FILED: QUEENS COUNTY CLERK 02/16/2018 12:40 PM INDEX NO. 707612/2015
NYSCEF DOC. NO. 343 RECEIVED NYSCEF: 02/16/2018

To be Argued by:
RICHARD L. CLAMAN
(Time Requested: 15 Minutes)

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.

BRIEF FOR DEFENDANTS-APPELLANTS

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Queens County Clerk's Index No. 707612/15

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—Second Department

JUVENAL REIS,

Plaintiff-Respondent,

– against –

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

Defendants-Appellants.

1. The index number of the case in the court below is 707612/15.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, Queens County.

4. The action was commenced on or about July 20, 2015 by the filing of a Summons and Verified Complaint. Issue was joined by service of a Verified Answer on or about February 12, 2016.

5. The nature and object of the action is declaratory judgment concerning the length of the term of a commercial lease.

6. This appeal is from the Decision and Order of the Honorable Robert J. McDonald, dated September 5, 2017, which denied Defendants' Motion for Summary Judgment.

7. This appeal is on the full reproduced record.

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DEFENDANTS' APPELLATE BRIEF

J.B. Kaufman Realty Co., LLC ("Prior Owner"), and 43-01 22nd Street Owner LLC ("Current Owner") (collectively, "Defendants"), as the prior owner, and current owner, respectively, of the commercial building known as 43-01 22nd Street, Long Island City, New York (the "Building"), respectfully submit this brief in support of their appeal from the Decision and Order of the Hon. Robert J. McDonald, J.S.C., dated September 25, 2017 (the "Decision," R.5-9) -- which denied Defendants' motion (R.10) for a summary judgment dismissal of the Verified Complaint (R.29-41) of the commercial tenant, Juvenal Reis ("Reis," or "Tenant"), which complaint seeks a declaration that Tenant holds an enforceable lease extension through February 2030 (see R.38, ¶39A).

Preliminary Statement

As shown herein, the Decision's denial of Defendants' motion rested on two clear errors of law -- and once those errors are corrected, then, in accordance with the leading case of "Martin Delicatessen,"[1] the purported 'issues of fact' noted in the Decision evaporate, and judgment as a matter of law should be granted to Defendants.

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

The focus of Defendants' motion was the 'extension sentence' first included in (what the Motion Court called) the "2012 Letter Agreement" (R.80-81) -- which Agreement undisputedly constituted, in other respects not relevant here,[2] a binding amendment to the original lease (R.57-69) for the period from March 2012 through February 2015. That 'extension' sentence stated (R.80):

> Lease terms to be extended [beyond February 2015] to now terminate on February 28, 2030; *terms to be determined* at the expiration of [the present lease, on February 28, 2015].[3]

(We refer to this as the "T-B-D Extension Sentence," or "the Sentence").[4]

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2 As illustrated by Martin Delicatessen, an extension provision is considered an independent lease covenant, and the fact that a particular 'extension provision' is unenforceable does not mean that the balance of that lease agreement was not effective. (This 'independence' concept goes back to Hart v. Hart, 22 Barb. 606 (1856)).

3 All emphasis in material quoted herein is added, unless otherwise noted.

4 As noted infra, Tenant argues that a further provision -- contained in a different and independent context in the 2012 Letter Agreement (as well as in earlier lease amendments), and providing that "Any percentage increase will not be less than 5% annually and not to exceed a maximum cap of 8% annually" (R.80 -- which we will call the "Range Provision") -- should be read-into the new T-B-D Extension Sentence. We show infra (pp. 18-19), however, that, in view of the Range Provision's prior and independent origin and context, it should not be read-into the T-B-D Extension Sentence -- whereupon Tenant's claim
[footnote continues]

As a first, 'procedural,' error, the Decision stated (R.8-9) that the predicate question in this case -- viz. (in the Decision's words) whether this Sentence "authorized the prior owner to unilaterally set the percentage [renewal-period rent] increase at the end of the[5] initial lease consolidation period, or whether the rent was to be negotiated [between landlord and tenant]" -- constituted an "issue[] of fact."

However, as reviewed infra (pp. 46-50), the Motion Court's characterization of this foundational question as an "issue[] of fact" was plainly mistaken, for: (a) the question whether or not a Court should add, to this writing's words (i.e., "to be determined at [a future date]"), the additional words 'unilaterally by Landlord,' as urged by Tenant, is a question of law for the Court[6] -- and even Tenant disavowed below any

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collapses completely at its inception. In any event, however: as reviewed infra (pp. 40-42), and even accepting, arguendo, solely for purposes of Defendants' summary judgment motion and appeal, Reis's alleged understanding of that Range Provision (see pp. 18-19, infra), still, and nevertheless, a rent 'range' is itself too 'indefinite,' under Martin Delicatessen, to give rise to an enforceable extension agreement, so that Tenant's invocation of the Range Provision does not help Tenant.

[5] The Decision, in a typographical error, used both the duplicative phrases "end of the," and "expiration of the."

[6] See generally, e.g., 1550 Fifth Avenue Bay Shoe, LLC v. 1550 Fifth Avenue, LLC, 297 A.D.2d 781, 783, 748 N.Y.S.2d 601 (2d Dep't 2002) ("The interpretation of a contract is a matter of law for the Court."); and Katina, Inc. v. Famiglietti, 306 A.D.2d 440, 441, 761 N.Y.S.2d 327 (2d
[footnote continues]

contention that the Sentence is ambiguous[7]; and (b) the question whether the phrase actually used in the writing, viz., "to be determined at [a future date]," is or is not unenforceably indeterminate under Martin Delicatessen, is likewise an issue of law for the Court.[8]

And second, and as a matter of substantive law: there is no basis for a Court to re-write the T-B-D Extension Sentence (nor to view that Sentence as ambiguous). The Sentence simply did not objectively specify the essential element of a definite price (i.e., rent). Thus the Sentence just does not say, e.g., 'to be determined based on fair market value,' or, 'to be determined by an arbitrator' -- even though (a) the Lease itself, in a different context (R.62, ¶46) provides that any necessary interior electrical work "is to be performed solely by Landlord and charged at fair market value"; and (b) this sophisticated Tenant, in subleases that it granted, regularly

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Dep't 2003).

[7] See, e.g., the opposition affirmation of Tenant's counsel (R.978, ¶13): "Tenant's aforesaid reading of the 2012 Letter Agreement is the only cogent reading of the document.") Apparently, Tenant did not assert 'ambiguity' because even Tenant recognized that, per the Statute of Frauds, a writing is insufficient if parol evidence is needed to construe an essential term, such as price/rent, see pp. 49-50, infra.

[8] See generally, e.g., Banks, N.Y. Contract Law (West's N.Y. Practice Series; 2d ed.) § 2:39: "The Court determines, as a matter of law, whether the definiteness requirement has been met." See also pp. 46-49, infra.

invoked 'objective' standards like "fair market value," and "current market price."[9]

Rather, the Sentence just says, "to be determined at [a future date]" -- without, however, any further specification as to how, as an objective matter, that determination was to be made, nor by whom. But the phrase "to be determined at [a future date]" is clearly indefinite under Martin Delicatessen; and hence the T-B-D Extension Sentence is unenforceable as a matter of law -- see Point II, infra.

Tenant's central opposition argument below was, as the Motion Court noted, that the T-B-D Extension Sentence somehow must now be enforced as if it said that the annual rent increase, beginning as of March 2015, was 'to be unilaterally determined by Landlord (within a range of 5% to 8% per year).'[10]

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[9] See, e.g., Sublease signed by Reis on 12/15/2011, ¶3 (R.966-967), referring to "fair market value" (in determining the amount Reis was to be paid by the subtenant artist for any build-out work); and ¶22 (R.971), referring to "current market price" (for the rent to be due in the event the subtenant held-over). See also R.956-964 (same provisions).

[10] See, e.g., Reis's opposition affidavit ¶32 (R.987):

> The phrase "terms to be determined at the end of this initial Lease consolidation period" meant that on or about February 28, 2015, Prior Landlord would set the rate of annual increase, which would have to be between 5% and 8%.

See also id. ¶7 (R.981).

But, even if the sought-to-be-added phrase 'by Landlord' were sufficient to supply the necessary objective and "extrinsic" (52 N.Y.2d at 544) methodology under Martin Delicatessen (see infra p. 45 fn. 51), that phrase is, in any event, simply not present here; and as a matter of law, there is no basis for the Court to write-in the extra words 'by Landlord.' (One would expect that if the parties to a particular lease had intended to give the landlord such unilateral power, then such a grant would be specifically articulated; but no such grant is stated here.[11])

Rather, as held in Martin Delicatessen (52 N.Y.2d at 111), in words fully applicable here: the T-B-D Extension Sentence's "unrevealing unamplified language" -- i.e., "[i]ts simple words leave no room for legal construction or resolution of ambiguity." What was written was simply indefinite, under long-standing precedent, and hence unenforceable.

In short, there is a 'hole,' as a matter of law, at the center of Tenant's claim for a declaration that it holds an enforceable lease extension through February 2030, for: (a) the T-B-D Extension Sentence did not provide for an objectively

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[11] Contrast, e.g., Lease ¶47 (R.63), which provides that if the demised premises become infested by vermin, Tenant "shall cause the same to be exterminated from time to time to the satisfaction of Landlord, ..." That clause shows both (a) that the parties knew how to grant the landlord unilateral decision-making power, but also (b) that the parties did so only in a very different context.

'definite' rent rate for the 15-year period from March 2015 through February 2030; and (b) the one-year-only agreement that the parties did make, via certain '2014-2015 emails' (R.54-56, reviewed infra pp. 24-29) so as to extend the 2012 Letter Agreement's expiration date (of February 2015) for one (but only one) additional year (i.e., through February 2016), plainly did not include any agreement as to the rent for any subsequent period -- and to the contrary, Reis admitted, in the last of those emails, that the parties "*were unable to agree on the rent for the following years*." (R.54; see infra.)

