To be Argued by:
CHRISTOPHER A. RAIMONDI
(Time Requested: 30 Minutes)

APL 2021-00168
New York County Clerk's Index No. 650745/10
Appellate Division–First Department Case Nos. 2020-02671 & 2020-03659

Court of Appeals

of the

State of New York

SAGE SYSTEMS, INC.,

Plaintiff-Respondent,

– against –

MICHAEL LISS, as Executor of the Estate of Robert Liss,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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RULE 500.13(A) STATEMENT

The following two actions related to this action remain pending: i) Sage Systems, Inc. and S-L Properties v. Michael Liss as the Executor of the Estate of Robert Liss (Index No.: 653523/2020), in which Sage Systems, Inc. and S-L Properties, under the two causes of action remaining in the case after a motion to dismiss, are seeking to recover certain rents collected by the Estate from sublessees/sublicensees during a portion of the time the Estate occupied the space controlled by S-L Properties; and ii) Estate of Robert Liss v. Sage Systems, Inc. (Index No. 107019/2010), in which the Estate seeks recovery of amounts recovered pursuant to a lawsuit against the Partnership's landlord ("Co-Op") that was not properly distributed under the Partnership Agreement.

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STATEMENT OF JURISDICTION

It is respectfully submitted that the Court has jurisdiction to entertain the instant appeal and to review the questions raised pursuant to an order of the Court of Appeals granting leave for an appeal to the Court of Appeals pursuant to CPLR § 5602(a)(1)(i). (R136.)

QUESTIONS PRESENTED

1. Does the indemnification clause contained in the parties' Partnership Agreement allow for the recovery of attorney's fees in direct actions between the partners?

The Appellate Division erroneously answered the question in the affirmative and affirmed the Motion Court's decision awarding Plaintiff-Respondent summary judgment on its claim for indemnification and denying Defendant-Appellant's cross-motion for summary judgment dismissing Plaintiff-Respondent's claim for indemnification.

2. Did the Motion Court err in finding bad faith on the part of the Defendant-Appellant as a predicate to the application of the indemnification clause at issue based solely upon *dicta* in a decision rendered in a prior litigation that erroneously stated that Defendant-Appellant had unclean hands in that prior action?

The Appellate Division erroneously answered the question in the negative.

NATURE OF THE ACTION

This action was commenced by Plaintiff-Respondent Sage Systems, Inc. ("Sage") against decedent Robert Liss ("Liss"). Defendant-Appellant Michael Liss, as Executor for the Estate of Robert Liss (the "Estate") was substituted for Liss as Defendant.

Sage and Liss entered into a partnership ("Partnership" or "S-L") on February 17, 1984. (R29-30.) The terms of the partnership were memorialized in the partnership agreement ("Partnership Agreement") dated February 17, 1984. (R52-75.) Section 13.02 of the Partnership Agreement contains the indemnification provisions at issue on this appeal.

As set forth herein, Sage contends that the Estate is liable to Sage for attorney's fees that Sage incurred in connection with an unsuccessful 2006 dissolution proceeding commenced by Liss ("Dissolution Proceeding").

The Estate, through its attorneys Raimondi Law, P.C., respectfully submits this memorandum of law in support of its appeal of the Appellate Division's April 27, 2021, Decision and Order ("Appellate Decision") which: i) dismissed the Estate's appeal from the Motion Court's Decision

and Order dated May 8, 2020 which granted Plaintiff-Respondent's motion and denied Defendant-Appellant's cross-motion ("Order") (R4-14) as subsumed in the appeal from the subsequent judgment filed August 18, 2020 ("Judgment"); and ii) affirmed the Judgment. (R19-21).

PRELIMINARY STATEMENT

As set forth in the Motion Court's Order, Sage brought this action seeking contractual indemnification from Liss for attorney's fees that Sage incurred relating to a dispute that arose between them and culminated in the unsuccessful Dissolution Proceeding commenced by Liss in 2006.

