2013 IL App (4th) 121091-U

NO. 4-12-1091

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 14, 2013
Carla Bender
4th District Appellate
Court, IL

RAMSHAW REAL ESTATE, INC., an Illinois Corporation,	)	Appeal from
	)	Circuit Court of
Plaintiff-Appellee,	)	Champaign County
v.	)	No. 09L219
ILLINOIS PROPERTIES, INC., an Illinois Corporation,	)	
	)	Honorable
Defendant-Appellant.	)	Jeffrey B. Ford,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Steigmann and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly awarded plaintiff's motions for summary judgment in regard to its complaint defendant breached the parties' contract to manage rental properties.

The trial court properly denied defendant's counterclaims, which sought to justify its termination of the contract between the parties to manage defendant's rental properties.

The trial court properly awarded plaintiff damages for "turnover" expenses.

The trial court properly awarded plaintiff damages for the remainder of the requested lost profits.

¶ 2 Plaintiff, Ramshaw Real Estate, Inc., filed a complaint for breach of contract against defendant, Illinois Properties, Inc., in regard to a management agreement for plaintiff to manage student rental apartments for defendant. Defendant filed a counterclaim against plaintiff alleging it was justified in terminating the agreement as plaintiff was actually the party who had

breached their contractual agreement. The trial court found for plaintiff on its motion for summary judgment and against defendant on its motion for summary judgment. Damages were awarded to plaintiff for a total of $512,832.88 for lost profits as the management agreement was terminated one year into a three-year agreement. The trial court awarded the damages based on another motion for summary judgment.

¶ 3 We affirm as to liability for termination of the contract and also affirm as to the damages awarded.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff, Ramshaw Real Estate, Inc., and defendant, Illinois Properties, Inc., entered into an exclusive management agreement effective November 1, 2008. The term of the agreement was three years, with one year extensions thereafter. Pursuant to the agreement, plaintiff was employed to "rent, lease, operate and manage" specified properties owned by defendant. The properties in question were primarily rental units marketed to college students in Champaign and Urbana, Illinois.

¶ 6 During the initial term of the agreement, upon 60 days' notice to plaintiff, defendant could withdraw a maximum of five properties from the agreement. Pursuant to paragraph 1 of the agreement, either party was permitted to terminate the agreement with 180 days' notice prior to the date of expiration of the contract. In the event of a default, the nondefaulting party was obligated to serve notice of default and allow 10 days for the defaulting party to cure the default.

¶ 7 By letter dated September 3, 2009, defendant's counsel notified plaintiff it was terminating the management agreement within 60 days. As its basis for terminating the

agreement, defendant asserted many pieces of new furniture intended for its apartment units were missing. Peter Baksa and Eunice Kim, representatives of defendant, then met with Todd Lienhart, a representative of plaintiff, regarding this furniture. After the meeting and pursuant to an exchange of e-mails, Lienhart corrected an apparent misunderstanding as to the location of the furniture belonging to defendant and confirmed it was appropriately accounted for in the rental units managed by plaintiff.

¶ 8 On September 11, 2009, defendant's second counsel sent plaintiff's counsel a letter confirming the previous notice of termination of the management agreement and listed five new bases for its claims plaintiff had defaulted under the agreement. These included (1) failing to obtain prior consent for nonemergency expenditures in excess of $500; (2) without authorization from defendant, giving a rental credit of one month's rent to obtain a lease with a tenant; (3) not having a representative available to show rental units between "leasing hours" of 8 a.m. and 5 p.m.; (4) holding furniture in plaintiff's warehouse but not using it to refurnish furniture in specific buildings designated by defendant; and (5) not giving defendant inventory or documentation of furniture removed or replaced from various of its rental units. Based on these defaults, defendant decided to terminate the management agreement in accordance with the terms of the agreement.

¶ 9 On August 31, 2009, prior to any notice to plaintiff, defendant entered into a separate exclusive property management agreement with Green Street Realty covering seven properties listed as covered by the management agreement between plaintiff and defendant. Defendant stopped paying plaintiff its fees under the management agreement. As a result, on October 2, 2009, plaintiff sued defendant for breach of contract.

