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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GABRIEL ROMAN et al., Plaintiffs and Appellants, v. BRE PROPERTIES, INC., et al., Defendants and Appellants.	B282422 (Los Angeles County Super. Ct. No. BC534948)

APPEALS from a judgment and postjudgment order of the Superior Court of Los Angeles County, Terry A. Green, Judge. Judgment and postjudgment order are affirmed.

Luminita Roman, in pro. per.; Rogers & Harris and Michael Harris for Plaintiffs and Appellants Gabriel L. Roman and Luminita Roman.

Rosen Saba and Elizabeth L. Bradley for Defendants and Appellants BRE Properties, Inc., Essex Property Trust, Inc. and Essex Portfolio, L.P.

Gabriel Roman and his live-in caregiver and former wife, Luminita Roman, sued BRE Properties, Inc. and several related entities for violating the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.) by unlawfully interfering with their housing at the Jefferson at Hollywood apartment complex and thereafter refusing to rent an apartment to them at the same complex in retaliation for the Romans' earlier lawsuit against BRE alleging violations of FEHA. The trial court granted BRE's motion for summary judgment, ruling in part, the Romans' claims were precluded by the settlement agreement between the Romans and the former owners and managers of the Jefferson at Hollywood, Jefferson at Hollywood, LP and Greystar Real Estate Partners, LLC (collectively JAH), and, in addition, BRE had a legitimate, nondiscriminatory reason for not leasing an apartment to the Romans.[1]

The Romans appeal, contending the trial court erred both in interpreting the settlement agreement to apply to their FEHA claims against BRE and by ignoring triable issues of material fact relating to BRE's motivation in refusing to rent to them. They also argue the trial court abused its discretion in connection with various evidentiary issues. In a cross-appeal BRE argues the trial court abused its discretion in declining to award it

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[1] We refer to Gabriel Roman as Roman; his live-in caregiver as Luminita; and Gabriel Roman and Luminita Roman collectively as the Romans.

attorney fees and costs as the prevailing defendant in a FEHA action. We affirm the judgment, as well as the postjudgment order denying BRE's motion for fees and granting the Romans' motion to tax costs.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Romans' Prior Action Against BRE*

In September 2011 the Romans sued BRE for injunctive and declaratory relief and damages, alleging disability discrimination in violation of FEHA, the Unruh Civil Rights Act (Civ. Code, § 51) and Civil Code section 54, commonly called the Disabled Persons Act (DPA), as well as unfair business practices (Bus. & Prof. Code, § 17200 et seq.) and negligence (based on a duty to operate rental premises in a manner that was free of discrimination and to train employees to fulfill that duty). The Romans had gone to the Villa Azure apartment complex, one of BRE's properties, without an appointment on November 2, 2009 with the goal of inspecting a low-income, affordable two-bedroom apartment Luminita had seen advertised online, even though she had been forewarned in a telephone call that the leasing agents were fully booked for that day and she risked not being able to see the apartment. According to the complaint, BRE's agents would not show the Romans the apartment without an appointment and refused to waive the policy as a reasonable accommodation even though Roman was emotionally disabled (depression and anxiety) and could not know whether he would feel well enough to be able to return at a specified future time. The Romans also alleged BRE's refusal to accept Roman's Section 8 housing voucher was discriminatory.

The trial court granted BRE's motion for summary judgment in September 2012, ruling the Romans had failed to

submit any admissible evidence to support their claims. As entered in BRE's favor on December 21, 2012, the judgment provided, "As prevailing party under Civil Procedure Code sections 1032 and 1033.5, BRE is entitled to an award of allowable costs as a matter of right." The Romans' appeal of the judgment and the postjudgment order denying their motion to tax costs and awarding costs to BRE was pending in this court when they filed their complaint in the case at bar.[2]

2. *The Romans' Tenancy at the Jefferson at Hollywood*

In October 2010 Roman rented unit 424, an affordable housing unit, in the Jefferson at Hollywood apartment complex, then owned and managed by JAH.[3] After Luminita threatened

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[2] In *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040 we affirmed the order granting summary judgment because the Romans had failed to present any evidence Roman suffered from a disability within the meaning of FEHA or the other statutes upon which he and Luminita, as a person "associated with" a person who has a disability, based their claims of disability discrimination. (*Id*. at pp. 1052-1053.) However, we reversed the postjudgment order awarding costs, holding, based on the Supreme Court's then-recent decision in *Williams v. Chino Valley Independent Fire Dist*. (2015) 61 Cal.4th 97, that costs, like attorney fees, could be awarded to a prevailing defendant in a FEHA action only if the court found the plaintiff had brought or continued the litigation without an objective basis for believing it had potential merit. (*Roman*, at pp. 1057-1058.) We also held inclusion of additional theories of liability (for example, a claim under the Unruh Civil Rights Act) did not divest the trial court of its discretion in awarding costs to a prevailing FEHA defendant. (*Roman*, at pp. 1059-1062.)

[3] The Jefferson at Hollywood consists of 270 luxury residential rental units. Twenty-seven of those units are

legal action for disability discrimination following denial of their request that JAH waive its policy not to accept Section 8 housing vouchers, that request was granted; Roman was allowed to use his voucher in connection with the rental.

In April 2011 Roman sued JAH in United States District Court, alleging a violation of the federal Fair Housing Act and numerous, related state causes of action. Roman alleged, in part, the noise from the apartment above unit 424 exacerbated his disability and constituted "mental and physical torture," but JAH had refused to accommodate his disability by immediately moving him to a penthouse apartment. JAH had explained there were no very-low-income units on the top floor of the apartment complex. The district court dismissed the federal claims in July 2011, and the Ninth Circuit affirmed in October 2012, holding Roman had failed to allege anything showing his requested accommodation was reasonable or even possible. (*Roman v. Jefferson at Hollywood LP* (9th Cir. 2012) 495 Fed. Appx. 804, *805; see *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1052, fn. 8.) The Ninth Circuit also held the district court properly declined to exercise supplemental jurisdiction over Roman's state law claims. (*Roman v. Jefferson at Hollywood LP,* at *806.)