Accordingly, summary judgment should simply have been granted to Defendants.[12]

Tenant's principal efforts to cover-over this central hole in its case should also have been held to be unavailing, as matters of law relative to the undisputed facts here. In particular:

[12] Both Prior Owner and Current Owner are entitled to rely on the facial unenforceability of the T-B-D Extension Sentence. See, e.g., 30 Carmine LLC v. DePierro, 7 Misc.3d 836, 840-841, 791 N.Y.S.2d 383 (Civ. Ct. N.Y. Co. 2005) (Gesmer, J.) (a successor-in-interest can assert the Statute of Frauds against a writing of its predecessor). See also, Tehan v. Thomas C. Peters Printing Co., Inc., 71 A.D.2d 101, 421 N.Y.S.2d 465 (4th Dep't 1979) (new commercial landlord not bound by prior commercial landlord's unwritten waiver of tenant's obligation to pay rent in a timely fashion); and Stoneybrook Realty LLC v. Cremktco Inc., 176 Misc.2d 589, 675 N.Y.S.2d 749 (AT 2d Dep't 1998) (following Tehan and rejecting commercial tenant's reliance on alleged oral modification by prior owner).

(a) as noted in the Decision (R.7), Tenant had argued that if the T-B-D Extension Sentence were deemed ambiguous, then it should be construed against Landlord (R.978, ¶15). But: (i) Reis has admitted that it was at his request that this Sentence was added to the prior draft of (what became) the 2012 Letter Agreement (R.985, ¶22: "I [Reis] pointed this [need to add the Sentence] out to Roger [Kaufman]"); and (ii) as a matter of law, such participation by a commercial tenant in the drafting process negates application of any 'construction against drafter/landlord presumption' (see pp. 50-52, infra). (It appears that the Decision just missed this point, even though it was duly noted in Defendants' reply memorandum.) Moreover, per Martin Delicatessen (as quoted supra p. 6), a Court should not in any event employ 'construction aids' so as to create an agreement where the parties themselves did not do so (see further pp. 47-50, 50-52, infra);

(b) in Tenant's opposition below, Tenant, for the first time in this case, asserted an entirely new theory (e.g., R.976-977, ¶¶8-10), viz., that Defendants must be estopped from now pointing-out the above-noted legal 'hole' in the T-B-D Extension Sentence, in view of a certain 'whereas'/'recital' clause[13] in a

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[13] The first "whereas" clause in that 2016 "without prejudice" pendente lite Stipulation says that "Whereas by invoice dated March 1, 2015 Landlord set the annual percentage increase of rent under the Lease at 5.4%; and ...." See
[footnote continues]

certain "Stipulation" that the parties entered-into in March 2016 (R.1060-1061) -- i.e., eight months after Tenant had commenced this action (in July 2015) -- to provide for the payment and acceptance pendente lite of certain monthly amounts "without prejudice."

But Tenant's new argument is blatantly without merit, as a matter of law. Indeed, even before examining the Stipulation as a whole (see pp. 32-34, infra), and before reviewing the legal rules as to the (lack of) effect of recital/whereas clauses (see pp. 55-56, infra): it simply makes no sense to imagine that -- after Prior Owner had (a) made a pre-answer motion to dismiss based on Martin Delicatessen (see R.1071-1074, and R.1062-1065) (-- although Prior Owner was not able, per this Court's procedural rules,[14] to therein rely on the concessions made by Reis in the 2014-2015 emails), and (b) filed an answer (R.45-51), reiterating Prior Owner's view that the 2012 Letter Agreement "expire[d] by its terms on February 28, 2015" (R.50) -- nevertheless, in a stipulation providing for monthly payments "without prejudice" while this litigation proceeded, Prior Owner would simply give-away its position (or that the

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infra pp. 32-34, explaining the plain meaning of this recital in context.

[14] Emails are not considered, in this Department, to constitute documentary evidence for purposes of CPLR 3211(a)(1); see p. 31, infra.

parties would thereafter engage in extensive discovery that, according to Tenant's new argument, was entirely superfluous).

In any event, as further shown herein:

(i) Tenant's new argument is refuted as a matter of law when the 2016 pendente lite, "without prejudice," Stipulation is read as a whole, noting in particular that the ensuing "Whereas" par. 3 (R.1060) clearly 'reserved' Defendants' position that "Landlord asserts that the Lease has expired as of February 29, 2016, and that Tenant has no right of renewal thereof"; and

(ii) in any event, as a matter of law, such recital clauses are just not themselves binding (see pp. 55-56). [Again, even though Defendants already thus refuted Tenant's new theory in Defendants' reply papers below, the Decision fails to even mention this refutation, and instead describes Tenant's mischaracterization of the 2016 Stipulation as raising "an issue of fact" (R.8)]; and

(c) the Motion Court, as the last of its supposed "issues of fact" -- and indeed going beyond even what Tenant argued -- speculated (R.8, last sentence of carry-over paragraph) that because, in March 2015, Prior Owner sent a rent bill to Tenant that was, by a de minimis amount (approximately 00.59%) lower than the 6% rent-increase amount set forth in the one-year-only agreement reached in the 2014-2015 emails (R.54-

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56; and see pp. 29-30, infra), then perhaps that one-year-only email agreement was (in the Motion Court's words) "superseded" by some subsequent agreement.

But that speculation as to a "supersed[ing]" agreement is contradicted by the record and the applicable law (as further shown infra pp. 52-55):

(i) pursuant to the 2014-2015 emails -- which show that the parties agreed therein, as a new, separate and independent agreement, to a one-year-only extension (for the period from March 2015 through February 2016) -- Landlord plainly was entitled to bill Tenant for rent for that one year without, however, giving rise to any sort of binding agreement as to any subsequent period, let alone for 14 more years;

(ii) Prior Owner's de minimis underbilling (of approx. $434 per month, relative to the 'correct' amount of $73,728.46) -- which the Complaint did not even notice[15] -- does not, as a matter of

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[15] Strikingly, Tenant's Complaint -- verified by Reis -- had not even noticed this underbilling, but had just alleged (¶30; R.37) that

> Tenant remained in possession of the Premises after February 28, 2015 and paid the 6% rent increase, which Landlord accepted.

It was only (-- albeit without amending its Complaint), after Prior Owner explained that the Sentence was indefinite, that Tenant began to point to the underbilling as supposedly binding against Defendants through 2030.

law, bind Landlord as to any months subsequent to that underbilling (-- which ended with the March 2016 pendente lite "without prejudice" Stipulation); and

(iii) in any and all events, any "supersed[ing]" 14-year agreement would, of course, have to satisfy the Statute of Frauds under GOL § 5-703; but the act of payment and acceptance of rent for several current months (in 2015) just does not constitute a sufficient memorialization of a binding agreement for 14 years thereafter.

The Motion Court's speculation was particularly unwarranted in light of a striking and unusual circumstance here, uncovered only half-way through Reis' deposition (see pp. 34-35, infra) -- viz., that Reis had been surreptitiously making recordings of various of his conversations with Roger Kaufman (see, e.g., R.457, R.482 and R.586). Leaving aside that recordings are not writings for purposes of the Statute of Frauds, clearly, if Reis thought that he had any basis to assert even some oral agreement, even as reflected only in some secret tape recording, as to some "supersed[ing]" agreement, we would have already seen an allegation by Reis to that effect. Particularly since there is no such allegation here (but cf. pp. 27-29, infra), there was no basis for the Motion Court to itself formulate such speculations.

Accordingly, neither Tenant's arguments, nor the Decision's additional speculations, suffice to cover-over the fundamental Martin Delicatessen 'hole' in Tenant's claim.

Thus, to sum-up this introduction, the simple and controlling record facts here, and the applicable conclusions as a matter of law, are that:

a. the T-B-D Extension Sentence, insofar as it envisioned a lease extension for the 15-year period March 2015 through February 2030, albeit on "terms to be determined at [a future date]," thus did not provide for a definite rent; and hence, as a matter of law, that Sentence does not support plaintiff's claim to hold an enforceable lease extension for any periods after the stated expiration of the 2012 Letter Agreement on February 28, 2015 (-- as extended by the one-year-only agreement in the 2014-2015 emails);

b. the 2014/2015 emails show: (i) that the parties agreed to a one-year-only extension, i.e., for the period of March 2015 through February 2016; but (ii) that the parties did not agree upon any rent rate to apply for any subsequent period (-- and insofar as Landlord, beginning in March 2015, i.e., for that agreed-upon one-year extension period, underbilled Tenant by a de minimis amount, that just does not give rise to an enforceable agreement for the subsequent 14 years); and

c. Tenant's new argument, first advanced in its motion opposition papers, to the effect that the first 'recital' clause in the March 2016 "without prejudice" pendente lite Stipulation constitutes a binding estoppel against Defendants, makes no contextual sense, and violates the plain meaning of the Stipulation as a whole, and violates the legal principle that 'recital' clauses do not have binding force.

Accordingly, Tenant's demand for a declaration that it holds an enforceable lease extension through February 2030 should be rejected.

QUESTIONS PRESENTED

1. Where a lease agreement for a 'base' duration also includes a sentence referring to an extension for an additional 15-year duration, but that sentence states only, as to the rent therefor, that the extension-period rent is "to be determined at [a future time, i.e., upon the expiration of the base term]," but without identifying any extrinsic procedure (e.g., an arbitration), or any objective methodology, for determining a specific rent; and the tenant-plaintiff is arguing that the clause must be read as if it said, '(to be determined) by the Landlord': should the question whether the writing sets forth a sufficiently definite agreement as to the rent for that 15-year period, so as to constitute an enforceable 15-year extension agreement under Martin Delicatessen, be decided by the Court as

a matter of law?

The Motion Court mistakenly held that the question whether the writing should be read as if it included the phrase 'by the Landlord' presented "issues of fact."

2. As a matter of law: upon applying Martin Delicatessen to the writing here, does the 'extension sentence,' which provides for the "[rent] to be determined at [a future date]," as written, specify a 'definite' rent amount?

The Motion Court mistakenly failed to reach this question.

STATEMENT OF THE CASE

A. The Parties, And The Relevant Events Prior To The 2012 Letter Agreement

Prior Owner is a family business, whose principal, at the times relevant here, was Roger Kaufman (see, e.g., R.839-843).

Current Owner -- which purchased the Building in July 2016 (R.16-28) -- is an affiliate of Olmstead Properties, Inc., a privately-owned real estate company (see R.12, ¶1).

Juvenal Reis -- who holds, inter alia, a master's degree in hotel management from Florida International University (R.90-91[16]) -- conceived the idea of renting space in the Building, and

[16] Reis also holds management/marketing degrees earned in Brazil and Switzerland (R.89, 91), and a Masters of Fine Arts from Southern Methodist University (R.92).

then sub-letting that space as artist studio space to (over the years) hundreds of different subtenants.[17] (In short, Reis is a sophisticated operator.)

