TO BE ARGUED BY:
THOMAS C. LAMBERT, ESQ.
TIME REQUESTED: 15 MINUTES

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

JUVENAL REIS,

Plaintiff-Respondent,

-against-

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

Defendants-Appellants.

Appellate Division Docket No. 2017-10961

BRIEF FOR PLAINTIFF-RESPONDENT

LAMBERT & SHACKMAN, PLLC
THOMAS C. LAMBERT, ESQ.
STEVEN SHACKMAN, ESQ.
Attorneys for Plaintiff-Respondent
274 Madison Avenue, Suite 1302
New York, New York 10016
(212) 370-4040

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PRELIMINARY STATEMENT

This is a declaratory judgment action to confirm the end date of the term of a commercial lease.

The subject of this case is the parties' 2012 Letter Agreement. It is reproduced at R80. It is the document which was referred to in the depositions as Exhibit O. A copy highlighted to show the critical sentences in context is at R997-998.

For three (3) years Defendant-Appellant JB Kaufman Realty Co, LLC ("Prior Landlord") performed under the 2012 Letter Agreement. Prior Landlord expanded and improved the demised premises and billed for and accepted rent, all specifically as prescribed in the 2012 Letter Agreement. Then prior Landlord decided to sell the subject building ("Building") and at that point for the first time asserted that the 2012 Letter Agreement (which extended the term to 2030) was a mere unenforceable "agreement to agree." R989-990. Plaintiff-Respondent ("Tenant") commenced the instant action. R29.

Prior Landlord moved to dismiss the case based on documentary evidence, asserting that the phrase "terms to be determined" renders the 2012 Letter Agreement indefinite, as a matter of law. R1062, 1071. By Order dated December 22, 2015, the Court below denied that motion. There is no longer any right to appeal that decision. R1064-1065.

Tenant's case is established very simply by four (4) sentences in the 2012 Letter Agreement. These sentences are highlighted at R997-998 so they can be seen in context. They are as follows:

> Sentence 1: "It is agreed that … all terms and provisions provided for within the original lease between the parties as dated and executed on March 12, 2002 … shall remain in full force and effect …."
>
> Sentence 2: "Lease terms to be extended to now terminate on Feb. 28, 2030; terms [annual percentage increase in rent[1]] to be determined at the expiration of this initial lease consolidation period [February 28, 2015[2]]."
>
> Sentence 3: "Any percentage increase will not be less than 5% annually and not to exceed a maximum cap of 8% annually."[3]
>
> Sentence 4: "…the signing of same [the 2012 Letter Agreement] is considered legal and binding to the parties involved."

At the end of what was referred to as "this initial lease consolidation period" in "Sentence 2" above, Prior Landlord set the annual percentage increase

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[1]Both parties agree that the word "terms" means the annual percentage increase in rent for the period from March 1, 2015–February 28, 2030. R515 (Reis ebt); R866 (Kaufman ebt).
[2]Both parties agree that the "expiration of this initial lease consolidation period" means February 28, 2015. R334 (Reis ebt), R891 (Kaufman ebt).
[3]Both parties agreed that the language "any" percentage increase applies to the period from March 1, 2015 – February 28, 2030. R747 (Reis ebt), R7, 886-887, 877-879, 902-903 (Kaufman ebt).

in rent under the Lease at 5.4%. Prior Landlord did so in writing by billing Tenant for the month of March 2015 (and for each month thereafter until the commencement of this lawsuit) in an amount which was a 5.4% increase over the base rent in effect on February 28, 2015. R993, 1043-1051. Tenant paid those bills, and Landlord accepted the payments. R993, 1052-1059. The new rent was then "determined."

This is reconfirmed by the March 17, 2016 Stipulation in the Court below (R1060-1061), signed by the attorneys for Prior Landlord and Tenant, respectively, which provides:

> WHEREAS by invoice dated March 1, 2015 Landlord set the annual percentage increase of rent under the Lease at 5.4%.

That is, very simply, Tenant's case: The term was extended to February 28, 2030 at a 5.4% annual increase over the base rent in effect at the end of the lease consolidation period (February 28, 2015), otherwise all terms shall remain in full force and effect.

In July 2016, Prior Landlord sold the Building to the current new owner Defendant-Appellant 43-01 22nd Street Owner LLC ("Landlord") which took title fully aware of the litigation including the Court's denial of the motion to dismiss and the parties' signing of the March 17, 2016 Stipulation. R16-28, 42-44. Landlord was then added as a second defendant. R52-53.

On their motion for summary judgment, Defendants-Appellants did not submit any affidavit by a person with personal knowledge of the facts and did not present any other evidence that would contradict or question the aforesaid simple documentary proof.

The Court below found that the parties agreed that (i) "[Tenant] could stay until 2030" and (ii) "the 5-8% range is applicable to the extended term period through February 28, 2030." R7. The Court below identified only one issue of fact: whether by issuing the March 2015 rent bill at 5.4% Prior Landlord set the "precise amount" of the annual rent increase for the extended term. The Court below stated (R8-9):

> the rent bill issued by the prior owner in March 2015 with a 5.4% rent increase and the Stipulation dated March 17, 2016 raise, at the very least, an issue of fact as to whether the prior owner determined the precise amount pursuant to the terms of the 2012 Letter Agreement .... Based upon the conflicting testimony, there are issues of fact including, but not limited to, whether the 2012 Letter Agreement authorized the prior owner to unilaterally set the percentage increase at the end of the expiration of the initial lease consolidation period or whether the rent was to be negotiated.

In point of actual fact, however, the paid March 2015 rent bill and the paid monthly rent bills thereafter (R993, 1043-1059) and the March 17, 2016 Stipulation (R1060-1061) conclusively resolve that one issue, in Tenant's favor. Prior Landlord stipulated that:

> by invoice dated March 1, 2015 Landlord set the annual percentage increase of rent under the Lease at 5.4%.

While Tenant did not cross-move for summary judgment in the Court below, the motion searches the Record and, based on the evidence presented it is Tenant who is entitled to summary judgment.

Defendants-Appellants' primary argument is that, because of the phrase "terms to be determined" in the 2012 Letter Agreement, it is indefinite on its face and therefore there is no enforceable extension as a matter of law. As shown above the terms were determined in writing by the parties, as a matter of fact --- just as prescribed in the 2012 Letter Agreement. In any case, Defendants-Appellants' legal argument was rejected by the denial of Prior Landlord's motion to dismiss. R1064-1065, 1071. As shown in the points below, that legal argument, and Defendants-Appellants' other legal arguments, are without merit

The holding of the Court below (R8), "defendants failed to make a prima facie showing of entitlement to summary judgment," should be affirmed. In addition, upon searching the Record, this Court should grant summary judgment in favor of Tenant. The only asserted issue of fact was resolved by the March 17, 2016 Stipulation. R1060-1061.

QUESTIONS PRESENTED

1. Is the parties' 2012 Letter Agreement void for indefiniteness? The Court below answered in the negative.

2. Is a triable issue of fact presented with regard to the terms of the parties' 2012 Letter Agreement? The Court below answered in the affirmative.

3. Was evidence presented sufficient to establish a triable issue of fact with regard to Tenant's simple case? The Court below answered in the affirmative.

STATEMENT OF THE FACTS

A. The Underlying Human Story

The underlying human story is set forth by Tenant in his affidavit at R982-996. It is the story of a family man (Roger Kaufman) who inherited part-ownership of Prior Landlord and was then burdened with managing the Building on behalf of his siblings. It is the story of a professional artist (Tenant) who initially leased an art studio in the Building for his work, who took additional space so that he could have other artists working near him, and who then over the years developed a large community of artists in the Building. Having initially in 2002 taken a 3,750 square foot studio for his own use, Tenant was by 2008 leasing 69,000 square feet of space, comprising approximately 39% of the Building. R984.

