

No. 14-3417 & 15-1320 (cons.)

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STERN INGREDIENTS, INC.,)	Appeal from the Circuit Court of
)	Cook County, Law Division
Plaintiff-Appellee/Cross-Appellant,)	
)	
v.)	No. 09 L 2571
)	
LAWRENCE FOODS, INC.,)	Honorable Margaret Brennan,
)	Judge Presiding
Defendant-Appellant/Cross-Appellee.)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Connors and Justice Harris concurred in the judgment.

O R D E R

- ¶ 1 *Held:* The trial court's finding, after a bench trial, that defendant breached the parties' contract was not against the manifest weight of the evidence. The award of damages and prejudgment interest in favor of plaintiff were not against the manifest weight of the evidence. The trial court did not abuse its discretion when awarding plaintiff attorney fees and costs and denying an award of exemplary damages.
- ¶ 2 This appeal arises from the termination of a nine-year business relationship between plaintiff Stern Industrial Inc. ("Stern"), an industrial food broker, and defendant Lawrence Foods, Inc. ("Lawrence"), an industrial food manufacturer. Stern claimed that Lawrence Foods breached

the parties' written contract when failing to timely pay the commissions for the brokerage services Stern performed. In its counterclaim, Lawrence Foods alleged Stern's breach of contract, breach of fiduciary duty and fraud. Following a bench trial, the trial court found that Lawrence Foods breached the parties' agreement. The court awarded Stern damages, prejudgment interest and attorney fees, but denied Stern's request for exemplary damages under the Illinois Sales Representative Act ("Sales Act"), 820 ILCS 120/1 *et seq.* (West 2012).

¶ 3 On appeal, Lawrence Foods argues that the trial court's findings and the verdict for Stern and against Lawrence Foods were against the manifest weight of the evidence. Stern cross-appeals the trial court's denial of exemplary damages. For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 Stern is an industrial food broker that obtains orders for sales of products for industrial vendors and works solely on commissions. Lawrence Foods is an industrial food manufacturer engaged in producing fruit fillings, icing, caramels, donut glazes, jellies, preserves, caramel donut icing and caramel buttercreams.

¶ 6 On April 5, 2000, Stern and Lawrence Foods entered into a brokerage agreement. The agreement provided that Stern was to promote and merchandise Lawrence Foods' products to customers, and, in return, Lawrence would pay Stern earned commissions "once monthly." The commissions were earned when the payment of related invoices was received by Lawrence Foods. Stern was entitled to receive 5% commission, exclusive of shipping and credits, of the amount paid to Lawrence Foods on products other than fondant. The fondant commission was paid at 1%. The agreement provided, in relevant part: that Stern would not sell product lines which were competitive with Lawrence Foods; that upon termination of the agreement, Stern would return to Lawrence Foods all books of accounts, papers, orders, or other property

belonging to Lawrence Foods; and that Stern would refrain from using Lawrence Foods' confidential information for any purpose.

¶ 7 On January 16, 2009, Lawrence Foods sent a notice to Stern that it was terminating its agreement effective February 16, 2009. Lawrence Foods indicated that it decided to terminate Stern because Stern was not focusing on growing Lawrence Foods' business.

¶ 8 On March 9, 2009, Stern filed its complaint against Lawrence Foods claiming that Lawrence Foods breached the brokerage agreement that the parties entered into on April 5, 2000, when failing to pay the commissions due and owing and sought "at least \$73,538.87" in damages. Stern claimed that Lawrence Foods also violated the Sales Act, by failing to pay the commissions in a timely manner, and that Stern was entitled to exemplary damages, prejudgment interest and attorney fees.

¶ 9 The parties unsuccessfully attended a settlement conference. During that conference, Lawrence Foods presented a document showing that the amount sought by Stern in its complaint was incorrect and the amount was no more than \$47,000. On August 9, 2009, Lawrence Foods filed its counterclaim against Stern for breach of contract, breach of fiduciary duty, civil conspiracy, and interference with existing business relationship.

