

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

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JUVENAL REIS,

Index Number
707612/15

Plaintiff- Respondent,

- against-

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

Defendants-Appellants.

**NOTICE OF
MOTION TO
REARGUE AND
FOR LEAVE TO
APPEAL TO
THE COURT
OF APPEALS**

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PLEASE TAKE NOTICE that upon the annexed Affirmation of Thomas C. Lambert dated May 7, 2020, and upon all papers and proceedings heretofore had herein, Plaintiff-Respondent Juvenal Reis will move this Court at the courthouse located at 45 Monroe Place, Brooklyn, NY 11201, on June 1, 2020 at 10 AM, or as soon thereafter as counsel can be heard, for an order:

- a. pursuant to CPLR Rule 2221 granting leave to reargue the above-captioned appeal to this Court from the Order of the Honorable Robert J. McDonald entered on October 3, 2017, and upon such reargument affirming such Order; or, in the alternative,

- b. pursuant to CPLR §§ 5513(b), 5516, 5602 and 22 NYCRR §600.14, granting Plaintiff-Respondent leave to appeal to the Court of Appeals from the Decision and Order of the Appellate Division, Second Department entered on March 11, 2020, with respect to the questions of:
- i. Where parties to a lease have agreed in writing to renewal in a rental amount “to be determined” within an expressly stated fixed range and the tenant is willing to renew at the highest end of the range, is the lease renewal provision void for indefiniteness? The Appellate Division answered the question in the affirmative.
 - ii. Where parties to a lease have agreed in writing to renewal in a rental amount “to be determined” within an expressly stated fixed range, and the tenant’s reading of the renewal provision is that the landlord must set the amount within the range, is the lease renewal provision void for indefiniteness? The Appellate Division answered the question in the affirmative.

- iii. Where parties to a lease have agreed in writing to renewal in a rental amount “to be determined” within an expressly stated fixed range, and a meeting of the minds of the parties on the specific amount is proved or provable based on admissible evidence, is the lease renewal provision void for indefiniteness? The Appellate Division answered the question in the affirmative.
- iv. In reversing the lower court’s finding of triable issues of fact, did this Court itself overlook (1) the fact that the tenant was willing to renew and pay rent at the high end of the agreed-upon fixed range, (2) the fact that the agreed-upon language “to be determined” means to be determined by the landlord and (3) the fact that the parties agreed on the amount within the range; all of which facts were proved and are proved and provable by admissible evidence? The Appellate Division answered the question in the negative.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR
Rule 2214(b) answering affidavits, if any, are required to be served upon the
undersigned at least seven (7) days prior to the return date of this motion.

Dated: New York, New York
May 7, 2020

Yours, etc.

Lambert & Shackman, PLLC
Attorneys for Plaintiff-Respondent
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By: 
Thomas C. Lambert

To: Stempel Bennett Claman & Hochberg, P.C.
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

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JUVENAL REIS,

Plaintiff-Respondent,

- against-

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

Defendants-Appellants.

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Index Number
707612/15

**AFFIRMATION
IN SUPPORT
OF MOTION TO
REARGUE AND
FOR LEAVE
TO APPEAL**

THOMAS C. LAMBERT, an attorney admitted to practice
before the courts of the State of New York, who is not a party to this action,
affirms the following statement to be true under the penalties of perjury
pursuant to CPLR Rule 2106:

1. I am a member of Lambert & Shackman, PLLC, the
attorneys for Plaintiff-Respondent Juvenal Reis (“tenant”) herein, and make
this affirmation in support of Plaintiff-Respondent’s motion for an Order:

- a. pursuant to CPLR Rule 2221 granting leave to reargue the
above-captioned appeal to this Court from the Order of the
Honorable Robert J. McDonald entered on October 3, 2017,
and upon such reargument affirming such Order; or, in the
alternative,

- b. pursuant to CPLR §§ 5513(b), 5516, 5602 and 22 NYCRR §600.14, granting Plaintiff-Respondent leave to appeal to the Court of Appeals from the Decision and Order of the Appellate Division, Second Department entered on March 11, 2020, with respect to the questions of:
- i. Where parties to a lease have agreed in writing to renewal in a rental amount “to be determined” within an expressly stated fixed range and the tenant is willing to renew at the highest end of the range, is the lease renewal provision void for indefiniteness? The Appellate Division answered the question in the affirmative.
 - ii. Where parties to a lease have agreed in writing to renewal in a rental amount “to be determined” within an expressly stated fixed range, and the tenant’s reading of the renewal provision is that the landlord must set the amount within the range, is the lease renewal provision void for indefiniteness? The Appellate Division answered the question in the affirmative.
 - iii. Where parties to a lease have agreed in writing to renewal in a rental amount “to be determined” within an

expressly stated fixed range, and a meeting of the minds of the parties on the specific amount is proved or provable based on admissible evidence, is the lease renewal provision void for indefiniteness? The Appellate Division answered the question in the affirmative.

iv. In reversing the lower court's finding of triable issues of fact, did this Court itself overlook (1) the fact that the tenant was willing to renew and pay rent at the high end of the agreed-upon fixed range, (2) the fact that the agreed-upon language "to be determined" means to be determined by the landlord and (3) the fact that the parties agreed on the amount within the range; all of which facts were proved and are proved and provable by admissible evidence? The Appellate Division answered the question in the negative.

