

New York Commercial Division Round-Up

Posted at 3:56 PM on September 8, 2010 by Sheppard Mullin

[New York Remains Inhospitable To Claims For Attorneys' Fees By Indemnified Parties, Absent Explicit Language In Indemnification Agreement To The Contrary](#)

By Jane Qin

In *Gotham Partners, L.P. v. High River, L.P.*, Index No. 602582/04 (App. Div. 1st Dep't July 20, 2010) ("*Gotham Partners*"), Judge Saxe held that the indemnification clause in a purchase contract did not permit a seller to recover attorneys' fees from a buyer after the seller successfully sued for breach of contract, concluding that the language of the indemnification clause fell short of satisfying the exacting "unmistakable intent" standard set forth by the Court of Appeals in *Hooper Assoc., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487 (1989) ("*Hooper*"). The ruling reversed the decision of Judge Bransten of the Commercial Division granting summary judgment to the seller. *Gotham Partners, L.P. v. High River L.P.*, Index No. 602582/04 (Sup Ct, NY County, January 5, 2009).

Relevant Background

The underlying dispute arose when plaintiffs Gotham Partners, L.P., and certain of its affiliates ("Gotham") and defendant High River Limited Partnership ("High River") entered into a purchase agreement ("Purchase Agreement") under which High River purchased shares of a real estate partnership, Hallwood Realty Partners, L.P. ("Hallwood") from Gotham. The Purchase Agreement provided for a \$18.8 million purchase price, and required High River to pay Gotham an additional purchase price if it sold or transferred its Hallwood units within 36 months. Within 36 months, High River sold its interest in Hallwood for cash pursuant to a merger. Gotham sued High River for breach of contract and prevailed.

Gotham then sought an award for attorney's fees and expenses of \$736,839.28 incurred in suing High River, citing the indemnification clause of the contract. The indemnification clause stated, in relevant part:

- (a) [High River] agrees to indemnify and hold [Gotham] harmless from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, charges,

expenses and disbursements (including reasonable fees and expenses of counsel) which may at any time be imposed on, incurred by or asserted against [Gotham], as a result of any action taken by (or failure to act of) [High River] following the execution and delivery of [the Purchase Agreement] with respect to, or associated or in connection with, [Hallwood] or [High River]'s interests [in Hallwood]...*(provided, that for avoidance of doubt, such obligation of [High River] shall not arise out of the entry of the parties into this Agreement or any breach by [Gotham] of any of [its] representations, warranties, covenants or agreements hereunder)*...

Commercial Division Decision

In the Commercial Division, Judge Bransten found that the “for avoidance of doubt” provision of the indemnification clause specifically only excluded two narrow categories of claims from indemnification by High River: (i) losses that arose out of the entry of the parties into the Purchase Agreement, and (ii) losses that arose out of any breach of the Purchase Agreement by Gotham. Judge Bransten reasoned this language made it unmistakably clear that the parties intended for High River to indemnify party and third-party losses caused by High River’s breach, so long as the obligation did not relate to the entry into the Purchase Agreement itself.

The Appellate Division Decision

The Appellate Division disagreed. Judge Saxe held that the indemnification clause, like the one considered by the Court of Appeals in *Hooper*, was framed in language typical of those which contemplate reimbursement only when the indemnitee is required to pay damages on a *third-party* claim. Nowhere in the indemnification clause in the Purchase Agreement was it *clearly* stated that expenses incurred by Gotham as a result of High River’s breach of the parties contract would be covered.

While the court recognized that Judge Bransten’s interpretation of the clause was not irrational, it held that *Hooper*’s strict standard requires more than “merely an arguable inference of what the parties must have meant.” Instead, “the intention to authorize an award of fees to the prevailing parties must be virtually inescapable.”

Judge Saxe further noted that the Purchase Agreement itself established that the parties were well aware of how to frame an enforceable provision creating an entitlement to prevailing party attorneys’ fees, because a later provision in the Purchase Agreement constituted an unmistakable, unequivocal prevailing party attorneys’ fees provision in favor of High River.

Implications and Conclusion

As Judge Saxe notes in *Gotham Partners*, New York has been distinctly inhospitable to claims for prevailing party attorneys’ fees under indemnification clauses. Other New York courts have

also found the high standard of *Hooper* was not met where the indemnification provision did not refer specifically to attorneys' fees arising out of actions between the parties to the contract. *See, e.g., Bridgestone/Firestone Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 21 (2d Cir. 1996); *Digital Broadcasting Corp. v. Ladenburg Thalman & Co.*, 49 A.D. 3d 412, 852 N.Y.S.2d 349 (1st Dep't 2008).

Gotham Partners highlights the importance of ensuring that the language of indemnification clauses unequivocally expresses the intention of the contracting parties. If the parties intend for the clause to cover claims for attorneys' fees incurred during disputes between them, the indemnification clause must explicitly say so.

For further information, please contact Jane Qin at (212) 634-3093.