¶ 10 The parties amended their pleadings during the course of the litigation. Ultimately, Lawrence Foods filed its third amended complaint against Stern for breach of contract, breach of fiduciary duty, and fraud. Lawrence Foods' complaint alleged that Stern breached the contract and its fiduciary duty by selling product lines which were competitive with Lawrence Foods, and by misappropriating Lawrence Foods' recipes and specifications. Lawrence Foods claimed that it paid all the commissions and was entitled to a set-off for the payments made to Stern.

¶ 11 A bench trial was held between August 11, 2014, and August 19, 2014. In relevant part, the following evidence was presented at trial. Joni Stern testified that she was the owner of Stern, a specialty ingredient industrial food broker. She knew Jeff Jenniges from Lawrence Foods since the 1990s. Jenniges introduced Joni Stern to Les Lawrence from Lawrence Foods. On April 5, 2000, Joni Stern and Les Lawrence signed a brokerage agreement. Joni Stern testified that she provided a list of her customers to Les Lawrence at their meeting and that Oringer Foods was on that list. Stern's website, when it started in 2001, listed that Stern acted as a broker for Oringer Foods.

¶ 12 Joni also stated that she had numerous conversations and sent several emails to Lawrence Foods where she complained about not being timely paid on commissions due and owing and that those issues began sometime in 2005. For instance, in 2008, before the termination of the agreement with Lawrence Foods, Joni Stern contacted Lawrence Foods about a commission in amount of \$20,000 which was outstanding for more than four months. Joni Stern deferred to Michael Halpin's calculations for the total amount of the commissions that Lawrence owed to Stern.

¶ 13 Les Lawrence testified regarding the execution of the 2000 agreement. He testified that the meeting between him and Joni Stern lasted approximately one hour, and that they discussed not representing competing products. He did not know at that time what vendors Stern represented. He testified that, in the 9 years Stern had brokered for Lawrence Foods, he never learned of anyone else for whom Stern brokered.

¶ 14 Mark Lawrence testified that Lawrence Foods sent a revised brokerage agreement to Stern on September 28, 2006. Mark Lawrence met with Joni Stern to discuss the new agreement. Joni Stern never signed the revised brokerage agreement. Mark Lawrence stated that Joni Stern

did not refuse to sign the document and she nodded her head with regard to what he had to say. Marc told Joni to take the document, review it, sign it and return it to him. Mark followed up with an email to Joni Stern on November 30, 2006, where he reminded her again to sign the agreement. The document was never signed.

¶ 15 Jeff Jenniges testified that he was a former employee of Lawrence Foods. He began his employment around March 2000. Jenniges knew and had worked with Joni Stern before joining Lawrence Foods and he was the contact person for Stern at Lawrence Foods. Jenniges testified that, although he sent certain confidential information to Jeff Faller from Stern, an action that may have violated his non-compete agreement he had with Lawrence Foods, he did not intentionally distribute or kept documents that would have permitted someone experienced in industrial foods to ascertain ingredients or the full recipe for certain products manufactured by Lawrence Foods.

¶ 16 Timothy Higgins testified that he was a former employee of Lawrence Foods. He began working for Lawrence Foods in 2005 and left in February 2009. In approximately September 2007, Higgins became Lawrence Foods on-boarding manager. As on-boarding manager, Higgins duties included: facilitating new businesses; setting up new customers; and working with quality issues for customers' products.

¶ 17 Higgins stated that he knew that Oringer Foods was a manufacturer of caramel layers. During his employment at Lawrence Foods, Higgins became aware that Stern sold caramel for Oringer Foods. More precisely, in 2007-2008 at the Chicago Institute of Food Technologists Show he saw a table with Oringer Foods products sitting on Stern's table, and it was clear from the display that Stern was acting as a broker for Oringer. He was initially surprised to see Oringer Foods' products there. Higgins did not protest or raise any concerns that Stern was

selling for Oringer Foods. Higgins acknowledged that, in 2008, Lawrence Foods was delaying paying its broker commissions. Joni Stern and Jeff Faller sent Higgins spreadsheets concerning missing payments and Higgins attempted to facilitate some of the payment issues.

¶ 18 Jeff Faller testified he was a broker for Stern Ingredients, and that he dealt with both Oringer Foods and Lawrence Foods at the same time. He had contacts with Jeff Jenniges without notifying Lawrence Foods. He also stated that Joni Stern was the primary contact for Oringer Foods and he was the primary broker for Lawrence Foods.