In January 2012 Luminita sued JAH for violating the Penal Code's Invasion of Privacy Act (see Pen. Code, §§ 632, 637.2), based on the recording of Luminita's calls to an after-hours number for tenants in which she complained about the noise from the Romans' upstairs neighbor. The trial court

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designated "affordable" for applicants with moderate, low or very low incomes. Unit 424 was one of four two-bedroom, very low income affordable housing units at the apartment complex.

sustained a demurrer to the original complaint and thereafter to the first amended complaint without leave to amend, ruling the complaint failed to allege there had been an unauthorized or nonconsensual reception or interception of the calls. Luminita filed a notice of appeal on June 20, 2012.[4]

In July 2012 Roman was served with a 60-day notice to terminate tenancy. JAH cited as the basis for the notice the Romans' continuous harassment of other tenants, prospective tenants and management employees. An unlawful detainer complaint was filed in October 2012; in his answer Roman claimed unit 424 was not habitable under Civil Code sections 1941 and 1941.1. The trial court granted Roman's motion to dismiss the unlawful detainer action in mid-January 2013. JAH appealed the dismissal; Roman cross-appealed, arguing the award of $500 in attorney fees was inadequate.

On November 23, 2012 Roman filed a complaint for discrimination with the California Department of Fair Employment and Housing, alleging the filing of the unlawful detainer action was in retaliation for Roman having asserted his rights as a disabled person.

In December 2012 the Romans demanded $1.5 million to settle their outstanding claims against JAH and to agree to vacate the property. JAH offered $50,000, also with the condition the Romans vacate the property. In mid-2013 JAH again offered to settle for $50,000; the Romans countered with a $1 million demand.

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[4] Although the order sustaining the demurrer was entered on May 23, 2012, the order dismissing the action was not filed until July 10, 2013. The appeal was dismissed at the request of the appellant on September 27, 2013.

3. *JAH's Sale of the Jefferson at Hollywood to BRE*

While the Romans' appeal in their FEHA lawsuit against BRE was pending in this court and the various actions between the Romans and JAH were continuing, JAH placed the Jefferson at Hollywood for sale and selected BRE as the potential purchaser. BRE learned the Romans were tenants in the complex, and JAH representatives discussed with BRE the multiple proceedings related to their tenancy. BRE also learned that Roman had been declared a vexatious litigant by the Los Angeles Superior Court in April 2013.

At one point in the negotiations for the sale of the Jefferson at Hollywood, BRE proposed reducing the contemplated $120 million purchase price by $1 million (the amount of the Romans' most recent settlement demand) if JAH was unable to conclude a settlement of outstanding claims with the Romans, including the Romans' agreement to move from the apartment complex.[5] Ultimately, however, BRE conditioned its purchase of the property on JAH obtaining a release of all claims, termination of the Romans' tenancy and an agreement by the

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[5] In an August 28, 2013 email Jason Spratt of BRE wrote to John Owens of JAH, "As outlined in our August 13th letter, BRE requests the Seller address the Roman tenancy and associated litigation prior to a closing. Gabriel Roman's status as a vexatious litigant and BRE's previous experience with the tenant on unrelated matters clearly demonstrates the tenant's propensity to engage in elongated litigation. BRE has expended significant resources defending unrelated matters with the Romans. Should ownership be unable to address the continued tenancy prior to close, BRE requests that the tenant's counter settlement proposal of $1M be mitigated via credit by Seller to BRE."

Romans not to attempt to rent from JAH or its successors in the future. JAH agreed to that condition.

The sale of the apartment complex was completed on September 30, 2013. BRE immediately took possession as the new owner.

4. *The Settlement Agreement Between the Romans and JAH*

Prior to the closing of JAH's sale of the property to BRE, the Romans and JAH entered into a settlement agreement with mutual releases, effective September 19, 2013, which provided JAH would pay Luminita $700,000 upon the Romans vacating unit 424 on or before September 26, 2013. Although both Roman and Luminita had active litigation pending against JAH, and Roman was the sole lessee of unit 424, at the Romans' direction the entire cash consideration was paid to Luminita. The settlement agreement recited that each of the parties had received independent legal advice concerning the settlement and the releases it provided. Counsel for JAH and the Romans each signed the agreement "as to form."[6]

For purposes of the settlement agreement, the Romans and JAH agreed the term "Landlords" "include[d] Jefferson at Hollywood, LP, Greystar Real Estate Partners, LLC and each of its respective subsidiaries, members, directors, officers, employees, insurance companies, agents, beneficiaries, successors, assigns, representatives, companies, and attorneys."

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[6] Michael Harris of Rogers & Harris, Roman's counsel in the trial court and on appeal in this matter, signed the agreement on behalf of both Roman and Luminita.

The term "Parties" referred collectively to "Landlords" and "Tenants"; the latter term was defined as Roman and Luminita.

The mutual release provision of the settlement agreement, paragraph 4, provided, subject to the terms and obligations to be performed under the agreement itself, "the Parties, for themselves, as well as for their agents, attorneys, servants, employees, members, partners, predecessor corporations, successor corporations, parent corporations, related corporations, joint ventures, subsidiaries, descendants, ancestors, dependents, heirs, executors, administrators, assigns, assignors, officers, directors, partners, and shareholders" released each other "and their respective predecessors in interest, successors and assigns . . . of and from all liability [and] claims . . . related in any way to the transactions or occurrences between the Parties, to the fullest extent permitted by law."

