New York County Clerk's Index No.: 650745/2010
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.

AFFIRMATION IN OPPOSITION TO DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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Dated: June 18, 2021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), Plaintiff-Respondent, Sage Systems, Inc., hereby discloses that it does not have any corporate parents, subsidiaries or affiliates, except as follows: S-L Properties.

RELATED LITIGATION STATEMENT

Pursuant to Court of Appeals Rule 500.13(a), the status of related litigations remains the same as set forth in Defendant-Respondent's application.

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SAGE SYSTEMS, INC.,	:	**AFFIRMATION IN OPPOSITION TO DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO APPEAL PURSUANT TO CPLR 5602(a)(1)(i)**
Plaintiff-Respondent,	:	
-against-	:	
MICHAEL LISS, as Executor of the Estate of Robert Liss,	:	New York County Clerk Index No. 650745/2010
Defendant-Appellant.	:	App. Div., First Dept Case Nos. 2020-02671 & 2020-03659

Fred L. Seeman, an attorney duly admitted to practice law before the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am the attorney for the Plaintiff-Respondent, Sage Systems, Inc (hereinafter "Sage"). As such, I am fully familiar with the facts and circumstances herein.

2. I respectfully submit this Affirmation in opposition to the application of Defendant-Appellant, Michael Liss, as Executor of the Estate of Robert Liss (hereinafter the "Estate") for leave to appeal to the New York Court of Appeals from the Decision and Order, entered May 4, 2021, of the Appellate Division, First Department. *See, Estate's Exhibit "A"*.

3. In sum, the Estate's application should be denied inasmuch as the Appellate Division, First Department affirmed, by unanimous decision, the Motion Court's granting of summary judgment in favor of Sage, and the Estate has not identified any issue that merits the grant of leave to appeal to this Court.

BACKGROUND

4. In February, 1984, Sage and Robert Liss entered into a partnership agreement (the "Partnership Agreement") to create S-L Properties [R. 52-75]. [1]

5. In January, 2006, Robert Liss commenced a lawsuit against Sage, in New York County Supreme Court, entitled *Robert Liss v. Sage Systems, Inc., Index No. 100205/2006* (the "Dissolution Proceeding") [R 78-85].

6. In the Dissolution Proceeding, Robert Liss sought the judicial dissolution of S-L Properties.

7. By Decision and Order dated February 10, 2009 (the "Dissolution Order"), Hon. Debra A. James, J.S.C., granted Sage summary judgment dismissing the Dissolution Proceeding. [R. 86-90].

8. The Dissolution Order held that Robert Liss failed to present any evidence supporting his claim for judicial dissolution, and that such relief was sought with "unclean hands". [R. 89].

9. Robert Liss did not appeal the Dissolution Order.

10. In June, 2010, Sage commenced the instant action [R. 28-34] seeking indemnification from Robert Liss, pursuant to Section 13.02 of the Partnership Agreement, based upon Robert Liss' commencement of the Dissolution Proceeding which caused Sage to incur substantial legal fees. [R. 49; 93-122].

11. In August, 2019, Sage moved for summary judgment and to amend the caption to name "Michael Liss as Executor of the Estate of Robert Liss" as Defendant in the place of Robert Liss. [R. 43-122].

12. The Estate cross-moved for summary judgment on September 20, 2019. [R. 123-138].

13. By Decision and Order dated May 8, 2020, Hon. Barbara Jaffe, J.S.C., granted Sage's motion, in its entirety, and denied the Estate's motion, in its entirety. [R. 4-14].

14. Specifically, the Motion Court held that, because Robert Liss was found to have acted with unclean hands in the Dissolution Proceeding, such conduct constituted "bad faith, thereby triggering the [Robert Liss'] duty to indemnify [Sage]". [R. 13].

15. The Motion Court further held that the Partnership Agreement's indemnification provision "applies to direct claims between the partners, and defendant raises no triable issues in opposition". [R. 12].

16. Sage was subsequently awarded a money judgment against the Estate in the amount of $80,608.04 on August 18, 2020 (the "Money Judgment"). [R. 16-21].

