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.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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DEFENDANTS-APPELLANTS' REPLY BRIEF

Preliminary Statement

Defendants' initial brief ("Def.Init.Br.")[1] showed that there is a central 'hole' in Tenant's claim to hold an enforceable lease for the fourteen-year period March 2016 - February 2030, for:

(a) there is no document[2] that says, in words or effect: 'Landlord and Tenant agree that the rent for those fourteen years shall be [some specific number]'; or 'shall increase at [some specific rate]'; or, 'shall increase in accordance with [some specific external standard, e.g., Consumer Price Index]'; or 'shall be reset periodically at [some specific standard, e.g., 'fair market rent'], or per some recognized 'external' procedure [e.g., arbitration]';

(b) absent a (written) agreement specifying either a price, or an objective formula, or an objective mechanism, there can be, under Martin Delicatessen,[3] no enforceable agreement as

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1 The Court is respectfully referred to Def.Init.Br. for all definitions, and general background. Again, all emphasis in material quoted herein is added, unless otherwise noted.

2 Tenant does not dispute that the Statute of Frauds applies here; see Def.Init.Br. 29 fn. 35; 49-50 and fn. 57.

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

to this fourteen-year period, as a matter of law;[4] and

(c) Tenant's principal attempt to provide definiteness was to assert that the phrase actually used by the T-B-D Sentence in the 2012 Letter Agreement, viz., "terms to be determined at the expiration of this initial lease consolidation period [-- defined as expiring February 28, 2015]" (R.80),[5] must be read as if that phrase also included, following its words 'to be determined," the additional words 'unilaterally by Landlord'[6] -- whereupon, issues of fact supposedly arise (as the Motion Court reported [R.8-9]) as to whether in 2015 or 2016 Landlord ever made such a "unilateral[]" determination. But Def.Init.Br. (e.g., 3-7, 45-50) showed that Tenant's effort was without merit as a matter of law, for the T-B-D Sentence just

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[4] See Def.Init.Br. 3-4 and fn. 8; 46-49, showing that a Martin Delicatessen 'indefiniteness' determination can and should be made as a matter of law; and Tenant does not dispute this legal point.

[5] Solely as a shorthand, Def.Init.Br. (e.g., 3) abbreviated this phrase as "'to be determined at [a future date].'"

[6] See R.8, last three lines, where the Motion Court characterized Tenant's theory as asserting that "the 2012 Letter Agreement authorized the prior owner to unilaterally set the percentage increase ...". See also, e.g., T.Br. 11, quoting Tenant's deposition assertion that the phrase "to be determined at [a future date]," in the T-B-D Sentence, must be read as if it said "'to be determined by you [the Landlord], not negotiated'." See also T.Br. 9 ("It provided that ... Landlord would set ...."); T.Br. 11 ("The phrase ... meant that ... Landlord would set the rate"); T.Br. 21 ("means ... Landlord was to set"); T.Br. 26 ("to be set by Landlord"); T.Br. 36 ["Landlord set (i.e., unilaterally)"].

does not include the additional phrase 'by Landlord,' nor does the actual phrase "to be determined at [a future date]" mean that Landlord could or would "unilaterally" determine the rate.

The principal 'responses' in Tenant's opposition brief ("T.Br.") fall into three categories:[7]

1. Concerning 'the law'. T.Br.'s central contention, astonishingly, is that "the Martin case supports Tenant's position" (T.Br. 29, heading), in that (T.Br. 29-30): (i) Martin Delicatessen supposedly held that a writing is indefinite only if it suffers from the exact same defect as did the writing in Martin Delicatessen -- viz., that it expressly uses the 'magic phrase' that the price is "to be agreed upon"; and (ii) supposedly, the phrase "to be determined at [a future date]," as used in the T-B-D Sentence, must somehow mean something different (-- and specifically must mean 'unilaterally by Landlord').

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[7] T.Br. 28 also asserts that Defendants "are essentially arguing that the agreement is unenforceable because the document is not 'lawyerly' enough." (Likewise, T.Br. 24: "the essence of Landlord's position.") Not so. Defendants have shown that even non-lawyers, and especially a sophisticated businessperson like Tenant (see Def.Init.Br. 15-16 and fn. 17) -- who indeed used the phrase "fair market value" in his subleases (see Def.Init.Br. 4-5 and fn. 9) -- is deemed as a matter of law to understand what a 'definite price' is. See Def.Init.Br. 20 and fn. 26 -- and T.Br. does not dispute these points.

As shown in Point I(A), infra, however, Tenant's new 'reading' of Martin Delicatessen is plainly mistaken:

(i) conceptually, Tenant's contention is 180° backwards, for (as already explained at Def.Init.Br. 39 and fn. 45) it is a plaintiff's burden -- which however Tenant plainly cannot meet -- to show a definite agreement; and there are, conversely, many ways that a writing can fail to be definite, even when not utilizing the 'magic' phrase "to be agreed upon" -- as illustrated in at least eighteen cases that were cited in Def.Init.Br. but are not addressed by Tenant; and

(ii) in any event, the phrase used in the T-B-D Extension Sentence, i.e., rent "terms to be determined at [a future date]," has been held, in, e.g., a recent case discussed in Def.Init.Br. 42-43 ("Nanto"),[8] to constitute an unenforceable "agreement to agree"; but T.Br. fails to address that case.