2. Exhibit A is a copy of the Notice of Appeal from the Order of the Hon. Robert J. McDonald, Justice of the Supreme Court of the State of New York, County of Queens, entered on October 3, 2017, which first invoked the jurisdiction of this Court. R5-6.

3. Exhibit B is a copy of this Court’s Decision and Order entered March 11, 2020, which is the subject of the instant motion.

4. This Court’s decision on the Appeal is based upon the rule announced by the Court of Appeals in the *Martin* case¹ that a lease renewal provision that sets the rent “to be agreed upon” is void because of indefiniteness. Citing the *Martin* case the Appellate Division found that the parties “2012 letter agreement ... demonstrated that the renewal provision was an unenforceable agreement to agree.” But there are critical differences between this case and the *Martin* case.

5. In this case, the parties’ 2012 letter agreement provides that the annual percentage increase in rent for the renewal term is “to be determined” between 5% and 8%. It is “to be determined” within a *fixed range*. The language in their 2012 letter agreement is as follows:

- a. Sentence 1: “It is agreed that ... all terms and provisions provided for within the original lease between the parties as dated and executed on March 12, 2002 ... shall remain in full force and effect”
- b. Sentence 2: “Lease terms to be extended to now terminate on

¹ *Joseph Martin Jr. Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 436 N.Y.S.2d 247 (1981).

Feb. 28, 2030; terms [annual percentage increase in rent]² to be determined at the expiration of this initial lease consolidation period [February 28, 2015]³.”

- c. Sentence 3: “Any percentage increase will not be less than 5% annually and not to exceed a maximum cap of 8% annually.”⁴
- d. Sentence 4: “...the signing of same [the 2012 Letter Agreement] is considered legal and binding to the parties involved.”

Here is the deposition testimony of the landlord’s agent:

Q. And then there’s also a sentence that says, quote, “Any percentage increase will not be less than 5 percent annually and not to exceed a maximum cap of 8 percent annually.” unquote. Isn’t that a fact?

A. That’s a fact also for the same period of time.

Mr. O’Brien: Are you finished with your answer?

A. Between 5 and 8 percent. The 5 to 8 percent is a big range. It would have to be determined what midpoint or what point on that graph would be factored into any rent increments, and that was never done.

Q. The percentage was never agreed to.

²Both parties agree that the word “terms” means the annual percentage increase in rent for the period from March 1, 2015–February 28, 2030. R515 (Reis ebt); R866 (Kaufman ebt).

³Both parties agree that the “expiration of this initial lease consolidation period” means February 28, 2015. R334 (Reis ebt), R891 (Kaufman ebt).

⁴Both parties agreed that the language “any” percentage increase applies to the period from March 1, 2015 – February 28, 2030. R747 (Reis ebt), R7, 886-887, 877-879, 902-903 (Kaufman ebt).

A. Only the range.

R902-903.

6. Here is the critical difference: As a matter of good faith and logic that *fixed range* obligates the landlord to renew at 8% or less and it obligates the tenant to pay for renewal at least 5%. The agreement to a fixed range creates at least one unequivocally clear and definite obligation on the part of each of the parties. Each party can thereby rely on knowing that it can definitely get renewal if it accepts the end point of the range which is least favorable to itself. That is not an indefinite right.⁵

7. The *Martin* case is critically different because in *Martin* neither party was obligated at all to agree to *any* amount.

8. *Martin* was decided forty years ago. Twenty years ago, in the *Mamaroneck* case⁶, the Court of Appeals observed that there were two

⁵ In the tenant's affidavit in the Court below, he reveals the parties' intentions (R988) as follows:

Roger said he wanted that range provision because he would have a better idea of the market in 2015 than he did in 2012 when the 2012 Letter Agreement was made; I wanted to make sure that we had a specific standard with a narrow range so that I could plan ahead. And, in fact, since the beginning of my first renewal, the increase had always been between 5% and 8%.

There was no affidavit from Roger Kaufman.

⁶ *166 Mamaroneck Avenue Corp. v. 151 East Post Road Corp.*, 78 N.Y.2d 88, 575 N.E.2d 104 (1991).

ways indicated by the *Martin* court in which the definiteness requirement could be satisfied *without an explicit contract term*: (i) an agreed upon methodology to determine the rent amount and (ii) an agreed upon “objective extrinsic event, condition or standard,” in other words a yardstick. The parties’ agreement here to a rate between 5-8% is a hybrid of “method” and “yardstick,” the two ways quoted above to avoid indefiniteness.

9. In the *Mamaroneck* case the Court of Appeals said that striking down an agreement as indefinite is “at best a last resort.” *Id.* The Court said “A strict application of the definiteness doctrine could actually defeat the underlying expectations of the contracting parties.” Here the Appellate Division’s decision defeats two unequivocally clear and definite rights of the parties even if those rights are limited --- as most rights are.

10. The first reason this case should be reviewed by the Court of Appeals is to obtain recognition, clarification and possibly expansion of the ways in which the definiteness requirement can be satisfied “without an explicit contract term” to include the parties setting a *fixed range* as they did in this case.

11. As it happens in this case too, the tenant has said from the outset that the words “to be determined” in the 2012 letter agreement mean that the landlord was required to *set* the rate between 5% and 8% and

the tenant would be bound by that. The tenant testified at his deposition as follows:

A. He defines unilaterally – sorry for my pronunciation – and I have to accept whatever he defines.

Q. You have to accept.

A. Yes, between 5 and 8 percent.

Q. Can you object?

A. According to the terms of our contract, and my understanding, no. He had the free will to take that between 5 and 8 percent.

