2017 IL App (1st) 162600

THIRD DIVISION
November 1, 2017

No. 1-16- 2600

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JONES LANG LASALLE MIDWEST, LLC, Plaintiff and Counterdefendant-Appellee and Cross-Appellant, v. LANZATECH, INC., Defendant, Counterplaintiff and Third-Party plaintiff-Appellant and Cross-Appellee, (Jones Lang Lasalle Americas, Inc., Third-Party Defendant-Appellee and Cross-Appellant.)	)	Appeal from the Circuit Court of Cook County. No. 2014 L 006069 The Honorable Margaret A. Brennan Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly entered judgment on the jury's verdict awarding plaintiff $205,485 for breach of contract and properly ordered defendant to pay attorney fees pursuant to a contractual fee-shifting provision. The court abused its discretion, however, by reducing the award of fees to reflect a holdback agreement between plaintiff, third-party defendant and their counsel.

¶ 2 This appeal arises from contractual disputes between LanzaTech, Inc. (LanzaTech) and two related entities: Jones Lang LaSalle Midwest, LLC (JLL Midwest) and, its parent company, Jones Lang LaSalle Americas, Inc. (JLL Americas) (collectively the JLL parties). Specifically, JLL Midwest commenced this action against LanzaTech for breaching the parties' exclusive agency agreement for real estate brokerage services (brokerage agreement). In turn, LanzaTech filed a counterclaim against JLL Midwest for tortious interference with its lease negotiations and sought relief against JLL Americas, which, according to LanzaTech, breached their incentive advisory services contract (incentive contract) by providing confidential information to JLL Midwest. The trial court entered a directed verdict against LanzaTech on its claims and a jury awarded JLL Midwest $205,485 for breach of contract. The trial court subsequently entered judgment on the verdict and awarded the JLL parties attorney fees and costs pursuant to their respective contracts with LanzaTech. All parties now appeal.

¶ 3 On appeal, LanzaTech asserts that because the jury awarded JLL Midwest $205,485 as nominal damages, the award must be reduced to $1. JLL Midwest responds that the jury's award should be upheld as an award of actual damages. Additionally, LanzaTech asserts that its contract with JLL Americas lacked a requisite fee-shifting provision and, thus, JLL Americas was not entitled to attorney fees. Pursuant to their cross-appeal, the JLL parties contend that the trial court improperly reduced their award of attorney fees to reflect an agreement that the JLL parties would not pay counsel 15% of the fees incurred unless they prevailed at trial and were awarded attorney fees. We reverse and remand for the trial court to award the JLL parties the full amount of attorney fees, and we affirm the judgment in all other respects.

¶ 4 I. BACKGROUND

¶ 5 A. The Dispute

¶ 6 LanzaTech is a biotech company focused on converting industrial waste into sustainable energy. In July 2012, LanzaTech began searching for a new global headquarters in Illinois. To that end, LanzaTech entered into a brokerage agreement with JLL Midwest.

¶ 7 The agreement stated that JLL Midwest would be LanzaTech's sole and exclusive real estate agent relative to the potential relocation of LanzaTech's headquarters. The agreement also stated that LanzaTech would refer all inquiries to JLL Midwest and that neither LanzaTech nor JLL Midwest would deal with any other brokers entitled to compensation. Additionally, the brokerage agreement contained an indemnity clause and a separate fee-shifting provision. Each party would indemnify the other for any and all losses, liabilities and damages arising from any action in connection with the brokerage agreement and, in the event of litigation between the parties, reasonable attorney fee and disbursements would be paid to the prevailing party.

¶ 8 In furtherance of relocating to Illinois, LanzaTech also entered into the aforementioned incentive contract with JLL Americas, which took the form of a signed letter. Pursuant to that contract, JLL Americas would negotiate and commission economic incentives from the State of Illinois for LanzaTech to move its headquarters here. Additionally, the incentive contract provided that JLL Americas would not disclose any confidential information delivered to JLL Americas by LanzaTech. The contract also included the following indemnification clause:

> "[LanzaTech] shall indemnify, defend and hold JLL [Americas] *** harmless from and against any and all claims, demands, causes of action, losses, damages, fines, penalties, liabilities, costs and expenses (*including without limitation attorneys' fees and court costs*) to which any of the JLL Indemnities may become liable or subject by reason of or *arising out of* the performance or nonperformance of JLL's duties and *activities within the scope of this Letter*." (Emphases added.)

