

**NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NOS. A-1965-21  
A-2046-21

PATRICK BOYLE, individually  
and derivatively on behalf of the  
OCEAN CLUB CONDOMINIUM  
ASSOCIATION,

Plaintiff-Respondent,

v.

CAROL HUFF, DIANE MILLER,  
TOMMY HARRELL, JOSEPH  
ROEHRIG, and SENY BELETE-  
LEVIN,

Defendants-Appellants,

and

OCEAN CLUB CONDOMINIUM  
ASSOCIATION,

Nominal Defendant.

---

Argued December 6, 2022 – Decided January 20, 2023

Before Judges Gilson, Gummer, and Paganelli.

On appeal from the interlocutory orders of the Superior Court of New Jersey, Chancery Division, Atlantic County, Docket No. C-000049-20.

Craig D. Gottilla argued the cause for appellants (Ansell, Grimm & Aaron, PC, attorneys; Craig D. Gottilla and Nicole D. Miller on the briefs).

Gary M. Fellner argued the cause for respondent (Porzio, Bromberg & Newman, PC, attorneys; Gary M. Fellner of counsel and on the brief; Joshua H. Abramson and Caitlin M. Nolan, on the brief).

#### PER CURIAM

These consolidated appeals involve disputes over the interpretation of an indemnification provision in the by-laws of a condominium association and plaintiff's right to recover attorneys' fees under that provision. Defendants, a condominium association and five former and current trustees of the association, appeal from orders and a final judgment granting summary judgment to plaintiff, a former trustee, and awarding him \$563,031.80 in attorneys' fees and costs. We affirm the portion of the orders and final judgment holding that plaintiff is entitled to recover certain fees and costs, vacate the actual fee award, and remand for further consideration of the amount of fees and costs to be awarded.

#### I.

Ocean Club Condominium (OC Condominium) is a real-estate development consisting of 725 residential and twenty-nine commercial units

built along the Atlantic City Boardwalk. The OC Condominium is managed by the Ocean Club Condominium Association (Association), which is a non-profit corporation that oversees the OC Condominium's affairs in accordance with the OC Condominium's Master Deed and By-laws. OC Condominium unit owners are members of the Association.

The By-laws provide that the Association and OC Condominium are managed by a board of trustees, comprised of seven unit owners (the Board). The trustees are elected by the unit owners and serve for two-year terms. The By-laws state that a trustee "may be removed with or without cause, by the affirmative vote of two-thirds of the outstanding votes of the Association [u]nit [o]wners . . . at any annual or special meeting of [m]embers duly called for such purpose."

The By-laws also contain an indemnification provision. That provision is set forth in Article VI of the By-laws and states, in relevant part:

The Association shall indemnify every [t]rustee and officer, his [or her] heirs, executors and administrators, against all loss, costs and expenses, including counsel fees, reasonably incurred by him [or her] in connection with any action, suit, or proceeding to which he [or she] may be a party by reason of his [or her] being or having been a [t]rustee or officer of the Association except as to matters as to which he [or she] shall be finally adjudged in such action, suit or proceeding to be liable for willful misconduct or bad faith.

Plaintiff Patrick Boyle and his wife purchased a residential unit at the OC Condominium in November 2017. In June 2018, plaintiff was appointed to fill an empty seat on the Board. The following year, in August 2019, plaintiff was elected to be a trustee of the Association.

After becoming a trustee, plaintiff began to have disputes with the other trustees. He alleged that the Association and OC Condominium had been financially mismanaged and that their financial statements were not properly prepared. In contrast, the other trustees contended that plaintiff had engaged in inappropriate and disruptive behavior. Those disputes came to a head in August 2020.

On August 16, 2020, five other trustees held a special meeting and adopted a resolution that expelled plaintiff as a trustee (the Resolution). The Resolution alleged that plaintiff had engaged in various misconduct that "evidenced his inability to serve the Association [and] its members." The alleged misconduct included claims that plaintiff had assaulted, harassed, intimidated, and bullied other trustees, unit owners, and OC Condominium employees. At approximately the same time that the five other trustees adopted the Resolution, those trustees filed criminal harassment charges against plaintiff. Ultimately, those criminal charges were dismissed.

