

<b>Boxer v Lee</b>
2017 NY Slip Op 32550(U)
November 30, 2017
Supreme Court, New York County
Docket Number: 652206/2014
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

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STEVEN BOXER, and THE STEVEN BOXER 2013  
IRREVOCABLE TRUST F/B/O LAUREN BOXER,

Index No.: 652206/2014

Plaintiffs,

**DECISION & ORDER**

-against-

DAVID LEE,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiffs Steven Boxer and the Steven Boxer 2013 Irrevocable Trust f/b/o Lauren Boxer (the Trust) move, pursuant to CPLR 3215, for a default judgment against defendant David Lee.

Plaintiffs' motion is granted in part and denied in part, on default, for the reasons that follow.

*I. Factual Background & Procedural History*

This case concerns contractual agreements pursuant to which Lee sold, and Boxer acquired, ownership interests in Dave 60 NYC Inc. (Dave 60)—a New York corporation formed to own and operate a Manhattan restaurant called “Philippe by Philippe Chow”—and certain related “Philippe” restaurant businesses. Dkt. 1 (Compl.) ¶¶ 4-6, 8-10; 74 (Boxer Aff.) ¶¶ 1, 3.<sup>1</sup> The Trust, of which Boxer’s brother, Garry Boxer, is the trustee, was formed to hold the shares of Dave 60 sold to Boxer. It remains a shareholder in Dave 60, which is a member of the limited liability company that owns the original Philippe restaurant in Manhattan, the only Philippe

<sup>1</sup> References to “Dkt.” followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). All citations are to the pdf pagination on NYSCEF.

restaurant still open. *Id.* ¶¶ 1, 12; Boxer Aff. ¶ 1.<sup>2</sup> Plaintiffs seek indemnification for expenses incurred by Dave 60, including legal fees and settlement payments, which arose from claims that accrued prior to Boxer's acquisition of an interest in Dave 60, but that were paid thereafter. Boxer Aff. ¶ 3. Boxer and Lee are New York residents. Compl. ¶¶ 1-2. In support of their motion for default judgment, plaintiffs submit the affirmation of their attorney, Lawrence Hirsch, which attests to Lee's default, and an affidavit from Boxer that sets forth the facts in support of their claims and the basis for the indemnification amounts sought. Dkt. 64 (Hirsch Aff.) ¶¶ 2-8; Boxer Aff. ¶¶ 2-10.

On October 28, 2011, Lee and Boxer entered into a sale agreement (the Sale Agreement) pursuant to which Lee sold to Boxer his ownership interest in three Philippe restaurants located in Jericho, New York, Miami Beach, Florida, and Boca Raton, Florida (the Philippe Entities). Dkt. 7 (Sale Agreement) at 1-3. Boxer paid a purchase price of \$585,000. *Id.* ¶ 2. On the same day, Lee and Boxer also executed redemption and subscription agreements with Dave 60, pursuant to which Dave 60 redeemed Lee's shareholding interest therein and Boxer acquired, for a purchase price of \$1,665,000, a portion of Lee's shares. *See id.* at 2; Dkt. 25 (Redemption & Subscription Agreements). Dave 60 owned and operated the original Philippe restaurant in Manhattan and was the licensor of two other Philippe restaurants in Mexico City and Los Angeles. Sale Agreement at 1. As defined in the Sale Agreement, the three restaurants under the Dave 60 umbrella (New York, Mexico City, Los Angeles) along with the three Philippe Entities (Jericho, Miami, Boca) together comprised the "Philippe Restaurants." *Id.*

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<sup>2</sup> On September 30, 2013, Boxer, as grantor, conveyed his shares of Dave 60 to the Trust. *See* Compl. ¶ 15; Dkt. 84 (K-1 returns showing plaintiffs' percentage ownership of Dave 60 for years in question).

At the time of the Sale Agreement's execution, Dave 60 was defending against an action in federal court for trademark infringement (the Mr. Chow Litigation), and a claim in New York State Supreme Court for unpaid construction costs (the Polteam Litigation). *Id.* at 1-2; *see* Dkt. 77 (Mr. Chow Judgment.), 79 (Polteam Settlement). Dave 60 was also the subject of an ongoing New York State Department of Labor (DOL) investigation, begun in 2010, into allegations that it had violated the wage and hour laws by failing to pay minimum wages and overtime to its kitchen workers between 2005 and 2010. *See* Dkt. 17 (DOL Claim Letter). The Sale Agreement acknowledged the Mr. Chow Litigation and Polteam Litigation, but did not mention the pending DOL investigation. *See* Sale Agreement at 1-2.