¶ 10 On October 7, 2009, defendant responded by filing affirmative defenses and counterclaims against plaintiff alleging a breach of plaintiff's fiduciary duty to defendant. Defendant alleged plaintiff had not given a proper accounting of furniture replaced by defendant in its rental units; failed to inform defendant it had an ownership interest in KleenRite, a company hired by plaintiff to clean carpets in defendant's rental units; and failed to deposit in defendant's accounts or otherwise account for October 2009 rent money collected for defendant's rental units.

¶ 11 On October 8, 2009, the trial court held a hearing on both parties' motions for a temporary restraining order in regard to enforcement of the management agreement. After the hearing, by agreement of the parties, the court entered an order terminating the management agreement "effective immediately." Plaintiff placed all rent money collected under the agreement in a trust account with its attorney. Defendant had demanded the money be placed in a trust account it had with its attorney.

¶ 12 In September, 2009, plaintiff sent to defendant vendor bills it was receiving for work done on defendant's properties. Some were paid out of the trust account with permission of defendant. Plaintiff was not happy with the amount of time it was taking defendant to give permission for payment of the vendors. On December 15, 2009, it filed a motion for partial summary judgment, requesting permission to pay eight specific vendors out of the trust fund it had established.

¶ 13 On January 22, 2010, defendant filed a memorandum in opposition to plaintiff's motion for partial summary judgment. On February 17, 2010, the trial court granted partial summary judgment to plaintiff but ruled it was not entitled to damages as it had not been

damaged. Plaintiff then paid the eights vendors listed in its motion for partial summary judgment as well as KleenRite and also paid itself the management fees due up to October 8, 2009, under the management agreement.

¶ 14 On May 7, 2010, plaintiff filed a motion for summary judgment on count V of its complaint for breach of contract, as well as supporting materials and affidavits citing defendant's termination of the management agreement without giving the proper notice under the agreement but entering into another purported "exclusive" agreement to manage its property with Green Street Realty. On June 24, 2010, defendant filed a motion to strike portions of the affidavit of Todd Lienhart filed in support of plaintiff's motion for summary judgment and a memorandum and affidavits in opposition to the motion for summary judgment. On July 23, 2010, defendant filed a petition for rule to show cause alleging plaintiff wrongfully paid itself and KleenRite out of the trust fund in violation of the trial court's orders.

¶ 15 On July 27, 2010, the trial court heard plaintiff's motion for summary judgment as to count V. The trial court found defendant breached the contract for management services and granted it. No damages were determined at that time. At the same time, summary judgment was entered against defendant on counts I and II of its counterclaim.

¶ 16 On August 24, 2010, the trial court held a hearing on defendant's petition for rule to show cause. The court denied defendant's request for a finding of contempt by plaintiff.

¶ 17 On December 14, 2010, plaintiff filed a motion for summary judgment as to damages for defendant's breach of contract as well as supporting materials and affidavits. On March 8, 2011, defendant's filed a response to the motion for summary judgment with supporting materials and affidavits.

¶ 18 On March 23, 2011, the trial court held a hearing on plaintiff's motion for summary judgment as to damages. The court allowed the motion as to all but labor costs and denied defendant's counterclaims. The court entered judgment for plaintiff and against defendant for $439,126.08.

¶ 19 On April 21, 2011, defendant filed a notice of appeal with this court. On April 29, 2011, plaintiff filed a motion for summary judgment as to maintenance labor damages, as well as supporting materials and affidavits. On May 23, 2011, this court dismissed defendant's appeal on plaintiff's motion. *Ramshaw Real Estate, Inc., v. Illinois Properties, Inc.*, No. 4-11-0353 (May 23, 2011) (dismissed on appellee's motion). On July 5, 2011, defendant filed its opposition to plaintiff's motion for summary judgment with supporting materials and affidavits.

¶ 20 On July 28, 2011, the trial court held a hearing on plaintiff's motion for summary judgment as to maintenance labor damages. The court found for plaintiff in the amount of $73,706.80. By agreement of the parties, defendant was to receive an $80,571.90 credit for payment of third-party vendors. The total judgment against defendant, when added to the amount awarded on March 23, 2011, was $432,260.98.

