2012 IL App (2d) 110208-U
No. 2-11-0208
Order filed February 1, 2012
Modified upon denial of rehearing March 6, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JEFF JONES and CHRISTINE JONES,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiffs and Counterdefendants-Appellants and Cross-Appellees,	)	
	)	
v.	)	No. 06-CH-2199
	)	
KEVIN REMPERT and JILL REMPERT,	)	
	)	
Defendants and Counterplaintiffs-Appellees and Cross-Appellants	)	Honorable
	)	Kenneth L. Popejoy,
(JOHN CLERY, as Escrowee, Defendant).	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: The defendants are entitled to nominal damages for the plaintiffs' breach of contract. Although the trial court did not err in granting the defendants' petition for attorney fees, it did err in determining the amount of such attorney fees to be awarded.

¶ 1 On November 22, 2006, the plaintiffs, Jeff and Christine Jones, filed a complaint seeking the return of earnest money paid to the defendants, Kevin and Jill Rempert, pursuant to a contract to purchase real estate. On July 3, 2007, the defendants filed a counterclaim for breach of contract.

On May 14, 2008, following a bench trial, the trial court entered judgments on the complaint and the counterclaim in favor of the plaintiffs. On appeal, this court reversed those judgments, directed the trial court to enter judgment in favor of the defendants on their counterclaim, and remanded for a determination of damages. See *Jones v. Rempert*, No. 2-08-0615 & 2-08-1092, cons. (Sep. 23, 2009) (unpublished order under Supreme Court Rule 23). On January 31, 2011, following a hearing, the trial court awarded the defendants an amount for damages and attorney fees and costs. The plaintiffs appeal and the defendants cross-appeal from that order. We affirm in part, reverse in part, and remand for additional proceedings.

¶ 2 I. BACKGROUND

¶ 3 This being the second appeal in this case, the background facts are well known by the parties and this court, and there is no need for a full recapitulation. Instead, we present a brief summary of the background and will include where appropriate other facts relevant to the disposition of this appeal.

¶ 4 On August 5, 2006, the parties entered into a real estate contract whereby the plaintiffs were to purchase the defendants' home at 114 Willow in Elmhurst for a purchase price of $809,000. The contract included a mortgage contingency clause, paragraph 11 of the contract. The mortgage contingency clause provided that the contract was contingent on the plaintiffs obtaining a firm written mortgage commitment, by August 30, 2006, for a conventional loan of no more than 80% of the purchase price with an interest rate not to exceed 7% amortized over 30 years. The mortgage contingency clause further stated that if the buyers were unable to procure a written mortgage commitment by the specified date, the sellers, if they so chose, would have 30 days to obtain financing for the buyers. If the sellers exercised that option, the buyers were required to provide the

sellers' lender all requested information to obtain such financing. The contract also provided for a closing date of October 7, 2006.

¶ 5 The plaintiffs applied for a mortgage with Professional Mortgage Services, Inc. (Professional Mortgage). On August 30, 2006, the plaintiffs requested an extension to the mortgage contingency clause of the contract. The defendants granted an extension until September 15, 2006. On September 15, 2006, the plaintiffs requested another mortgage contingency extension, indicating that they had been unable to obtain a firm mortgage commitment in accordance with the terms of paragraph 11. The same day, the defendants advised the plaintiffs that they wished to exercise their option, as contained in paragraph 11 of the real estate contract, to attempt to procure a mortgage commitment for the plaintiffs. The defendants provided the requisite contact information and requested that the plaintiffs contact "Benchmark Mortgage." The plaintiffs never contacted Benchmark Mortgage and the parties never closed on the contract.

¶ 6 On June 29, 2007, the defendants sold their home to a third party for $763,000. On November 22, 2006, the plaintiffs filed a complaint seeking the return of the earnest money. On July 3, 2007, the defendants filed an answer to the plaintiffs' complaint and a counterclaim for breach of contract. The defendants' counterclaim alleged that the plaintiffs breached the contract by failing to cooperate in obtaining seller financing.