As for T.Br.'s alternative legal arguments: Point I(B) shows that Tenant has in effect now conceded that a writing is unenforceably indefinite if it just provides a price range; and Points I(C) and I(D) show that the slogans 'last resort' and 'contra proferentum' do not 'save' the insufficiency of the T-B-D Sentence;

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[8] The Court is respectfully referred to the Table of Cases for full citations to cases previously cited.

2. Concerning 'the facts'. Tenant asserts principally (and repeatedly -- e.g., T.Br. 3, 4-5, 13, 18-19, 21, 27, 34, 36, 37-39, and 49-50) that, as a matter of fact, the 'first whereas clause' in the 2016 Without-Prejudice Pendente-Lite Stipulation (R.1060-1061; see Def.Init.Br. 8-9 fn. 13) itself constitutes a sufficient writing to evidence a supposed agreement on a 5.4% rate of annual increase for each year through February 2030. Tenant's two-step contention is (a) that the key term in that 'first whereas clause' is "the Lease" (T.Br. 36, Tenant's underscoring), and (b) that Landlord must therefore have "agreed" (T.Br. 33) that "the Lease" thus referred-to must be an existing and enforceable agreement that extended through February 2030.

However, as reviewed again in Point II herein (see Def.Init.Br. 31-34, and 55-56), Tenant's contention is blatantly mistaken on multiple levels: (i) as a matter of law [i.e., because of the legal (non-)effect of 'whereas' clauses]; (ii) in view of the overall plain intent of this "without prejudice" interim stipulation; and (iii) based on a plain reading of the 'first whereas clause' together with the 'third whereas clause' (which T.Br. never quotes).

Plainly, Landlord did not agree in the 2016 Stipulation that there existed any "Lease" that was effective through

February 2030, because the 'third whereas clause' states (R.1060):

> WHEREAS, Landlord asserts that the Lease has expired as of February 29, 2016 and that Tenant has no right of renewal thereof; ...[9]

Likewise, Tenant's attempt to question the existence and/or effect of the one-year-only extension agreement made per the 2014-2015 emails (R.54-55; see Def.Init.Br. 24-29) is defeated on the record. Tenant's effort rests (T.Br. 36-37) on quoting only from a certain February 11, 2015 email (R.54, bottom), wherein indeed Tenant had reiterated various of its contentions. But Tenant simply fails to address Tenant's own subsequent February 20, 2015, email (R.54, top), which stated that following "our meeting on February 18," Tenant now (i) acknowledges that the parties had now agreed to a "fixed rent" for March 2015 - February 2016, but also (ii) conceded,

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[9] As a rhetorical flourish/obfuscation, T.Br. 34 (see also at 4-5) pretends that the 2016 Stipulation is supposedly so clear that it "conclusively resolves" this case in favor of Tenant, so that this Court should search the record and grant summary judgment to Tenant -- especially, Tenant says, since there is no contrary affidavit by Roger Kaufman. However: (a) Tenant, as reviewed herein, has completely misconstrued, on its face, that 2016 Stipulation; and (b) the moving affidavit of Patrick Pavone, as Managing Director-Acquisitions for Current Owner's management/ownership affiliate (R.12) -- which attached, inter alia, the full transcript of Roger Kaufman's deposition, but appropriately focused on proffering the relevant documents revealing the 'hole' in Tenant's case -- properly supports Defendants' motion.

"*we were unable to agree on the rent for the following years*."

See Point II(B), infra; and

3. Attempts to distract attention from the relevant law and the relevant facts. In a telling deposition statement that T.Br. carefully 'ellipses-out,' Tenant, a sophisticated businessperson (see fn. 7, supra), had stated (R.511):

> There are two sides of this lease, sir, in my view. There's the legal side and there's another one which is the business relationship that I had with Roger [Kaufman] for 15 years.[10]

And so, implicitly conceding that "the legal side" (i.e., as just reviewed) does not support Tenant's claim to an enforceable lease extending through February 2030, T.Br. purports to regale the Court with Tenant's version of the "relationship" side. (See, e.g., T.Br. 7, heading: "The Underlying Human Story").

But, a "relationship" is not an excuse for the absence of an enforceable writing. See "Tenber v. Bloomberg" (Def.Init.Br. 20 fn. 26, and 41-42), where the tenant had likewise argued on appeal (2008 WL 5933318 at 14-15) that the absence of an enforceably definite extension should be excused because the principals of the landlord and the tenant had been "friends" for

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[10] Compare T.Br. 42, in fn. 10, stopping its quote from R.511 in mid-phrase, just before this passage; and T.Br. 45, in fn. 11, quoting from immediately before and after this passage.

many years (cf. R.994, ¶58) -- but the First Department held against the tenant.[11]

Nor is Defendants' 'motive' for asserting the 'hole' in Tenant's case relevant -- as already noted in Def.Init.Br. 17-18 fn. 23, and see further Point III herein.[12]

And any 'fact' disputes concerning such irrelevant 'distractions' are just not an obstacle to Defendants' summary judgment motion: a defendant-movant's burden is not to eliminate every fact 'issue' that the plaintiff seeks to create; rather, a defendant-movant's burden is only (Def.Init.Br. 35-36) to "negat[e] at least one essential element of the plaintiff's claim" (quoting "Rosabella").

