New York County Clerk's Index No. 650745/10
Appellate Division–First Department Case Nos. 2020-02671 and 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.

MOTION FOR LEAVE TO APPEAL

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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.	**NOTICE OF MOTION FOR PERMISSION TO APPEAL TO THE NEW YORK COURT OF APPEALS PURSUANT TO CPLR § 5602(a)(1)(i)** New York County Clerk Index No. 650745/10 App. Div., First Dep't Case Nos. 2020-02671 and 2020-03659

PLEASE TAKE NOTICE that Appellant MICHAEL LISS, as Executor of the Estate of Robert Liss ("Estate") will move this Court, pursuant to CPLR § 5602(a)(1)(i) and Rule 500.22 of the Rules of Practice of the Court of Appeals, upon the record of the prior appeal in this case to the Appellate Division, First Judicial Department, and upon the papers submitted herewith, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on June 21, 2021, at 9:30 a.m., for an order granting permission to appeal to this Court from a Decision and Order of the Appellate Division, First Department, entered on April 27, 2021 (the "Decision and Order").

Answering papers, if any, must be served and filed in the Court of

Appeals with proof of service on or before the return date of the motion.

Dated: Massapequa, New York
June 3, 2021

Christopher A. Raimondi
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Attorneys for Plaintiff-Respondent

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.	**AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL PURSUANT TO CPLR § 5602(a)(1)(i)** New York County Clerk Index No. 650745/10 App. Div., First Dep't Case Nos. 2020-02671 and 2020-03659

Christopher A. Raimondi, an attorney duly admitted to the practice of law before the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am a shareholder of the law firm of Raimondi Law, P.C., attorneys for Defendant-Appellant Michael Liss, as Executor of the Estate of Robert Liss ("Estate") and as such, I am fully familiar with the facts and circumstances herein. I respectfully submit this affirmation in support of the Estate's motion for leave to appeal to this Honorable Court from the April 27, 2021 Decision and Order of the Appellate Division, First Judicial

Department (Gische, J.P., Kern, Mazzarelli, Kennedy, JJ.) ("Decision and Order"). *See* Exhibit "A" hereto.

2. The Decision and Order of the Appellate Division, First Judicial Department is contrary to established decisions and precedents of this Court and, therefore, requires its consideration.

STATEMENT OF JURISDICTIONAL BASIS FOR LEAVE TO APPEAL

3. This Court has jurisdiction of the motion and appeal requested pursuant to CPLR § 5602(a)(1)(i).

4. The Decision and Order of the Appellate Division is a final determination since it completely disposes of the case. Because there were no dissents, Petitioners have no right to appeal, but herein seek leave of this Court to appeal. This case presents questions of law and thus meets all the requirements set out in CPLR § 5602(a)(1)(i) as to this Court's jurisdiction over motions for leave to appeal.

STATEMENT OF PROCEDURAL HISTORY OF CASE AND TIMELINESS

5. The Estate makes this timely motion for leave to appeal pursuant to CPLR §§ 5513(b) and 5602(a)(1)(i) and §§ 500.21 and 500.22 of the Court's Rules of Practice.

6. This action was commenced by the filing of a summons and complaint on June 27, 2010. (*See* Appellate Division Record at 1. The Appellate Division Record will hereafter be referred to as "R" with appropriate page references.) Issue was joined by filing of an answer on July 19, 2010. (R35-40).

7. On August 29, 2019, Sage filed a motion for summary judgment on its claims against the Estate. (R43-122). On September 20, 2019, the Estate filed a cross-motion for summary judgment dismissing Sage's claims. (R123-128).

8. The Supreme Court, New York County (Jaffe, J.) issued a Decision and Order on the motions dated May 8, 2020, which was entered on May 8, 2020, ("Motion Court's Order") and notice of entry was served and filed by Sage on May 13, 2020. *See* Exhibit "B" hereto. The case was thereby disposed. On June 11, 2020, within 30 days of the service of notice of entry, Liss filed a notice of appeal from the decision and order. (R3).

9. The Supreme Court, New York County (Jaffe, J.) issued a Judgment dated August 18, 2020, which was entered on August 18, 2020, ("Judgment") and notice of entry was served and filed by Sage on September 1, 2020. *See* Exhibit "C" hereto. On September 2, 2020, within

30 days of the service of notice of entry, the Estate filed a notice of appeal from the judgment. (R15).

10. The appeal from the order was dismissed as subsumed into the appeal from the judgment and on April 27, 2021, the Appellate Division, First Judicial Department issued the Decision and Order affirming the judgment. *See* Exhibit "A". Sage served notice of entry of the Decision and Order on May 4, 2021, by electronic filing. This motion was served on June 3, 2021, and is thus timely. *See* CPLR §§ 2103(b)(1), 5513(b).

RULE 500.13(A) STATEMENT

11. On January 6, 2006, Liss commenced a 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 ("Dissolution Proceeding"). (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 their partnership, S-L Properties ("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.)

12. In an order dated February 10, 2009 ("Dissolution Order"), 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. *See* Exhibit "D" hereto. 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*. No appeal of the Dissolution Order was taken.

13. On May 27, 2010, Liss commenced the action captioned *Robert Liss v. Sage Systems, Inc*., Supreme Court of the State of New York, County of New York, Index No. 107019/2010 ("Liss Action"). The Liss Action was deemed a related case to the matter before this Court. The Liss Acton was resolved after summary judgment by decision and order dismissing Sage's claim for breach of contract against the Estate for failure to cooperate in the closing of the transfer and dismissing Sage's claim for a preliminary injunction claiming that the Estate should be removed from the Premises during the pendency of the litigation (having obviously never granted it as requested) and granting the branch of Sage's motion for specific performance allowing Sage to purchase Liss' interest in S-L. The motion court's decision and order was dated March 28, 2019 and its Order and Judgment was dated April 19, 2019. An appeal was taken by the Estate and the Appellate Division, First Judicial Department affirmed by decision and order dated September 10, 2019.

