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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

8451 MELROSE PROPERTY, LLC, Plaintiff and Respondent, v. SINA AKHTARZAD, Defendant and Appellant.	B288963 (Los Angeles County Super. Ct. No. BC415957)

APPEAL from a judgment of the Superior Court of Los Angeles County. Monica Bachner, Judge. Affirmed.

Foley, Bezek, Behle & Curtis, Peter J. Bezek and Aaron Lee Arndt; Benedon & Serlin, Gerald M. Serlin and Kelly Riordan Horwitz for Defendant and Appellant.

Freedman & Taitelman, Michael A. Taitelman and September Rea; Greines, Martin, Stein & Richland, Robin Meadow and Meehan Rasch for Plaintiff and Respondent.

8451 Melrose Property, LLC (Melrose) sued Sina Akhtarzad for breach of a commercial lease. In defense, Akhtarzad argued the lease is unenforceable because it required he occupy an unlawful building and use it for an illegal purpose. His defense was premised on a theory that a portion of the building's second story was illegally constructed. Following a 10-day trial in front of a referee, the trial court entered judgment for Melrose and awarded it more than $10 million in damages. On appeal, Akhtarzad contends the court erroneously rejected his illegality defense and awarded Melrose excessive damages. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

"Following the usual rules on appeal after a trial on the merits, we construe the facts in the light most favorable to the judgment." (*Fulton v. Medical Bd. of California* (2010) 183 Cal.App.4th 1510, 1513.)

The lease at issue in this case concerns an approximately 10,000-square-foot building (the Building)[1] in the City of West Hollywood (the City), which was constructed several decades before the City was incorporated. The Building is divided into two sections. The front section is permitted to be used as retail space. The rear section, which is two stories and totals about 4,000 square feet, is permitted to be used as a warehouse (the Warehouse).

Jack Simantob and his siblings purchased the Building in 1991. At some point, they transferred ownership to Melrose, which Simantob manages. For a number of years, Simantob

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[1] For the sake of simplicity, we do not differentiate between the building and the property on which it sits. We refer to both as "the Building."

operated a rug store out of the Building; he used the front for retail sales and the back to store merchandise.

Simantob completed two major construction projects on the Building in the 1990s. The first project, which began in 1991, involved a complete remodel of the retail portion of the Building. The plans for the project did not include any changes to the Warehouse or to the square footage of the Building. Simantob obtained the necessary permits and received final approval from the City in 1993.

Simantob hired Charles Matthews to survey the Building in connection with the remodel project. Matthews believed the Warehouse had only one story and what Simantob considered to be a second story was actually something else, such as a mezzanine or attic. Simantob insisted the Warehouse had two stories, and Matthews agreed to mark the area on his survey as "warehouse" rather than "single-story warehouse." The plans Simantob submitted to the City identify the Warehouse, but they do not specify how many stories it has.

In 1994, Simantob began a second major project to repair damage to the Warehouse caused by the Northridge earthquake. One of the permits for the project listed the Warehouse as having two stories. The plans did not purport to add any square footage to the Building. The City inspected the Building prior to and during construction, and it approved the completed project.

About 10 years later, Simantob decided to lease the building after changing the focus of his rug business from retail to wholesaling. Simantob hired Jay Luchs to list the Building. Luchs is the most frequently used broker in the area.

Akhtarzad, who is one of Luchs's clients, approached Simantob about purchasing or leasing the Building. Akhtarzad is an experienced real estate businessman who improves properties and then leases or subleases them. He manages several properties in the City, including two directly adjacent to the Building, that are owned by his wife and other family members. Akhtarzad was interested in subdividing the Building and then subleasing it to multiple retailers.

Prior to signing a lease, Akhtarzad walked the Building six or seven times. He went into the Warehouse, which at the time was used for storage and had a mechanical hoist system designed to lift rugs to the second floor. At Akhtarzad's request, Simantob gave him plans for the 1991 and 1994 construction projects.

Akhtarzad and Melrose entered into a lease for the Building on March 5, 2008 (the Lease). They agreed to rent of $55,000 per month, with three percent annual increases, for a term of 11 years. The Lease provides that Akhtarzad "acknowledges that [Melrose] has entered into this Lease in reliance on [Akhtarzad's] undertaking to operate the [Building] continuously throughout the Term solely for the purpose expressly provided in this Lease as a selective, first-class retail development. . . . [Akhtarzad] shall devote the entire [Building] to such use, except for areas reasonably required for office or storage space uses limited to the business conducted by [Akhtarzad] in the [Building]."