¶ 7 On May 14, 2008, following a bench trial, the trial court found in favor of the plaintiffs and ordered the return of the earnest money. The trial court found that the defendants had "anticipatorily and prematurely made a decision to procure financing when the time frame for same was not ripe to exercise." On July 2, 2008, the trial court denied the defendants' motion to reconsider. The

defendants filed a notice of appeal on July 15, 2008 based on the trial court's orders of May 14 and July 2, 2008. The notice of appeal was docketed in this court as case number 2-08-0615.

¶ 8 On July 8, 2008, the plaintiffs filed a petition for attorney fees and costs. On September 10, 2008, the trial court granted the plaintiffs' petition for attorney fees and costs. On November 10, 2008, this court entered an order allowing the defendants to file a late notice of appeal and amend their notice of appeal to indicate that they were also appealing from the trial court's order of September 10, 2008. This appeal was docketed in this court as case number 2-08-1092. Thereafter, this court consolidated the two cases.

¶ 9 On appeal, this court reversed the trial court's determination. *Jones*, Nos. 2-08-0615 & 2-08-1092 at 19. We held that the defendants' right to invoke seller financing was neither premature nor a counteroffer because it was specifically provided for in paragraph 11 of the contract. *Id.* at 17. We further held that the plaintiffs breached the contract by failing to respond to the defendants' request to procure a mortgage commitment from Benchmark Mortgage. *Id.* at 18. Accordingly, we remanded the cause with directions to enter judgment in favor of the defendants on their counterclaim and to determine the amount of damages. *Id.* at 20.

¶ 10 On remand, at a November 8, 2010, hearing, the defendants argued that in addition to the damages presented at trial, they also had to pay a $25,000 realtor commission as a result of the breach and subsequent sale of the house to a third party. The trial court found that the defendants had the opportunity to claim the realtor commission as damages at trial, because the second closing had already taken place, but failed to do so. The trial court indicated that, other than what was presented at trial, it would not allow further evidence of damages. The trial court noted that the damages requested by the defendants at trial were $90,817.70. The trial court stated that it would

hear evidence as to whether that amount of damages was the true out-of-pocket expenses or whether there were any tax savings that reduced those damages. It would also hear evidence as to the defendants' petition for attorney fees and costs. A hearing date was set for November 29 and 30, 2010.

¶ 11 On July 19 and November 22, 2010, the defendants filed a motion and supplemental motion for attorney fees and costs, respectively. The defendants argued that because the plaintiffs breached the contract, they were entitled to recover attorney fees and costs. In response, the plaintiffs argued that because they had prevailed at trial and the defendants had only prevailed on appeal, the parties should pay their own attorney fees and costs. Alternatively, the plaintiffs argued that the defendants had not provided proof that they had paid the attorney fees and that the requested attorney fees were not reasonable. Specifically, the plaintiffs argued that certain attorney fees were (1) from dates prior to the time the litigation commenced, (2) clerical in nature, (3) repetitive, *i.e.*, multiple attorneys completing the same tasks, or (4) unrelated to the litigation.

¶ 12 On November 29, 2010, the hearing on damages commenced. Both parties elicited expert testimony from certified public accountants. Both parties' experts agreed that there would be no tax effect were the trial court to award the requested damages of $90,817.70. The trial court ordered that the parties submit written closing arguments.

¶ 13 On December 13, 2010, the parties submitted written closing arguments. The defendants argued that they were entitled to total damages of $90,817.70, which included $46,000 for the difference in the sale price of the home, $33,903.54 in mortgage and interest costs, $5,542.42 in interest to refinance and close on the home, $4,268.49 in property taxes, and $1,103.25 for homeowner's insurance.