Paragraph 9 of the settlement agreement, titled "Future Housing," provided, "Tenants represent that they will not, either collectively or individually, knowingly apply for, seek, or accept housing at properties owned or operated by Landlords, or their affiliates, or their companies. To the maximum extent permitted by law, Tenants hereby expressly waive any and all rights, if any, that they may have to apply for, seek, or obtain housing of any kind at properties owned or operated by Landlords, their affiliates, or their companies. Tenants further agree that Landlords, their affiliates, or their companies, shall have no duty to consider any application submitted by them for housing at any property owned or operated by Landlords, or their affiliates, or their companies, and that Landlords, their affiliates, and their companies will have no liability to Tenants for denying any application they may submit for future housing."

Because the settlement agreement contained a confidentiality provision, JAH did not provide a copy to BRE. However, in a fifth amendment to the purchase and sale agreement, dated September 27, 2013, JAH represented that all litigation between JAH and the Romans had been settled and dismissed with prejudice; the settlement agreement contained a general release of all claims, as well as a waiver of rights under Civil Code section 1542, by both Roman and Luminita against JAH and JAH's "successors and assigns, including subsequent owners of the Property"; and that all leases between JAH and the Romans had been terminated.[7]

Although the Romans knew JAH was selling the Jefferson at Hollywood, they were not told the identity of the prospective buyer. The day the Romans moved from unit 424 they learned that BRE was buying the apartment complex. Luminita has claimed the news made her feel "raped" by BRE; Roman testified he felt he had been made a fool. The Romans insisted they would not have settled with JAH or would have held out for more money had they known BRE was the intended buyer.

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[7] In the fourth amendment to the purchase and sale agreement between JAH and BRE, dated September 13, 2013, JAH agreed to confirm to BRE's reasonable satisfaction by September 27, 2013 that the Romans' lease had been terminated and that all outstanding litigation with them had been settled without liability of any kind to BRE. The fifth amendment to the purchase and sale agreement represented that the conditions relating to the Romans contained in the fourth amendment had been satisfied.

5. *The Romans' Attempt To Rent Their Old Apartment*

The Romans alleged they became homeless the moment they moved from unit 424 at the Jefferson at Hollywood. On October 22, 2013 they went to the Jefferson at Hollywood to apply to rent an affordable two-bedroom unit. What happened next is the subject of some dispute.

According to the Romans, they met with Trina Smith, an assistant community manager, who told Roman unit 424 was available and he could fill out an application for it. Smith also told Roman there would be no problem accepting his Section 8 housing voucher. However, after Smith conferred with property manager Andrea Reis, she returned and told the Romans she had been instructed that she could not rent to them. While Smith was with Reis, Reis sent an email to others at BRE, including the executive vice president of operations, with the subject line "Romans" and the following message: "They are here trying to rent their unit back. I am going to send them away but I want to make sure there isn't something that I am saying wrong that they can sue us for before I go out there."

According to BRE, when the Romans came to the property on October 22, 2013, they should have been aware there was an affordable housing wait list, as there had been when they initially rented their apartment at the Jefferson at Hollywood. When Smith conferred with Reis, Reis told Smith, who was simply helping out in the leasing office and had no training as a leasing agent, that she could not accept an application for unit 424 because there was a wait list for affordable housing units; Reis instructed Smith to make sure the Romans knew

there was a wait list. Roman left the property without adding his name to the wait list.[8]

As for Reis's email seeking advice about communications with the Romans, BRE explained that, from her review of the computer database when she began working as property manager at the Jefferson at Hollywood in September 2013, Reis believed Roman had been the subject of an eviction action. In addition, Reis had been instructed to report any interactions with the Romans to management. However, at that time Reis did not know the Romans had sued BRE for housing discrimination and was not aware of any instructions for property managers not to rent to the Romans.

6. *The Complaints for Violating FEHA and for Unfair Business Practices*

On February 4, 2014 Roman filed the instant action for disability discrimination and retaliation under FEHA and for unfair business practices under Business and Professions Code section 17200, alleging BRE, in retaliation for his lawsuit against it, interfered with his tenancy at the Jefferson at Hollywood by conditioning its purchase of the apartment complex on his agreement to vacate his apartment and then denied him housing at the property. Roman filed a first amended complaint in March 2015; and in August 2015 Luminita, representing herself, filed a separate complaint essentially based on the same operative facts and claims. The two actions were consolidated in September 2015.

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[8] Unit 424 was rented in January 2014 to an individual who had been on the wait list since 2010.

BRE answered Roman's unverified complaint and first amended complaint by general denial and asserted 22 separate affirmative defenses.[9] After the court overruled BRE's demurrer to Luminita's complaint, with the comment that the issues presented were best raised at summary judgment or trial, BRE answered her unverified complaint and asserted the same affirmative defenses pleaded in response to Roman's first amended complaint.

7. *The Discovery Dispute Regarding BRE's Claim of Privilege*

In September 2014 Roman moved for an in camera review of documents identified in BRE's privilege log and withheld from production. The trial court denied the motion but gave Roman the option to have a discovery referee "make a ruling as to the privilege log emails dated September 26, 2013."[10]

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[9] BEX Properties, LLC, a Delaware limited liability company, filed the answers, explaining it was the surviving entity to BRE Properties, Inc., which had been erroneously named as a defendant in the action.

[10] In his declaration filed with BRE's opposition to the motion for in camera inspection of documents, Scott Reinert, formerly executive vice president of operations of BRE, stated, "On September 26, 2013, I sent an email, in my capacity as an authorized representative of our Executive Committee, and in the ordinary course of the company's business to managers and executives at BRE. . . . This communication to these individuals consisted of and summarized legal advice and directives communicated by our General Counsel to our Executive Committee regarding Roman and his relationship with the Jefferson property, and was reasonably necessary to implement

8. *Summary Judgment Proceedings*

In September 2016 BRE moved for summary judgment or, in the alternative, summary adjudication as to the Romans' causes of action for retaliation and unfair business practices, as well as its eighth affirmative defense (unit 424 did not accommodate Roman's claimed disability), 10th affirmative defense (legitimate, nondiscriminatory and nonretaliatory reasons for the challenged decisions), 12th affirmative defense (waiver and release pursuant to the terms of the September 19, 2013 settlement agreement), 22d affirmative defense (Roman was not qualified to rent the unit) and the Romans' claim for punitive damages.