As detailed herein, the Motion Court erroneously held that the indemnification clause contained in the Partnership Agreement provided for the award of attorney's fees even though the Partnership Agreement does not mention attorney's fees in connection with indemnification. Relatedly, the Motion Court erroneously held that the indemnification clause contained in the Partnership Agreement provided for indemnification in instances of direct actions between Sage and Liss and was not limited to third-party claims despite no clear expression of the parties' intent to provide indemnification in the form of attorney's fees with respect to direct actions.

Also, the Motion Court—having specifically found that Plaintiff-Respondent did not submit any evidence of bad faith on the part of Liss which was required to trigger the indemnification provision of the Partnership Agreement—held that such bad faith existed solely based upon the language contained in the decision and order resolving the Dissolution

Proceeding ("Dissolution Order"). (R89.) The language contained therein was insufficient to support an award of summary judgment to Sage in this action.

The Appellate Division, First Department, unanimously affirmed the Judgment and dismissed the appeal from the Order as subsumed in the appeal from the Judgment (R137-138).

For the reasons set forth herein, the Estate is entitled to dismissal of the indemnification claim and the Estate asks this Court to reverse the Appellate Decision affirming the Judgment.

STATEMENT OF FACTS

The Partnership and Partnership Agreement

As set forth in the record below, Sage and Liss entered into the Partnership on February 17, 1984. (R29-30.) The terms of the Partnership were memorialized in the Partnership Agreement dated February 17, 1984. (R52-75.)

As set forth in the Partnership Agreement, the purpose of the Partnership was to purchase and hold shares of stock in 246 West 38th Street Tenants Corp. ("Co-Op") allocated to the unit the Partnership intended to occupy ("Premises") so that it could sublease its rights under the Proprietary Lease for the Premises to Sage and Liss. (R56 at 1.03.) Sage and Liss, in turn, were entitled to their own respective use areas. (R57 at 2.01.)

Section 13.02 of the Partnership Agreement contains the indemnification provisions at issue on this appeal which read:

> SECTION 13.02. Indemnities. (a) The Partners shall be indemnified and held harmless by the Partnership from and against any and all claims, demands, liabilities, costs, damages, expenses and causes of action of any nature whatsoever arising out of or incidental to any act performed or omitted to be performed by any one or more of the Partners in connection with the business of the Partnership; provided, however, that, such act or omission was taken in good faith, was reasonably

> believed by the applicable Partners to be in the best interests of the Partnership and the scope of authority granted to such Partners under this Agreement, and did not constitute fraud, bad faith, willful misconduct or negligence on behalf of such Partners; and, provided, further, that an indemnity under this Section shall be paid solely out of and to the extent of Partnership assets and shall not be a personal obligation of any Partner. All judgments against the Partnership and the Partners, or any one or more thereof, wherein such Partner (or Partners) is entitled to indemnification, must first be satisfied from Partnership assets before the Partners shall be responsible for these obligations.
>
> (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 without 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.

(R72 at 13.02.)

The Dissolution Proceeding

On January 6, 2006, Liss commenced the Dissolution Proceeding captioned *Robert Liss v. Sage Systems, Inc.*, Supreme Court of the State of New York, County of New York, Index No. 100205/2006 in which Liss

demanded judicial dissolution of the Partnership. (R31.) The verified complaint therein alleged that the conditions of a proprietary lease rider for the Premises they occupied required that Sage and Liss collectively remain in possession of 51% of the Premises, that Liss rented out space to subtenants with the permission of the Co-Op, and that, years later, Sage subsequently put S-L in violation of the proprietary lease by renting out a portion of the space to subtenants without the Co-Op's permission. (R80-82.) Liss alleged Sage's actions violated the proprietary lease because, as a result of Sage's actions, Sage and Liss, collectively, occupied less than 51% of the premises. (R80-82.) Liss also alleged that this and other violations remained uncured despite due demand and that the business of the Partnership was prejudiced and could not continue. (R82-83.)

In the Dissolution Order dated February 10, 2009, the court in the Dissolution Proceeding dismissed the complaint, holding that the "condition" referenced by Liss was not made part of the proprietary lease and, therefore, Sage had not placed S-L in violation of the proprietary lease. (R88.) The court, however, continued and stated that Liss had "unclean hands with respect to his demand for the equitable relief of dissolution" by virtue of his subletting of space and, therefore, "assuming arguendo the

existence of a 51% provision in the Proprietary Lease," Liss would be placing S-L in violation of the proprietary lease as well. (R89.) The court also found that Liss did not meet his burden of showing "prejudice or lack of reasonable practicality of carrying out the partnership's business." *Id*.