Almost 18 months later, LanzaTech signed a 10-year, 3-month lease with FC Skokie PQ, LLC (Forest City) for a property in Skokie, Illinois (the Skokie property), which contained 41,097 rentable square feet. Forest City's broker was David Saad of CBRE, Inc. (CBRE). LanzaTech, however, did not inform Forest City that JLL Midwest was LanzaTech's broker, taking the position that the Skokie property was not within the scope of their brokerage agreement. Consequently, JLL Midwest did not receive a commission. JLL Midwest then filed this action against LanzaTech, alleging that it breached the brokerage agreement by engaging with an outside broker, CBRE, to reach an agreement with Forest City and by failing to see that JLL Midwest received its brokerage commission fee. JLL Midwest sought indemnification, including attorney fees.

¶ 9 LanzaTech generally denied the allegations and raised several affirmative defenses. Specifically, LanzaTech maintained that it had considered the Skokie property before contracting with JLL Midwest and that the property was excluded from the brokerage agreement. LanzaTech also denied working with another broker. Additionally, LanzaTech asserted that JLL Midwest abandoned its brokerage services in April 2013, breached the brokerage agreement by failing to perform services after that time and waived the right to commission on the Skokie property by failing to include it in the brokerage agreement. As counterclaims against JLL Midwest, LanzaTech asserted that it tortiously interfered with LanzaTech's reasonable expectations of economic advantage during lease negotiations when JLL Midwest sent Forest City a letter demanding commission for the Skokie property lease. LanzaTech also sought indemnification.

¶ 10 In its third-party complaint, LanzaTech alleged that JLL Americas breached the incentive contract by informing JLL Midwest of LanzaTech's intent to lease the Skokie property. LanzaTech sought indemnification for all resulting loss and expense. JLL Americas responded

with a counterclaim seeking indemnification from LanzaTech for all attorney fees, costs and expenses pertaining to this litigation.

¶ 11 B. The Trial

¶ 12 The parties then proceeded to a jury trial regarding the parties' claims surrounding the Skokie property lease, leaving the matter of attorney fees and costs for the trial court to resolve. At trial, LanzaTech represented, through the testimony of its chief executive officer, Dr. Jennifer Holmgren, that the Skokie property was not included in the brokerage agreement. The cross-examination of Dr. Holmgren effectively illustrated, however, that nothing in the written brokerage agreement excluded that property. The evidence was conflicting as to whether CBRE was acting as a dual agent for the Skokie property.

¶ 13 With respect to damages, JLL Midwest presented the testimony of Jeffrey Liljeberg, a JLL Midwest tenant representation broker, who essentially testified that the market rate for commissions was $1.25 per square foot, per year of the lease term. JLL Midwest also presented the testimony of Robert Bradley Chodos, Sr., a tenant representation broker for the commercial real estate firm Newmark Grubb Knight Frank, who similarly testified that the market rate for commissions in the Chicagoland area was $1.25 per square foot, per year of the lease term. Chodos testified that under that rate, JLL Midwest’s damages amounted to $526,533.

¶ 14 LanzaTech presented the testimony of Saad, the CBRE broker for Forest City, and Michael Farley, a representative of Forest City. They confirmed that the agreement between CBRE and Forest City entitled CBRE to $0.50 per rentable square foot if co-brokers are involved. Specifically, Farley testified that while he paid CBRE $1 per square foot, he would have paid only $0.50 per square foot if there had been another broker involved. Additionally, he would have paid CBRE $1.50 had it been representing both landlord and tenant. Farley indicated

that he had paid more than the amounts spelled out in that agreement on only one occasion. Saad testified that based on CBRE's brokerage agreement with Forest City, it would have been paid $205,485.00 if LanzaTech used a tenant broker such as JLL Midwest. At the close of evidence, the trial court entered directed verdicts against LanzaTech with respect to its claims against the JLL parties, leaving only the question of LanzaTech's liability for breach of contract.