R730-731.

A. That for me, I have stated to him, even at 8 percent I will be ok with it.

* * *

Q. What if you got to the point in 2020 where you couldn't pay 8 [percent] without losing your business, what would happen under the lease?

A. I would be losing money.

R335-336.

12. Accordingly, the second reason this case should be reviewed by the Court of Appeals is to ascertain whether the definiteness requirement is met where the landlord is obligated to set the rate, at least at one end of a spectrum, and the tenant's reading of the alleged "indefinite" term "to be determined" is that the tenant is bound by the landlord's determination.

13. In the instant case, did the landlord, in bad faith, fail to do what it said it would do? Did it fail to agree even to 8%?

14. It is the landlord's *legal* position that the rental rate was never set or agreed to and that the Lease renewal provision is void for indefiniteness. But, as a matter of fact, proved by the admissible evidence, the landlord *did* set the rental rate.

15. On or about March 1, 2015, the landlord set the annual percentage increase for the extended term at 5.4%. The landlord did so in writing by billing the tenant for the month of March 2015 (and for each month thereafter until October 2015 when this case was commenced) in an amount which was a 5.4% increase over the base rent in effect on February 28, 2015. R993. Copies of the bills are R1044-1051. A copy of the bill for February 2015, the last month prior to the increase, is R1043.

16. The tenant paid those bills. The landlord accepted the payments. R993. Copies of the checks are at R1052-1059.

17. It may be asked why the landlord set the percentage increase at 5.4%, when it could have set it at 8%. The facts which explain that are set forth in the tenant's Affidavit in the Court below. R 995, ¶¶ 60 -

61.⁷ There was no affidavit submitted on behalf of the landlord by anyone purporting to have knowledge of the facts. Roger Kaufman, who maintains a continuing financial interest in the ownership of the Building after the sale of the Building, tellingly did not submit an affidavit. R910.

18. It is the tenant's argument here that the instant case presents a third way under the *Martin* case in which the definiteness requirement can be satisfied "without an explicit contract term." That third way is where a meeting of the minds of the parties on the amount can be

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60. At a time when Prior Landlord was having a hard time finding tenants for the rest of the Building, Prior Landlord was securing a huge rent increase for my space, which comprised 43% of the Building, compounded each year to 2030. In this way Roger "hedged his bets" in case a sale of the Building did not go through. Roger knew that he had in me a good tenant who always paid the rent on time. Our arrangement, where I was leasing almost half the building and subletting it, freed him up from many of the administrative tasks a landlord would ordinarily do. This suited Roger, who never really wanted to be in the landlord business, but had gotten stuck managing his family's building.

61. In a way, Roger actually outsmarted the buyer. Roger kept for himself and Prior Landlord a commitment on my part to lease 43% of the Building at a huge rent increase of 5.4% compounded each year for 15 years. That was an especially valuable asset given that Roger was having trouble leasing the remaining space in the Building. But Roger could also tell the buyer that he did not really intend to do that, but that he just sent me those rent bills by mistake. That may very well be why there is no affidavit from Roger in support of Defendant's motion for summary judgment.

R.995, ¶¶60-61.

proved by admissible evidence. The proof must be heard. As a matter of fact, the landlord here set the rate. If upon trial, it is determined that the landlord did not set any rate, then as a matter of law, it breached its obligation in good faith to do so --- at least at 8%.

19. Accordingly, the third reason this case should be reviewed by the Court of Appeals is to ascertain whether the definiteness requirement is met in a case where a meeting of the minds of the parties on a definite amount is proved or provable based on admissible evidence.

20. The fourth reason this case should be reviewed by the Court of Appeals is because the Appellate Division, in reversing the lower Court's finding of triable issues of fact, itself overlooked the facts.

21. The Court below found as follows:

Although Mr. Kaufman testified that the precise amount within the 5-8% range would have to be determined by the parties, and was never determined, the rent bill issued by the prior owner in March 2015 with a 5.4% rent increase and the Stipulation dated March 17, 2016 raise, at the very least, an issue of fact as to whether the prior owner determined the precise amount pursuant to the terms of the 2012 Letter Agreement. Moreover, plaintiff's own testimony and affidavit contradict Mr. Kaufman's testimony that a rent amount was not determined. Based upon the conflicting testimony, there are issues of fact including, but not limited to, whether the 2012 Letter Agreement authorized the prior owner to unilaterally set the percentage increase at the end of the expiration of

the initial lease consolidation period or whether the rent was to be negotiated.

R8-9.⁸

22. Based on the facts the Court below correctly denied Defendants-Appellants' motion for summary judgment.

Conclusion

23. By reason of the foregoing, Plaintiff-Respondent respectfully prays for an Order (i) pursuant to CPLR Rule 2221 granting leave to reargue the above-captioned appeal to this Court; or, in the alternative, (ii) pursuant to CPLR §§ 5513(b), 5516, 5602 and 22 NYCRR § 600.14 granting leave to appeal to the Court of Appeals from this Court's Decision and Order entered on March 11, 2020, and (iii) granting such other and further relief as the Court may deem just and proper in the premises.

Dated: New York, New York
May 7, 2020



Thomas C. Lambert

⁸ The Stipulation cited in the quote provides *inter alia* "WHEREAS by invoice dated March 1, 2015 the landlord set the annual percentage increase of rent under the Lease at 5.4%." R1060-1061.