Accordingly, in the period 2002-2007, Prior Owner and Tenant entered into an original lease (R.57-69), and then a sequence of short expansion/extension agreements (R.70-79).[18] 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 total rentable area.

These different expansions/extensions ended on the single end-date of February 28, 2015.[19]

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[17] In Reis's own words: "I'm an entrepreneur that manages a space that rents studios for artists" (R.99). See also R.337:

> Sir, I'm a marketing person. * * * I have a master's degree in business and I studied marketing and I understand how the market behaves.

[18] These were dated as follows: April 16, 2002 (R.70); April 15, 2002 (R.71); July 24, 2003 (R.72); March 9, 2004 (R.73); January 13, 2005 (R.74); November 30, 2006 (R.75); page double-dated Nov. 30, 2006 and September 1, 2007 (R.76); and a separate page, likewise double-dated Nov. 30, 2006 and Sept. 1, 2007 (R.77).

[19] The end-date clause, as already set forth in the '2006 Amendment' (R.75), and reiterated in the 2012 Letter Agreement (R.80), states:

> All rental of said space is due to terminate as of Feb. 28, 2015 as that is the latest date of all agreements, and it is the purpose of this document to consolidate all existing letter agreements to the same

[footnote continues]

B. The 2012 Letter Agreement

The focus of this litigation is the so-called 2012 Letter Agreement (R.80-81), and the prior (signed) 'draft' thereof, of the same date (R.78-79).[20] The first version (R.78-79) added (relative to the 2007 amendment, R.77) a ninth space, on the 2nd floor, likewise for a term to expire on February 28, 2015, and a provision relating to the build-out of that space. And then Reis (R.985, ¶22)[21] asked Roger Kaufman to also add thereto the T-B-D Extension Sentence;[22] and when Roger did so, that agreement was executed.[23]

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expiration date for all occupied space including space added after the date of this letter.

[20] Both documents are triple-dated, i.e., as of Nov. 30, 2006, Sept. 1, 2007, and June 27, 2012.

[21] Reis opp.aff. ¶22 (R.985) states that the prior document (i.e., R.78-79) "incorrectly did not" include a sentence concerning an extension to 2030, and "I pointed this out to Roger [Kaufman]." See also, e.g., R.292, where Reis noted that he had also, on prior occasions, initiated changes in respect of drafts of other prior agreements as well.

[22] The T-B-D Sentence states:

> 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., as of Feb. 28, 2015].

[23] The question why Tenant requested, and Roger Kaufman agreed, to add the T-B-D Extension Sentence is irrelevant: since the T-B-D Extension Sentence is objectively unenforceable, the parties' possible motives for preparing a writing that clearly does not suffice to create a binding extension agreement are irrelevant. See, e.g., Grand Bank for Savings, FSB v. Araujo Familia, Inc., 2012 WL 6888208

[footnote continues]

[As noted above (fn. 4), Tenant argues that the T-B-D Extension Sentence must be deemed to incorporate a physically-separate, and pre-existing, provision of the 2012 Letter Agreement, viz., the 'between 5% and 8%' Range Provision;[24] and Tenant then argues, in effect, that the Sentence must be read as if it said that the rent-increase figure for the entire 2015-2030 period had to be unilaterally picked, by March 2015, within this range, by the Landlord. Leaving aside, however, for the

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(Sup. Ct. Suffolk Co.) (holding: "The circumstances which motivated" the alleged oral agreement were irrelevant to the objective point that the alleged "representation ... was 'nothing more than negotiations, or an agreement to agree'"); see also, e.g., State Bank of Chittenango v. Central National Bank, Canajoharie, 202 A.D.2d 828, 609 N.Y.S.2d 381 (3d Dep't 1994), and pp. 38-39, infra.

In any event, however, we note that, when he was asked this question at his deposition, Prior Owner's principal, Roger Kaufman, explained (R.889-890) that Reis said that he (Reis) was requesting the T-B-D Extension Sentence to make Tenant 'look good' for Tenant's potential investors, but without binding Landlord.

[24] The Lease documents show that, in context, the Range Provision is part of a certain "Renewal Clause" that had first appeared in an earlier '2006 amendment' (R.75; see also R.76 and R.77), and which was located at the foot of the first page of the 2012 Letter Agreement, as follows (R.80):

> 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.

moment, that even a 'range provision' is considered indefinite and unenforceable under Martin Delicatessen (see infra pp. 40-42), the accompanying footnote reviews why Tenant's proposed 'incorporation' of the Range Provision into the Sentence is, in any event, without merit, on the face of the Lease documents considered as a whole.[25]]

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[25] Given the independent pre-existence, and separate context, of that Range Provision (see fn. 24), relative to the T-B-D Extension Sentence as first added in 2012 (and located on the top half of R.80), there is no good reason to read the Range Provision into the Sentence; and conversely, if such incorporation were what the parties had intended, it would have been simple enough to have included such a cross-reference within the Sentence -- but there is no such cross-reference.

[Moreover, even if, arguendo, the Range Provision were to be incorporated into the T-B-D Extension Sentence: Roger Kaufman consistently explained -- both in deposition (R.877), and in one of Reis's secret recordings (see infra pp. 34-35) (R.689) -- that the "terms to be determined at [a future date]," per the Sentence, included not only the annual rent-'bumps' that would be required, but also the new starting base rent amount as of March 2015. While Reis has asserted that the new base rent was already fixed by the 2014-2015 amount, (a) this Court does not have to reach this second-level fact dispute in order to decide that the T-B-D Extension Sentence just does not 'incorporate' the Range Provision; and (b) in any event, our point infra (pp.40-42), that a range provision is in any event insufficient as a matter of law, assumes arguendo Reis's allegations in all the foregoing respects.]

As for the Renewal Clause itself, Tenant is not relying thereon, for, as Reis recognized (see R.319-320, 499): independent of the issue of the indeterminacy of 'rent' that is the focus herein, the Renewal Clause is in any event unenforceably indefinite, because even its duration is not specified, but rather is left open. See, e.g., 410 BPR Corp. v. Chmelecki Asset Management Inc., 51 A.D.3d

[footnote continues]

As a last point concerning the T-B-D Extension Sentence: Tenant has suggested that the Martin Delicatessen rule should not apply here because the 2012 Letter Agreement was negotiated by the business principals (i.e., Roger Kaufman and Juvenal Reis) without the presence of lawyers. But, as held already back in 1917,[26] the tenant's lack of counsel is not a basis to enforce an indefinite writing:

> Plaintiffs are presumed to have known the law, and certainly could easily have procured expert advice upon the subject. If they failed to do this, ... they cannot be heard to complain ... that they misunderstood the legal import of their contract.

Moran v. Wellington, 101 Misc. 594, 595, 167 N.Y.S. 465 (Sup. Ct. Steuben Co. 1917).

Moreover, Reis is concededly a sophisticated business-

715, 859 N.Y.S.2d 209 (2d Dep't 2008), holding that a renewal option "for an additional term to be agreed upon by the parties" was indefinite, and hence unenforceable.

[26] As noted in Dolan, Rasch's [New York] Landlord & Tenant (5th ed. 2017) §§ 11:14, 11:17. (See also infra fn. 44.)

See also Tenber Assoc. v. Bloomberg L.P., 51 A.D.3d 573, 859 N.Y.S.2d 61 (1st Dep't 2008) ("Tenber v. Bloomberg"), discussed infra fn. 48), where (i) that tenant, too, had sought to raise, as an 'excuse,' that the alleged temporary lease extension agreement there was made just between the two business principals, i.e., without lawyers (see, e.g., 2008 WL 5933318 at 6, 14-15); but (ii) the First Department nevertheless held that the alleged agreement was unenforceable under Martin Delicatessen.

person; and he also admitted that he had ready access to "lawyers": see, e.g., his February 11, 2015 email (R.54, bottom); and R.632 ("I spoke with four lawyers").

Thus, in short, there is no basis in the record for the Motion Court to have avoided applying Martin Delicatessen here.

* * *

While Defendants' primary contention here is that the T-B-D Extension Sentence is indefinite as a matter of law (-- and as an objective matter, i.e., regardless of any party's intent, see infra pp. 39-40), Defendants also submit that this Court, as an alternative basis for reversal of the Decision,[27] can determine that Reis, in his deposition testimony, conceded that he understood, in 2012, that the T-B-D Extension Sentence did not itself provide any mechanism for determining the annual rent increases that would apply after February 2015, and that some further agreement between the parties would be necessary to give rise to any enforceable extension agreement for any periods after February 2015.

Thus Reis testified (R.425-426):

[27] See, e.g., Taylor v. New York City Transit Authority, 19 A.D.3d 478, 798 N.Y.S.2d 467 (2d Dep't 2005) (plaintiff could not avoid summary judgment by posing multiple "contradictory theories"); and similarly Allen v. Robinson, 2011 WL 5022819 at *5 (S.D.N.Y. 2011).

> Q. Could you tell me, as of the date that you signed that contract, that you contend is a contract, what the rent would be that you would have to pay as of March 1, 2015?
>
> A. It would be whatever I was paying in February [2015] plus whatever we agreed on our conversation.
>
> Q. So you would had to agree with Mr. Kaufman?
>
> A. We had to agree.[28]

See also, e.g., R.430:

> Q. ... as of the date you executed the [2012 Letter] agreement ... th[ere] would have to be an agreement that you reached later with Mr. Kaufman, correct?
>
> A. Correct.

* * *

[28] In respect of both of his above-quoted answers, Tenant, in his purported 'errata' changes (R.953 -- which were promptly rejected by Defendants, R.954-955), attempted to in effect 'erase' these concessions, by 'adding,' at the end of each, an assertion that such 'agreement' was only "in order to avoid litigation." The supposed "reason" given in the 'errata' sheet for these changes is a three-word assertion: "[t]o disclose context." Reis further asserted below (in his opposition memorandum, NYSCEF #312 at 41) that in 2014-2015 he agreed to various matters only "to avoid [the] litigation" that would otherwise have been triggered by Prior Owner's supposedly unjustified new demands in 2015. But that proffered 2014-2015 "context" 'explanation' makes no sense here, for our questions concerned Reis's understanding as of 2012. Accordingly, the 'errata' should be stricken, see, e.g., Ashford v. Tannenhauser, 108 A.D.3d 735, 736, 970 N.Y.S.2d 65 (2d Dep't 2013); and Horn v. 197 5th Ave. Corp., 123 A.D.3d 768, 770, 999 N.Y.S.2d 111 (2d Dep't 2014). And thus Reis indeed contradicted his primary theory.