Accordingly, the court dismissed Liss' complaint and awarded Sage statutory costs and disbursements that did not include attorney's fees. *Id*.

The Instant Action

In its Order, the Motion Court succinctly summarized the facts as follows:

> In this action, commenced in 2010, plaintiff sues defendant for contractual indemnity. Relying on the findings made by the justice in the dissolution action, plaintiff alleges that defendant acted in bad faith, with willful misconduct, negligently, and/or fraudulently in commencing and litigating it. It thus seeks to recover the costs, damages, and expenses, including attorney fees, it incurred in that action.

(R7.)

ARGUMENT

POINT I

LEGAL STANDARD ON SUMMARY JUDGMENT

Under CPLR 3212, a motion for summary judgment "shall be granted" if the papers and proof are sufficient "to warrant the court as a matter of law in directing judgment in favor of any party." CPLR 3212. The party moving for summary judgment must present "sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact." *Tech. Support Servs., Inc. v. Int'l Bus. Machs. Corp.*, 18 Misc. 3d 1106[A], 1106A, 2007 NY Slip Op 52428[U], *22 (Sup. Ct. Westchester County 2007). The burden then shifts to the opponent to "produce sufficient evidence in admissible form to establish the existence of a triable issue of fact." *Id*. at *22. Summary judgment "is properly granted when the opponent of the motion raises only feigned issues of fact." *Id*. at *23 (emphasis added). A "sham or frivolous issue will not preclude summary relief." *Kornfeld v. NRX Tech., Inc.*, 93 A.D.2d 772, 773 (1st Dep't 1983), *aff'd*, 62 N.Y.2d 686 (1984).

The center of the dispute between the parties is their differing readings of the plain language of the Partnership Agreement. Such

questions are appropriately determined on summary judgment, where the Court's function is "to apply the meaning intended by the parties, as derived from the language of the contract in question." *See Duane Reade, Inc. v. Cardtronics, LP*, 54 A.D.3d 137, 140 (1st Dep't 2008); *see also Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). In interpreting a contract, words should be accorded their "fair and reasonable meaning," and "the aim is a practical interpretation of the expressions of the parties to the end that there be a realization of [their] reasonable expectations." *See Duane Reade, Inc*., 54 A.D.3d at 140 (internal quotation marks omitted); *see also Gessin Elec. Contrs., Inc. v. 95 Wall Assoc., LLC*, 74 A.D.3d 516 (1st Dept 2010).

Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *See Greenfield*, 98 N.Y.2d at 569. Although the parties offer conflicting interpretations of a contract, that does not render it ambiguous. *See Bethlehem Steel Co. v Turner Constr. Co*., 2 N.Y.2d 456, 460 (1957). Moreover, "where the intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law and no trial is necessary to determine the legal effect of the contract." *Id*. The Estate was entitled to summary judgment dismissing Sage's claims.

POINT II

THE PARTNERSHIP AGREEMENT DOES NOT PROVIDE FOR THE AWARD OF ATTORNEY'S FEES IN DIRECT ACTIONS BETWEEN PARTNERS

The indemnification provision of Section 13.02 of the Partnership Agreement contains no reference whatsoever to attorney's fees. It is well-settled that where a contract for indemnification does not specifically reference indemnification for attorney's fees, the parties are not entitled to recover such fees. *See, e.g., Hooper Assoc. v. AGS Computers,* 74 N.Y.2d 487, 492, 548 N.E.2d 903, 549 N.Y.S.2d 365 (1989) ("Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise.")

