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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

VALENCIA TOWN CENTER VENTURE, L.P., Cross-complainant and Respondent, v. VTC BUSINESS CENTER, LLC,, Cross-defendant and Appellant.	B235948 (Los Angeles County Super. Ct. No. PC039894)

APPEAL from a judgment of the Superior Court of Los Angeles County. Melvin D. Sandvig, Judge. Reversed and remanded with directions.

Greenberg Traurig, Matthew S. Steinberg, Raymond B. Kim, Karin L. Bohmholdt; Greenberg Traurig, Elliot H. Scherker for Cross-defendant and Appellant.

Katten Muchin Rosenman, Thomas J. Leanse for Cross-complainant and Respondent.

Appellant owns parking garages which are utilized by respondent, the owner of properties at a large shopping center. Appellant and respondent are bound by a contract whereby appellant can charge respondent for a portion of real property taxes assessed on the parking garages.

Respondent claims that appellant acted improperly by seeking and obtaining a revised appraisal from the Los Angeles County Assessor's Office affecting the assessment on the garages. The trial court agreed with respondent and found that appellant improperly charged respondent for real property taxes.

We reverse on this issue. Nothing in the contract prevented appellant from seeking a revised appraisal, and the revised appraisal more closely approximated the parties' reasonable expectations. In this opinion, we also find that the trial court improperly awarded an additional miscellaneous expense to respondent. Accordingly, we reverse the judgment in part, with directions for the trial court to reconsider its prevailing party determination.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties

The dispute at issue on appeal centers around the construction and effect of a contract covering parking garages at the Valencia Town Center, a mixed-use office, entertainment, and shopping complex. Appellant VTC Business Center, LLC, a subsidiary of Invesco Real Estate (hereinafter referred to as Invesco), owns two parking garages (hereinafter referred to as the North Garage and the South Garage, and collectively as the Invesco Garages or Parking Structures) at the VTC. Invesco also owns five buildings in the VTC used for offices, restaurants, and retail stores (the Invesco Buildings).

The other party to this appeal is respondent Valencia Town Center Venture, L.P., a joint venture between Westfield LLC and LNR Property (hereinafter referred to as Westfield). Westfield owns the other Valencia Town Center properties, including an indoor mall and an area known as the Entertainment Center, which houses a movie

theater. Tenants of the Entertainment Center and Invesco Buildings, as well as their customers and invitees, park primarily in the Invesco Garages.

Both Invesco and Westfield are successors to prior Valencia Town Center owners. The property was originally developed by Newhall Land and Farming Company (Newhall). In 2000, Newhall sold the Invesco Garages and Invesco Buildings to the California State Teachers Retirement System (CalSTRS). In 2004, Newhall sold the Entertainment Center and other properties to LNR Property. In 2005, Westfield became the owner of the Entertainment Center as part of a joint venture agreement with LNR. Invesco acquired the Invesco Garages and the Invesco Buildings from CalSTRS in 2007.

The Parking REA

Parking rights in the Invesco Garages and related obligations are controlled by contract. On December 1, 2000, Newhall executed a "Declaration and Reservation of Reciprocal Parking and Easement Agreement" (the Parking REA) for, among other things: (1) "the creation and reservation of an easement for pedestrian and vehicular ingress, egress, access and circulation" to and from the Invesco Garages for the benefit of the Entertainment Center and Invesco Buildings; and (2) "the management, operation, maintenance, replacement, improvement and repair of the Parking Areas, including the allocation and assessment of Parking Structure Expenses among the Building Owners." Through this agreement, Westfield, as the current owner of the Entertainment Center, has an easement for parking in the Invesco Garages, but it has to pay certain expenses for this privilege.

The Parking REA provides for the designation of a "Parking Operator," which is defined as "the person or entity that shall operate, manage, maintain, repair and/or restore [the Invesco Garages] pursuant to this Parking REA, *including the allocation and assessment of Parking Structure Expenses*." (Italics added.) Invesco succeeded Newhall and CalSTRS as the party to the Parking REA, and therefore Invesco, as the Parking Operator, has the right and obligation to allocate and assess Parking Structure Expenses.