In October 2020, plaintiff and his wife filed a verified complaint and order to show cause against the five trustees who had signed the Resolution: Carol Huff, Diane Miller, Tommy Harrell, Joseph Roehrig, and Seny Belete-Levin (collectively, the Trustee Defendants). The complaint sought various forms of relief, including a declaration reinstating plaintiff as a trustee and an injunction preventing the Trustee Defendants from removing plaintiff as a trustee. The complaint also alleged several causes of action for torts, including defamation.

On December 11, 2020, the Chancery court entered an order granting plaintiff certain preliminary relief, including reinstating him as a trustee. The court found that plaintiff had been "wrongfully" removed as a trustee in violation of the By-laws and an administrative regulation, N.J.A.C. 5:26-8.12(a) and (d). The court also ordered that the Association be added to the action as a nominal defendant.

The Trustee Defendants then scheduled a special meeting for December 18, 2020, to hold a vote to remove plaintiff as a trustee. In response, plaintiff filed an amended verified complaint, with an added claim against defendants for indemnification, and another order to show cause. After hearing arguments on the order to show cause, on December 17, 2020, the Chancery court enjoined that meeting. Thereafter, on January 5, 2021, the court entered an order

memorializing the injunction. The January 5, 2021 order also enjoined the Trustee Defendants from holding another meeting to remove plaintiff until after the parties completed "non-binding Alternate Dispute Resolution ("ADR") as required by N.J.A.C. § 5:26-8.11(b)(1)." The order also stated:

Counsel for the Trustee Defendants and [p]laintiff are directed to work together in good faith to agree to a chosen ADR arbitrator or arbitrators, . . . "in which the ADR provider concludes from substantial credible evidence that there was a breach that adversely affected the interests of the [A]ssociation members as opposed to that of the executive board."

Thereafter, the parties entered into an agreement to arbitrate the right to remove plaintiff as a trustee (the Arbitration Agreement). The Arbitration Agreement selected a retired judge as the arbitrator and stated:

The scope of the [d]ecision shall be to determine whether pursuant to N.J.A.C. § 5:26-8.11(b)1 the Board may remove [plaintiff] from the Board without a vote from the Association members as so provided in the By[-]laws.

The Arbitration Agreement also stated: "The [d]ecision is binding on the [p]arties and the court. Judicial review of the [d]ecision and/or of any aspect of the proceedings is allowed only as permitted by N.J.S.A. 2A:23A-13."

In April 2021, plaintiff filed a third-amended complaint, which did not include his wife as a plaintiff.<sup>1</sup> In the third-amended complaint, plaintiff asserted four causes of action: (1) a derivative-action claim on behalf of the Association, alleging that the Trustee Defendants had breached their fiduciary duties (count one); (2) a claim for injunctive relief to reinstate plaintiff as a trustee and enjoin defendants from further attempts to remove plaintiff from serving as a trustee (count two); (3) a claim for reimbursement of plaintiff's fees and costs under the indemnification provision of the By-laws (count three); and (4) a declaration that plaintiff's removal from the Board was "wrongful" (count four).

The arbitration was scheduled to begin in July 2021, but it did not proceed. Instead, defendants elected to "abandon" the arbitration "and cease any and all steps to remove [plaintiff] from the Board." The parties then submitted a consent order, which the court entered on July 27, 2021. That consent order provided, in relevant part:

1. Defendants have informed this [c]ourt that they have agreed among themselves to forever abandon,

---

<sup>1</sup> By that time, the parties had agreed by consent order to transfer the tort-based claims in plaintiff's earlier complaints to the Law Division. The parties have not informed us whether those claims were resolved or are still pending. Nevertheless, those tort-based claims were not part of the underlying Chancery action after the transfer and are not at issue on this appeal.

relinquish, cease, and forego, with prejudice, any and all rights to pursue any proceeding, meeting or ADR to remove [plaintiff] from the Board based on any act or omission of [plaintiff] or his agents occurring at any time through the date of this [o]rder; [and]

2. Defendants and [p]laintiff reserve all stated rights and defenses asserted to date in this action, except as stated above, including [p]laintiff's request for an [o]rder compelling reimbursement of all legal fees and costs incurred.