Under Section 6 of the Sale Agreement, Lee represented and warranted that:

Other than the Mr. Chow Litigation and Polteam Litigation, there is no litigation, arbitration, proceeding, investigation, judgment, order, or decree pending, or to the knowledge of [Lee], threatened against any Philippe Entity or *Philippe Restaurant* or any officer, director or key employee, or by or before any public body, agency, or authority, which has or may have a materially adverse effect on the financial condition of any Philippe Entity or *Philippe Restaurant* or the *Business*.<sup>3</sup>

Sale Agreement ¶ 6.4 (emphasis added). Lee further represented and warranted that:

To [Lee's] knowledge, there are no labor disputes of a material nature pending between any Philippe Entity or *Philippe Restaurant* and any of its employees . . . . In connection with the Business, each Philippe Entity and *Philippe Restaurant* has, to his knowledge, complied in all material respects with all laws relating to the employment of labor, including any provisions thereof relating to wages, hours, collective bargaining and the payment of social security and other taxes, and is not liable for any material arrearages of wages or any taxes or penalties for failure to comply with any of the foregoing.

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<sup>3</sup> The Sale Agreement states that "the Philippe Entities and Dave 60 NYC are engaged in the business (the 'Business') of operating the Philippe Restaurants and granting licenses to operate [Philippe] restaurant[s] . . . ." Sale Agreement at 2.

¶ 6.9 (emphasis added). Section 8 of the Sale Agreement provided for the survival of Lee's representations and warranties. ¶ 8.

Pursuant to Section 9 of the Sale Agreement, Lee agreed to indemnify Boxer and his assignees for a variety of damages and claims arising on or prior to the October 28, 2011 closing date of the agreement, including:

[A]ny and all damages, liabilities, obligation, losses, deficiencies, costs, expenses, fines, judgments, settlement payments and any other amounts, and any claims, actions or causes of action and encumbrances suffered, sustained, incurred, arising, or resulting from any and all misrepresentations or breaches of any warranty, representation, covenant, provision or term of this Agreement . . . whether known or unknown or contingent . . . or relating in any way whatsoever to the Business, any Philippe Entity or any Philippe Restaurant during the period on or prior to the Closing, whether known, unknown or contingent . . . or resulting in any way whatsoever from the Mr. Chow Litigation or Polteam Litigation.<sup>4</sup>

¶¶ 9.1.2; 9.1.3; 9.1.5. Lee also agreed to indemnify Boxer and his assignees for the reasonable costs and expenses, including legal fees, incident to "any and all actions, suits, proceedings, claims, demands, assessments or judgments in respect of the matter for which [Boxer or his assignee] is indemnified" under the first five subsections of Section 9. ¶ 9.1.6.

After closing the Sale Agreement, Dave 60 incurred costs and expenses with respect to six claims (the Indemnified Claims) that accrued prior to the October 28, 2011 closing date. In 2012, judgment was entered against Dave 60 in the Mr. Chow Litigation in the amount of \$520,451. Dkt. 77 (Mr. Chow Judgment). To satisfy the judgment after appeal, Dave 60 discharged a bond, so that the adjusted amount of the judgment was \$572,496.10. Boxer Aff. ¶

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<sup>4</sup> Also on October 28, 2011, Lee and Boxer executed a separate Guaranty and Indemnification Agreement (the Guaranty Agreement) pursuant to which Lee agreed to a personal guarantee and certain indemnification with respect to the Mr. Chow Litigation and the Polteam Litigation. See Dkt. 9 (Guaranty Agreement).

5(i); Dkt. 78 (Letter from Bonding Company). Also in 2012, Dave 60 settled the Polteam Litigation for \$150,000. Boxer Aff. ¶ 5(ii); Dkt. 79 (Polteam Settlement).

In 2013, Dave 60 reached a \$1,150,000 settlement in an action commenced in June 2012 by “front of house” employees that sought damages, under the Fair Labor Standards Act (FLSA), for unpaid wages and related acts during the period from 2006 to 2010 (the Atlas Litigation). See Dkt. 18 (Atlas Compl.) ¶¶ 16-23; Boxer Aff. ¶ 5(iv); Dkt. 81 at 26-52 (Atlas Settlement Agreement). A second FLSA action, brought in May 2013, sought damages for unpaid wages stemming from the period from 2007 to 2012 (the Gu Litigation). See Dkt. 19 (Gu Compl.) ¶¶ 19-20. Dave 60 settled the Gu Litigation in 2014 for \$100,000. Boxer Aff. ¶ 5(v); Dkt. 82 at 18-25 (Gu Settlement Agreement).