In support of its motion BRE argued its motive in conditioning the purchase of the Jefferson at Hollywood on JAH's settlement of all outstanding litigation with the Romans, coupled with the Romans' agreement to move from their apartment, was the legitimate, nondiscriminatory desire to avoid the risk of costly future litigation, not to retaliate against the Romans for their prior lawsuit against BRE. There similarly were legitimate, nondiscriminatory and nonretaliatory reasons for the events of October 22, 2013: There was a wait list for affordable units at the apartment complex; and it was BRE's policy not to accept Section 8 vouchers, as it had a right to do. In addition, BRE presented evidence Reis did not know the Romans had previously sued BRE for disability discrimination.

BRE also argued the settlement agreement between the Romans and JAH established a complete defense to the lawsuit.

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and to further the interest of the legal advice and directives received by and adopted by the Executive Committee."

In the agreement the Romans released all claims relating to the transactions between JAH and themselves; that release extended to JAH's successors and assigns. In addition, the Romans waived any right they may have had to apply for housing at any property owned or operated by "Landlords," a term that was defined to include JAH and its successors (among others). BRE also presented evidence that Roman had previously made judicial admissions that unit 424, the apartment he sought to rent on October 22, 2013, did not properly accommodate his disabilities (in fact, according to Roman, living in the unit exacerbated his disabilities) and that he could not afford to rent the unit without using his Section 8 housing vouchers, which BRE did not accept.

The Romans opposed the motion, arguing there were several material questions of fact that precluded summary judgment: (1) Whether the Romans were terminated from their tenancy at the Jefferson at Hollywood because they had previously sued BRE for disability discrimination; (2) whether employees of BRE were instructed not to rent to the Romans because of the prior lawsuit for disability discrimination; (3) whether Andrea Reis was aware of the prior lawsuit at the time of the October 22, 2013 incident; and (4) whether there was a genuine wait list requirement for affordable housing units at the Jefferson at Hollywood after the BRE assumed ownership. The Romans supported their argument, in part, with an analysis of various emails between JAH and BRE executives relating to the sale of the Jefferson at Hollywood that had been obtained during discovery. The Romans also argued BRE was not a successor or successor in interest to JAH within the terms of the Romans-JAH settlement agreement, insisting, without offering

any extrinsic evidence, the term referred to a corporate successor to JAH, not a subsequent, independent purchaser of the property.

The superior court sustained a number of BRE's written objections to the Romans' evidentiary materials, overruled Luminita's oral objections to the declaration of Scott Reinert and granted the motion for summary judgment. The court explained the basic rationale for its ruling, "[N]either FEHA, nor any other rule of law, requires a party to enter into a rental agreement or any relationship, when to do so will subject that party to on-going expensive litigation." In light of the Romans' extensive litigation history, the desire to avoid costly lawsuits from a known litigious party, already identified as a vexatious litigant by the Los Angeles Superior Court, constituted a legitimate, nondiscriminatory reason for not leasing a unit to Roman. In addition, the court ruled the existence of the wait list at the Jefferson at Hollywood was uncontradicted and waiver of the wait list as an accommodation to Roman's disability was not reasonable because of Roman's prior claims unit 424 was uninhabitable and exacerbated his disability. Similarly, the refusal to accept Section 8 vouchers was not actionable because a landlord is not obligated to participate in the program.

The court also granted summary adjudication as to BRE's eighth affirmative defense (no reasonable accommodation possible without undue hardship) and its 22d affirmative defense (plaintiff was not qualified to rent the available unit on the day of the incident), again finding it undisputed that unit 424 was not suitable for Roman based upon his position in the prior litigation that the apartment aggravated his disability and that he could not afford the unit without using Section 8 housing vouchers, which BRE was not legally obligated to accept.

Finally, the court granted summary adjudication as to the 20th affirmative defense, ruling the settlement agreement provided a complete defense to the Romans' claims: "The Agreement provides the Plaintiffs waive any and all rights they may have had to apply for, seek, or obtain housing of any kind at properties owned or operated by 'Landlords,' which expressly defines JAH and their 'beneficiaries and successors.' [Citation.] Plaintiffs also waived rights and claims . . . related to the transactions between them and JAH, and that release was also extended to JAH's successors and assigns. [Citation.] The Agreement expresses the parties' intent that the Agreement may be enforceable by those 'who may assume any and all of the above-described capacities subsequent to the execution of the Agreement.' [Citation.] In fact, Plaintiff does not dispute that Plaintiffs entered into the Settlement Agreement where all parties agreed to release all claims against each other, and Plaintiffs agreed to vacate the Unit on the Property within one week, and not to apply to rent from JAH *and its successors and assigns,* in exchange for $700,000."

Although the Romans did not know BRE was the intended purchaser of the property and insisted they would have demanded more money to settle their claims and vacate their apartment if they had, the trial court found the terms of the settlement agreement applied to BRE as JAH's successor-in-interest because it would have been irrational for the Romans to believe they were paid $700,000 to leave the apartment complex only for a few days. Indeed, the court continued, the settlement agreement "specifically provides that 'landlords' are to include successive owners . . . . Were these provisions not meant to apply

to successive owners of the Property, the provision mandating Plaintiffs vacate the premises would make no sense."

The court granted summary adjudication as to the second cause of action for unfair business practices because that claim "is both legally and factually co-extensive with their FEHA claim. As this Court has ruled that the FEHA claim has no merit, it must follow that their second claim must fail."[11]

Judgment was entered on March 28, 2017. The Romans filed a timely notice of appeal.