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

x

JUVENAL REIS,

Plaintiff,

-against-

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

Defendants.

Index No. 707612/15

NOTICE OF APPEAL

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Defendant-Appellants J.B. Kaufman Realty Co., LLC and 43-01 22nd Street Owner LLC (“Appellants”) hereby appeal to the Appellate Division, Second Department, from a Decision and Order of the Supreme Court of the State of New York, County of Queens (McDonald, J.), dated September 25, 2017, and entered in the Office of the Clerk of Queens County on October 3, 2017 (a copy of which is annexed as Exhibit A) (motion seq. 010), notice of entry of which was served and filed on October 4, 2017, and from each and every part of said Decision and Order.

Dated: New York, New York
October 11, 2017

STEMPEL BENNETT CLAMAN &
HOCHBERG, P.C.

By: 
Edmond O'Brien

Attorneys for Defendants/Appellants
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(212) 681-6500

To: LAMBERT & SHACKMAN, PLLC
Attorneys for Plaintiff/Respondent
274 Madison Avenue, Suite 1302
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(212) 370-4040

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

----- x

JUVENAL REIS,

Index No.: 707612/2015

Plaintiff,

Motion Date: 9/14/17

- against -

Motion No.: 139

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

Motion Seq.: 10

Defendants.

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The following electronically filed documents read on this motion by defendants for an Order pursuant to CPLR 3001 and/or 3212, denying plaintiff's request for a declaration that the lease between plaintiff and defendants should be deemed to not expire until February 28, 2030 and instead counter-declaring that the lease between plaintiff and defendants expired as of February 29, 2016, and pursuant to CPLR 6514(a), cancelling the notice of pendency filed by plaintiff; and pursuant to CPLR 3116(a), striking the change that plaintiff has purported to make to his deposition transcripts:

Papers
Numbered

Notice of Motion-Affirmation-Exhibits-Memo. of Law... EF 287 - 308
Affidavits in Opposition-Memo. of Law-Exhibits..... EF 310 - 330
Affirmation in Reply-Exhibits-Memo. of Law..... EF 331 - 334

This is a declaratory judgment action concerning the length of the term of a commercial lease pertaining to the premises located at 43-01 22nd Street, Long Island City, in Queens County, New York. Plaintiff is a tenant of the premises currently owned by defendant 43-01 22nd Street Owner LLC (current owner). Defendant J.B. Kaufman Realty Co., LLC was the previous owner (prior owner).

On July 20, 2015, plaintiff commenced this action by filing a lis pendens and summons and complaint, seeking a declaration that the term of plaintiff's lease is scheduled to expire on February 28, 2030. Prior owner previously moved to dismiss the complaint. By Order dated December 22, 2015, this Court denied the motion to dismiss, finding that the submitted documentary evidence, including a certain letter agreement, did not utterly refute plaintiff's factual allegations. Now that discovery has been completed, defendants move for summary judgment on the ground that plaintiff's testimony coupled with the documentary evidence demonstrate that no effective agreement was ever reached as to the rent for any period subsequent to February 2016, and therefore, the lease expired as of February 29, 2016.

At issue is a letter dated November 30, 2006, September 1, 2007, and June 27, 2012 (hereinafter the 2012 Letter Agreement). The 2012 Letter Agreement is signed by plaintiff and Roger Kaufman, Managing Partner of the prior owner. In relevant part, the 2012 Letter Agreement provides in the second paragraph that the "Lease terms to be extended to now terminate on February 28, 2030; terms to be determined at the expirations of this initial lease consolidation period." At the bottom of the page, the 2012 Letter Agreement further provides "Tenant will have the option to renew entire lease at expiration of above with written notification to Landlord within 1 year prior to expiration of present lease. 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." The last line of the 2012 Letter Agreement reads "the signing of same is considered legal and binding to the parties involved."

Plaintiff appeared for an examination before trial on December 5, 2016. The deposition was continued on December 6, 2016, December 7, 2016, December 16, 2016, January 31, 2017, and March 16, 2017. He testified that under the 2012 Letter Agreement, the term was extended to February 28, 2030 at an annual percentage increase between 5 and 8% to be set by the prior owner on or about February 28, 2015, the date of the expiration of the initial lease consolidation period. He testified that Mr. Kaufman had the option to unilaterally choose the number between 5 and 8%, and he had to accept the terms. For the period of March 2015 through February 2016, he also testified that he did negotiate a percentage increase of the rent with Mr. Kaufman. The errata sheet notes that he discussed the percentage increase "in order to avoid litigation." He acknowledges that he discussed a 6% increase, but then the prior owner set the annual percentage increase at 5.4% by issuing the March 2015 bill.

Roger Kaufman appeared for an examination before trial on March 17, 2017. He testified that under the 2012 Letter Agreement, the only thing that was agreed to was that plaintiff could stay until 2030. The 5-8% range is applicable to the extended term period through February 28, 2030. The precise amount within that range would have to be determined between the parties, but that was never done.

