

NEW YORK COURT OF APPEALS ROUNDUP

CONTRACT LANGUAGE ON ATTORNEY FEE RECOVERY MUST BE CLEARLY STATED

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After six years of leading the Court of Appeals and the New York State judicial system, Chief Judge Janet DiFiore stepped down as of Aug. 31, 2022. The six remaining judges on the Court of Appeals selected the Hon. Anthony Cannataro to serve as Acting Chief Judge until a successor is named by Gov. Kathy Hochul and confirmed by the State Senate. Much has been written about the ideological split among the six judges of the Court of Appeals, and how the governor's selection of a new Chief Judge will impact the Court's jurisprudence. Until then, the Court appears to be taking a measured approach. The Court has issued approximately a dozen decisions since Chief Judge DiFiore's resignation and in all but one of those decisions as of the date this column was drafted, the Court was unanimous in its voting and 5-1 in the remaining case.

In one of those unanimous decisions, the Court of Appeals ruled last month that language in a contract must be express and "unmistakably clear" in order to evince the parties' intent to indemnify each other for attorney fees in an action between the parties. In *Sage Sys. v. Liss*, a decision written by Judge Jenny Rivera, the Court determined that a contract's broad, unrestrictive indemnification language did not demonstrate sufficiently the parties' clear intent to provide attorney fees related to direct claims between them as opposed to third party claims.

Plaintiff Sage Systems and defendant Robert Liss entered into an agreement to form a partnership for the purpose of purchasing a commercial cooperative unit. See No. 650745/2010, 2020 WL 2302982 at *1 (N.Y. Sup. May 8, 2020). Pursuant to their contract:

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 interest 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.

Id. After Mr. Liss pursued unsuccessfully a partnership dissolution action, Sage commenced a separate case seeking reimbursement of its attorney fees and costs incurred in defending the dissolution action. The parties cross-moved for summary judgment, with Sage arguing that the provision quoted above provided for attorney fees and Mr. Liss arguing that it did not. Id. at *5. The trial court granted Sage's motion and ruled that the provision was broad enough to encompass attorney fees. Id. at *5, *6. The Appellate Division, First Department, affirmed and the Court of Appeals granted leave to appeal.

On appeal, Sage argued "that the indemnification provision's broad, unrestrictive language demonstrates the parties' clear intent to provide attorney fees related to direct claims between them" arising out of the contract.

The Court began its analysis by reminding us that pursuant to the American Rule, “attorney fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule.” The purpose of the rule is to increase access to the courts for those who may be discouraged from seeking judicial assistance out of fear that they may have to pay a defendant’s attorney fees if they lose. Having laid out the general standard, the court turned its attention to what it described as the courts’ duty to determine the intent of “vague fee-shifting language and broad indemnification provisions that do not explicitly allow for the prevailing party in an action between contracting parties to collect attorney fees.” The Court then cited three Appellate Division cases from the First, Second, and Fourth Departments where those courts attempted to do so and noted that “[t]o the extent that some of these decisions presume that broadly worded indemnification provisions by their nature are intended to cover attorney fees in direct party actions, they deviate from this Court’s exacting standard that the agreement must contain ‘unmistakably clear’ language of the parties’ intent to encompass such actions.”

The Court then turned to its opinion in *Hooper Assocs. v. AGS Computers*, 74 N.Y.2d 487 (1989). There, the plaintiff sought reimbursement for its attorney fees after successfully suing the defendant for breach of contract. *Id.* at 489. The plaintiff relied on an indemnity clause in the parties’ agreement requiring the defendant to pay for “reasonable counsel fees.” The *Hooper* Court rejected the plaintiff’s claim because the parties failed to sufficiently define the scope of the defendant’s promise. *Id.* at 492. According to the Court, because the parties were under no legal duty to indemnify, the indemnity clause must be strictly construed to avoid reading into the contract a duty which the parties did not intend to be assumed. See *id.* at 491-92. The Court concluded that the clause was a typical, broadly worded indemnity provision, which referred to subjects that give rise to third party claims as opposed to direct claims between the parties. *Id.* at 492. Because application of that indemnity agreement to direct actions between the contracting parties would be contrary to the American Rule, the Court instructed that courts “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.” *Id.*

In this case, the Court determined that the contractual provision at issue made no explicit mention that partners may recover attorney fees in a direct action between the parties and was even broader than the provision in *Hooper*, in that it expansively applies to all types of actions. The Court distinguished this situation from cases like *Breed, Abbott & Morgan v. Hulko*, 74 N.Y.2d 686 (1989), in which it was difficult to ascertain what the indemnification clause would cover other than attorney fees in suits between the parties. The Court ultimately held that “nothing in the provision nor the agreement as a whole makes ‘unmistakably clear’ that the parties intended to permit recovery for attorney fees in an action between them on the contract.” Accordingly, the Court reversed the summary judgment entered in favor of Sage Systems and granted Mr. Liss’s cross-motion for summary judgment.

The Court concluded with advice to the drafters of agreements that if they want to provide that the prevailing party is entitled to recover its attorney fees in an action between the parties, they need to include language making that expressly clear.

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