9. *Postjudgment Motions Relating to Fees and Costs*

BRE on April 12, 2017 filed a memorandum of costs requesting $75,462.68 exclusive of attorney fees. The Romans moved to tax costs. On May 30, 2017 BRE moved for an award of attorney fees and costs as the prevailing defendant in a FEHA action, as well as under the attorney fee provision in the JAH settlement agreement and Civil Code section 1717, seeking a total of $911,954.90. The Romans opposed the motion.

Following a hearing the trial court on July 6, 2017 denied BRE's motion for fees and costs and granted the Romans' motion to tax costs, ruling BRE had not established the Romans' lawsuits were objectively without foundation when filed or became so at some later time, the showing FEHA requires for a prevailing defendant to recover fees and costs. The court explained, although it had found the Romans' settlement agreement with JAH precluded them from returning to the apartment complex, the Romans had presented a colorable

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[11] Luminita, joined by Roman, moved for reconsideration of the order granting summary judgment on January 26, 2017. The court denied the motion.

argument the contractual bar did not apply to the subsequent purchaser of the building. In addition, although the court stated it was clear the Romans had returned to the complex "looking for a reason to sue," "*looking* for a reason to sue is not the same as *fabricating* a reason to sue. The Plaintiffs' desire to sue a particular Defendant is not by itself sufficient proof that the suit filed is in bad faith." BRE filed a timely appeal from that ruling.[12]

DISCUSSION

1. *Standard of Review*

a. *Summary judgment*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); see *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 618.) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.) The evidence is viewed in the light most favorable to

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[12] Several weeks after the trial court's ruling, the Supreme Court in *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744 held assertion of an affirmative defense was not a legal action or other proceeding to enforce a contract, triggering a contractual right to attorney fees. Acknowledging that decision, BRE does not argue on appeal it is entitled to fees under the Romans-JAH settlement agreement.

the nonmoving party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 703; *Schachter*, at p. 618.)

A defendant may move for summary judgment on the ground there is an affirmative defense to the action. (Code Civ. Proc., § 437c, subds. (*o*)(2), (p)(2); see *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.) Once the defendant establishes all the elements of the affirmative defense, the burden shifts to the plaintiff to show there is one or more triable issues of material fact regarding the defense. (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1188; see *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1484-1485 [when a defendant moves for summary judgment, "the burden shifts to the plaintiff to show there is one or more triable issues of material fact regarding the defense after the defendant meets the burden of establishing all the elements of the affirmative defense"]; *Mirzada v. Department of Transportation* (2003) 111 Cal.App.4th 802, 806-807 [once defendant establishes the existence of an affirmative defense, burden on summary judgment shifts to the plaintiff to produce evidence establishing a triable issue of material fact refuting the defense].)

b. *Interpretation of written agreements*

In the absence of any conflict in extrinsic evidence presented to prove the meaning of an ambiguous contract term, we review the interpretation of a written agreement de novo. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439 ["[i]t is solely a judicial function to interpret a written contract unless the interpretation turns upon the credibility of extrinsic evidence, even when conflicting inferences may be drawn from uncontroverted evidence"]; see *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; see also

Johnson v. Greenelesh (2009) 47 Cal.4th 598, 604; *Western Heritage Ins. Co. v. Frances Todd, Inc.* (2019) 33 Cal.App.5th 976, 983.)

c. *FEHA fee and cost awards*

A prevailing defendant in a FEHA action may be awarded its attorney fees and costs only if the trial court finds the action was "frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." (Gov. Code, § 12965, subd. (b), as amended by Stats. 2018, ch. 955, § 5, eff. Jan. 1, 2019; see *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 115 [a prevailing defendant "should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so"].)[13] A plaintiff's lack of success alone does not justify an award of fees or costs to the defendant, but the prevailing defendant need not show the plaintiff initiated the suit in bad faith to recover fees. (See *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421 [98 S.Ct. 694, 54 L.Ed.2d 648]; *Williams*, at p. 115 ["the *Christiansburg* standard applies to discretionary awards of both

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[13] The Legislature's 2018 amendment to Government Code section 12965, subdivision (b), specifying the standard for a discretionary award of fees and costs to a prevailing defendant clarified existing law, as articulated by the Supreme Court in *Williams v. Chino Valley Independent Fire Dist.*, *supra*, 61 Cal.4th 97, rather than changed it. (See *Scott v. City of San Diego* (2019) 38 Cal.App.5th 228, 232 ["[w]e conclude that, with this amendment [to section 12965, subdivision (b)], the Legislature sought to clarify existing law, rather than to change it"].)

attorney fees and costs to prevailing FEHA parties under Government Code section 12965(b)"].)

We review the trial court's ruling denying attorney fees and costs to a prevailing defendant in a FEHA action under the deferential abuse of discretion standard. (*Robert v. Stanford University* (2014) 224 Cal.App.4th 67, 73; see *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 989.)

2. *Governing Law*

Government Code section 12927, subdivision (c)(1), defines "discrimination" to include "refusal to sell, rent, or lease housing accommodations"; "refusal to negotiate for the sale, rental, or lease of housing accommodations"; and "representation that a housing accommodation is not available for inspection, sale, or rental when that housing accommodation is in fact so available."

Government Code section 12955, subdivision (f), provides in part that it is unlawful "[f]or any owner of housing accommodations to harass, evict, or otherwise discriminate against any person in the sale or rental of housing accommodations when the owner's dominant purpose is retaliation against a person who has opposed practices unlawful under this section." Section 12955, subdivision (g), further provides it is unlawful "[f]or any person to aid, abet, incite, compel, or coerce the doing of any of the acts or practices declared unlawful in this section, or to attempt to do so."