¶ 15 C. The Verdict

¶ 16 The jury was tendered two general verdict forms, Verdict Form 1.A and Verdict Form 1.B, accompanied by ten questions. These questions somewhat conformed to the pattern verdict form questions found in the Illinois Pattern Jury Instructions. Ill. Pattern Jury Instr.-Civil 700.01V, 700.07V, 700.13V. While the parties and the court equivocated before deliberations as to whether those questions were in the nature of special interrogatories or something else, it appears that by the end of their discussions, it was decided that the questions did not constitute special interrogatories. Counsel for LanzaTech represented, "they're actually not special interrogatories" and counsel for JLL Midwest expressed her preference that the questions be submitted "in the verdict form," rather than as special interrogatories. The court appears to have proceeded on the understanding that the questions did not constitute special interrogatories.

¶ 17 The jury was asked, among other things, "Did JLL Midwest prove it sustained damages resulting from LanzaTech's breach?" Additionally, "Did JLL Midwest present evidence from which you can determine the fair and reasonable value of its damages?" The jury responded yes to the former and no to the latter. Furthermore, the jury answered yes when asked the following inverse question: "Did JLL Midwest prove it sustained damages, but fail to present evidence from which you can determine the fair and reasonable value of its damages?" Upon answering

yes, the jury was instructed to "go to Verdict Form 1.A at the end of this verdict, insert the amount of nominal damages, such as a $1.00, and sign it."

¶ 18 Verdict form 1.A stated that the jury found in favor of JLL Midwest and against LanzaTech. It also allowed the jury to fill in the amount of damages: "We award JLL Midwest damages in the amount of $____." The form itself did not specify whether the jury was purporting to award actual or nominal damages. The jury entered damages in the amount of "$205,485."

¶ 19 In LanzaTech's posttrial motion, it asserted that the trial court was required to reduce the award to $1 or order a new trial because $205,485 was an inappropriate amount of nominal damages. In addition, LanzaTech argued that a reduction in the damages award was necessary because JLL Midwest "did not prove it was entitled to actual damages at trial." LanzaTech has failed to include in our record on appeal, however, JLL Midwest's response, LanzaTech's reply and any related transcript. *Schacht v. Lome*, 2016 IL App (1st) 141931, ¶ 35 (recognizing that appellants have the burden of providing a complete record, in absence of which, we presume the trial court acted in conformity with the law). That being said, in a later pleading, JLL Midwest disputed LanzaTech's representation that the jury had intended to award nominal, rather than actual, damages. The trial court subsequently denied LanzaTech's posttrial motion.

¶ 20 The trial court found that with interest, the jury verdict awarded $255,680 to JLL Midwest. The court also awarded the JLL parties attorney fees, expenses, costs and interest incurred during the litigation in the amount of $945,046.71. In calculating this sum, the trial court considered that during litigation, the JLL parties and their attorneys agreed that 15% of attorney fees incurred from that point on would not be paid unless the JLL parties prevailed. As a

result, the court reduced the award of attorney fees to reflect the 15% holdback. The court's order stated, "the Court will not pass the 15% onto LanzaTech simply because LanzaTech lost."

¶ 21 II. ANALYSIS

¶ 22 A. Damages

¶ 23 On appeal, LanzaTech asserts that the trial court improperly entered judgment on the jury's verdict awarding JLL Midwest $205,485 in nominal damages because that amount of nominal damages is impermissible as a matter of law. *In re Estate of Halas*, 209 Ill. App. 3d 333, 349 (1991) (stating that only nominal damages are recoverable where the party demonstrates a right to damages but fails to prove them); see also *Department of Transportation v. Bolis*, 313 Ill. App. 3d 982, 988 (2000) (stating that nominal damages are to be a trifling sum). Additionally, LanzaTech contends that the court's duty to reduce nominal damages presents a different matter from the court's discretion to remit excessive damages.