Soon after signing the Lease, Akhtarzad reached an agreement with Vera Wang, which is a clothing retailer, to sublease 6,500 square feet of the Building, consisting of 4,000 square feet of retail space and 2,500 square feet of "back" space. Vera Wang intended to use the back space to store inventory and

supplies, and for offices and a sewing room. The sublease permitted Vera Wang to "warehouse, store and/or stock in the leased premises" goods and merchandise it intended to sell at the retail store.

In the Fall of 2008, Akhtarzad told Simantob he was having financial problems and was concerned he would not have enough funds to pay the rent. Akhtarzad said Vera Wang was not going through with the sublease, but he did not explain why. He did not mention any problems with the Building.

Akhtarzad later claimed he ended the sublease with Vera Wang because he was concerned about zoning issues with the Building. A Vera Wang representative, however, explained it decided not to go forward with the sublease due to a change in its business direction. Vera Wang ultimately opened a retail store on property adjacent to the Building, which Akhtarzad and his family owned and controlled.

Akhtarzad stopped paying rent in January 2009 and returned the key to the Building two months later. He told Simantob he would give him $25,000 to put the Building back together, but nothing further. He warned Simantob that if he filed a lawsuit, his attorneys would "crush" Simantob in court. When Simantob subsequently inspected the Building, he found it had been gutted, with the stairs, drywall, electrical wiring and sockets, railings, ductwork, and bathroom fixtures removed.

Shortly after retaking possession of the Building, Simantob created a website to market it, and he contacted Luchs to find a new tenant. The Building was offered at $50,000 per month, which Luchs informed Simantob was more than a fair price. Simantob nonetheless told Luchs not to let a potential tenant walk away because of price. To make the Building more

attractive to potential tenants, Simantob applied for and received conditional approval from the City to change the Warehouse's use to retail.

Luchs showed the Building to 20 potential tenants. Simantob accepted proposals from prospective tenants to rent the space for $25,000 and $30,000 per month, but the deals ultimately fell through for unknown reasons. In 2015, Simantob rented parking spaces to a neighboring property for $90,000. He was never able to find a new tenant for the Building.

Melrose eventually filed a complaint against Akhtarzad for breach of commercial lease. Akhtarzad responded by filing complaints against Melrose and Simantob for breach of lease, fraud and deceit, and rescission. Following a consolidated bench trial, the court entered judgment for Melrose and Simantob, and awarded over $8.1 million in damages. In a nonpublished opinion, we reversed the judgment because Akhtarzad was prevented from introducing parol evidence to prove fraud as an affirmative claim and as a defense to Melrose's breach of contract claim. (*8451 Melrose Property, LLC v. Akhtarzad* (July 30, 2013, B237052) [nonpub. opn.].) We based our opinion on a California Supreme Court decision, issued while the appeal was pending, that overruled long-standing precedent on the issue.

On remand, the parties stipulated to a second trial in front of a referee. Over the course of a 10-day trial, Akhtarzad sought to establish the Lease was illegal and therefore unenforceable. He argued Simantob built the second story to the Warehouse sometime after purchasing it in 1991, which caused the Building to exceed the maximum floor area permitted under the West Hollywood Municipal Code (WHMC). This, he argued, rendered the building unlawful and prevented him from occupying it.

Akhtarzad also argued the Lease illegally required he use the entire Building for retail, which violated the restriction that the back portion be used as a warehouse.

In support of his illegality defense, Akhtarzad presented testimony from Joan Perry, who said there was no second story to the Warehouse when she was last in it, which was sometime around 1985. Akhtarzad also presented testimony from his architect and engineer, who posited that Simantob illegally added the second story to the Warehouse sometime after 1991. Akhtarzad's engineer and one of his attorneys brought these concerns to the City's attention. The City investigated, but it did not take any official action because it could not reach a conclusion on the issue.

Melrose and Simantob introduced evidence at trial establishing the facts summarized above. In addition, Soheil Mehrabanian testified that he toured the Building shortly after Simantob bought it, but before the 1991 renovation project. Mehrabanian recalled the Warehouse having two stories, with the second story being used to store rugs and as office space.