Based on the above testimony as well as the submitted documentary evidence, defendants contend that while the 2012 Letter Agreement was effective to extend the lease through and until February 2015, it was not itself a sufficiently definite agreement to bind the parties beyond February 2015. Defendants contend that plaintiff's reading of the 2012 Letter Agreement depends on the incorrect assumption that the phrase "terms to be determined at the expiration of this initial lease consolidation period" incorporates the phrase "[a]ny percentage increase will not be less than 5% annually and not to exceed a maximum cap of 8% annually", which appears later on in the 2012 Letter Agreement. Defendants point to an email chain from November 2014 through February 2015 between Mr. Kaufman and plaintiff to demonstrate that there was no 15-year rent agreement by the prior owner in February 2015, but rather only an agreement for a one year extension. The emails confirm that the parties agreed to a new rent for just one more year, through February 2016, but the parties conceded that they were unable to agree on the rent for the following years. Based on such, defendants contend that all of the essential terms were not agreed upon, and thus, the 2012 Letter Agreement is unenforceable (see Joseph Martin, Jr., Delicatessen v Schumacher, 52 NY2d 105, 109 [1981] ["a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable"]; Tenber Assoc. v Bloomberg L.P., 51 AD3d 5173 [1st Dept. 2008]; Belasco Theatre Corp. v Jelin Productions, 270 AD 202, 205 [1st Dept. 1945] ["To establish merely a range with minimum and maximum figures within which the parties could negotiate does not meet the test of definiteness"]).

In opposition, plaintiff contends that the entire 2012 Letter Agreement should be read as a whole and any ambiguities must be construed against the drafter (see Beal Sav. Bank v Sommer, 8 NY3d 318 [2007]; 151 West Associates v Printsiplis Farbic Corp., 61 NY2d 732 [1984]). The 2012 Letter Agreement by itself, per the rent range provision, is a binding commitment as to rent without need for any further agreements. The only item left to be determined by the prior owner was the rent, utilizing the agreed-upon standard range of 5-8%. Therefore, when prior owner set the annual percentage increase for the extended term at

5.4% by billing plaintiff for the month of March 2015, the 2012 Letter Agreement extended the term to February 28, 2030 at a rent of 5.4% annual percentage increase over the base rent. Plaintiff also presents the Stipulation dated March 17, 2016 in which the parties agreed that "by invoice dated March 1, 2015 Landlord set the annual percentage increase of rent under the Lease at 5.4%." Plaintiff contends that the Stipulation, executed by both parties, establishes that the Landlord unilaterally set the rent from March 2015 through February 2030 pursuant to the terms of the 2012 Letter Agreement. Regarding the November 2014 through February 2015 emails that defendants contend demonstrate that plaintiff conceded that the rent was to be negotiated and not unilaterally set by the prior owner, plaintiff argues that even if there was an agreement pursuant to the emails for a one year extension at 6%, the email agreement was superseded when the prior owner set the annual percentage increase of rent at 5.4%.

A movant for summary judgment must make a prima facie showing of entitlement by demonstrating that there are no material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once the movant satisfies this burden, then the burden shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see Zuckerman v City of N.Y., 49 NY2d 557 [1980]). All reasonable inferences will be drawn in favor of the non-moving party (see Dauman Displays v Masturzo, 168 AD2d 204 [1st Dept. 1990]). "A court may not weigh the credibility of witnesses on a motion for summary judgment, unless it clearly appears that the issues are not genuine, but feigned" (Conciatori v Port Auth. of N.Y. & N.J., 46 AD3d 501 [2d Dept. 2007]).

Upon a review of the motion papers, opposition, and reply thereto, and viewing the facts in a light most favorable to the non-moving party, this Court finds that defendants failed to make a prima facie showing of entitlement to summary judgment.

Although Mr. Kaufman testified that the precise amount within the 5-8% range would have to be determined by the parties, and was never determined, the rent bill issued by the prior owner in March 2015 with a 5.4% rent increase and the Stipulation dated March 17, 2016 raise, at the very least, an issue of fact as to whether the prior owner determined the precise amount pursuant to the terms of the 2012 Letter Agreement. Moreover, plaintiff's own testimony and affidavit contradict Mr. Kaufman's testimony that a rent amount was not determined. Based upon the conflicting testimony, there are issues of fact including, but not limited to, whether the 2012 Letter Agreement authorized the prior owner to unilaterally set the percentage increase at the end of the

expiration of the initial lease consolidation period or whether the rent was to be negotiated.

Regarding that branch of the motion to strike the errata sheet, CPLR 3116(a) permits the witness to make "any changes in form or substance which the witness desires. . . at the end of the deposition with a statement of the reasons given by the witness for making them." Defendants contend that plaintiff failed to provide any reason for the changes. Plaintiff's stated reason was to disclose context. As plaintiff will be subject to cross-examination, defendants can raise any issues regarding the credibility and legitimacy of plaintiff's changes at the time of trial.

Accordingly, for the above stated reasons, it is hereby,

ORDERED, that defendants' motion is denied in its entirety.

Dated: September 25, 2017
Long Island City, N.Y.



ROBERT J. MCDONALD
J.S.C.

FILED
OCT - 3 2017
COUNTY CLERK
QUEENS COUNTY

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

Form A - Request for Appellate Division Intervention - Civil

See § 670.3 of the rules of this court for directions on the use of this form (22 NYCRR 670.3).

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

JUVENAL REIS,

Plaintiff,

-against-

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

Defendants.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type	<input type="checkbox"/> CPLR article 78 Proceeding	Filing Type	<input type="checkbox"/> Transferred Proceeding
<input checked="" type="checkbox"/> Civil Action	<input type="checkbox"/> Special Proceeding Other	<input checked="" type="checkbox"/> Appeal	<input type="checkbox"/> CPLR 5704 Review
<input type="checkbox"/> CPLR article 75 Arbitration	<input type="checkbox"/> Habeas Corpus Proceeding	<input type="checkbox"/> Original Proceeding	

Nature of Suit: Check up to five of the following categories which best reflect the nature of the case.