In August 2021, the Association members elected new trustees and plaintiff was not re-elected. Shortly thereafter, plaintiff moved for summary judgment on his claims for injunctive and declaratory relief regarding his alleged improper removal from the Board (counts two and four). Plaintiff also sought partial summary judgment on his claim that he was entitled to fees and costs under the indemnification provision of the By-laws (count three). Defendants cross-moved to dismiss all of plaintiff's claims.

On October 6, 2021, after hearing argument, the Chancery court issued an order granting plaintiff's motion and denying defendants' cross-motion. The court supported its ruling with a written opinion.

The Chancery court found plaintiff succeeded fully on his claims for injunctive and declaratory relief. The Chancery court also held that the plain language of the indemnification provision in the By-laws required plaintiff to be



reimbursed for his fees and costs. The court reasoned that Article VI did not limit indemnification to fees and costs incurred by a trustee in an action brought by a third-party against the trustee. In other words, the Chancery court held that the indemnification provision applied to first-party claims where the trustee was a plaintiff. The Chancery court further held that when defendants had withdrawn from the arbitration, they had abandoned their right to contend that plaintiff was precluded from being indemnified because his actions involved willful misconduct or bad faith. Consequently, the court concluded that plaintiff was entitled to the legal fees and costs incurred in this matter, except it reserved on whether plaintiff could recover fees incurred in connection with his derivative-action claim (count one).

Shortly after the court made that ruling, the parties submitted a proposed consent order setting forth the parties' agreement to settle the derivative-action claim. The court entered that consent order on October 12, 2021.

Thereafter, defendants filed two motions for reconsideration of the October 6, 2021 order. The Chancery court denied both those motions in an order and opinion issued on January 13, 2022. In making that ruling, the court rejected defendants' contention that the arbitrator could have found plaintiff's

actions adversely affected the interests of the Association members without determining whether his actions constituted willful misconduct or bad faith.

On January 4, 2022, the Chancery court issued an order awarding plaintiff \$516,811.80 in attorneys' fees and costs. In an accompanying opinion, the court found that plaintiff was entitled to fees incurred in connection with his derivative-action claim. The court also found that the Association was not responsible for indemnifying plaintiff for fees that he had not paid. In calculating the fee award, the court adjusted for, among other things, duplicative fees and "courtesy discounts." The court also did not include hours billed by persons other than attorneys and paralegals, and it adjusted the attorneys' and paralegals' rates so that the award was based on prevailing rates in the Atlantic County locality. Finally, the court ordered that the fees be paid within thirty days.

Plaintiff moved for reconsideration, and defendants moved for a stay of the provision requiring payment within thirty days. When the Chancery court did not schedule the hearing on the stay request until after the thirty-day deadline, defendants moved before us for leave to appeal and for a stay. We granted defendants' motion for a stay of the payment provision and directed that

a new notice of appeal be filed once a final order or judgment was entered by the Chancery court.

On March 9, 2022, the Chancery court granted, in part, plaintiff's motion for reconsideration and entered a final judgment, awarding plaintiff \$563,031.80 in attorneys' fees and costs. The court adjusted the original attorneys' fees award to account for a clerical error and disbursements previously omitted. The final judgment also acknowledged our stay of the thirty-day payment provision. The final judgment did not, however, identify the defendant or defendants against whom the judgment was entered.

Defendants then filed a notice of appeal from the final judgment and the order granting summary judgment. The two appeals were consolidated.

## II.

Defendants appeal from the March 9, 2022 final judgment; the October 6, 2021 order granting partial summary judgment; and the January 4, 2022 order awarding plaintiff attorneys' fees and costs. Defendants make four arguments, contending that (1) the final judgment should be reversed because the Trustee Defendants had no contractual duty to indemnify plaintiff under the By-laws; (2) the final judgment should be reversed because the Chancery court improperly interpreted the indemnification provision; (3) the October 6, 2021 order should

be reversed because there were material factual disputes precluding summary judgment; and (4) the final judgment should be reversed because it included awards for fees and costs incurred in connection with the derivative-action claim and for enforcing the indemnity obligation.