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11 The question whether Prior Owner's principal, and Tenant, were in fact friends is an example of an issue that is, accordingly, irrelevant to Defendants' motion, see p. 8, infra. Defendants do not, however, in any way concede the accuracy of Tenant's irrelevant "story": thus, e.g., Defendants note that (i) 'friends' do not secretly tape-record friends (see Def.Init.Br. 12), and (ii) Defendants do dispute, at a minimum, the 'completeness' of the in-any-event irrelevant excerpts from those secret tapes now proffered by Tenant (see T.Br. 46 in fn. 11).

12 Again, Defendants do not, however, concede the accuracy of Tenant's irrelevancies. Thus, e.g., Tenant's assertion, as if it were a matter of undisputed fact (T.Br. 13), that Roger Kaufman "suddenly disavowed," in 2014-2015, his supposed prior understanding that the T-B-D Sentence obligated Landlord, in 2014-2015, to unilaterally set a new rent for fifteen more years, is contradicted by Kaufman's explanation (see Def.Init.Br. 18, in fn. 23) that Reis had requested the T-B-D Sentence as a favor to Tenant, and on a non-binding basis (R.889-890).

Accordingly, on this Court's "de novo" review,[13] the central question identified by the Motion Court, i.e., Tenant's contention that the words "unilaterally [by Landlord]" (R.8) must be read-into the T-B-D Extension Sentence, should now be resolved in favor of Defendants, setting-aside all distractions.

ARGUMENT

I. TENANT CANNOT AVOID MARTIN DELICATESSEN

A. Martin Delicatessen is Not Somehow Limited To Circumstances Where The Writing Expressly Calls For A Further Agreement; And In Any Event, The T-B-D Sentence Does Call For A Further Agreement

As noted supra, Tenant's central legal contention (T.Br. 29-32) is that Martin Delicatessen only renders unenforceable writings that use the 'magic' phrase "to be agreed upon" (or otherwise, similarly, expressly call for a future agreement).

However, first, Tenant's argument is conceptually wrong. As shown in Def.Init.Br. 39-40 fn. 45, and 43-44, it is the plaintiff's burden to show that the writing to which it points

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[13] On appeal of an order that denied a motion for summary judgment, this Court reviews the record "de novo," see, e.g., Rothouse v. Assoc. of Lake Mohegan Park Prop. Owners, Inc., 15 A.D.2d 739, 223 N.Y.S.2d 1012 (1st Dep't 1962). And so this Court should reverse a motion court's denial of summary judgment when the movant "established its prima facie entitlement of judgment," and the opponent "failed to raise a triable issue of fact to rebut the [movant's] prima facie entitlement"; Daniel Perla Assoc., LP v. 101 Kent Assoc., Inc., 40 A.D.3d 677, 836 N.Y.S.2d 630 (2d Dep't 2007).

had set forth, as an objective matter, a definite agreement. Thus, e.g., in Mur-Mil (Def.Init.Br. 44), the phrase at issue was that the rent would be "predicated upon a normal increase." But this Court held that, under this provision, "the rent figure is not ascertainable by an objective standard, and thus the purported Lease fails for indefiniteness" (166 A.D.2d at 566); and T.Br. does not even attempt to respond.

See also the following cases previously cited in Def.Init.Br., where the writing at issue likewise did not include a 'magic phrase,' but rather only set forth either a 'standard' or 'range' that was, however, inherently vague, and so the writing was held unenforceable: Belasco; Ashkenazi; Paladino; Lumet; Rapay; Tenber; Carione; Mary Mathews; London Paint; Mellen & Jayne; Behrends; and Duckett.

See also, most recently, Total Telcom Group Corp. v. Kendal on Hudson, 2018 WL 343618 (2d Dep't), and the following cases previously cited in Def.Init.Br., which declared writings to be unenforceable under Martin Delicatessen based on the sheer absence of definite terms, without any reference to the presence/absence of the 'magic phrase' "to be agreed upon": Davis; Olim; KJ Roberts; Abbey; Azoulay; Mocca; and Gotham.

That's twenty cases -- and aside from T.Br.'s mistaken attempts to distinguish Belasco and Askenazi (infra fn. 19),

T.Br. does not address a single one of these.[14]

Second, and in any event: the phrase used in the T-B-D Sentence, "to be determined at [a future date]," does call for a future negotiation and agreement. Indeed, Def.Init.Br. 42-43 had cited a recent case (Nanto) holding that the phrase "rent to be determined later" constituted "an agreement to agree"; and T.Br. fails to even mention that decision.

See also, e.g., Cooper Sq. Realty, Inc. v. A.R.S. Management, Ltd., 181 A.D.2d 551, 581 N.Y.S.2d 50 (1st Dep't 1992), holding that a writing calling for a "commission to be separately determined" was unenforceable.

See similarly, e.g., Alter v. Bogoricin, 1997 WL 691332 (S.D.N.Y.). There, an employment agreement promised plaintiff (i) a base salary, and (ii) a profit-sharing participation, which "shall be in the range of 10% but according to a formula yet to be developed" (at *6). While the Court upheld plaintiff's claim for unpaid salary, it dismissed plaintiff's claim for a profit-sharing amount, because the phrase "yet to be developed"

[14] Obviously, as noted at T.Br. 31 -- which purports to distinguish three other cases we had cited (Carmon, 410 BPR, and Mulcahy) -- there are of course cases subsequent to Martin Delicatessen where the writings at issue did also use a 'magic' phrase like 'to be agreed upon': but the analyses even in those cases show that those courts were not concerned with the presence or absence of any 'magic' words, but rather with the substantive issue of indefiniteness as explicated in Martin Delicatessen.

showed "that the parties left the profit sharing provision to future negotiations."