Courts have routinely held that for a party to recover attorney's fees based upon contractual language, the language must be unmistakably clear by not only explicitly referencing the parties' intention to provide indemnification for attorney's fees, but also must specifically provide that attorney's fees are recoverable in direct actions between the parties to the

agreement—requirements that have not been met here. In the case of *Gotham Partners, L.P. v. High River Ltd. Partnership*, 906 N.Y.S.2d 205, 76 A.D.3d 203 (1st Dep't 2010), the contract provided that the defendant was obligated to indemnify the plaintiff for any litigation related costs, subject to two carve-outs: (i) for losses arising out of entry into the agreement, and (ii) for any breach of the agreement by the plaintiff. *Id*. at 206, 76 A.D.3d at 204-05. The plaintiff argued that such carve-outs only made sense if the indemnity was construed to cover direct claims. The First Department, however, held that the indemnification clause only covered third-party claims despite the two carve-outs that arguably implied the parties' intention to cover direct claims—precisely because the indemnification provision could be read "at least as easily" to apply solely to third-party claims. *Id*. at 207, 76 A.D.3d at 208.

The *Gotham Partners* court explained that although it was not "irrational" to interpret the indemnification provision as covering direct claims, the provision should be construed to apply solely to third-party claims because, in order to cover direct claims, the *Hooper* standard requires "more than merely an arguable inference of what the parties must have meant." *Id*. at 209, 76 A.D.3d at 209. The court concluded that for such an

indemnification provision to cover direct claims, "the intention to authorize an award of fees to the prevailing party . . . must be virtually inescapable.'' *Id*. Here it cannot be said that the language demonstrates an inescapable intent to provide indemnification for attorney's fees in direct actions, as the Partnership Agreement is completely silent as to attorney's fees and can be read to cover claims by third-parties arising out of the acts of Sage or Liss.

Broad and non-specific language regarding all claims without differentiation between third-party claims and direct claims between parties to the agreement (as is present in the Partnership Agreement) is also insufficient. In *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186 (2d Cir. 2003), plaintiff investment firm Oscar Gruss & Son, Inc. (''OGSI'') brought a breach of contract claim against Hollander, the owner of a software company, for the alleged failure to deliver warrants under an engagement letter and Hollander crossclaimed for, among other things, breach of contract. *Id*. at 190-91. After OGSI prevailed on the merits, it sought reimbursement of its attorney's fees and expenses under a provision in the parties' engagement letter that required Hollander to:

> reimburse [OGSI] promptly for any legal or other expenses reasonably incurred by it in connection with . . . any lawsuits, investigations, claims or other proceedings arising in any manner out of or

> in connection with rendering of services by [OGSI] hereunder (including, without limitation, in connection with the enforcement of this Agreement and the indemnification obligations set forth herein).

Id. at 199. Citing *Hooper*, the U.S. Court of Appeals for the Second Circuit concluded that this provision, including the phrase "in connection with the enforcement of this Agreement," "in light of the surrounding provisions . . . can apply only to a situation where Hollander refuse[d] to indemnify OGSI from a third-party action and not to an action commenced by OGSI against Hollander." *Id*. at 200.

Similarly, in *Canpartners Investments IV, LLC v. Alliance Gaming Corp*., 981 F. Supp. 820 (S.D.N.Y. 1997), the Southern District held that plaintiff-lender was not entitled to indemnification of attorney's fees and expenses under a financing commitment letter relating to the funding of a tender offer. Under that letter, defendant-borrower agreed to indemnify each lender for "any and all claims, damages and liabilities (including reasonable fees, expenses and disbursements of counsel) which may be incurred by or asserted against [a Lender] in connection with or arising out of any . . . litigation or proceeding arising out of or in connection with this letter agreement." *Id*. at 827. Citing *Hooper*, the Southern District reasoned that,

notwithstanding the broad language of the provision at issue, indemnification for attorney's fees was not covered for the breach of contract claims asserted by the plaintiff because the language in the commitment letter was "typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim." *Id*.

There is absolutely no language in the Partnership Agreement specifically referencing direct claims such as the underlying Dissolution Proceeding, so indemnification must be denied.