A. Administrative Review	D. Domestic Relations	F. Prisoners	I. Torts
<input type="checkbox"/> 1 Freedom of Information Law	<input type="checkbox"/> 1 Adoption	<input type="checkbox"/> 1 Discipline	<input type="checkbox"/> 1 Assault, Battery, False Imprisonment
<input type="checkbox"/> 2 Human Rights	<input type="checkbox"/> 2 Attorney's Fees	<input type="checkbox"/> 2 Jail Time Calculation	<input type="checkbox"/> 2 Conversion
<input type="checkbox"/> 3 Licenses	<input type="checkbox"/> 3 Children - Support	<input type="checkbox"/> 3 Parole	<input type="checkbox"/> 3 Defamation
<input type="checkbox"/> 4 Public Employment	<input type="checkbox"/> 4 Children - Custody/Visitation	<input type="checkbox"/> 4 Other	<input type="checkbox"/> 4 Fraud
<input type="checkbox"/> 5 Social Services	<input type="checkbox"/> 5 Children - Terminate Parental Rights	G. Real Property	
<input type="checkbox"/> 6 Other	<input type="checkbox"/> 6 Children - Abuse/Neglect	<input type="checkbox"/> 1 Condemnation	<input type="checkbox"/> 5 Intentional Infliction of Emotional Distress
B. Business & Other Relationships		<input type="checkbox"/> 2 Determine Title	<input type="checkbox"/> 6 Interference with Contract
<input type="checkbox"/> 1 Partnership/Joint Venture	<input type="checkbox"/> 7 Children - JD/PINS	<input type="checkbox"/> 3 Easements	<input type="checkbox"/> 7 Malicious Prosecution/Abuse of Process
<input type="checkbox"/> 2 Business	<input type="checkbox"/> 8 Equitable Distribution	<input type="checkbox"/> 4 Environmental	<input type="checkbox"/> 8 Malpractice
<input type="checkbox"/> 3 Religious	<input type="checkbox"/> 9 Exclusive Occupancy of Residence	<input type="checkbox"/> 5 Liens	<input type="checkbox"/> 9 Negligence
<input type="checkbox"/> 4 Not-for-Profit	<input type="checkbox"/> 10 Expert's Fees	<input type="checkbox"/> 6 Mortgages	<input type="checkbox"/> 10 Nuisance
<input type="checkbox"/> 5 Other	<input type="checkbox"/> 11 Maintenance/Alimony	<input type="checkbox"/> 7 Partition	<input type="checkbox"/> 11 Products Liability
C. Contracts		<input type="checkbox"/> 8 Rent	<input type="checkbox"/> 12 Strict Liability
<input type="checkbox"/> 1 Brokerage	<input type="checkbox"/> 12 Marital Status	<input type="checkbox"/> 9 Taxation	<input type="checkbox"/> 13 Trespass and/or Waste
<input type="checkbox"/> 2 Commercial Paper	<input type="checkbox"/> 13 Paternity	<input type="checkbox"/> 10 Zoning	<input type="checkbox"/> 14 Other
<input type="checkbox"/> 3 Construction	<input type="checkbox"/> 14 Spousal Support	<input type="checkbox"/> 11 Other	
<input type="checkbox"/> 4 Employment	<input type="checkbox"/> 15 Other		
<input type="checkbox"/> 5 Insurance	E. Miscellaneous		J. Wills & Estates
<input checked="" type="checkbox"/> 6 Real Property	<input type="checkbox"/> 1 Constructive Trust	<input type="checkbox"/> 1 City of Mount Vernon Charter § § 120, 127-f, or 129	<input type="checkbox"/> 1 Accounting
<input type="checkbox"/> 7 Sales	<input type="checkbox"/> 2 Debtor & Creditor	<input type="checkbox"/> 2 Eminent Domain Procedure Law § 207	<input type="checkbox"/> 2 Discovery
<input type="checkbox"/> 8 Secured	<input type="checkbox"/> 3 Declaratory Judgment	<input type="checkbox"/> 3 General Municipal Law § 712	<input type="checkbox"/> 3 Probate/Administration
<input type="checkbox"/> 9 Other	<input type="checkbox"/> 4 Election Law	<input type="checkbox"/> 4 Labor Law § 220	<input type="checkbox"/> 4 Trusts
	<input type="checkbox"/> 5 Notice of Claim	<input type="checkbox"/> 5 Public Service Law § § 128 or 170	<input type="checkbox"/> 5 Other
	<input type="checkbox"/> 6 Other	<input type="checkbox"/> 6 Other	
	H. Statutory		

Appeal

Paper Appealed From (check one only):

- | | | | |
|---|---|---|---|
| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input checked="" type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgment | <input type="checkbox"/> Finding | <input type="checkbox"/> Order & Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

Court: Supreme Court

County: Queens

Dated: September 25, 2017

Entered: October 3, 2017

Judge (name in full): Robert J. McDonald

Index No.: 707612/2015

Stage: Interlocutory Final Post-FinalTrial: Yes No If Yes: Jury Non-Jury

Prior Unperfected Appeal Information

Are any unperfected appeals pending in this case? Yes No. If yes, do you intend to perfect the appeal or appeals covered by the annexed notice of appeal with the prior appeals? Yes No. Set forth the Appellate Division Cause Number(s) of any prior, pending, unperfected appeals:

Original Proceeding

Commenced by: Order to Show Cause Notice of Petition Writ of Habeas Corpus Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:

County:

Judge (name in full):

Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order

Court:

County:

Judge (name in full):

Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of the proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

This is an appeal from a September 25, 2017 decision and order (entered on October 3, 2017, the "Order") denying Defendants post-discovery motion for summary judgment against the declaratory-judgment complaint of commercial tenant, Plaintiff and for other related relief.

