State of New York
Court of Appeals

JUVENAL REIS,

Plaintiff-Respondent,

-against-

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

Defendants-Appellants.

PLAINTIFF'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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Date Completed: October 14, 2020

Appellate Division, Second Department Docket Nos. 2019-10961
Supreme Court, Queen County, Index No. 707612/15

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COURT OF APPEALS
STATE OF NEW YORK

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JUVENAL REIS, Plaintiff, - against- J.B. KAUFMAN REALTY CO., LLC, and 43-01 22nd STREET OWNER LLC, Defendants.	Queens County County Clerk Index No.: 707612/15 **NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS**

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PLEASE TAKE NOTICE that upon the annexed statement pursuant to Rules 500.21 and 500.22 of the Court of Appeals Rules of Practice, signed on 13th day of October, 2020, and upon all papers and proceedings heretofore had herein, Appellant Juvenal Reis will move this Court, at the Court of Appeals Hall, Albany, New York, on October ____, 2020, for an order pursuant to CPLR §5602 granting Appellant Juvenal Reis leave to appeal to this Court from the Decision and Order of the Appellate Division, Second Department entered on March 11, 2020.

Answering papers, if any, must be served and filed in the Court of Appeals with proof of service on or before the return date of the motion.

Dated: New York, New York
October 13, 2020

Yours, etc.

Lambert & Shackman, PLLC
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By:
Thomas C. Lambert

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STATEMENT IN SUPPORT OF MOTION

I. Procedural History and Timeliness Chain

Respondents J.B. Kaufman Realty Co., LLC and 43-01 22nd Street Owner LLC ("Landlord") served Appellant Juvenal Reis ("Tenant") with the Order of the Appellate Division dated March 11, 2020 from which Tenant is seeking leave to appeal, by electronically filing the Order together with Notice of Entry on the New York State Courts Electronic Filing system on March 11, 2020 (**Exhibit A**).

Tenant served his Notice of Motion to the Appellate Division, Second Department to Reargue and for Leave to Appeal to the Court of Appeals upon Landlord by email on May 8, 2020 (**Exhibit B**).

The Appellate Division denied Tenant's motion to reargue and for leave to appeal to the Court of Appeals on September 16, 2020. On September 16, 2020, Landlord served upon Tenant the Appellate Division Order with Notice of Entry by electronic filing on the New York State Courts Electronic Filing system (**Exhibit C**).

II. Jurisdiction

The Appellate Division's Decision and Order from which this appeal is sought finally determines the action within the meaning of CPLR §5602.

III. Questions Presented

1. Where parties to a lease have agreed in writing to renewal in a rental amount “to be determined” within an expressly stated fixed range and the tenant is willing to renew at the highest end of the range, is the lease renewal provision void for indefiniteness?

2. Where parties to a lease have agreed in writing to renewal in a rental amount “to be determined” within an expressly stated fixed range, and the tenant’s reading of the renewal provision is that the landlord must set the amount within the range, is the lease renewal provision void for indefiniteness?

3. Where parties to a lease have agreed in writing to renewal in a rental amount “to be determined” within an expressly stated fixed range, and a meeting of the minds of the parties on the specific amount is proved or provable based on admissible evidence, is the lease renewal provision void for indefiniteness?

4. In reversing the lower court’s finding of triable issues of fact, did the Appellate Division overlook (1) the fact that the tenant was willing to renew and pay rent at the high end of the agreed-upon fixed range, (2) the fact that the agreed-upon language “to be determined” means to be determined by the landlord and (3) the fact that the

parties agreed on the amount within the range; all of which facts were proved and are proved and provable by admissible evidence?

III. Why Leave Should Be Granted

A. The Undisputed Merits of the Case

1. The Appellate Division's decision on the Appeal is based upon the rule announced by the Court of Appeals in the *Martin* case[1] that a lease renewal provision that sets the rent "to be agreed upon" is void because of indefiniteness. Citing the *Martin* case the Appellate Division found that the parties "2012 letter agreement … demonstrated that the renewal provision was an unenforceable agreement to agree." But there is a critical difference between this case and the *Martin* case.