By this point, Tenant was operating the premises under the trade name "Reis Studios." He was providing the subtenants-artists with amenities and services, some of which are particular to this artists' community (library, common rooms, art shows and other events) and some of which are things that a landlord of a building would often provide (trash removal, internet, utilities). R982-984.

As set forth in Tenant's affidavit, "[this] arrangement, where [Tenant] was leasing almost half the building and subletting it, freed [Roger Kaufman] up from many of the administrative tasks a landlord would ordinarily do. This suited Roger, who never really wanted to be in the landlord business, but had gotten stuck

managing his family's building." R995. For 15 years, Mr. Kaufman and Tenant "were friends ... [who] worked together cooperatively ... [and] never had a disagreement about anything until he and his siblings decided to sell the Building." R994.

This background explains how it is that the parties' agreements were drafted by Mr. Kaufman without either party using a lawyer.

B. The 2002 Lease and the Letter Agreement Amendments Through 2012

In 2002 Prior Landlord and Tenant entered into a lease for space in the Building.[4] Over the ensuing years they made several agreements to expand the demised premises and extend the term. Each such agreement was memorialized in a written letter agreement signed by the parties. Each such letter agreement was drafted by Prior Landlord, and neither party used a lawyer. R980, 847, 848, 851, 852, 854, 856, 859, 884.

C. The 2012 Letter Agreement Which is the Subject of this Case

Like the prior letter agreements in 2003, 2004, 2005, 2006 and 2007, the 2012 Letter Agreement was prepared by Prior Landlord and neither party used a lawyer. R986, 884.

[4] The lease, comprised of the original lease document and 8 subsequent letter agreements, is at R999-1020. The 2012 Letter Agreement (R1019-1020), the last document in that group, is also separately set forth at R997-998. The original lease, as modified by these subsequent writings, is referred to herein as the "Lease."

The 2012 Letter Agreement expanded the demised premises.[5] In what is the basis for this case, the 2012 Letter Agreement extended the term to February 28, 2030 on the same terms and conditions as the existing lease except for the amount of annual percentage increase in rent. It provided that in or about February 2015 Prior Landlord would set the annual percentage increase of rent for the extended term period (March 2015 – February 2030) in an amount between 5% and 8%. This agreement is proved by the following sentences in the 2012 Letter Agreement:

> Sentence 1: "It is agreed that … all terms and provisions provided for within the original lease between the parties as dated and executed on March 12, 2002 … shall remain in full force and effect …."
>
> Sentence 2: "Lease terms to be extended to now terminate on Feb. 28, 2030; terms to be determined at the expiration of this initial lease consolidation period."

Both parties agree that the word "terms" in Sentence 2 means the annual percentage increase in rent for the period from March 1, 2015–February 28, 2030. R515 (Reis ebt), R866-887 (Kaufman ebt). Both parties agree that the phrase in

[5] The 2012 Letter Agreement states "New space (see line item 9) increases Tenant's position as of July 1, 2012 to 76,500 sq. ft.* and 43.166%** of building total." Line 9 describes the space being added: "2nd floor SE corner (7500 sq. ft. and an additional 4.166% of total building consumption)." R997-998.

Sentence 2 "the expiration of this initial lease consolidation period" means on or about February 28, 2015. R334 (Reis ebt), R891 (Kaufman ebt).[6]

Sentence 3: "Any percentage increase will not be less than 5% annually and not to exceed a maximum cap of 8% annually."

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

Sentence 4: "...the signing of same is considered legal and binding to the parties involved."

As shown by Tenant's affidavit, and not put at issue in any affidavit submitted by Defendants-Appellants, these sentences memorialized the parties' meeting of the minds. R986-988. An annual increase of 5-8% was the standard the parties agreed on. The word "any" means exactly what it says, that this language is applicable to both the increase effective March 1, 2015 for the current extension, and for the separate option to extend the term past February 28, 2030. *Id.*

Objectively, this is clear when one reads the document. All other terms were spelled out. The length of the extension term was set forth ("to now

[6] The parties referred to the period until February 28, 2015 as the "initial lease consolidation period" because the 2007 Letter Agreement (in language that is repeated in the 2012 Letter Agreement) consolidated the expiration dates and rent amounts for the various spaces, which had been added piecemeal under the various prior letter agreements. R987-990, 1017.

terminate on February 28, 2030"), and the document states "all terms and provisions provided for within the original lease ... shall remain in full force ...." Length and non-monetary terms having been set forth, the only item left, to be determined by Prior Landlord utilizing an agreed-upon standard, a range of 5-8%, was the annual percentage increase in rent.[7] 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 increase, which would be between 5% and 8%. R987-980. As stated in Tenant's Affidavit in the Court below:

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

R988. Defendants-Appellants offered no evidence to the contrary. There was no affidavit from Mr. Kaufman. As Tenant explained at his deposition, "terms to be determined [means] to be determined by him, not by me .... to be determined, to be determined by you, not negotiated. If he had said terms to be negotiated, that's something else." R515-516.

[7] See also the language at the bottom of p.1 of the 2012 Letter Agreement (R80) which pertains to the separate option to extend past February 28, 2030 "terms and length to be determined at that time." The word "terms" means rent and the word "length" means number of years. All other "terms and conditions" were as "provided for within the original lease...." R80.

The 2012 Letter Agreement states "the signing of [this Agreement] is considered legal and binding to the parties involved." That too memorialized the parties' agreement. This language, drafted by Prior Landlord, is an unmistakable and unequivocal expression of the parties' mutual intention to be bound. R988-989.

D. The Parties Perform Under the 2012 Letter Agreement

Prior Landlord then performed, and billed Tenant for, the construction work required under the 2012 Letter Agreement. Tenant paid these bills and Prior Landlord accepted Tenant's payments. R 903-904, 989, 1023-1032. Prior Landlord delivered possession of the new space demised under the 2012 Letter Agreement to Tenant. Prior Landlord issued rent bills at the increased amount under the 2012 Letter Agreement. Tenant paid these bills and Prior Landlord accepted the payments. R 903-904, 989, 1033-1042. Tenant remained in possession of the entire demised premises after February 28, 2015, the date the term would have ended but for the 2012 Letter Agreement. Landlord continued to bill Tenant for rent and accept Tenant's rent payments. *Id.*

E. Pursuant to the 2012 Letter Agreement, Prior Landlord Determines the Annual Percentage Increase of Rent for the Extended Term

On or about March 1, 2015, Prior Landlord set the annual percentage increase for the extended term at 5.4%. Prior Landlord did so in writing by billing Tenant for the month of March 2015 (and for each month thereafter until this case

was commenced) in an amount which was a 5.4% increase over the base rent in effect on February 28, 2015. R993. Copies of the bills are R1044-1051. A copy of the bill for February 2015, the last month prior to the increase, is R1043.

Tenant paid those bills. Landlord accepted the payments. R993. Copies of the checks are at R1052-1059.

Subsequently, after the commencement of this case, the parties made a Stipulation wherein they reconfirmed and agreed on the correctness of the foregoing fact. The March 17, 2016 Stipulation herein, signed by the attorneys for Prior Landlord and Tenant, provides:

> WHEREAS by invoice dated March 1, 2015 Landlord set the annual percentage increase of rent under the Lease at 5.4%

R1060.

F. Prior Landlord Decides to Sell the Building and Suddenly Disavows the 2012 Letter Agreement; Tenant Commences This Declaratory Judgment Action

Years after the parties' uninterrupted mutual performance under the 2012 Letter Agreement, Prior Landlord decided to sell the Building and suddenly disavowed the 2012 Letter Agreement, asserting to Tenant for the first time (and contrary to its prior agreement and performance) that it was an "unenforceable agreement to agree." R989-993.

At that point, in July 2015, Tenant commenced this case and filed the Notice of Pendency. R29-44.

