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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

FIRST CITY PACIFIC, INC., Plaintiff and Appellant, v. HOME DEPOT U.S.A., INC., Defendant and Respondent.	B268604 (Los Angeles County Super. Ct. No. LC101652)

APPEAL from a judgment and order of the Superior Court of Los Angeles County, Huey P. Cotton, Jr., Judge. Affirmed.

Weintraub Tobin Law Corporation, David R. Gabor and Brendan J. Begley for Plaintiff and Appellant.

Sedgwick, Steven D. Roland, Randall G. Block and Nora E. B. Wetzel for Defendant and Respondent.

INTRODUCTION

First City Pacific, Inc. appeals from the judgment entered after a jury found it failed to prove its cause of action for unlawful detainer against Home Depot U.S.A., Inc. First City contends the trial court erred in allowing the jury to interpret the parties' lease agreement. First City also appeals the trial court's order granting Home Depot's post-trial motion for attorneys' fees and costs. Because First City does not identify an erroneous ruling or order, we affirm the judgment. We also affirm the order granting Home Depot's motion for attorneys' fees and costs.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Ground Lease and the Sublease*

In 1985 First City, a commercial developer, leased seven acres near the Van Nuys airport from the City of Los Angeles. The 40-year lease agreement (Ground Lease) provided that in February 1990 and every five years thereafter the rental rate would adjust to fair rental value, as determined by agreement between First City and the City of Los Angeles or, if they did not agree, by the City of Los Angeles Board of Airport Commissioners. The Ground Lease also provided that at the midpoint of each of those five-year periods (i.e., 30 months after the start of the period) the rental rate would adjust based on increases in the Producer Price Index for All Commodities (PPI) published by the United States Department of Labor.

First City subleased the seven acres to Home Depot as a location for one of its stores. Under the sublease agreement (Sublease), which provided for an initial 20-year term beginning

May 1, 1988,[1] the rent payable consisted of several components. One of those components, referred to as "pass-through rent," was a portion of the anticipated increases in First City's rent under the Ground Lease. Specifically, Section 4.4 of the Sublease (section 4.4), which gives rise to this litigation, provided: "[Home Depot] acknowledges that [First City's] minimum rental obligations under the [Ground] Lease may be increased from time to time pursuant to said [Ground] Lease, and [Home Depot] has agreed to partially reimburse [First City] in connection therewith in the following manner: to the extent that [First City's] minimum rent under the [Ground] Lease is adjusted so as to be more than One Hundred Forty Thousand Dollars ($140,000), [Home Depot] shall pay such amount in excess of said One Hundred Forty Thousand Dollars ($140,000), not to exceed, however, an amount equivalent to a five percent (5%) per annum increase in the minimum rent payable under the [Ground] Lease."

The parties may have recognized that section 4.4 might be a little difficult to implement in practice. So they included helpful illustrations on how they envisioned the provision would work: "By way of example, if the [Ground] Lease rental is increased from $140,000 to $160,000 as a result of the first thirty (30) month adjustment, then [Home Depot] shall pay as additional rent $17,500 (5% of $140,000 per annum for 30 months is $17,500). By way of further example, if the [Ground] Lease rental is increased from $140,000 to $150,000 as a result of the first 30 month adjustment, then [Home Depot] shall pay as additional rent the entire $10,000 increase (because $10,000 is

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[1] In November 2000 Home Depot exercised its right to extend the Sublease for an additional 20-year term.

less than 5% per annum for 30 months). Said amount shall be payable on a monthly basis . . . ." As of May 1, 1988, the annual rent under the Ground Lease was $140,760.

B. *The Notice To Pay Rent or Quit*

For the 30-month period that began in August 2007, First City's annual rent under the Ground Lease was $381,385. For the following 30-month period, which began in February 2010, First City and the City of Los Angeles disagreed on the fair rental value adjustment, which they then negotiated for three years before presenting the matter to the Board of Airport Commissioners. In December 2013 the Board retroactively adjusted the annual rent under the Ground Lease for the 30-month period that began in February 2010 to $457,470. At the same time, based on increases in the PPI, the Board retroactively adjusted the annual rent for the 30-month period that began in August 2012 to $531,890.[2]

Based on these retroactive increases, the City of Los Angeles billed First City on February 3, 2014 for unpaid rent under the Ground Lease in the amount of $318,634.63. First City, in turn, notified Home Depot on February 15, 2014 that, pursuant to the pass-through rent provision in the Sublease, "Home Depot's current unpaid share" of the bill First City received was $204,958.08, and asked Home Depot to make that

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[2] In stating this rate and the rate for the 30-month period that began in February 2010, the Board used a "per acre per year" figure. We have multiplied by 7.038 acres and rounded to the nearest dollar to state these annual rates for the entire parcel.

payment.[3] Disputing First City's calculations, Home Depot refused to pay as requested, and on March 31, 2014 First City served Home Depot with a 15-day notice to pay rent or quit. The notice stated the amount Home Depot owed was $204,958.08. Home Depot did not pay or quit.

