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

**PRESENT:** HON. BARBARA JAFFE **PART** 12
*Justice*

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ESTATE OF ROBERT LISS,

Plaintiff,

- v -

SAGE SYSTEMS, INC.,

Defendant.

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**INDEX NO.** 107019/10

**MOTION DATE**

**MOTION SEQ. NO.** 3

**DECISION AND ORDER**

By notice of motion, plaintiff moves pursuant to CPLR 3212 for an order granting it summary judgment on its claims for an accounting, breach of contract, and specific performance, dismissing defendant's counterclaims, and thereafter awarding it a judgment directing defendant to dissolve the parties' partnership, liquidate the partnership's assets, and distribute plaintiff's pro rata share of the proceeds; and dismissing the complaint in a related action commenced by defendant against plaintiff. Defendant opposes and, by notice of cross motion, moves for summary judgment on its counterclaims and for dismissal of plaintiff's claims. Plaintiff opposes the cross motion.

## I. PERTINENT BACKGROUND

On February 17, 1984, Robert Liss and defendant entered into a partnership agreement creating S-L Properties. The purpose of the partnership was to purchase 66 shares of stock in 246 West 38th Street Tenants Corp., allocated to the tenth floor in the commercial cooperative

building located there, to finance the acquisition of the unit, and to provide office space for the partners' business. The term of the partnership was to continue until December 31, 2024, unless terminated earlier under the agreement. (NYSCEF 73).

Pursuant to section 3.02(c) of the agreement, the partners are required to contribute "additional cash to the Partnership in proportion to their respective Partnership interests in the event the Partnership shall be required to pay any amounts due under any Building mortgage or any Unit mortgage in the nature of a balloon principal payment." (*Id.*).

The agreement also provides that the partnership must be dissolved upon the death of a partner, as follows:

> Section 12.02. Termination. (a) In the case of a dissolution of the Partnership [due to a partner's death], the Surviving Partner shall have the option to purchase the Partnership Interest of the Defaulting Partner in accordance with the provisions of Section 11.01(a), and the Partnership shall be liquidated upon the closing of said purchase. In the event the Surviving Partner shall not elect to purchase, the provisions of subsection (b) below shall apply.

(*Id.*).

Pursuant to Section 11.01(a), the purchasing partner must provide written notice to the other partner, and the closing shall occur within 30 days thereafter. The purchase price must equal the fixed price, that being the product of (i) the sum of (y) $112,500 increased by a factor of six percent per year from the date of the agreement to the date of notice, and (z) any amounts contributed to the partnership by the partners on account of (aa) the renovation plan and (bb) any building or unit mortgage, all increased by a factor of six percent per year from the date of the contribution to the date of notice, and (ii) the partnership interest of the offering partner. (*Id.*).

All notices were to be sent to Robert Liss at 767 Lexington Avenue in Manhattan, and it was agreed that any "delay or omission in the exercise of any power, remedy or right herein provided or otherwise available" to a partner or the partnership would not impair or affect the

right to exercise the same. An indemnification provision is included by which the partners agree to indemnify each other from all claims arising out of the agreement, unless the acts or omissions at issue were taken in good faith and reasonably believed to be in the partnership's best interests and the partner's scope of authority granted to it, and did not constitute fraud, bad faith, willful misconduct or negligence. (*Id.*).

Before his death on February 2, 2011, Robert Liss commenced this action in 2010 against defendant for breaching the partnership agreement by, among other things, refusing to allow him to inspect the partnership's books and records and failing to provide him with proper distributions. On June 20, 2011, letters testamentary were issued to Michael Liss (NYSCEF 95), and by decision and order dated March 14, 2015, the pleadings were amended to substitute the Estate as plaintiff (NYSCEF 21). The action is for an accounting, breach of contract, specific performance, and compensatory, consequential, incidental, and punitive damages, along with attorney fees, interest, costs, and disbursements. (NYSCEF 70). By amended verified answer, defendant interposes counterclaims for specific performance, breach of contract, a preliminary injunction, and contractual indemnification. (NYSCEF 71).

On or about June 23, 2010, defendant commenced a lawsuit against Robert Liss under index number 650745/10 (second action), asserting a claim for contractual indemnification, arising from a proceeding that Liss had commenced in 2006 in which he sought judicial dissolution of the partnership. The 2006 action was dismissed in 2009 on defendant's motion for summary judgment. The trial court found that Liss had "unclean hands with respect to his demand for the equitable relief of dissolution." Defendant thus seeks to recover approximately $300,000 in costs, damages, and expenses related the 2006 proceeding. (NYSCEF 79).