After hearing all the evidence, the referee issued a statement of decision rejecting Akhtarzad's illegality defense and finding he breached the Lease by failing to pay rent. The referee concluded the Lease was for a lawful purpose, noting it was not illegal to use the Building as retail. Further, there was no evidence Akhtarzad was prevented from using the Building or obtaining necessary permits, and the City never deemed the Building illegal or took any other enforcement action. The referee further found the "mystery" of when the Warehouse's second story was built was "never satisfactorily solved."

The referee concluded Melrose's total damages were $10,555,837, consisting of $9,887,337 in unpaid rent and $668,500 to restore the Building. The referee also found Melrose made reasonable efforts to mitigate these damages. He awarded Melrose and Simantob attorney fees and costs.

The trial court adopted the referee's statement of decision and entered judgment in favor of Melrose and Simantob. Akhtarzad timely appealed.

DISCUSSION

I. The Lease is Not an Illegal Contract

Akhtarzad contends the judgment must be reversed because the Lease is an illegal contract and therefore unenforceable. We disagree.

A. Relevant Law

The general rule is that courts will not enforce illegal contracts. (*Tri-Q, Inc. v. Sta-Hi Corp.* (1965) 63 Cal.2d 199, 218; *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 435.) A contract is illegal if its object or consideration is "1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; or, 3. Otherwise contrary to good morals." (Civ. Code, § 1667; see Civ. Code, §§ 1596, 1607.) A contract that violates a local ordinance is illegal. (*Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1400.)

B. Akhtarzad Did Not Prove the Building is an Unlawful Structure

Akhtarzad first argues the Lease is an illegal contract because it required he occupy an unlawful structure. He contends the Building is an unlawful structure because it exceeds the permissible floor area ratio (FAR) allowed under the WHMC

Zoning Ordinance.[2] The Zoning Ordinance provides any structure "that is established, operated, . . . maintained, or allowed to exist or continue in a manner contrary to the provisions of this Zoning Ordinance" is "unlawful." (West. Hollywood Mun. Code, § 19.80.030, subd. (A).)

It is undisputed the Building does not comply with the Zoning Ordinance's FAR restriction. That fact, however, is not dispositive. The parties agree the Zoning Ordinance contains a "grandfather" provision, which generally exempts nonconforming structures from the FAR restriction if they were legally constructed before the restriction went into effect.[3] (See West Hollywood Mun. Code, §§ 19.72.010, subd. (A), 19.72.020, subd. (C), 19.72.030, subd. (A), 19.90.020, subds. (I), (N).) Therefore, to show the failure to comply with the FAR restriction rendered the Building an unlawful structure, Akhtarzad must also show it was not exempt under the grandfather provision.

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[2] The FAR restriction limits the total floor area of all structures on certain commercial sites to no more than the total area of the lot. (West Hollywood Mun. Code, §§ 19.10.040, 19.90.020, subd. (F).)

[3] A nonconforming structure is defined in the current version of the WHMC as "[a] structure that was legally constructed prior to the adoption of this [WHMC] Zoning Ordinance and which does not conform to current code provisions/standards (e.g., open space, distance between structures, etc.) prescribed for the zoning district in which the structure is located." (West Hollywood Mun. Code, § 19.90.020, subd. (N).) A prior version of the code contained a similar definition. (Former West Hollywood Mun. Code, § 9.706.)

Akhtarzad's theory throughout trial was the Building became illegal when a second story was added to the Warehouse in the 1990s—after the FAR restriction went into effect—that caused the building to exceed the permissible FAR. Akhtarzad, however, did not sufficiently prove that fact. The referee found, even after a 10-day trial, the "mystery" of when the second story was built was "never satisfactorily solved." The referee's finding on this issue is fatal to Akhtarzad's argument. Without knowing when the second story was built, we cannot determine when the Building first exceeded the FAR restriction. Consequently, we cannot rule out the possibility that it was grandfathered into the restriction as a pre-existing nonconforming structure.

Akhtarzad urges us to simply disregard the grandfathering issue because Melrose failed to raise it at trial. Melrose, however, was not required to do so. Illegality is an affirmative defense to a breach of contract claim, for which Akhtarzad had the burden of proof at trial. (*Sweeney v. KANS, Inc.* (1966) 247 Cal.App.2d 475, 480.) To meet that burden, he had to show the Building illegally violated the FAR restriction, which in turn required he show the Building was not exempt under the grandfather provision. Melrose had no burden to prove the Building was legal, and therefore had no obligation to raise the grandfathering issue at trial.