"Parking Structure Expenses" are defined at section 1.36 of the Parking REA as "all sums incurred, expended or reasonably reserved for the ownership, repair,

maintenance, operation, insurance, management, or replacement of [the Invesco Garages], including but not limited to, the costs of the following: [¶] All reasonable general maintenance, operation and repairs; . . . *all real property taxes (general and special) and assessments which may be levied, assessed, or charged by any public authority or assessment district, for any reason, on improvements and land comprising the North Parking Structure and South Parking Structure, including the Parcels on which such Parking Structures are located* . . . . In addition, Parking Structure Expenses shall include a commercially reasonable fee payable to Parking Operator for supervision and maintenance of the Parking Structures and for accounting, bookkeeping and collection of the Parking Structure Expenses in an amount equal to fifteen percent (15%) of the combined total of the aforementioned Parking Structure Expenses. Parking Operator may cause any or all of said services to be provided by an independent contractor who is experienced in operating first-class mixed-use parking structures." (Italics added.)

Under the Parking REA, "Building Owners"—Westfield and Invesco, for purposes of this case—are required to pay an "Allocable Share" of "Parking Structure Expenses." The Parking REA defines "Allocable Share" as "a Building Owner's proportionate share of all Parking Structure Expenses which share Parking Operator shall levy . . . ." The Allocable Share for the Entertainment Center (owned by Westfield) is 46.6 percent, while the Allocable Share for the buildings owned by Invesco is 53.4 percent.

Earlier Tax-Related Allocations

Prior to the time Invesco acquired its assets, CalSTRS owned the Invesco Garages and was the designated Parking Operator. CalSTRS is a tax-exempt entity, and, as such, possessory interest taxes were assessed. Through its agent, CalSTRS allocated a portion of the possessory interest taxes assessed on affiliated Valencia Town Center properties to the Invesco Garages. It then charged the Entertainment Center for a proportionate amount, allegedly per the terms of the Parking REA.

Because CalSTRS is tax-exempt, there was no specific tax assessment against the Invesco Garages, so CalSTRS itself computed the Parking REA charge based on

appraisals of land and improvement value. For example, to determine the charge in 2002, CalSTRS used an $82 million appraised replacement value for its properties, which included $22 million for the Invesco Garages. CalSTRS assigned 34.93 percent of the total possessory interest taxes assessed against affiliated Valencia Town Center properties to the Invesco Garages, and then charged the Entertainment Center for its Allocable Share (46.6 percent) of the taxes when assessing Parking Structure Expenses.

Newhall, as the Entertainment Center owner, paid the Parking Structure Expenses, including the allocated taxes. It did, however, express concerns about increases in expenses assessed by CalSTRS, and it requested back-up for expense items, including tax bills. It appears that Newhall's requests were rebuffed. After Westfield purchased the Entertainment Center, it continued to pay the CalSTRS charges, while similarly expressing concerns.

Invesco's Allocation and Assessment of Parking Structure Expenses

After Invesco's purchase of the subject property, the Los Angeles County Office of the Assessor (LACOA) appraised the property, as required by Proposition 13. Using an "income approach," the appraiser, Herach Pilikian, appraised the total value of the property purchased by Invesco at $156,890,000. The vast majority of this value was allocated by Pilikian to parcels housing office buildings – the Invesco Buildings. A total of *$9.00* was allocated to the Invesco Garages (although one of the parking structure parcels was valued at $4,735,000, due to the presence of an Italian restaurant at the bottom portion of the structure). At trial, Pilikian explained that this was a "common method" of valuing parking structures, especially structures such as the Invesco Garages that did not produce any income. Pilikian testified that he also accounted for the fact that parking in the Invesco Garages was shared with the Entertainment Center, and stated that the Entertainment Center's own taxes reflected the value of having access to the Invesco Garages.