G. Prior Landlord's Motion to Dismiss is Denied

Prior Landlord moved to dismiss the Complaint based on documentary evidence and failure to state a cause of action, arguing that the words in the 2012 Letter Agreement "terms to be determined" render the writing indefinite, on its face, as a matter of law. R1073.

By Order dated December 22, 2015 (R1062-1065) the Court below denied Prior Landlord' motion to dismiss, holding:

> The 2012 Letter does not utterly refute plaintiff's factual allegations as there are questions of fact including whether the 2012 Letter extended the lease term beyond February 28, 2015 and whether the parties already performed under the 2012 Letter.

R1064-1065.

H. Prior Landlord Sells the Building to Landlord

In July 2015, Prior Landlord sold the Building to Landlord. R16 is a copy of the Deed and R52-53 is a copy of the Stipulation whereby Landlord was added as a party to this case.

Landlord bargained for and took its title with notice of all the facts, including the 2012 Letter Agreement, the bills showing that Prior Landlord set the annual percentage increase for the extended term, the December 22, 2015 Order

denying Prior Landlord's motion to dismiss, and the March 17, 2016 Stipulation, which provides "by invoice dated March 1, 2015 Landlord set the annual percentage increase of rent under the Lease at 5.4%."

I. The Court Enjoins Landlord, the New Owner, From Physically Interfering with Tenant's Occupancy; the Court Holds that Tenant Has Demonstrated a Probability of Success on the Merits

After it took title Landlord began physically interfering with Tenant's occupancy. By Order dated March 7, 2017 the Court below enjoined Landlord from its cutting off heat, disabling security doors and elevator locks, and performing dangerous un-permitted demolition. R1066-1070. The Order provides:

> ... it is hereby,
>
> ORDERED that plaintiff's [Tenant] applications (seq. nos. 3&4) are granted to the extent that defendant 43-01 22nd STREET OWNER LLC [Landlord] is enjoined from cutting off or reducing to below previous customary and normal levels the heat provided to the leased premises which are the subject of this action on business days from 8:00 AM to 5:00 PM, disabling security doors to the premises, leaving the building elevator unlocked after 9:00 PM, and from performing demolition and construction work at the building without the necessary permits from the New York City Department of Buildings and without taking all safety measures and safeguards prescribed for such work by the New York City Buildings Code.

R1069-1070.

In its Order, the Court below held "plaintiff [Tenant] has demonstrated a probability of success on the merits." The Court below held (R1069):

> Here, plaintiff [Tenant] has demonstrated a probability of success on the merits. This Court has already denied defendants' motion to dismiss finding that issues of fact remain including whether the 2012 Letter extended the lease term beyond February 28, 2015 and whether the parties already performed under the 2012 Letter.

J. The Kaufman Deposition

Roger Kaufman was the sole witness produced for deposition by both Defendants-Appellants. He testified that he was and is the owner of a 90% interest in the Prior Landlord and that upon the sale of the Building he became employed by the new purchaser Landlord. R840, 926. Asked if he has a continuing financial interest in the profitability of new Landlord's ownership of the Building, he answered "without a doubt." R910.

The Court below found that at his deposition Mr. Kaufman acknowledged that the parties "agreed … that plaintiff could stay until 2030." R7; see R902 (Kaufman ebt).

Mr. Kaufman testified that under the 2012 Letter Agreement the annual percentage increase would have to be between 5 and 8 percent. R902-903. The Court below found "Roger Kaufman … testified [at his deposition] that under

the 2012 Letter Agreement ... [t]he 5-8% range is applicable to the extended term period through February 28, 2030." R7.

Mr. Kaufman testified that the precise amount within that range "would have to be determined." R902-903. He testified, however, "that was never done." R903.

K. Defendants-Appellants' Motion for Summary Judgment

By notice dated July 14, 2017, Defendants-Appellants moved for summary judgment (i) "denying [Tenant's] request for a declaration that the lease ... expire[s] ... [on] February 28, 2030" and (ii) "counter-declaring that the lease ... expired as of February 29, 2016." R10.

The motion was not supported by an affidavit of Mr. Kaufman or any other person purporting to have knowledge of the facts.

The affidavit of Tenant, submitted in opposition, set forth the facts in detail (as summarized above). R980-996.

L. The Order Appealed From

By Decision and Order dated September 25, 2017 and entered October 3, 2017 (R5-9), the Court below denied Defendants-Appellants' motion for summary judgment, holding as follows:

> defendants failed to make a prima facie showing of entitlement to summary judgment.

R8.

The Court below found that at their respective depositions, Tenant "testified that under the 2012 Letter Agreement the term was extended to February 28, 2030," and Mr. Kaufman "testified that under the 2012 Letter Agreement, the only thing that was agreed to was that plaintiff could stay until 2030." R6-7.

The Court below found that at their respective depositions Tenant and Mr. Kaufman agreed that "the 5-8% range was applicable to the extended term period through February 28, 2030." *Id.*

The Court below identified a single issue of fact, as follows:

> the rent bill issued by the prior owner in March 2015 with a 5.4% rent increase and the Stipulation dated March 17, 2016 raise, at the very least, an issue of fact as to whether the prior owner determined the precise amount pursuant to the terms of the 2012 Letter Agreement .... Based upon the conflicting testimony, there are issues of fact including, but not limited to, whether the 2012 Letter Agreement authorized the prior owner to unilaterally set the percentage increase at the end of the expiration of the initial lease consolidation period or whether the rent was to be negotiated.

R8-9.

As shown below, the Court below properly held "defendants failed to make a prima facie showing of entitlement to summary judgment." Upon searching the Record, the Court below should have found that "the rent bill issued by the prior owner in March 2015 with a 5.4% rent increase and the Stipulation

dated March 17, 2016" resolve in Tenant's favor any issue of fact "as to whether the prior owner determined the precise amount pursuant to the terms of the 2012 Letter Agreement" and, thereupon granted summary judgment in favor of Tenant.

ARGUMENT

POINT I
THE PARTIES' 2012 LETTER AGREEMENT IS NOT VOID FOR INDEFINITENESS

Defendants-Appellants' argument on this appeal is that the Court below erred in denying summary judgment based on "purported issues of fact" because the phrase in the 2012 Letter Agreement, "terms to be determined," is indefinite on its face and therefore there is no enforceable extension, as a matter of law.[8]

Defendants-Appellants' legal argument was rejected by the denial of Prior Landlord's motion to dismiss, an Order which is now unappealable. R1064-1065, 1071. If the phrase "terms to be determined" was indefinite on its face, the case could not have survived the motion to dismiss. That is the law of the case. *Brownrigg v. NYC Hous. Auth.*, 29 A.D.3d 721, 815 N.Y.D.2d 681 (2d Dep't 2006).

Defendants-Appellants' appeal is based almost entirely on the case of *Joseph Martin Jr. Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 436 N.Y.S.2d 247 (1981), where the lease expressly stated that the rent was "to be agreed upon" and provided no methodology, no recourse to extrinsic events, no range, no formula, no ambiguity, and no room for legal construction.

[8] Defendants-Appellants' Brief at p.1.

As shown below, based on the plain language of the 2012 Letter Agreement, the *Martin* case supports Tenant's position. In the 2012 Letter Agreement there is an objective range, methodology and time requirement. It was proved in the Court below by the deposition testimony, the unrefuted affidavit of Tenant, and the parties' mutual pre-litigation performance, that "to be determined at the expiration of this initial lease consolidation period .... Any percentage increase will not be less than 5% annually and not to exceed a maximum cap of 8% annually" means that on or about February 28, 2015 Prior Landlord was to set the precise amount of the annual rent increase for the extended term. And Prior Landlord did so, just as prescribed in the 2012 Letter Agreement. The parties' performance establishes, as a matter of fact, what those words meant to the parties. *Federal Ins. Co. v. Americas Ins. Co.*, 258 A.D.2d 39, 44, 691 N.Y.S.2d 508 (1st Dep't 1999). It was then confirmed by the March 17, 2016 Stipulation. As further shown below, the result urged by Defendants-Appellants, to "strik[e] down the contract as indefinite and in essence meaningless," is, as stated by the Court of Appeals, "at best a last resort" that would be totally inappropriate and unfounded under the applicable facts and law. *166 Mamaroneck Avenue Corp. v. 151 East Post Road Corp.*, 78 N.Y.2d 88, 575 N.E.2d 104 (1991).