C. *The Trial*

On May 13, 2014 First City filed this action against Home Depot, asserting one cause of action for unlawful detainer. After the trial court denied cross motions for summary judgment, the parties tried the case to a jury. A central disputed issue was the amount Home Depot owed (i.e., in pass-through rent) when it received the notice to pay rent or quit, an issue that turned on the parties' competing interpretations of section 4.4. Specifically, the parties disagreed over how to calculate the limit, or "cap," section 4.4. imposed on pass-through rent.

First City argued section 4.4 capped annual pass-through rent at an amount equal to 5 percent of the prior annual rent under the Ground Lease multiplied by 2.5.[4] Applying this

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[3] First City also informed Home Depot that the monthly pass-through rent due March 1, 2014 would be $20,161.02.

[4] First City "explained": "Pursuant to Section 4.4, the amount of the increase in the ground rental rate [i.e., in the annual rent owed under the Ground Lease] that can be 'passed-through' to Home Depot *is the lesser of*: (a) the actual amount of the per annum increase in the prior rental rate; or (b) 5% per annum as calculated for a 30-month period of the prior ground rental rate. This amount is calculated by multiplying the prior ground rental rate by 5% per annum for 30 months or by 12.5% for the 30-month period (5% for the first 12 months in the rent

formula to the February 2010 and August 2012 increases in rent due under the Ground Lease, First City contended that, when Home Depot received the notice to pay or quit, Home Depot owed $204,958.08, the amount stated in the notice.

Home Depot argued section 4.4 capped annual pass-through rent simply at 5 percent of the prior annual rent under the Ground Lease. Home Depot further argued that, because of the amount it overpaid in pass-through rent in previous years as a result of First City's incorrect calculation of the cap, Home Depot in fact owed nothing when it received the notice.

Much of the evidence at trial concerned testimony about the parties' past performance in calculating the cap under section 4.4. In particular, First City's founder and president, Morton Scolnick, testified First City had calculated the cap consistent with its interpretation for every previous rent increase under the Ground Lease, beginning with an increase in February 1990 and continuing through an increase in August 2007. But that testimony was subject to numerous qualifications. For example, Scolnick also testified that on one occasion (relating to the first increase under the Ground Lease, in February 1990) First City initially billed Home Depot for pass-through rent using the method for calculating the cap that Home Depot argued was

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period, plus 5% for the second 12 months, plus 2.5% for the remaining 6 months in the rent period). In other words, the Pass-Through Rent is capped at 5% . . . per annum applied to the adjustment period of 2.5 years, resulting in a maximum increase of 12.5% for a 30-month rent period. The amount owed is then added to the amount of Pass-Through Rent that Home Depot is required to pay per year (on a monthly basis) until the next Adjustment Date."

correct.[5] Scolnick also testified Home Depot had not always paid pass-through rent without objecting to First City's method of calculating the cap. In fact, because rent increases under the Ground Lease were sometimes relatively small, sometimes nonexistent, sometimes delayed for several years and applied retroactively, and sometimes for periods longer than 30 months, it was not clear from Scolnick's testimony how many times Home Depot had paid, without objection, an amount of pass-through rent exceeding the cap, as Home Depot argued the cap should be calculated.[6]

In addition, during his deposition in September 2014, Scolnick testified that, when First City charged and collected pass-through rent in connection with an August 1997 rent increase under the Ground Lease (a retroactive increase made by

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[5] Scolnick testified that First City later sent Home Depot an amended bill for pass-through rent, using First City's method for calculating the cap, and that Home Depot paid it.

[6] From the record we can identify with confidence only three such occasions. The first was when Home Depot received the amended bill for the February 1990 increase under the Ground Lease. The second occurred in connection with an August 1997 increase under the Ground Lease, although on that occasion the amount Home Depot paid over its version of the cap was negligible ($71) and, as we discuss, Scolnick's testimony concerning how he calculated the cap on that occasion was inconsistent. The third occasion occurred in connection with an August 2007 rent increase under the Ground Lease based on an increase in the PPI. According to Scolnick, First City calculated the cap on that occasion by multiplying 5 percent of the prior annual rent under the Ground Lease by 5, rather than by 2.5, because the most recent increase under the Ground Lease had occurred in August 2002.

the City of Los Angeles in April 1999), First City calculated the cap Home Depot's way.[7] After his deposition, Scolnick revised his deposition transcript extensively to make his testimony consistent with First City's interpretation of section 4.4. At trial Scolnick explained he revised his deposition transcript to correct his "improper" answers.