Additionally, where an indemnification provision would cover both direct and third-party claims, the indemnification provision will be read to only apply to third party claims. For example, in *Broadhurst Investments, L.P. v. Bank of New York Mellon*, No. 09 Civ. 1154 (PKC), 2009 U.S. Dist. LEXIS 117590, 2009 WL 4906096 (S.D.N.Y. Dec. 14, 2009), plaintiff Broadhurst sued Bank of New York Mellon (''BNY Mellon'') alleging that the investment banking fees that BNY Mellon charged exceeded the contractually permitted amount. *Id*. at *1. BNY Mellon counterclaimed for attorney's fees for the costs of its defense based on an indemnification provision in the parties' agreement, which entitled BNY Mellon to indemnification for "any and all losses, claims, damages and liabilities

(including, without limitation legal fees and other expenses . . .), in connection with any matter in any way relating to or referred to in this Instruction Letter, and/or Losses arising out of the matters contemplated in the Instruction Letter . . . " *Id*. While BNY Mellon admitted there was a potential for third-party claims at the time the parties negotiated the agreement, it argued that the "most likely scenario" in which this provision would be invoked involved a dispute between the contracting parties themselves. The Southern District rejected this argument, reasoning that the question of whether the indemnification provision covered direct claims was "not one of likelihood, but rather whether the clause [was] 'exclusively or unequivocally referable to claims between the parties themselves'" and concluded that, in light of the potential for third-party claims at the time the agreement was negotiated, it was not. *Id*. at *3.

The language of the Partnership Agreement is so broad as to necessarily encompass third-party claims and, therefore, cannot be read to cover direct claims between Sage and Liss. Due to the absence of any clear and unmistakable intent in the Partnership Agreement to provide the indemnification sought, the indemnification provision is of no avail to Sage.

In awarding summary judgment to Sage, the Motion Court first relied upon the First Department's holding in *Breed, Abbott & Morgan v. Hulko*, 139 A.D.2d 71 (1st Dep't 1988), *aff'd*, 74 N.Y.2d 686 (1989), on the basis that the *Breed* court held that the movant was "entitled to legal fees and expenses where indemnity provision covered 'any claims, damages, losses, or expenses.'" (R9.) However, as explained in *Breed*, the clear meaning of the indemnification provision at issue derived from the fact that it was not credible that:

> a respected law firm would accept the responsibilities of an escrowee, with the inherent risk that a good-faith discharge of those responsibilities might give rise to an unjustified lawsuit by an aggrieved party, without a firm promise that it would be protected against the heavy financial detriment inherent in defending against such a lawsuit.

Breed, Abbott & Morgan, 139 A.D.2d at 76. In other words, direct suits by the parties to the escrow agreement are the central concern in an escrow agreement and such protections against incurring attorney's fees is of vital importance to enticing a "trustworthy escrowee" to assume the responsibilities of an escrowee. *Id*. In its affirmance, the Court of Appeals held:

> The narrow question before us is whether, under the circumstances presented, defendant agreed to indemnify plaintiff for its legal expenses incurred resisting defendant's claims *(see, Matter of A. G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5). We conclude that defendant did so agree, for the reason stated in the opinion of the late Justice Leonard H. Sandler that if this agreement did not include plaintiff law firm's "legal expenses incurred in defending against an action by one of the parties alleging misconduct by the escrowee which resulted in a determination in favor of the escrowee, it is difficult, if not impossible, to ascertain for what it was that the parties had agreed to indemnify the escrowee."

Breed, Abbott & Morgan v. Hulko, 74 N.Y.2d 686, 687, 543 N.Y.S.2d 373, 374, 541 N.E.2d 402 (1989) (quoting *Breed, Abbott & Morgan v. Hulko*, 139 A.D.2d 71, 73 (1st Dep't 1988)).

The same rationale does not hold true in a partnership agreement such as the one at bar where third-party claims are clearly contemplated as demonstrated by the case law set forth above, including *Hooper*. *See Hooper Assocs., Ltd*., 74 N.Y.2d at 493-94, 549 N.Y.S.2d at 368. *Hooper* distinguished *Breed, Abbott & Morgan* due to the nature of escrow agreements and because, unlike in *Breed, Abbott & Morgan*, "the potential existed for third-party actions." *Id*. The Motion Court also did not address the fact that in *Hooper*, which denied an award of attorney's fees relating to

a direct action, the provision at issue provided broad indemnification "'from any and all claims, damages, liabilities, costs and expenses, including reasonable counsel fees.'" *Hooper Assocs., Ltd*., 74 N.Y.2d at 493-94, 549 N.Y.S.2d at 368.