14. On August 1, 2016, S-L Properties filed a landlord tenant petition against the Estate in the L&T Proceeding captioned *S-L Properties*

v. Michael Liss, as Executor of the Estate of Robert Liss, et al., Index No. 070845/2016. After motion practice, the L&T Proceeding ended in a Decision and Order dated December 6, 2016, holding that S-L was not entitled to evict the Estate as it was premature because the court in the Liss Action would need to determine the rights and responsibilities of the parties.

15. On July 31, 2010, Sage and S-L commenced an action captioned *Sage Systems, Inc. and S-L Properties v. Michael Liss, as Executor of the Estate of Robert Liss*. On September 8, 2020, Liss filed a motion to dismiss the complaint. On October 23, 2020, Sage and S-L opposed the motion to dismiss and cross-moved for leave to amend the complaint to add Michael Liss as a party in his individual capacity. Both the motion and cross-motion are full briefed and *sub judice.* On April 2, 2021, an ADR order was issued directing the parties to engage in mediation, which is expected to take place in mid-July 2021.

STATEMENT OF QUESTION PRESENTED FOR REVIEW

16. This request for leave to appeal presents the following question:

Whether, under New York law, an indemnification clause in a partnership agreement provides a basis for the recovery of attorney's fees arising out of a direct claim between the parties when the provision at issue does not specify whether it applies to indemnification for third-party or direct claims and does not reference attorney's fees.

NATURE OF THE ACTION

17. This action was commenced by Sage against decedent Robert Liss ("Liss"). The was subsequently substituted for Liss as Defendant.

18. 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.

19. 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").

STATEMENT OF FACTS

The Partnership and Partnership Agreement

20. 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.)

21. 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.)

22. 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

23. 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.)

24. 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. *See* Exhibit "D". 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. *Id*. 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*.

25. 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 the Motion Court 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.)

THE FIRST DEPARTMENT ERRED IN ITS APPLICATION OF THE LAW, IN CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT

26. It is respectfully submitted that the First Department erred in its application of well-settled law, in conflict with the controlling decisions of this Court regarding the award of attorney's fees pursuant to contractual provisions between parties, specifically *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 492, 548 N.E.2d 903, 549 N.Y.S.2d 365 (1989) and its progeny.

27. As courts in the State of New York have long been bound to apply the "American Rule" that parties are responsible for bearing their own attorney's fees absent a statute or clear agreement to the contrary, any

departure from that rule—or even a loosening of same—is a matter of public importance.

28. 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.")

29. Courts have routinely held that in order 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.

30. 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, in order 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 evidences 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.

31. 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 was 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 central importance to enticing a "trustworthy escrowee" to assume the responsibilities of an escrowee. *Id*. In its affirmance, this Court 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)).

32. 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.

33. 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.)

34. 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).

35. In the Decision and Order appealed from, the First Department affirmed the Motion Court citing *Nigri v. Liberty Apparel Co., Inc*., 76 A.D.3d 842, 844 (1st Dept. 2010) which Sage had argued as standing for the proposition that, "as long as an indemnification provision has broad applicability, the phrase 'attorneys' fees' is not required in order to recover attorney's fees from the other." (Brief for Plaintiff-Respondent at 13.)

Sage's reading of *Nigri* was incorrect and the Appellate Division's reliance upon it was misplaced. First, the indemnification clause at issue covering third-party claims in *Nigri* contained the words "attorney's fees." *Nigri*, 76 A.D.3d 842, 843. Second, the only direct attorney's fees claim awarded to the plaintiff in *Nigri* was recovered pursuant to a separate, standard fee-shifting clause specifically providing for the payment of attorney's fees incurred in enforcing the agreement at issue. *Id.*

CONCLUSION

36. For the foregoing reasons, the Estate submits that this case is appropriate for this Court's review and asks that this Court grant leave to appeal the Decision and Order of the Appellate Division.

Dated: Massapequa, New York
June 3, 2021

Christopher A. Raimondi

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – FIRST DEPARTMENT

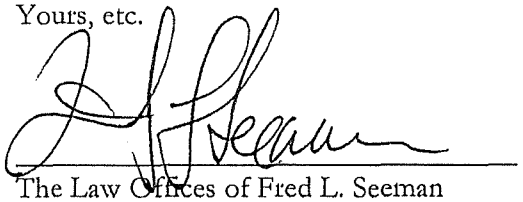
SAGE SYSTEMS, INC.	:	Index No.:
	:	650745/2010
Plaintiff-Respondent	:	
-against-	:	Appellate Case Nos.:
	:	2020-02761
	:	2020-03659
	:	
MICHAEL LISS, as Executor of the Estate of Robert Liss	:	**NOTICE**
	:	**OF ENTRY**
Defendant-Appellant	:	
	:	

COUNSELOR(S):

PLEASE TAKE NOTICE that the Decision and Order of the Appellate Division, First Department, dated April 27, 2021, of which the within is a true copy, was entered in the Office of the Clerk at the above-named Court on or about April 27, 2021.

Dated: New York, New York
May 4, 2021

Yours, etc.



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Supreme Court of the State of New York

Appellate Division, First Judicial Department

Gische, J.P., Kern, Mazzarelli, Kennedy, JJ.