¶ 14 The plaintiffs argued that the defendants had not proved that they suffered damages as a result of the plaintiffs' breach. The plaintiffs argued that the defendants had not presented any evidence that, had the plaintiffs contacted Benchmark Mortgage, it would have provided the plaintiffs a loan within the contract requirements such that the contract would have closed. The plaintiffs noted that, at trial, the evidence showed that the loan they had applied for was, eventually, only approved with conditions.

¶ 15 On December 30, 2010, the trial court issued a written letter opinion. The trial court noted that in the underlying trial, the defendants had prayed for $90,817.70 in damages and that both tax experts agreed that there were no tax benefits that would justify reducing that award. The trial court stated that it agreed with the plaintiffs that the defendants were required to prove that a closing would have taken place had the plaintiffs contacted Benchmark Mortgage. However, the trial court further stated that this argument was "moot pursuant to the Appellate Court's reversal of this Court's ruling and its direction to enter judgment for the Defendants on their counterclaim." The trial court further stated that it had "no choice" but to order the damages prayed for by the defendants in the amount of $90,817.70.

¶ 16 With respect to the defendants' motion for attorney fees and costs, the trial court agreed with the plaintiffs' attorney that certain fees, for various reasons, should be disallowed. The trial court further found that the November 2010 evidentiary hearing was "totally unnecessary" as the defendants "could have clearly, at very early stages, determined that no evidentiary hearing was necessary due to the issue of there being no tax consequences pursuant to their own expert and advised this Court accordingly!" The trial court found the defendants at fault for the "unnecessary"

evidentiary hearing and, consequently, determined that the defendants were only entitled to five hours of attorney time at $250 per hour for the work done following remand.

¶ 17 On January 31, 2011, the trial court entered a judgment order, incorporating its previous letter opinion, in favor of the defendants and against the plaintiffs in the amount of $90,817.70 in damages, plus $65,110 in attorney fees and $5,290.50 in costs, for a total of $161,218.20. Thereafter, the plaintiffs filed a timely notice of appeal and the defendants filed a timely notice of cross-appeal.

¶ 18 As a preliminary matter, the defendants filed a motion to strike the plaintiffs' opening brief. The defendants argue that the statement of facts is argumentative and that the inclusion of the plaintiffs' closing argument in the appendix is an improper attempt to circumvent the page limitation of our supreme court rules. Supreme Court Rule 341(h)(6) (eff. July 1, 2008) requires that a statement of facts state the facts "accurately and fairly without argument or comment." The striking of a brief is not necessarily warranted where the violations of the supreme court rules are not so flagrant as to hinder our review of the issues. *Gaston v. City of Danville*, 393 Ill. App. 3d 591, 601 (2009). In the present case, the appellants' statement of facts does include some argumentative comments but is not so egregious as to hinder our review. We will, however, disregard any inappropriate or unsupported statements. Supreme Court Rule 342(a) (eff. Jan. 1, 2005) indicates that an appendix may contain any materials from the record pertinent to the appeal. The plaintiffs' closing argument is part of the record and it was not improper to include it in the appendix of their appellants' brief as they found it pertinent to their appeal. Accordingly, we deny the defendants' motion to strike the appellants' brief.

¶ 19 On appeal, the plaintiffs first argue that the defendants failed to prove that they were damaged by the plaintiffs' breach of contract. Specifically, the plaintiffs argue that the defendants

were required to prove that, had the plaintiffs submitted to seller-financing with Benchmark Mortgage, the lender would have provided a loan within the contract requirements and that the closing would have taken place. The plaintiffs note that the defendants did not provide evidence from anyone at Benchmark Mortgage, or any other mortgage company, as to whether it would have provided the plaintiffs with a mortgage under the terms of the contract.