Amount: If an appeal is from a money judgment, specify the amount awarded.

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review.

See next page.

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Issues Continued: The lease included a sentence: "Lease terms to be extended to now terminate on February 28, 2030; terms to be determined at the expiration of this initial lease [i.e., Feb. 2015]." Defendants submit that: (a) "to be determined" is indefinite, and renders the sentence unenforceable, as a matter of law, under "Martin Delicatessen", 52 N.Y.2d 105 (1981), and (b) the Motion Court erred in that instead of evaluating "to be determined" as a matter of law, it determined that the phrase raised "issues of fact."

Use Form B for Additional Appeal Information

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

Examples of a party's original status include: plaintiff, defendant, petitioner, respondent, claimant, defendant third-party plaintiff, third-party defendant, and intervenor. Examples of a party's Appellate Division status include: appellant, respondent, appellant-respondent, respondent-appellant, petitioner, and intervenor.

No.	Party Name	Original Status	Appellate Division Status
1	JUVENAL REIS	PLAINTIFF	PLAINTIFF-RESPONDENT
2	J.B. KAUFMAN REALTY CO., LLC	DEFENDANT	DEFENDANT-APPELLANT
3	43-01 22ND STREET OWNER LLC	DEFENDANT	DEFENDANT-APPELLANT
4			
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Attorney Information

Instructions: Fill in the names of the attorneys or firms of attorneys for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided.

In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: **LAMBERT & SHACKMAN, PLLC**

Address: **274 MADISON AVENUE, SUITE 1302**

City: **NEW YORK** State: **NY** Zip: **10016-0701** Telephone No.: **212 370-4040**

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

1																			
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Attorney/Firm Name: **STEMPEL BENNETT CLAMAN & HOCHBERG, P.C.**

Address: **675 THIRD AVENUE, 31ST FLR.**

City: **NEW YORK** State: **NY** Zip: **10017-5704** Telephone No.: **212 681-6500**

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

2	3																		
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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

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Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

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Use Form C for Additional Party and/or Attorney Information

The use of this form is explained in § 670.3 of the rules of the Appellate Division, Second Department (22 NYCRR 670.3). If this form is to be filed for an appeal, place the required papers in the following order: (1) the Request for Appellate Division Intervention [Form A, this document], (2) any required Additional Appeal Information Forms [Form B], (3) any required Additional Party and Attorney Information Forms [Form C], (4) the notice of appeal or order granting leave to appeal, (5) a copy of the paper or papers from which the appeal or appeals covered in the notice of appeal or order granting leave to appeal is or are taken, and (6) a copy of the decision or decisions of the court of original instance, if any.

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Supreme Court of the State of New York

Appellate Division : Second Judicial Department

Form B - Additional Appeal Information

Use this Form For Each Additional Paper Covered by the Notice of Appeal to be filed with Form A

Paper Appealed From (check one only):

- | | | | |
|---|---|---|---|
| <input type="checkbox"/> Amended Decree | <input type="checkbox"/> Determination | <input type="checkbox"/> Order | <input type="checkbox"/> Resettled Order |
| <input type="checkbox"/> Amended Judgment | <input type="checkbox"/> Finding | <input type="checkbox"/> Order & Judgment | <input type="checkbox"/> Ruling |
| <input type="checkbox"/> Amended Order | <input type="checkbox"/> Interlocutory Decree | <input type="checkbox"/> Partial Decree | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree | |
| <input type="checkbox"/> Decree | <input type="checkbox"/> Judgment | <input type="checkbox"/> Resettled Judgment | |

Court: _____ County: _____

Dated: _____ Entered: _____

Judge (name in full): _____ Index No.: _____

Stage: Interlocutory Final Post-Final Trial: Yes No If Yes: Jury Non-Jury

Description of Appeal

Description: Briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied.

Amount: If the appeal is from a money judgment, specify the amount awarded.

Issues: Specify the issues proposed to be raised on the appeal.

Supreme Court of the State of New York

Appellate Division : Second Judicial Department

Form C - Additional Party and Attorney Information

Additional Party Information			
No.	Party Name	Original Status	Appellate Division Status
21			
22			
23			
24			
25			
26			
27			
28			
29			
30			
31			
32			

Additional Attorney Information

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C):

Form C - RADI - Civil

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V2.0.060293

AFFIDAVIT OF SERVICE

Edmond O'Brien, being duly sworn, says: I am not a party to the action, am over 18 years of age and am employed at Stempel Bennett Claman & Hochberg, P.C., 675 Third Avenue, NY, NY 10017.

On October 11, 2017, I served a true copy of a **DEFENDANTS' NOTICE OF APPEAL WITH COPY OF DECISION AND RADI FORM** in the following manner:

by e-mail on October 11, 2017 to:

Thomas Lambert
Lambert & Shackman, PLLC
274 Madison Avenue, Suite 1302
New York, New York 10016
Attorneys for Plaintiff
Email: TLambert@LambertandShackman.com



Edmond P. O'Brien

Sworn to before me this
11th day of October, 2017

Notary Public

ZAIN A. NAQVI
Notary Public, State of New York
No. 02NA6322819
Qualified in NEW YORK County
Commission Expires 4/13/2019

EXHIBIT B

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D62077
L/htr

_____AD3d_____

Argued - October 7, 2019

MARK C. DILLON, J.P.
JEFFREY A. COHEN
ROBERT J. MILLER
ANGELA G. IANNACCI, JJ.