A. Reading the 2012 Letter Agreement as a Whole and Giving Each Sentence Some Meaning, as is Required under the Case Law, Tenant's Aforesaid Reading of the 2012 Letter Agreement is the Only Cogent Reading of the Document

The aforementioned four (4) key sentences in the 2012 Letter Agreement do not appear in the document one after the other. Nevertheless, reading the document as a whole and giving each sentence some meaning, as is required under the case law, Tenant's aforesaid reading of the 2012 Letter Agreement is the only cogent reading of the document:

> The court should "construe the agreements so as to give full meaning and effect to the material provisions" (*Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582, 822 NE2d 768, 789 NYS2d 461 [2004]). A reading of the contract should not render any portion meaningless (*see God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP, 6 NY3d 371, 374, 845 NE2d 1265, 812 NYS2d 435 [2006]*; *Excess Ins. Co., 3 NY3d at 582*). Further, a contract should be "read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358, 794 NE2d 667, 763 NYS2d 525 [2003] [citations omitted]).

Beal Savings Bank v Sommer, 8 N.Y.3d 318, 834 N.Y.S.2d 44 (2007).

B. Any Ambiguity in the 2012 Letter Agreement Must Be Construed in Favor of Tenant

Prior Landlord drafted the 2012 Letter Agreement. R884, 986. Accordingly, the meaning of Prior Landlord's words in that agreement, if they

would be ambiguous (which they are not) must be construed against Prior Landlord and Landlord:

> It has long been the rule that ambiguities in a contractual instrument will be resolved *contra proferentem*, against the party who prepared or presented it. (*Taylor v United States Cas. Co.,* 269 NY 360, 364) .... the ambiguity should be resolved against the landlord.

151 West Associates v. Printsiples Fabric Corp. et al., 61 N.Y.2d 732, 734; 460 N.E.2d 1344, 1345; 472 N.Y.S.2d 909, 910 (1984). Not only is the rule applicable here because Prior Landlord drafted the 2012 Letter Agreement, but also, as a matter of law, any ambiguities in a lease agreement between a landlord and a tenant must be construed against the landlord.

Defendants-Appellants' argument that this rule of construction should not apply here because Tenant "had a voice" in the drafting of the 2012 Letter Agreement is without merit. The cases cited by Defendants-Appellants apply to situations where both parties had a voice in the drafting of the actual words and phrases in the memorializing document, not just the business terms of the underlying agreement. *Coliseum Towers Associates v. County of Nassau,* 2 A.D.3d 562, 769 N.Y.S.2d 293 (2d Dep't 2003) (presumption applied "against the party who prepared it, and favorably to a party who had no voice in the selection of its language." [emphasis added]). It is undisputed that Mr. Kaufman was the sole preparer of "the language." R980, 983, 985. In the one instance where a change

was made to the document because Tenant noticed that an agreed-upon business term was not memorialized in the writing, Mr. Kaufman "went back and made a revision to the document on his computer ... [and] then presented [Tenant] with the revised document.... prepared by Roger [Kaufman]." R985.

C. Under the Rule Set Forth by the Court of Appeals, the Court Should Endeavor to Hold the Parties to Their Bargain; the Result Urged by Defendants-Appellants is What the Court of Appeals Calls "at best a last resort"

Nowhere in the Court below did Defendants-Appellants deny the parties' meeting of the minds. The Court below found that Mr. Kaufman acknowledged that the parties "agreed ... that plaintiff could stay until 2030." R7.

Rather, Landlord, the new owner who took title with notice of all the facts, is seeking to utilize the "non-lawyerly" draftsmanship of its predecessor-in-interest to try to avoid being held to the bargain its predecessor-in-interest made.

That is the essence of Landlord's position in this litigation.

The result urged by Landlord, to relieve Landlord of the bargain made by its predecessor-in-interest based on allegedly "imprecise" language in the document that its predecessor-in-interest drafted, would be directly contrary to the well-settled law, as set forth by the Court of Appeals in *166 Mamaroneck Avenue Corp. v. 151 East Post Road Corp.*, 78 N.Y.2d 88, 575 N.E.2d 104 (1991). In that case the Court of Appeals held as follows:

> Contracting parties are often imprecise in their use of language, which is, after all, fluid and often susceptible to different and equally plausible interpretations. Imperfect expression does not necessarily indicate that the parties to an agreement did not intend to form a binding contract. A strict application of the definiteness doctrine could actually defeat the underlying expectations of the contracting parties. Thus, where it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain. Striking down a contract as indefinite and in essence meaningless "is at best a last resort."

Id. at 91 [internal citations omitted].

In the case at bar, it is "clear from the language of [the 2012 Letter Agreement] that the parties intended to be bound." *Id.* After all, the 2012 Letter Agreement expressly states as follows:

> the signing of same is considered legal and binding to the parties involved.

R81. That language, drafted by Prior Landlord, is an unmistakable expression and affirmation of the parties' mutual intention to be bound. At his deposition, Mr. Kaufman testified as follows:

> Q. I'm looking at the last two lines [of the 2012 Letter Agreement] there's the phrase "this lease agreement," on the second to the last line and then is it says, quote, "and the signing of the same is considered legal and binding to the parties involved." Unquote.
>
> Mr. O'Brien: Is there a question?
>
> Q. Do you see that?
>
> A. Yes.

Q. And is that correct? Do you subscribe to that?
A. Yes.

R862.

Under the guiding principles espoused by the Court of Appeals, this Court "should endeavor to hold the parties to their bargain." *Id.*

Unlike in the *Mamaroneck* case, in the case at bar there is no "missing term" at all. The 2012 Letter Agreement memorialized the parties' agreement to *inter alia* extend the term from March 1, 2015 to February 28, 2030 at an annual rent increase to be set by Landlord in or about February 2015 in an amount between 5% and 8%. It is well-settled that where, as here, the parties agree to an objective method for setting rent within a limited range, the agreement is sufficiently definite and enforceable. *Rosa Luna v. Lower East Side Mutual Housing Association, Inc.*, 293 A.D.2d 307, 740 N.Y.S.2d 317 (1st Dep't 2002) (agreement enforceable where the parties selected a process and objective basis, within a range, for the calculation of rent for the renewal term and intended to be bound thereby); *see also Subcarrier Communications, Inc. v Satra Realty, LLC*, 11 A.D.3d 829,785 N.Y.S.2d 545 (3d Dep't 2004) (rule of *Martin* case is limited to situations where the rent is left open for "future negotiations.")

Moreover, any *potential* indefiniteness or ambiguity was completely dispelled when Prior Landlord set the rent at a 5.4% increase by issuing bills in that amount commencing March 2015 and accepted Tenant's payments in such

amount. The parties' performance establishes, as a matter of fact, what the words "to be determined ..." meant to the parties. It is well-settled that:

> the parties' course of performance under the contract is considered to be the "most persuasive evidence of the agreed intention of the parties." (*Webster's Red Seal Publis v. Gilbertom World-Wide Publis.*, 67 AD2d 339, 341, aff'd 53 NYS2d 643). "Generally speaking, the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." (*Old Colony Trust Co. v. City of Omaha*, 230 US 100, 118 ....

Federal Ins. Co. v. Americas Ins. Co., 258 A.D.2d 39, 44, 691 N.Y.S.2d 508 (1st Dep't 1999). Here that pre-litigation performance is established not only by the paid bills, but also by the March 2016 Stipulation wherein the parties, by their respective attorneys, stipulated that "by invoice dated March 1, 2015 Landlord set the annual percentage increase of rent under the Lease at 5.4%." R1060-1061.