For completeness, we note that Tenant has also pointed to two other sentences in the 2012 Letter Agreement, as supposedly showing that the parties intended, as a general matter, 'to be bound' by that Agreement (see R.975-976, ¶7). But those two sentences are not relevant here: as noted above (fn. 2), a lease agreement can be binding in respect to, e.g., the additional 2nd floor space newly added in 2012, independent of the (in)sufficiency of an 'extension sentence' like the T-B-D Extension Sentence.[29]

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[29] Tenant points (see, e.g., R.986, ¶26) to the first sentence of the 2012 Letter Agreement, which states (R.80):

> all terms and provisions provided for within the original lease between the parties [i.e., R. 57-69] shall remain in full force for all further and future space taken within the same [Building].

But the question here does not concern an agreement as to additional "space"; rather, it concerns the enforceability of a new sentence in the 2012 Letter Agreement concerning additional time -- and the T-B-D Extension Sentence is clear that, inter alia, the rent for that future time will need to be different from the 2012-2015 rent.

Hence, this 'opening' sentence is irrelevant here.

Tenant also pointed below (e.g., R.975-976, ¶7; R.988, ¶35) to a fragment, out of context, of the final sentence in the 2012 Letter Agreement, as supposedly showing the parties' subjective intent to be bound through 2030.

Read, however, in full: the last sentence of each of the two prior agreements (R.76, double-dated November 30, 2006, and September 1, 2007; and R.77, same double-date, but adding space #8), and of the 2012 Letter Agreement (R.81), concerns the separate issue of Reis's personal guaranty:

[footnote continues]

C. The 2014/2015 Emails, And Landlord's Rent Bills In The March 2015 - February 2016 Year

In 2014/2015, as shown in an exchange of emails (duly subscribed by Reis and by Roger Kaufman, respectively)[30]: (i) the parties negotiated, and agreed to, a new 6%-increase rent rate, albeit only for a 1-year extension (i.e., through February 2016); but (ii) although they tried to reach an agreement extending beyond that, they were unable to reach any such further agreement. Thus:

(a) Prior Owner's email in November 2014 (R.55) had stated that Prior Owner was agreeing to extend the lease at a 6% increase, "*but based on a single one year renewal at the present*

> Therefore, the balance of security required of [-- specific numbers updated in each agreement] is to be in the form of a personal guarantee from Juvenal Reis, his heirs and/or assigns as to this lease agreement, and the signing of same is considered legal and binding to the parties involved.

In short: (i) this sentence, in context, is irrelevant to Reis's subjective intent concerning the enforceability of the T-B-D Extension Sentence; and (ii) in any event, such subjective intent to be bound is not relevant with respect to the objective definiteness test under Martin Delicatessen, see infra pp. 39-40. (And again, notwithstanding that Defendants had already made these points in Defendants' reply mem. below, the Decision [cf. R.6] just repeats Reis's misquotation.)

30 Tenant does not dispute that even if the one-year-only extension for March 2015 - February 2016 needed to be in writing, the key emails here (see R.55 and R.54) were sufficiently subscribed by Reis and Kaufman, see, e.g., Rosenfeld v. Zerneck, 4 Misc.3d 193, 195-196, 776 N.Y.S.2d 458 (Sup. Ct. Kings Co. 2004).

time"; and Prior Owner noted further that the lease term accordingly would "expire February 29, 2016";[31] and

(b) Reis's response on February 20, 2015 (R.54) -- i.e., after an email (Feb. 11, 2015; R.54) in which Reis stated that he had consulted with counsel (-- indeed, "four different lawyers," R.632) -- conceded that, while the parties had agreed "that the fixed rent for the year of March 1st 2015 to February 29th 2016 will increase by 6%, *we were unable to agree*

[31] The e-mail exchange between Landlord to Tenant in Nov. 2014 had stated (in chronological order) (R.55-56):

> From: JUVENAL REIS <juvenalreis@mac.com>
> To: Roger Kaufman <maddstorkk@aol.com>
> Sent: Sat, Nov 15, 2014 1:20 pm
> Subject: Last meeting
>
> Hi Roger,
> I wanted to follow up on our last meeting regarding my lease rate adjustment for the coming years. I am confirming that we have agreed on a 6% rent increase starting February 28th 2015.
>
> Based on our agreement, I am communicating to my artists the new rent increase for the 2015.
>
> Please let me know if this is correct.
> Thank you
> Juvenal Reis
>
> * * *
>
> From: [Landlord] maddstorkk <maddstorkk@aol.com>
> To: juvenalreis <juvenalreis@mac.com>
> Subject: Re: Last meeting
> Date: Mon, Nov 17, 2014 11:00 am
>
> Yes this is correct but based on a single one year renewal at the present time. General lease extended to expire Feb. 29, 2016. * * *
>
> Roger

on the rent for the following years. I am hopeful we can work this out."[32]

In his deposition, Reis (a) authenticated these emails, and (b) confirmed that they showed an agreement for only one year.[33] See, e.g., R.350-351:

> Q. I'm asking you to read the e-mail that is from Roger to you dated November 17th, 2014. * * * So are you saying that this e-mail from Mr. Kaufman represents an agreement extending out to 2030?
>
> A. No.
>
> Q. Well, did you testify earlier that you were going to pay 6 percent rent from 2015 to 2030, correct?

---

32 Thus, Tenant's February 20, 2015 email stated (R.54):

> From: JUVENAL REIS <juvenalreis@mac.com>
> Date: February 20, 2015 at 16:43:40 EST
> To: [Landlord] "maddstorkk@aol.com" <maddstorkk@aol.com>
> Subject: Re: Last meeting
>
> "Roger--Regarding our meeting on Feb. 18, while we reconfirmed that the term of the Lease has been extended to Feb. 28th, 2030, and that the fixed rent for the 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.*"
>
> Regards
> Juvenal Reis

33 See also, e.g., the exchange preserved in one of Reis's secret recordings (R.690):

> Roger Kaufman: The other 14 years haven't been defined yet.
>
> Juvenal Reis: And then we have to work on that.

A. Uh-huh.

Q. Is that what Mr. Kaufman says in his e-mail?

A. No.

Q. What does he say?

A. He says 2016.[34]

However, apparently realizing that his above-quoted deposition concession (viz., that there was no agreement beyond February 2016) 'sank' his case, Reis then asserted that he and Roger Kaufman had reached a subsequent (i.e., post-emails) oral

[34] Tenant has asserted that the 2014-2015 emails must be placed in the supposed context where Reis felt that: (i) Landlord was somehow obligated to 'pick a number' for the 2015-2030 period, but had failed to do so, and (ii) Landlord thereby was placing Tenant under 'duress.' [Cf. Reis opp.aff. ¶44 (R.991): "At this point I basically panicked."]

But, even if, arguendo, Reis had entered into the 2014-2015 one-year-only email agreement only under duress, that does not in any event help him here -- because if there had been no such one-year-only agreement, then the Lease simply would have ended on February 28, 2015. In other words, a 'duress' argument doesn't help Reis to show an actual lease extension agreement, at a definite rent, for the further period March 2016 - February 2030.

Moreover, and in any event, any claim of duress is refuted by the documents and chronology here: (i) as a predicate matter, there was no obligation in the T-B-D Extension Sentence requiring Landlord to pick a rent number for any period after February 2015, let alone for 15 more years; and (ii) the facts that the 2014–2015 email negotiations extended over a period of several months, and that Tenant has admitted that he was able to consult with counsel (indeed, "four different lawyers," R.632) in that time, negate any excuse of duress, see, e.g., C.B.S. Rubbish Removal Co., Inc. v. Winters Waste Services of N.Y., Inc., 18 A.D.3d 790, 797 N.Y.S.2d 501 (2d Dep't 2005).

agreement applicable to the following 14 years (R.411-412):

> Q. When you were negotiating the increase here in November that's memorialized in these e-mails, isn't it true that Mr. Kaufman said that that 6 percent increase was only valid for one year between March 2015 and February 2016?
>
> A. No, sir, it is not true.
>
> Q. That is not what he said in the e-mail?
>
> A. That is what he said, but he changed later on when I came personally to talk to him, I came with the contract, he said, oh, I changed my mind.
>
> * * *
>
> Q. When was that conversation?
>
> A. I don't remember.
>
> Q. Where did that conversation take place?
>
> A. In his office.
>
> Q. And who was present during that conversation?
>
> A. Roger and I.
>
> * * *
>
> Q. Do you have a written communication memorializing that conversation?
>
> A. No, I don't.

But, as we explained in our moving papers below, such an alleged oral lease extension agreement, which would supposedly be effective for fourteen years, is unenforceable, both under GOL § 15-301, giving effect to the Lease's requirement (in ¶21; R.60) that any modifications are required be in writing, and

under general Statute of Frauds principles.[35]

* * *

Following the 2014-2015 emails agreement, Landlord sent a rent bill to Tenant for March 2015 (R.1044) -- although the bill was actually for approx. $434 -- or 00.59% -- less than the 6% increase amount.[36] Tenant never complained about this underbilling -- and indeed, as noted above (fn.15), Complaint ¶30 (R.37), as verified by Reis (R.41), did not even notice the de minimis underbilling. Nor would Tenant have had any basis to have complained, since that underbilling was in its favor. And as reviewed below (pp.52-55), this underbilling cannot, as a matter of law, be deemed, in the face of the Statute of Frauds,

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[35] See, e.g., Rouzani v. Rapp, 203 A.D.2d 446, 610 N.Y.S.2d 600 (2d Dep't 1994):

> The Statute of Frauds (General Obligations Law § 5-703[2]) provides that a lease for more than one year is void unless the lease or some memorandum thereof is in writing subscribed by the party to be charged or a lawful agent with written authorization. To satisfy the Statute of Frauds, a memorandum evidencing a contract must state the entire agreement with such certainty that the substance thereof will appear from the writing alone [citation omitted].

See also, e.g., Carmon v. Soleh Boneh Ltd., 206 A.D.2d 450, 614 N.Y.S.2d 555 (2d Dep't 1994); and 410 BPR, supra fn. 25, 51 A.D.3d at 717.