¶ 19 Michael Halpin testified as to his reconciliation of the commissions due to Stern. He made his calculations based on a review of Stern's records, Lawrence Foods' records, and information obtained from third party vendors. Halpin determined that the amount of outstanding commissions was \$115,800.74 plus an added 5% interest that would generate an additional \$31,551.74, for a total of \$147,351.48.

¶ 20 Howard Gamer, a certified public accountant for Lawrence Foods testified concerning his calculations of damages and lost profits claimed by Lawrence Foods as a result of Stern's alleged actions of brokering for Oringer Foods, a competitive company. He stated that he calculated the damages for lost sales and, accounting for 5% sales commissions, he reached an amount of \$3,874,872. His calculations assumed that Lawrence Foods would capture 100% of the sales that went to Oringer Foods. Gamer indicated that he did not analyze whether Lawrence Foods had the financial means to accommodate the increased volume and he did not access Lawrence Foods' cost system to verify the cost to manufacture the extra products.

¶ 21 On October 27, 2014, the trial court entered a judgment for Stern and against Lawrence Food in the amount of \$91,977.50 plus \$4,598.87 in prejudgment interest. In its posttrial motions, Stern requested that the court: reconsider the calculation of prejudgment interest, and

award exemplary damages, attorney fees and costs pursuant to the Sales Act. Stern's motion for exemplary damages was denied while its motion for the modification of the amount for prejudgment interest and for attorney fees was allowed. The court awarded Stern \$26,031.10 in prejudgment interest. Following a hearing, the court awarded Stern \$89,320.20 in attorney fees.

¶ 22 Lawrence Foods appeals the trial court's judgment entered on October 27, 2014, and the judgment awarding Stern prejudgment interest and attorney fees. Stern appeals the portion of the court's judgment denying exemplary damages, and the court's motion to reconsider where the court again denied its request for exemplary damages.

¶ 23 On June 1, 2015, we entered an order consolidating the appeals raised in this case.

¶ 24 ANALYSIS

¶ 25 I. Lawrence Foods' Appeal

¶ 26 A reviewing court will not substitute its judgment for that of the trial court in a bench trial unless the judgment is against the manifest weight of the evidence. *Dargis v. Paradise Park, Inc.*, 354 Ill. App. 3d 171, 177 (2004); *First Baptist Church of Lombard v. Toll Highway Authority*, 301 Ill. App. 3d 533, 542 (1998). “A judgment is against the manifest weight of the evidence only when the opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.” *Judgment Services Corp. v. Sullivan*, 321 Ill. App. 3d 151, 154 (2001).

¶ 27 On appeal, Lawrence Foods argues that it shouldn't have been found liable for any breach of contract, and that damages, prejudgment interest, and attorney fees should not have been assessed against it. To recover for a breach of contract a party must present facts showing (1) a valid and enforceable contract existed; (2) the plaintiff performed according to the contract; (3) the defendant breached the contract; and (4) the breach resulted in damages. *D.S.A Fin. Corp. v.*

Cty. of Cook, 345 Ill. App. 3d 554, 559 (2003). Lawrence Foods contends that the court's findings on which it based its conclusion that Stern proved by a preponderance of the evidence that Lawrence Foods breached the contract were against the manifest weight of the evidence. Instead, Lawrence Foods argues, it was Stern who breached the agreement, breached its fiduciary duty, and defrauded Lawrence Foods.

¶ 28 The trial court held that Stern proved by a preponderance of the evidence that Lawrence Foods breached the parties' agreement to pay the commissions. When analyzing Stern's breach of contract claim, the trial court noted that the parties did have an enforceable brokerage agreement signed on April 5, 2000, that terminated on January 16, 2009. The court held that Lawrence Foods breached the contract when it failed to timely pay the commissions due and owing to Stern.

¶ 29 Initially, Lawrence Foods challenges the court's finding that the 2000 agreement applied, contending that Stern, by its conduct, indicated its assent to another contract sent by Lawrence to Stern in September 2006. According to Lawrence Foods, the September 2006 agreement controlled where the testimony of Mark Lawrence established that, although the parties did not sign the 2006 agreement, Joni Stern consented to the new contract when she "nodded her head with regard to what Mr. Lawrence had to say."