Defendants-Appellants argue (Brief at p.19, n.25, p.45) that if the parties had "intended" that the 5-8% range be applicable to the renewal term, and "intended" that Prior Landlord set the rent, it "would have been simple enough to have included such a cross-reference within the Sentence..." and thereby make the language of the 2012 Letter Agreement more precise. This argument is without merit.

First, it is undisputed that this is what the parties intended. The two human beings who made the agreement were Juvenal Reis and Roger Kaufman.

Reis submitted an affidavit wherein he described the meeting of the minds. Mr. Kaufman did not submit an affidavit. As cited by the Court below, at his deposition, Mr. Kaufman "testified that … [t]he 5-8% range is applicable to the extended term period through February 28, 2030." R7.

Second, Defendants-Appellants are essentially arguing that the agreement is unenforceable because the document is not "lawyerly" enough. That position is contrary to the well-settled law. *166 Mamaroneck Avenue Corp. v. 151 East Post Road Corp.*, 78 N.Y.2d 88, 575 N.E.2d 104 (1991), *151 West Associates v. Printsiples Fabric Corp.*, 61 N.Y.2d 732, 472 N.Y.S.2d 909 (1984), *Beal Savings Bank v Sommer,* 8 N.Y.3d 318, 834 N.Y.S.2d 44 (2007).

Landlord, the new owner who took title with notice of all the facts and documents, is seeking to utilize the "non-lawyerly" draftsmanship of its predecessor-in-interest (the 2012 Letter Agreement was drafted by Prior Landlord and neither party used a lawyer) to try to avoid being held to the bargain its predecessor-in-interest made. That is the essence of Landlord's position in this litigation.

The result urged by Defendants-Appellants, to "strik[e] down the contract as indefinite and in essence meaningless," is, as stated by the Court of Appeals, "at best a last resort" that would be totally inappropriate and unfounded under the applicable facts and law.

D. The Martin Case Supports Tenant's Position

Defendants-Appellants' appeal is based almost entirely on the case of *Joseph Martin Jr. Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 436 N.Y.S.2d 247 (1981).[9]

In *Martin*, the lease expressly stated that the rent for a renewal term was "to be agreed upon." The tenant retained an appraiser who opined on fair market value and then commenced a specific performance action to compel the landlord to enter into a renewal "at the appraiser's figure or such other sum as the court would decide was reasonable." The Court noted that there was no basis under the lease for the rent to be set by appraisal or by a court. Because the only obligation was to attempt in good faith to agree, specific performance did not lie. Because the rent was expressly left for future negotiation, the Court (somewhat reluctantly, in view of the aforementioned preference for enforcing agreements) found that the language "to be agreed upon," without anything more, was an express "agreement to agree," which rendered the agreement indefinite. The Court was careful to state that if the document had contained any discernable methodology for determining the rent, that "certainly would have sufficed" to render it enforceable. The Court stated:

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[9] *Martin* is cited at the following pages of Defendants-Appellants' Brief: 1, 2-4, 6, 8, 9, 13, 14, 15, 20, 24, 31, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47-48, 49, 50 and 55.

> This is not to say that the requirement for definiteness in the case before us now could only have been met by explicit expression of the rent to be paid. The concern is with substance, not form. It certainly would have sufficed, for instance, if a methodology for determining the rent was to be found within the four corners of the lease, for a rent so arrived at would have been the end product of agreement between the parties themselves. Nor would the agreement have failed for indefiniteness because it invited recourse to an objective extrinsic event, condition or standard on which the amount was made to depend. All of these, *inter alia*, would have come within the embrace of the maxim that what can be made certain is certain [citations omitted].
>
> But the renewal clause here in fact contains no such ingredients. Its unrevealing, unamplified language speaks to no more than "annual rentals to be agreed upon". Its simple words leave no room for legal construction or resolution of ambiguity. Neither tenant nor landlord is bound to any formula.

Id. at 110.

The lease in *Martin* expressly stated that the rent was "to be agreed upon" and provided no methodology, no recourse to extrinsic events, no range, no formula, no ambiguity, and no room for legal construction. If any of these items had been present, "it certainly would have sufficed." *Id.* As stated in *Martin*, "what can be made certain is certain." In the 2012 Letter Agreement, on the other hand, there is an objective range, methodology and time requirement: "to be determined at the expiration of this initial lease consolidation period [February 28,

2015] .... Any percentage increase will not be less than 5% annually and not to exceed a maximum cap of 8% annually."

As shown in the case of *Subcarrier Communications, Inc. v Satra Realty, LLC*, 11 A.D.3d 829, 785 N.Y.S.2d 545 (3d Dep't 2004), the rule set forth in the *Martin* case is limited to situations where the rent is left open for "future negotiations." That is not the situation here.

Carmon v. Soleh Boneh Ltd., 206 A.D.2d 450 (2d Dep't 1994), cited by Defendants-Appellants, involved a document entitled "letter of intent." It contained open terms, called for future approval, and anticipated future preparation and execution of a binding contract document. In contrast, the 2012 Letter Agreement expressly states "...the signing of [this Agreement] is considered legal and binding to the parties involved."

In *410 BPR Corporation v. Chmelecki Asset Management, Inc.,* 51 A.D.3d 715, 859 N.Y.S.2d 209 (2d Dep't 2008), cited by Defendants-Appellants, the lease had an option to renew "for an additional term to be agreed upon by the parties" and required the parties to make a future agreement on term, rent and security. *Mulcahy v. Rhode Island Hospital Trust National Bank*, 83 A.D.2d 846, 441 N.Y.S.2d 752 (2d Dep't 1981), cited by Defendants-Appellants, concerned an option to renew for a rent "to be agreed upon by the parties...." *Belsaco Theatre Corp. v. Jelin Productions, Inc.*, 270 A.D. 202, 59 N.Y.S.2d 42 (1st Dep't 1945),

cited by Defendants-Appellants, involved an option which "contained none of the essential financial terms for the booking or subleasing of a theatre. Nothing specific was mentioned with respect to the length of the term, the amount of rent to be fixed, nor any of the other usual and necessary provisions of a sublease." In *Ashkenazi v. Kelly*, 157 A.D.2d 578; 550 N.Y.S.2d 322 (1st Dep't 1990), cited by Defendants-Appellants, the contract of sale was for "which ever [of 2 possible terms was later] agreeable between two parties," thereby expressly reserving a material term for future agreement. In *Leonard C. Pratt Co., Inc. v. Roseman*, 259 A.D. 534, 20 N.Y.S.2d 10 (1st Dep't 1940), cited by Defendants-Appellants, the contract "expressly says the 'price is to be determined between us.'"

The case at bar does not concern an "option" and does not provide for a rent or any other terms "to be agreed upon." By the unequivocal terms of the 2012 Letter Agreement the term was extended to February 28, 2030 with all terms and conditions in the original lease to remain in effect except for the annual percentage increase in rent, which was to be set by Prior Landlord at a specific time within a specific range. Then, by invoice dated March 1, 2015 Prior Landlord set the annual percentage increase of rent under the Lease at 5.4%. That is a stipulated fact in this case.

Accordingly, the Court below properly held "defendants failed to make a prima facie showing of entitlement to summary judgment."

POINT II
NO TRIABLE ISSUE OF FACT WAS PRESENTED AS TO THE TERMS OF THE PARTIES' 2012 LETTER AGREEMENT; SINCE A MOTION FOR SUMMARY JUDGMENT SEARCHES THE RECORD THE COURT BELOW SHOULD HAVE GRANTED SUMMARY JUDGMENT IN FAVOR OF THE TENANT

The Court below found that at his deposition Mr. Kaufman agreed that (i) "[Tenant] could stay until 2030" and (ii) "the 5-8% range is applicable to the extended term period through February 28, 2030." R7.