17. On September 2, 2020, the Estate filed a Notice of Appeal from the Money Judgment. [R. 15].

18. On April 27, 2021, the Appellate Division, First Department (the "First Department") affirmed, by unanimous decision, the Money Judgment. *See, Defendant-Appellant's Exhibit "A".*

19. Notice of Entry of the First Department's Decision was filed on May 4, 2021. This application followed.

FIRST DEPARTMENT, PROPERLY HELD THAT THE PARTNERSHIP AGREEMENT'S INDEMNIFICATION PROVISION APPLIED TO DIRECT CLAIMS BETWEEN THE PARTIES AND INCLUDED THE RECOVERY OF ATTORNEYS' FEES

20. A motion for leave to appeal may be granted where "the issues are novel or of public importance, present a conflict with prior decisions of this court, or involve a conflict among the departments of the Appellate Division". *22 NYCRR §500.22(b)(4).*

21. Here, as the Estate concedes, the issues are not novel or of public importance, and do not involve a conflict among the Appellate Division departments.

22. The Estate therefore attempts to demonstrate that the First Department's Decision conflict's with this Court's prior decisions.

23. However, as set forth below, the Estate has failed to make such a showing, thereby warranting a denial of the Estate's application.

24. The Court of Appeals has broad discretion in deciding the cases that it places on its docket and may deny leave to appeal if the case "would have no significant import...[or] would not advance the law in the area in which

advancement is needed". *Matter of Seawright v. Board of Elections in the City of New York, 35 NY3d 227, 252 (2020).*

25. However, both the First Department, and the Motion Court, issued decisions grounded in controlling law that encapsulated well-entrenched legal precepts.

26. Specifically, the First Department's Decision properly held that, with respect to the Partnership Agreement's indemnification provision:

> 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 [the Estate'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]). See, Estate's Exhibit "A", p. 3.*

27. The Estate, in an attempt to demonstrate that the First Department's Decision conflicts with past Court of Appeals Decisions, merely rehashes the same arguments that were rejected first by the Motion Court and then again, by unanimous decision, by the First Department.

28. The overarching rule governing indemnification provisions is that broad, unlimited indemnification provisions, that are not specifically limited to third-party claims, will include claims between the parties. *Crossroads ABL LLC v. Canaras Capital Management, LLC, 105 AD3d 645 (1st Dept. 2013); Crown Wisteria, Inc. v. Cibani, 178 AD3d 524 (1st Dept. 2019).*

29. Moreover, such all-encompassing indemnification provisions will necessarily include claims for attorneys' fees. *Nigri v. Liberty Apparel Co., Inc., 76 AD3d*

842 (1st Dept. 2010); Breed Abbott & Morgan v. Hulko, 139 AD2d 71 (1st Dept. 1988) aff'd 74 NY2d 686 (1989).

30. The Estate, primarily relying upon *Hooper Assoc. v. AGS Computers, 74 NY2d 487 (1989)* and *Gotham Partners L.P. v. High River Ltd. Partnership, 76 AD3d 203 (1st Dept. 2010), lv. app. denied 17 NY3d 713 (2011)*, argues that parties are not entitled to recover attorneys' fees unless the indemnification provision specifically references attorneys' fees.

31. However, the Decision in *Hooper Assoc.* only applies to indemnification provisions that are limited in their application.

32. Specifically, the indemnification provision in *Hooper Assoc.* applied only to costs "arising out of breach of warranty claims, the performance of any service to be performed, the installation, operation and maintenance of the computer system, infringements of patents, copyrights or trademarks and the like". *Hooper Assoc. v. AGS Computers, 74 NY2d 487, 492 (1989).*

33. Inasmuch as *Hooper Assoc.* indemnification provision included restrictions that were not "exclusively or unequivocally referrable to claims between the parties themselves", then the parties' intent to include such direct claims was not "unmistakably clear". *Id.*

34. Here, by contrast, the Partnership Agreement's indemnification provision applied to "any and all claims, demands, liabilities, costs, damage, expenses and causes of action of any nature whatsoever". [R. 72].

35. Because the Partnership Agreement's indemnification provision contains no restrictions whatsoever, it is not subject to the scrutiny of *Hooper Assoc*.

36. Indeed, where, as here, "the parties chose to use highly inclusive language in their indemnification provision", direct claims between the parties will necessarily be included. *Crossroads ABL LLC v. Canaras Capital Management LLC, 105 AD3d 645, 646 (1st Dept. 2013).*

37. In other words, the parties' intent to include direct claims between them is evidenced by the complete lack of restrictions contained in the Partnership Agreement's indemnification provision.