The DOL investigation that began in 2010 resulted in a 2013 claim for violations of the wage and hour laws (the DOL Claim). See Dkt. 17 (DOL Claim Letter). In 2015 and 2016, Dave 60 paid \$153,855, plus an additional \$29,000 in legal fees, to settle the claim. Boxer Aff. ¶ 5(iii); Dkt. 80 (DOL Claim Settlement Stip. & Fees Spreadsheet). Finally, in 2015, Dave 60 settled a claim by the New York City Department of Finance for past due corporate income taxes, some of which were attributable to the period prior to the closing of the Sale Agreement (the Tax Claim), for a sum of \$353,855.04. Boxer Aff. ¶¶ 5(vi), 9; Dkt. 83 (Dept. of Finance Letter & Payment Schedule).

On July 18, 2014, plaintiffs commenced this action to enforce the indemnification provisions of the Sale Agreement, asserting causes of action for: (1) breach of the representations and warranty and indemnification provisions of the Sale Agreement; (2) declaratory judgment for indemnification under the Sale Agreement and the Guaranty Agreement; (3) Fraud; and (4)

breach of the indemnification provisions of the Guaranty Agreement. *See* Dkt. 1 (Compl.) ¶¶ 20-41. They alleged, as relevant here, that Lee's representations and warranties in subsections 6.4 and 6.9 of the Sale Agreement were false when made, citing the pendency of the DOL investigation since 2010, and sought indemnification, pursuant to subsections 9.1.2 and 9.1.3, for expenses, including legal fees, incurred by Dave 60 with respect to the Indemnified Claims. *Id.* ¶¶ 7, 13, 18-24, 26; *see* Dkt. 33 (12/16/14 Tr.) at 4-6. They further alleged that, by letter dated July 7, 2014, they specifically demanded indemnification for these claims, but that Lee did not respond and thereby refused any such indemnification. Compl. ¶ 19. Lee was served with the complaint, and filed his answer on December 26, 2014.<sup>5</sup> Dkt. 2 (Aff. of Service), 34 (Answer).

On September 12, 2016, Lee's attorney, Michael Romano, moved to withdraw as counsel. Dkt. 56. On October 7, 2016, the court granted Romano's motion to withdraw, stayed further proceedings for a period of thirty days to allow Lee to retain new counsel, and ordered the parties to appear for a conference on November 18, 2016. Dkt. 61 (Oct. 7 Order). Lee was served with a copy of the court's October 7 order, but nevertheless failed to appear himself or through new counsel at the November 18, 2016 conference. *See* Dkt. 60 (Aff. of Service), 62 (Nov. 18 Order). Plaintiffs filed the instant motion for default judgment on July 28, 2017. Dkt. 63. Lee was provided additional service as required by CPLR 3215(g)(1) and (3), but did not respond to the motion. Dkt. 71 & 86 (Proof of Service).

## II. *The Present Motion*

Plaintiffs request judgment awarding them damages based on the amount paid by Dave 60 with respect to each of the Indemnified Claims multiplied by each plaintiff's percentage

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<sup>5</sup> Lee filed a pre-answer motion to dismiss that was granted as to the complaint's third cause of

ownership interest in Dave 60 in the year in which payment was made. Plaintiffs have submitted K-1 returns filed between 2012 and 2015 to demonstrate each plaintiff's percentage ownership of Dave 60 during the relevant period (Dkt. 84), which can be summarized as follows: in 2012, Boxer held a 25% interest; in 2013, Boxer held a 20.136745% interest and the Trust held a 4.862955% interest; from 2014 to the present, Boxer no longer held any interest individually and the Trust held a 35.713918% interest.

Plaintiffs ask that damages be calculated based on the evidence attached to the Boxer Affidavit, as well as on the determinations of a special referee in a related action, *Steven L. Kantor and the Steven L. Kantor Trust F/B/O Children v. Michael Reda*, Index No. 150839/2015 (the Kantor Action), which was consolidated with this case for the purposes of discovery. See Dkt. 40 (order listing index numbers for both actions); Hirsch Aff. ¶¶ 9-10. The Kantor Action was brought against Michael Reda, Lee's partner in the underlying Philippe restaurant business, who sold his interest in Dave 60 to Kantor in May 2011, just a few months before the sale by Lee to Boxer. See Kantor Dkt. 17 (Kantor Compl.).<sup>6</sup> It involved a virtually identical sale agreement, indemnification provisions, and representations and warranties, and sought indemnification for the same set of Indemnified Claims at issue in this case. See *id.* ¶¶ 7, 13, 16-19; Kantor Dkt. 7 (Kantor Sale Agreement) ¶¶ 5.6 & 5.14 (representations and warranties), 12.1.2, 12.1.3, 12.1.5, 12.1.6 (indemnification provisions). The court granted a default application in the Kantor Action and referred that case to a special referee to hear and determine damages. See Kantor Dkt. 75 (Kantor Referee Order) at 1. The special referee calculated damages with respect to each of the

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action alleging fraud, but was otherwise denied. Dkt. 3 (Notice of Mot.), 32 (Order).

<sup>6</sup> References to "Kantor Dkt." followed by a number refer to documents filed on NYSCEF in the Kantor Action, Index No. 150839/2015. All citations are to the pdf pagination on NYSCEF.



Indemnified Claims. *Id.* 4-6. With one exception, discussed below, plaintiffs' evidence and damages calculations mirror the determinations of the special referee in the Kantor Action.

*Compare id.*, with Boxer Aff. ¶ 9.

### III. Discussion

To succeed on a motion for a default judgment, plaintiffs must submit proof of service of process and affidavits attesting to the default and the facts constituting the claim. CPLR 3215(f). A defaulting defendant "admits all traversable allegations in the complaint, including the basic allegation of liability." *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 (1984); see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 (2003) ("[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them."). Nonetheless, a defendant's default does not "give rise to a 'mandatory ministerial duty' to enter a default judgment against it. Rather, the [plaintiff is] required to demonstrate that [it] at least [has] a viable cause of action." *Resnick v Lebovitz*, 28 AD3d 533, 534 (2d Dept 2006) (citation omitted); see *Guzetti v City of New York*, 32 AD3d 234, 235 (1st Dept 2006) (McGuire, J., concurring). "The standard of proof is not stringent, amounting only to some firsthand confirmation of the facts." *Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994) (citations omitted); see *Whittemore v Yeo*, 117 AD3d 544, 545 (1st Dept 2014).

#### A. Indemnification Claims

The elements of a breach of contract are a valid contract, plaintiff's performance, defendant's breach, and damages therefrom. See *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 (1st Dept 2007). Plaintiffs have submitted the Sale and Guaranty Agreements, and they aver facts, supported by documentary evidence, sufficient to show the validity of both agreements,

their performance thereunder, and Lee's breach. Based on Boxer's affidavit, the effective admissions of Lee on default, and the evidence submitted with respect to the Indemnified Claims, the court finds that Lee breached the Sale Agreement by falsely representing and warranting that the Mr. Chow Litigation and Polteam Litigation were the only potential liabilities pending against Dave 60, and breached both the Sale Agreement and the Guaranty Agreement by refusing to indemnify plaintiffs for the Indemnified Claims, all of which are encompassed by the various indemnification provisions of those agreements.

The evidence submitted and the determinations of the special referee in the Kantor Action demonstrate the following with respect to the Indemnified Claims:

1. *Mr. Chow Litigation*

In 2012, Dave 60 paid the judgment in the Mr. Chow Litigation in the adjusted amount of \$572,496.10. Boxer Aff. ¶ 5(i); Dkt. 77 (Mr. Chow Judgment), 78 (Letter from Bonding Company); Kantor Referee Order at 4. Boxer's share of this amount, based on his 25% ownership interest in Dave 60 at that time, was \$143,124.03.

2. *Polteam Litigation*

Also in 2012, Dave 60 settled the Polteam Litigation for \$150,000; \$100,000 was paid that year, and the remaining \$50,000, plus \$183 in interest, was paid in 2013. Boxer Aff. ¶¶ 5(ii), 9; Dkt. 79 (Polteam Settlement); Kantor Referee Order at 4.<sup>7</sup> Based on their percentage ownership, Boxer's damages were \$25,000 in 2012 and \$10,105.22 in 2013; the Trust's damages were \$2,440.38 in 2013.

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<sup>7</sup> The special referee's order erroneously states that the Polteam Litigation was settled for \$100,000. However, this is evidently a scribner's error, as the referee's actual damages

### 3. *Atlas Litigation*

The Atlas Litigation was settled for \$1,150,000, which was paid out between 2013 and 2015. Boxer Aff. ¶¶ 5(iv), 9; Dkt. 81 at 26-126 (Atlas Settlement Agreement & Proof of Payment)<sup>8</sup>; Kantor Referee Order at 4-5. The payments made in 2013 totaled \$160,440.86, resulting in damages of \$32,307.57 to Boxer, and \$7,802.17 to the Trust. The payments made in 2014 and 2015 totaled \$989,896.32, resulting in damages to the Trust of \$353,530.76.<sup>9</sup>

The damages sought with respect to the Atlas settlement payments made in 2014 and 2015 are the lone instance in which plaintiffs' calculations diverge from the determinations of the special referee in the Kantor Action. The special referee did not state a total amount for the Atlas settlement payments made in these years, but by working backward from the referee's ultimate damages determination it can be deduced that the sum the referee arrived at was \$825,977.52, rather than the \$989,896.32 claimed by the plaintiffs here.<sup>10</sup> Plaintiffs nowhere acknowledge this difference, and the reasons for the discrepancy are unclear. However, the payment total claimed by plaintiffs is substantiated by the documentary evidence. Plaintiffs submit payroll journals demonstrating that Dave 60 made settlement payments to the individual

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calculation, based on the Kantor plaintiffs' ownership interests for the years in question, is consistent with the correct settlement sum of \$150,000. *See* Kantor Referee Order at 4.

<sup>8</sup> The last eight pages of the Payroll Journal, showing payments made pursuant to the Atlas Settlement, appear twice. *Compare* Dkt. 81 at 119-126, *with id.* at 127-134.

<sup>9</sup> The table in paragraph nine of the Boxer Affidavit correctly states the amount of the non-legal fee portion of the 2015 Atlas Settlement payment (\$163,918.80), as well as the Trust's ownership interest for that year (35.713918%), but miscalculates the Trust's resulting damages. The table states damages of \$57,673.06, but the correct amount of damages should be \$58,541.83 ( $\$163,918.80 \times .35713918$ ).

<sup>10</sup> The special referee in the Kantor Action found that, for 2014 and 2015, the Kantor Trust sustained damages of \$353,992.39, based on its 42.857388% ownership interest in Dave 60. Kantor Referee Order at 5.  $\$353,992.39$  divided by  $.42857388$  equals  $\$825,977.52$ .

Atlas plaintiffs that, when combined with the legal fee payments agreed to in the Atlas settlement agreement, equal the claimed total of \$989,896.32. *See* Dkt. 81 at 32-34, 76-126. Moreover, combined with the 2013 payments totaling \$160,440.86 (the same 2013 total was found by the special referee in the Kantor Action), plaintiffs' claimed payment total for 2014 and 2015 yields an aggregate settlement payment of \$1,150,337.18, which conforms to the agreed-upon \$1,150,000 settlement amount. *See id.* at 32 ¶ 9. The \$825,977.52 payment total for 2014/2015 apparently reached by the special referee falls short of the agreed-upon \$1,150,000 settlement total by more than \$163,000.<sup>11</sup>

#### 4. *Gu Litigation*

The Gu Litigation was settled in 2014 for \$100,000. Boxer Aff. ¶ 5(v); Dkt. 82 at 18-36 (Gu Settlement Agreement & Proof of Payment); Kantor Referee Order at 5. The resulting damage to the Trust, based on its 35.713918% ownership interest in Dave 60 for that year, was \$35,713.92.

#### 5. *Government Claims*

In 2015 and 2016, Dave 60 paid \$153,855, plus \$29,000 in associated legal fees, to settle the DOL Claim. Boxer Aff. ¶¶ 5(iii), 9; Dkt. 80 (DOL Claim Settlement Stip. & Fees

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<sup>11</sup> The difference between the \$989,896.32 payment total for 2014/2015 claimed by plaintiffs and the \$825,977.52 payment total apparently used by the special referee is \$163,918.80. This is the exact amount of the non-legal fee portion of the 2015 Atlas settlement payment claimed by plaintiffs and substantiated by the payroll journals attached to the Boxer Affidavit. *See* Boxer Aff. ¶ 9; Dkt. 81 at 114-126 (payroll journals for 2015 payments). It therefore appears that the special referee in the Kantor Action may have correctly determined the 2014 payment total (\$742,422.24), but only accounted for the legal fees due in 2015 (\$83,555.28) without also accounting for the final \$163,918.80 payment due to the individual Atlas plaintiffs (\$742,422.24 + \$83,555.28 = \$825,977.52).