¶ 20 To succeed on a claim for breach of contract, a plaintiff must plead and prove: (1) the existence of a contract, (2) the performance of its conditions by the plaintiff, (3) a breach by the defendant, and (4) damages as a result of the breach. *Roberts v. Adkins*, 397 Ill. App. 3d 858, 866–67 (2010) (citing *Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd.*, 376 Ill. App. 3d 1006, 1014 (2007)). The purpose of damages for breach of contract is to put the injured party in the position it would have been in had the contract been fully performed. *Anderson v. Long Grove Country Club Estates, Inc.*, 111 Ill. App. 2d 127, 141 (1969). As such, the proper measure of damages for breach of contract is the difference in the injured party's current position and the position the injured party would have attained if the breaching party had fully performed its duties under the contract. *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 546-47 (2011). Although absolute certainty with regard to damages is not required, damages must be proved with reasonable certainty and cannot be based on conjecture or speculation. *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 130 (2008).

¶ 21 We will reverse a trial court's ruling as to damages only if it is contrary to the manifest weight of the evidence. *Roberts v. Adkins*, 397 Ill. App. 3d 858, 867 (2010). A trial court's determination is against the manifest weight of the evidence where "an opposite conclusion is clearly apparent or the [trial court's] finding is palpably erroneous and wholly unwarranted, is clearly the

result of passion or prejudice, or appears to be arbitrary and unsubstantiated by the evidence." *Joel R. v. Board of Education of Mannheim School District 83*, 292 Ill. App. 3d 607, 613 (1997).

¶ 22 In determining what evidence was necessary in order to prove damages as a result of the plaintiffs' breach in the present case, we find *Docas v. G.A.D. Incorporated*, 84 Ill. App. 3d 883 (1980), instructive. In that case, the plaintiff, Mary Docas, was awarded $4,600 as damages because the defendant, Richard Africk, president of G.A.D., was found to have breached a contract for the purchase of the plaintiff's business. *Id.* at 884. The contract was conditioned on Africk obtaining acceptable lease terms from the lessor of the premises where the business was located. *Id.* Africk attempted to cancel the contract, alleging the lessor refused to grant him acceptable lease terms. *Id.* at 885. After hearing testimony, the trial court determined that Africk had failed to use reasonable efforts in procuring acceptable lease terms from the lessor. *Id.* at 886. The trial court awarded damages of $4,600, the difference between the contract price and the price for which the business was ultimately sold. *Id.* The reviewing court held that the trial court's determination was supported by the evidence. *Id.* at 887. Specifically, the evidence showed that Africk had only contacted the lessor once after the contract was executed and the lessor's testimony showed that he was willing to negotiate with the defendant. *Id.*

¶ 23 In *Docas*, Docas presented some evidence, the lessor's testimony, that had Africk used reasonable efforts, the lessor would have negotiated reasonable lease terms. Similarly, in the present case, to prove damages, the defendants should have provided some evidence that had the plaintiffs contacted Benchmark Mortgage, Benchmark would have issued the plaintiffs a mortgage commitment. The defendants could have requested the necessary financial information via discovery and had a representative of Benchmark Mortgage testify that, based on the plaintiffs' financial

position, they would have qualified for a mortgage within the contract requirements. As stated earlier, the proper measure of damages was the difference in the defendants' position following the breach and the position the defendants would have attained had the plaintiffs contacted Benchmark Mortgage and provided all the necessary information. *Palmolive Tower Condominiums*, 409 Ill. App. 3d at 546-47. If the plaintiffs would have qualified for a mortgage from Benchmark Mortgage, then the defendants could be found to have incurred actual damages as a result of the breach. However, if the plaintiffs would not have so qualified, then the contract would not have closed even if the plaintiffs had cooperated in securing seller-financing. Because there was no evidence that the plaintiffs would have qualified for a mortgage from Benchmark mortgage, the damage award was not substantiated by the evidence and it was, therefore, against the manifest weight of the evidence. *Joel R.*, 292 Ill. App. 3d at 613.