2. In this case, the parties' 2012 letter agreement provides that the annual percentage increase in rent for the renewal term is "to be determined" between 5% and 8%. R997-998.[2] It is "to be determined" within a *fixed range*.

3. As a matter of good faith and logic, that *fixed range* obligates Landlord to renew at 8% or less and it obligates the tenant to pay for renewal at least 5%. The agreement to a fixed range creates at least one unequivocally clear

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[1] *Joseph Martin Jr. Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 436 N.Y.S.2d 247 (1981).
[2] Citation to and analysis of the language in the 2012 letter agreement and the deposition testimony which supports this finding of fact of both the lower court and the Appellate Division are set forth as **Exhibit D**.

and definite obligation on the part of each of the parties. Each party can thereby rely on knowing that it can definitely get renewal if it accepts the end point of the range which is least favorable to itself. That is not an indefinite right.[3]

4. The *Martin* case is critically different because in *Martin* neither party was obligated at all to agree to *any* amount. It is noted that nevertheless in *Martin* the tenant agreed to renew at one rental amount and the landlord agreed to another, both acting in good faith, whether reasonably or not.

5. *Martin* was decided forty years ago. Twenty years ago, in the *Mamaroneck* case[4], the Court of Appeals observed that there were two ways indicated by the *Martin* court in which the definiteness requirement could be satisfied *without an explicit contract term*: (i) an agreed upon methodology to determine the rent amount and (ii) an agreed upon "objective extrinsic event, condition or standard," in other words a yardstick. The parties' agreement here to a

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[3] In Tenant's affidavit in the Court below, he reveals the parties' intentions (R988) as follows:

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

There was no affidavit from Roger Kaufman.

[4] *166 Mamaroneck Avenue Corp. v. 151 East Post Road Corp.*, 78 N.Y.2d 88, 575 N.E.2d 104 (1991).

rate between 5-8% is a hybrid of "method" and "yardstick," the two ways quoted above to avoid indefiniteness.

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

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

8. As it happens in this case too, Tenant has said from the outset that the words "to be determined" in the 2012 letter agreement mean that the landlord was required to *set* the rate between 5% and 8% and Tenant would be bound by that. Tenant testified at his deposition as follows:

> A. He defines unilaterally – sorry for my pronunciation – and I have to accept whatever he defines.
> Q. You have to accept.
> A. Yes, between 5 and 8 percent.
> Q. Can you object?

> A. According to the terms of our contract, and my understanding, no. He had the free will to take that between 5 and 8 percent.
>
> R730-731.
>
> A. That for me, I have stated to him, even at 8 percent I will be ok with it.
>
> * * *
>
> Q. What if you got to the point in 2020 where you couldn't pay 8 [percent] without losing your business, what would happen under the lease?
> A. I would be losing money.
>
> R335-336.

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

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

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

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

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

14. It may be asked why Landlord set the percentage increase at 5.4%, when it could have set it at 8%. The facts which explain that are set forth in Tenant's Affidavit in the Court below. R 995, ¶¶ 60-61.[5] There was no affidavit

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[5] 60. At a time when Prior Landlord was having a hard time finding tenants for the rest of the Building, Prior Landlord was securing a huge rent increase for my space, which comprised 43% of the Building, compounded each year to 2030. In this way Roger "hedged his bets" in case a sale of the Building did not go through. Roger knew that he had in me a good tenant who always paid the rent on time. Our arrangement, where I was leasing almost half the building and subletting it, freed him up from many of the administrative tasks a landlord would ordinarily do. This suited Roger, who never really wanted to be in the landlord business, but had gotten stuck managing his family's building.
61. In a way, Roger actually outsmarted the buyer. Roger kept for himself and Prior Landlord a commitment on my part to lease 43% of the Building at a huge rent increase of 5.4% compounded each year for 15 years. That was an especially valuable asset given that Roger was having trouble leasing the remaining space in the Building. But Roger could also tell the buyer that he did not really

submitted on behalf of Landlord by anyone purporting to have knowledge of the facts. Roger Kaufman, the principal of Prior Landlord, who maintains a continuing financial interest in the ownership of the Building after the sale of the Building, tellingly did not submit an affidavit. R910.