[36] The base rent amount billed in February 2015 was $69,555.15 (R.1043). A full 6% increase therefrom would have been $73,728.46. The March 2015 base rent bill was for $73,294.33 (R.1044). As a percentage of the 'correct' new rent, this underbilling amounted to a de minimis 00.59%.

to constitute (in the words of the Motion Court) a "supersed[ing]" agreement. To the contrary, Reis admitted in his deposition that his payments were made and accepted pursuant to the 2014-2015 emails (R.662):

> Q. And did you pay rent under that [2014-2015 emails] agreement?
>
> A. Yes.
>
> Q. Did Mr. Kaufman accept the rent under that agreement?
>
> A. Yes, he did accept.

D. The Complaint, And Prior Owner's Pre-Answer Motion To Dismiss

Tenant's July 2015 complaint (R.29-41), as augmented/ amended by Tenant's subsequent affidavits (e.g., R.974-979, and R.980-996),[37] in summary, alleges that:

(i) the T-B-D Extension Sentence must be deemed to mean that (a) the annual rent-increase-rate for the period 2015-2030 was to be determined by Landlord's unilateral choice of a rate (between 5% and 8%), and (b) once made by Landlord, that rate-

[37] As noted above, the Complaint never mentions, inter alia, (i) the 'underbilling' in March 2015, nor (ii) the 2014-2015 emails. And the 2016 "without prejudice" pendente lite Stipulation, which Tenant below asserted as a new argument, obviously post-dates the Complaint. (See also R.305, where Tenant's counsel asserted: "it doesn't matter what it [the Complaint] says.")

choice would necessarily be binding for each of the next 15 years;[38] and

(ii) Landlord then proceeded to "set" such a 15-year annual-increase rate of 5.4%, "by billing [Tenant] for the month of March 2015" at that rate (Reis opp.aff. ¶9; R.982; and ¶48, R.992).

Based on the face of Complaint (i.e., before Reis's subsequent augmentations/amendments), Prior Owner had moved to dismiss, in reliance on Martin Delicatessen (see R.1071-1074).

Prior Owner's pre-answer motion was obviously limited, however, by this Department's rule that emails do not constitute 'documentary evidence'[39]; and Motion Court denied the motion to dismiss (see R.1062-1065) -- noting that a declaratory judgment action is a recognized means for resolving commercial landlord-tenant disputes (R.1064). (See also fn. 48, infra.)

E. The 2016 "Without Prejudice" Pendente Lite Stipulation

Shortly after Prior Owner filed its answer (in February

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38 See fn. 10, supra, quoting from Reis opp.aff. ¶32 (R.987); and see also, e.g., id. ¶7 (R.988), and ¶¶47-50 (R.992).

39 See, e.g., JBGR, LLC v Chicago Title Ins. Co., 128 A.D.3d 900, 11 N.Y.S.3d 83 (2d Dep't 2015). See generally D. Siegel, N.Y. Practice § 259 (5th ed., 2017 supp.), noting a split between First Department and Second Department in this regard.

2016, R.45-51), and with the one-year-only agreement set forth in the 2014-2015 emails expiring, the parties entered into the March 2016 "without prejudice" pendente lite Stipulation.

In its opposition below, as a brand-new argument in this case, Tenant asked the Motion Court to look at only the first recital ("whereas") clause in that Stipulation (R.1060-1061), which states that "WHEREAS by invoice dated March 1, 2015 Landlord set the annual percentage increase of rent under the Lease at 5.4%; and ..." (¶¶8-10, R.976-977). Moreover, Tenant insisted (see ¶9, R.976-977, with its "*N.B.*," and highlighting) that this first recital must be construed in a manner that is plainly circular: according to Tenant, this recital cannot possibly just refer to the one-year-only extension of the Lease agreed-to in the 2014-2015 emails, because, Tenant says, the reference therein to "the Lease" can only refer to (what Tenant asserts was) the binding 15-year lease extension that the parties supposedly had already agreed-to back in 2012.

However, Tenant's argument is plainly without merit, even just considering the Stipulation itself -- albeit reading it in its entirety. Contrary to Tenant's 'circular' theory, Prior Owner plainly did understand that "the Lease" referred to the Lease as extended only for the one-year-only term, because the third recital/"whereas" then recited:

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> WHEREAS, Landlord asserts that the Lease has expired as of February 29, 2016 and that Tenant has no right of renewal thereof; ....

Thus, in context, the reference in that first recital clause to a 5.4% rate simply reflects the historical facts (i.e., without any concessions going forward) that (a) per the email exchange in 2014-2015, the parties had agreed that the rent increase for the one-year-only period of March 2015-February 2016 would be 6.0%, but (b) Landlord's actually billing was for a de minimis amount (approx. $434 per month) less -- and Tenant did not complain, nor was that underbilling 'binding' as to the future.

[Indeed, the amount that Stipulation ¶1 (R.1060-1061) calls for Tenant to pay going forward, pendente lite, is not based on the prior (March 2015 - February 2016) year increase of 5.4%, but rather on annual increases of 6.4%; and Tenant has indeed been billed at, and has been paying, that higher figure (see R.1093-1133).]

Moreover:

a. on a practical level, as noted above: it makes no sense, after Prior Owner had made a pre-answer motion to dismiss, and had filed an answer, both consistently denying that there was any enforceable lease beyond February 2016, that Prior Owner would then just give-away its opposition by entering into

a stipulation to such an effect;

b. as the operative matter: Stipulation ¶1 (R.1060-1061), in providing for monthly payments pendente lite (i.e., now that the one-year-only extension in the 2014-2015 emails had ended), states that the payments by Tenant of, and acceptance by Landlord of, ongoing monthly payments, while this litigation continues, shall be "without prejudice"; and

c. in any event, and as a matter of law, statements in recital/whereas clauses are just not binding; see pp. 55-56, infra.

Accordingly, the Motion Court's belief that the 2016 Stipulation raised an issue of fact (R.8): (a) failed to address Defendants' refutations of Tenant's new argument, as already contained in our reply papers below; and (b) in any event, as summarized here, was simply mistaken.

F. Discovery

The Decision noted (R.6) that the deposition of Reis extended over multiple sessions. What the Decision did not say, however -- but is obvious from reading the transcripts (R.82-952) -- is that the multiple sessions were necessitated because, inter alia:

1. Reis and his lawyer walked out of the first session (R.161) -- and it was later revealed (R.190-200) that they did

so because Reiss had failed to turn over what he regarded as his 'master' set of 'lease' documents (see, e.g., R.299);

b. Reis and his lawyer also walked out of a follow-up session (R.438, 457) -- and it was later revealed that they did so because Reis had secretly recorded (on his iPhone) various conversations with Roger Kaufman (R.482, 586), but had failed to disclose, let alone produce, those recordings; and

c. Reis failed to produce, until the very last minute, any of his subleases (see R.281-282, 311-312, 424-425, and R.805-809).

Promptly upon conclusion of this discovery, Defendants made their summary judgment motion.

ARGUMENT

I. SUMMARY JUDGMENT SHOULD BE GRANTED TO A MOVANT/DEFENDANT WHEN, AS HERE, THERE IS A 'HOLE' IN THE PLAINTIFF'S CASE

It is not necessary for a summary-judgment defendant-movant to establish that there are no fact issues anywhere in the case: rather, all that the movant needs to do, in order to prevail, is to "negat[e] at least one essential element of the plaintiff's claim," Rosabella v. Metropolitan Transit Authority, 23 A.D.3d 365, 366, 804 N.Y.S.2d 771 (2d Dep't 2005) (citations omitted).[40]

[40] See similarly, e.g., DeSimone v. South African Marine [footnote continues]

And here, the documentary record (including, for this purpose, the T-B-D Extension Sentence itself, the 2014-2015 emails,[41] and plaintiff's own deposition concessions), shows that there is a Martin Delicatessen 'hole' in plaintiff's case, independent of any other potential issues.

II. AS A MATTER OF LAW, THE T-B-D EXTENSION SENTENCE IS INDEFINITE AND UNENFORCEABLE UNDER MARTIN DELICATESSEN

A. The Martin Delicatessen 'Definiteness' Rule

As a general matter: in order to give rise to an enforceable lease (or to an enforceable lease modification[42]),

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Corp., S.A., 82 A.D.2d 820, 821, 439 N.Y.S.2d 436 (2d Dep't 1981); and Orphan v. Pilnik, 66 A.D.3d 543, 544, 887 N.Y.S.2d 66 (1st Dep't 2009), aff'd, 15 N.Y.3d 907, 914 N.Y.S.2d 729 (2010).

41 Emails and other correspondence can and should be considered at the summary judgment stage. Thus, see, e.g., 410 BPR Corp., supra fn. 25, where the Second Department reversed the motion court, and granted summary judgment in favor of the landlord based on Martin Delicatessen, upon considering "a copy of the subject lease" and "the correspondence exchanged between the parties" (51 A.D.3d at 716-717).

See also, relying on emails in granting summary judgment: e.g., Thor Properties, LLC v. Willspring Holdings LLC, 118 A.D.3d 505, 988 N.Y.S.2d 47 (1st Dep't 2014); and Codrington v. Wendell Terrace Owners Corp., 118 A.D.3d 844, 845, 988 N.Y.S.2d 237 (2d Dep't 2014).

42 The same rules apply whether the 2012 Letter Agreement is considered as a new lease agreement, or as a modification of the original Lease. See, e.g., Mary Matthews Interiors, Inc., v. Levis, 208 A.D.2d 504, 506, 617 N.Y.S.2d 39 (2d Dep't 1994); and Beacon Terminal Corp. v. Chemprene, Inc., 75 A.D.2d 350, 354, 429 N.Y.S.2d 715 (2d Dep't 1980).

it is necessary and essential that the parties have reached agreement on each and all of the essential terms. See, e.g., Davis v. Dinkins, 206 A.D.2d 365, 366-367, 613 N.Y.S.2d 933 (2d Dep't 1994) ("In order for an agreement, oral or written, to be enforceable as a lease, all the essential terms must be agreed upon. These essential terms include the area to be leased, the duration of the lease, and the price to be paid [citation omitted]. If any of these essential terms are missing and are not otherwise discernible by objective means, a lease has not been created [citations omitted].")