¶ 24 Nonetheless, in a contract case, a plaintiff is entitled to nominal damages even if he cannot show any injury from the breach. *Midland Hotel Corporation v. Reuben H. Donnelley Corporation*, 118 Ill. 2d 306, 316 (1987); *Hydrite Chemical Co. v. Calumet Lubricants Co.*, 47 F. 3d 887, 891 (7th Cir. 1995); Restatement (Second) of Contracts § 346 cmt. b (1981). Accordingly, we reverse the trial court's damage award and grant the defendants $1 in nominal damages. In so ruling, we note that our remand order did not place any limitations on the determination of damages. See *Thatch v. Missouri Pacific Railroad Co.*, 69 Ill. App. 3d 48, 55-56 (1979) (it is necessary to look beyond the concluding language of a mandate or opinion to see what was in fact ordered to be done). The trial court could have made any damages determination it saw fit, if based on correct reasons and warranted by the evidence. In our previous order, we held only that the plaintiffs had breached the contract. The parties' first appeal did not raise any issue as to damages and we, therefore, did not

address the issue of damages. Contrary to the trial court's determination, our previous order did not render the issue of damages "moot." Finally, based on our determination that the defendants were entitled to only nominal damages, we need not reach the plaintiffs' additional arguments, raised on appeal, regarding the alleged impropriety of the damage award.

¶ 25 In a petition for rehearing, the defendants argue that our determination is inconsistent with our decision in the first appeal. The defendants note that in the trial court's original 2008 letter opinion, it had stated that the defendants "did not contractually or procedurally lay the proper foundation for a finding of breach of contract and resultant damages to be awarded." The defendants argue that, because we reversed that order, we necessarily held that they did prove that they suffered actual damages as a result of the breach. However, when read in context, the quoted trial court language meant only that, because the defendants failed to prove breach, they were not entitled to damages. The trial court did not address the issue of damages. In reversing the trial court in the first appeal, we held that the defendants had proved that the plaintiffs breached the contract, recognized that the defendants were likely entitled to some damages, and remanded the matter to the trial court on the issue of damages. We made no determination as to the amount of damages. In this appeal, we determined that the defendants had not proved they were entitled to actual damages and therefore reduced the damage award to nominal damages. Accordingly, our orders are not inconsistent.

¶ 26 The plaintiffs' final argument on appeal is that the defendants are not entitled to attorney fees and costs under the contract. Specifically, the plaintiffs argue that because the defendants failed to prove actual damages, they are not a prevailing party under the contract. Paragraph 28 of the contract in the present case provided, in part:

> "In any action with respect to this Contract, the Parties are free to pursue any legal remedies at law or in equity and the prevailing Party in litigation shall be entitled to collect reasonable attorney fees and costs from the non-Prevailing Party as ordered by a court of competent jurisdiction."

¶ 27 Under this contract provision, a prevailing party is entitled to collect reasonable attorney fees and costs from the non-prevailing party. A "prevailing party" is one who has been awarded some relief by the court. See *Kirkpatrick*, 385 Ill. App. 3d at 138 (plaintiffs were prevailing party where they established a cause of action under the Consumer Fraud Act and were awarded nominal damages). See also *J.B. Esker & Sons, Inc. v. Cle–Pa's Partnership*, 325 Ill. App. 3d 276, 280 (2001) (holding that a party that receives judgment in his favor is usually considered the prevailing party). In the present case, the defendants received judgment in their favor on their claim for breach of contract and are awarded nominal damages. Accordingly, the defendants are the prevailing party and are entitled to reasonable attorney fees and costs pursuant to the contract.

¶ 28 On cross-appeal, the defendants first argue that the trial court erred in failing to include a $25,000 broker's commission, incurred in the ultimate sale of the subject home, in the amount of damages. However, we need not address this argument due to our determination above. Because the defendants failed to provide some evidence that the contract would have closed had the plaintiffs contacted Benchmark Mortgage, the defendants are not entitled to actual damages. Accordingly, whether the trial court acted within its discretion in failing to consider additional evidence as to the $25,000 commission on remand is a moot issue.