After receipt of Pilikian's appraisal, an Invesco agent, Susan Orloff, a tax consultant and former County appraiser, contacted LACOA to discuss the appraisal. Orloff spoke to Pilikian, told him that allocating essentially no value to the parking

structures did not "make sense," and requested that value be reallocated to the Invesco Garages. Pilikian testified that Orloff told him the reason for the request was so that Invesco could "pass through these taxes" to tenants. Pilikian's supervisor, Dale Hammonds, testified that the primary concern with him was the "total valuation" of the property, and that the allocation among parcels was merely a "secondary consideration."

Based on Invesco's request, LACOA issued a revised valuation, reallocating a portion of the value from the Invesco Buildings to the Invesco garages. Using a "cost approach," the North Garage was assessed a value of $35,552,000, and the South Garage was assessed a value of $8,233,482. The total valuation on all Invesco properties remained at approximately $157 million.

Invesco did not notify Westfield that it requested the reallocation of value. Nor did Invesco notify LACOA that the reallocation could affect amounts charged to Westfield for Parking Structure Expenses. LACOA appraisers testified that, if they knew about the potential effect on Westfield, they would have been inclined to leave the original appraisal as-is.

Using the revised appraisal and resulting property tax bills, Invesco charged Westfield for 46.6 percent of real property taxes for the Invesco Garages when allocating Parking Structure Expenses. Westfield paid hundreds of thousands of dollars in connection with this allocation.

The Instant Action

This action was initiated in 2006 by tenants of the Entertainment Center after disputes arose over management of the Invesco Garages. The case grew to encompass numerous parties and claims. Many of the claims were eventually settled and various parties were dismissed.

By the time of trial, the causes that remained were Westfield's claims against Invesco relating to Invesco's charges for real property taxes and other asserted Parking Structure Expenses, including allegedly improper charges for management expenses. Invesco's cross-claims against Westfield for anticipatory breach and declaratory relief also remained to be decided.

A bench trial commenced in March 2011 and lasted over 10 days. The trial court heard testimony from a variety of witnesses affiliated with the parties and former Valencia town center owners, from numerous LACOA assessors, and from expert witnesses.

On July 18, 2011, the trial court issued its statement of decision, which included the following findings: (1) when Westfield purchased the Entertainment Center, LACOA assessed the Entertainment Center using an income approach, and this approach necessarily included the imputed value arising from the Entertainment Center's right to use the Invesco Garages; (2) the initial valuation of the Invesco properties performed by Pilikian, which allocated essentially no value to the Invesco Garages, was proper and in accordance with applicable law; (3) in requesting that LACOA reallocate value to the Invesco Garages, Invesco misrepresented to LACOA that a reallocation was necessary so Invesco could bill tenants of the Invesco Buildings; (4) Invesco failed to inform LACOA of Westfield's parking rights in the Invesco Garages and Westfield's concerns regarding tax assessments on the Invesco Garages; (5) Invesco failed to inform Westfield of Invesco's communications with LACOA; (6) but for Invesco's conduct, LACOA would not have revised the appraisal and changed the original assessed values of the Invesco Garages; (7) Parking Structure Expenses included only real property taxes levied, assessed, or charged by a public authority or assessment district on the Invesco Garages and the parcels on which they are located; (8) but for Invesco's conduct, Westfield would not have had an obligation to pay for real property taxes on the Invesco Garages; (9) Westfield was forced to make a double payment of taxes because its payment of Entertainment Center taxes included the imputed value of parking in the Invesco Garages; (10) Invesco's conduct breached section 9.14 of the Parking REA, which expressly laid out a covenant of good faith and fair dealing; (11) Invesco's conduct breached section 2.01 of the Parking REA, which requires that the Invesco Garages be managed for the parties' mutual benefit; and (12) because of Invesco's breaches of sections 9.14 and 2.01, Westfield was not required to pay property taxes above the initial valuations in Pilikian's appraisal. Judgment was entered in favor of Westfield in the

amount of $840,748.98 for charges relating to real property taxes on the Invesco Garages, and for an additional $127,849.03 for further Parking Structure Expenses that the trial court found improper. Invesco was awarded damages of $38,284.57 for an owing administrative fee charge. As the prevailing party, Westfield was awarded more than $1.2 million in fees and costs pursuant to an attorney fees provision in the Parking REA.