Accord, e.g., Mur-Mil Caterers, Inc. v. Werner, 166 A.D.2d 565, 560 N.Y.S.2d 849 (2d Dep't 1990) (discussed further infra p. 44).[43]

Accordingly, if the document in question (or relevant portion of the document, concerning a particular 'extension' time period) leaves the rent amount/rate therefor indefinite, then the writing does not give rise to an enforceable lease for that time period. As stated in Martin Delicatessen (52 N.Y.2d

[43] See also, e.g., Olim Realty v. Lanaj Home Furnishings, 65 A.D.3d 1318, 1320, 885 N.Y.S.2d 750 (2d Dep't 2009) ("Contrary to the Supreme Court's determination, the memorandum agreement dated December 31, 2001, was insufficient to satisfy the statute of frauds because it was "a mere agreement to agree," and did not contain all of the essential terms of a complete agreement, such as the amount of rent due" [citations omitted].").

at 110) (internal citations omitted): "[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable. This is especially true of the amount to be paid for the sale or lease of real property."

Accord, e.g., Mulcahy v. Rhode Island Hospital Trust National Bank, 83 A.D.2d 846, 441 N.Y.S.2d 752 (2d Dep't 1981) (reversing the motion court for its failure to have granted summary judgment in favor of the landlord, and holding that an option to renew at a "mutually agreeable rent to be agreed upon" was unenforceable, citing Martin Delicatessen.)[44]

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[44] A leading treatise, Dolan, Rasch's [New York] Landlord and Tenant (5th ed.) § 11:17, traces this rule back to 1917, citing to Moran v. Wellington, supra p. 20.

Defendants agree, of course, that, under Martin Delicatessen, it is sufficient if two parties have agreed, in their document, either upon (i) an objective standard, e.g., 'fair market value,' (as in the Subleases granted by Reis, see fn. 9 supra); or (ii) an objective procedure that implicitly incorporates such an objective standard, e.g., "arbitration" [as in Tenant's favorite citation below, In re 166 Mamaroneck Ave. Corp. v. 151 East Post Road Corp., 78 N.Y.2d 88, 571 N.Y.S.2d 686 (1991), which simply enforces an arbitration clause].

But no such objective extrinsic mechanism is specified here; and so In re 166 Mamaroneck is accordingly not applicable here. See, e.g., Carione v. Hickey, 133 A.D.3d 811, 20 N.Y.S.3d 157 (2d Dep't 2015), reversing the motion court's failure to have granted summary judgment, noting In re 166 Mamaroneck, but yet following Martin Delicatessen, and concluding that defendant's "representation ... was too vague and indefinite to constitute an enforceable contract."

It should be stressed that, as explained therein, Martin Delicatessen is based upon an 'objective' theory of contracts, i.e., as viewed from the perspective of the courts; and the courts should not, and will not, supply key contract elements -- and especially the key element of rent or price -- that the parties failed themselves to provide, regardless of the parties' alleged subjective expectations.[45]

[45] As summarized in Palumbo v. Donalds, 194 Misc.2d 675, 681, 754 N.Y.S.2d 856 (Civ. Ct. Kings Co. 2003) (discussed further infra pp. 53-54):

> It is axiomatic that "the existence of a binding contract is not dependent on the subjective intent" of the parties [citations omitted].

Thus Martin Delicatessen wrote (52 N.Y.2d at 109):

> Before the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained. Otherwise, a court, in intervening, would be imposing its own conception of what the parties should or might have undertaken, rather than confining itself to the implementation of a bargain to which they have mutually committed themselves. Thus, definiteness as to material matters is of the very essence in contract law.

Martin Delicatessen further stressed that such definiteness is particularly essential to real estate contracts, including leases, in contrast to contracts for sale of goods as governed by the UCC, see 52 N.Y.2d at 111.

By contrast, the majority opinion in the Second Department's decision in the Martin Delicatessen case, which the Court of Appeals reversed (see 70 A.D.2d 1, 419 N.Y.S.2d 558 [2d Dep't 1979]), had relied upon a mixture of (i) analogy to the UCC (70 A.D.2d at 6-7), (ii) giving weight to subjective "intent" (70 A.D.2d at 6), and (iii) a

[footnote continues]

B. Under Martin Delicatessen, A Price 'Range' Is Indefinite

As a corollary of the Martin Delicatessen rule, a writing that sets forth only a price (or rent) range is also unenforceable as indefinite. Thus Belasco Theatre Corp. v. Jelin Productions, 270 A.D. 202, 205, 59 N.Y.S.2d 42 (1st Dep't 1945), summarized:

> To establish merely a range with minimum and maximum figures within which the parties could negotiate, does not meet the test of definiteness essential to establish an enforceable contract.

Similarly, see, e.g., Leonard C. Pratt Co. v. Roseman, 259 A.D. 534, 536, 20 N.Y.S.2d 10 (1st Dep't 1940) ("It says 'not to be less than' \$1.27½ or 'more than' \$1.32½, thus necessarily leaving the price undetermined and undeterminable within a range of five cents per pound except by an agreement in the future.")[46]

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presumption in favor the tenant (70 A.D.2d at 7). Plainly, however, these arguments were all rejected by the Court of Appeals.

[46] See also the following cases, where various 'ranges' were found to be unenforceably indefinite: Paladino v. Brovitz, 170 A.D.2d 958, 958, 565 N.Y.S.2d 662 (4th Dep't 1991) ("commission of \$12,500 or 6% of base rents"); Ashkenazi v. Kelly, 157 A.D.2d 578, 550 N.Y.S.2d 322 (1st Dep't 1990) ("mortgage for 15 or 20 years"); Lumet v. SMH (U.S.), Inc., 1992 WL 380004 at *9-*10 (S.D.N.Y.) (bonus "between .5 and 1%."); and Rapay v. Chernov, 2017 WL 892372 (S.D.N.Y.) (compensation "in the range of \$50,000 to \$75,000, a rate commensurate with her experience.")

The sole case that Tenant had cited below in this regard (see R.1063), viz., the First Department's 2002 decision in "Luna"[47], is plainly distinguishable, as appears from a subsequent (2008) First Department case on point, viz., Tenber v. Bloomberg, supra fn. 26.[48] And while the Decision cites to

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47 Luna v. Lower East Side Mutual Housing Assoc., 293 A.D.2d 307, 740 N.Y.S.2d 317 (1st Dep't 2002).

48 In Tenber Assoc. v. Bloomberg L.P., 51 A.D.3d 573, 859 N.Y.S.2d 61 (1st Dep't 2008) the tenant (Bloomberg) argued that the landlord (Tenber) had agreed to allow tenant to remain in its space while tenant completed the build-out of its new offices elsewhere, at a rent rate of "from two to five dollars a foot" more than Bloomberg had been paying. [See Bloomberg's brief to the First Department, 2008 WL 5933318 at *42, citing Luna.]

The Civil Court recognized that such a 'range' was indeed too indefinite to give rise to an enforceable lease (or lease extension) agreement, but asserted that such an agreement might nevertheless be sufficient to give rise to some sort of short-term 'license.' On appeal, however, the Appellate Term, 2006 WL 1716920, held, inter alia, (i) that since the agreement alleged by Bloomberg would give it control of a specified premises, the agreement (if enforceable) would constitute, and hence had to satisfy the criteria for, a lease (rather than a license); and (ii) the conceded 'range' was too indefinite to be enforceable as a lease, citing Martin Delicatessen. And the First Department affirmed, likewise citing to Martin Delicatessen.

Moreover, Luna is clearly distinguishable on its facts from the context here (or from the context in Tenber v. Bloomberg, supra) -- as indeed that tenant conceded in its reply appellate brief (see 2001 WL 36090382 at *4-*5). That tenant asserted that the option granted there by the landlord did not violate Martin Delicatessen only because it needed to be construed, in the context of the parties' relationship there, to include, as a component, the concept that the tenant had been granted the power, in the absence of any other agreement, to exercise her option so long as she committed to pay the highest point of the 'range' set

[footnote continues]

Tenber v. Bloomberg and Belasco Theatre (supra p. 40), it does not cite to Luna, nor does it dispute Defendants' analysis in this regard (see R.7).

C. The Phrase "[Rent] To Be Determined At [A Future Date]" Is Indefinite

The key phrase in the T-B-D Extension Sentence, that the rent was "to be determined at [a future date]," is clearly indefinite, for purposes of Martin Delicatessen. Thus, in Nanto MK Corp. v. J&E Realty, 2016 WL 8928902 at *1 (Sup. Ct. N.Y. Co.): (a) the alleged 'extension' clause in that commercial lease[49] likewise provided for the "rent to be determined later"; and (b) the Court (at *1) explained that that clause "is an agreement to agree" that is indefinite and unenforceable.[50]

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by the landlord in the original grant of that option; and the tenant in Luna argued that, in her option exercise, she did so commit. The First Department accordingly explained (293 A.D.2d at 308) that "[u]nder the circumstances of this case" -- i.e., but not in other circumstances -- Luna's specific option, as so construed, and exercised, could thereupon be enforced. But that is just not the context here: among other plain distinctions, Tenant is seeking to enforce the T-B-D Extension Sentence not as a unilateral option granted to Tenant, but rather, according to Tenant, as supposedly establishing a bilateral agreement, binding upon both Landlord and Tenant through 2030.

[49] See Index No. 650433/2015, NYSCEF #2, ¶75.

[50] The motion court in Nanto did not, however, immediately dismiss the complaint, only because the plaintiff additionally asserted that a subsequent "exchange of emails filled out the agreed terms of the agreement to agree ...." (Id.) Subsequently, however, on summary judgment review of those alleged subsequent writings, the court granted the [footnote continues]

See also McElroy v. Gemark Alloy Refining Corp., 592 F.Supp.2d 508, 511, 519 (S.D.N.Y. 2008) (explaining that, where parties had made handwritten notations at several points on a 'draft' document that had been prepared by one of the parties, which stated that various matters were "to be determined," plaintiff "cannot be heard to say that he and Gemark had agreed" on those matters).

Moreover, the Martin Delicatessen doctrine does not say that the phrase at issue, in order to be deemed indefinite, must specifically refer to a future agreement (e.g., by use of a phrase like 'to be negotiated,' or 'to be agreed upon').

To the contrary, it is the burden of the party asserting an enforceable agreement to show, rather, that the phrase actually used in the writing sufficiently provides an objective basis for determining price, without need for a further agreement; and all varieties of phraseologies that fail to do so are considered indefinite. Thus, for example:

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landlord's follow-up motion for summary judgment, explaining (Order dated December 9, 2016, Index No. 650433/2015, NYSCEF #208) that "there are no other writings that set forth terms sufficient to establish an agreement for a new lease or a renewal." [And subsequently, the First Department held that the IAS Court should have already granted landlord's prior motion to dismiss, based on an even-more-predicate defect in that plaintiff's case, see 147 A.D.3d 695, 47 N.Y.S.3d 706 (1st Dep't 2017).]