¶ 21 On August 10, 2011, plaintiff filed a motion to modify the judgment. On September 9, 2011, the trial court found plaintiff was correct and the judgment should be modified to reflect the two separate and distinct amounts at issue, damages for breach of contract, which was scheduled to run until 2011, and damages for the period of time representing September and October 2009, when defendant's breach occurred. The court's original judgment prior to adjustment for credits should stand. The July 28, 2011, judgment was amended to be $512,832.88 plus costs.

¶ 22 On October 4, 2011, plaintiff filed a motion for summary judgment, as well as supporting materials and affidavits as to count III of defendant's counterclaim, which dealt with the funds received as October 2009 rent payments held by plaintiff in trust for defendant. Count III of the counterclaim alleged plaintiff wrongfully held these funds which belonged to defendant. Plaintiff alleged the funds were needed to pay vendors, including KleenRite, who worked on defendant's rental property, as well as to pay the management fees owed plaintiff under the management agreement for September and October 2009, prior to the termination of the management agreement. On November 16, 2011, defendant filed its memorandum and supporting materials and affidavits in opposition to plaintiff's motion for summary judgment on count III of the counterclaim. On December 1, 2011, the trial court denied the motion for summary judgment as to count III of the counterclaim.

¶ 23 On January 9, 2012, plaintiff filed a motion for leave to file count VI of its complaint, requesting damages for the period of time in September and October 2009 when termination of the management agreement was in dispute and defendant was not paying either plaintiff or third-party vendors. On January 26, 2012, the trial court gave plaintiff leave to file count VI and defendant filed counts IV, V, and VI of its counterclaim. On February 13, 2012, plaintiff filed a motion to dismiss counts IV, V, and VI of defendant's counterclaim. On February 29, 2012, defendant filed a motion to dismiss count VI of the complaint.

¶ 24 On April 25, 2012, the trial court dismissed counts IV, V, and VI of defendant's counterclaim and denied the motion to dismiss count VI of the complaint.

¶ 25 On July 11, 2012, plaintiff filed a motion for summary judgment, as well as supporting materials and affidavits as to count VI of its complaint. On August 21, 2012,

defendant filed its response to the motion for summary judgment, as well as supporting materials and affidavits.

¶ 26 On September 27, 2012, the trial court held a hearing on plaintiff's motion for summary judgment and granted plaintiff's motion, entering judgment for plaintiff and against defendant in the amount of $80,571.88. On October 26, 2012, defendant filed a motion to reconsider. On October 31, 2012, the court denied defendant's motion to reconsider. This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 Defendant appeals (1) the grant of the partial summary judgment order allowing plaintiff to pay vendors from September 2009 for work done on defendant's rental units managed by plaintiff under the management agreement; (2) the grant of summary judgment on counts V and VI for breach of contract by defendant; (3) the grant of summary judgment or dismissal of all of defendant's counterclaims, which were defenses raised in opposition to plaintiff's breach of contract claims; (4) whether the management agreement allowed plaintiff to recoup maintenance labor expenses; (5) whether the management agreement allowed plaintiff to recoup "turnover" expenses; (6) whether the management agreement allowed plaintiff to recoup online marketing expenses and (7) whether plaintiff was entitled to the full amount of management fees under the agreement for breach of contract. We affirm on all issues.

¶ 29 Most of the issues in this case were decided by way of summary judgment in the trial court. The standard for reviewing a summary judgment order is *de novo*. *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 461, 939 N.E.2d 487, 490 (2010).

¶ 30 A. Partial Summary Judgment as to Vendors

¶ 31 Defendant argues this was an instance where plaintiff breached its fiduciary duty to defendant as its agent. No vendors had pursued litigation against defendant for payment for the work they had done. Yet plaintiff, defendant's agent under the management agreement, was, in essence, bringing suit against defendant on behalf of the vendors. Defendant argues there was no controversy between the vendors and itself and plaintiff had no standing to "bring the action" it did. By "bring the action," we assume defendant means plaintiff's request of the trial court to be allowed to pay the vendors. Plaintiff argued it was suffering damage to its reputation, as it contracted with the vendors on defendant's behalf and defendant was refusing to pay the vendors.