15. It is Tenant's argument here that the instant case presents a third way under the *Martin* case in which the definiteness requirement can be satisfied "without an explicit contract term." That third way is where a meeting of the minds of the parties on the amount can be proved by admissible evidence. The proof must be heard. As a matter of fact, Landlord here set the rate. If upon trial, it is determined that Landlord did not set any rate, then as a matter of law, it breached its obligation in good faith to do so --- at least at 8%.

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

> intend to do that, but that he just sent me those rent bills by mistake. That may very well be why there is no affidavit from Roger in support of Defendant's motion for summary judgment.

R.995, ¶¶60-61.

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

18. The Court below found as follows:

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

R8-9.[6]

19. Based on the facts the Court below correctly denied Landlord's motion for summary judgment.

B. Anticipating the Opposition

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

20. Assuming that Landlord will oppose this application on the same grounds on which it opposed Tenant's application for leave at the Appellate Division, we note the following in ¶¶ 21-33 below:

21. First comes the *face* of the renewal provision of the 2012 letter agreement which the Appellate Division held to be void for indefiniteness.

22. The opposing papers will be unable to deny that *on the face* of the 2012 letter agreement the Landlord is obligated to renew to 2030 *at 8%* (or less of course at its will).[7]

23. Tenant has said from the beginning[8] and continues to say here and now that upon performance by Landlord of its obligation, Tenant will pay the annual percentage increase which is set by Landlord up to and including 8%.

24. Why is this case not over? For two reasons.

<u>Reason #1</u>

25. Before the initial lease term ended on February 28, 2015, the Tenant and the Prior Landlord's agent Kaufman made an agreement, confirmed by emails, that Tenant could stay until February 29, 2016 at a 6% increase. The sole

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[7] Landlord has acknowledged that the Appellate Division read the "Range Provision" (5%-8% annual increase) as incorporated into the "T-B-D Sentence" (extending the lease term to 2030). That is how both parties read it. R747 (Reis EBT), R866-867, 877-879, 902-903 (Kaufman EBT).

[8] R335-336 (Reis EBT): "A. That for me, I have stated to him, even at 8 percent I will be ok with it …. Q. What if you got to the point in 2020 where you couldn't pay 8 [percent] without losing your business, what would happen under the lease? A. I would be losing money."

expression of Tenant's assent to this is contained in two emails which read in part as follows:

<u>First Email</u>

> 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, email from Tenant to Kaufman dated February 11, 2015.

<u>Second Email</u>

> Roger --- Regarding our meeting on Feb. 18, while we reconfirmed that the term of the Lease has been extended to February 28, 2030, and that the fixed rent for the year of March 1st 2015 to February 29th 2016 will increase by 6%, we were unable to agree on the rent for the following years. I am hopeful we can work this out.

R54, email from Tenant to Kaufman dated February 20, 2015.

26. It is noted that in both emails Tenant makes clear that his agreement to pay 6% for one year *does not vitiate* his continued tenancy to 2030.

27. Tenant explains how and why this agreement was made (and also how and why it was never performed by either party) in his affidavit below. R991-993 (Tenant wanted to avoid litigation for as long as possible). There is no affidavit which disputes Tenant, from Kaufman or anyone else with personal knowledge on behalf of Landlord.

28. In opposition to Tenant's motion for leave made to the Appellate Division, Landlord took the position without evidence, without citation

to the Record, that this 6% agreement was made *in lieu* of the renewal to 2030 and therefore absolves Landlord of its obligation to renew even at 8%. Neither the Appellate Division nor the *nisi prius* Court made such finding.