(a) in Mur-Mil Caters, Inc. v. Werner, supra p. 37, "the alleged agreement stated that rent was to be 'predicated upon a normal increase'" (166 A.D.2d at 566). The Second Department held that under this provision, "the rent figure is not ascertainable by an objective standard, and thus the purported lease fails for indefiniteness (see Martin Delicatessen v. Schumacher, supra)";

(b) in Cosmolite Mfg. Co., Inc. v. Theodus, 122 A.D.2d 246, 505 N.Y.S.2d 172 (2d Dep't 1986), an 'option to purchase' contained in a lease was held to be unenforceably indefinite, under Martin Delicatessen, where the price was stated as "'100,000.00 with terms to be arranged at any time during said lease.'";

(c) in Deli of Latham, Inc. v. Freije, 101 A.D.2d 935, 475 N.Y.S.2d 652 (3d Dep't 1984), aff'd 63 N.Y.2d 915, 483 N.Y.S.2d 214 (1984), the Third Department reversed a bench-trial ruling for the tenant, where the alleged handwritten lease agreement included the phrase "make up drawing" -- referring to necessary renovations of the space at issue; and

(d) Ashkenazi v. Kelly, supra fn. 46, noted, additionally, that a provision stating that the amount of the cash payment portion of the purchase price would "depend on the taxes which [seller] pays towards income taxes and other taxes" was too

indefinite (157 A.D.2d at 578, 579).

By contrast, if the parties' intent had been to give Landlord a unilateral power (-- and Tenant argues that Landlord had both (a) the unilateral power and (b) an obligation to exercise that power), it would have been simple enough to use the phrase "rent to be so determined by landlord" -- as was indeed used in Tai On Luck Corp. v. Cirota, 35 A.D.2d 380, 316 N.Y.S.2d 438 (1st Dep't 1970) -- but that phrase is not used here.[51]

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[51] Moreover, even the phrase "rent to be determined by landlord," which was held sufficient by 3-2 vote in Tai On Luck, would appear to be insufficient today, however: for (i) the subsequent decision in Martin Delicatessen requires that a clause, to be sufficient, must refer "to an objective extrinsic event, condition or standard" (52 N.Y.2d at 544); and (ii) a provision that one or the other party would itself set the price is not "extrinsic." Thus, in In re McVoy's Estate (Viemeister v. McVoy), 94 N.Y.S.2d 396 (Sup. Ct. Queens Co. 1949), aff'd, 276 A.D. 1102, 96 N.Y.S.2d 686 (2d Dep't 1950), plaintiff alleged, as quoted by the Court, that he held an option to purchase certain land, "'at a satisfactory, consideration to the said Martin McVoy, Jr.'." The Court held that "[t]his language is not ambiguous," but meant that "the price, a material element of any contract of sale, was not agreed upon, and plaintiff's alleged option is therefore unenforceable."

See also, e.g., Rosenbaum v. Premier Sydell, Ltd., 240 A.D.2d 556, 659 N.Y.S.2d 52 (2d Dep't 1997); and Eagle v. Emigrant Capital Corp., 2016 WL 410072 (Sup. Ct. N.Y. Co.) at *5.

But there is no need to resolve the sufficiency vel non today of a "to be determined by landlord" clause -- for the clause in the T-B-D Extension Sentence plainly does not say even that.

D. The Absence Of A Definite Price Term Does Not Give Rise To An Ambiguity, But Rather Renders The Writing Unenforceable, Under Martin Delicatessen, As A Matter Of Law

Accordingly, the absence from a document of an objective mechanism for determining the price is not itself an ambiguity: rather, it reveals a failure of the parties to have arrived at a binding agreement, as a matter of law. As stated in Martin Delicatessen, where the plain language of the document does not provide an objective basis for determining price, then an essential term is just absent, and there is "no room for legal construction or resolution of ambiguity." (52 N.Y.2d at 111). Accord, e.g., In re McVoy's Estate, supra fn. 51; and KJ Roberts & Co. Inc. v. MDC Partners Inc., 2014 WL 1013828 at *9 (S.D.N.Y.), aff'd, 605 Fed.Appx. 6 (2d Cir. 2015).[52]

And this determination -- viz., that the existing language in a writing is indefinite -- should be made by the Court, as a matter of law. See generally Banks, N.Y. Contract Law, supra

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[52] The District Court in KJ explained (at *9):

> However, where missing or indefinite terms cannot be substituted by reference to an objective standard, the alleged agreement 'leave(s) no room for legal construction or resolution of ambiguity' and therefore is unenforceable.

See also, e.g., London Paint & Wallpaper Co., Inc. v. Kesselman, 2016 WL 3522296 (Sup. Ct. N.Y. Co.); and Mary Matthews Interiors, Inc. v. Levis, 208 A.D.2d 504, 617 N.Y.S.2d 39 (2d Dep't 1994).

fn. 8. See also, e.g., the motion court decision in Martin Delicatessen, 1978 WL 403147 (Sup. Ct. Suffolk Co.), ultimately affirmed by the Court of Appeals (determining that there was not "any triable issue of fact in the case, in view of the clear precedent that a "renewal clause in the lease does not bind the landlord to renew until and unless the 'price' can be agreed upon"); and Marinas of the Future, Inc. v. City of N.Y., 87 A.D.2d 270, 277, 450 N.Y.S.2d 839 (1st Dep't 1982) (where the renewal clause provided for "terms and conditions ... as may be mutually acceptable"; and the motion court was of the view that "the question of the parties' intention is a factual question to be resolved upon a trial"; reversed; and the appellate court determined, citing Martin Delicatessen, that the renewal clause was unenforceably indefinite, noting that this "'question is one of law, appropriately decided by an appellate court ... or on a motion for summary judgment'" [citation omitted]).[53]

Nor should a court write-in additional words so as to make an existing indefinite clause into an enforceable one. See, e.g., Bernstein v. Felske, 143 A.D.2d 863, 865, 533 N.Y.S.2d 538 (2d Dep't 1988) ("Absent any indication in the letter of intent of an objective method, independent of each party's mere wish or desire, upon which to make these provisions definite [citing

[53] See similarly, e.g., Abbey v. Henriquez, 36 A.D.3d 724, 828 N.Y.S.2d 539 (2d Dep't 2007).

Martin Delicatessen], we must decline to supply them by implication"). See also, e.g., Azoulay v. Cassin, 128 A.D.2d 660, 512 N.Y.S.2d 900 (2d Dep't 1987) ("This Court cannot supply such essential terms for the parties by implication"); and Mellen & Jayne, Inc. v. AIM Promotions, Inc., 33 A.D.3d 676, 678, 823 N.Y.S.2d 99 (2d Dep't 2006) ("the court cannot, under the guise of interpretation, ... supply the missing terms").

Nor can a tenant rely on the doctrine of the 'implied covenant of good faith' to supply a missing essential term, such as price. See, e.g., Mocca Lounge, Inc. v. Misak, 94 A.D.2d 761, 763, 462 N.Y.S.2d 704 (2d Dep't 1983) (explaining that the implied covenant of good faith only applies if and when "the parties are under a duty to perform an obligation which is definite and certain"; but where the objective criteria necessary to create a sufficiently definite and binding agreement are just missing, then such "objective criteria or standards ... may not be implied ....").[54]

Likewise, the doctrine of promissory estoppel does not 'substitute' for the requirement of a definite agreement: "The doctrine of estoppel cannot be applied to supply an essential term of an agreement such as price [citations omitted]," for

[54] Accord, e.g., American-European Art Associates, Inc. v. Trend Galleries, Inc., 227 A.D.2d 170, 641 N.Y.S.2d 835 (1st Dep't 1996).

"the court will not write a new contract for the parties by estoppel [citation omitted]." Ayer v. Bd. of Education of Cent. Sch. Dist. No. 1, 69 Misc.2d 696, 699-700, 330 N.Y.S.2d 465 (Sup. Ct. Monroe Co. 1972). Accord, e.g., Schloss v. Danka Bus. Sys. PLC, 2000 WL 282791 at *5 (S.D.N.Y.), aff'd, 234 F.3d 1263 (2d Cir. 2000).

See also 410 BPR, supra fn. 25, 51 A.D.3d at 717, where the Second Department held that the tenant could not rely on an 'estoppel' theory to cover-over the Martin Delicatessen 'hole' in its alleged option to renew.[55]

And finally, just because Tenant wishes to 'read' the T-B-D Extension Sentence as if it included the additional words 'unilaterally by Landlord,' that does not give rise to an ambiguity.[56]

Moreover, even if Tenant were now to argue that the T-B-D Extension Sentence is ambiguous (cf. fn. 7, supra), that still

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[55] See also, e.g. Vesta Industries, LLC v. Auto America of NJ, Inc., 280 A.D.2d 666, 721 N.Y.S.2d 247 (2d Dep't 2001).

[56] See, e.g., F.D.I.C. v. Herald Sq. Fabrics Corp., 81 A.D.2d 168, 180, 439 N.Y.S.2d 944 (2d Dep't 1981) ("Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact." [citation omitted]); and similarly, see Commercial Union Ins. Co. v. Liberty Mut. Ins. Co., 36 A.D.3d 645, 646, 828 N.Y.S.2d 479 (2d Dep't 2007).

would not help Tenant, for if a document's existing price-related language is ambiguous, then that ambiguity itself is fatal to the requisite definiteness for purposes of the Statute of Frauds -- which would apply to a 15-year lease extension agreement.[57] See, e.g., Behrends v. White Acre Acquisitions, LLC, 54 A.D.3d 700, 701, 865 N.Y.S.2d 227 (2d Dep't 2008); and Computer Associates Int'l, Inc. v. US Balloon Mfg. Co., Inc., 10 A.D.3d 699, 782 N.Y.S.2d 117 (2d Dep't 2004).

Accordingly, the T-B-D Extension Sentence is simply not enforceable, per Martin Delicatessen and its progeny.