¶ 24 In response, JLL Midwest does not dispute that $205,485 would be an inappropriate amount of nominal damages. Instead, JLL Midwest asserts that the jury clearly awarded it $205,485 in *actual* damages. See Black's Law Dictionary 10th ed. (2010), damages (defining "actual damages" as "an amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual loses. — Also termed *compensatory damages*" and defining "compensatory damages" as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered"). JLL Midwest essentially asserts that the verdict contained an error in form, not substance.

¶ 25 i. Forfeiture

¶ 26 As a threshold matter, however, JLL Midwest argues that LanzaTech forfeited this issue by not raising any defect in the jury's verdict and findings before the trial court dismissed the

jury. See *Eckel v. O'Keefe*, 254 Ill. App. 3d 702 (1993) (finding that the plaintiff's failure to object to an incomplete verdict form before dismissal of the jury would constitute forfeiture); *Richter v. Northwestern Memorial Hospital*, 177 Ill. App. 3d 247, 255 (1988) (Where the defendant hospital allowed the jury to be discharged before damages were apportioned, the defendant led the court to believe that apportionment was no longer important.)

¶ 27 We agree that the better practice would have been to bring any defect in the jury's verdict to the court's attention when the defect first became apparent to LanzaTech. The court read the verdict and answers to the accompanying questions aloud. At that point, it was clear that the jury's determination suffered from some defect, whether in form or substance; yet, LanzaTech raised no objection. Although both parties declined to have the jury polled, JLL Midwest may have decided otherwise had LanzaTech raised its objection. See *Cretton v. Protestant Memorial Medical Center, Inc.*, 371 Ill. App. 3d 841, 853-54 (2007) (finding the court did not err in denying a motion for a mistrial based on an article related to the case where the defendant failed to ask the court to poll the jury). Moreover, the court could have directed the jury to reconsider. *Roth v. Meeker*, 72 Ill. App. 3d 66, 72 (1979) (stating that a trial court may direct a jury to reconsider inconsistent verdicts before discharging the jury). As this court has stated, "[a] jury's finding does not become a verdict until it is accepted by the court and entered of record and until the jury is discharged the finding is within their control and may be changed by them." *Id*. at 73. LanzaTech's inaction deprived the court of a valuable opportunity to cure any defect in the jury's findings.

¶ 28 JLL Midwest also asserts that LanzaTech failed to raise this issue in a posttrial motion. The posttrial motion asserted that the jury findings and verdict were improperly granted because JLL Midwest did not prove actual damages at trial, but the jury went on to award JLL Midwest

$205,485 in nominal damages, which LanzaTech argued was excessive. Yet, LanzaTech's motion cited case law pertaining to the discretionary reduction of damages, leaving it unclear that LanzaTech was raising a mandatory matter. Posttrial motions require specificity in order to preserve a matter for review. *Bank of Illinois v. Thweatt*, 258 Ill. App. 3d 349, 363 (1994). Forfeiture aside, we find no error.

¶ 29 ii. The Issue

¶ 30 This dispute, *i.e.*, whether the jury awarded nominal or actual damages, centers on the questions submitted to the jury. Specifically, the record reveals that the parties and the trial court were under the impression below that the questions were part of the verdict forms themselves, not special interrogatories. LanzaTech now suggests otherwise. In addition, the interpretation of the jury's answers to these questions could potentially be governed by different legal principles and case law depending on the nature of these questions. Yet, the parties bring little clarity as to how the verdict questions are to be treated. They have cited no case law specifying whether questions attached to a verdict form, such as those included in Illinois' pattern verdict forms, constitute special interrogatories or merely constitute components of the verdict form itself. Ill. S. Ct. R. 341(h) (7) (eff. Oct. 1, 2017) (stating that argument must contain the appellant's contentions, reasons therefore and citations to legal authority). In any event, we find LanzaTech's suggestion that the questions constitute special interrogatories to be disingenuous. When discussing these questions in the trial court, LanzaTech's counsel said, "Actually, they're not special interrogatories." We are not persuaded by LanzaTech's attempt to take an inconsistent position on appeal.[1] See *Grillo v. Yeager Construction*, 387 Ill. App. 3d 577, 593 (2008) (stating that parties cannot take a position on appeal that is inconsistent with its position

[1] Under either scenario, we would affirm the trial court's judgment.

in the trial court); see also *Gaffney v. Board of Trustees of the Orland Fire Protection District*, 2012 IL 110012, ¶ 33 (stating that the invited error doctrine prohibits parties from asking the court to proceed in one manner and then asserting on appeal that the requested action constitutes error).