The single issue of fact identified by the Court below is whether Prior Landlord was authorized to set the annual increase in rent and whether by issuing the March 2015 rent bill, Prior Landlord set the "precise amount" of the annual rent increase for the extended term. As stated by the Court below:

> the rent bill issued by the prior owner in March 2015 with a 5.4% rent increase and the Stipulation dated March 17, 2016 raise, at the very least, an issue of fact as to whether the prior owner determined the precise amount pursuant to the terms of the 2012 Letter Agreement .... Based upon the conflicting testimony, there are issues of fact including, but not limited to, whether the 2012 Letter Agreement authorized the prior owner to unilaterally set the percentage increase at the end of the expiration of the initial lease consolidation period or whether the rent was to be negotiated.

R8-9.

As shown above, after the 2012 Letter Agreement was made the parties performed in a manner which shows that Prior Landlord set the annual percentage increase of rent at 5.4%. Prior Landlord did so by issuing bills in that

amount commencing March 2015 and thereafter accepting Tenant's payments in such amount. That was shown by the undisputed documentary evidence (the bills and checks, R1043-1059) and in Tenant's affidavit. R993. Mr. Kaufman, who issued the bills and accepted the payments, did not submit an affidavit. Nevertheless, there was an issue of fact.

However, those issues of fact were conclusively resolved by the March 2016 Stipulation, wherein the parties, by their respective attorneys, stipulated to the following fact:

> WHEREAS by invoice dated March 1, 2015 Landlord set the annual percentage increase of rent under the Lease at 5.4%.

R1060-1061.

The Court below erred in finding that "the rent bill issued by the prior owner in March 2015 with a 5.4% rent increase and the Stipulation dated March 17, 2016 raise, at the very least, an issue of fact as to whether the prior owner determined the precise amount pursuant to the terms of the 2012 Letter agreement." The March 2016 Stipulation conclusively resolves that issue of fact, in Tenant's favor.

Upon searching the Record this Court should grant summary judgment in favor of Tenant.

POINT III
DEFENDANTS-APPELLANTS DID NOT PRESENT EVIDENCE SUFFICIENT TO ESTABLISH A TRIABLE ISSUE OF FACT WITH REGARD TO TENANT'S SIMPLE CASE

A. There is no Evidentiary Support for Defendants-Appellants' Assertions of a One Year Agreement at a 6% Rent Increase

Without citation to any statement of any person purporting to have personal knowledge of the facts (there was none, in the Court below), Defendants-Appellants argue (Brief at p.13) that the bills and payments commencing March 1, 2015 at a 5.4% rent increase were not made and accepted "under the lease," but, rather, were made under a separate "one-year-only agreement in the 2014-2015 emails" at a 6% rent increase That argument is demonstrably without merit, for several separate and distinct reasons.

The simplest and most obvious reason is that, even assuming *arguendo* and contrary to fact that in "2014- 2015 emails" the parties made a "one-year-only agreement" for a 1-year extension at a 6% increase, neither party ever performed under such "email agreement." Prior Landlord never billed Tenant for a 6% increase. Rather, almost immediately after this so-called "email agreement for a 1 ycar extension at a 6% increase" was purportedly made, Prior Landlord set the annual percentage increase of rent under the Lease at 5.4%. Prior Landlord did so by billing Tenant for the month of March 2015 (and for every month thereafter until this case was commenced) in an amount which was a 5.4%

increase over the base rent in effect on February 28, 2015. That is shown by the documentary evidence, that is, the bills and payments. It is shown in Tenant's affidavit, which states the surrounding facts unequivocally and with detail, and which was not controverted in the Court below. R993-995. It was reconfirmed by the March 17, 2016 Stipulation (R1060-1061), which provides:

> WHEREAS by invoice dated March 1, 2015 Landlord set the annual percentage increase of rent under the Lease at 5.4%

The critical words in this Stipulation are (i) "Landlord set," (ii) the "annual" percentage increase, and (iii) "under the Lease."

Not an "agreement" as Defendants-Appellants now argue, but rather, Landlord set (i.e. unilaterally) the annual percentage increase.

Not an increase applicable for just one year as Defendants-Appellants now argue, but rather, the annual percentage increase under the Lease.

Not an increase under an "email agreement" as Defendants-Appellants now argue, but rather, the annual percentage increase under the Lease.

Moreover, the plain language of the email chain itself shows that there was no "email agreement for a 1-year extension at a 6% increase." Tenant's February 11, 2015 email to Prior Landlord, which is part of the email chain upon which Defendants-Appellants are relying, states "A 6% increase for February 28, 2015 through February 28, 2016 is fine, but I want to remind you that our general

lease extends to February 28, 2030." R54 [emphasis added]. It is clear from the emails (as well as the context, which is summarized below with citation to the Record) that the email chain that Defendants-Appellants assert is an "agreement on a one year extension" shows that the parties were in disagreement over whether Tenant already had in place an extension to 2030 under the 2012 Letter Agreement, which Prior Landlord had just then suddenly disavowed (having received an offer to purchase the Building), and that they were (at least from Tenant's perspective) attempting to work out a short-term way to continue for the next year without litigation. R989-996.

Likewise, without citation to any statement of any person purporting to have personal knowledge of the facts (there was none, in the Court below), Defendants-Appellants now assert in their Brief that Landlord's billing Tenant at 5.4% was, variously, a "gift" (p.54), an "underbilling" (pp.11, 54), and "de minimis" (pp. 10, 11). None of that is supported by any citation to the Record.

B. There is no Evidentiary Support for Defendants-Appellants' Attacks on the March 17, 2016 Stipulation

The parties' March 17, 2016 Stipulation (R1060-1061) provides:

> WHEREAS by invoice dated March 1, 2015 Landlord set the annual percentage increase of rent under the Lease at 5.4%

Defendants-Appellants did not disclose this Stipulation in their moving papers in the Court below, wherein they asserted that the annual percentage increase must be set by "agreement." R13-14.

Defendants-Appellants erroneously assert (at p.8 of their Brief) that Tenant is arguing that the Stipulation creates an "estoppel." Tenant has argued no such thing. The "whereas" clause in the Stipulation is a recitation of agreed-upon fact, an admission, nothing more and nothing less.

Those agreed-upon admitted facts, set forth in the "whereas" clause of the Stipulation, have not been denied. There was no affidavit from Defendants-Appellants in the Court below. There is only argument in the Brief that the March 17, 2016 Stipulation does not mean what it says.

For example, Defendants-Appellants assert (at p. 32 of their Brief) that in entering into the Stipulation "Prior Owner plainly did understand" the words in the Stipulation "under the Lease" to mean "for the one-year-only term...." [emphasis in original]. That assertion about what Prior Landlord "understood" is *de hors* the Record and contrary to the plain unequivocal meaning of the Stipulation, which was negotiated and executed by the parties' attorneys.

Defendants-Appellants cite cases which stand for the proposition that a "whereas" clause does not create a right or impose a binding obligation. Tenant has no disagreement with that recitation of the law. But Tenant is not claiming that

the "whereas" clause created a right or an obligation. The "whereas" clause is simply an admission of fact.

That the "whereas" clause "merely" recites an agreed-upon fact, and does *not* purport to create a right or impose an obligation, makes it stronger.

In entering into an agreement, a stipulation, wherein they each undertook obligations of performance (as set forth in ¶1 of the Stipulation), the parties recited, preliminarily, agreed-upon facts.

There are four "whereas" paragraphs where they did so. R1060. Two of those four paragraphs begin, respectively, "Whereas Tenant alleges..." and "Whereas Landlord asserts...," thereby signaling to the reader that the only agreed-upon fact being recited is that one of the parties has made an allegation.

The other two "whereas" paragraphs simply recite facts, without any such proviso, thereby signaling to the reader that they represent a memorialization of facts agreed-upon by both parties. One of those agreed-upon facts is set forth as follows:

> WHEREAS by invoice dated March 1, 2015 Landlord set the annual percentage increase of rent under the Lease at 5.4%

The stipulation is signed by the attorneys for both parties. It is a stipulated fact that is not in controversy.