After the close of evidence, the court instructed the jury that, to prevail on its cause of action for unlawful detainer, First City had to prove, among other elements, that First City "properly gave Home Depot 15 days written notice to pay the rent or vacate the property" and that, "as of March 28, 2014, a reasonable estimate of the amount stated in the 15-day notice was due." The court further instructed the jury that, to prove the notice was proper and contained the required information, First City had to prove, among other things, that "the notice states a reasonable estimate of the amount due." The court also instructed that "[a] notice stating a reasonable estimate of the amount of rent due that is within 20 percent of the amount actually due is reasonable unless Home Depot proves that it was not reasonable." Beyond providing the jury with basic principles of contract interpretation,[8] the trial court did not instruct the

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[7] Scolnick testified to this multiple times during his deposition, including after taking a 15-minute break with a calculator and his attorney, to make sure of his answer.

[8] For example, the trial court instructed: "You should assume that the parties intended the words in their contract to have their usual and ordinary meaning, unless you decide that the parties intended the words to have a special meaning. . . . [I]n deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts.

jury how to interpret section 4.4 to arrive at the amount of pass-through rent due as of March 28, 2014.

The jury returned a special verdict in favor of Home Depot, answering four questions. Question 1 was "Did [Home Depot] fail to make a required reimbursement rental payment to [First City] upon the demand dated February 15, 2014, pursuant to Section 4.4 of the [Sublease]?" The jury answered "yes." Question 2 was "Did [First City] properly give [Home Depot] a written notice to pay the rent or vacate the property at least fifteen days before May 13, 2014?" The jury answered "yes." Question 3 was "Did [First City] do all, or substantially all, of the significant things that the [Sublease] terms, both express and implied, required it to do?" The jury answered "yes." And Question 4 was "Was the amount due stated in the Notice to Pay Rent or Quit a reasonable estimate of the amount that [Home Depot] actually owed pursuant to Section 4.4 of the [Sublease]?" The jury answered "no." After the trial court entered judgment, First City timely appealed.

D. *The Motion for Attorneys' Fees*

After the trial court denied First City's motions for judgment notwithstanding the verdict and for a new trial, the court declared that Home Depot, as the prevailing party in the action, was entitled to attorneys' fees and costs under Code of Civil Procedure section 1032 and Civil Code section 1717. Citing the attorneys' fees provision in the Sublease, Home Depot filed a motion for attorneys' fees and costs, which First City opposed. The trial court granted the motion and awarded Home Depot

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You should use each part to help you interpret the others so that all the parts make sense when taken together."

$1,334,368.30 in attorneys' fees and $4,637.03 in costs. First City timely appealed, and we consolidated the appeals.

DISCUSSION

A. *First City Has Not Demonstrated the Trial Court Committed Reversible Error*

"The primary issue presented in this appeal," according to First City, "is the Superior Court's erroneous decision to delegate to the jury a legal question that should have been answered by the Superior Court concerning the interpretation of section 4.4 of the [Sublease]." First City argues that the trial court "abdicated its duty" to interpret section 4.4 by "misallocating that task to the jury" and that we should therefore "reverse the ruling of the Superior Court."

But what ruling? Nowhere does First City provide a citation to any ruling in the record, whether written or oral, that First City would have us reverse. In fact, not once in its briefs does First City identify the "erroneous decision" it is challenging. That failure is fatal to First City's appeal. "'It is the appellant's burden to demonstrate the existence of reversible error. [Citation.]' [Citation.] As part of that burden, the appellant must identify each order that he asserts is erroneous, cite to the particular portion of the record wherein that ruling is contained, and identify what particular legal authorities show error with respect to each challenged order." (*County of Orange v. Smith* (2005) 132 Cal.App.4th 1434, 1443; see *Coral Construction, Inc. v. City and County of San Francisco* (2010) 50 Cal.4th 315, 336 ["'[i]t is axiomatic that we review the trial court's rulings and not its reasoning'"]; *Alamo v. Practice Management Information*