Invesco timely appealed.

DISCUSSION

I. Real Property Taxes

At trial, Westfield devoted much of its presentation to the proposition that any parking-related taxes charged by Invesco were improper double charges because Westfield already paid taxes for the imputed value of parking by virtue of the tax assessment on the Entertainment Center. Westfield largely abandons this argument on appeal, and instead concentrates on the assertion that substantial evidence supports the trial court's findings that Invesco breached two provisions of the Parking REA by causing LACOA to reallocate value from the Invesco Buildings to the Invesco Garages.[1]

A. Invesco's power to allocate

For its part, Invesco argues that, as the Parking Operator, it had the right to allocate and assess Parking Structure Expenses as it deemed appropriate, and that the reallocation of property taxes in the revised appraisal was, for all practical purposes, irrelevant. According to Invesco, even if the appraisal was not revised and the Invesco Garages continued to be assessed at $9.00, Invesco still could have allocated substantial taxes to the Invesco Garages because the value of the structures was inherent in the

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[1] Westfield's October 5, 2012, motion for judicial notice is denied. (Evid. Code, §§ 452, 459.) The documents Westfield seeks to have noticed were issued before termination of the trial court proceedings, were issued well more than a year prior to the time Westfield filed its motion for judicial notice in this Court, and went unmentioned in the parties' appellate briefs. (See *City of Oakland v. Hassey* (2008) 163 Cal.App.4th 1477, 1488, fn. 5 [an appellate court may decline to take judicial notice of matters that should have been presented to the trial court, and when judicial notice is not sought prior to the briefing stage on appeal].)

overall assessment of the Invesco properties. The revised assessment simply provided a method of determining a reasonable amount of real property taxes to allocate to the Invesco Garages.

We find Invesco's argument on this point unavailing. "'California recognizes the objective theory of contracts [citation], under which "[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation."'" (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 980.) "It is the outward expression of the agreement, rather than a party's unexpressed intention, which the court will enforce." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166.) Contractual language that is clear and explicit governs. (*County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal.4th 406, 415.) Section 1.36 of the Parking REA provides only that "real property taxes . . . which may be levied, assessed, or charged by any public authority or assessment district . . . on improvements and land comprising the North Parking Structure and South Parking Structure, including the Parcels on which such Parking Structures are located" comprise Parking Structure Expenses. We find it clear and explicit from this language that taxes can only be considered Parking Structure Expenses if they are levied, assessed, or charged by LACOA or another applicable authority *on* the Invesco Garages or the land/parcels upon which they are situated. Real property taxes expressly assessed against the Invesco Buildings and not against the Invesco Garages cannot be considered Parking Structure Expenses under the contractual language. Invesco—which is not a "public authority or assessment district"—does not have authority under the Parking REA to disregard LACOA's valuations and allocate real property taxes as it sees fit.

B. The actual allocation

Still, the fact remains that Invesco did not charge Westfield for real property taxes based on the original appraisal. It instead relied on the allocation expressed in the revised appraisal, which assessed a substantial value to the Invesco Garages. If we assume that the issuance of the revised appraisal was entirely proper, there is no question that that real property taxes allocated by Invesco to Westfield were appropriate. Both parties on

appeal agree that Invesco had the right to collect Westfield's Allocable Share of property taxes on the Invesco Garages, and both parties agree that Invesco charged Westfield for 46.6 percent of the revised allocation.[2]