13670-
13670A

SAGE SYSTEMS, INC.,
Plaintiff-Respondent,

Index No. 650745/10
Case No. 2020-02671
2020-03659

-against-

MICHAEL LISS, as Executor of the ESTATE OF ROBERT LISS,
Defendant-Appellant.

Raimondi Law, P.C., Massapequa (Christopher A. Raimondi of counsel), for appellant.

Law offices of Fred L. Seeman, New York (Fred L. Seeman of counsel), for respondent.

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered August 18, 2020, in favor of plaintiff, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered May 8, 2020, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff seeks reimbursement, pursuant to § 13.02(b) of its partnership agreement with the decedent, for its attorneys' fees incurred in an action brought by the decedent to dissolve the partnership. In that action, the court dismissed the complaint upon its finding that neither the proprietary lease nor any document cited by the decedent demonstrated that, as the decedent claimed, plaintiff had violated the proprietary lease. The court also found that the decedent had unclean hands in seeking the equitable relief of dissolution.

Section 13.02(b) provides, "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, damages, 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."

This broad language encompasses the recovery of attorneys' fees *(see Nigri v Liberty Apparel Co., Inc.*, 76 AD3d 842, 844 [1st Dept 2010]).

Contrary to defendant's contention, § 13.02(b) is not limited to third-party claims (*see Crown Wisteria, Inc. v Cibani,* 178 AD3d 524, 525 [1st Dept 2019]).

The finding of the court in the dissolution action that the decedent had unclean hands in bringing that 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.

We have considered defendant's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: April 27, 2021

Susanna Molina Rojas
Clerk of the Court

Index No. 650745 Year 2010 RJI No. Hon.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

SAGE SYSTEMS, INC.

Appellate Case Nos.:
2020-02761
2020-03659

Plaintiff-Respondent,

-against-

MICHAEL LISS as Executor of the Estate of Robert Liss,

Defendant-Appellante

NOTICE OF ENTRY

FRED L. SEEMAN
ATTORNEY AT LAW
Attorney for *Plaintiff-Respondent*
Office and Post Office Address, Telephone
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TEL: (212) 608-5000
FAX: (212) 385-8161

To

Attorney(s) for

Compliance Pursuant to 22NYCRR § 130-1.1-a

To the best of the undersigned's knowledge, information and belief formed after an inquiry reasonable under the circumstances, the within document(s) and contentions contained herein are not frivolous as defined in 22NYCRR §130-1.1-a

Print name beneath Fred L. Seeman

Service of a copy of the within is hereby admitted.

Dated,

.....
Attorney(s) for

Please take notice

☐ NOTICE OF ENTRY

that the within is a (*certified*) true copy of a
duly entered in the office of the clerk of the within named court on

☐ NOTICE OF SETTLEMENT

that an order of which the within is a true copy will be presented for settlement to the HON. one of the judges of the within named court, at on at 1 M

Dated,

Yours, etc.

FRED L. SEEMAN

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

SAGE SYSTEMS, INC.,	:	Index No. 650745/2010
Plaintiff,	:	
-against-	:	
	:	**NOTICE OF ENTRY**
MICHAEL LISS, As the Executor of the Estate of Robert Liss,	:	
Defendant.	:	

COUNSELORS:

PLEASE TAKE NOTICE, that the Decision and Order of the Honorable Barbara Jaffe, J.S.C., dated May 8, 2020, of which the within is a true copy, was entered in the Office of the Clerk at the above-named Court on or about May 8, 2020.

Dated: New York, New York
May 13, 2020

Yours, etc.,

Fred L. Seeman

The Law Offices of Fred L. Seeman
By: Fred L. Seeman, Esq.
Attorneys for Plaintiff
32 Broadway, Suite 1214
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To: Raimondi Law, P.C.
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552 Broadway
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

----------X

INDEX NO. 650745/2010

SAGE SYSTEMS, INC.,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

ROBERT LISS,

DECISION + ORDER ON MOTION

Defendant.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25-36, 39-40, 42-43, 45-48

were read on this motion for summary judgment.

By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting it summary judgment and a money judgment against defendant, and pursuant to CPLR 1015 and 1021 for an order substituting Michael Liss as Executor of the Estate of Robert Liss in place of defendant. Michael opposes the motion for summary judgment and cross-moves pursuant to CPLR 3212 for an order granting summary dismissal of the complaint.

I. BACKGROUND

A. Partnership

On February 17, 1984, the parties agreed to form a general partnership, S-L Properties, for the purpose of purchasing shares of condominium stock in 246 West 38th Street Tenants Corp. (cooperative), which were allocated to the 10th floor of the commercial cooperative building at that address (unit). On February 21, 1984, S-L purchased the unit and entered into a propriety lease and rider with the cooperative. (NYSCEF 1).

Among other terms, the partnership agreement contains the following indemnification

provision:

> 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, damages, expenses and causes of action of any nature whatsoever arising out of or incident 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.

(NYSCEF 30 [emphasis in original]).

In August 2005, defendant solicited an offer to purchase the unit for $2.2 million, with the additional agreement that his company, Robert Liss Realty, would receive 50 percent of the 6 percent commission on the sale, or $66,000. (NYSCEF 33). The offer was not accepted and an agreement was never finalized.

In February 2011, defendant died, and in June 2011, Michael was appointed as executor of his estate. (NYSCEF 29).

B. Dissolution action

On January 6, 2006, defendant commenced a separate action against plaintiff in this court (index number 100205/2006) and demanded judicial dissolution of the partnership (dissolution action). Underlying that action are the following allegations:

In February 1984, the cooperative permitted S-L to sublet the unit to plaintiff and/or defendant and to further sublet it to others on condition that one or more of S-L's partners continue to occupy at least 51 percent of it. In 1985, S-L sublet the unit to plaintiff and defendant, with 43.07 percent of the floor space sublet to defendant and 56.93 percent to plaintiff. Defendant then sublet approximately 90 percent of his space (40 percent of the entire space) to others. The sublease agreement was extended in 2002. (NYSCEF 32).

In 2003 and 2004, plaintiff sublet 90 percent of its space without the cooperative's consent, thereby violating the proprietary lease and rider which permitted it to lease only 49 percent of its space and required it to maintain in occupancy of 51 percent of its space. Its actions, therefore, violated the Partnership Law and prejudiced the ability of the partnership to conduct business. Defendant also alleged that plaintiff had failed to comply with the lighting requirements of the New York City Building Code related to the unit's lobby. (*Id.*).

In his prayer for relief, defendant sought dissolution of the partnership, that a receiver be appointed to dispose of the partnership and manage its dissolution, and that the proceeds of the dissolution be divided and distributed to the partners. (*Id.*).

Following discovery, plaintiff moved for summary judgment, and by decision and order dated February 10, 2009, the motion was granted and the complaint was dismissed. As pertinent here, the justice then presiding observed that the parties' partnership agreement permitted the dissolution, *inter alia*s, when a partner is guilty of conduct that tends to prejudice the partnership's business, or willfully or persistently breaches the agreements or conducts himself in a way that renders it not reasonably practicable to conduct business with that partner. (NYSCEF 33).

The court held that plaintiff had established, *prima facie*, that there was no condition

related to subletting that required a partner to remain in 51 percent occupancy of the unit, and that

> [m]oreover, Liss has unclean hands with respect to his demand for the equitable relief of dissolution. [Liss] testified at an examination before trial on August 29, 2007 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 that the board does "not consider [any such agreement] a real lease". Therefore, even assuming arguendo the existence of a provision in the Proprietary Lease, it would be [Liss], who would be persisting in placing the partnership in violation of such Proprietary Lease provision. Such is also a concession by [Liss] that no more than 51% of the Unit is sublet, since his subleases "are not real." Nor does [Liss] come forward with any evidence of any prejudice or lack of reasonable practicability of carrying out the partnership's business that the sublets pose or that [Plaintiff] has placed the Partnership in violation of any local or state building codes.

(*Id.*).

Plaintiff was thus granted summary dismissal plus costs and disbursements related to defending the action.

C. Instant action

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.

II. MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION TO DISMISS

A. Contentions

1. Plaintiff (NYSCEF 26, 36)

Plaintiff's principal contends that defendant had, without plaintiff's knowledge and consent, tried to sell the premises owned by the partnership with defendant's company as broker with the expectation of receiving a commission of more than $60,000. The dissolution action was

thus commenced, it alleges, in an effort by defendant to dissolve the partnership in order for him to force a sale of the premises and receive his commission.

As the court found in the dissolution action that defendant had acted with unclean hands and had submitted no evidence to support his claims, plaintiff argues that it had been commenced in bad faith, thereby entitling it, under the terms of the partnership agreement, to recoup its legal fees and expenses incurred in defending itself.

2. Michael's opposition (NYSCEF 39, 40)

Michael denies that the indemnity provision in the partnership agreement permits the partners to recoup attorney fees, or that it pertains to direct claims between the parties, rather than only third-party claims. He maintains that plaintiff submits no evidence to support its contention that defendant tried to dissolve the partnership in bad faith, denies that defendant was seeking to force the dissolution in order to benefit from it personally, and assails as insufficient plaintiff's evidence relating to the alleged broker's commission.

3. Plaintiff's opposition to cross motion (NYSCEF 43)

Plaintiff asserts that the indemnity provision permits both the recovery of attorney fees and direct claims between the partners, and that defendant's bad faith was confirmed by the dismissal of the dissolution action on the grounds that it had no merit and that he had unclean hands in commencing it.

4. Reply (NYSCEF 45)

Defendant argues that the indemnity provision must be strictly construed and that plaintiff offers no apposite authority to support its arguments. He also denies that defendant acted in bad faith in seeking dissolution.

B. Analysis

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." (*Hooper Assocs. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]).

1. Indemnity provision and attorney fees

As the provision here permits the recovery of any costs, damages, and expenses, provided other conditions are met, it includes the recovery of attorney fees. (*See Breed, Abbott & Morgan v Hulko*, 139 AD2d 71 [1st Dept 1988], *affd on other grounds* 74 NY2d 686 [1989] [movant entitled to legal fees and expenses where indemnity provision covered "any claims, damages, losses, or expenses"]; *see also* 23 NY Jur 2d, Contribution, Etc. § 141 [2020] [broad indemnity provision containing language such as any losses, demands and expenses may be construed to cover attorney fees even if it does not expressly mention such fees]).

2. Indemnity provision as permitting direct claims between partners

In *Hooper Assocs.*, the Court of Appeals held that whether an indemnity provision in an agreement permits the recovery of attorney fees incurred in litigation between the parties to the agreement, rather than that involving third-party claims, must be demonstrated by language clearly indicating such an intent. (74 NY2d at 491).

Here, the indemnity provision contains two specifically separated sections. The first, subsection a, addresses a situation where the partnership must indemnify the partners for acts performed in connection with the partnership's business. Thus, it is inapplicable here.

Subsection b requires a partner to indemnify and hold harmless the partnership and the other partner from an 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."

Neither subsection addresses or limits the types of claims, actions, or proceedings covered by the provision. The distinction between the two sections is based on whether a partner has acted in good faith or bad faith, and if the partner acted in good faith, then the indemnity is paid out of the partnership's assets and there is no personal liability. Conversely, if the partner acted in bad faith, then the partner must personally indemnify the other partner and the Partnership.

What is not addressed in either provision is whether a partner must indemnify the other for claims brought by one partner directly against the other, ie, direct or intra-party claims rather than third-party claims. An indemnification provision is not ordinarily construed to cover direct claims between the parties to the contract. Rather, in *Hooper Assocs., Ltd.*, the Court held that

> (i)nasmuch 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.

(74 NY2d at 492).

Here, the provision contains no reference to direct claims between the parties. However, it broadly covers "any and all claims, demands, liabilities, costs, damages, expenses and causes of action of any nature whatsoever." The parties also did not limit the indemnity in any way, nor is there an indication that it is limited to specific claims or third-party claims in general.

The Appellate Division, First Department, has held that provisions containing terms that are the same as or similar to the one in issue here evidence the contracting parties' unmistakably clear intent to permit the recovery of expenses related to direct claims brought against one

another. For example, in *Crossroads ABL LLC v Canaras Cap. Mgt., LLC*, the Court held that the subject indemnity provision covered direct claims between the parties, reasoning as follows:

> Nor does the indemnification provision at issue preclude intra-party claims. To the contrary, the indemnification provision does not include an exhaustive list of actions for which indemnification is required, nor are there any other provisions in the servicing agreement that would be rendered meaningless if the indemnification provision is read to include any claims—intra-party or otherwise—that involve Crossroads by reason of its services to, or on behalf of, or management of the affairs of, Quad–C. Rather, this indemnification provision is, as noted above, extremely broad, applying to "any and all claims, demands, actions, suits or proceedings," provided that Crossroads' involvement therein is by reason of its service, etc. to Quad–C. The 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. Therefore, while the rule set forth in *Hooper Assoc. v. AGS Computers,* 74 N.Y.2d 487, 549 N.Y.S.2d 365, 548 N.E.2d 903 [1989] applies in those cases where the parties' intent is not evident from the plain language of the agreement, that is not the case here.

(105 AD3d 645 [1st Dept 2013]).

The Court thereby 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. (*Id.*, *see also Crown Wisteria, Inc. v Chibani*, 178 AD3d 524 [1st Dept 2019] ["The indemnification clauses in the license agreement were neither limited to a specific list of items, nor did they explicitly limit indemnification to third-party claims"]).

The Third and Fourth Departments have reached similar conclusions. (*WSA Group PE., PC v DKI Engineering & Consulting USA PC*, 178 AD3d 1320 [3d Dept 2019] ["Nothing in the provision's broad language, which requires defendant to indemnify plaintiff 'against any claim, demand or cause of action of every name or nature,' reveals that the parties intended to exclude claims such as this from its coverage or to limit its scope to breaches of duty to third parties."]; *Healthnow New York, Inc. v David Home Builders, Inc.*, 176 AD3d 1602 [4th Dept 2019]

[indemnification provision contained broad inclusive language and did not limit types of proceedings which were covered]).

All three factors identified in *Crossroads* are present here. The provision is broad, it does not limit the types of proceedings covered by it, and it has no impact that would render meaningless other provisions of the partnership agreement. Plaintiff thus establishes that the provision applies to direct claims between the partners, and defendant raises no triable issue in opposition.

3. Defendant's alleged bad faith

While plaintiff alleges that defendant acted in bad faith in commencing the dissolution action due to his personal desire to benefit from a sale of the unit, the sole evidence it offers in support, the 2005 purchase offer, is insufficient to demonstrate that defendant harbored such a motive. Moreover, defendant could not have reasonably presumed that a purchase offer made in 2005 would still be effective even if the dissolution action which he commenced a year later was decided in 2006 and the dissolution occurred in 2006, which in itself would have reflected a perhaps overly optimistic view that the litigation would come to an end in one year. Nor does the potential gain of a $66,000 commission warrant a finding that defendant commenced the dissolution action solely in order to obtain that sum of money.

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.

Although neither party cites caselaw in support of its position, research reveals *839 Cliffside Ave. LLC v Deutsche Bank Ntl. Trust Co.*, whereby the federal Eastern District Court of

New York held that it is well-established that "an unclean [hands] defense requires a finding of bad faith." (2016 WL 5372804, *11 [Dist Ct, ED NY 2016]; *see also Wells Fargo Bank, N.A. v Hughes*, 27 Misc 3d 628 [Sup Ct, Erie County 2010] [plaintiff's bad faith conduct constituted unclean hands]; *cf* CPLR 8303-a [c][ii] [in actions to recover damages for personal injury, injury to property, or wrongful death, court may assess costs and fees against party who commences or continues action or claim "in bad faith without any reasonable in law or fact"]). Although the parties were alerted to *839 Cliffside Ave. LLC* at oral argument on the motion and have had an ample opportunity to address it, neither party has done so.

Plaintiff therefore establishes that defendant's commencement of the dissolution action, without having evidence to support his allegations and despite his unclean hands in engaging in the very conduct of which he accused plaintiff, constitutes bad faith, thereby triggering defendant's duty to indemnify plaintiff for its expenses incurred in defending itself in that action.