III. TENANT'S EFFORTS TO COVER-OVER THE MARTIN DELICATESSEN 'HOLE' IN ITS CASE ARE WITHOUT MERIT

A. 'Construction Against Drafter/Landlord' Does Not Apply Where, As Here, Tenant Concededly Was Involved In The Drafting

While the Motion Court noted that Tenant had referred to the principle of 'construe against the landlord as drafter'

[57] Under the Statute of Frauds, the writing itself is required to set forth all of its essential terms, without the need to refer to parol evidence. See, e.g., Rouzani v. Rapp, supra fn. 35, 203 A.D.2d at 447. Accord, e.g., Ashkenazi v. Kelly, supra fn. 46, 157 A.D.2d at 569; and Duckett v. Engelhard, 2017 WL 512455 at *3 (S.D.N.Y.).

And where (as here) a plaintiff's new theories would violate the Statute of Frauds, the appellate court can simply preclude those new theories without requiring the plaintiff to first amend its complaint, and the defendants to then amend their answer, see Red Hook Marble, Inc. v. Herskowitz & Rosenberg, 15 A.D.3d 560, 789 N.Y.S.2d 737 (2d Dep't 2005).

(R.7), the Motion Court failed to notice our showing (in reply) that that principle was simply not applicable here:

(a) as noted above (p. 17 and fn. 21) Reis has admitted that he did have a 'voice' in connection with the T-B-D Extension Sentence -- and indeed he initiated its inclusion in the 2012 Letter Agreement; and

(b) the clear rule is that no 'drafting presumption' applies when the tenant thus has had a "voice" in the drafting process. See, e.g., Coliseum Towers Associates v. County of Nassau, 2 A.D.3d 562, 769 N.Y.S.2d 293 (2d Dep't 2003), explaining that the contra proferentem rule only

> applies "against the party who prepared it, and favorably to a party who had no voice in the selection of its language" [citation omitted]. The contra proferentem was inapplicable to the subject lease since the record demonstrates that CTA participated in negotiating its terms.

Accord, e.g., Science Applications Int'l Corp. v. State of N.Y., 60 A.D.3d 1257, 1259, 876 N.Y.S.2d 182 (3d Dep't 2009) ("Claimant failed to establish that it had "'no voice in the selection of (the contractual) language'" [citation omitted]); and Oceana Holding Corp. v. Atlantic Oceana Co., Inc., 2004 WL 2246177 at *5 (Civ. Ct. Kings Co.).

Nor can Reis deny that he was, at the time of the (June)

2012 Letter Agreement, 'a sophisticated "play[er]"'[58] fully familiar with 'objective' standards like "fair market value" -- for, e.g., a sublease executed by Reis on 12/15/2011 (R.966-973) employed, in favor of Tenant as sublandlord therein, the concepts of "fair market value" (¶3, R.967) and "current market price" (¶22, R.371); and see also Lease ¶46 (R.62) ("fair market value").

Moreover, 'contra proferentum' is just an aid to the construction of an existing contract, and should not be invoked to create a contract. See, e.g., Mellen & Jayne, Inc. v. AIM Promotions Inc., 2005 WL 6214622 (Sup. Ct. Rockland Co.) (noting the 'contra proferentum' principle, but concluding that, under Martin Delicatessen, the writing "provides no basis for imposing liability"); aff'd, 33 A.D.3d 676, 823 N.Y.S.2d 99 (2d Dep't 2006).

B. The March 2015 Billing Does Not Create Any Material Issue Of Fact

According to the Motion Court (R.8), an issue of fact existed as to whether a subsequent agreement might have been reached that both "superseded" the 2014-2015 emails' one-year-only extension, and fixed the rent for the 14-year period March

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[58] See, e.g., R.610, where Reis admitted that, in the conversations with Kaufman that he (Reis) was secretly recording, he was "playing with Mr. Kaufman."

2016 through February 2030, because (i) the 2014-2015 emails provided for an increase of 6% for the one year March 2015-February 2016, but (ii) the March 2015 invoice actually underbilled Tenant by a de minimis amount.

However: (i) Tenant itself (-- even with its secret recordings) has never identified a point in time after the 2014-2015 emails when such a supposed "supersed[ing]," 14-year, agreement was made, even orally (see pp. 12-13, 27-29, supra); and (ii) any such "supersed[ing]" agreement would have to be in writing, complying with the Statute of Frauds (see supra pp. 18-29, 49, and infra p. 54).

Nor can Tenant attempt to argue that the March 2015 rent bill was 'inexplicable' unless there had been some new 15-year agreement reached at that time: for the March 2015 rent bill is 'explained' by the agreement reached in the 2014-2015 emails;[59] see, e.g., Palumbo v. Donalds, 194 Misc.2d 675, 677-681, 754 N.Y.S.2d 856 (Civ. Ct. Kings Co. 2003).[60]

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[59] Also, Reis has conceded that the March 2015 invoices (and the subsequent bills for that one year) were issued and paid pursuant to that '2014-2015 emails' one-year-extension agreement (pp. 29-30, supra).

[60] In Palumbo, the tenant argued that, since the parties' written lease agreement had expired by its terms on August 31, 2002, its payment for the month of September 2002 (-- as accepted by the landlord) was 'inexplicable,' and must be deemed to have created a 'holdover' month-to-month

[footnote continues]

The Motion Court's speculation concerning a "supersed[ing]" agreement is also without basis in that:

(i) while a landlord's underbilling, and acceptance of such lesser payment, for any one month might preclude landlord from subsequently re-billing the tenant for the amount of such underbilling, such an underbilling/undercollection is certainly not binding upon landlord for any subsequent (i.e., not-yet-billed) month. In other words, landlord is free to grant tenant a gift by billing for and accepting a lesser amount than the amount provided in the parties' agreement -- but such a gift is not deemed to constitute a binding modification of the parties' underlying lease agreement. See, e.g., Auswin Realty Corp. v. Kirschbaum, 270 A.D. 334, 59 N.Y.S.2d 824 (2d Dep't 1946);[61] and

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tenancy. But the landlord showed that the parties had orally agreed to extend the Lease's expiration date for one month. Accordingly, the Court held that the September 2002 rent payment was thus explained by, and was made pursuant to, that (oral) agreement; and so landlord prevailed on its claim that the lease (as extended) had now ended.

[61] As summarized in Russo v. De Balla, 220 N.Y.S.2d 587, 589 (Sup. Ct. Suffolk Co. 1961) (citing to, inter alia, Auswin, supra):

> The law of this State applicable to those instances in which a landlord accepts rental in an amount less than that called for in an agreement of lease has been clearly established. Acceptance of rent in a lesser amount than that recited in a lease operates only as a forgiveness of the balance between the lesser amount accepted and that recited. At any time during the term of the lease the landlord may demand payment of

[footnote continues]

(ii) in any event, the billing and payment of a lesser amount for any one month is insufficient, as a matter of the Statute of Frauds, to constitute a sufficient 'memorandum' of a new agreement for a term extending beyond the time of those billings and payments -- let alone for 14 years beyond. See, e.g., Gotham Food Group Enterprises, Inc. v. Principal Mut. Life Ins. Co., 267 A.D.2d 48, 49, 699 N.Y.S.2d 366 (1st Dep't 1999) (holding that monthly rent payments did not satisfy Statute of Frauds as to alleged 12-year lease, since those payments were made and accepted pursuant to various stipulations).

C. The 2016 "Without Prejudice" Pendente Lite Stipulation Does Not Somehow 'Estop' Defendants From Relying On Martin Delicatessen

As reviewed above, the 2016 pendente lite "without prejudice" Stipulation, considered as a whole, simply cannot be read to constitute an estoppel against Defendants' right to assert that the Lease ended as of February 29, 2016 -- let alone a new agreement, in and of itself, establishing the rent for March 2016 - February 2030.

In addition, and in any event: as a matter of law, a

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the rent in the amount recited in the agreement for the executory or unexpired term of the lease.

See likewise, In re Central Savings Bank v. Fashoda, Inc., 94 A.D.2d 927, 463 N.Y.S.2d 335 (3d Dep't 1983), aff'd "for the reasons stated [therein]," 62 N.Y.2d 721, 476 N.Y.S.2d 828 (1984).

'recital,' or 'whereas,' clause cannot have such force, for 'statements' made in recital clauses are just not considered to be binding.

Thus, Grand Manor Health Related Facility, Inc. v. Hamilton Equities Inc., 65 A.D.3d 445, 447,885 N.Y.S.2d 255 (1st Dep't 2009), rejected a commercial tenant's attempt to rely upon a 'whereas' recital that had been included in a stipulation resolving a prior dispute, explaining:

> Although a statement in a "whereas" clause may be useful in interpreting an ambiguous operative clause in a contract, it cannot create any right beyond those arising from the operative terms of the document [citation omitted].

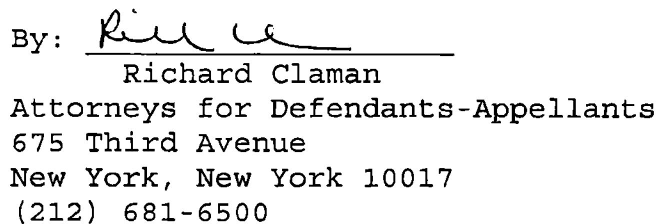
Accord, e.g., In re Legion of Christ, Inc. v. Town of Mt. Pleasant, 151 A.D.3d 858, 54 N.Y.S.3d 681 (2d Dep't 2017); and Darby Group Companies, Inc. v. Wulforst Acquisition, LLC, 2013 WL 3790217 (Sup. Ct. Suffolk Co.), aff'd, 130 A.D.3d 866, 14 N.Y.S.3d 143 (2d Dep't 2015).

CONCLUSION

Accordingly, this appeal should be granted; and thereupon (a) a counter-declaration should be issued, in favor of Defendants, that (i) the 2012 Letter Agreement expired on February 28, 2015, and (ii) the one-year-only extended lease term, per the 2014/2015 emails, ended on February 29, 2016; and

(b) the notice of pendency that Tenant filed (R.42-44) should be cancelled.[62]

Dated: New York, New York
October 30, 2017



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[62] See, e.g., Gallagher Removal Service, Inc. v. Duchnowski, 179 A.D.2d 622, 578 N.Y.S.2d 584 (2d Dep't 1992) ("upon granting summary judgment in favor of the defendant, the court properly cancelled the notice of pendency").

APPELLATE DIVISION - SECOND DEPARTMENT
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 670.10.3(f) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: New York, New York
October 30, 2017

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