¶ 31 The parties also dispute the nature of LanzaTech's challenge to the jury's award. According to JLL Midwest, LanzaTech essentially argues that a jury verdict awarding $205,485 in actual damages would be inconsistent with its finding that JLL Midwest failed to present evidence of the fair and reasonable value of its damages and, thus, the jury must have awarded $205,485 as nominal damages, notwithstanding that this was inconsistent with the instruction to award nominal damages such as $1. LanzaTech disagrees, maintaining that the jury's determination was consistent but legally erroneous.

¶ 32 In *Redmond v. Socha*, 216 Ill. 2d 622 (2005), our supreme court stated that under Illinois case law, "a single verdict is alleged to be internally inconsistent *** where the damages awarded are not reasonably related to the liability found." *Id*. at 643. Here, LanzaTech is essentially arguing that the jury's award of $205,485 is inconsistent with the liability found, *i.e.*, that no fair and reasonable amount of actual damages were proven, and, thus, the jury must have awarded JLL Midwest $205,485 in nominal damages, which would be excessive and contrary to the jury instructions. Accordingly, we find that LanzaTech is challenging an inconsistency in the verdict. See also *Corpus v. Bennett*, 430 F.3d 912, 915 (8th Cir. 2005) (addressing the appellant's contention "that the jury's award of substantial 'nominal' damages on the special verdict form was inconsistent with its special finding of no direct injury").

¶ 33 iii. Inconsistencies in Verdicts

¶ 34 We consider *de novo* the legal question of whether a verdict is inconsistent. See *Rodriguez v. Northeast Illinois Regional Commuter R.R. Corp.,* 2012 IL App (1st) 102953, ¶ 48. Courts "exercise all reasonable presumptions in favor of the verdict or verdicts, which will not be found legally inconsistent unless absolutely irreconcilable; further, the verdict or verdicts will not be considered irreconcilably inconsistent if supported by any reasonable hypothesis." *Redmond,* 216 Ill. 2d at 643-44. In determining whether a reasonable hypothesis exists, this court has examined the parties' theories, the jury instructions and the evidence. See, e.g., *Rodriguez,* 2012 IL App (1st) 102953, ¶ 52; see also *Simmons v. Garces*, 198 Ill. 2d 541, 556, 561 (2001) (considering the evidence and the parties' theories in determining whether the jury verdict and answer to a special interrogatory were irreconcilable).

¶ 35 Here, the verdict is not irreconcilably inconsistent, as a reasonable hypothesis supports the jury's determinations. Contrary to LanzaTech's suggestion, the jury could have been confused by the verdict forms and attached questions, particularly when examined in light of the evidence and arguments presented. Upon finding that JLL Midwest sustained actual damages, the jury was asked, "Did JLL Midwest present evidence from which you can determine the fair and reasonable value of its damages?" The jury answered no and was essentially asked a duplicative inverse of the question, which the jury answered consistently.[2]

¶ 36 During closing argument, counsel for JLL Midwest argued as follows:

> "[T]he amount of damages, Mr. Chodos, expert witness got up on the witness stand, has 30 years in the business, very distinguished member of this profession. *** He testified that the market rate for tenant commissions, which is what the agreement said that we would be entitled to, was $1.25 per square foot, times the amount of square feet,

[2] The jury answered yes when asked, "Did JLL Midwest prove it sustained damages, but fail to present evidence from which you can determine the fair and reasonable value of its damages?"

> times the term of the lease. And in this case, that amount comes out to $526,555.31 That's the commission we lost out on because of LanzaTech's breach."