We reject defendants' arguments about the interpretation of the indemnification provision. That provision covers the fees and costs plaintiff incurred in his action in the Chancery court to be reinstated as a trustee. We also hold that defendants "abandon[ed]" their contention that plaintiff engaged in misconduct or bad faith. Accordingly, we affirm the portion of the summary-judgment order and final judgment holding that plaintiff is entitled to reasonable fees and costs incurred in this action. We reverse the actual fee award because plaintiff is not entitled to fees incurred in pursuing his derivative-action claim. He is, however, entitled to fees incurred in enforcing the indemnification provision. Further, before us the parties agreed that it is the obligation of the Association, not the Trustee Defendants, to pay plaintiff's fees and costs. Therefore, we remand for a further review of the fees and costs and the entry of a new judgment setting forth the amount of the fees and costs the Association must pay plaintiff.

A. Our Standard of Review.

An appellate court reviews a grant of summary judgment de novo, using the same standard that governed the trial court's decision. Samolyk v. Berthe, 251 N.J. 73, 78 (2022). Summary judgment will be granted when "the competent evidential materials submitted by the parties," viewed in the light most favorable to the non-moving party, show that there are no "genuine issues of material fact and . . . the moving party is entitled to summary judgment as a matter of law." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23-24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)); accord R. 4:46-2(c). "An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Id. at 24 (quoting Bhagat, 217 N.J. at 38). "[The] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

B. The Indemnification Provision.

The question of whether plaintiff is entitled to be reimbursed for his attorneys' fees and costs involves an interpretation of the indemnification provision in the Association's By-laws. Courts interpret an indemnification provision using the rules governing contract interpretation. Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177, 191 (1986); see Kieffer v. Best Buy, 205 N.J. 213, 223 (2011) (explaining that "[t]he objective in construing a contractual indemnity provision is the same as in construing any other part of a contract"). When the language of a contract is clear and unambiguous, "it is the function of a court to enforce [the contract] as written." Cypress Point Condo. Ass'n, Inc. v. Adria Towers, L.L.C., 226 N.J. 403, 415 (2016) (quoting Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960)).

Article VI, § 1 of the Association's By-laws states:

The Association shall indemnify every [t]rustee and officer, his [or her] heirs, executors and administrators, against all loss, costs and expenses, including counsel fees, reasonably incurred by him [or her] in connection with any action, suit, or proceeding to which he [or she] may be a party by reason of his [or her] being or having been a [t]rustee or officer of the Association except as to matters as to which he [or she] shall be finally adjudged in such action, suit or proceeding to be liable for willful misconduct or bad faith.

There is nothing ambiguous about that indemnification language. It covers "all loss, costs and expenses, including counsel fees, reasonably incurred . . . in connection with any action" to which a trustee is a party because of his or her position as trustee. Plaintiff brought his suit in the Chancery court to defend his rights to be a trustee and to challenge what he contended was an unlawful action in removing him as a trustee. Consequently, plaintiff is entitled to the fees and costs incurred in the Chancery action that are related to the costs he incurred in connection with his position as a trustee of the Association.

Defendants argue that plaintiff is not entitled to indemnification because the indemnification provision did not expressly state that it covered first-party claims. In other words, defendants argue that the provision should be limited to third-party claims because there is no specific language stating that it applies to a first-party claim. We reject that interpretation as inconsistent with the provision's plain language.

It is true that indemnification agreements are often applied to "the indemnitee's claim to obtain recovery from the indemnitor for liability incurred to a third-party." Invs. Sav. Bank v. Waldo Jersey City, LLC, 418 N.J. Super. 149, 159 (App. Div. 2011) (quoting Travelers Indem. Co. v. Dammann & Co.,

592 F. Supp. 2d 752, 766-67 (D.N.J. 2008)). That principle, however, is based on the general situation when indemnity claims arise.

In that regard, the intent to indemnify against a certain loss or liability should be expressed clearly in the indemnification provision. See 42 C.J.S. Indemnity § 6 (2017). Consequently, courts in other jurisdictions "have generally declined to infer indemnification obligations arising from an indemnitee/indemnitor suit if the contractual language does not expressly refer to or explicitly contemplate such circumstances and the context does not suggest that the contracting parties were specifically concerned with prospective litigation between themselves." Luna v. Am. Airlines, 769 F. Supp. 2d 231, 244 (S.D.N.Y. 2011).