¶ 30 A party named in a contract may, by his acts and conduct, indicate his assent to its terms and become bound by its provisions even though he has not signed it. *Landmark Properties, Inc. v. Architects Int'l-Chicago*, 172 Ill. App. 3d 379, 383 (1988). However, for course of conduct to act as consent to a contract, the consent must be clearly indicated. *Id.*

¶ 31 Here, it is undisputed that the September 2006 contract was never signed by Stern. Marc Lawrence testified that, during his meeting with Joni Stern, on September 28, 2006, he told her

to sign the new amended contract and send it back to him. On November 30, 2006, Marc Lawrence sent a follow-up email to Joni Stern again requesting the signed copy of the new contract. He testified that he did not receive a response, or the contract back, and never followed up.

¶ 32 Joni Stern testified that she did not recall ever receiving another draft contract. Furthermore, Jeff Faller from Stern testified that although he recalled that Joni Stern asked him to read a new contract with Lawrence Foods, he told her that the new contract was not appropriate. Faller also stated that Joni Stern told him that she was not going to sign the new agreement. Based on this record, we find that Lawrence Foods failed to establish that Stern consented to the 2006 agreement and the trial court's finding that the 2000 agreement controlled the parties' business relationship was supported by the evidence.

¶ 33 Lawrence Foods argues next that Stern did not prove by a preponderance of the evidence that Lawrence Foods breached their contract. Lawrence Foods maintains that it was Stern who did not fulfill its obligations under either agreement because, from the outset of their relationship, without Lawrence Foods' knowledge and in violation of their agreement and Stern's fiduciary duty, Stern was selling caramel for Oringer Foods, one of Lawrence Foods' primary competitors. Lawrence denies that it owed commissions to Stern and claims that Stern was, in fact, overpaid.

¶ 34 The trial court found that Lawrence Foods was aware that Stern sold products for Oringer Foods since the commencement of their business relationship. Lawrence disputes the trial court's findings regarding Oringer Foods arguing that that the court's credibility determination in this regard was misplaced. As the trier of fact, the trial judge is in a position superior to a court of review to observe the demeanor of witnesses, to judge their credibility and to determine the

weight their testimony should receive. *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008).

¶ 35 The court's determination was supported by the evidence. Specifically, Joni Stern testified that, at the initial meeting with Les Lawrence, she supplied the list of vendors represented by Stern which included Oringer Foods. Jeff Jenniges who worked for Lawrence Foods in different capacities for a number of years, corroborated Joni Stern's testimony. Jenniges testified that he knew that Stern represented Oringer Foods, and that he introduced Joni Stern to Les Lawrence. Jenniges stated that Joni Stern's "normal operating procedure" at meetings with new vendors was to hand out her list of current clients with their products and that her vendors were also listed on her website. Both Stern and Lawrence Foods advertised commercial products for sale on their respective websites. Joni Stern identified Stern's website pages from 2001 through 2008 showing that Stern listed Oringer Foods as a vendor. The pages also provided links to both Oringer Foods' and Lawrence Foods' respective websites. In addition, Timothy Higgins from Lawrence Foods indicated that, in 2007-2008, at the Chicago Institute of Food Technologists Show, he saw Oringer Foods' products sitting on one of Stern's tables, and it was clear from the display that Stern was acting as a broker for Oringer Foods.

¶ 36 On the other side, Lawrence Foods points to Les Lawrence's testimony where he stated that he did not remember Joni Stern providing him a copy of Stern's vendors list at contract formation in 2000 and that, had he known from the outset that Stern was a broker for Oringer Foods, Lawrence Foods would have never entered into an agreement with Stern. Les Lawrence claimed that Lawrence Foods never looked at Stern's website and did not monitor Stern during the period the contract was in effect because the culture of its business was to rely on the honesty of the people with whom Lawrence Foods was dealing.

¶ 37 Where the evidence is conflicting or where conflicting inferences may be reasonably drawn from the evidence the resolution of such conflicts is particularly within the province of the trier of fact. *Bekele v. Ngo*, 236 Ill. App. 3d 330, 331 (1992). Here, the trial court determined as a matter of fact that Stern advised Lawrence Foods about providing brokering services for Oringer Foods. The court specifically noted that "the claimed lack of knowledge by both Les and Marc Lawrence rang particularly hollow," and deemed Les Lawrence's testimony incredible. We will not disturb the court's finding and credibility determination as the court's conclusion in this matter is amply supported by the evidence.

¶ 38 Next, Lawrence Foods argues that Stern failed to establish that it performed its part of the contract because it failed to return all Lawrence Foods' property when their agreement was terminated. Lawrence points to Joni Stern's testimony that neither she nor anyone else on behalf of Stern contacted Lawrence to request a method or a place to return the documents obtained from Lawrence Foods. However, Joni Stern testified that she did not receive any directives from anyone at Lawrence Foods to return, delete or destroy any materials. Since there was no request to return any materials, the court's determination that Stern did not breach its agreement for this reason is not against the manifest weight of the evidence.

¶ 39 Lawrence Foods also maintains that Stern inadequately retained Lawrence Foods' confidential formula for bar layers that remained in Jeff Faller's personal computer that he used at Stern. But, there was no evidence that the confidential mocha bar document was disclosed or used by anyone for anything. Specifically, Jeff Jenniges from Lawrence Foods testified that he designed the mocha bar layer and that he forwarded an email containing the factor costs pertaining to the mocha bar layer to Jeff Faller. The reason he did that was because Faller was meeting with another company, Abbot Labs/Ross Nutrition, one of Lawrence Foods' clients, to

discuss pricing issues regarding this product. Furthermore, Jeff Faller testified that he was instructed to keep information that Stern received from vendors confidential and that he kept the information confidential. Accordingly, the circuit court's finding that Stern performed its part of the agreement was supported by the record and not against the manifest weight of the evidence.

¶ 40 Lawrence Foods contends that, when granting Stern's claim for breach of contract, and denying its third amended complaint, the circuit court failed to consider Lawrence Foods' affirmative defense of breach of fiduciary duty against Stern. To state a claim for breach of fiduciary duty, a plaintiff must establish: (1) a fiduciary duty on the part of the defendant; (2) the defendant's breach of that duty; and (3) damages that were proximately caused by the defendant's breach. *AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill. App. 3d 17, 32 (2005).

¶ 41 The trial court did consider Lawrence Foods' arguments and rejected them. Lawrence Foods' claims for breach of fiduciary duty, breach of contract and fraud claims contained in its third amended complaint were all premised on the same facts—that Stern was selling Oringer Foods competing products without disclosing to Lawrence that such transactions were occurring. Lawrence Foods also alleged that Stern was in "cahoots" with Jeff Jenniges and Tim Higgins to destroy Lawrence Foods' business by approaching its customers and requesting them to do business with Jeff Jenniges' wife's company as opposed to Lawrence Foods.

¶ 42 The court rejected Lawrence Foods' arguments finding that Lawrence Foods was in fact aware that Stern was selling Oringer Foods products and we found that the court's determination was supported by the record. Similarly, the court heard evidence about the theory that Jeff Jenniges acted in concert with Tom Higgins and Stern to destroy Lawrence Foods' business. It resolved that question in favor of Stern and found that, while Jeff Jenniges and Timothy Higgins did engage in conduct that may have violated their non-compete agreements with Lawrence

Foods, it would have been a too great of a leap to determine that Stern breached its contract or fiduciary duty by possessing information that came from Jeff Jenniges to Jeff Faller. And, although Jenniges, Faller and Higgins shared information, the court found that the link to Joni Stern was not present. The court found no credible evidence that Stern breached its contract, or fiduciary duty or that it defrauded Lawrence Foods. We are not going to set aside the court's findings merely because the court could have determined the credibility of the witnesses differently or drawn different inferences of fact. See *Alwin v. Village of Wheeling*, 371 Ill. App. 3d 898, 916 (2007). None of the trial court's findings were against the manifest weight of the evidence.

¶ 43 Furthermore, the trial court properly held that Lawrence Foods offered no reliable evidence that Stern's transactions with Oringer Foods caused Lawrence Foods any damages or losses. Lawrence Foods pointed to no lost customers, no lost market share, and no lost sales. The testimony of Howard Gamer, Lawrence Foods' expert, was speculative at best. Gamer used a total sales-lost profits formula and his calculations assumed that Lawrence Foods would capture 100% of the sales that went to Oringer Foods. Gamer admitted that he did not analyze whether Lawrence Foods had the financial means to accommodate the increased volume, he did not access Lawrence Foods' cost system to verify Lawrence Foods' financial ability to perform, and did not consider the additional cost of the potential \$19 million dollars in sales. In sum, we find that the court's verdict in favor of Stern and rejecting Lawrence Foods' third amended complaint was not against the manifest weight of the evidence.

¶ 44 C. Damages and Prejudgment Interest

¶ 45 Lawrence challenges next the evidence to support the circuit court's award of commissions. Where an award of damages is made after a bench trial, the standard of review is

whether the trial court's judgment is against the manifest weight of the evidence. *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859. [A] reviewing court should not overturn a trial court's findings merely because it does not agree with the lower court or because it might have reached a different conclusion had it been the trier of fact." *In re Application of the County Treasurer*, 131 Ill. 2d 541, 549 (1989). In overturning a damage award, a reviewing court must find that the trial judge either ignored the evidence or that its measure of damages was erroneous as a matter of law. *MBC, Inc. v. Space Center Minnesota, Inc.*, 177 Ill. App. 3d 226, 234 (1988). An award of damages is not against the manifest weight or manifestly erroneous if there is an adequate basis in the record to support the trial court's determination of damages. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13.

¶ 46 We find that the circuit court's determination of the commissions due to Stern was not against the manifest weight of the evidence. Michael Halpin, a certified public accountant was qualified as Stern's expert in accounting to testify as to the reconciliation of commissions due to Stern. Halpin testified that he reviewed 5,000 pages of documents in preparing his report and testimony. He stated that his calculations were based on a review of Stern's record, Lawrence Foods' records, and information obtained from third party vendors. Halpin determined that the amount of outstanding commissions was \$115,800.74. Contrary to Lawrence Foods' argument, Halpin did not change its testimony regarding the amount of the commissions due, but simply responded to Stern's hypothetical questions on cross-examination.

¶ 47 On the other side, Marc Lawrence testified regarding Halpin's damage calculation and stated that Lawrence Foods paid Stern \$71,311.95 more than what Halpin noted in his calculation. Marc Lawrence stated that Lawrence Foods did not collect an amount of \$12,819.45

from several vendors, and that \$1,523.79 had to be deducted from the amount which Halpin improperly included in his damage calculation. Similarly, Lawrence stated that Halpin did not take into consideration purchase orders that were never shipped which totaled \$4,893.29. In addition, Lawrence Foods contends that the amount due to Stern should be reduced by 45% due to Jeff Faller, a Stern employee. According to Lawrence Foods, the amount of the commissions, if any, due to Stern should have been \$12,644.46.

¶ 48 The trial court reviewed all the evidence presented and determined that the amount of outstanding commissions due to Stern was \$91,977.50. The court remarked that the amount of the commissions was a matter of extensive debate and noted that it considered all of the evidence presented by the parties. The court deemed Marc Lawrence's testimony incredible and pointed out that his calculations regarding damages changed a few times during the litigation. As discussed above, this court will not disregard the findings made by a trial court when there is an adequate basis in the record to support the trial court's determination of damages. See *P.A.M. Transport, Inc. v. Builders Transport, Inc.*, 209 Ill. App. 3d 889, 892 (1991) (stating that under the manifest weight standard “where several reasonable inferences based upon the evidence are possible, the inference drawn by the fact finder must prevail”). Based on our review of the evidence, we cannot say that the circuit court's finding as to damages was “arbitrary, unreasonable, or not based in evidence.” See *Staes & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 39. Accordingly, we affirm the trial court's damage award.

¶ 49 Lawrence Foods also challenges the court's award of the prejudgment interest. The court initially awarded Stern \$4,598.87 in prejudgment interest. Following Stern's motion for reconsideration, the court corrected the amount and awarded Stern \$26,031.10. Lawrence Foods

does not challenge Stern's amended calculation, but argues that Stern was not entitled to an award of prejudgment interest because their brokerage agreement did not provide for it.