Corporation (2013) 219 Cal.App.4th 466, 481, fn. 5 ["we review a trial court's ruling, not its reasoning"]; see also *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 44 [disregarding an argument for which the appellant did not provide citations to the record]; *Cassidy v. California Board of Accountancy* (2013) 220 Cal.App.4th 620, 628 ["[w]e disregard assertions and arguments that lack record references"].) """The appellate court is not required to search the record on its own seeking error." [Citation.] Thus, "[i]f a party fails to support an argument with the necessary citations to the record, . . . the argument [will be] deemed to have been waived."" (*People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 502-503; see *Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 215 ["[a]n appellate court will not search the record for the purpose of discovering errors not pointed out in the brief," and "[i]t is the duty of counsel to refer the reviewing court to the portion of the record to which he objects and to show that the appellant was prejudiced thereby"].)

To be sure, the record reflects the jury had the task of analyzing section 4.4 to determine the amount Home Depot owed in pass-through rent when Home Depot received First City's notice, so that the jury could decide, in turn, whether the amount stated in the notice was a reasonable estimate of the amount owed. But even assuming that should not have happened (see *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [interpreting a written instrument is solely a judicial function "when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or when a determination was made based on incompetent evidence"]), First City has not shown it happened as the result of an

erroneous ruling. Instead, First City appears to suggest—variously, in general terms, and without citation to the record—the trial court should have "instructed the jurors on the correct formula" for calculating the cap in section 4.4, limited the jury's role to issues of credibility, or excluded some or all extrinsic evidence.

But First City leaves it to us to find an actual erroneous ruling and explain why it is reversible. First City does not, for example, cite or propose any specific instruction the trial court should have given. First City does not identify any order granting or denying a motion–such as a motion to bifurcate, a motion in limine, or a motion for the court to decide an issue of contract interpretation–that erroneously allowed the jury to decide an issue of law. First City does not challenge the order denying its motion for summary judgment. First City does not point to an objection the trial court erroneously sustained or overruled that admitted evidence the jury should or should not have heard on the issue of contract interpretation. And First City does not identify the "issues of credibility" to which the court should have limited the jury's role.

Without an erroneous ruling, there can be no error. And First City does not point to anything in the record suggesting that First City ever asked the trial court—rather than the jury—to interpret section 4.4 or that First City ever objected to having the jury decide the issues it did. (Cf. *Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1133 [trial court erred by submitting a contract interpretation issue to the jury "over [the defendant's] objection," which the defendant raised in "motions for summary judgment or adjudication, motions in limine and motions for a directed verdict"].) Indeed, at oral

argument counsel for First City conceded First City did not raise the issue in the trial court. First City has failed to meet its burden on appeal of demonstrating reversible error.

B. *The Trial Court Did Not Err in Granting Home Depot's Motion for Attorneys' Fees and Costs*

Civil Code section 1717, subdivision (a), authorizes the trial court to award reasonable attorneys' fees and costs to the prevailing party in a contract action if the contract provides for such an award.[9] (See *Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 523 (*Frog Creek*).) "[T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract." (Civ. Code, § 1717, subd. (b)(1); see *Frog Creek*, at pp. 523-524.) "[I]n deciding whether there is a 'party prevailing on the contract,' the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 876; accord, *Roberts v. Packard, Packard & Johnson* (2013) 217 Cal.App.4th 822, 834.)

"'"On review of an award of attorney fees after trial, the normal standard of review is abuse of discretion. However, de novo review of such a trial court order is warranted where the

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[9] An unlawful detainer action based on an alleged breach of the lease during an unexpired term, as this action was, sounds in contract and comes within Civil Code section 1717. (*Hjelm v. Prometheus Real Estate Group, Inc.* (2016) 3 Cal.App.5th 1155, 1176; *Mitchell Land and Improvement Co. v. Ristorante Ferrantelli, Inc.* (2007) 158 Cal.App.4th 479, 486, 488.)

determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law.'"' (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213; accord, *Willard v. Kelley* (2015) 238 Cal.App.4th 1049, 1053; see *Wohlgemuth v. Caterpillar Inc.* (2012) 207 Cal.App.4th 1252, 1258 ["'[g]enerally, the trial court's determination of the prevailing party for purposes of awarding attorney fees is an exercise of discretion, which should not be disturbed on appeal absent a clear showing of abuse of discretion'"].)

First City challenges the trial court's order granting Home Depot's motion for attorneys' fees and costs on three grounds. First, it contends we must vacate the award because, for the reasons discussed, we should reverse the judgment. (See, e.g., *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284 [judgment reversed and trial court directed on remand to reverse its order awarding attorneys' fees and costs].) This argument fails because First City has not demonstrated we should reverse the judgment.