Reason #2

29. Tenant claims, and has proved with documentary evidence that, *after* making the 6% agreement, and at last in good faith, the Prior Landlord *did* in writing set forth the annual percentage increase to 2030 at 5.4%. For months after the end of the existing term on February 28, 2015 and until this lawsuit was commenced, the Prior Landlord billed Tenant rent at a 5.4% increase, Tenant paid the rent by checks and Landlord endorsed the checks, thereby setting in writing the annual percentage increase to 2030. R 993, 1044-1059. Tenant in his affidavit below explains how and why the Prior Landlord set the increase *not* at 8%, *not* at 6% but rather at 5.4%. R995 (The building had not yet been sold, Kaufman was having difficulty finding tenants and did not want to lose Tenant who occupied 43% of the building). There is no affidavit below from Kaufman, the owner, the current owner or *anyone* else with personal knowledge who disputes this. The new current owner, upon *legal argument*, disputes it. In opposition to Tenant's motion for leave at the Appellate Division, Landlord *argued* (without evidentiary facts) that the Prior Landlord's billing at 5.4% was a *mistaken underbilling* under the 6% email agreement! Landlord argued in its main brief (without evidentiary facts) that

it was a “gift” (p. 54). And on top of that, a gift which is “de minimis” (pp. 10, 11). All without any evidence and in flat contradiction of Tenant’s affidavit as well as the *face of the documents*.

30. If it has been, or will be, finally determined by the Court that these billings and payments at 5.4% do not establish the annual percentage increase to 2030, then Tenant is *still prepared* to perform and pay the rent, if Landlord fulfills its obligation to renew and agrees (sets the increase) at 8%.

31. The trouble is Landlord (the current owner) takes the legal position that it is not obligated to renew even at 8%.

32. In the *Martin* case, where the parties agreed to renew at a rent “to be agreed upon,” without any fixed range, the landlord asked for $900 a month which the tenant showed was way above market and therefore unreasonable. The tenant argued that the landlord had to be reasonable. The Court of Appeals (6-1 reversing the 5-0 Appellate Division) held that the landlord was not obligated to be reasonable under the lease as written. Query: whether the scales would have tipped the other way if either 1) the landlord had refused to renew at any price or 2) the tenant agreed to pay the $900 a month and then the landlord refused to go forward. In *Martin*, the landlord may not have been reasonable. But the landlord fulfilled its obligation of good faith. That is what the tenant is looking for here, consistent with *Martin*.

33. The Appellate Division below has held that Landlord is not obligated to renew *even at 8%*. It is respectfully submitted that this Court should review that holding.

C. Public Importance of the Issues Presented

34. The Appellate Division held that Landlord established its "prima facie entitlement to judgment as a matter of law by submitting, inter alia, a copy of the 2012 letter agreement, which demonstrated that the renewal provision was an unenforceable agreement to agree." This case should be reviewed by the Court of Appeals to obtain recognition, clarification and possibly expansion of the ways in which the definiteness requirement can be satisfied "without an explicit contract term" to include the parties setting a *fixed range* as they did in this case. The enforceability of the parties' agreement to set the rate between 5% and 8%, though they did not provide a fixed number, is a matter of public importance.

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

36. The third reason this case should be reviewed by the Court of Appeals is to ascertain whether the definiteness requirement is met in a case where

a meeting of the minds of the parties on a definite amount is proved or provable based on admissible evidence.

37. The fourth reason this case should be reviewed by the Court of Appeals is because the Appellate Division, in reversing the lower Court's finding of triable issues of fact, itself overlooked the facts. The lower Court found issues of fact regarding whether (1) the prior owner determined the precise amount pursuant to the terms of the 2012 Letter Agreement and (2) 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.

38. By reason of the foregoing, Appellant respectfully prays for an Order (i) for an order pursuant to CPLR §5602 granting Appellant Juvenal Reis leave to appeal to this Court from the Decision and Order of the Appellate Division, Second Department entered on March 11, 2020 and (iii) granting such other and further relief as the Court may deem just and proper in the premises.

Dated: New York, New York
October 13, 2020

Thomas C. Lambert

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

JUVENAL REIS,

Plaintiff,

-against-

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

Defendants.

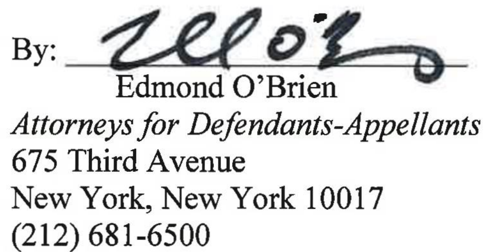
Index No.: 707612/2015

NOTICE OF ENTRY

PLEASE TAKE NOTICE that a Decision and Order, dated March 11, 2020 (the "Order") rendered in connection with an appeal from this action, was entered in the Office of the Clerk of the Supreme Court of the State of New York, Appellate Division, Second Department, on March 11, 2020. A true and accurate copy of the Order is annexed hereto as Exhibit A.