B. The Designation Of A Price Range, Without Specification Of An Objective Method For Picking A Specific Figure Within That Range, Is Unenforceably Indefinite

Remarkably, T.Br., with its misguided focus on the presence/absence of 'magic' words, does not dispute our showing that a range, without a mechanism for fixing a figure within that range, is simply indefinite.[15] Hence, even assuming that the T-B-D Sentence incorporates the Range Provision,[16] the Range Provision does not help Tenant.

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[15] See Def.Init.Br. 40-42, citing seven illustrative cases -- including a recent First Department case (Tenber v. Bloomberg, discussed in fn. 48), and a 2017 federal case (Rapay; fn. 46) directly on point -- neither of which T.Br. addresses.

[16] Contrary to T.Br. 2 fn. 3, 10, and the Decision (R.8), Roger Kaufman did not, in his deposition, concede this point. Rather, Kaufman explained, at the very transcript pages cited by T.Br., that his consistent intent and understanding was that the Lease term would end as of February 28, 2015, unless (and only to the extent that) the parties reached an agreement on a new base rent -- although that the new agreement would also provide for subsequent annual increases in the range of 5% - 8%. Tenant now wants to 'accept,' out of context, just the subsequent-years-increase portion of Kaufman's statement, while pretending to ignore the essential first half of his statement. Kaufman's entire understanding defeats, of course, Tenant's claim; and a party cannot properly cherry-pick, out of context, just a portion of the other party's actual statement, and pretend to ignore how the balance refutes its position. See, e.g., City Bank Farmers Trust Co. v. Roosen, 251 A.D. 437, 440, 296 N.Y.S. 797 (1st Dep't 1937); and Powers v. MTA, 289 A.D.2d 216, 734 N.Y.S.2d 845 (2d [footnote continues]

[To be sure, while T.Br. 26 does not contest this point, Tenant tries to talk 'around' it. Thus, Tenant purports (a) to characterize its 'best' case (Luna) as if the parties there had (in T.Br.'s words) "selected [an] objective basis within a range" (id.);[17] and (b) to assert that the only reason that three of the seven 'range' cases cited in Def.Init.Br. 36-40 had held for defendants was because those writings contained (what Tenant labels) the 'magic phrase' "to be agreed upon." But, as noted above, Tenant's 'magic phrase' (mis)reading of Martin Delicatessen is plainly erroneous;[18] and indeed the three "range"

Dep't 2001).

T.Br. 20 also does not respond to our analysis (Def. 2-3 fn. 4, 18-19) of the specific and limited context of the Range Provision, within the 2012 Letter Agreement and prior agreements -- such that the reference to "Any ... increase," in the earlier iterations of the Range Provision, i.e., in 2006 (R.75), and in 2007 (R.76 and R.77), plainly could not refer to the T-B-D Sentence, since the T-B-D Sentence did not exist until 2012 (R.80). (See also Def.Init.Br. 19-20 fn. 25.)

[17] The actual, albeit idiosyncratic, facts of Luna are reviewed and distinguished in Def.Init.Br. 41-42 fn. 48; and T.Br. fails to acknowledge that discussion, or the subsequent First Department decision in Tenber v. Bloomberg.

[18] In the same vein, T.Br. 26, 31, mischaracterizes the only one new case that it cites in this regard: Subcarrier Communications, Inc. v. Satra Realty, LLC, 11 A.D.3d 829, 785 N.Y.S.2d 545 (3d Dep't 2004) just restated the predicate rule that if a lease (i) provides for a renewal period, but (ii) says absolutely nothing about the rent therefor, then the 'original' rent rate continues to apply. Even Subcarrier noted, however, that, per Martin Delicatessen, if the parties had indicated that the rent [footnote continues]

cases that T.Br. 31-32 purports to distinguish refute T.Br.'s 'magic words' contention.[19]]

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would be changing, but did not specify what that new rate would be, "we would find the provision void for uncertainty."

19 Thus:

a. in Belasco, the Court indeed began by explaining, as a preliminary point, that even though the document at issue did not itself specify the financial terms for a sublease of the theatre for a particular performance (and it is only this preliminary discussion to which T.Br. now refers), the document did grant the holder an option to book the theatre upon "'the usual and customary terms ... prevailing in the theatrical industry" (270 A.D. at 203). Accordingly, the Court went on to explain that a reference to "usual and customary terms", could be sufficiently definite, if the evidence showed that 'custom and usage' provided specific dollar amounts. But, the testimony showed that the supposed 'customary' terms only fell within ranges. And so the Court explained -- without any reference to any 'magic words' -- that "[t]o establish merely a range with minimum and maximum figures within which the parties could negotiate, does not meet the test of definiteness ..." (at 205);

b. Ashkenazi held that the writing there concerning the sale/purchase of a property was fatally indefinite in two respects -- the "duration of the mortgage," and the "downpayment" amount (157 A.D.2d at 579). As to the duration of the mortgage, the writing indeed used a 'magic' phrase, and provided (indefinitely): "15 or 20 years which ever agreeable between the two parties."