The question, however, is whether Invesco acted properly in obtaining the revised appraisal and whether, through its actions, it breached any terms of the Parking REA. The trial court found that Westfield "is not obligated to pay property taxes levied, assessed, or charged on the Parking Structures above the Initial Valuations in the Original Appraisal" because Invesco breached sections 2.01 and 9.14 of the Parking REA. Section 9.14 of the Parking REA provides that the Parking Operator (Invesco) and Building Owners (Invesco and Westfield) "shall at all times exercise and act in good faith in carrying out their respective rights, burdens, benefits and obligations under this Parking REA." Section 2.01 states, in pertinent part, that the "Parking Operator shall operate, manage, maintain, repair and restore its respective Parking Structure for the mutual benefit of all Owners in accordance with this Parking REA." Westfield characterizes Invesco's breach of these two provisions as: "Invesco breached two provisions of the Parking REA based on its improper conduct in requesting a reallocation of value from the Office Buildings to the Parking Structures, without notice to Westfield or a full accounting to LACOA of Westfield's interests, and with the improper purpose of burdening Westfield with a substantial portion of Invesco's tax liability for properties other than the Parking Structures."

Section 9.14 requires parties to "act in good faith"—essentially, an express restatement of the implied covenant of good faith and fair dealing inherent in every

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[2] Westfield's initial argument that it was improperly required to make a double payment of the same property taxes was misguided. Regardless of the real property taxes Westfield paid on the Entertainment Center, Westfield had a contractual obligation to pay Invesco for a portion of the real property taxes on the Invesco Garages. If Westfield felt that LACOA improperly imputed the value of the parking garages when determining taxes on the Entertainment Center, it could have aired its grievances with LACOA. But, even assuming for the sake of argument that LACOA had improperly imputed taxes, this would not have relieved Westfield of its contractual obligations to Invesco.

contract. (See *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 34-35.) The implied covenant exists to prevent a contracting party from unfairly frustrating the other party's right to receive the benefits of the agreement. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 36.) Thus, in order to determine whether a party has breached the covenant, the terms of the contract must be considered. The covenant is not "'endowed with an existence independent of its contractual underpinnings.'" (*Ibid.*) It "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350.)

In light of these principles, we cannot find that Invesco acted in a manner that violated section 9.14 of the Parking REA. Westfield cites to no provision in the Parking REA (or to any authority in general) that would limit Invesco's right to confer with LACOA and request a revised allocation. In fact, Ronald Arison, principal appraiser with LACOA, testified that there was "nothing wrong" with a taxpayer or its representative approaching the LACOA office and asking for reconsideration on valuation issues. He stated that LACOA works with tax representatives "all the time, especially on complex commercial properties" such as the one at issue here. Dale Hammonds, a supervising appraiser at LACOA, along with Arison and Pilikian, all testified that the revised appraisal was proper, and that it was not inappropriate to issue the revised appraisal.

Indeed, when considering the testimony presented at trial in conjunction with the terms of the Parking REA, it is apparent that the methodology used in the revised appraisal—a "cost approach"—was more in line with the expectations of the contracting parties. (See Civ. Code, § 1636 ["contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting"]; *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 832 ["we look to the reasonable expectation of the parties at the time of contract"].) To be clear, the evidence supported the conclusion that the original appraisal was not improper. But the practice of placing a negligible value on non-income-producing property such as the Invesco

Garages was, according to Hammonds, a "fairly recent methodology." It was not a methodology used when the Parking REA was executed in 2000.

Furthermore, a conclusion that the Invesco Garages have essentially no taxable value would render substantial portions of the Parking REA practically meaningless, a result contrary to basic rules of contract interpretation. (See *Appalachian Ins. Co. v. McDonnell Douglas Corp.* (1989) 214 Cal.App.3d 1, 12 ["An interpretation which renders part of the instrument to be surplusage should be avoided."].) Westfield receives a significant benefit by virtue of its right to use the Invesco Garages for Entertainment Center parking. The Parking REA contemplates a cost for this benefit—that Westfield help Invesco with the sums incurred for the "ownership, repair, maintenance operation, insurance, management, or replacement of the Parking Structures," including real property taxes, by paying its "Allocable Share." If Westfield fails to pay as required, a lien may be filed by Invesco against Westfield's property, and the property could potentially be foreclosed. (Parking REA, Article VII.) These provisions have little to no meaning if the Invesco Garages have only $9.00 worth of taxable value. And, in any event, as testified by Arison, the $9.00 valuation is only a "placeholder" used because it generally results in "less complication" when assessing a complex property. The placeholder value is not indicative of the fair market value of the Parking Structures. Pilikian testified that, even in his original appraisal, he did not conclude that the garages had no value, but he simply included their value in his valuation of the Invesco Buildings.