Akhtarzad alternatively urges us to disregard the grandfathering issue because it was not a basis for the referee's decision. Once again, that fact is irrelevant. On appeal, "we do not review the trial court's reasoning, and we will uphold the ruling if it is correct on any theory properly sustained by the record." (*Old Republic Ins. Co. v. FSR Brokerage, Inc.* (2000) 80 Cal.App.4th 666, 677.) Here, the record demonstrates Akhtarzad

failed to prove the Building falls outside the grandfather provision, which is sufficient to confirm the decision below.

Akhtarzad next insists the issue of when a FAR violation arose and when the second story was added are not identical. We agree. It is possible the Building unlawfully violates the FAR restriction, even if the second story was built before the restriction went into effect. Akhtarzad, however, does not suggest any reason for that to be the case, let alone point to evidence in the record that would compel such a finding. His position throughout trial was the addition of the second story to the Warehouse in the 1990s caused the Building's square footage to exceed the FAR restriction; he has never meaningfully advanced any alternative theories under which the Building would violate the FAR restriction.

Akhtarzad also seems to contend there is not substantial evidence supporting the referee's finding that he failed to prove the date the second story was built. Where, as here, "the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) The question instead is "whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.]" (*Ibid.*; accord *Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838.)

Akhtarzad suggests the undisputed evidence shows the second story was added sometime after 1991. Not so. Simantob testified the second story existed when he purchased the Building in 1991, and he provided a plausible reason why the 1991 survey did not reflect that fact. Soheil Mehrabanian similarly testified he saw the second story shortly after Simantob purchased the Building and before it was renovated. This testimony contradicts Akhtarzad's evidence indicating the second story was built sometime after 1991. Akhtarzad's evidence, therefore, does not compel a finding in his favor as a matter of law.

Contrary to Akhtarzad's claims, the 1991 construction project plans do not provide definitive proof that the Building first exceeded the FAR restriction sometime in the 1990s. Although the plans seem to indicate the Building's square footage complied with the FAR restriction as of the early 1990s, Simantob provided a plausible explanation for that. According to Simantob, the Warehouse contained a second story at that time, but his surveyor did not mark it on the plans due to a disagreement about how to categorize it. It is reasonable to infer that, had the second story been included in the plans, they would have indicated the Building exceeded the FAR restriction. The plans, therefore, do not conclusively establish when the Building first exceeded the FAR restriction.

Finally, Akhtarzad contends we may not consider the grandfathering issue because it requires us to make implied findings, which we are not permitted to do. Under the doctrine of implied findings, the appellate court generally may infer the lower court made all factual findings necessary to support the judgment. (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58.) The appellate court may not, however, make

implied findings related to ambiguities and omissions in the statement of decision that were brought to the lower court's attention, but the court did not correct. (*Ibid.*; see Code Civ. Proc., § 634.)

Here, Akhtarzad objected to the referee's tentative statement of decision on the basis that the referee did not make explicit findings regarding: (1) the square footage of the Building as of the date of the Lease; (2) the applicable FAR restriction; and (3) whether the Building violated the applicable FAR restriction. Akhtarzad insists that, because the referee did not address these objections, we cannot imply findings on those issues.

We need not resort to implied findings, however, because the referee's express findings are determinative. As discussed above, the referee's finding that Akhtarzad failed to prove when the second story was built precludes him from demonstrating the Building falls outside the grandfather provision. This holds true regardless of the precise square footage of the Building, the applicable FAR restriction, and whether the square footage exceeds that restriction. Therefore, we need not make implied findings on those issues in order to affirm the judgment.

C. The Lease Did Not Require Akhtarzad Use the Building Unlawfully

Akhtarzad next claims the Lease is illegal because it required he use the entire Building, including the Warehouse, exclusively as retail. In support, he points to language in the Lease stating Melrose "entered into this Lease in reliance on [Akhtarzad's] undertaking to operate the [Building] continuously through the Term solely for the purpose expressly provided in this Lease as a selective, first-class retail development. . . . [Akhtarzad] shall devote the entire [Building] to such use, except

for areas reasonably required for office or storage space uses limited to the business conducted by [Akhtarzad] on the premises." Akhtarzad insists this language required he use the Warehouse "as a selective, first-class retail development," which would have violated the requirement that such space be used as a warehouse. We disagree.

Our task in interpreting a contract is to give effect to the mutual intention of the parties as it existed at the time of contracting. (Civ. Code, § 1636.) We infer such intent, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) We interpret these provisions in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage." (*Id.*, § 1644.) Our goal is to interpret the contract in such a way as to give effect to all its provisions. (*Id.*, § 1641.) "[I]nterpretation of a contract is a question of law we review de novo when, as here, the parties offer no extrinsic evidence on the contract's meaning." (*Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1200.)