Dated: New York, New York
March 11, 2020

STEMPEL BENNETT CLAMAN & HOCHBERG, P.C.

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

D62077
L/htr

_____AD3d_____ Argued - October 7, 2019

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

2017-10961 DECISION & ORDER

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

(Index No. 707612/15)

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

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

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

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

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

space within the subject building.

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

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

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

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

The plaintiff's remaining contentions are without merit.

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

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

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

ENTER:

Aprilanne Agostino
Clerk of the Court

EXHIBIT B

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

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JUVENAL REIS, Plaintiff- Respondent, - against- J.B. KAUFMAN REALTY CO., LLC, and 43-01 22nd STREET OWNER LLC, Defendants-Appellants.	Index Number 707612/15 **NOTICE OF MOTION TO REARGUE AND FOR LEAVE TO APPEAL TO THE COURT <u>OF APPEALS</u>**

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

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

b. pursuant to CPLR §§ 5513(b), 5516, 5602 and 22 NYCRR §600.14, granting Plaintiff-Respondent leave to appeal to the Court of Appeals from the Decision and Order of the Appellate Division, Second Department entered on March 11, 2020, with respect to the questions of:

i. Where parties to a lease have agreed in writing to renewal in a rental amount "to be determined" within an expressly stated fixed range and the tenant is willing to renew at the highest end of the range, is the lease renewal provision void for indefiniteness? The Appellate Division answered the question in the affirmative.

ii. Where parties to a lease have agreed in writing to renewal in a rental amount "to be determined" within an expressly stated fixed range, and the tenant's reading of the renewal provision is that the landlord must set the amount within the range, is the lease renewal provision void for indefiniteness? The Appellate Division answered the question in the affirmative.

iii. Where parties to a lease have agreed in writing to renewal in a rental amount "to be determined" within an expressly stated fixed range, and a meeting of the minds of the parties on the specific amount is proved or provable based on admissible evidence, is the lease renewal provision void for indefiniteness? The Appellate Division answered the question in the affirmative.

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

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

Dated: New York, New York
May 7, 2020

Yours, etc.

Lambert & Shackman, PLLC
Attorneys for Plaintiff-Respondent
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(212) 370-4040

By:
Thomas C. Lambert

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

JUVENAL REIS, Plaintiff-Respondent, - against- J.B. KAUFMAN REALTY CO., LLC, and 43-01 22nd STREET OWNER LLC, Defendants-Appellants.	Index Number 707612/15 **AFFIRMATION IN SUPPORT OF MOTION TO REARGUE AND FOR LEAVE TO APPEAL**

---x

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

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

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

b. pursuant to CPLR §§ 5513(b), 5516, 5602 and 22 NYCRR §600.14, granting Plaintiff-Respondent leave to appeal to the Court of Appeals from the Decision and Order of the Appellate Division, Second Department entered on March 11, 2020, with respect to the questions of:

    i. Where parties to a lease have agreed in writing to renewal in a rental amount “to be determined” within an expressly stated fixed range and the tenant is willing to renew at the highest end of the range, is the lease renewal provision void for indefiniteness? The Appellate Division answered the question in the affirmative.

    ii. Where parties to a lease have agreed in writing to renewal in a rental amount “to be determined” within an expressly stated fixed range, and the tenant’s reading of the renewal provision is that the landlord must set the amount within the range, is the lease renewal provision void for indefiniteness? The Appellate Division answered the question in the affirmative.

    iii. Where parties to a lease have agreed in writing to renewal in a rental amount “to be determined” within an

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

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

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

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

4. This Court's decision on the Appeal is based upon the rule announced by the Court of Appeals in the *Martin* case[1] that a lease renewal provision that sets the rent "to be agreed upon" is void because of indefiniteness. Citing the *Martin* case the Appellate Division found that the parties "2012 letter agreement … demonstrated that the renewal provision was an unenforceable agreement to agree." But there are critical differences between this case and the *Martin* case.