¶ 32 Defendant argued it had not received the rent money plaintiff collected for October 2009. Further, it was not allowed to contest the vendors' bills plaintiff paid as far as the validity of the charges. However, it did not cite any instances where the validity of the bills was actually in question; it simply argued it was denied the possibility of contesting the bills. The parties agreed normally under the management agreement rent monies were used to pay vendors' bills as well as paying plaintiff's management fees. The trial court did not err in allowing plaintiff to pay outstanding vendors' bills incurred while the management agreement was still in force from the rent money collected under the management agreement.

¶ 33 B. Summary Judgment on Counts V and VI of the Complaint

¶ 34 Count V of the complaint alleged breach of contract against defendant from November 2009 through the end of the contract in November 2011 and asked for damages for the amount of management fees and other compensation plaintiff would have received under that time period of the management agreement if the breach had not occurred. The management agreement entered into between plaintiff and defendant provided for plaintiff "exclusively"

managing campus rental units owned by defendant. When defendant entered into a second "exclusive" management agreement with Green Street Realty for some of the same properties during the term of the contract and prior to termination of the agreement, it breached the contract with plaintiff.

¶ 35 Absent a contractual termination provision to the contrary, a party may only terminate a contract because of substantial nonperformance or a material breach. *Wolfram Partnership, Ltd. v. LaSalle National Bank*, 328 Ill. App. 3d 207, 222-23, 765 N.E.2d 1012, 1025 (2001). Defendant alleged plaintiff either defaulted on its contractual obligations under the management agreement or materially breached the contract itself, justifying defendant in terminating the contract.

¶ 36 A nondefaulting party commits a breach of contract when it fails to give a contractually mandated notice of default and fails to allow a period of time to cure the default. *Magnuson v. Schaider*, 183 Ill. App. 3d 344, 353-54, 538 N.E.2d 1309, 1315 (1989). In the first letter defendant sent plaintiff it mentioned no default period or time to cure. In the second letter defendant sent plaintiff, it purported to give the 10-day notice of default and time to cure it mandated by the management agreement but then stated plaintiff had 10 days to cure its defaults and the contract would terminate in 60 days or, if no cure in 10 days, the contract would terminate immediately. Because defendant stated it could still terminate the contract after 60 days despite plaintiff curing its defaults, no real default cure period was provided to plaintiff despite the wording of the agreement.

¶ 37 As to material breaches on plaintiff's part, which defendant's counterclaims also alleged, the trial court found they either did not exist or were not material. Defendant claimed

there was a dispute about the whereabouts of furniture removed from defendant's rental units and placed in storage by plaintiff. Todd Lienhart, plaintiff's manager for defendant's properties, stated in his testimony there was a misunderstanding, which was later cleared up. An e-mail from Eunice Kim, one of defendant's officers, agreed with Lienhart's testimony. It stated "Thank you for meeting with us yesterday. We just wanted to know where the furniture went. We will work with the insurance company to reinspect and close the file now that we know where things are."

¶ 38 Defendant also claimed plaintiff violated a provision of the contract requiring it to get approval for expenditures over $500 unless it was an emergency. The contract specifically stated expenditures were excepted from the approval requirement "if in the opinion of the Agent, such repairs are necessary." Defendant cited no evidence that any of the expenses paid by plaintiff were not necessary emergency expenditures. The contract clearly authorized plaintiff to make the determination of what is an emergency and a necessity, and not defendant.