Counsel further stated, "you're going to get a jury verdict form and its going to ask you several questions, and I'm going to tell what you [*sic*] those questions are and how I think based on the evidence, how I think those questions should be answered." Counsel argued:

> "And did JLL Midwest present evidence from which you could determine the fair and reasonable value of its damages?
>
> Clearly, yes. The testimony of Mr. Chodos was clear yet, uncontradicted testimony. So there's going to be a place for you to fill in the amount of the damage at the end, and it says, the value of the contract that JLL Midwest proved and should've received if LanzaTech had not breached the contract is, and the value you should put in there is $526,555.31."

Accordingly, the jurors may have understood the aforementioned question, and its inverse, as inquiring whether the jurors accepted JLL Midwest's theory of damages, as testified to by Chodos. That understanding would not prevent the jury from determining that the evidence presented a different basis for determining a fair and reasonable amount of damages and that JLL Midwest sustained actual damages in a different amount.

¶ 37 The jury could have concluded from Farley's testimony that under any scenario involving a lease of the Skokie property, CBRE would be Forest City's broker and, consequently, JLL Midwest would never have been the lone broker in the transaction. Additionally, Farley indicated that he paid co-brokers $ 0.50 per square foot. The jury could have also concluded that this reflected the standard market rate, and that, consequently, Farley would have paid JLL Midwest that amount. Liljeberg himself testified that "[t]he market [rate] is what landlords are willing to

pay." Additionally, Saad testified that at that rate, CBRE would have been paid $205,485 for the lease. The jury may have understood from those witnesses' testimony that had Farley known of JLL Midwest's involvement, Farley similarly would have paid JLL Midwest $205,485, the exact amount of the jury's verdict. See also *Rodriguez*, 2012 IL App (1st) 102953, ¶ 53 (finding no inconsistency where the jury's award matched the estimates of the defendant's expert witness). Thus, the jury's award of damages was not unrelated to the actual harm sustained by JLL Midwest. See Restatement (Second) Torts § 907 (1979) (stating that nominal damages are granted irrespective of the harm to the complainant).

¶ 38 To the extent LanzaTech's reply brief suggests that the evidence did not support a finding of actual damages in the amount entered, this presents a separate, albeit related, legal question, for which LanzaTech has failed to develop a cohesive argument with citation to legal authority. *Rodriguez*, 2012 IL App (1st) 102593, ¶ 48 (stating that whether verdicts are legally inconsistent presents a separate question from whether the verdict was against the manifest weight of the evidence); see also Ill. S. Ct. R. 341(h) (7) (eff. Oct. 1, 2017). Accordingly, that contention is forfeited. *Gakuba v. Kurtz*, 2015 IL App (2d) 140252, ¶ 19; see also *Farrell by Scheel v. Farrell*, 2016 IL App (3d) 160220, ¶ 16 (stating that appellants forfeit an issue by failing to include it in their opening brief).

¶ 39 Finally, assuming that JLL Midwest proved it sustained damages but failed to present evidence from which the jury could determine the fair and reasonable value of its damages, the jury was instructed to award nominal damages. The instruction following the question gave the jury an example of $1, but did not define "nominal damages." No instruction tendered to the jury did. While the jury generally found in favor of JLL Midwest in the amount of $205,485 on

Verdict Form 1.A, that form did not specify whether such sum represented an award of actual or nominal damages.

¶ 40 Here, the record shows that a reasonable hypothesis exists to explain why the jury awarded JLL Midwest $205,485 in damages, despite finding that JLL Midwest did not present "evidence from which you can determine the fair and reasonable value of its damages," and despite being instructed to award nominal damages such as $1. JLL Midwest's counsel told the jury that answering that question in JLL Midwest's favor required the jury to enter an award of $526,555.31. Absent a definition of nominal damages, a jury, having decided that the evidence reflected $205,485 in actual damages, could have believed that it was putting JLL Midwest in the position it would have been in had LanzaTech not breached the contract, just as JLL Midwest was instructed to do. *Cf. Xtec, Inc. v. Hembree Consulting Services, Inc.*, 183 F.Supp.3d 1245. 1271-72 (2016) (rejecting the plaintiff's contention that the jury meant to award $250,000 as compensatory damages where the jury entered the sum next to a question about nominal damages and was instructed to award an "inconsequential" amount as nominal damages if the jury did not award compensatory damages). Exercising all reasonable presumptions in favor of the verdict, the verdict is not irreconcilably inconsistent, as the jury properly awarded JLL Midwest $205,485 in actual damages. *Cf. Corpus*, 430 F. 3d at 915-17 (finding, where the jury found the defendant caused no actual damages, that the nominal damages award must be reduced to a nominal sum); *Brown v. Smith*, 920 A. 2d 18 (Ct. Sp. App. Md. 2007) (where attorney sought only nominal damages, the trial court's award of $8,350 was excessive); *Guidance Endodontics, LLC v. Dentsply International, Inc.*, 791 F. Supp. 2d 1026, 1055-56 (2011) (where