But, in connection with the second open point there, viz., the downpayment, the writing did not use any such 'magic words,' but rather said only that it would "depend on the taxes." Yet, that too was held to be too "speculative and undetermined." Thus, Ashkenazi shows that a provision can be indefinite whether the writing uses the 'magic words' or not!

c. finally, concerning Leonard C. Pratt, T.Br. 32 entirely fails to dispute the point for which Def.Init.Br.

[footnote continues]

C. Tenant's "'Last Resort'" Argument Fails

While indeed (see T.Br. 21, 24-25) 166 Mamaroneck (-- which was already distinguished in Def.Init.Br. 38 fn. 44) quoted the slogan "'last resort,'" that slogan, properly understood, does not help Tenant here.

In short, as illustrated in, e.g., Argent Electric, Inc. v. Cooper Lighting, Inc., 2005 WL 2105591 at *4 (S.D.N.Y.), the "last resort" slogan is just a reminder that "Before rejecting an agreement as indefinite, 'a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear'" [citation omitted]. But if, upon analysis, the writing does not set forth such "an extrinsic standard,"[20] then the writing should be rejected "as indefinite," and held unenforceable.

Thus in Teutul v. Teutul, 2010 WL 1733475 (Sup. Ct. Orange Co.), rev'd, 79 A.D.3d 851, 912 N.Y.S.2d 664 (2d Dep't 2010), the Motion Court tried to enforce a writing, invoking the "'last

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40 had cited this case, viz., that the writing's statement that the price would be determined within a range of "not ... less than $1.27½ ... or more than $1.32½" was indefinite. Nor did Pratt place any weight on the presence/absence of any 'magic' words.

20 In Argent, the writing provided only that "the commission rate Plaintiff was to receive" would be based "upon the (future) development of a 'book price.'" Thus that Court concluded that the writing "lacks an objective means by which the commission rate could be determined."

resort'" slogan; but this Court -- after reviewing both Martin Delicatessen, and 166 Mamaroneck -- reversed, and declared the writing unenforceable.

See also, e.g., Seiden v. Francis, 184 A.D.2d 904, 905, 585 N.Y.S.2d 562 (3d Dep't 1992) (noting 166 Mamaroneck, but concluding, per Martin Delicatessen, that the purported lease renewal clause was indefinite); and Carione v. Hickey, 133 A.D.3d 811, 20 N.Y.S.3d 157 (2d Dep't 2015) (noted in Def.Init.Br. 38 fn. 44).

D. Tenant's Citation To The Principle That Ambiguities In 'Form' Provisions Should Be Construed Against The Drafter Is Irrelevant Here

T.Br. 22-23 asserts that "any ambiguities" in the 2012 Letter Agreement must be construed against Landlord.

However:

(i) First, the T-B-D Sentence is not ambiguous: it is just indefinite. T.Br. fails entirely to address the predicate point (Def.Init.Br. 6, 46-49) that the lack of an essential term is not an ambiguity;

(ii) Second, if an "ambiguit[y]" existed, that itself would be fatal to Tenant's claim, since the Statute of Frauds clearly applies here. T.Br. fails to dispute our point (see

Def.Init.Br. 50 and fn. 57) that, under the Statute of Frauds, the writing, by itself, needs to be definite; and

(iii) In any event, the 'construe against landlord' slogan does not apply on the facts here, because Tenant was admittedly (see Def.Init.Br. 17 and fn. 21, quoting from Tenant's opp.aff., R.985) involved in -- and indeed, was the initiator of -- the inclusion of the T-B-D Sentence into the 2012 Letter Agreement.

Concerning this last point:

a. the test is not whether the plaintiff, as a mechanical matter, participated in physically transcribing the parties' agreement, but rather whether plaintiff had "participated in negotiating its terms," Coliseum, 2 A.D.3d at 565 (Def.Init.Br. 51). [T.Br. 23-24, in purporting to distinguish Coliseum, simply fails to address how this Court explained that the relevant "voice" that negates application of the contra proferentum principle is a voice "in [the] negotiating" process. See Def.Init.Br. 51.] Likewise, see Science Applications, 60 A.D.3d at 1259 (also cited at Def.Init.Br. 51) (the "record reflects that these are sophisticated parties [who] engaged in negotiations"); and see Flushing Auto Salvage, Inc. v. City of New York, 144 A.D.3d 624, 39 N.Y.S.3d 835 (2d Dep't 2016) ("the record reflects that the stipulation was the result of negotiations between commercially sophisticated parties"); and

b. the sole case cited by T.Br. 23, 151 West Assoc. v. Printsiples Fabric Corp., 61 N.Y.2d 732, 472 N.Y.S.2d 909 (1984), by contrast, is plainly distinguishable: (i) it involved the construction of a landlord's standard-form default-for-bankruptcy clause -- a 'forfeiture' clause, inherently subject, accordingly, to a narrow construction; and (ii) there was no contention by landlord that there had been any negotiation concerning that boilerplate clause.

II. T.BR.'S 'FACT' ARGUMENTS ARE REFUTED BY THE DOCUMENTARY RECORD

A. Tenant's Misreading Of The 2016 Without-Prejudice Pendente-Lite Stipulation Should Be Rejected

Tenant's 'Stipulation' argument (see esp. T.Br. 37-39) is blatantly mistaken, both as to the legal (non-)effect of recital clauses, and as a reading of the Stipulation, and its 'recitals,' as a whole.