To establish a prima facie case of retaliation, a plaintiff must demonstrate (1) he or she engaged in a protected activity; (2) the defendant subjected him or her to an adverse action; and (3) a causal link exists between the protected activity and the adverse action. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042; see *Wilson v. Cable News Network, Inc.* (2019)

7 Cal.5th 871, 885.) If the defendant thereafter offers evidence of a legitimate, nonretaliatory reason for its decision (see *Yanowitz*, at p. 1042; see generally *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354-355), the plaintiff must prove that reason was merely a pretext for retaliation or offer other evidence of intentional retaliation. (*Yanowitz*, at p. 1042; *Batarse v. Service Employees Internat. Union, Local 1000* (2012) 209 Cal.App.4th 820, 831.)

3. *The September 19, 2013 Settlement Agreement Provides a Complete Defense to the Romans' Causes of Action for Interfering with Their Existing Tenancy at the Jefferson at Hollywood and Refusing To Re-rent Unit 424*

The Romans' operative complaints set forth two different theories of retaliation in violation of FEHA: (1) By requiring JAH to settle its outstanding litigation with the Romans, including an agreement to vacate the apartment complex, as a condition of its purchase of the Jefferson at Hollywood, BRE interfered with the Romans' tenancy, compelling JAH, in effect, to evict the Romans in retaliation for the Romans' earlier lawsuit against BRE, a protected activity within the meaning of FEHA; and (2) by falsely claiming there was a preexisting wait list for affordable housing units at the Jefferson at Hollywood and/or failing to waive the wait list requirement and refusing to accept Roman's Section 8 housing voucher as reasonable accommodations for his disability, BRE engaged in unlawful retaliation against Roman for his lawsuit concerning the Villa Azure apartment complex.

The September 19, 2013 settlement agreement provides a complete defense to the first theory of retaliation as a matter of law because BRE, as JAH's successor in interest, is protected by the Romans' expansive release of all claims related in any way to transactions between the Romans and JAH, including

transactions or occurrences concerning the Romans' tenancy at the Jefferson at Hollywood. The settlement agreement provides a complete defense to the second theory of retaliation as a matter of law because BRE, as JAH's successor in interest, which assumed JAH's role as the landlord at the Jefferson at Hollywood, was entitled to enforce the Romans' agreement not to apply for or accept housing at properties owned by JAH or its successor.

a. *The Romans' waiver of all claims related to the termination of their tenancy*

As discussed, the mutual releases executed by the Romans as part of their settlement agreement with JAH encompassed all claims related in any way to their tenancy at the Jefferson at Hollywood, necessarily including termination of Roman's lease and the Romans' agreement to vacate unit 424 by September 26, 2013. Similarly, the allegation BRE compelled JAH to include those provisions in the settlement agreement, thereby unlawfully interfering with the Romans' tenancy at the apartment complex, falls within the scope of the release, which the Romans agreed was "intended to be interpreted as broadly as possible," if BRE is included as one of the entities entitled to enforce it. It is.

By its terms the release covered not only "the Parties,"[14] but also their "successors and assigns." Moreover, a separate paragraph, titled "Successors in Interest," provided, "The provisions of this agreement shall be binding on and shall be deemed to obligate, extend and inure to the benefit of the Parties,

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[14] "Parties" is a defined term that included two other defined terms, "Landlords" and "Tenants." "Landlords" is defined for purposes of the settlement agreement to include "Jefferson at Hollywood, LP, Greystar Real Estate Partners, LLC and each of its respective . . . successors [and] assigns . . . ."

their . . . successors in interest, and assigns of the Parties hereto and upon and to their agents and other designees who may assume any and all of the above-described capacities subsequent to the execution of this Agreement."

BRE was unquestionably JAH's successor as owner and landlord of the Jefferson at Hollywood. The Romans' contrary contention that the terms "successor" and "successor in interest" as used in the settlement agreement are limited to a "successor in ownership of a business that is carried on and controlled substantially as it was before the transfer" is inconsistent with the plain meaning of the language used (see Civ. Code, § 1644 [words of a contract are generally to be understood in their ordinary and popular sense unless used by the parties in a technical sense]; *Linton v. County of Contra Costa* (2019) 31 Cal.App.5th 628, 636 ["[c]ourts first look to the plain meaning of the agreement's language"]); disregards the circumstances surrounding execution of the settlement agreement, which focused exclusively on issues relating to the Jefferson at Hollywood apartment complex, not other aspects of JAH's business operations (see Civ. Code, § 1647 ["[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates"]; *California National Bank v. Woodbridge Plaza LLC* (2008) 164 Cal.App.4th 137, 144 ["[t]o give effect to the parties' intent, we may look to evidence of the circumstances surrounding execution of the lease"]); and is unsupported by any contrary extrinsic evidence.[15] In fact,

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[15] The Romans' contention it is a question of fact whether they intended to release BRE betrays a fundamental misunderstanding of the objective theory of contracts, as well as the respective roles of the court and a finder of fact in

elsewhere in the release itself, JAH and the Romans referred to the parties' "predecessor corporations [and] successor corporations," demonstrating their ability to limit the term successor when that was their intent.

The sole California case the Romans cite in their opening brief to support their argument, *California National Bank v. Woodbridge Plaza LLC*, *supra*, 164 Cal.App.4th 137, actually refutes their position. As the Romans state in their brief, the trial court ruled the term "successor" in a lease meant "a legal successor-in-interest who has assumed the rights and obligations of the Bank of Irvine." (*Id.* at p. 141.) But the Romans fail to disclose that the court of appeal expressly disapproved that ruling, "[W]e do not agree with the trial court that 'successor' means a legal successor in interest to Bank of Irvine. Whether the space was occupied by a successor in interest or merely a successor operating a financial institution would not matter to plaintiff." (*Id.* at p. 146.)[16] Similarly here, the term successor as

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interpreting a written agreement. (See *Iqbal v. Ziade*h (2017) 10 Cal.App.5th 1, 8 ["'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"'"]; *City of Hope National Medical Center v. Genentech*, *Inc.*, *supra*, 43 Cal.4th at p. 395 [when there is no material conflict in the extrinsic evidence, the court interprets the contract as a matter of law].)