Here, Akhtarzad's interpretation of the Lease is flawed in that it simply ignores the language permitting him to use a portion of the Building as "storage space . . . limited to the business conducted by [Akhtarzad] on the premises." Such a use falls within the WHMC's current and historical definitions of warehousing. The current version of the WHMC defines "warehousing" as "[f]acilities for the storage of furniture, household goods, or other commercial goods of any nature." (West Hollywood Mun. Code, § 19.90.020.) A prior version of the code defined it as "the storage of materials in a warehouse . . . ." (Former West Hollywood Mun. Code, § 9707.) By their plain terms, both definitions encompass the storage of commercial

goods in connection with an attached retail business, which the Lease expressly permitted. The Lease, in other words, allowed Akhtarzad to use the Warehouse as a warehouse. It did not require an unlawful use.

There is no merit to Akhtarzad's passing contention that our interpretation is inconsistent with the WHMC's definition of "Storage, indoor" as "storage of various materials entirely within a structure, as the primary use of the structure. The storage of materials accessory and incidental to a primary use is not considered a land use separate from the primary use." (West Hollywood Mun. Code, § 19.90.020, subd. (S).) According to Akhtarzad, this provision means the storage of retail goods in the Warehouse would not "transform the [Building's] retail usage to any other kind of usage." Even assuming that were true, it is irrelevant because there was no need to transform the Building's retail usage to another kind of usage. Rather, there was only a need to use the Warehouse as a warehouse, which the Lease expressly permitted him to do.

II. Akhtarzad is Not Entitled to Rescission of the Lease Based on a Unilateral Mistake of Fact

Akhtarzad argues that, even if the Lease is legal, it should be rescinded on the grounds that he mistakenly believed the entire Building could be used for retail. We disagree.

Rescission is warranted for a defendant's unilateral mistake of fact where (1) the defendant made a mistake regarding a basic assumption upon which the defendant made the contract; (2) the mistake has a material effect upon the agreed exchange of performances that is adverse to the defendant; (3) the defendant does not bear the risk of the mistake; and (4) the effect of the mistake is such that

enforcement of the contract would be unconscionable. (*Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 282.) Because Akhtarzad had the burden to prove rescission was warranted, we will reverse the judgment only if he shows his evidence was uncontradicted and unimpeached, and of such a character and weight as to leave no room for a judicial determination that it was insufficient to support each of these elements. (*Dreyer's Grand Ice Cream, Inc. v. County of Kern, supra*, 218 Cal.App.4th at p. 838.) He has not done so.[4]

In his opening brief on appeal, Akhtarzad contends the undisputed evidence establishes that, before signing the Lease, he mistakenly believed the entire Building could be used for retail. He fails, however, to even acknowledge the other elements required for rescission, let alone explain how his evidence compelled a finding in his favor on each. This is reason enough to reject his argument. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [a judgment of a lower court is presumed correct and the appellant must affirmatively demonstrate reversible error].)

Regardless, Akhtarzad has not even shown the evidence compels a finding that he made a mistake of fact. In support of this assertion, Akhtarzad claims the evidence shows the Lease required the entire Building be used exclusively for retail, he saw Simantob using the Building for a retail business, and the rent

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[4] The referee did not explicitly address Akhtarzad's unilateral mistake claim in the statement of decision. Because Akhtarzad did not bring that fact to the referee's attention, under the doctrine of implied findings, we may presume the referee determined he failed to meet his burden on the issue.

was consistent with the Building being used for retail, but not for warehousing.

None of this compels a finding that Akhtarzad was mistaken about the permissible uses of the Building. As discussed in detail above, the Lease expressly permitted him to use a portion of the Building as a warehouse. Moreover, the fact that the rent was consistent with retail use is largely irrelevant given the complete lack of evidence showing the rent was inconsistent with a partial-warehouse use. Akhtarzad tried to introduce expert testimony to prove the latter point, but the referee sustained objections to it.