there was apparently no dispute that the $200,000 award was intended to be nominal damages, the court had a duty to reduce the award to $1).[3]

¶ 41 B. Fee Shifting

¶ 42 Next, LanzaTech asserts that no fees should have been awarded to JLL Americas because the parties' contract did not contain an express fee-shifting clause that was separate from the indemnity provision. We review this contention *de novo*. *Work Zone Safety, Inc. v. Crest Hill Land Development*, LLC, 2015 IL App (1st) 140088, ¶ 28.

¶ 43 Pursuant to the American Rule, which is followed in Illinois, prevailing parties cannot recover their attorney fees from the losing party in the absence of express contractual or statutory provisions to that effect. *Id*. ¶ 33. Courts strictly construe a contractual provision providing for the payment of the other party's attorney fees, as such provisions constitute exceptions to the general rule. *Willis Capital LLC v. Belvedere Trading*, LLC, 2015 IL App (1st) 132183, ¶ 24; see also *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 952 (2004) (stating that fee-shifting provisions mean no more or less "than the letter of the text"). Courts must also strictly construe indemnification agreements with respect to attorney fee awards. *Downs v. Rosenthal Collins Group, LLC*, 385 Ill. App. 3d 47, 51-52 (2008). Furthermore, a contract must use specific language stating that "attorney fees" are recoverable. *Bank of America v. WS Management, Inc.*, 2015 IL App (1st) 132551, ¶ 120.

[3] Consequently, we need not consider LanzaTech's assertion that the trial court must reconsider the award of interest, fees and costs "[i]f nominal damages are remitted to $1.00." We would nonetheless find it unnecessary to alter the attorney fee award, as JLL Midwest, to the exclusion of LanzaTech, would still be the prevailing party. A finding that JLL Midwest failed to prove the amount of damages but nonetheless was damaged would constitute a judgment in its favor. In contrast, LanzaTech has prevailed on no substantial matter. *Cf. Med+Plus Neck and Back Pain Center, S.C. v. Noffsinger*, 311 Ill. App. 3d 853, 861 (2000) (finding the trial court's decision to forgo awarding attorney fees was not an abuse of discretion where the "plaintiff failed to adequately prove the existence of damages").

¶ 44 Here, the contract between LanzaTech and JLL Americas, in the form of a signed letter, contained the following indemnifaction provision:

> "[LanzaTech] shall indemnify, defend and hold [JLL Americas] *** harmless from and against any and all claims, demands, causes of action, losses, damages, finds, penalties, liabilities, costs and expenses incurred in the capacity of a defendant or a witness, *and all other costs and expenses (including without limitation attorneys' fees and court costs)* to which any of the JLL Indemnitees may become liable or subject by reason of or arising out of the *performance* or nonperformance *of* [*JLL Americas'*] duties and *activities within the scope of this Letter*." (Emphasis added.)

The plain language of this provision, when strictly construed, clearly anticipates that LanzaTech would pay JLL Americas' attorney fees in this matter.