Neither the New Jersey Supreme Court nor this court has ever held that indemnification provisions will not apply to first-party claims. Moreover, neither the Court nor this court has required an indemnification provision to include express language covering a first-party claim for the indemnification obligation to be triggered. Instead, we look to the actual language of the indemnification provision at issue. See Invs. Sav. Bank, 418 N.J. Super. at 158-59; Travelers Indem. Co. v. Dammann & Co., 594 F.3d 238, 255-56 (3d Cir. 2010) (applying New Jersey law and determining the indemnification provision



did not apply to first-party claims based on the provision's plain language); see also Kieffer, 205 N.J. at 223 (explaining that, in determining the scope of an indemnification provision, "[t]he judicial task is simply interpretive; it is not to rewrite [the] contract for the parties better than or different from the one they wrote for themselves").

For example, in Investors Savings Bank, we concluded that the indemnification provision involved in a loan agreement did not preclude defendants' counterclaims that the bank had breached the loan agreement. We did not directly consider whether the indemnification provision would apply to a first-party claim. Instead, we addressed whether the indemnification provision prohibited defendants' counterclaims. More importantly, our discussion of the indemnification provision in Investors Savings Bank was focused on the specific language of the indemnification provision included in the loan agreement. 418 N.J. Super. at 158-59.

Nothing in the indemnification provision in the Association's By-laws limits its application to third-party claims. In that regard, there is no language excluding a suit involving one trustee against other trustees. The provision states that it covers "any action, suit, or proceeding," so long as the trustee is a party to that action "by reason of his [or her] being or having been a [t]rustee."

Plaintiff brought the Chancery action because he believed he had been improperly removed as a trustee. Accordingly, his legal efforts to be restored to his position as a trustee and to prevent his improper further removal directly relate to "his being or having been a [t]rustee." In short, the indemnification provision in the By-laws is broadly worded and, like any contract, should be enforced based on its plain meaning. If the Association had wanted to limit the scope of the indemnification, it could have easily done so by including language expressly stating that it did not cover first-party claims.

C. The Alleged Factual Dispute.

Defendants argue that there was a factual dispute precluding summary judgment on plaintiff's right to indemnification. They rely on the portion of the indemnification provision that excludes indemnity in matters where the trustee is "adjudged . . . to be liable for willful misconduct or bad faith." Defendants contend that the Chancery court erred in granting summary judgment before determining whether plaintiff had justifiably been removed as a trustee because he had engaged in willful misconduct or bad faith. The Chancery court rejected defendants' arguments, concluding that they had abandoned any right to contend that plaintiff had engaged in willful misconduct or bad faith. We agree with the Chancery court's conclusion.

The Chancery court had directed the parties to arbitrate whether the Trustee Defendants had properly removed plaintiff or could remove plaintiff without a vote of the unit owners. The parties then entered into the Arbitration Agreement, under which they agreed to arbitrate whether "the Board may remove [plaintiff] from the Board without a vote from the Association members as so provided in the By[-]laws."

Thereafter, defendants elected not to proceed with the arbitration and "abandon[ed]" all rights to remove plaintiff as a trustee of the Association. The parties then signed and submitted a consent order that was entered on July 27, 2021. In the consent order, defendants "agreed among themselves to forever abandon, relinquish, cease, and forego, with prejudice, any and all rights to pursue any proceeding, meeting or ADR to remove [plaintiff] from the Board based on any act or omission of [plaintiff] or his agents occurring at any time through the date of this [o]rder."

The consent order is clear that defendants relinquished their right to contend that plaintiff had engaged in any misconduct or bad faith based on any action or omission occurring before July 27, 2021. Consequently, defendants cannot argue that the exception to the indemnification provision applies to plaintiff or his actions that gave rise to the Chancery suit.

D. The Fees Covered by the Indemnification Provision.

Defendants also argue that the legal fees incurred in prosecuting the derivative-action claim in count one and in enforcing the indemnification provision are not covered by the provision and, therefore, those fees should have been excluded from plaintiff's fee award. We agree that the legal fees incurred in prosecuting count one are not covered by the indemnification provision but hold that the fees incurred in enforcing the provision are covered.