Spreadsheet); Kantor Referee Order at 5. Accordingly, the Trust's damages were \$54,947.65 with respect to the settlement amount, and \$10,357.04 with respect to the associated legal fees.

Additionally, in 2015, Dave 60 settled the Tax Claim for \$353,855.04, of which \$42,944 was attributable to the period prior to the closing of the Sale Agreement. Boxer Aff. ¶¶ 5(vi), 9; Dkt. 83 (Letter from Dept. of Finance & Payment Schedule); Kantor Referee Order at 5-6. The Trust's liability for this tax was \$15,336.98.<sup>12</sup>

Accordingly, the motion for default judgment as to plaintiffs' breach of contract claims is granted. Based on the evidence submitted and the determinations of the special referee in the Kantor Action, Boxer is entitled to judgment in the amount of \$210,536.82, and the Trust is entitled to judgment in the amount of \$480,128.90.<sup>13</sup>

*B. Remainder of Motion*

The motion is denied with respect to plaintiffs' declaratory judgment cause of action. A declaratory judgment is inappropriate where a breach of contract action is available. *See Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 (1st Dept 1988).

Similarly, plaintiffs' request for attorneys' fees and expenses is denied. *See Hirsch Aff.* ¶¶ 11-14. "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., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 (1989). "The

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<sup>12</sup> Here again, the table in paragraph nine of the Boxer Affidavit correctly states the amount of the 2015 payment on the Tax Claim (\$42,944), as well as the Trust's ownership interest for that year (35.713918%), but miscalculates the Trust's resulting damages. The table states damages of \$18,404.67, but the correct amount of damages should be \$15,336.98 ( $\$42,944 \times .35713918$ ).

<sup>13</sup> As already noted, the table in paragraph nine of the Boxer Affidavit contains a pair of calculation errors related to the total amount of the judgment sought by the Trust. Accounting

promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances.” *Id.* at 491-92.

Plaintiffs assert that they are entitled to attorneys’ fees under subsection 9.1.6 of the Sale Agreement. Under that provision, Lee agreed to indemnify Boxer and his assignees for:

The reasonable costs and expenses incident to any and all actions, suits, proceedings, claims, demands, assessments or judgments *in respect of the matter for which [Boxer or his assignee] is indemnified under [the preceding indemnification subsections]*, including legal and accounting fees, expenses and disbursements.

Sale Agreement ¶ 9.1.6 (emphasis added). Subsection 9.1.6 provides for the indemnification of legal fees incurred in connection with a matter for which indemnification is provided by the preceding subsections of section 9. Those subsections relate to potential third-party claims arising from events preceding the Sale Agreement. *See* Sale Agreement ¶¶ 9.1.1-9.1.5. Neither subsection 9.1.6 nor the preceding subsections unambiguously refer to claims between Lee and Boxer (or his assignees), or support an inference that Lee agreed to pay for counsel fees in an action on the Sale Agreement itself. As such, plaintiffs are not entitled to indemnification for attorneys’ fees incurred in connection with this action. Accordingly, it is

ORDERED that plaintiffs’ motion for a default judgment is granted to the extent set forth above, and the Clerk is directed to enter judgment in favor of plaintiff Steven Boxer and against defendant, David Lee, in the amount of \$210,536.82, with interest at the rate of 9% per annum from the date of July 18, 2014, until entry of judgment, and thereafter at the statutory rate, together with taxable costs, as calculated by the Clerk; and it is further

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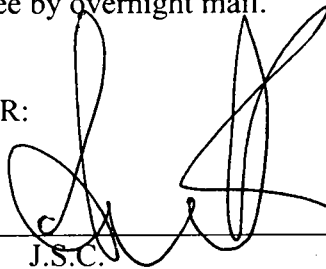
for these miscalculations, the total amount of the judgment sought by the Trust should be \$480,128.90, rather than the stated total of \$482,327.82.

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff Steven Boxer 2013 Irrevocable Trust f/b/o Lauren Boxer and against defendant, David Lee, in the amount of \$480,128.90, with interest at the rate of 9% per annum from the date of July 18, 2014, until entry of judgment, and thereafter at the statutory rate, together with taxable costs, as calculated by the Clerk; and it is further

ORDERED that within 10 days of the entry of this order on NYSCEF, plaintiffs shall serve a copy of this order with notice of entry on Lee by overnight mail.

Dated: November 30, 2017

ENTER:



C  
J.S.C.

**SHIRLEY WERNER KORNREICH  
J.S.C.**