¶ 45 The provision explicitly imposed upon LanzaTech a duty to reimburse JLL Americas for attorney fees and costs incurred due to its performance of activities under this letter. JLL Americas' defense in litigation is itself an activity within the scope of this letter. Moreover, the clause contains no language limiting LanzaTech's duty to the reimbursement of financial burdens created through lawsuits of third parties. See *Water Tower Realty Co. v. Fordham 25 E. Superior, LLC*, 404 Ill. App. 3d 658, 666 (2010) (stating that a party who wishes to narrow indemnification to damage sustained by third parties must expressly limit the scope of the indemnification clause or accept its application to damages suffered by the contracting parties themselves); see also INDEMNIFY, Black's Law Dictionary (10th ed. 2014) (stating that "indemnify" means "[t]o reimburse (another) for a loss suffered because of a third party's *or one's own act* or default," or "[t]o promise to reimburse (another) for such a loss"); but see

Travelers Indemnity Co. v. Damman & Co., 594 F.3d 238, 254-56 (3d Cir. 2010) (finding that the appellee could not indemnify the appellant for the appellant's own loss). We find no error.

¶ 46 C. Cross-Appeal

¶ 47 Finally, the JLL parties assert in their cross-appeal that the trial court abused its discretion by reducing the award of attorney fees based on an agreement that the JLL parties made with their attorneys during litigation. Specifically, they agreed that the JLL parties would hold back 15% of their payment for attorney fees incurred. The attorneys would receive that sum if their clients prevailed and were awarded attorney fees.

¶ 48 We generally review an award of attorney fees for an abuse of discretion. *Young v. Alden Gardens of Waterford, LLC,* 2015 IL App (1st) 131887, ¶ 10. Reasonable attorney fees are generally based on the prevailing market rate. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2013 IL 110505, ¶51. Consequently, a party is entitled to reasonable attorney fees, not the amount actually incurred or paid. *Id*.

¶ 49 Here, the trial court reduced the award for attorney fees incurred after the fee agreement was amended, stating as follows:

> "Counsel for the JLL entities agreed to a 15% reduction in fees to be paid only if the JLL entities prevailed in the litigation and were awarded attorney fees. Litigants and their attorneys are free to negotiate reduced fee agreements in the event that the litigation is not successful and this Court will not pass the 15% on to LanzaTech simply because LanzaTech lost."

We find the court abused its discretion in reducing the award.

¶ 50 The JLL parties, and their attorneys are entitled to 100% of the reasonable fees incurred, not simply because LanzaTech lost, but because LanzaTech contractually agreed to make such

payments. LanzaTech has identified no contractual exception to its obligation to fully reimburse the JLL parties. Additionally, we categorically reject LanzaTech's assertion that the JLL parties' attorneys sought "enhanced fees." *Cf.* 735 ILCS 5/2-1114(c) (West 2008) (allowing fees beyond the statutory maximum where "an attorney performs extraordinary services involving more than the usual participation in time and effort"); *In re Matter of UNR Industries Inc.*, 986 F.2d 207, 210 (7th Cir. 1993) (finding that an attorney's services rarely warrant fees to be enhanced pursuant to statutes such as the Bankruptcy Reform Act of 1978 (11 U.S.C.§ 330)). Moreover, LanzaTech has not developed any argument on appeal suggesting that the amount of fees sought were unreasonable. See also *Young*, 2015 IL App (1st) 131887, ¶ 100 (rejecting the contention that counsel could recover no more than its contingency fee).[4]

¶ 51 Finally, the JLL parties ask that this court remand this case to the trial court with instructions to award them reasonable attorney fees and costs incurred in this appeal. In light of the aforementioned contractual provisions, we grant that request.

¶ 52 III. CONCLUSION

¶ 53 LanzaTech has not shown that it is entitled to a reduction of the jury's award. Additionally, the trial court properly found that the fee-shifting provision within JLL Americas' indemnity clause entitled it to attorney fees in this matter. That being said, the trial court abused its discretion in declining to award the JLL parties the full amount of reasonable attorney fees incurred. Consequently, we reverse and remand for the court to award those parties the remaining 15% of fees incurred at trial as well as their fees and costs incurred in this appeal.

[4] LanzaTech categorically asserts that case law applying statutory fee shifting provisions provides no guidance whatsoever in contractual attorney fee cases. Yet, LanzaTech itself has cited case law involving attorney fees under federal statute. See e.g. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992). We find LanzaTech's assertion to be disingenuous.

¶ 54 For the foregoing reasons, we affirm in part, reverse in part and remand for further proceedings consistent with this decision.

¶ 55 Affirmed in part and reversed in part; cause remanded.