38. Accordingly, *Hooper Assoc.* is not controlling, and the First Department's Decision is therefore not in conflict with *Hooper Assoc.*

39. The Estate cites no other precedent from the Court of Appeals in support of its argument that an indemnification provision must specifically reference direct claims between parties in order for such a claim to be viable.

40. Similarly, the Estate has failed to cite any authority from the Court of Appeals to support its argument that an indemnification provision must explicitly state that legal fees are included in order for a party to be indemnified for same.

41. In fact, the Court of Appeals has previously affirmed decisions that awarded legal fees pursuant to broadly worded indemnification clauses. *Breed v. Hulko, 139 AD2d 71 (1st Dept. 1988) aff'd 74 NY2d 686 (1989).*

42. Indeed, the Court in *Breed*, citing *Tyng v. American Surety Co., 174 NY 166 (1903)* and *Johnson v. General Mutual Insurance Co., 24 NY2d 42 (1969)*, held that "there is a long, uninterrupted line of decisions which have interpreted broadly worded indemnification clauses as embracing the right to reimbursement for counsel fees". *Id* at 74.

43. The Estate does not address this finding by the *Breed* Court.

44. The Estate has failed to cite any authority, either from the Appellate Division or the Court of Appeals, that support's the Estate's argument that an indemnification provision must reference attorneys' fees in order to allow a party to receive an award for such fees.

45. The fact that the indemnification clause in *Nigri v. Liberty Apparel Co., Inc., 76 AD3d 842 (1st Dept. 2010)* contained the words "attorney's fees" is of no moment as the holding did not state that the phrase was a requirement in order to be considered in an indemnification provision.

CONCLUSION

46. In closing, the Estate has failed to demonstrate how First Department's Decision is in conflict with controlling decisions of this Court.

47. Specifically, the sole Court of Appeals case cited by the Estate, *Hooper Assoc.*, is inapplicable to broad, unrestricted indemnification provisions such as the provision in the Partnership Agreement.

48. Moreover, the Court of Appeals has routinely awarded attorneys' fees based upon broadly worded indemnification provisions.

49. Accordingly, since there is no valid legal basis to grant leave to appeal, Sage respectfully requests that this Court deny the Estate's motion for leave to appeal to the Court of Appeals and assess costs against the Estate.

WHEREFORE, the Plaintiff-Respondent respectfully requests that the Defendant-Appellant's application be denied, in its entirety, together with such other relief as this Court deems just and proper.

Dated: New York, New York
June 18, 2021

Respectfully submitted;

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CERTIFICATION PURSUANT TO RULE 500.13(c)(1)

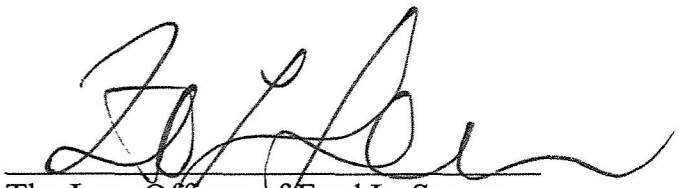
Fred L. Seeman, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms the following under penalty of perjury:

1. I am the attorney for the Plaintiff-Respondent herein. As such, I am fully familiar with the facts and circumstances as set forth below.

2. In compliance with Court of Appeals Rule 500.13(c)(1) the accompanying Affirmation, to which this certification is attached, contains 1,743 words.

3. I have relied upon the word count function of the word-processing systems used to prepare this Memorandum of Law.

Dated: New York, New York
June 18, 2021



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AFFIDAVIT OF SERVICE

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

Christian Mateo, being duly sworn, deposes and says: That he is not a party to the proceeding, is over 18 years old, and resides in Kings County .

That on the 18th Day of June, 2021, he serve three (3)copies of the within **AFFIRMATION IN OPPOSITION TO DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS** upon:

Raimondi Law, P.C.
Attorneys for Defendant-Appellant
552 Broadway
Massapequa, New York 11758

by **Federal Express** to the address designated above.

Christian Mateo

Sworn to before me this
18th day of June, 2021

Notary Public

JOSE A. TAVAREZ
Notary Public, State of New York
No. 01TA6202299
Qualified in Kings County
Commission Expires March 9, 2022 2025

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Index No. 650745 Year 2010 RJI No. Hon.
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AFFIRMATION IN OPPOSITION TO DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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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

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. 1 one of the judges
of the within named court, at
on at M

Dated,

Yours, etc.

FRED L. SEEMAN