Therefore, by seeking an appraisal that allocated an actual value to the Parking Garages and that more closely approximated the parties' reasonable expectations, Invesco did not breach its duty to act in good faith. The fact that Invesco did not inform Westfield of its discussions or inform LACOA of the potential impact on Westfield is immaterial. Nothing in the Parking REA required Invesco to make such disclosures, and the result of its discussions with LACOA was an appropriate appraisal that fulfilled the contractual expectations of the Parking REA. Basically, Westfield received a windfall because LACOA's newly implemented methodology resulted in an unexpectedly low valuation of the Invesco Garages. The revised appraisal allowed Invesco to allocate a

reasonable amount of real property taxes on the Invesco Garages to Westfield, a result that (prior to the original assessment) Westfield could only have expected. For this particular property, given the terms of the Parking REA, the methodology used in the revised appraisal was clearly superior.

For these reasons, the finding that Invesco breached section 2.01 of the Parking REA also cannot stand. By lawfully seeking a proper, more appropriate appraisal from LACOA, Invesco did not fail to "operate, manage, maintain, repair and restore [the Invesco Garages] for the mutual benefit of all Owners in accordance with this Parking REA."

The trial court's determination that Westfield "is not obligated to pay property taxes levied, assessed, or charged on the Parking Structures above the original nominal valuations assessed to the non-restaurant portions of the Parking Structures by [LACOA] in the April 24, 2008 Transfer Valuation Appraisal" was error. The judgment must be reversed to strike the damages award to Westfield of $840,748.98.

II. Supervision Fees

The next issue appealed by Invesco is the trial court's finding that Invesco improperly charged costs of "supervision and maintenance of the Parking Structures and for accounting, bookkeeping and collection of the Parking Structure Expenses" (Parking REA, section 1.36)—which tasks were performed by a third party independent contractor, CB Richard Ellis (CBRE)—to Westfield as Parking Structure Expenses.

Section 1.36 provides that "Parking Structure Expenses shall include a commercially reasonable fee payable to Parking Operator for supervision and maintenance of the Parking Structures and for accounting, bookkeeping and collection of the Parking Structure Expenses in an amount equal to fifteen percent (15%) of the combined total of the aforementioned Parking Structure Expenses. Parking Operator may cause any or all of said services to be provided by an independent contractor who is experienced in operating first-class mixed-use parking structures." Invesco charged Westfield a fee of 15 percent of Parking Structure Expenses. In addition, in its calculation of Parking Structure Expenses, Invesco included CBRE's expenses and

management fees. Westfield contended, and the trial court agreed, that Invesco was entitled to include a 15 percent fee in Parking Structure Expenses, but it was not proper to also include the amounts charged by CBRE.

We largely agree with the trial court that Invesco could not properly charge these costs in addition to the 15 percent fee. Reading the entirety of section 1.36 as a whole, the language is reasonably clear that "supervision . . . and . . . accounting, bookkeeping and collection" are not fees included in Parking Structure Expenses. Section 1.36 is a lengthy provision that comprehensively lists a great number of tasks prior to the point where it discusses the "commercially reasonable fee." The tasks of supervision, accounting, bookkeeping, and collection fees are not referenced anywhere in the primary list of Parking Structure Expenses, and are only referenced as tasks *for* which the commercially reasonable fee is to be charged. It is apparent that the parties to the agreement intended that fees and costs of independent contractors performing supervision, accounting, bookkeeping, and collection functions be paid out of the commercially reasonable fee rather than being separately billed as additional Parking Structure Expenses. Debra Lindsay and Bradley Heath, employees of CBRE, testified that CBRE performs supervision, accounting, bookkeeping, and collection functions for the Invesco Garages. These are expenses properly paid out of the 15 percent fee, and not properly charged as additional Parking Structure Expenses.