2017-10961

DECISION & ORDER

Juvenal Reis, respondent, v J.B. Kaufman Realty Co.,
LLC, et al., appellants.

(Index No. 707612/15)

Stempel Bennett Claman & Hochberg, P.C., New York, NY (Edmond P. O'Brien and
Richard L. Claman of counsel), for appellants.

Lambert & Shackman, PLLC, New York, NY (Thomas C. Lambert and Steven
Shaurman of counsel), for respondent.

In an action for a judgment declaring, inter alia, that a certain lease expires on
February 28, 2030, the defendants appeal from an order of the Supreme Court, Queens County
(Robert J. McDonald, J.), entered October 3, 2017. The order, insofar as appealed from, denied
those branches of the defendants' motion which were for summary judgment declaring that the
subject lease expired on February 29, 2016, and to cancel a notice of pendency filed by the plaintiff.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs,
those branches of the defendants' motion which were for summary judgment declaring that the
subject lease expired on February 29, 2016, and to cancel the notice of pendency filed by the plaintiff
are granted, and the matter is remitted to the Supreme Court, Queens County, for the entry of a
judgment, inter alia, declaring that the subject lease expired on February 29, 2016.

The plaintiff and the defendant J.B. Kaufman Realty Co, LLC (hereinafter J.B.
Kaufman), were the tenant and the landlord, respectively, under a lease with respect to certain real
property located in Long Island City. The plaintiff entered into the lease with J.B. Kaufman's
predecessor in interest in 2002. Over the years, the plaintiff and J.B. Kaufman executed various
letter agreements extending the terms of the original lease and providing for the lease of additional

March 11, 2020

Page 1.

space within the subject building.

In a document dated June 27, 2012 (hereinafter the 2012 letter agreement), the parties “consolidate[d] all existing letter agreements to the same expiration date” of February 28, 2015. The 2012 letter agreement also stated that the terms of the lease were “extended to now terminate on Feb. 28, 2030,” with “terms to be determined at the expiration of this initial lease consolidation period.” The 2012 letter agreement further stated that any annual percentage increase in rent will not be less than five percent and will not exceed eight percent. The plaintiff and J.B. Kaufman disagreed about whether the 2012 letter agreement constituted a binding contract under which the plaintiff was entitled to remain in occupancy of the leased premises through February 2030. Despite the dispute regarding the 2012 letter agreement, the plaintiff and J.B. Kaufman agreed that the plaintiff could remain in possession of the premises through February 29, 2016, with a six percent increase in rent.

In July 2015, the plaintiff commenced this action for a judgment declaring that the lease expires on February 28, 2030, and that annual rent increases shall not be less than five percent and shall not exceed eight percent. The plaintiff also filed a notice of pendency with regard to the property. After the building was sold in July 2016, the new owner, 43-01 22nd Street Owner, LLC, was added as a defendant pursuant to a stipulation. The defendants moved, among other things, for summary judgment declaring that the lease expired on February 29, 2016, and to cancel the notice of pendency, contending that the 2012 letter agreement was an unenforceable agreement to agree. The Supreme Court, inter alia, denied those branches of the motion, and the defendants appeal.

A “mere agreement to agree, in which a material term is left for future negotiations, is unenforceable” (*Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109; see *Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91). “This is especially true of the amount to be paid for the sale or lease of real property” (*Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d at 110; see *Olim Realty v Lanaj Home Furnishings*, 65 AD3d 1318, 1320; *410 BPR Corp. v Chmelecki Asset Mgt., Inc.*, 51 AD3d 715, 716). An agreement is not enforceable as a lease unless all of the essential terms are agreed upon, and if “any of these essential terms are missing and are not otherwise discernible by objective means, a lease has not been created” (*Matter of Davis v Dinkins*, 206 AD2d 365, 367; see *Olim Realty v Lanaj Home Furnishings*, 65 AD3d at 1320; *410 BPR Corp. v Chmelecki Asset Mgt., Inc.*, 51 AD3d at 716-717; *Mur-Mil Caterers v Werner*, 166 AD2d 565, 566; *Mulcahy v Rhode Island Hosp. Trust Natl. Bank*, 83 AD2d 846, 847).

Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting, inter alia, a copy of the 2012 letter agreement, which demonstrated that the renewal provision was an unenforceable agreement to agree (see *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d at 110-111; *410 BPR Corp. v Chmelecki Asset Mgt., Inc.*, 51 AD3d at 716). In opposition to the defendants’ prima facie showing, the plaintiff failed to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Accordingly, the Supreme Court should have granted those branches of the defendants’ motion which were for summary judgment declaring that the lease expired on February 29, 2016, and to cancel the notice of pendency.

The plaintiff’s remaining contentions are without merit.

Since this is a declaratory judgment action, we remit the matter to the Supreme Court,

Queens County, for the entry of a judgment, inter alia, declaring that the subject lease expired on February 29, 2016 (*see Lanza v Wagner*, 11 NY2d 317, 334).

DILLON, J.P., COHEN, MILLER and IANNACCI, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court