Concerning the latter point: even Tenant recognizes that agreements should be "'read as a whole'" (T.Br. 22, quoting). Yet, Tenant now asserts (T.Br. 36-39) that the 'first whereas clause' (R.1060) must be read without considering -- and indeed T.Br. does not quote -- the 'third whereas clause' (id.), which sets forth Landlord's understanding of the key term used in the 'first whereas clause.'

Thus: (i) T.Br. 36 asserts that, in respect of the phrase "under the Lease" (-- underscored by T.Br. 36), in the 'first whereas clause,' both sides supposedly must have agreed that that phrase referred to a lease agreement in effect through 2030, as opposed to a lease agreement in effect only through February 2016; but

(ii) the next two 'whereas' clauses (R.1060) made plain that the parties were specifically disagreeing as to what "the Lease" meant:

a. according to the 'second whereas clause,' "Tenant alleges that ... the end of the term of the Lease ... is February 28, 2030"; while

b. according to the 'third whereas clause,' "Landlord asserts that the Lease has expired as of February 29, 2016 ...." Hence, reading the 'whereas' clauses together,[21] Landlord clearly did not somehow concede -- but rather expressly rejected -- Tenant's

[21] T.Br. 39 seeks to distinguish between the 'first whereas clause' and the next two, in that the first clause doesn't say 'Landlord asserts' or 'Tenant asserts.' But, while Landlord and Tenant indeed jointly recited the same words in the 'first whereas clause,' nevertheless, they each immediately made plain that they meant very different things by the key term therein, viz., "the Lease."

contention that there existed an enforceable Lease beyond February 29, 2016.[22]

Moreover, in its focus on just the 'first whereas clause,' T.Br. never considers the substantive provisions of the Stipulation, which show, inter alia: (i) that the stipulated rent-rate increase beginning as of March 2016 was not 5.4%, but rather was now 6.4%; and (ii) that the Stipulation is expressly "without prejudice" (R.1061; Def.Init.Br. 31-34.) Here too, T.Br. violated its own principle of 'reading as a whole.'

Finally, concerning the clear legal principle (Def.Init.Br. 55-56) that recitals are not themselves binding: (i) T.Br. 39 asserts only -- without any citation -- that this rule can be side-stepped if the 'recital' is re-characterized as an "agreed-upon fact"; but

(ii) a recent federal case rejected that contention. Thus, in NYU v. Galderma Laboratories, Inc., 2017 WL 1491838, 689 Fed.Appx. 15 (2d Cir.), NYU sought royalties for a certain patented mechanism, and asserted that in a certain 'whereas' clause defendant had recited -- and so thereby must be deemed to have conceded -- that a certain drug in fact utilized that patented mechanism. The Second Circuit (reversing the district

[22] Nor, contra to T.Br. 38, was it somehow "dehors the Record" for Landlord to point to the 'third whereas clause' (R.1060).

court) held, however, that the statement in the 'whereas' clause was simply not controlling, quoting the same rule as quoted at Def.Init.Br. 56.

B. Given The One-Year-Only Extension Agreed-Upon In The 2014-2015 Emails, The Rent Payments Made During That One Year Do Not Somehow Show An Enforceable Agreement For Fourteen Additional Years

T.Br. 12 asserts that Landlord's act of billing for March 2015 itself constituted a "writing" establishing the rent for a fifteen-year extension period. (See also T.Br. 26-27.)

But that assertion just misses the points that:

(i) the usual effect of a billing, payment and acceptance of rent for any month after expiration of a lease's specified termination -- and the 2012 Letter Agreement provided that "All rental of said space is due to terminate as of Feb. 28, 2015" (R.80) -- is just to create a month-to-month tenancy, and not anything more;[23] and

(ii) as shown in Def.Init.Br. 53-54 fn. 60 (citing Palumbo), and 55 (citing Gotham), the reason why this 'usual' month-to-month result did not obtain here for the one-year-only

[23] See, e.g., Finkelstein & Ferrara, Landlord and Tenant Practice in New York § 4:314 ["A landlord's acceptance of rent is insufficient to renew a lease .... [Rather] a month to month tenancy is created"; citing Samson Management, LLC v. Hubert, 92 A.D.2d 932, 939 N.Y.S.2d 138 (2d Dep't 2012).]

period March 2015-February 2016 was because there was a documented agreement, per emails duly subscribed by Landlord and Tenant (see Def.Init.Br. 24 fn. 30), that the Lease term would be extended to -- but not beyond – February 29, 2016.[24]

Tenant's principal basis for pretending to ignore the one-year-only email agreement is refuted by the record. T.Br. 36-37 asserts that an email that Tenant sent on February 11, 2015, did not show that one-year-only agreement.

As noted above, however, the key email -- which Tenant has authenticated (e.g., R.992-993, ¶51; see also Def.Init.Br. 27-28) -- was sent by Tenant nine days later, i.e., on February 20, 2015 (R.54; see Def.Init.Br. 25-26), accepting Landlord's Nov. 17, 2014 offer (R.55; Def.Init.Br. 24-25). In that final email, Tenant, after referring to a meeting held in February 18, 2015 -- i.e., one week after Tenant's February 11 email -- confirmed (R.54) both (i) that an agreement had now been reached as to "the fixed rent for the year of March 1st 2015 to February 29th 2016," but (ii) that "*we were unable to agree on*

[24] Tenant's citation to a single case (T.Br. 21, 27) for the unremarkable proposition that "practical construction" may be relevant to resolving ambiguities is irrelevant, for that citation/discussion is premised upon ignoring the 2014-2015 emails, and their unambiguous one-year-only agreement.

the rent for the following years [i.e., after February 29, 2016]."