¶ 39 Defendant also claimed plaintiff had been self-dealing and had been doing so for quite a while. Plaintiff contracted with a vendor named KleenRite on numerous occasions to clean and extract water from dirty or flooded carpets in defendant's rental units. For several years, plaintiff owned 60% of KleenRite. Defendant claimed plaintiff did not disclose its ownership of KleenRite and defendant's owner only found out about this in the summer of 2009. Kim, an employee of defendant, stated no one from plaintiff ever told her about its ownership interest in KleenRite. Defendant argued this violated section 10-10 of the Real Estate License Act of 2000 (Act) (225 ILCS 454/10-10) (West 2008). Section 10-10 requires a licensee, such as plaintiff, who owns greater than a 1% ownership interest in a company must disclose this to a

client when it makes a referral of that company to the client. The trial court found use of KleenRite did not constitute a referral under the Act. Lienhart stated he sent written notice of plaintiff's ownership interest in KleenRite to defendant as well as other companies with whom plaintiff did business several years ago when plaintiff obtained the ownership interest. Defendant argued this notice issue constituted a factual dispute which could not be decided by way of summary judgment. Defendant's president and Kim stated they did not know about plaintiff's ownership of KleenRite. Lienhart stated he sent notice to defendant. This is a factual dispute, but we agree the use of a vendor is not a referral under the Act.

¶ 40 Defendant failed to present sufficient evidence to show a material breach of contract on the part of plaintiff so as to justify defendant terminating the contract and either prevailing on its counterclaims or defeating plaintiff's motion for summary judgment as to defendant's own breach of contract. The trial court did not err in granting summary judgment to plaintiff on count V for defendant's breach of contract and finding against defendant in its attempt to show its breach was justified as a reaction to plaintiff's alleged breach.

¶ 41 Count V covered the period of time from defendant's breach, November 1, 2009, to the end of the management agreement, October 31, 2011. Count VI covered the period of time of September and October 2009, when defendant's breach of contract occurred. Plaintiff argued defendant owed it the management fees and other compensation provided under the management agreement for September and October 2009 until the management agreement was deemed to be terminated by the trial court. Defendant argued plaintiff owed it certain fiduciary duties as its agent in regard to the use of KleenRite without permission of defendant and against the direction of defendant once it found out plaintiff owned 60% of KleenRite and, further, disputed the

disposition of money collected as October 2009 rent, arguing plaintiff did not provide a proper accounting of those funds.

¶ 42 Plaintiff noted the management agreement gave it the authority to "hire, discharge and supervise all cleaning, maintenance, and security personnel, *some of whom may be employees of the Agent* ***." (Emphasis added.) If plaintiff had authority to utilize cleaning and water extraction services of its own employees, it was not a breach of contract to engage the services of a company in which it held an ownership interest. Using a vendor it was authorized to select for legitimate work is not a referral as contemplated by the Real Estate Licensing Act. Further, defendant did not allege KleenRite's charges were not commercially reasonable or its services not performed in an acceptable manner.

¶ 43 As for an accounting of October 2009 rent money, plaintiff conceded it held funds for defendant. However, it also provided an accounting of the vendors owed on behalf of defendant which it paid from the October 2009 rent money. Plaintiff did not breach the contract during the period of September and October 2009.

¶ 44 C. Counterclaims

¶ 45 Defendant raised several counterclaims against plaintiff which were also affirmative defenses against plaintiff's breach of contract claims against defendant. Count III of the counterclaim addressed the same funds covered by count VI of plaintiff's complaint. Defendant alleged plaintiff failed to tender to it funds belonging to defendant (October 2009 rent money) and improperly converted it for its own purposes. However, pursuant to affidavits provided by plaintiff, the funds were properly applied according to the terms of the management agreement. Pursuant to the trial court's entry of partial summary judgment, plaintiff paid third

parties who provided services and materials to defendant's properties and paid past tenants entitled to security deposit refunds. The remaining funds covered plaintiff's monthly management fee and reimbursement to plaintiff for maintenance labor, materials, turnover services, and marketing. Defendant failed to cite any evidence refuting plaintiff's claims as to how it handled the funds. The trial court entered summary judgment for plaintiff on count VI of its complaint and against defendant on count III of its counterclaim.

¶ 46 Count I of the counterclaim dealt with a breach of contract for self-dealing and the issue of plaintiff's alleged failure to disclose its ownership in KleenRite. Count II of the counterclaim dealt with plaintiff's alleged breach of contract for making payments to vendors in excess of $500 without defendant's approval. As noted above, these issues were resolved in favor of plaintiff on its motions for summary judgment and, therefore, against defendant on its counterclaims for the same issues.