In fact, the Motion Court specifically found that Section 13.02 did not address "whether a partner must indemnify the other for claims brought by one partner directly against the other" and "the provision contains no reference to direct claims between the parties." (R10.) The cases cited by the Motion Court in support of its departure from the rule in *Hooper* are inapposite. The Motion Court identified three factors that must be present before intra-party claims may be deemed included within an indemnity provision:

> broad and inclusive language, i.e., "any and all claims," the absence of a limit on the types of proceedings covered by the indemnity provision, and the absence of an impact that would render meaningless other provisions of the agreement at issue.

(R11.)

The Motion Court ignored one other critical factor in the case law it cited, however, which is required before the rule in *Hooper* can be found inapplicable—that the indemnification provision provide for the recovery of

attorney's fees. *See Crown Wisteria, Inc. v. Cibani, 178 A.D.3d* 524 (1st Dep't 2019) ("Cibani agreed to hold Plaintiff harmless from the attorney's fees it incurred"); *Crossroads ABL LLC v. Canaras Cap. Mgt., LLC*, 105 A.D.3d 645 (1st Dep't 2013) (agreement to advance attorney's fees); *WSA Grp., PE-PC v. DKI Eng'g & Consulting USA PC*, 178 A.D.3d 1320, 1324, 116 N.Y.S.3d 719, 725 (3rd Dep't 2019) ("provision requires defendant to 'indemnify and save harmless and *defend"*") (emphasis in original). The remaining case cited by the Motion Court did not involve a claim for attorney's fees. *See HealthNow N.Y., Inc. v. David Home Builders, Inc.*, 176 A.D.3d 1602, 112 N.Y.S.3d 360 (4th Dep't 2019).

In affirming, the Appellate Division cited two cases as support—*Nigiri v. Liberty Apparel Co., Inc*., 76 A.D.3d 842, 844 (1st Dep't 2010) and *Crown Wisteria, Inc. v. Cibani*, 178A.D.3d 524, 525 (1st Dep't 2019)—despite the fact that both of those cases involved indemnification provisions that explicitly referenced attorney's fees. Those cases are inapplicable here giving the lack of reference to attorney's fees in the Partnership Agreement.

For these reasons, the Estate is entitled to dismissal of the indemnification claim and the Estate asks this Court to reverse the decision of the Appellate Division.

POINT III

THE MOTION COURT ERRED IN FINDING BAD FAITH ON THE PART OF LISS, WITHOUT WHICH THERE CAN BE NO LIABILITY UNDER SECTION 13.02

Sage argued that Robert Liss acted in bad faith by seeking to force the dissolution of the Partnership under a theory that Liss was motivated by the potential for Liss' real estate brokerage to sell the rights to the proprietary lease for the Premises and collect a $66,000.00 commission. Sage cites to an August 14, 2005, offer letter as support. (R91-91.)

As argued before the Motion Court, this conjecture was based upon the false assumption that the only reason to obtain an offer on a property is to sell it when, in fact, obtaining an arms-length offer is one method of determining the market value of a property—an act devoid of any nefarious intent. (R126-27 at ¶¶9-10.)

Second, Sage's supposition is hardly credible given that Sage argues that the litigation cost Sage $80,848.04 in legal fees. The opportunity to collect $66,000.00 is not a compelling reason for Robert Liss to spend an amount of attorney's fees commensurate with Sage's expenditures. (R127 at ¶12.)

Third, the non-binding offer letter is also probative of nothing for the mere fact that Liss could not have commenced the Dissolution Proceeding with the intent of proceeding with the transaction contemplated therein after the conclusion of the action four years later. (R127 at ¶11.)

Moreover, even if Robert Liss had been successful in obtaining a judicial dissolution, the Partnership Agreement provides that in the event of a dissolution, the liquidation of the Partnership will be carried out by the Partners—and Sage had a 56.93% controlling interest. (R69-71 at 12.01(d), 12.02(b)(i), 12.03(a)). Accordingly, Sage would have been in sole control of choosing a broker—not Liss.