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

a. Sentence 1: "It is agreed that … all terms and provisions provided for within the original lease between the parties as dated and executed on March 12, 2002 … shall remain in full force and effect …."

b. Sentence 2: "Lease terms to be extended to now terminate on

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

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

c. Sentence 3: "Any percentage increase will not be less than 5% annually and not to exceed a maximum cap of 8% annually."[4]

d. Sentence 4: "…the signing of same [the 2012 Letter Agreement] is considered legal and binding to the parties involved."

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

> Q. And then there's also a sentence that says, quote, "Any percentage increase will not be less than 5 percent annually and not to exceed a maximum cap of 8 percent annually." unquote. Isn't that a fact?
> A. That's a fact also for the same period of time.
> Mr. O'Brien: Are you finished with your answer?
> A. Between 5 and 8 percent. The 5 to 8 percent is a big range. It would have to be determined what midpoint or what point on that graph would be factored into any rent increments, and that was never done.
> Q. The percentage was never agreed to.

---

[2]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).

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

[4]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).

A. Only the range.

R902-903.

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

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

8. *Martin* was decided forty years ago. Twenty years ago, in the *Mamaroneck* case[6], the Court of Appeals observed that there were two

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

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

There was no affidavit from Roger Kaufman.

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

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

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

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

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

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

> A. He defines unilaterally – sorry for my pronunciation – and I have to accept whatever he defines.
> Q. You have to accept.
> A. Yes, between 5 and 8 percent.
> Q. Can you object?
> A. According to the terms of our contract, and my understanding, no. He had the free will to take that between 5 and 8 percent.
>
> R730-731.
>
> A. That for me, I have stated to him, even at 8 percent I will be ok with it.
>
> * * *
>
> Q. What if you got to the point in 2020 where you couldn't pay 8 [percent] without losing your business, what would happen under the lease?
> A. I would be losing money.
>
> R335-336.

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

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

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

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

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

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

61.[7] There was no affidavit submitted on behalf of the landlord by anyone purporting to have knowledge of the facts. Roger Kaufman, who maintains a continuing financial interest in the ownership of the Building after the sale of the Building, tellingly did not submit an affidavit. R910.

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

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[7]

> 60. At a time when Prior Landlord was having a hard time finding tenants for the rest of the Building, Prior Landlord was securing a huge rent increase for my space, which comprised 43% of the Building, compounded each year to 2030. In this way Roger "hedged his bets" in case a sale of the Building did not go through. Roger knew that he had in me a good tenant who always paid the rent on time. Our arrangement, where I was leasing almost half the building and subletting it, freed him up from many of the administrative tasks a landlord would ordinarily do. This suited Roger, who never really wanted to be in the landlord business, but had gotten stuck managing his family's building.
> 61. In a way, Roger actually outsmarted the buyer. Roger kept for himself and Prior Landlord a commitment on my part to lease 43% of the Building at a huge rent increase of 5.4% compounded each year for 15 years. That was an especially valuable asset given that Roger was having trouble leasing the remaining space in the Building. But Roger could also tell the buyer that he did not really intend to do that, but that he just sent me those rent bills by mistake. That may very well be why there is no affidavit from Roger in support of Defendant's motion for summary judgment.

R.995, ¶¶60-61.

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

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

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

21. The Court below found as follows:

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

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

R8-9.[8]

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

Conclusion

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

Dated: New York, New York
May 7, 2020

Thomas C. Lambert

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

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

JUVENAL REIS,

Plaintiff,

-against-

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

Defendants.

Index No. 707612/15

NOTICE OF APPEAL

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

Dated: New York, New York
October 11, 2017

STEMPEL BENNETT CLAMAN & HOCHBERG, P.C.

By:
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To: LAMBERT & SHACKMAN, PLLC
Attorneys for Plaintiff/Respondent
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SHORT FORM ORDER

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

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

- x

JUVENAL REIS,	Index No.: 707612/2015
Plaintiff,	Motion Date: 9/14/17
- against -	Motion No.: 139
J.B. KAUFMAN REALTY CO., LLC and 43-01 22nd STREET OWNER LLC,	Motion Seq.: 10
Defendants.	