Likewise, T.Br.'s secondary efforts to ignore the 2014-2015 email one-year-only agreement are unavailing.[25]

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[25] T.Br. 46 suggests that Tenant intended the one-year-only agreement as 'just' an interim 'settlement' agreement: but that doesn't make it any less an effective agreement for that one year. (And T.Br. has abandoned any 'duress' contention, see Def.Init.Br. 29 fn. 34.)

Also, T.Br. 20 contends that the Motion Court's Pre-Answer Opinion (R.1062-1065) -- which did not consider the 2014-2015 emails -- must be deemed "law of the case." However:

a. Tenant's Complaint had misleadingly omitted any reference to the 2014-2015 emails; and per Second Department case-law, Landlord could not proffer those emails as 'documentary evidence' -- so that the record on that pre-answer motion was incomplete (but now is complete) (see Def.Init.Br. 30-31, and 36 fn. 41; and T.Br. does not dispute the foregoing); and

b. as a matter of law:

1. even at the Motion Court level, a denial of a motion to dismiss is not 'law of the case' on a subsequent motion for summary judgment. See, e.g., Borawski v. Abulafia, 140 A.D.3d 817, 817-818, 33 N.Y.S.3d 412 (2d Dep't 2016);

2. in any event, any 'law of the case' effect, at the motion court level, of a prior order on a subsequent motion, is irrelevant to -- and so the doctrine of law of the case is not applicable to -- the appellate court, on appeal of the motion court's second order. E.g., Precision Window Systems, Inc. v. EMB Contracting Corp., 149 A.D.3d 883, 884, 53 N.Y.S.3d 80 (2d Dep't 2017); and

3. a fortiori, there is no 'law of the case' effect when, as here, no appeal was noticed in respect of the motion court's first order. See, e.g., In re Atlantic Mut. Ins. Co. v. Lauria, 291 A.D.2d 492, 492-493, 739 N.Y.S.2d

[footnote continues]

Lastly in this regard, Tenant asserts, again (cf. T.Br. 3, 37), that because the monthly rent amounts billed and paid in that year were approx. $434, or 00.59%, less than the '6% increase' provided-for in those emails, this underbilling must somehow show some other, different and unilateral 'fixing' by Landlord. But T.Br. 37 never addresses our refutation of its contention (see Def.Init.Br. 29-30, 52-55). In short, we explained that (a) the underbilling was de minimis, so that even Tenant admittedly did not notice it in its Complaint (see R.37 and Def.Init.Br. 11, fn. 15); and (b) as a matter of law, an underbilling by a landlord does not create any new or different agreement, let alone an agreement as to any subsequent time-period (see Def.Init.Br. 54-55 fn. 61: and, characteristically T.Br. does not address that case-law). See also the provision in original Lease §25 (R.60), that

> No payment by Tenant or receipt by Owner of a lesser amount than the monthly rent herein

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394 (2d Dep't 2002).

The sole case cited by T.Br. 20, Brownrigg v. NYC Housing Authority, 29 A.D.3d 721, 815 N.Y.S.2d 681 (2d Dep't 2006), does not address any of the foregoing points.

Likewise, the Motion Court's interim 'heating' decision (T.Br. 15-16) -- leaving aside its misunderstandings and interim nature -- is irrelevant here, and indeed is just a characteristic distraction, since it did not anew consider the 'merits,' but rather expressly just relied on the limited and incomplete record at the motion-to-dismiss stage.

> stipulated shall be deemed to be other than on account of the earliest stipulated rent ....
>
> * * *

As a last 'fact' contention: during his deposition, Tenant had asserted (R.411-412, see Def.Init.Br. 27-28) that, subsequent to those 2014-2015 emails, Kaufman and Tenant had supposedly orally reached a new fourteen-year rent agreement. We showed, however (id.), that such an alleged oral fourteen-year agreement fails in the face of the Statute of Frauds; and Tenant does not now dispute this.

III. T.BR.'s MISCELLANEOUS EFFORTS AT DISTRACTION ARE IRRELEVANT

A. Questions As To Defendants' Supposed Motive For Now Insisting That There Is No Enforceable Lease-Extension Are Simply Irrelevant

As already shown at Def.Init.Br. 17-18 fn. 23 -- and Tenant does not attempt to answer -- the background "circumstances which motivated" an insufficient writing are irrelevant.

Correspondingly, a defendant's motive for standing on his/her/its right to 'reject' a writing as indefinite is irrelevant. Thus in Sun Printing and Publishing Ass'n v. Remington Paper & Power Co., Inc., 235 N.Y. 338 (1923), a contract provided that defendant would supply paper to plaintiff at a definite rate for certain months, and then at a rate "to be agreed upon by and between the parties" for the following 12

months. Defendant refused to make delivery after the initial period. Judge Cardozo explained that: (a) defendant was entitled to "'exercis[e] its legal right'" [citations omitted] to insist, as to the latter time-period, that the writing "was nothing more than 'an agreement to agree'"; and (b) "The right [-- i.e., of defendant to 'stand' on the unenforceability of the agreement as to the latter time-period] is not affected by our appraisal of the motive" [citing Mayer v. McCreery, 119 N.Y. 434 (1890)].[26]

B. The Fact That The Parties Performed Under The 2012 Letter Agreement Through February 2015 Is Irrelevant

T.Br. misses a key background point: "a [commercial] landlord is not obliged to renew a lease [citations omitted], even though the tenant may have invested capital and energy in the expectation of renewal," Mobil Oil Corp. v. Rubenfeld, 48 A.D.2d 428, 370 N.Y.S.2d 943 (2d Dep't 1975), aff'd, 40 N.Y.2d 936, 390 N.Y.S.2d 57 (1976). Accord, e.g., Dime Savings Bank of New York, FSB v. Montague St. Realty Assoc., 90 N.Y.2d 539, 542, 664 N.Y.S.2d 246 (1997), and Pepe v. Stock, 24 A.D.3d 527, 808 N.Y.S.2d 277 (2d Dep't 2005).