[16] Counsel's misleading discussion of *California National Bank v. Woodbridge Plaza LLC*, *supra*, 164 Cal.App.4th 137 comes perilously close to a violation of rule 3.3(a)(1) & (2) of the Rules of Professional Conduct, which provides, in part, a lawyer shall not knowingly make a false statement of fact or law to a

used in the settlement agreement, including the mutual releases, applied equally to a legal successor in interest to JAH's business and to a subsequent purchaser operating the Jefferson at Hollywood. (Cf. *Le Gault v. Erickson* (1999) 70 Cal.App.4th 369, 373-374 [purchaser of property is the successor in interest to the previous owner within the meaning of Government Code section 66499.32 concerning division of property under the Subdivision Map Act].)

b. *The Romans' agreement not to apply for housing at properties owned by "Landlords," a term defined to include JAH's successors*

With respect to their housing following termination of Roman's lease at the Jefferson at Hollywood, the Romans agreed not to apply at any property owned or operated by "Landlords" and also that "Landlords, their affiliates or their companies, shall have no duty to consider any application submitted by [the Romans] for housing at any property owned or operated by Landlords, or their affiliates, or their companies." As discussed, "Landlords" was a defined term in the settlement agreement and expressly included JAH's "beneficiaries, successors [and] assigns." The Romans further agreed the provisions of the settlement agreement "extend and inure to the benefit of" JAH's "grantees, transferees, . . . successors in interest, and assigns . . . and other designees who may assume any and all of the above-described capacities subsequent to the execution of this Agreement." As with the provisions of the mutual release just discussed, the plain meaning of this language regarding future housing extends to BRE as the purchaser of the Jefferson at

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tribunal or knowingly misquote to a tribunal the language of a decision.

Hollywood and, therefore, JAH's successor as landlord and manager of the apartment complex. (See, e.g., Merriam-Webster Online Dict. (2019) <https://merriam-webster.com/legal/successor%20in%20interest> [as of Sept. 23, 2019], archived at <https://perma.cc/8E33-HKUH> ["successor in interest" means "a successor to another's interest in property; *especially*: a successor in ownership of a business that is carried on and controlled substantially as it was before the transfer"].) Accordingly, BRE was entitled, as JAH's successor in interest, to insist Roman honor his agreement not to reapply for an apartment at the Jefferson at Hollywood. (Cf. *Jencks v. Modern Woodmen of America* (7th Cir. 2007) 479 F.3d 1261, 1266-1267 [reliance on a no-rehire clause in an agreement settling a former employee's discrimination claim can serve as a legitimate, nondiscriminatory reason for declining an application for employment]; *Kendall v. Watkins* (10th Cir. 1993) 998 F.2d 848, 850-851 [same]; *Salerno v. City University of New York* (S.D.N.Y. Mar. 10, 2005) 2005 U.S.Dist. Lexis 3825 ["a bar on future employment is not unusual"].)[17]

The Ninth Circuit's decision under the federal Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. § 2601 et seq.) in *Sullivan v. Dollar Tree Stores, Inc.* (9th Cir. 2010) 623 F.3d 770, relied upon by the Romans in the trial court and cited in their

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[17] Notably, although vigorously arguing their agreement not to seek future housing at properties owned or operated by "Landlords" did not apply to the Jefferson at Hollywood once the complex was sold to BRE by JAH, the Romans do not contend BRE's reliance on that provision in the settlement agreement is a pretext for discrimination or retaliation or otherwise violates FEHA.

reply brief here, supports, rather than contradicts, this interpretation of the settlement agreement. As the court of appeals explained, an employee is not eligible for family or medical leave until he or she has worked for an employer for 12 months. For this purpose the term "employer" in the FMLA includes "any successor in interest of an employer." (*Id*. at p. 780.) The term "successor in interest" is not defined by the FMLA, but the United States Department of Labor has issued a regulation identifying eight factors to be considered, including whether there is a substantial continuity of the same business operation, the similarity of the employee's job and working conditions, the similarity in services provided and whether the same physical facility is used. (*Id*. at pp. 780-781.) Applying these criteria the court determined Dollar Tree Stores, Inc. was not a successor employer to Factory 2-U, a retail store that sold discount clothing, in evaluating whether a former manager at a Factory 2-U store was entitled to family leave after working as an assistant manager at the same location for Dollar Tree for less than a year.

The court explained, Dollar Tree had purchased the lease on the building where the employee's Factory 2-U store had been located, "but absolutely nothing else." (*Sullivan v. Dollar Tree Stores, Inc*., *supra*, 623 F.3d 770 at p. 784.) After acquiring the lease in Factory 2-U's bankruptcy proceeding, Dollar Tree spent four weeks renovating the building. In addition, "[a]lthough both stores sell some clothing, it is undisputed that Dollar Tree did not acquire *any* of Factory 2-U's merchandise; that Dollar Tree sells a wide variety of merchandise whereas Factory 2-U sold clothing only; and that Dollar Tree sells items for $1 only whereas Factory 2-U sold clothing at many different prices. Both stores operated

a retail business selling discounted merchandise, but the similarities end there. This factor strongly supports a conclusion that Dollar Tree is not a successor to Factory 2-U. [¶] . . . [¶] . . . That both stores were 'retail business operations' is too general to demonstrate substantial continuity giving rise to successorship liability. Were it otherwise, the replacement of a Safeway by a Saks Fifth Avenue, after a month of renovations, would create successorship liability." (*Ibid.*)