The function of "maintenance," however, is explicitly listed as a Parking Structure Expense several times in section 1.36. The trial court's judgment states that Invesco may not charge for "[c]osts of CBRE, Invesco, and others relating to . . . maintenance of the Parking Structures." This ruling is not supported by the contractual language or the evidence. Therefore, on remand, the trial court must determine what part of the award in favor of Westfield was based on maintenance fees, and subtract this amount from the award.

III. Pass-Through of Expenses

Invesco further argues that, regardless of whether Westfield was damaged, Westfield cannot recover in full against Invesco because it passed through 76.98 percent

of Parking Structure Expenses to its tenants.[3] Invesco relies on the case of *Bramalea California, Inc. v. Reliable Interiors, Inc.* (2004) 119 Cal.App.4th 468, 472 (*Bramalea*), which found that the plaintiff could not recover attorney fees from defendants because all of the plaintiff's fees were paid for by its insurer and it suffered no out-of-pocket loss. Any recovery would be a prohibited double recovery. (*Ibid.*)

We find *Bramalea* clearly distinguishable. First, unlike in *Bramalea*, the evidence here showed that Westfield certainly suffered an out-of-pocket loss—a substantial portion of Parking Structure Expenses charged (about 23 percent) were not passed through to tenants. Second, and more importantly, the evidence presented at trial showed that Westfield (by its own admission) is contractually required to refund to its tenants the net proceeds of any award for the share of any improper Parking Structure Expenses the tenants paid. Thus, unlike in *Bramalea*, in which an award for the plaintiff would result in a double recovery because the plaintiff had no obligation to refund the cost of attorney fees to its insurer, an award here would not. The improper Parking Structures Expenses that were passed on to tenants will be refunded.

IV. Attorney Fees

The trial court found that Westfield was the prevailing party in this action and, pursuant to an attorney fees provision at section 7.05 of the Parking REA, awarded fees and costs in excess of $1.2 million.

Civil Code section 1717 provides, in pertinent part: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether

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[3] Invesco's motion for summary adjudication, which sought an adjudication that Westfield had not suffered any damages because it passed through any expenses to its tenants, was properly denied. Among other issues, Invesco was unable to show that Westfield passed all expenses through to tenants and that it did not suffer damages.

he or she is the party specified in the contract or not, shall be entitled to reasonable attorney fees in addition to other costs."

Because we are reversing several aspects of the trial court's judgment, a new prevailing party determination is required. We therefore reverse and remand the order on attorney fees, with a direction that the trial court reconsider the matter of the prevailing party in light of this opinion, deciding which party, if any, is entitled to recovery of attorney fees. (See *Roden v. AmerisourceBergen Corp.* (2007) 155 Cal.App.4th 1548, 1579.)

DISPOSITION

The judgment is reversed to strike the rulings and damages awards in favor of Westfield with respect to real property taxes allocated and charged by Invesco. The judgment is also reversed to the extent that it states that Invesco improperly charged costs of maintenance to Westfield and awarded related damages to Westfield, and to the extent that it awarded attorney fees and costs to Westfield.

The matter is remanded to the trial court to determine what part of the award in favor of Westfield was based on maintenance fees and subtract this amount from the award. On remand, the trial court shall also determine what party, if any, is the prevailing party, and award attorney fees and costs accordingly. The trial court shall enter a new judgment addressing these matters, which shall be in favor of Invesco with respect to the real property taxes issue. Matters not addressed herein shall remain as stated in the trial court's original judgment.

Invesco shall recover its costs on appeal.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.