SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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SAGE SYSTEMS, INC.,

Plaintiff,

- v -

ROBERT LISS,

Defendant.

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INDEX NO. 650745/2010

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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.

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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