provisions. *Oscar Gruss & Son, Inc. v. Hollander, 337 F3d 186, 199 (2d Cir. 2003)* (indemnification provision limited to costs incurred "in connection with investigating, preparing to defend or defending, or providing evidence in or preparing to serve or serving as a witness…")*; Broadhurt Investments, LP v. Bank of New York Melon, 2009 WL 4906096, *1 (S.D.N.Y. 2009)* (indemnification provision limited to costs incurred "relating to or referred to in this Instruction Letter, and/or Losses arising out of the matters contemplated in the Instruction Letter, without limitation, the delivery of the Spin-Off Entitlement and/or the FGC UES Merger Entitlement").

Moreover, the Estate's reliance upon *Hooper Assoc. v. AGS Computers, 74 NY2d 487 (1989)* is misplaced. The indemnification provision in *Hooper Assoc.* had limited application to costs "arising out of breach of warranty claims, the performance of any service to be performed, the installation, operation and maintenance of the computer system, infringement of patents, copyrights or trademarks and the like". *Id.* at 492. Therefore, the Court held that the parties' intended to restrict the indemnification provision and that, since the restrictions were not "exclusively or unequivocally referrable to claims between the parties themselves", then parties intention to include these direct claims was not "unmistakably clear". *Id.*

Pursuant to recent Appellate authority, the rule in *Hooper Assoc.* is limited to instances where parties choose to limit an indemnification provision's applicability, and do not specifically provide for claims between the parties. Under those circumstances, direct claims between parties will not be included. But where, as here, the indemnification provision is broad and unrestricted, then it shall be deemed to include direct claims between the parties. *Crown Wisteria, Inc. v. Cibani, 178 AD3d 524 (1st Dept. 2019)*; *Crossroads ABL LLC v. Canaras Capital Management, LLC, 105 AD3d 645, 646 (1st Dept. 2013)*.

Thus, the Motion Court properly held that the Partnership Agreement's broad, unrestricted indemnification provision demonstrates "the contracting parties' unmistakably clear intent to permit the recovery of expenses related to direct claims brought against one another" [R. 10-11].

B. The Partnership Agreement's Indemnification Provision Allows for the Recovery of Attorneys' Fees

The Motion Court properly held that the Partnership Agreement's broad indemnification provision included attorneys' fees [R. 9]. Caselaw is clear that clauses such as:

> 'all claims, actions, litigation, and other liabilities, costs and expenses' constitutes broad language that is generally interpreted to encompass attorneys' fees. *Nigri v. Liberty Apparel Co., Inc., 76 AD3d 842, 844 (1st Dept. 2010); see also, Breed Abbott & Morgan v. Hulko, 139 AD2d 71, 72 (1st Dept. 1988) aff'd 74 NY2d 686 (1989)*.

The Partnership Agreement's indemnification provision contains a similar clause, which includes "any and all claims, demands, liabilities, costs, damage, expenses and causes of action of any nature whatsoever" [R. 72]. Therefore, the Motion Court properly held that attorneys' fees were recoverable under the indemnification provision.

The Estate insists, without support, that the indemnification provision cannot apply unless it explicitly provides for "attorneys' fees". As demonstrated by the holdings in Nigri v. Liberty Apparel Co., Inc., *76 AD3d 842, 844 (1st Dept. 2010)* and in Breed Abbott & Morgan v. Hulko, *139 AD2d 71, 72 (1st Dept. 1988) aff'd 74 NY2d 686 (1989),* as long as an indemnification provision has broad applicability, the phrase "attorneys' fees" is not required in order to entitle one party to recover attorneys' fees from the other. Indeed, the Estate cites no cases to support the notion that in indemnification provision must include the phrase "attorneys' fees" in order to allow one party to recover such costs from the other.

Accordingly, the Motion Court properly held that "defendant must indemnify plaintiff for all costs and expenses, including attorney fees incurred in the 2006 dissolution action" [R. 14].

CONCLUSION

In closing, the Motion Court's Decision and Order, dated May 8, 2020, and the Money Judgment filed on August 18, 2020, should be affirmed inasmuch as the Partnership Agreement's indemnification provision was triggered by Robert Liss' bad faith conduct, and the indemnification provision permits direct claims between the Partners for attorneys' fees.

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Respectfully submitted,

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