¶ 50 Section 2 of the Illinois Interest Act, 815 ILCS 205/0.01 *et seq.* (West 2012), permits the recovery of prejudgment interest at a 5% per annum rate, despite the lack of express agreement of the parties, "for all moneys [sic] after they become due on any bond, bill, promissory note, or other instrument of writing." *Kouzoukas v. Ret. Bd. of Policemen's Annuity & Benefit Fund of City of Chicago*, 234 Ill. 2d 446, 476 (2009). An "instrument of writing" includes "a variety of written documents, such as contracts, leases, including instruments evincing transactions of a business and commercial nature which created a debtor-creditor relationship." *Id.*

¶ 51 The instrument "in writing" here is the April 5, 2000, brokerage agreement signed by both parties. Paragraph 4 of the agreement provided for the payment of commissions to Stern within 30 days of Lawrence Foods' receiving its payment from its customers. Just as the trial court noted, this provision indicates a debtor-creditor relationship between Lawrence Foods and Stern, its sales representative. Based on the provisions of the Interest Act, 815 ILCS 205/2 (West 2012), Stern was entitled to a statutory interest of 5% per year for Lawrence Foods' failure to timely pay the commissions. We therefore affirm the trial court's award of prejudgment interests in favor of Stern in the amount of \$26,031.10.

¶ 52 D. Attorney Fees

¶ 53 Lawrence Foods argues that the court's award of attorney fees was against the manifest weight of the evidence. Lawrence contends that Stern failed to present detailed time records containing the facts and computations upon which the fees were predicated, and claims that Stern merely submitted copies of the attorney bills sent to Stern. According to Lawrence Foods, a lot of the work rendered by one of the attorneys, Mr. Gotkin, had nothing to do with Stern's claim

under the Sales Act and there were "repeated references" where Mr. Gotnik inflated the amount of working time during depositions or at trial.

¶ 54 Section 3 of the Sales Act provides that failure to comply with the timely payment provisions results in civil liability for attorney fees and costs. 820 ILCS 120/3 (West 2012). A petition for fees must present the court with detailed records containing facts and computations upon which the charges are predicated specifying the services performed, by whom they were performed, the time expended and the hourly rate charged. *Harris Trust & Sav. Bank v. Am. Nat. Bank & Trust Co. of Chicago*, 230 Ill. App. 3d 591, 595 (1992). We review an order which determined the dollar amount of the award under an abuse of discretion standard. See *Harris Trust & Savings Bank v. American National Bank & Trust Co. of Chicago*, 230 Ill. App. 3d 591, 595-96 (1992) (“Once the trial court makes a determination as to the reasonableness of attorney fees and related costs, that determination will not be disturbed absent an abuse of discretion”). Accordingly, we will reverse the amount of attorney fees only if no reasonable person would make the same decision as the trial court. *DeLapaz v. Selectbuild Construction, Inc.*, 394 Ill. App. 3d 969, 972 (2009).

¶ 55 Here, following extensive briefing and a hearing, the court awarded Stern an amount of \$89,320.20 in attorney fees. Stern's Motion for Attorney Fees sought an amount of \$150,772.46 for the work performed by the two attorneys and included fees incurred in conducting pretrial discovery, settlement attempts, and trial preparation. Stern produced detailed bills as to who performed the task and what was done, and a corrected spreadsheet regarding the claims made under the Sales Act. The evidence also included the attorneys' affidavits that specifically responded to all the objections raised by Lawrence Foods regarding the amount of working time spent on certain issues.

¶ 56 During the hearing, Lawrence Foods raised the same objection as here. The trial court acknowledged that some of the fees proposed by Stern were incurred pursuing Stern's counterclaim and were not covered by the Sales Act. The trial court had all the information and considered Lawrence Foods' objection along with the exhibits and the affidavits and reduced the amount proposed by Stern by almost \$60,000. Based on this record we cannot say that "no reasonable person would make the same decision as the trial court." See *DeLapaz v. Selectbuild Construction, Inc.*, 394 Ill. App. 3d at 972. Therefore, we affirm the court's award of \$89,320.20 in attorney fees in favor of Stern.