¶ 29 The defendants' final contention on appeal is that the trial court erred in awarding them only five hours' worth of attorney fees for the work conducted on remand. The defendants argue that,

merely because the trial court ultimately determined that there was no net tax effect on the damages award, did not mean that preparation for and attendance at the evidentiary hearing was unnecessary for the defendants.

¶ 30 Although a party is generally responsible for his own attorney fees, an exception exists when a contract provides for an award of attorney fees. *J.B. Esker & Sons*, 325 Ill. App. 3d at 281. In the present case, the contract provided, as stated above, that the prevailing party is entitled to collect reasonable attorney fees and costs from the non-prevailing party. Contractual provisions for an award of attorney fees must be strictly construed. *Id.* "When a contract calls for the shifting of attorney fees, a trial court should award all reasonable fees." *Id.* at 282. Nonetheless, whether and in what amount to award attorney fees is within the discretion of the trial court and its decision will not be disturbed on review absent an abuse of that discretion. *In re Estate of Callahan*, 144 Ill.2d 32, 43-44 (1991).

¶ 31 Here, the trial court found the hourly rates charged by the defendants' counsel to be fair, reasonable, and customary. Nonetheless, the trial court disallowed certain charges for the reasons argued by the plaintiff. The plaintiff had argued that certain charges were improper because they were clerical in nature, duplicative, or unrelated to the litigation. The defendants do not challenge these findings. However, the trial court further found that:

> "Anything and everything that was done in preparation for the evidentiary hearing on damages was a <u>complete</u> waste of time in light of what was presented by the experts of the respective parties. Defendant's counsel did not need to engage in any of the activities pertaining to the preparation of the evidentiary hearing. They could have clearly, at very early stages, determined that no evidentiary hearing was necessary due to the issue of there

> being no tax consequences pursuant to their own expert and advised this Court accordingly!" (Emphasis in original).

Accordingly, the trial court found that the defendants were only entitled to five hours of attorney fees, at $250 per hour, for the work conducted on remand.

¶ 32 We agree with the defendants that this was an abuse of the trial court's discretion. The record demonstrates that the plaintiffs and the trial court were the proponents of the evidentiary hearing on possible tax consequences related to the damage award. In the plaintiffs' reply to the defendants' response to their motion to compel filed on remand, the plaintiffs argued that any damage award should be offset by any tax benefits. At the November 8, 2010, hearing, the trial court stated:

> "I think I do need an accountant to testify in regard to the net tax effect on the difference in the price of the home, the effect of an interest deduction for the additional mortgage interest payments that were made, and the effect of the property tax ***.
>
> I do think it's in both of your interests to either have one or each of you have an accountant work up the net effect of that."

The defendants presented expert testimony at the hearing at the specific request of the trial court. The trial court abused its discretion in finding defendants' counsel at fault for failing to advise the trial court that there were no tax consequences. Naturally, the defendants would argue that there were no tax consequences while the plaintiffs would argue that there were tax benefits justifying a decrease in the damage award. The defendants' expert testimony was, therefore, no surprise. Accordingly, the trial court abused its discretion in limiting the defendants' attorney fee award to five hours of attorney fees for the work conducted on remand. The matter is remanded for a proper determination of attorney fees for the remand portion of this case.

¶ 33 The plaintiffs argue that the trial court did not abuse its discretion in limiting the attorney fees for work conducted after remand because most of the work conducted on remand was due to the defendants' failure to cooperate with discovery and their improper requests for additional damages. In light of our determination above, it is appropriate to allow the trial court to consider this matter on remand.

¶ 34 For the foregoing reasons, we affirm the judgment in favor of the defendants on their counterclaim but reduce the damage award from $90,817.70 in actual damages to $1 in nominal damages. We also affirm the finding that the defendants are entitled to reasonable attorney fees and costs pursuant to the contract. However, we vacate the award of attorney fees to the extent that the award limited attorney fees to five hours for the work conducted on remand. We remand for further proceedings not inconsistent with this order.

¶ 35 Affirmed in part as modified and vacated in part; cause remanded.