As plaintiff submits detailed invoices showing the expenses and fees incurred in support of its claim here, and as Michael does not contest the amount or relevancy of the invoices, plaintiff establishes that defendant must indemnify it in the amount of $80,848.04. However, as plaintiff was awarded costs and disbursements in the sum of $695 in the judgment dismissing the dissolution action, that amount is subtracted from the total sum sought by plaintiff.

III. MOTION FOR SUBSTITUTION

Absent opposition thereto, the motion to substitute is granted.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for substitution is granted, and Michael Liss, as Executor of the Estate of Robert Liss, deceased, is substituted as defendant in the above-entitled

action in the place and stead of the defendant, Robert Liss, without prejudice to any proceedings heretofore had herein; it is further

ORDERED, that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of Michael Liss, as Executor of the Estate of Robert Liss, deceased, as defendant in the place and stead of said decedent, without prejudice to the proceedings heretofore had herein; it is further

ORDERED, that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein; it is further

ORDERED, plaintiff's motion for summary judgment on its contractual indemnification claim against defendant is granted, and defendant must indemnify plaintiff for all costs and expenses, including attorney fees incurred in the 2006 dissolution action; it is further

ORDERED, that defendant's cross motion for summary judgment is denied; and it is further

ORDERED, that judgment is granted in favor of plaintiff as against Michael Liss, as Executor of the Estate of Robert Liss, in the sum of $80,153.04, and the clerk is directed to enter judgment accordingly.

20200508095119BJAFFE321B0B59CB66A4747AF3A7FC764A7D8E0

5/8/2020
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

SAGE SYSTEMS, INC., Plaintiff, -against- MICHAEL LISS, As the Executor of the Estate of Robert Liss, Defendant.	Index No. 650745/2010 **NOTICE OF ENTRY**

COUNSELORS:

PLEASE TAKE NOTICE, that the Judgment, dated August 18, 2020, of which the within is a true copy, was entered in the Office of the Clerk at the above-named Court on or about August 18, 2020.

Dated: New York, New York
September 1, 2020

Yours, etc.,

The Law Offices of Fred L. Seeman
By: Fred L. Seeman, Esq.
Attorneys for Plaintiff
32 Broadway, Suite 1214
New York, New York 10004
Tel: (212) 608-5000

To: Raimondi Law, P.C.
Attorneys for Defendant
552 Broadway
Massapequa, New York 11758
Tel: (516) 308-4462

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:

SAGE SYSTEMS, INC.	:	Index No.
	:	650745/2010
Plaintiff,	:	
	:	**JUDGMENT**
-against-	:	~~(Proposed)~~
	:	
MICHAEL LISS	:	
As Executor of the Estate of Robert Liss	:	
	:	
Defendant.	:	

WHEREAS, Plaintiff, Sage Systems, Inc., on August 29, 2019, filed a Motion for (i) summary judgment, pursuant to CPLR §3212, (ii) the issuance of a money judgment, and (iii) an Order substituting Michael Liss, as Executor of the Estate of Robert Liss, as the Defendant herein; and Defendant, on September 20, 2019, filed a Cross-Motion, for summary judgment, pursuant to CPLR §3212, to dismiss this action; and Plaintiff having filed an Affirmation in Opposition to Cross-Motion and in Further Support of Motion on October 17, 2019; and Defendant having filed a Memorandum in Further Support of Cross-Motion on October 30, 2019; and

WHEREAS, oral argument on Plaintiff's Motion and Defendant's Cross-Motion having been held before the Honorable Barbara Jaffe, J.S.C., on January 29, 2020; and

WHEREAS, by Decision and Order of the Honorable Barbara Jaffe, J.S.C., dated May 8, 2020, the Court denied Defendant's Cross-Motion for summary judgment and granted Plaintiff's motion to substitute the Defendant and for summary judgment and awarded a money judgment in favor of Plaintiff and against the Defendant in the amount of $80,153.04, and further ordered the Clerk of the Court to enter judgment accordingly in favor of Plaintiff and against Defendant; and

NOW, upon motion of the Law Offices of Fred L. Seeman, attorneys for Plaintiff, it is hereby:

ADJUDGED, that Plaintiff, Sage Systems, Inc., with an address located at 246 West 38th Street, New York, New York 10018, shall have judgment and recover against Defendant, Michael Liss, as Executor of the Estate of ~~Michael~~ **Robert** Liss, with an address 155 West 68th Street, Apt. 2022, New York, New York 10023, in the principal amount of $80,153.04, plus statutory costs and disbursements in X the amount of ~~$545.00~~ **$455.00**, amounting in all to the sum of ~~$80,698.04~~ **$80,608.04** and that the Plaintiff have execution thereof.

18 th Aug. 2020

Milton Adam Tingling
County Clerk

FILED
Aug 18 2020
NEW YORK
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:

SAGE SYSTEMS, INC.	:	Index No.
	:	650745/2010
Plaintiff,	:	
	:	**BILL OF COSTS**
-against-	:	
	:	
MICHAEL LISS	:	
As Executor of the Estate of Robert Liss	:	
	:	
Defendant.	:	

COSTS

Cost before Note of Issue - CPLR §8201(1)		$200.00
Cost after Note of Issue - CPLR §8201(2)		$ 0.00
Cost after Note of Issue - CPLR §8201(3)		$ 0.00
Allowance by statue - CPLR §8302(a)(b)		$ 0.00
First $200.00 at 10%	$0.00	
Next $800.00 at 5%	$0.00	
Next $2,000.00 at 2%	$0.00	
Next $5,000.00 at 1%	$0.00	
		$ 0.00
Additional allowance - CPLR §8302(d)		$ 0.00
Cost upon frivolous claims and counterclaims - CPLR §8303(a)		$ 0.00
		=====
Costs		$200.00