The Motion Court correctly agreed with the Estate on these points and held:

> the "sole issue, therefore, is whether the determination by the court in the dissolution action that defendant acted with unclean hands in commencing the action and that defendant's claims therein were meritless and unsupported, constitutes sufficient evidence of bad faith, thereby triggering defendant's obligation to indemnify plaintiff under the indemnity provision.

(R12.)

The court in the Dissolution Proceeding held that there was no "51% provision" in the proprietary lease requiring the parties to maintain 51%

possession of the premises by subleasing no more than 49% of the space. (R88-89.) Continuing in *dicta* and "assuming arguendo the existence of a 51% provision in the Proprietary Lease," that court stated that Liss' conduct comparable to Sage's conduct meant that Liss had "unclean hands with respect to his demand for the equitable relief of dissolution." (R89.) Insofar as the Dissolution Order found that no misconduct or breach of the proprietary lease had occurred, a finding of unclean hands was unnecessary and not binding since, in order to make the statement, the court in the Dissolution Proceeding had to assume the existence of a "51% provision" that it specifically held was not contained in the applicable leases. The Motion Court overstated the significance of this language in its holding.

Specifically, the Motion Court cited the Eastern District of New York case of *839 Cliffside Ave. LLC v. Deutsche Bank Ntl. Trust Co*. for the proposition that "an unclean [hands] defense requires a finding of bad faith." (R12-13 (*citing 839 Cliffside Ave. LLC v. Deutsche Bank Ntl. Trust Co*., 2016 WL 5372804, *11 (E.D.N.Y. September 26, 2016).) As set forth in *839 Cliffside*, the doctrine of unclean hands applies "'only where the misconduct alleged as the basis for the defense '"has immediate and necessary relation to the equity that [plaintiff] seeks in respect to the matter

in litigation."'" *Id*. (internal citations omitted). Indeed, "under New York law, to assert a defense of unclean hands, a party must have been injured by the allegedly inequitable conduct." *Id.* The allegedly inequitable conduct of subletting space in fact caused no injury to anyone, as the court held in the Dissolution Order. (R88.) Accordingly, the language in the Dissolution Order concerning unclean hands must be read as *dicta* rather than a finding of fact.

In its affirmance, the Appellate Division addressed the bad faith issue in stating:

> The finding of the court in the dissolution action that the decedent had unclean hands in bringing the action is the equivalent of a determination that the decedent acted in bad faith (see Citibank, N.A. v American Banana Co., Inc., 50 AD3d 593, 594 [1st Dept 2008]). No appeal was taken from that finding. Contrary to defendant's contention, plaintiff was damaged by having to defend itself, incurring legal costs, in that action.

(R138.) The Appellate Division therefore ruled that a finding of unclean hands is the equivalent of a finding of bad faith and that Plaintiff-Respondent was damaged by having to defend itself in the Dissolution Action, citing *Citibank, N.A. v. American Banana Co., Inc*. 50 A.D.3d 593, 594 (1st Dep't 2008). As the court held in *Citibank*, "[r]eliance upon the doctrine of unclean hands is applicable only when the conduct relied on is

directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct" and "[t]o charge a party with unclean hands, it must be shown that said party was guilty of immoral or unconscionable conduct directly related to the subject matter." *Id*. (internal quotation marks and citations omitted). The Appellate Division's ruling conflates injury potentially suffered as a result of the conduct of Robert Liss (subletting in the same manner as complained of which would constitute "coming to court with unclean hands" and warrant dismissal of the Dissolution Proceeding if it resulted in injury) with the act of filing a lawsuit. If the act of filing a lawsuit to seek redress for an act that a plaintiff was also guilty of was in and of itself the type of damage required to find unclean hands, the second part of the test set forth above would be unnecessary and there would be no need to require a defendant asserting an unclean hands defense in litigation to demonstrate injury. If that were the rule, every unclean hands case would automatically involve injury and the doctrine of unclean hands would be another exception to the American Rule regarding attorney's fees on par with contractual agreement or statutory authorization.