Second, First City contends Home Depot was not the prevailing party. First City argues it was the prevailing party because the special verdict established that it "prevailed on the issue of whether [Home Depot] was in default for amounts owed under the Sublease." First City also argues Home Depot was not the prevailing party because Home Depot "could have avoided this action if it had exercised its right to make a payment to [First City] under protest, preserving its ability to maintain possession of the premises and challenging [First City's] right to the amount demanded."

These arguments are unpersuasive. "[W]hen a defendant defeats recovery by the plaintiff on the only contract claim in the

action, the defendant is the party prevailing on the contract under section 1717 as a matter of law." (*Hsu v. Abbara*, *supra*, 9 Cal.4th at p. 876; accord, *Zintel Holdings, LLC v. McLean* (2012) 209 Cal.App.4th 431, 440; see *Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109 ["[w]hen a party obtains a simple, unqualified victory by completely prevailing on or defeating all contract claims in the action and the contract contains a provision for attorney fees, section 1717 entitles the successful party to recover reasonable attorney fees incurred in prosecution or defense of those claims"].) First City sued under the Sublease asserting a single cause of action, based on which it sought possession of the premises, termination of the Sublease, and damages. It lost on that cause of action and recovered nothing. Home Depot was the prevailing party under Civil Code section 1717. (See *DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal.5th 968, 973 ["a party who obtains an unqualified victory on a contract dispute, including a defendant who defeats recovery by the plaintiff on the plaintiff's entire contract claim, is entitled as a matter of law to be considered the prevailing party for purposes of section 1717"]; *David S. Karton, A Law Corporation v. Dougherty* (2014) 231 Cal.App.4th 600, 608 [defendant was prevailing party under Civil Code section 1717 because, among other reasons, plaintiff "recovered no 'relief in the action on the contract'"].)

Third, First City contends the trial court's award of attorneys' fees was unreasonable because counsel for Home Depot litigated inefficiently, performed unnecessary work, and did not staff the case economically. The only fact First City provides to support these assertions, however, is that counsel for Home Depot billed 3,647.6 hours, "with nearly two-thirds of the hours

billed by two partners." This is not enough to demonstrate an abuse of discretion, particularly in a case litigated as extensively as this one was, as reflected by the size of the record on appeal: 25 volumes of the appellant's appendix and 6 volumes of the reporter's transcript. (See *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1096 ["'[t]he "experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong["]'"]; accord, *Holguin v. DISH Network LLC* (2014) 229 Cal.App.4th 1310, 1329.)[10]

First City also suggests the trial court abused its discretion because, although First City "inventoried all the ways that [Home Depot's] counsel engaged in activities that should not be credited," the court declined to consider those "deficiencies." Even assuming that failing to consider purported "deficiencies" constitutes an abuse of discretion, however, the record does not show the trial court failed to consider them. In its order granting Home Depot's motion for attorneys' fees, the trial court acknowledged and rejected First City's arguments regarding these "deficiencies": "First City argues in its opposition that the nature of the case does not justify Home Depot's request, but the court disagrees, finding that this case was complicated and

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[10] First City also refers us to arguments it made to the trial court. An appellant, however, "may not simply "'incorporate by reference arguments made in papers filed in the trial court, rather than briefing them on appeal."'" (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 390, fn. 12.) First City has forfeited these arguments on appeal. (See *ibid.*; *Salehi v. Surfside III Condominium Owners' Assn.* (2011) 200 Cal.App.4th 1146, 1161-1162.)

extensively litigated." Although the court did not provide an extensive written analysis of the specific objections raised by First City, we do not infer from the record's silence that the trial court failed to consider them. (See *Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 192 [trial court is not required "to provide detailed reasons for overruling objections to a fee request"]; *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 101 ["there is no general rule requiring trial courts to explain their decisions on motions seeking attorney fees"]; see also *Chalmers v. Hirschkop* (2013) 213 Cal.App.4th 289, 299 ["[i]n reviewing any order or judgment we start with the presumption that the judgment or order is correct, and if the record is silent we indulge all reasonable inferences in support of the judgment or order"]; *Biscaro v. Stern* (2010) 181 Cal.App.4th 702, 708 ["on a silent record the 'trial court is presumed to have been aware of and followed the applicable law' when exercising its discretion[,]" and "[t]he appellate court will not presume error in this situation"].)

DISPOSITION

The judgment and the order granting Home Depot's motion for attorneys' fees and costs are affirmed. Home Depot is to recover its costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J. ZELON, J.