In count one of the third-amended complaint, plaintiff brought a derivative action on behalf of the Association against the Trustee Defendants. He sought injunctive relief requiring the Trustee Defendants to govern the Association in accordance with the By-laws and statutes and regulations governing condominiums. Ultimately, the parties settled that count and, under the October 12, 2021 consent order, defendants agreed to follow New Jersey law regarding, among other things, accounting, financial, and voting protocols as set forth in statutes and regulations.

In awarding plaintiff fees under the indemnification provision, the Chancery court included the fees plaintiff incurred in connection with pursuing count one. The court explained that plaintiff had sought to assert his rights as a trustee and as a unit owner and that the October 12, 2021 consent order provided

all of the relief sought under count one. Thus, the court found plaintiff was the prevailing party on count one and, therefore, was entitled to indemnification for his fees and costs incurred in pursuing that claim.

The plain language of the indemnification provision in the By-laws precludes plaintiff from recovering his attorneys' fees incurred in connection with pursuing the derivative-action claim in count one. As already pointed out, the indemnification provision covers "any action, suit, or proceeding" to which a trustee is a party by reason of "being or having been a [t]rustee or officer of the Association." In bringing a derivative action, plaintiff was not acting as a trustee. Instead, he was acting as a unit owner asserting a derivative-action claim on behalf of the Association and all unit owners.

Plaintiff argues that he learned of the Board's failure to comply with the By-laws, statutes, and regulations through information that he had received as a trustee. Even if we accept that contention, it still does not convert count one into an action by a trustee. Instead, count one was a derivative action on behalf of the Association and all unit owners.

By contrast, the language of the indemnification provision in the By-laws includes the fees plaintiff incurred in enforcing the indemnification provision.

The provision states that it covers "all loss, costs and expenses, including counsel fees." That language includes fees incurred in enforcing the provision.

Defendants argue that unless the indemnification provision expressly allows an award for fees and costs incurred in connection with enforcing the provision, those fees are not recoverable. To support that argument, defendants cite Johnson v. Johnson, 92 N.J. Super. 457 (App. Div. 1966). We reject that argument.

Defendants overstate the holding in Johnson. In Johnson, a divorce settlement agreement contained an indemnification provision under which a husband agreed to indemnify and hold his wife "harmless from . . . [a]ny and all loss or damage (including, without limitation, legal expenses if legal services are incurred) arising out of any claims for goods or service furnished to [the husband], [wife], or their households . . . [p]rior to January 12, 1962." Id. at 461. We held that the indemnification provision did not apply to fees incurred by the wife's attorneys in prosecution of a suit to enforce the indemnity agreement because of the language in the indemnification provision. Id. at 463.

In Johnson, we did not find as a matter of law that fees incurred in the enforcement of an indemnification provision are recoverable only if the provision contains express language providing for their recovery. As already

pointed out, indemnification provisions will be enforced in accordance with their plain terms. Accordingly, we have held that an indemnitee is entitled to counsel fees for its effort in enforcing an indemnification provision "based on the express language in the indemnification provision allowing counsel fees." Serpa v. N.J. Transit, 401 N.J. Super. 371, 382 (App. Div. 2008).

E. Summary.


We hold that the indemnification provision in the By-laws entitled plaintiff to recover the reasonable attorneys' fees and costs incurred in pursuing the Chancery court action, with the exception of the fees incurred in pursuing the derivative-action claim in count one. Accordingly, we affirm the portions of the order granting summary judgment and final judgment that granted plaintiff fees and costs. We vacate the actual fee award and remand for the Chancery court to make a new award consistent with our ruling that plaintiff is not entitled to the fees and costs incurred in pursuing his derivative-action claim under count one.

We also direct that the judgment to be entered on remand clearly state that it is the obligation of the Association to pay plaintiff's fees and costs. The indemnification provision is clear in stating that the "Association shall indemnify." Indeed, before us the parties agreed that it is the Association, not

the Trustee Defendants, that must indemnify plaintiff. Accordingly, we also vacate the payment provision in the March 9, 2022 final judgment and direct that the new final judgment to be entered on remand cannot require the Trustee Defendants to pay for any portion of the fees and costs awarded to plaintiff. Finally, we vacate, as moot, the stay we entered on the thirty-day payment provision.

Affirmed in part, reversed in part, and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION