New York Supreme Court

Appellate Division—Second Department

JUVENAL REIS,

Docket No.: 2017-10961

Plaintiff-Respondent,

– against –

J.B. KAUFMAN REALTY CO., LLC and 43-01 22ND STREET OWNER LLC,

Defendants-Appellants.

AFFIRMATION IN OPPOSITION TO MOTION FOR REARGUMENT/LEAVE TO APPEAL

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

JUVENAL REIS, Plaintiff-Respondent, -against- J.B. KAUFMAN REALTY CO., LLC and 43-01 22nd STREET OWNER LLC, Defendants-Appellants.	Queens Co. Index No. 707612/15 App. Div. Docket No. 2017-10961 **AFFIRMATION IN OPPOSITION TO PLAINTIFF-RESPONDENT'S MOTION FOR REARGUMENT/LEAVE TO APPEAL**

Richard Claman, an attorney admitted to practice before the Courts of this State, under the penalties of perjury, affirms:

1. I am a principal of Stempel Bennett Claman & Hochberg, P.C., attorneys for J. B. Kaufman Realty Co., LLC ("Prior Owner") and 43-01 22nd Street Owner LLC ("Current Owner") (collectively, "Defendants" or "Landlord"), as prior and current owner of the commercial building known as 43-01 22nd Street, Long Island City, New York (the "Building"); and I am familiar with the matters relevant here, having, inter alia, argued Defendants' appeal before this Court on October 7, 2019, leading to the Decision and Order of this Court dated March 11, 2020 (the "Decision," 181 A.D.3d 740).

2. This affirmation is respectfully submitted in opposition to the motion by Mr. Juvenal Reis, d/b/a Reis Studios, as a tenant in the Building ("Reis" or "Tenant"), for

reargument of the Decision, and/or leave to appeal to the Court of Appeals.

3. As reviewed herein, and as had been set forth in our initial and reply appellate briefs to this Court ("Init.Br." and "ReplyBr.," respectively), this case concerns a straightforward application of the "Martin Delicatessen" decision[1] to the 'lease extension' language at issue here, on its face; and this Court properly rejected Tenant's multiple efforts to distract attention from the central 'hole' in Tenant's claim to hold an ongoing lease extension through 2030 -- viz., the absence of a definite agreement between the parties as to the rent amount to be paid during the alleged extension period of March 1, 2016 through February 28, 2030.

4. The moving affirmation of Thomas Lambert, Esq., for Tenant now asserts that this Court, in issuing the Decision, supposedly missed four points -- which, according to Lambert Affirm. ¶ 4, stand as "critical differences between this case and the *Martin* case."

5. As will be reviewed herein, however, each of the Lambert Affirm.'s four points (a) was already addressed in the parties' briefs to this Court (except insofar as Tenant now

[1] Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105 (1981), reversing 70 A.D.2d 1 (2d Dep't 1979), which had reversed 1978 WL 403147 (Sup. Ct. Suffolk Co.).

suggests new variations relative to his actual prior arguments -- variations that, however, we had already anticipated and refuted in our briefs); and (b) Tenant does not even attempt to point to any statement in the Decision as somehow indicative of any 'misapprehension' by this Court, as required for reargument.

6. And, leaving aside how the 'questions proposed' in the Lambert Affirm. do not fairly present the 'Record' and/or the issues previously raised by Tenant (see infra), the Lambert Affirm. fails to point to any 'conflicts' amongst the Appellate Divisions, or with Court of Appeals precedent, concerning any applicable general or novel principle of law, nor to any other consideration warranting review by the Court of Appeals. Other than Martin Delicatessen, the only case cited in the Lambert Affirm. is the "In re 166 Mamaroneck" case[2]; and while the Lambert Affirm. pretends (e.g., ¶ 9) that this Court must have failed to consider In re 166 Mamaroneck, in actuality the Decision herein specifically cites to that case!

7. Accordingly, it is respectfully submitted that Tenant's motion should in all respects be denied.

[2] In re 166 Mamaroneck Ave. Corp. v. 151 East Post Road Corp., 78 N.Y.2d 8 (1991).

THE FACTS

8. To put Tenant's present arguments into perspective, we review briefly (a) the key uncontroverted facts of this matter, as shown in the 'Record,' and (b) the prior proceedings herein. (References herein to "R.__" are to the Record on Appeal.)

9. Prior Owner is a family business, whose principal, at the times relevant here, was Roger Kaufman (see, e.g., R.839-843). [In an attempt to avoid any question from Tenant in this regard, we had included the full transcript of Tenant's deposition of Mr. Kaufman in our summary judgment motion, and hence in the Record (R. 834-953) -- but as we repeatedly have explained (see infra), neither Mr. Kaufman's subjective intent, nor Mr. Reis's, is relevant here.][3]

10. The subject building, located on 22nd Street, between 43rd and 44th Avenues, in Long Island City, is a six-story commercial building, offering approximately 222,000 sq. ft. of commercial space, first constructed in 1925, and subsequently renovated by Current Owner -- a privately-owned real estate

[3] The Lambert Affirm. (¶ 6, in fn. 5; ¶ 17) again repeatedly notes that the Record does not also include any affidavit from Mr. Kaufman. The reason is simple: as further reviewed (again) herein, this case simply does not turn on the subjective view of either Mr. Reis or of Mr. Kaufman, but rather on the dispositive documentary facts here concerning, in particular, the absence, from the 'extension' clause of the 'June 2012 Letter Agreement,' of any definite rent amount; see infra.

company that acquired the Building in 2016 (see R.12, ¶ 1). As will be noted infra, as of the last of the letter agreements made between the parties expanding Reis's space, i.e., the 'June 2012 Letter Agreement' (see infra), Reis leased approximately 43% of the Building, for his studio-subletting business.

11. As explained in his own deposition testimony, Juvenal Reis -- who holds, inter alia, a Master's degree in hotel management from Florida International University, as well as marketing/management degrees earned in Brazil and Switzerland, and a Masters of Fine Arts from Southern Methodist University, (R.90-92) -- conceived the idea of renting space in the Building, and then sub-letting portions thereof for use as artist studio space, to (over the years) hundreds of different subtenants (R.99, 337). [Reis finally produced various of those subleases after prolonged resistance on his part; see Init.Br.35. The reason for Reis's reluctance was immediately apparent: as noted infra, those subleases confirm that Reis plainly knew how to draft lease clauses that refer to 'formula' concepts such as "fair market value" (R.966-967, ¶ 3), and "current market price" (R.971, ¶ 22); but no such formulas were included in the critical 'extension' sentence here; see infra and Init.Br. 5 fn. 9.]

12. In 2002, Prior Owner and Reis entered into their first lease agreement -- starting with the so-called "REBNY" form

lease, plus 'riders' and other modifications (R.57-69).

13. During the period 2002-2007, Prior Owner and Reis then entered into a sequence of short expansion/extension letter agreements (R.70-79). At that point, Reis was renting eight different spaces, located in various portions of the 2nd, 3rd, 4th, 5th and 6th Floors, totaling around 39% of the Building's rentable area.

These different expansion/extension agreements provided that Reis's term of possession for all of the demised premises would end on a single end-date -- February 28, 2015. (See, e.g., R.75, R.80).

14. The focus of this litigation is the so-called 'June 2012 Letter Agreement' (R.80-81), and the prior (signed) 'draft' thereof, made earlier that same date (R.78-79).

15. That first 'draft' (R.78-79) added (relative to the previous 2007 letter agreement; R.77) a ninth space, likewise for a term of possession to expire on February 28, 2015.

16. And then, on that same day in June 2012 -- according to, inter alia, Reis's own affidavit in opposition to Defendants' summary judgment motion (R.985, ¶ 22) -- Reis asked Roger Kaufman to also add to that 'draft' another sentence, on the subject of an 'extension'; and after Kaufman did so, that agreement was also executed.

17. That 'extension' sentence (the "T-B-D Sentence") states[4]:

> Lease terms to be extended to now terminate on February 28, 2030; *terms to be determined* at the expiration of this initial lease consolidation period [i.e., which 'period' would expire as of February 28, 2015].

18. [As we already noted (e.g., Init.Br. 17-18 fn. 20; 39-40 fn. 45; and 49 fn. 56), any question as to the thinking of either Mr. Reis or Mr. Kaufman in including this T-B-D Sentence is irrelevant here, per Martin Delicatessen. Likewise, Defendants' 'motive' for insisting that the T-B-D Sentence is unenforceably indefinite is also irrelevant; see ReplyBr. 25-26.]

19. In his papers herein, Reis argued that this T-B-D Sentence, as thus added in June 2012, should be deemed to incorporate-by-reference a 'range' statement that had already been included as part of a separate (-- but otherwise irrelevant)[5] 'option' provision already included in the parties' agreements, first appearing in 2006 (R.75; see also R.76 and R.77). That provision gave Tenant an option to renew "at expiration" of the agreed-upon lease term, to be exercised by

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[4] All emphasis in material quoted herein is added, unless otherwise noted.

[5] See, e.g., Tenant's opposition appellate brief to this Court ("Opp.Br.") at 32: "The case at bar does not concern an 'option.'"

"written notification" to be given one year in advance, with

> Terms and length to be determined at that time. Any percentage increase will not be less than 5% annually and not to exceed a maximum cap of 8% annually.

(We have referred to this last sentence as the "Range Provision").

20. We had argued (see, e.g., Init.Br. 2-3, fn. 4; and 18-19) that, as a preliminary matter, this Range Provision should not be read-into the T-B-D Sentence. In the Decision, however, this Court -- perhaps to make the point that Reis's ultimate argument failed even if the Range Provision were to be deemed incorporated into the T-B-D Sentence -- accordingly treated the Range Provision as so incorporated. (If this dispute were to proceed any further, we would, however, respectfully reserve our argument, as an 'alternative' basis for upholding the Decision, that the Range Provision should not be 'incorporated' into the T-B-D Sentence.)

21. There is no dispute but that Tenant never exercised its separate 'option' right (-- cf. Tenant's Opp.Br. 32). Rather, Reis's claim herein is only that the T-B-D Sentence itself, as set forth in the June 2012 Letter Agreement (and incorporating the Range Provision), established a binding agreement for an extension term that would not expire until the end of February 2030.

22. There is also no dispute but that the June 2012 Letter Agreement was performed by both parties, from June 2012 through February 2015: Reis did occupy the additional space added in that June 2012 Letter Agreement; and Prior Owner did perform the referenced work to build-out that space for Reis. (See ReplyBr. 26-27.)

23. In late 2014, a dispute arose between Reis and Kaufman, as shown in the emails exchanged between them in the period November 2014 through February 2015 (R.54-56, quoted at Init.Br. 25-26, fns. 31 and 32). In short: (a) on November 15, 2014, Reis sent an email asserting that he and Kaufman had orally reached an agreement on the rent "for the coming years"; (b) by responsive email (two days later, on November 17, 2014), however, Kaufman denied any such long-term agreement, and stated that his only rent agreement was "based on a single one year renewal," "to expire February 29, 2016"; and (c) on February 20, 2015, Reis emailed to confirm that, while there was agreement that (R.54)

> the fixed rent for year of March 1st 2015 to February 29th 2016 will increase by 6%, *we were unable to agree on the rent for the following years. I am hopeful we can work this out.*

(In his deposition, and in his affidavit in opposition to Landlord's summary judgment motion, Reis authenticated these

emails, and confirmed that they indeed showed an extension agreement for only one year; see R.350-351; see also his 'opp.aff.,' R.992-993, ¶ 11. See also, e.g., ReplyBr. at 22-23.)

Characteristically (see infra), the Lambert Affirm. fails to even mention Reis's above-quoted February 20, 2015 admission.

24. Following this 'email' one-year-only agreement, in March 2015, Prior Owner sent a rent bill to Reis for this new year (R.1044). [Lambert Affirm. ¶ 15 asserts that Landlord thereby "set the annual increase for the [sic] extended term." Since the Lambert Affirm. omits any mention of Reis's February 20, 2015 email, or of the one-year-only extension agreed-to therein, Lambert Affirm. ¶ 15 thus seeks to create the impression that Landlord's March 2015 billing was setting the rate for not just one year, but for 15 years. That contention is simply refuted, however, by the Reis February 20 email; yet Lambert Affirm. just keeps on misstating the Record in this regard, see also Init.Br. 24-30, 52-54; ReplyBr. 21-24.] The March 2015 rent bill underbilled Reis, relative to the 6% increase agreed-upon in the November 2014 – February 2015 emails, by approx. $434, or 00.59%. Reis did not complain at the time of this underbilling -- and indeed did not even refer to it in his verified Complaint (compare ¶ 30, R.37). As we showed below, this slight underbilling by Kaufman, relative to the one-year-only extension agreement reached in the November –

February 2015 emails, simply cannot be deemed to constitute a binding agreement as to the rent to be paid for the ensuing 14 years (i.e., from March 1, 2016 through February 28, 2030), in the face of, inter alia, the statute of frauds as applicable to any lease agreement for a term of more than one year. (Init.Br. 29-30; 50 fn. 47; 52-55).

25. In July 2015, Reis filed a complaint (R.29-41), seeking a declaration that he held a valid and binding lease extension running through February 28, 2030. Reis's key allegation was that Landlord's billing in March 2015 must be deemed to show an agreement by Landlord that the rent would increase for each and every year through February 2030 at a rate of 5.4%. In so alleging, Reis simply pretended, however, that the November 2014 – February 2015 emails did not exist; and he likewise pretended that there had not been a simple one-year-only extension agreement, underlying the March 2015 billing. Prior Owner, in making a pre-answer motion to dismiss, sought to inform the Motion Court of Reis's key 'omission': but under this Court's rules, emails are not 'admissible' as documentary evidence on a CPLR 3211(a)(1) motion.[6] Obviously, however, for purposes of a summary judgment motion, following discovery, Reis's own February 20, 2015 email, confirming that an agreement

[6] And of course denial of a motion to dismiss is not, contrary to Reis's contention, 'law of the case' on a subsequent summary judgment motion; see ReplyBr. 23-24 fn. 25.

had been reached for one-year-only -- but admitting that "we were unable to agree on the rent for the following years" (R.54) -- is decisive against Reis in this regard.

26. Defendants' eventual summary judgment motion rested on a very simple point: looking at the face of the June 2012 Letter Agreement, there clearly was no definite agreement on the essential element of the rent to be paid during the 'extension' period March 2015 – February 2030; and (b) the one-year-only agreement reached in the 2014-2015 emails did not constitute an agreement for the ensuing 14 years. Hence, under Martin Delicatessen, Reis's claim to hold an enforceable lease extension through February 2030 was without basis; and his lease thus expired on February 29, 2016.

27. Reis, in opposition to Landlord's summary judgment motion, advanced multiple arguments -- each of which we carefully refuted (as shown in the Init.Br. and Reply Br.). In particular, and as relevant here (-- for the Lambert Affirm. now makes no reference to several of Tenant's other previous theories[7]): Reis argued that (a) he believed that the phrase "to

[7] There is, to be sure, an oblique reference to one such other theory, in Lambert Affirm. ¶ 14 fn. 8 -- namely, that in a certain without-prejudice 'interim payment' stipulation made in March 2016 (R.1060-1061), Landlord 'really' conceded the entire case here. See however Init.Br. 31-34, 55-56; and Reply Br. 18-21, utterly refuting Tenant's misreading of that stipulation.

be determined," in the T-B-D Sentence, meant 'to be determined unilaterally by Landlord' -- so that a 'methodology' did exist for picking a specific number within the 5%-8% Range Provision (e.g., ReplyBr. 2 fn. 6, citing to Tenant's Opp.Br.); and (b) Landlord must thereupon be deemed to have 'picked' its number, for all 15 renewal-period years, when Landlord issued its March 2015 invoice, showing (due to the slight underbilling) a 5.4% increase (e.g., Tenant's Opp.Br. at 26-27, reviewed in ReplyBr. 21-22; see also the variant at Opp.Br. 3, 37, refuted at ReplyBr. 24-25).

28. In reply to these two points, we showed that (a) Reis's alleged subjective intent was in any event irrelevant, for Martin Delicatessen establishes an objective test (see, e.g., Init.Br. 39-40, fn. 45); and the parties clearly knew how to say that a particular determination would be made unilaterally by Landlord, if that were their agreement -- for the Lease so provided in a different context, but plainly, objectively, did not so provide here;[8] and (b) the 5.4% increase reflected in the March 2015 billing plainly related only to the parties' one-year-only extension agreement as reached in the November 2014 – February 2015 email exchange, and could not, as a matter of law, in the face of the statute of

[8] We pointed (Init.Br. 6 fn. 11) to Lease ¶ 47 (R.63), where Tenant was obligated to provide extermination services "to the satisfaction of Landlord."

frauds, constitute a sufficient memorialization of a binding 'agreement' for an additional 14 subsequent years (Init.Br.52-55; ReplyBr. 21-25).

29. Notwithstanding our showing, the Motion Court denied our summary judgment motion. For its primary basis, the Motion Court stated that, in his view, the question whether the phrase "to be determined" could be read, in accordance with Reis's supposed subjective intent, to mean 'to be determined unilaterally by landlord,' constituted an "issue of fact" (R.8-9). As we demonstrated on appeal, however (see, e.g., Init.Br. 3-5; see also ReplyBr. 2-4), this was a plain error by the Motion Court, for (a) the issue of whether an extension clause is or is not sufficiently definite is an 'issue of law' under Martin Delicatessen; and (b) the subjective intent of one party is simply not a basis for the Court to write-in additional words (see, e.g., Init.Br. 46-50).

30. The Motion Court also speculated that the 5.4% March 2015 underbilling might represent some yet additional and separate agreement, somehow "supersed[ing]" (R.8) the one-year-only email agreement reached in November 2014 – February 2015 -- so that, according to the Motion Court, there was an "issue of fact" in this regard as well. But such speculation, of course, made no sense, since the material terms of any such supposed "supersed[ing]" agreement would need to have been duly

memorialized in a writing that stated its material terms, in order to comply with the statute of frauds -- but obviously, neither the Motion Court nor Reis could point to any document corresponding to the Motion Court's speculation concerning such a "supersed[ing]" agreement (see Init.Br. 10-12, 52-55; ReplyBr. 24-25).

31. In sum, we showed, in our appellate briefs, that (a) there was a fundamental 'hole' in Reis's claim of a binding lease extension through February 2030, in that the 'extension clause' of the June 2012 Letter Agreement, i.e., the T-B-D Sentence, was on its face, as an objective matter, indefinite under Martin Delicatessen; and (b) all of Tenant's various efforts (and those of the Motion Court) to try to cover-over that fundamental flaw were ultimately insufficient, as a matter of law, in the face of the documentary record.

32. And this Court, after an extensive and searching oral argument (on October 7, 2019), held for Defendants, recognizing the fundamental point that the T-B-D Sentence in the June 2012 Letter Agreement did not constitute a sufficiently definite extension agreement so as to 'support' a 14-year extension.

I. REARGUMENT SHOULD BE DENIED

A. The Standard

33. A motion for leave to reargue is required to "be based upon matters of fact or law allegedly overlooked or

misapprehended by the court" in reaching its prior determination. CPLR 2221(d); see also, e.g., Foley v. Roche, 68 A.D.2d 558, 567 (1st Dep't 1979); and Williams v. Abiomed, Inc., 173 A.D.3d 1115 (2d Dep't 2019); ad see generally Davies, Stecich and Gold, New York Civil Appellate Practice § 5:5. It is Reis's burden, as movant, to affirmatively establish that this Court overlooked some point of fact or law. A motion for reargument "is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." Foley, 68 A.D.2d at 567.

34. Also, reargument is not available insofar as the movant is seeking "to argue 'a new theory of law not previously advanced,'" DeSoignies v. Cornasesk House Tenants' Corp., 21 A.D.3d 715, 718 (1st Dep't 2005) (citation omitted); see also Sheldrake River Realty LLC v. Village of Mamaroneck, 106 A.D.3d 1075 (2d Dep't 2013).

35. Finally, 4 N.Y.Jur.2d Appellate Review § 398 explains that: "It cannot be assumed that any particular point has been overlooked because it was not discussed in the opinion"; see likewise, e.g., William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, 27-28 (1st Dep't 1992); see already Burke v. Continental Ins. Co., 184 N.Y. 570 (1906) (denying reargument).

B. Tenant's New "Hybrid" Argument Is Insufficient

36. Tenant's first contention, in Lambert Affirm. ¶¶ 5-7, is that, according to Tenant, the parties' agreement upon (in Tenant's words) a "fixed range" -- i.e., here, as paraphrased in the Decision, the agreement that the rent increase each year would be "not less than five percent and will not exceed eight percent" (see supra ¶ 19, quoting the Range Provision) -- must be deemed sufficiently definite to satisfy Martin Delicatessen, under (what Tenant now itself calls as) a new "hybrid" theory (Lambert Affirm. ¶ 8).

37. To review: in our Init.Br. (at 40-42), we cited to the consistent case-law, going back to 1940, for the point that (as stated by the First Department in 1945) a contract's statement of "a range within minimum and maximum figures ... does not meet the test of definiteness."[9]

38. Tenant's Opp.Br., moreover, essentially conceded this point (-- i.e., the point that the setting forth, in a contract, of a price range, by itself, is not sufficient under Martin Delicatessen): for Tenant itself had noted that there also needed to be "an objective method for setting rent within a limited range." (Opp.Br. 26; see also our further discussion in ReplyBr. 13-15).

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[9] Belasco Theatre Corp. v. Jelin Productions, 270 A.D. 202, 205 (1st Dep't 1945).

39. Even now, Lambert Affirm. ¶ 8 admits that the June 2012 Letter Agreement did not provide for either of the two methods recognized in the In re 166 Mamaroneck case as providing the requisite definiteness. Under In re 166 Mamaroneck, there needs to be either (a) the specification in the writing of an objective procedure, such as arbitration, or (b) there needs to be the specification in the writing of an "extrinsic ... formula," e.g., 'fair market value.'

40. But the June 2012 Letter Agreement does not provide for either of these methods -- notwithstanding that, as noted above (¶ 11), Reis himself employed the standards of "fair market value" and "current market price" in his subleases (R.966-967, ¶ 3; R.971, ¶ 22; see Init.Br. at 5 fn. 9.) See already Init.Br. 38 fn. 44, explaining that, accordingly, In re 166 Mamaroneck did not help Tenant here.

41. Lambert Affirm. ¶ 8 now admits that Tenant indeed cannot rely on either 'prong' of In re 166 Mamaroneck. And so Tenant is, instead, now arguing for (what Lambert now calls) a "hybrid" theory; and Lambert Affirm. ¶ 10 effectively concedes that such a "hybrid" theory would indeed constitute (in his words) an "expansion" of the existing law.

42. Leaving aside that Tenant's present "hybrid" theory is a new variation on Tenant's previous efforts to avoid Martin Delicatessen (and as such does not support re-argument, see

¶ 34, supra): Lambert Affirm. ¶ 8 still does not, however, explain how a Court, looking at the "range" here (i.e., between 5% and 8%), is supposed to pick a specific number 'in between.' And Tenant does not dispute that the fundamental point of the Court of Appeals decision in Martin Delicatessen (-- reversing the Appellate Division there) is that the Court will not make an agreement for the parties when the parties themselves could have made, but failed to make, a definite agreement for themselves. Moreover, In re 166 Mamaroneck simply did not somehow modify this essential core teaching of Martin Delicatessen. While Reis indeed previously tried to so argue (see Opp.Br. 24-25, pointing to the phrase "last resort" therein), we already refuted that attempt in our ReplyBr. (at 15-16), citing three Appellate Division cases, and a federal case, all decided subsequent to In re 166 Mamaroneck, which all held, in effect, that In re 166 Mamaroneck did not diminish the force of Martin Delicatessen as relevant here.[10] Nor does the Lambert Affirm. now even attempt to present any contrary authority.

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[10] See also, more recently, Douglas Elliman LLC v. Firefly Entertainment Inc., 729 Fed. Appx. 64, 2019 WL 6271547 (2d Cir., Nov. 25, 2019), which, after discussing both In re 166 Mamaroneck and Martin Delicatessen, concluded that the writing pointed-to by that plaintiff was too indefinite to constitute a binding contract: "even if there was sufficient intent shown ..., it would be inappropriate to read in missing terms," including the commission amount.

We infer, from the fact that the Second Circuit dealt with that dispute by way of a "summary order," that the Second

43. Moreover, again, the Lambert Affirm.'s suggestion that this Court ignored In re 166 Mamaroneck is refuted by the simple point that the Decision itself cites to In re 166 Mamaroneck!

44. At bottom, then, the Lambert Affirm. is (again) just making some of the same arguments for a change in the law that the Appellate Division had made in Martin Delicatessen -- but which the Court of Appeals in Martin Delicatessen rejected. (See Init.Br. at 39-40 and fn. 45).

45. Accordingly, Tenant's first contention has failed to show a proper basis for reargument.

C. The Phrase "To Be Determined" Does Not Mean 'To Be Determined Unilaterally By Landlord'

46. For Tenant's second argument, Lambert Affirm. ¶¶ 11-13 repeats Tenant's contention that the phrase "to be determined," as used in the T-B-D Sentence, must -- because such was supposedly "tenant's reading" (Lambert Affirm. ¶ 12) -- be deemed to mean 'to be determined unilaterally by the landlord.' And Lambert Affirm. ¶ 11 now contends, as a new 'second step' proposition supposedly following from this "tenant's reading" theory, that Landlord also must be deemed to have set the rent

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Circuit saw no issue in this regard that was novel, or of public importance, or necessary to otherwise clarify any conflict in the law. See also infra ¶¶ 62-63.

The various other cases cited in Tenant's Opp.Br. are all distinguished in Landlord's ReplyBr.

at the maximum of 8%, so as to thus establish a definite agreement. (Tenant did not assert this second step below, for this 'second step' contradicts, of course, Tenant's argument below that there was supposedly an agreement on a 5.4% rate for 15 years; see infra. Contrast, accordingly, Tenant's Opp.Br. at, e.g., 26, 32).

47. As we already explained at some length, however (-- focusing only on the 'first step' in Tenant's present two-step argument, as just outlined): if the parties had meant to say, in respect of the 15-year extension period, that the rent was 'to be determined unilaterally by landlord,' they could of course have simply said that -- and indeed, in a different context in the Lease, they did agree that Landlord would control the decision in a particular respect (see ¶ 28, fn. 8, supra). But that is not what the parties said in this regard, in the T-B-D Sentence. And the phrase "to be determined" clearly requires some further agreement by and between the parties, and hence is indefinite for purposes of Martin Delicatessen. (See Init.Br. at 42-45, and ReplyBr. 11-12, reviewing case-law in this regard.) In sum, the phrase used in the T-B-D Sentence, i.e., "to be determined [in the future]," clearly meant that there was no present agreement when the T-B-D Sentence was added in June 2012, and hence no binding agreement as to a 15-year extension. Even now Tenant proffers no case-law to support its

theory that the phrase actually used in the June 2015 Letter Agreement must be re-written by the Court based upon Reis's supposed subjective understanding thereof.[11]

48. Accordingly, per the standards reviewed above, there is no basis for reargument in this regard, either.

D. The Prior Owner's Billing In March 2015 For The One-Year-Only Extension Did Not Somehow Set The Rate For An Ensuing 14 Years

49. For Tenant's third argument, Lambert Affirm. ¶¶ 15-19 purports to repeat a 'fact' argument -- viz., that Prior Owner must be deemed to have in fact set the annual rent for each year in the 14-year period March 2016-February 2030 (i.e., following the one-year-only extension that had been agreed-upon in the November 2014-February 2015 emails) when Prior Owner invoiced Tenant for March 2015 at a rent increase of approx. 5.4% above the prior year's rent.

50. In short, Tenant just pretends, however (yet again), to entirely ignore the point that, in the email exchange in November 2014 – February 2015 (reviewed supra), the parties

[11] Lambert Affirm. ¶ 11 quotes a couple snippets of deposition testimony by Reis. But Reis's subjective 'understanding,' even if those snippets were credible (cf. Init.Br. 21-22, quoting from Reis's earlier and contrary testimony) is in any event legally irrelevant (Init.Br. 17-18 fn. 20; 39-40 fn. 45, and 49 fn. 50). As explained in Init.Br. 46-50, a key element of the Martin Delicatessen rule is that the absence of definiteness is not an ambiguity, but rather simply a failure of definiteness.

agreed on a one-year-only extension of the lease term, through February 2016. Indeed, as quoted above, Reis admitted, in his February 20, 2015 email (R.54), that "we were unable to agree on the rent for the following years" -- i.e., for the 14 years after the one-year-only extension.

51. And the fact that Landlord underbilled Tenant by a small amount during the term of that one-year-only extension likewise does not show an agreement for the ensuing 14 years. Among other things, Tenant's theory would violate the statute of frauds, which requires that any lease agreement for more than one year, and a fortiori for 14 more years, be memorialized in a writing that sets forth all the material (and definite) terms of such an extension agreement. (See Init.Br. 50 fn. 57, and 52-55; ReplyBr. 21-25.)

52. Again, however (as in Tenant's Opp.Br., cf., e.g., 12-13), Tenant's 'fact' argument based on the March 2015 invoice entirely fails to address the context thereof, i.e., the one-year-only agreement acknowledged by Reis himself in his February 20, 2015 email.

53. Accordingly, Tenant's reliance, again, upon such a 'fact' theory -- which, indeed, as reviewed herein, rests on a distortion of the documentary record -- warrants rejection of Tenant's present motion.

E. This Court Did Not Somehow Overlook Any Facts

54. Lastly, Lambert Affirm. ¶ 20 asserts that this Court must be deemed to have "overlooked the facts" because the Motion Court supposedly "found" (¶ 21) that there were two triable "issues of fact." (The Lambert Affirm., in its statement of proposed questions warranting review, pretends that there was a 'third' 'fact' 'finding' as well -- but that is just a figment of Tenant's present imagination.[12])

55. First, a determination by a motion court that there exists an issue of fact is of course not a finding by that court of any fact.

56. Second, and more critically, we had carefully explained in our appellate briefs why the supposed "issues" of "fact" noted by the Motion Court were not indeed relevant issues of fact: rather, (a) the question whether the extension sentence was sufficiently definite was not (as the Motion Court thought) an 'issue of fact,' but instead (under Martin Delicatessen) an issue of law, to be determined by looking simply at the existing

[12] Lambert Affirm. ¶ 1(b)(iv) pretends that there was a finding by the Motion Court that Reis had stated to Landlord in February 2015 that he, Reis, was prepared to pay an 8% annual increase for each of the 14 years March 2016 – February 2030. But, again, the Record evidence is that Reis himself, in his February 20, 2015 email, in essence refuted and precluded any such contention, when he wrote that "we were unable to agree on the rent for [those] years."

words of the T-B-D Sentence, without the court adding more words thereto (e.g., Init.Br. 3-4); and (b) the Motion Court's 'speculation' that the March 2015 billing might show that there might have been some subsequent and "supersed[ing]" agreement between the parties, i.e., even after Reis's own February 2015 email (acknowledging agreement upon only a one-year-only extension), is baseless -- for again, the statute of frauds should preclude any such speculation.

57. Accordingly, in this last regard as well, Tenant has failed to identify any proper basis for reargument.

II. TENANT HAS FAILED TO SHOW ANY BASIS FOR LEAVE TO APPEAL

58. While there are no hard-and-fast rules in respect of granting or denying leave to appeal to the Court of Appeals, the general principle is that disputes turning on the particular language of individual contracts, and/or on other individual features of a case, do not warrant leave to appeal. See generally N.Y.Jur.2d Appellate Review §§ 293-294.

59. And a fortiori, purported appellate 'questions' that simply do not correspond to the issues that had been presented to this Court, and/or that assert 'fact' question that otherwise diverge from the Record, do not warrant further consideration.

60. Without repeating all of the analysis supra, it is plain, we submit, that even now Tenant's arguments turn on

matters of specific contract language, and on supposed 'fact assertions' arising in specific contexts (-- leaving aside how Tenant pretends to ignore those contexts, and the documentary evidence); and thus do not warrant further review.

61. As shown by the dozens of cases cited in the Init.Br. and ReplyBr., the question of the effect (or non-effect) of an indefinite 'extension sentence' is not "novel" [cf. Court of Appeals Rule 500.22(b)(4)], but has been litigated since at least 1917 (see Init.Br. 20, and 38 fn. 44). Tenant does not point to any feature of this particular case that is somehow of "public importance" (id.) towards the development of the longstanding requirement of definiteness. Nor does Tenant point to any conflict among the Appellate Divisions in this regard (id.). (See, e.g., Init.Br. 41-42 fn. 48, and ReplyBr. 11, discussing First Department developments to the same effect as the Decision here.)

62. The only Rule 500.22(b)(4) factor to which Tenant apparently attempts to point (cf. Lambert Affirm. ¶ 9) is a supposed conflict between Martin Delicatessen and In re 166 Mamaroneck, as relevant here: but there is no real conflict, as the many subsequent cases citing to both of these cases -- and proceeding to find the subject writings to be indefinite -- have shown. See, e.g., the cases cited in Init.Br. 38 fn. 44, and ReplyBr. 5-16. See also Douglas Elliman, supra ¶ 42 fn.

10 -- where, as we noted there, the Second Circuit plainly saw no conflict, nor indeed anything novel in this regard. And finally, of course, this Court did not somehow disregard In re 166 Mamaroneck, but rather indeed cited that case in the Decision!

63. Accordingly, to review quickly as to each of the four 'questions' now posed in Lambert Affirm. ¶ 1(b):

a. Tenant's first question simply mischaracterizes the Record. Reis did not, in February 2015, acknowledge that he was bound to pay an 8% annual increase through 2030: rather, he stated (in his February 20, 2015 email) that "we were unable to agree on the rent" beyond the one-year-only extension (R.54). Tenant's prior argument to this Court, rather, was that "any *potential* [sic] indefiniteness or ambiguity [in the T-B-D Sentence] was completely dispelled when Prior Landlord set the rent at a 5.4% increase by issuing bills in that amount commencing March 2015 ..." (Opp.Br. 26). But that billing for the one-year-only extension likewise does not, as reviewed above, establish a binding lease extension through February 2030. In short, Tenant's attempt to thus re-write history, and to re-write its own prior arguments, would not in any event help Tenant, for reasons reviewed in, e.g., Init.Br. 41-42 fn. 48; and surely such a 're-write' does not constitute a 'question' warranting further appellate review;

b. Tenant indeed argued below that (what it now calls) "tenant's reading of the renewal provision" -- i.e., Tenant's subjective intent -- should be determinative here, and should support a re-writing of the T-B-D Sentence. While this was indeed one of Tenant's arguments below, it is plainly without merit, as shown in our appellate briefs, and noted again herein; and this 'subjective' contention was clearly rejected in Martin Delicatessen, and has continued to be consistently rejected by its progeny, and does not warrant further appellate review;

c. Tenant indeed sought below to ignore Tenant's own words, in its February 20, 2015 email, acknowledging that the parties were agreeing only to the one-year-only extension, but that "we were unable to agree to the rent for the following years" (see ¶ 23, supra). But such an attempt to ignore a documented admission does not give rise to a potential "provable" [sic] fact (in the words of the Lambert Affirm.) to the contrary of that documentary admission. And (as reviewed above) the statute of frauds clearly precludes any speculation as to any "supersed[ing]" oral agreement, subsequent to that February 20, 2015 email, for a 14-year term. A supposed 'fact' issue based on such distortion of the record does not warrant further review; and

d. as reviewed above, this Court, in the Decision, did not somehow (in Tenant's words now) "reverse" any "finding" by

the Motion Court, but rather simply focused on the relevant predicate questions of law, under Martin Delicatessen, as to whether the T-B-D Sentence on its face was sufficiently definite, and whether Tenant had proffered any subsequent writing, satisfying the statute of frauds, to show a definite agreement extending through February 2030. Thus, in this regard as well, Tenant's proposed 'question' does not warrant further review.

CONCLUSION

64. Accordingly, it is respectfully submitted that Tenant has failed to show any basis for reargument or for granting leave to appeal; and so Tenant's motion should be denied.

Dated: New York, New York
May 22, 2020

Richard Claman

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE BY MAIL

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On May 22, 2020

deponent served the within: **AFFIRMATION IN OPPOSITION TO MOTION FOR REARGUMENT/LEAVE TO APPEAL**

upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

Sworn to before me on
the 22nd day of May, 2020.

MARIA MAISONET
Notary Public State of New York
No. 01MA6204360
Qualified in Queens County
Commission Expires Apr. 20, 2021

Job# 296199