Landlord took its title subject to that stipulated fact, and is now asserting meritless arguments to try to avoid being held to the bargain.

It is well-settled that "actual possession of real estate is notice to all the world of the existence of any right which a person in possession is able to establish...." Joseph Rasch, New York Law and Practice of Real Property §2.1 (2d ed. 1991). Thus, one who takes title with another in possession takes subject to the rights of the person in possession, whatever those rights may be. *Chen v. Geranium Development Corp*, 243 A.D.2d 708, 663 N.Y.S.2d 288 (2d Dep't 1997) ("The status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property, or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such."). Such a purchaser takes title "subject to the claims of which he has actual or constructive notice, and one who purchases real property with notice of the equities is bound thereby." 91 N.Y. Jur. Real Property Sales and Exchanges to Receivers §§ 130, 132 (2d ed. 1991).

Landlord took its title with the Notice of Pendency in place. Landlord bargained for and took its title with notice of all the facts, including the 2012 Letter Agreement, the bills showing that Prior Landlord set the annual percentage increase for the extended term, the statements in Tenant's Affidavit in opposition

to Prior Landlord's motion to dismiss, the Order denying Prior Landlord's motion to dismiss, and the March 17, 2016 Stipulation.

C. There is no Evidentiary Support for Defendants-Appellants' Assertions Regarding Tenant's Deposition

At his deposition (R82-953) Tenant testified that under the 2012 Letter Agreement the term was extended to February 28, 2030 at an annual percentage increase between 5-8% to be set by Landlord on or about February 28, 2015.[10]

After operating and performing under the 2012 Letter Agreement for years, Prior Landlord suddenly (upon receiving an offer to buy the Building)

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[10] The following are excerpts from Tenant's Deposition (R82-953):

> A. On this document here, sir [the 2012 Letter Agreement], it's very clear, shall remain in full force, this letter shall remain in full force based on the original lease that we did. This is number one... That is the key in this document that establish that this document is attached to original lease that we signed.
>
> Number two, it terminate as of February 2015 – 28, 2015. This is the date for termination of this initial consolidation, this first consolidation lease....
>
> And then we have here another date, that is very important, it's 2030. The lease was extended at that day until 2030.
>
> So, and then Mr. Kaufman wrote the terms to – terms -- terms -- to be the terms at the expiration of this initial lease, consolidation, which is 2015 .... And then he continues on another line: Any percentage increase will not be less than 5 and no more than 8 percent.
>
> And at the end of this document, sir, it is right here clear to me: Lease agreement and the signing of same is considered legal and binding to the parties involved.
>
> So he [Roger] started with document by saying: that shall remain in full force, and he ends the document: is binding and legal, you know, to the parties involved.

R581-584.

> A. It is here, "any percentage increase will not" --- "any percentage increase will not be less than 5 percent annually and not to exceed a maximum cap of 8 percent annually."
> Q. And that applies to what period of time?

A. To me, that applies to the lease, which is 2030.

* * *

Q. The first sentence of that paragraph has no bearing on how you read the second sentence?

A. In my understanding here, it said clearly any percentage increase, I understood that any percentage increase starting in 2015 is going to be no less than 5 and no more than 8 percent.

He [Roger] says under there the terms and then he has in the last paragraph for the renewal of the contract, it says terms and length. So he used very clear words here that say 2030 in the second paragraph, terms to be determined at the expiration of this initial lease consolidation period.

Q. Where does it refer to the lease consolidation period? What is the lease consolidation period?

A. To me the consolidation period is 2015.

Q. Okay. The end of the consolidation period, the terms would be determined at the expiration of the lease consolidation period, that's what you are telling me?

A. Yes, 2015.

Q. And that means 2015?

A. 2015, the rent would be increased between 5 and 8 percent. This is based on the last payment that I made, because this is a sum of all of this with all adjustments and everything.

R332-333.

A. My understanding is – why? I'm not a lawyer to tell you why. I can only tell you what I read here, what I understand is in here, and what had been done, what we defined, that Roger established the rent between 5 and 8 percent and that's what I have been paying.

Q. You're telling me now that Roger set the rent with no negotiation on your behalf?

A. No negotiation, no .... The only negotiation that I had with Roger is the very beginning of the [2012 Letter Agreement]. When he defined the new space, how much I am going to pay, how is going to be the construction, how much it's going to cost for the construction, and when it's going to end. We put that on paper. There is no negotiation after this (indicating). The only negotiation –

MR LAMBERT: Indicating O [the 2012 Letter Agreement].

R510-511.

Q. I understand, but I am asking you, you said that Roger, meaning the landlord, got to choose the number between 5 and 8 percent, correct?

A. Yes.

Q. Unilaterally, without any input from you, correct?

A. It was his option to do it.

Q. Where does it say that in the [2012 Letter] agreement, that the landlord shall select the rent increase between 5 and 8 percent?

A. When he says the terms to be determined. To be determined by him, not by me .... Paragraph 2 of document O [the 2012 Letter Agreement]. Terms to be determined. To me in my poor language, poor English language, when you say this is to be determined, to be determined by you, not negotiated. If he had said terms to be negotiated, that's something else.

R515-516.

Q. So which is it, Mr. Reis? Does the landlord unilaterally get to set the rent under [Exhibit] O [the 2012 Letter Agreement] or did you have to agree with the landlord for the rent under Exhibit O?
A. He defines unilaterally – sorry for my pronunciation – and I have to accept whatever he defines.
Q. You have to accept.
A. Yes, between 5 and 8 percent.
Q. Can you object?
A. According to the terms of our contract, and my understanding, no. He had the free will to take that between 5 and 8 percent.

R730-731.

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

R336.

Q. Any percentage increase will be [not] less than 5 percent or not to exceed a maximum cap of 8 percent annually. Okay?
How does that apply to a section of the lease that's three paragraphs above when it comes in the renewal paragraph?
A. Okay. Well—
Q. Explain that to me.
A. Can you tell me what the word "any" means?

* * *

A. Any increase – "any", to me, it's any increase on this lease cannot be less than 5 percent and not more than 8 percent. That's my understanding. This was very clear to me.
Q. Okay.
A. Absolutely clear.

R746-747.

disavowed the 2012 Letter Agreement and asked Tenant to sign a new writing that would state that the term of the Lease was scheduled to end on February 29, 2016. R989-990. Prior Landlord told Tenant that if Tenant did him this "favor" he would be able to tell his bank that Tenant was moving out in 2016 instead of 2030, which would help him get a new mortgage. R990. Prior Landlord threatened elevator turn offs and costly litigation if Tenant would not agree. R991. This put Tenant's entire business at risk. R991. At that point Tenant was searching for a way to avoid litigation and protect his business and was willing to renegotiate the existing deal under the 2012 Letter Agreement. R991.

It was in the context of these attempts to renegotiate the existing agreement (the 2012 Letter Agreement) and thereby avoid litigation that Tenant testified that the parties "attempted to agree" and were "unable to agree." R 998-996.[11]

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[11] In addition to the statements in his Affidavit at R989-996, at his deposition, Tenant testified:

> A. Yeah. And I said, wait a minute, Roger, we have an agreement here, we have a contract, I came into the office. I said, this is why we put on paper is to protect you and to protect me. All right. So he said, yes, that is true, but I changed my mind.
> Q. Okay. And he didn't tell you specifically what he changed his mind with respect to in the contract? What parts of the contract are you telling me that he changed his mind about?
> A. He didn't say a part, a specific part. He just said that is just a letter of intention.
> Q. Okay. Now yesterday you testified that during these negotiations leading up to that 6 percent that initially Mr. Kaufman demanded 100 percent increase on the rent you were paying?
> A. No He threatened me many times, not only one time. He threatened me either I can turn off the elevator when you have event here, I could be a bad guy, because he wanted me to sign a renewal one year with him. He said, do me a favor, I need to sign a one

year. And when he asked me to sign that one year, that's what he told me, that he needed to borrow some money from a bank and the bank would not give him money because he had a tenant with 43 percent in the building and the lease was extended to 2030....