By letter dated March 31, 2011, defendant's attorney notified plaintiff's attorney of defendant's intent to purchase Liss's partnership interest, and set forth a calculation of the fixed price including, as pertinent here, $112,500 as the amount of the unit mortgage paid plus interest from February 17, 1988 to March 31, 2011. (NYSCEF 77).

## II. CONTENTIONS

Plaintiff asserts that defendant did not give Liss notice of its intent to purchase his interest as required by the agreement, and that even if it did, it was untimely. It maintains that defendant failed to distribute properly partnership funds when the co-op refunded $48,884.18 to the partnership after the building was refinanced in 2008, and argues that defendant's calculation of the fixed price is inaccurate as it does not account for the mortgage monthly interest payments that the parties contributed from 1984 to 1998, and does not include the parties' contributions toward the building mortgage, or a correct calculation of the fixed price as pertinent records are incomplete or missing. Given defendant's failure to comply with the conditions precedent for purchasing Liss's interest, plaintiff maintains that the counterclaims must be dismissed, and that the second action must be dismissed pursuant to CPLR 3211(a)(4) as duplicative and/or encompassed by the instant one. (NYSCEF 83).

As pertinent here, defendant argues that pursuant to section 3.02 of the agreement, the partners are required only to contribute toward the building or unit mortgage as set forth therein, and it denies any partnership contribution to the building mortgage as the co-op has continuously refinanced it and a principal payment has not yet become due, whereas the partners contributed toward the unit mortgage in the sum of two principal payments of $112,500. (NYSCEF 107).

## III. ANALYSIS

### A. Defendant's purchase of Liss's interest

Given the no-waiver provision in the agreement, defendant's alleged failure to give proper notice of its intent to purchase Liss's partnership interest or to close timely is irrelevant to whether it is entitled to purchase Liss's interest upon his death. (*See e.g., Morgan Stanley Cap. Partners III, L.P. v J.C. Flowers II L.P.*, 92 AD3d 443 [1st Dept 2012], *lv denied* 19 NY3d 803 [defendant did not waive right to terminate agreement despite lapse of deadline to do so, given clause in agreement that no failure or delay by any party in exercising right, power, or privilege under agreement would be waiver]).

At issue is the proper method of calculating the purchase price of Liss's interest in the partnership, or the correct fixed price amount and, in particular, what must be included in "any amounts contributed to the partnership by the partners on account of . . . any building or unit mortgage."

Adopting defendant's interpretation essentially requires that instead of permitting the inclusion of "any" amounts contributed, only "the" amount paid for the unit mortgage would be included. As the provision at issue contains no such qualification but contains the broad and inclusionary term "any," defendant's attempt to restrict the meaning of the phrase fails. There is also nothing to indicate that the parties intended to qualify the dissolution provision by section 3.02, i.e., that they intended that the fixed price calculation include only the contribution to the building or unit mortgage mentioned therein. Thus, absent any evidence that the parties intended to limit the phrase "any amounts" in any way, plaintiff's interpretation is more logical in terms of that portion of the provision.

However, the "any amounts" part of the provision is modified by the requirement that it include sums "contributed to the partnership by the partners." While it is undisputed that the partners contributed monthly with pro rata contributions to the partnership for the co-op's monthly maintenance fees, those fees were paid to the co-op, not to the partnership. Viewing the entire fixed price formula as a whole, it is clear that the parties intended that in order for one partner to buy out the other, the buyer would have to reimburse the other for what was put into or toward the partnership. It is also undisputed that the partners contributed nothing to the partnership for a building mortgage except for the amount of $112,5000 for a balloon mortgage as part of the initial purchase price. (NYSCEF 122).

Plaintiff thus fails to establish that the fixed price formula promoted by defendant is incorrect, or that its interpretation is the correct one.

B. Defendant's counterclaims

Defendant does not oppose dismissal of its second and third counterclaims. Given the finding that defendant did not waive its right to buy out Liss's partnership interest (*supra*, II.A), defendant is entitled to an order directing plaintiff to sell the interest to it and to dissolve the partnership. Plaintiff sets forth no legal basis for dismissal; defendant does not establish entitlement to judgment on its remaining counterclaims.

C. Dismissal of the second action

The contractual indemnification claim at issue in the second action is not identical to that in issue here. In any event, no authority is offered demonstrating that it is procedurally proper to seek dismissal of the other action by moving for dismissal of it in this action.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is denied except as to dismissal of defendant's counterclaims for breach of contract and a preliminary injunction; it is further

ORDERED, that defendant's cross motion for summary judgment is granted to the extent of granting it judgment on its counterclaim for specific performance, and is otherwise denied; and it is further

ORDERED, that the parties are directed to submit a proposed order and judgment in accordance with this decision and order regarding the procedure for the sale and dissolution.

8/22/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
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