These same factors unerringly point to the conclusion BRE is properly considered JAH's successor in interest as the landlord of the Jefferson at Hollywood. With the exception of some changes in management personnel, BRE's purchase of the property in no way altered the nature of the business: It remained a luxury residential apartment complex with the same limited number of affordable housing units. To borrow the Ninth Circuit's analogy, it is as if the local Safeway became a Ralphs without any change in physical features or inventory.

c. *The Romans' belated public policy argument lacks merit*

The Romans did not contend in opposition to BRE's motion for summary judgment that their settlement agreement with JAH violated public policy and, therefore, was not recognized as a complete defense to their claims of unlawful retaliation. In a lengthy motion for reconsideration, however, they did argue, as they do on appeal, that the settlement agreement is unenforceable to the extent it purports to release future claims of discrimination in violation of FEHA or exempt JAH and its successors from responsibility for future torts involving willful

injury or fraud. (See Civ. Code, § 1668;[18] *Watkins v. Wachovia Corp*. (2009) 172 Cal.App.4th 1576, 1587-1588, fn. 12 [Civil Code section 1668 "is meant to prohibit contracts releasing liability for *future* torts [citation], not to prohibit settlements of disputes relating to past conduct"]; see also *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754-755 ["[t]he traditional skepticism concerning agreements designed to release liability for future torts . . . long has been expressed in Civil Code section 1668"].)

This public policy argument, even if properly before us, lacks merit. First, to the extent the settlement agreement released currently existing claims, including the claim BRE unlawfully induced JAH to demand the Romans agree to vacate their apartment at the Jefferson at Hollywood as part of the parties' settlement, the prohibition against a *prospective* release of certain types of unlawful conduct is simply inapplicable. (Cf. *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 930 [""[t]he law favors settlements""; "[a] settlement agreement is considered presumptively valid"]; *Dunkin v. Boskey* (2000) 82 Cal.App.4th 171, 183-184 [""courts have been cautious in blithely applying public policy reasons to nullify otherwise enforceable contracts""].) Second, as its defense to the claim of retaliation arising from the October 22, 2013 incident, BRE does not rely on the Romans' broad release of claims in the settlement agreement,

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[18] Civil Code section 1668 provides, "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

which included a waiver of rights under Civil Code section 1542, but on their representation they would not seek housing in the future from "Landlords." While arguing BRE is not authorized to enforce that provision of the settlement agreement, the Romans did not contend the will-not-re-rent provision violates public policy.

Finally, in their brief on appeal the Romans raise an entirely new claim, contending the settlement agreement's mutual nondisparagement clause would impermissibly prevent them from providing information to government agencies about future acts of discrimination by JAH and/or BRE. (Compare *E.E.O.C. v. Cosmair, Inc*., *L'Oreal Hair Care Div.* (5th Cir. 1987) 821 F.2d 1085, 1090 ["an employer and an employee cannot agree to deny to the EEOC the information it needs to advance [the] public interest"] with *Cooper Tire & Rubber Co. v. Farese* (5th Cir. 2005) 423 F.3d 446, 456-457 [mere possibility that nondisparagement clause might be used to hide unlawful discrimination did not make it void as illegal or contrary to public policy].) We need not consider this argument because that provision is not in any way implicated by this case. Even if applying it in the manner suggested by the Romans would violate public policy, under California law it is properly severed from the other, enforceable terms of the settlement agreement. (Civ. Code, § 1599 ["[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest"]; see *Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 80 ["[i]t is only when 'the illegality taints the entire contract' that courts may declare 'the entire transaction is illegal and unenforceable'"]; *Keene v.*

Harling (1964) 61 Cal.2d 318, 320-321 ["It has long been the rule in this state that "'[w]hen the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the Courts will make the distinction'"'].)[19]

4. *The Trial Court Did Not Abuse Its Discretion in Denying Attorney Fees and Costs to BRE as the Prevailing Defendant*

The trial court found the Romans had gone to the Jefferson at Hollywood apartment complex on October 22, 2013 "looking for a reason to sue," a finding amply supported by the evidence before it. Although we certainly do not condone the Romans' motivation for attempting to re-rent unit 424 or filing this lawsuit, the trial court acted within its discretion in finding the Romans' action was not objectively without foundation either when brought or at the time the summary judgment motion was granted. (See *Williams v. Chino Valley Independent Fire Dist.*, *supra*, 61 Cal.4th at p. 115.)

The Romans presented evidence that, when they went to the leasing office, Smith initially told Roman unit 424 was

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[19] Although the Romans argue on appeal that the trial court abused its discretion when it declined to conduct an in camera inspection of the emails identified on BRE's privilege log, sustained BRE's objections to portions of the exhibits submitted by the Romans with their opposition to the motion for summary judgment and failed to deny summary judgment based on BRE's inadequate discovery responses, they do not contend those rulings in any way impact the proper interpretation of the September 19, 2013 settlement agreement. Accordingly, because we affirm the order granting summary judgment based on the settlement agreement (BRE's 12th affirmative defense), we need not address those issues.

available, gave him an application form to complete and said his Section 8 housing voucher would be accepted. Once the Romans' name was recognized by Reis, however, Reis directed Smith to tell them she could not accept an application because there was a wait list for affordable housing units. Given this sequence of events, coupled with evidence that BRE had indicated its "previous experience with the tenant on unrelated matters" was one of the reasons it was concerned about the Romans' continued tenancy at the Jefferson at Hollywood, the cause of action for retaliation was not patently contrived.

Similarly, while we conclude, as did the trial court, that BRE was JAH's successor within the meaning of the Romans' settlement agreement with JAH, the Romans' contrary argument, although shrouded in serious misstatements of law, was not entirely frivolous, given the absence of any express reference to a "subsequent owner of the property" within the extensive list of entities and individuals covered by the terms of the agreement and mutual releases.

Accordingly, the trial court acted within its discretion in denying BRE's motion for attorney fees and costs as the prevailing defendant in this FEHA action.

DISPOSITION

The judgment and postjudgment order are affirmed. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J. FEUER, J.