¶ 57 II. Stern's Appeal

¶ 58 On appeal, Stern argues that the circuit court erred in denying its request for exemplary damages under the Sales Act. According to Stern, Lawrence Foods' conduct was egregious and the type of conduct that Section 3 of the Sales Act was enacted to prevent. Stern points out that Lawrence Foods was "slow pay[ing]" Stern during their business relationship and that Lawrence Foods refused to pay the commissions owed when their brokerage agreement terminated in February 2009. At one point, Lawrence Foods admitted in an audit letter sent to Stern it owed Stern unpaid commissions in the amount of \$82,000. Stern maintains that, after the litigation commenced, Lawrence Foods inexplicably adjusted the amount to \$47,634.97, and, ultimately, it completely denied that it owed Stern any commission.

¶ 59 According to Stern, Lawrence Foods resisted the claim for unpaid commissions counterclaiming with accusations of misconduct unable to be proven at trial ranging from stealing recipes, stealing customers, divulging confidential information and selling competitive product lines. Stern also complains that Lawrence Foods withheld financial documents that were

repeatedly requested in discovery and "multiplied the cost of the litigation unmercifully," so that Stern had to spend money on a discovery facilitator.

¶ 60 Section 3 of the Sales Act provides in pertinent part that “[a] principal who fails to comply with the provisions of Section 2 concerning timely payment or with any contractual provision concerning timely payment of commissions due upon the termination of the contract with the sales representative, shall be liable in a civil action for exemplary damages in an amount which does not exceed 3 times the amount of the commissions owed to the sales representative.” 820 ILCS 120/3 (West 2012). No automatic award of exemplary damages is granted for every violation of the Act. *Installco Inc. v. Whiting Corp.*, 336 Ill. App. 3d 776, 784 (2002) citing *Maher and Associates, Inc. v. Quality Cabinets*, 267 Ill. App. 3d 69, 80 (1994); *Zavell & Associates, Inc. v. CCA Industries, Inc.*, 257 Ill. App. 3d 319, 322 (1993). The court's decision as to whether to grant exemplary damages, or not, will not be disturbed absent an abuse of discretion. *Installco Inc. v. Whiting Corp.*, 336 Ill. App. 3d at 784.

¶ 61 In *Installco Inc. v. Whiting Corp.*, 336 Ill. App. 3d at 784, we noted that the purpose of exemplary damages is to punish the offender and to deter that party and others from committing similar acts of wrongdoing in the future. Such damages should not be awarded absent a finding of "culpability that exceeds bad faith." *Id.* at 784-85. We held that plaintiff was entitled to exemplary damages only if it could demonstrate that the defendant's behavior in withholding the commissions beyond the statutory period "was outrageous and the moral equivalent of criminal conduct." *Id.* at 785; See also *Zavell*, 257 Ill. App. 3d at 322 (“The standard for awarding such damages is willful and wanton conduct or vexatious refusal to pay.”).

¶ 62 The record reveals that, although some commissions were not timely paid, Lawrence Foods' conduct was not outrageous or the moral equivalent of criminal conduct. Lawrence Foods

issued several responses to Stern's demand for payment indicating, for instance, that Stern was going to receive a check for \$11,454.28, and that Stern was paid by Lawrence Foods just under \$70,000 in 2008.

¶ 63 During settlement negotiations, when Stern tendered to Lawrence Foods a list of outstanding invoices, Lawrence Foods stated some its reasons for withholding payment: either because Lawrence Foods never got paid, or there was a dispute about shipping, or that payment was received after the agreement between the parties terminated. Furthermore, although Lawrence Foods amended its counterclaim and pursued causes of action against Stern for fraud, breach of contract, breach of fiduciary duty and did not proceed with its initial pleadings, its conduct certainly does not rise to willful and wanton misconduct. See *Zavell*, 257 Ill. App. 3d at 322. Additionally, while the trial court appointed a discovery facilitator, the cost of the services was shared equally between the parties. Therefore, the trial court did not abuse its discretion when determining that Lawrence Foods' conduct was not vexatious to justify an award of exemplary damages under Section 3 of the Sales Act.

¶ 64 CONCLUSION

¶ 65 Accordingly, we affirm the judgment in favor of Stern and against Lawrence Foods. Furthermore, we affirm the judgment denying Stern's request for exemplary damages under the Sales Act.

¶ 66 Affirmed.