Akhtarzad also overlooks the substantial evidence showing he was aware of the Warehouse's permitted use before he signed the Lease. Simantob testified that Akhtarzad toured the Building, including the Warehouse, on multiple occasions prior to signing the lease. During that time, the Warehouse was being used to store merchandise and contained a machine consistent with that use. Akhtarzad also requested and received plans that clearly identified the back portion of the Building as a warehouse. Then, shortly after signing the Lease, he entered into a sublease with Vera Wang that expressly permitted it to "warehouse" goods and merchandise in the Building. Considered with the fact that Akhtarzad was an experienced and highly sophisticated landlord and developer in the City, the referee could have reasonably concluded he understood the nature of the Warehouse prior to signing the Lease. Akhtarzad, therefore, has not shown he is entitled, as a matter of law, to rescission based on unilateral mistake.

III. The Damages Award Is Not Excessive

Akhtarzad contends the award of damages is excessive because the evidence compels a conclusion that Melrose failed to make a reasonable and good faith effort to mitigate its damages. We disagree.

In an action for breach of lease, the injured party may not recover damages it could have reasonably avoided. (Civ. Code, § 1951.2, subd. (a); *Lu v. Grewal* (2005) 130 Cal.App.4th 841, 849.) " 'The standard by which the reasonableness of the injured party's efforts is to be measured is not as high as the standard required in other areas of law. [Citations.] It is sufficient if he acts reasonably and with due diligence, in good faith. [Citations.]' " (*Sebastian International, Inc. v. Peck* (1987) 195 Cal.App.3d 803, 810; see *Lu v. Grewal, supra*, 130 Cal.App.4th at p. 850.) " 'The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable.' " (*Sebastian International, Inc. v. Peck, supra*, 195 Cal.App.3d at p. 810.) The lessee has the burden to prove the lessor failed to adequately mitigate its damages. (*Ibid.*; *Polster, Inc. v. Swing* (1985) 164 Cal.App.3d 427, 433.)

Akhtarzad advances three arguments for why Melrose did not reasonably mitigate its damages, none of which has merit. First, he contends Melrose's failure to comply with the WHMC's FAR restriction precluded any potential tenant from lawfully occupying the Building. As discussed above, however, Akhtarzad has not shown the Building unlawfully violates the FAR restriction.

Akhtarzad next argues the list price of $50,000 per month was unreasonable because it did not account for the poor condition in which he left the Building, the poor economy, and the fact that a large portion of the Building is a warehouse. Once again, we are not persuaded. The evidence shows Jay Luchs—who is the most prominent broker in the area and has listed several of Akhtarzad's properties—told Simantob the price is fair. Consistent with that assessment, Luchs showed the Building to 20 potential tenants and received multiple offers. The referee certainly could have concluded Melrose acted reasonably and in good faith in relying on Luchs's opinion about the value of the Building.

Even if the $50,000 per month list price was above market value, it does not compel a conclusion that Melrose failed to take reasonable steps to mitigate its damages. Simantob testified that he instructed Luchs not to let a potential tenant walk because of price. He also accepted offers to rent the Building for significantly below the list price. Although it is not clear why those deals fell through, we can say with confidence it was not because of the list price.

Akhtarzad next argues Melrose's failure to finalize the permit to change the Warehouse's use to retail is the reason it was unable to find a new tenant. The record, however, does not compel such a conclusion. In fact, there is evidence suggesting just the opposite. According to Simantob, finalizing the change of use would require substantial alterations to the Building, for which the next tenant could provide input and exercise some control. By waiting to finalize the change of use, therefore, Melrose preserved flexibility in the design of the Building, which potentially made it more attractive to prospective tenants.

The record is also full of evidence explaining why the Building remained vacant, despite Melrose's efforts to find a new tenant. Luchs explained the rental market was down significantly when he relisted the Building, and it did not recover until 2012. In addition, the Building is not in a prime location, Akhtarzad left it in poor condition, and its relatively large size limits the pool of potential tenants. That Melrose's efforts are not to blame is further supported by evidence that several retail spaces in the immediate vicinity—including two owned and controlled by Akhtarzad and his family—also had significant difficulty finding tenants during the same time period, with many remaining vacant. On this record, the referee did not err in finding Melrose made sufficient efforts to mitigate its damages.

V. The Award of Attorney Fees and Costs is Proper

Akhtarzad contends that if we reverse the judgment, we must also reverse the award of attorney fees and costs to Melrose and Simantob. Because we reject Akhtarzad's arguments to reverse the judgment, we also reject his request to reverse the award of attorney fees and costs.

DISPOSITION

The judgment is affirmed. Melrose is awarded costs on appeal.

BIGELOW, P. J.

WE CONCUR:

GRIMES, J.

WILEY, J.