[26] Mayer held, first, that certain correspondence was too indefinite to create a lease in favor of plaintiff against defendant-owner, and second, that even if owner was 'walking-away' because "he thought he could make a more favorable agreement with some other person," any issue as to "what motive activated him" "was entirely immaterial" (at 438-439, 439-440).

Tenant does not dispute that an extension provision is considered, accordingly, to be conceptually separate from the main lease (see Def.Init.Br. 2 fn. 2); and so there is no inconsistency in recognizing (as relevant here) that (a) the 2012 Letter Agreement was performed until the stated "terminat[ion] [date] of February 28, 2015" (R.80); but (b) that performance is irrelevant to the point that the 2012 Letter Agreement did not include an enforceable extension agreement, see e.g., Martin Delicatessen; and see generally, e.g., Sun Printing, supra; and Alter v. Bogoricin, supra.

Correspondingly, Tenant's repeated (e.g., T.Br. 2, 10) pointing to the statements in the 2012 Letter Agreement that (a) it incorporated the substantive terms of the original lease agreement, and (b) the personal guaranty remained "legal and binding" (-- but see Def.Init.Br. at 23 fn. 29, noting, without rebuttal, how Tenant has mischaracterized these provisions) is irrelevant -- for, again, the 2012 Letter Agreement did (see T.Br. 9 fn. 5) add additional space, effective through February 28, 2015, and so needed to provide that the existing lease terms, and the guaranty, would continue to apply also as to that space, for that time.[27]

[27] T.Br. also does not dispute our showing (Def.Init.Br. 48-49) that any 'promissory estoppel' argument is precluded here.

C. Tenant's Attempt To Create A Fact Issue In Respect Of Def.Init.Br.'s "Alternative" Argument Is Both (i) Unsuccessful, And (ii) Irrelevant

Def.Init.Br. showed not only that the T-B-D Sentence's phrase, "to be determined at [a future date]," is on its face 'indefinite' under Martin Delicatessen (42-46), but also, as an "alternative" point (21), that Tenant itself had conceded, in deposition, that Tenant understood, in 2012, that the T-B-D Sentence required further negotiation and agreement.

As a final[28] effort at distraction, T.Br. 47-48 asserts that this "alternative" point must be disregarded, because Def.Init.Br. is supposedly "misquoting" that deposition by failing to include certain "errata" changes that Tenant had subsequently sought to make.

But, T.Br. never addresses either our substantive showing, or the cited case-law (Def.Init.Br. 22 fn. 28)[29], as to why those purported 'errata' are indeed irrelevant and insufficient, and so should properly be disregarded.

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[28] As a penultimate effort, T.Br. (3, 28, 40-41) spends multiple pages addressing the non-controversial point that, if Prior Owner had made an enforceable agreement with Tenant for the period March 2016 - February 2030, then Current Owner would be bound thereby (cf. Def.Init.Br. 7 fn. 12). Conversely, however, Tenant does not dispute that, insofar as Prior Owner did not bind itself for the 2016-2030 period, neither is Current Owner bound (id.).

[29] Cf. T.Br. 48, asserting, amazingly, that "Defendants offer no authority."

T.Br. 47 also asserts that Tenant's concession (R.425-426, quoted in Def.Init.Br. 21-22) was negated when Tenant subsequently switched to the theory -- refuted at length in Def.Init.Br. and herein -- that the T-B-D Sentence must be read as if it included the phrase 'unilaterally by Landlord.' (T.Br. 41-43, fn. 10, citing R.515-516, and R.730-731).

But, when Defendants, at a subsequent deposition session (see R.728-729), asked Tenant to address the earlier admissions, Tenant failed to do so -- and indeed Tenant's counsel (improperly) directed Tenant not to respond to those questions (see R.729-730). "[A] [party's] belated attempt to avoid the consequences of [that party's own] earlier admissions" is "insufficient to defeat" a summary judgment motion based on the earlier admission, Abramov v. Miral Corp., 24 A.D.3d 397, 805 N.Y.S.2d 119 (2d Dep't 2005).

In any event, an issue of fact concerning Defendants' clearly-labelled "alternative" argument should not distract attention from Tenant's failure to proffer any genuine issue of fact in respect of Defendants' main-line Martin Delicatessen point, based on the facial indefiniteness of the T-B-D Sentence. Indeed, one reason Defendants presented this "alternative" argument (clearly labeled as such) was so that this Court would see that Tenant's "errata" contentions go only to this

"alternative" point, and do not concern Defendants' main-line points.

CONCLUSION

Accordingly, and as shown in Def.Init.Br., Defendants should be granted summary judgment.

Dated: New York, New York
February 5, 2018

Respectfully submitted,

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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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