R420-422.

A. The only negotiation on document O [the 2012 Letter Agreement] that happened between Roger and me was when he breached our contract by ... asking me a favor to sign a document with him that would change all my lease for a one-year term....

* * *

Q. To clarify your answer, did Roger tell you he wanted you to sign another agreement for a one-year lease extension because he was trying to sell the building; did he tell you those words?

A. No. Not at that point, no. At that point, no, but later, yes, he did. My building is worth more money without you here, so I need you to sign a document that extends – that fixes your lease in a one-year term.

* * *

A. Yes, he [Roger] was talking about the document O [the 2012 Letter Agreement], because this is the one that established until 2030 with 5 and 8 percent increases. That's the document I was talking about. And I had no problem renegotiating with Roger if he wanted to accommodate his needs, to sell the building. I proposed this to him many times. I suggested him many times let's sit down, let's find a formula to make it work for you. And he kept saying you have a letter agreement, you don't have a lease or something like that. So this is when I had to look for a lawyer....

* * *

I don't consider this a negotiation. It was a defense mechanism that I had to protect me as a businessman....

R511-514.

A..... Roger started threatening me what he could do to me if I didn't sign that one-year extension. Threatening to shut down the elevator when I had open studious for all my clients. That's one of them. The other one was sell the business to someone that had a lot of money that could fight me. They would have a lawyer on their payroll. He told me that as well.

That, for me, after the 15 years that we were together, you have to agree with me that that is very, very concerning on my part. So I tried to negotiate with Roger in a different way, a different approach for us to get an answer to this....

R517-518.

A.... I been asking him [Roger]: You need to define my increase, is between 5 and 8 percent, you need to define that. He comes to me and say: I need you to do me a favor, Mr. Reis. You're like my brother, we're like friends, we're like family here, you need to do me a favor and sign a one-year lease.

R584.

> A. Um- Roger asked (indicating) about how we're going to get out of this 30 year --- until 2030 agreement, because he wanted to sell the building. There's no way he could sell, and he said that he had many buyers that rejected – that stopped the purchasing of the building because they didn't want any lease that would go until 2030. So I vetted the possibility with Roger to renegotiate this (indicating) Exhibit O [the 2012 Letter Agreement] to change the terms that we could both live with it. And I was open to that with Roger, and I was looking for how we can make that work. That was the whole what this conversation was about.
>
> * * *
>
> A. If I may here, you need to remember that the relationship that Roger and I had for 15 years that we always dealt on a face-to-face with each case, and here I am in a position where my landlord is breaching – literally breaching a contract with me, and I'm trying to work that out, and I'm trusting him, I'm trusting him as a friend, as a family member, as a co-worker, that we could possibly work this, so I'm trying to accommodate to him because he wanted to sell the building.

R705-709.

> Q. So why did you continue on in these talks, when Mr. Kaufman suggests different numbers, $15, well why were you continuing to negotiate and why – so why would you continue to talk to him about these numbers, if they were too much for you, if you had an agreement already?
> A. Why?
> Q. Why?
> A. Because I found appropriate that we should continue the conversation to avoid litigation.

R717.

It is also undisputed (R910-920) that during these negotiations Mr. Kaufman made the following statements:

> if I were to take your existing document to anybody, there's no deal on the street. Zero.... Nobody is interested in investing in this building with the present tenancy; with the present deals that are in place.

R1080.

> All I'm saying to you though is that the ability to do whatever they want to do has to be given to them and they don't feel they can live within a 15-year parameter.... They're looking at 15 years as a roadblock. I have to say to them, it's not 15 years.

R1081-1082.

On the motion for summary judgment in the Court below, and now again in their Brief, Defendants-Appellants seek to turn those settlement negotiations into some sort of "admission" that under the 2012 Letter Agreement the parties "had to agree" on the rent.

In that way, Defendants-Appellants are trying to make it seem as if the 2012 Letter Agreement was a mere "agreement to agree," which required further negotiation and agreement to set the rent.

Since that argument is inconsistent with Tenant's actual deposition testimony (as cited above), Defendants do so by misquoting Tenant's deposition

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> Let's suppose I make a deal based on three years. All right, your three years and let's say I can get – I don't know, $5 million more because I cut out 12 years of your deal. How much is that worth – how much does that cost me? Can you give me any formula?

R1083.

> And I'll tell you now that we can get a lot of happy campers not having that 15 number there. Once it changes to three, we have a lot of flexibility.

R1084-1085.

> Well, the only hurt is somebody coming in, looking at this, saying, I can't encumber – I'm not going to buy a building that has 43 percent occupancy for 15 more years ....

R1088.

> But a lot of these people are coming in that have lawyers on staff with nothing to do, and they will stand there and challenge everything legally because they have nothing else to do. Do you want to run that risk?

R1091.

testimony. Each time they purport to recite Tenant's words "we had to agree," Defendants-Appellants omit the words which follow, "to avoid litigation." R953.

In purporting to quote testimony that they trumpet as proof of their case, Defendants-Appellants insert, in brackets, words that were not part of the testimony and omit words that were part of the testimony, thereby totally changing the meaning. For example, the testimony as "quoted" at p.30 of Defendants-Appellants' Brief is:

> 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.

The actual testimony was:

> Q. And did you pay rent under that agreement?
> A. Yes, under Exhibit O [the 2012 Letter Agreement].
> Q. Did Mr. Kaufman accept the rent under that agreement?
> A. Yes, he did accept.

R662, 953.

This misquoting is actually acknowledged at p.22 of Defendants-Appellants' Brief where, contrary to well-settled law and the Order of the Court below, they assert that the errata sheet signed by Tenant (R953) "should be stricken."

Defendants offer no authority for this proposition.

CPLR 3116(a) permits "changes in form or substance." As required by the statute, the witness provided "a statement of the reasons given ... for making [the changes]." R9, 953, 1077-1078. In the case cited in Defendants-Appellants' footnote, the witness failed to provide any reason for the changes. Here, in contrast, the witness gave a reason, that is, to disclose context. Obviously it would be potentially misleading to have a transcript that fails to disclose context. The so-called "admissions" on which Defendants-Appellants' case is based came in the *context* of Tenant trying to reach a non-litigation resolution after Prior Landlord disavowed the 2012 Letter Agreement.

Contrary to Defendants-Appellants' assertion, CPLR Rule 3116(a) expressly permits "changes in form or substance." Of course, if the reason given for the change is not credible, that may be fertile grounds for cross-examination. But where, as here, a reason is given for a change to form or substance, there is no basis for deeming an errata sheet a "nullity." The Court below properly denied that branch of Defendants-Appellants' motion as sought to strike the errata sheet. R9.

Accordingly, Defendants-Appellants did not present evidence to establish a triable issue of fact with regard to Tenant's simple case. The holding of the Court below, "defendants failed to make a prima facie showing of entitlement to summary judgment" (R8), should be affirmed. In addition, upon searching the Record, this Court should grant summary judgment in favor of Tenant. The only

asserted issue of fact was resolved by the March 17, 2016 Stipulation. R1060-1061.

CONCLUSION

For the foregoing reasons, so much of the Order appealed from as denied Defendants-Appellants' motion for summary judgment should be sustained; and summary judgment should be granted in favor of Plaintiff-Respondent.

Respectfully Submitted,
Lambert & Shackman, PLLC
Attorneys for Plaintiff-Respondent
274 Madison Avenue
New York, NY 10016
(212) 370-4040

By: 
Thomas C. Lambert

Dated: January 5, 2018

CERTIFICATE OF COMPLIANCE

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

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