¶ 47 Count VI of the counterclaim dealt with alleged breaches of plaintiff's fiduciary duties owed to defendant. The alleged duties raised by defendant are the same issues of using KleenRite as a vendor despite instructions by defendant not to do so and plaintiff's accounting of the rent money collected on behalf of defendant. These issues were resolved by the trial court granting summary judgment for plaintiff as to counts V and VI of its complaint.

¶ 48 Counts IV and V of the counterclaim dealt with plaintiff's claims of damages under the management agreement for turnover expenses and marketing expenses. The trial court granted summary judgment for both these items as damages sustained by plaintiff for defendant's breach of contract. We affirm as to the marketing expenses and the turnover expenses.

¶ 49 D. Damages for Breach of Contract Under Count V

¶ 50 The trial court awarded plaintiff damages of $439,126.08 on March 23, 2011, and modified it by increasing it by $73,706.80 on July 28, 2011. The court finalized the judgment at $512,832.88. Defendant argues there are calculation errors as well as contract interpretation errors and questions of fact which should not have been resolved on summary judgment.

¶ 51 If a party is determined to have breached a contract, the remedy is to place the nonbreaching party in as good a position as it would have been in had the breach not occurred and the contract been performed. *Equity Insurance Managers of Illinois, LLC v. McNichols*, 324 Ill. App. 3d 830, 837, 755 N.E.2d 75, 80 (2001). Lost profits are recoverable where (1) their loss can be proved with a reasonable degree of certainty; (2) the court is satisfied wrongful acts of defendant caused the loss; and (3) the profits were reasonably within the contemplation of the defaulting party at the time contract was entered into. *F.E. Holmes & Son Construction Co., Inc. v. Gualdoni Electric Service, Inc.*, 105 Ill. App. 3d 1135, 1141, 435 N.E.2d 724, 728 (1982); *Rivenbark v. Finis P. Ernest, Inc.*, 37 Ill. App. 3d 536, 538-39, 346 N.E.2d 494, 496-97 (1976). Gross profits are not contemplated. Labor, materials, and direct overhead costs which are variable are to be deducted from the recoverable profits. *Holmes*, 105 Ill. App. 3d at 1141, 435 N.E.2d at 728. Defendant argues plaintiff did not present and the trial court did not require the showing of deductions which should have been applied to gross profits, especially in the case of management fees received. Thus, plaintiff received excessive damages.

¶ 52 1. *Turnover Expenses*

¶ 53 Turnover expenses dealt with expenses incurred by plaintiff as defendant's agent related to annual tenant turnover, either tenants leaving their apartments or renewing their leases. They were not itemized in plaintiff's count V as damages. They are listed in the management

agreement as "special expenses" and include expenses for moving trucks, warehousing, laborers, hauling and dumping fees, and materials and fuel. They are to be reimbursed to plaintiff on a dollar-for-dollar basis.

¶ 54 Plaintiff contends these expenses are a profit item as the entire management agreement is intended to be a profit maker for plaintiff. It contends it was entitled to make a profit on the labor provided for needed turnover work. While no turnover work was done on defendant's properties by plaintiff after the contract had ended, it was contemplated such work would be done and plaintiff would make a profit on that work. Plaintiff showed it made a profit on annual tenant turnover. The trial court properly awarded plaintiff $24,074.74 as lost profit from turnover expenses it expected to be reimbursed in 2010 and 2011 under the management agreement.

¶ 55 2. *Marketing Expenses*

¶ 56 Plaintiff sought and received online marketing fees at an annual rate of $19,164, or $38,328 for two years, 2010 and 2011, as lost profit. Defendant argues online marketing fees were not subject to itemization and reimbursable to plaintiff. They were not specified in the management agreement. Defendant argued it was part of the leasing operation included in management fees. However, the management agreement provides defendant is responsible for marketing fees. While operating under the management agreement, plaintiff had an employee perform marketing work and did not incur outside expenses. During the first year of the agreement, defendant paid plaintiff $19,164 for marketing fees. This payment is evidence of ratification of plaintiff's contractual entitlement to those fees as a separate profit item.