AUGUST 18 2020
I HEREBY CERTIFY THAT I HAVE
ADJUSTED THIS BILL OF COSTS AT
$455.00
Milton Adam Tarlow CLERK

FEES AND DISBURSEMENTS

Fee for Index Number - CPLR §8018(a)	$210.00	
Referees fees to compute - CPLR §8301(a)(1), CPLR §8003(a)	$ 0.00	
Commissioner's compensation CPLR §8301(a)(2)	$ 0.00	
Clerk's fee, filing notice of pend. or attach CPLR §8021(a)(10)	$ 0.00	
Entering and docketing Judgment CPLR §8301(a)(7), CPLR §8016(a)(2)	$ 0.00	
Paid for searches - CPLR §8301(a)(10)	$ 0.00	
Affidavits & acknowledgments CPLR §8009	$ 0.00	
Serving copy of Summons and Complaint - CPLR §8011(h)(1), CPLR §8301(d)	~~$ 90.00~~	
Request for Judicial Intervention	$ 0.00	
Note of Issue CPLR §8020(a)	$ 0.00	
Paid Referee's Report - CPLR §8301(a)(12)	$ 0.00	
Certified copies of papers - CPLR §8301(a)(4)	$ 0.00	
Satisfaction piece - CPLR §5020(a), CPLR §8021	$ 0.00	
Transcript and filing - CPLR §8021	$ 0.00	
Certified Copy of Judgment - CPLR §8021	$ 0.00	
Postage - CPLR §8301(a)(12)	$ 0.00	
Jury Fee - CPLR §8020(c)	$ 0.00	
Stenographers' Fee - CPLR §8002, CPLR §8301	$ 0.00	
Sheriff's Fee on execution - CPLR §8011, CPLR §8012	$ 0.00	
Sheriff's Fee, attachment, arrest, etc. - CPLR §8011	$ 0.00	
Paid printing cases - CPLR §8301(a)(6)	$ 0.00	
Clerk's Fees Court of Appeals - CPLR §8301(a)(12)	$ 0.00	
Paid copies of papers - CPLR §8016(a)(4)	$ 0.00	
Motion expenses - CPLR §8301(b)	$ 45.00	
Fees for publication - CPLR §8301(a)(3)	$ 0.00	
Serving Subpoena - CPLR §8011(h)1, CPLR §8301(d)	$ 0.00	
Paid for Search - CPLR §8301(a)(10)	$ 0.00	
Referee's Report	$ 0.00	
Attendance of Witness - CPLR §8001(a)(b)(c), CPLR §8301(a)(1)	$ 0.00	
	=====	
Disbursements	~~$345.00~~	**$255.00**
	========	
TOTAL	~~$545.00~~	**$455.00**

ATTORNEY'S AFFIRMATION

STATE OF NEW YORK }
} ss.:
COUNTY OF NEW YORK }

The undersigned, attorney admitted to practice in the Courts of this State, affirms: that I am an attorney with the Law Offices of Fred L. Seeman of record for the Plaintiff herein, and that the foregoing disbursements have been or will necessarily be made or incurred in this action and are reasonable in amount and that each of the persons named as witnesses attended as such witness on the trial, hearing or examination before trial herein in the number of days set opposite their names; that each of said persons resided the number of miles set opposite their names from the place of said trial, hearing or examination; and each of said persons, as such witness as aforesaid, necessarily traveled the number of miles so set opposite their names in traveling to, and the same distance in returning from, the same place of trial, hearing or examination; and that the copies of documents or papers as charged herein were actually and necessarily obtained for use.

The undersigned affirms that the foregoing statements are true under the penalties of perjury.

Dated: New York, New York
August 4, 2020

Law Offices of Fred L. Seeman
By: Fred L. Seeman, Esq.
Attorneys for Plaintiff
32 Broadway, Suite 1214
New York, New York 10004
Tel: (212) 608-5000

10 650745

Index No. 650745 Year 2010 RJI No. Hon.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SAGE SYSTEMS, INC.

Plaintiff,

-against-

MICHAEL LISS
As Executor of the Estate of Robert Liss

Defendant.

~~PROPOSED~~ JUDGMENT and BILL OF COSTS

FRED L. SEEMAN
ATTORNEY AT LAW
Attorney for *Plaintiff*
Office and Post Office Address, Telephone
32 BROADWAY, SUITE 1214
NEW YORK, NEW YORK 10004
TEL: (212) 608-5000
FAX: (212) 385-8161

1-1
FILED AND DOCKETED
Aug 18 2020
AT 02:20 P M
N.Y. CO. CLK'S OFFICE

To

Attorney(s) for

Compliance Pursuant to 22NYCRR § 130-1.1-a

To the best of the undersigned's knowledge, information and belief formed after an inquiry reasonable under the circumstances, the within document(s) and contentions contained herein are not frivolous as defined in 22NYCRR §130-1.1-a

Print name beneath Fred L. Seeman, Esq.

Service of a copy of the within is hereby admitted.

Dated,

Attorney(s) for

Please take notice

☐ NOTICE OF ENTRY

that the within is a (*certified*) true copy of a
duly entered in the office of the clerk of the within named court on

☐ NOTICE OF SETTLEMENT

that an order of which the within is a true copy will be presented for
settlement to the HON. one of the judges
of the within named court, at 1
on at M

Dated,

Yours, etc.

FRED L. SEEMAN

Index No. 650745 Year 2010 RJI No. Hon.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SAGE SYSTEMS, INC.