Attempting to shield the Motion Court's finding of bad faith from review, Plaintiff-Respondent argued before the Appellate Division that the *dictum* set forth in the Dissolution Order regarding unclean hands was binding upon the Appellate Division, citing *Garofano Const. Co. v. New York*, 180 Misc. 539, 540 (AT 1st Dept. 1943) *aff'd* 266 A.D. 960 (1st Dep't 1943). In *Garofano*, however, the court held that it was bound by the *dicta* in *Ewen v. Thompson-Starrett Co.*, 208 N.Y. 245, 246, 101 N.E. 894, 895 (1913), a decision of the Court of Appeals, under a circumstance where the decision of the Court of Appeals involved interpretation of a statute "of such far-reaching public importance." *Id*. The Dissolution Order is a decision of a lower court and the *dicta* contained therein does not involve public policy considerations.

Sage also cited *Diarrassouba v. Consol. Edison Co. of N.Y. Inc*., 2014 NY Slip Op 08749, ¶ 1, 123 A.D.3d 525, 525, 999 N.Y.S.2d 33, 33-34 (1st Dep't 2014) for the proposition that the Estate's failure to appeal from the Dissolution Order precludes the Estate's argument on appeal. As a threshold matter, given that the language at issue in the Dissolution Order was *dicta*, the Estate could not have been required to appeal from language that was not determinative of the issues when the Dissolution Order contained a ground

upon which the decision would be upheld—specifically that the conduct that Liss complained of in the Dissolution Proceeding did not violate the proprietary lease or prevent the partnership from carrying out its business.

Moreover, *Diarrassouba* does not stand for the cited proposition. In *Diarrassouba*, the Court, in fact, held that a factual argument not raised below in the same case could not be raised for the first time on appeal. *Id*. The *Diarrassouba* Court, however, specifically noted that it could review legal arguments, such as the legal issues raised herein, which appear on the face of the record. *Id*. Appellate courts also make an exception to that general rule of not reviewing factual arguments when there is a sufficient record on appeal and the issue is determinative. *See Allstate Ins. Co. v. Perez*, 157 A.D.2d 521, 523, 549 N.Y.S.2d 713, 714-15 (1st Dep't 1990). Here the entirety of the legal and factual issues regarding bad faith that Defendant-Appellant seeks review of are contained in the Dissolution Order relied upon the Motion Court in issuing its Order.

Sage also argued below that Liss' commencement of the Dissolution Action without supporting evidence constituted a bad faith act. Such is not the case, however, absent findings to the contrary that are not present in either the Motion Court's Order or the Dissolution Order upon which it

relies and, accordingly, the commencement of the Dissolution Proceeding does not undeniably constitute a bad faith act meriting treatment analogous to sanctions. *See Di Pace v. Figueroa*, 223 A.D.2d 949, 951, 637 N.Y.S.2d 222, 224 (3rd Dept. 1996) (affirming a denial of sanctions after dismissal of a dissolution proceeding despite holding "DiPace has proffered not a shred of evidentiary material substantiating her claims; her deposition testimony, which she maintains raises factual questions, consists merely of hearsay and conclusory allegations"). Indeed, even the court in the Dissolution Proceeding did not determine that the commencement of those proceedings warranted sanctions or attorney's fees.

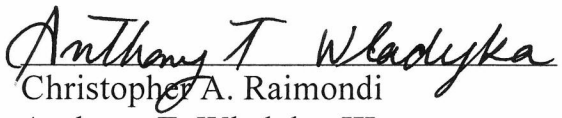
For these reasons, the Estate is entitled to dismissal of the indemnification claim and the Estate asks this Court to reverse the decision of the Appellate Division.

CONCLUSION

For the foregoing reasons, the Estate is entitled to dismissal of the indemnification claim and the Estate asks this Court to reverse the decision of the Appellate Division.

Dated: Massapequa, New York
December 10, 2021

Respectfully submitted,



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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: Massapequa, New York
December 10, 2021

Respectfully submitted,

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STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On December 10, 2021

deponent served the within: **Brief for Defendant-Appellant**

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on December 10, 2021

Mariana Braylovskiy

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Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2022

T. Heath

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