¶ 57 3. *Maintenance Labor*

¶ 58 Plaintiff sought and received $73,706.80 for maintenance labor lost profits. Pursuant to the management agreement, defendant had a duty to pay plaintiff for maintenance employee labor at a rate of $29.50 per hour. It is uncontested during the first year of the management agreement, defendant paid $107,731 to plaintiff for maintenance employee labor. Jerry Ramshaw's affidavit in support of summary judgment states during that same time period, he paid $59,311.93 in payroll to maintenance labor employees; $4,122.18 in Social Security and Medicare; $474.50 in federal unemployment tax; $4,982.20 in state unemployment tax and billed $1,986.79 directly to tenants, for maintenance labor fees which were the responsibility of individual tenants. Therefore, plaintiff earned $36,853.40 in net profit on maintenance employee labor. Multiplying that by the two years remaining on the maintenance agreement following defendant's breach of contract yields a total of $73,706.80 as lost profits on maintenance employee labor.

¶ 59 Defendant's argument plaintiff sought gross profits on maintenance labor did not take into account reductions for "employer's tax, contributions for Social Security, and contributions for Medicare tax" and ignores the uncontested testimony of Jerry Ramshaw. Defendant also argues plaintiff did not reduce its labor damages to account for equipment or materials. However, Todd Lienhart expressly testified plaintiff removed expense "pass-through items" from its claim for damages. His affidavit expressly stated the amount claimed for this element of damages was for "maintenance employee labor" and not equipment and materials. Jerry Ramshaw's affidavit stated the same.

¶ 60 4. *Management Fees*

¶ 61 Plaintiff sought and received $376,723.34 for management fees as lost profit.

Lienhart estimated in his deposition defendant's apartments were about 20% of the campus properties managed by plaintiff. Plaintiff claimed the entire management fee was lost net profit because no overhead was reduced after defendant took its business elsewhere. Defendant argues there are expenses the property management agent would have to incur relating directly to management fees. These would include salaried or wage-earning employees to perform services, including showing the property, answering questions regarding the unit, presenting a lease, answering questions relating to the lease, comparing or differentiating between subject property and a lease with competing properties, collecting security deposits, and the ongoing responsibility of receiving, depositing, collecting, and enforcing lease and rental payments. These employees utilize computers, take up office space, and require utilities at a workplace. No attempt was made to show there were any changes in employee time or tasks relative to less work caused by the departure of 20% of plaintiff's business. For every employee there are payroll expenses, tax contributions, social security and medicare taxes, and other related human-resources issues.

¶ 62 The issue is not whether plaintiff incurred overhead expenses, but whether ~~or not~~ they were reduced following defendant's breach of the management agreement. "[T]hat portion of indirect costs which cannot be reduced by defendant's breach, called fixed indirect costs, are not subtracted from the contract price." *Holmes*, 105 Ill. App. 3d at 1141, 435 N.E.2d at 728. An award of anticipated profits should only be reduced by avoidable expenses, and indirect costs which have not been avoided in the face of a breach do not reduce an award of lost profits.

¶ 63 Plaintiff argued the record established its expenses were not diminished by the loss of defendant's business. The affidavit of Jerry Ramshaw stated plaintiff is a multifaceted real estate practice and its overhead was not directly associated with property management

services provided to defendant. Overhead was allocated across its business operations and was not affected or avoided as a result of defendant's breach of the management agreement. Following defendant's breach, plaintiff has not replaced the resulting loss in its volume of business, but no overhead expenses were avoided as a result of the breach.

¶ 64 Defendant points to nothing in the record to support its argument plaintiff's damages should be reduced by the reduction in its overhead expenses. The uncontested facts related to the amount of plaintiff's lost profits in the form of management fees represent a reasonable basis for calculating damages and the trial court properly awarded them.

¶ 65 III. CONCLUSION

¶ 66 We affirm the trial court's judgment as to liability for breach of contract and damages.

¶ 67 Affirmed.