Plaintiff,

-against-

MICHAEL LISS,
As Executor of the Estate of Robert Liss

Defendant

NOTICE OF ENTRY

FRED L. SEEMAN
ATTORNEY AT LAW
Attorney for *Plaintiff*

Office and Post Office Address, Telephone
32 BROADWAY, SUITE 1214
NEW YORK, NEW YORK 10004
TEL: (212) 608-5000
FAX: (212) 385-8161

To

Attorney(s) for

Compliance Pursuant to 22NYCRR § 130-1.1-a

To the best of the undersigned's knowledge, information and belief formed after an inquiry reasonable under the circumstances, the within document(s) and contentions contained herein are not frivolous as defined in 22NYCRR §130-1.1-a

Print name beneath Fred L. Seeman

Service of a copy of the within is hereby admitted.

Dated,

.....
Attorney(s) for

Please take notice

☐ NOTICE OF ENTRY

that the within is a (*certified*) true copy of a
duly entered in the office of the clerk of the within named court on

☐ NOTICE OF SETTLEMENT

that an order of which the within is a true copy will be presented for
settlement to the HON. one of the judges
of the within named court, at
on at 1 M

Dated,

Yours, etc.
FRED L. SEEMAN

Exhibit D

SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES *Justice* PART 59

ROBERT LISS,

Plaintiff,

-v-

SAGE SYSTEMS, INC.,

Defendant.

Index No.: 100205/2006
Motion Date: 07/29/08
Motion Seq. No.: 001
Motion Cal. No.: _____

The following papers, numbered 1 to 4 were read on this motion for summary judgment dismissing the complaint that seeks dissolution and appointment of a receiver.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1
Answering Affidavits - Exhibits	2, 3
Replying Affidavits - Exhibits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

The court shall GRANT the motion of defendant Sage Systems, Inc. for summary judgment dismissing the complaint pursuant to CPLR 3212.

S-L Properties, a general partnership, owns the shares of stock allocated to the 10th floor unit of a commercial cooperative building ("Unit") and is the tenant under a Proprietary Lease for such Unit. On February 17, 1984, the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

plaintiff and defendant entered into a written partnership agreement of S-L Properties, which was amended on January 1, 1985. By its terms, the written agreement provides that the partnership should 'continue until December 31, 2024, unless sooner terminated pursuant to the provisions hereof." With respect to dissolution, the agreement provides, in pertinent part, that "The Partnership shall be dissolved and its business wound up upon the happening of any of the following events, whichever shall first occur:*** (d) when required by law."

New York Partnership Law § 63 states, in pertinent part, that "The court shall decree a dissolution. On application by or for a partner whenever: (c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business," (d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that is not reasonably practicable to carry on the business in partnership with him".

Plaintiff seeks a dissolution of the partnership and an appointment of a receiver based on the claims that (1) sometime in the year of 2004 and 2005, defendant sublet 90% of that portion of its portion of the Unit without the consent of the cooperative corporation, and that such sublet is in violation of the Proprietary Lease and Rider; and (2) that defendant has failed

to comply with lighting requirements of the NYC Building Code in the lobby area of the Unit and refused to correct same.

The defendant has established a prima facie defense entitling it to the dismissal of the plaintiff's complaint in that neither the Proprietary Lease nor any document referenced thereunder contains any condition with respect to subletting that requires one or more of the partners to remain in occupancy of at least 51% of the Unit. It argues that the statement in the Letter dated February 21, 1984, which is signed only by the then president of the cooperative corporation, does not constitute such "condition".

The court concurs with the defendant. The Letter, which forms the gravamen of plaintiff's complaint, does not constitute a condition of subletting because it was not "duly authorized by a resolution of the Directors, or given in writing by a majority of the Directors or by lessees owning 66 2/3 % of the issued shares of the cooperative corporation," as provided under the "Subletting" provisions of the Proprietary Lease Rider. The absence of any board action with respect to this "condition", though plaintiff has persisted in inviting the board to do so, is further evidence that no such condition has been duly authorized or given.

Moreover, plaintiff has unclean hands with respect to his demand for the equitable relief of dissolution. Plaintiff testified at an examination before trial on August 29, 2007 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 that 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 such Proprietary Lease provision. Such is also a concession by plaintiff that no more than 51% of the Unit is sublet, since his subleases "are not real".

Nor does plaintiff come forward with any evidence of any prejudice or lack of reasonable practicability of carrying out the partnership's business that the sublets pose or that defendant has placed the Partnership in violation of any local or state building codes.

Accordingly, it is

ORDERED that the motion of defendant SAGE SYSTEMS, INC. for summary judgment dismissing the Complaint, as a matter of law, is GRANTED; and it is further

ORDERED and ADJUDGED that Clerk shall enter judgment in favor of the defendant and against the plaintiff DISMISSING the complaint, and calculating statutory costs and disbursements to

be awarded to defendant SAGE SYSTEMS, INC. and assessed against plaintiff.

This is the decision and order of the court.

Dated: February 10, 2009 ENTER:

HON. DEBRA A. JAMES J.S.C.

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

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 June 3, 2021

deponent served the within: **Motion for Leave to Appeal**

upon:

THE LAW OFFICES OF FRED L. SEEMAN
Attorneys for Plaintiff-Respondent
32 Broadway, Suite 1214
New York, New York 10004
(212) 608-5000
fred@seemanlaw.com

the address(es) designated by said attorney(s) for that purpose by depositing **1** 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 June 3, 2021

MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Queens County
Commission Expires Apr. 20, 2025

Job# 305037