- x

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

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

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

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

At issue is a letter dated November 30, 2006, September 1, 2007, and June 27, 2012 (hereinafter the 2012 Letter Agreement). The 2012 Letter Agreement is signed by plaintiff and Roger Kaufman, Managing Partner of the prior owner. In relevant part, the 2012 Letter Agreement provides in the second paragraph that the "Lease terms to be extended to now terminate on February 28, 2030; terms to be determined at the expirations of this initial lease consolidation period." At the bottom of the page, the 2012 Letter Agreement further provides "Tenant will have the option to renew entire lease at expiration of above with written notification to Landlord within 1 year prior to expiration of present lease. Terms and length to be determined at that time. Any percentage increase will not be less than 5% annually and not to exceed a maximum cap of 8% annually." The last line of the 2012 Letter Agreement reads "the signing of same is considered legal and binding to the parties involved."

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

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

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

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

NYSCEF DOC. NO. 338
RECEIVED NYSCEF: 10/11/2017

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

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

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

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

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

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

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

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

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

ROBERT J. MCDONALD
J.S.C.

FILED
OCT -3 2017
COUNTY CLERK
QUEENS COUNTY

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

Form A - Request for Appellate Division Intervention - Civil

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

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

JUVENAL REIS,

Plaintiff,

-against-

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

Defendants.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- [x] Civil Action
- [ ] CPLR article 75 Arbitration
- [ ] CPLR article 78 Proceeding
- [ ] Special Proceeding Other
- [ ] Habeas Corpus Proceeding

Filing Type

- [x] Appeal
- [ ] Original Proceeding
- [ ] Transferred Proceeding
- [ ] CPLR 5704 Review

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

A. Administrative Review

- [ ] 1 Freedom of Information Law
- [ ] 2 Human Rights
- [ ] 3 Licenses
- [ ] 4 Public Employment
- [ ] 5 Social Services
- [ ] 6 Other

B. Business & Other Relationships

- [ ] 1 Partnership/Joint Venture
- [ ] 2 Business
- [ ] 3 Religious
- [ ] 4 Not-for-Profit
- [ ] 5 Other

C. Contracts

- [ ] 1 Brokerage
- [ ] 2 Commercial Paper
- [ ] 3 Construction
- [ ] 4 Employment
- [ ] 5 Insurance
- [x] 6 Real Property
- [ ] 7 Sales
- [ ] 8 Secured
- [ ] 9 Other

D. Domestic Relations

- [ ] 1 Adoption
- [ ] 2 Attorney's Fees
- [ ] 3 Children - Support
- [ ] 4 Children - Custody/Visitation
- [ ] 5 Children - Terminate Parental Rights
- [ ] 6 Children - Abuse/Neglect
- [ ] 7 Children - JD/PINS
- [ ] 8 Equitable Distribution
- [ ] 9 Exclusive Occupancy of Residence
- [ ] 10 Expert's Fees
- [ ] 11 Maintenance/Alimony
- [ ] 12 Marital Status
- [ ] 13 Paternity
- [ ] 14 Spousal Support
- [ ] 15 Other

E. Miscellaneous

- [ ] 1 Constructive Trust
- [ ] 2 Debtor & Creditor
- [ ] 3 Declaratory Judgment
- [ ] 4 Election Law
- [ ] 5 Notice of Claim
- [ ] 6 Other

F. Prisoners

- [ ] 1 Discipline
- [ ] 2 Jail Time Calculation
- [ ] 3 Parole
- [ ] 4 Other

G. Real Property

- [ ] 1 Condemnation
- [ ] 2 Determine Title
- [ ] 3 Easements
- [ ] 4 Environmental
- [ ] 5 Liens
- [ ] 6 Mortgages
- [ ] 7 Partition
- [ ] 8 Rent
- [ ] 9 Taxation
- [ ] 10 Zoning
- [ ] 11 Other

H. Statutory

- [ ] 1 City of Mount Vernon Charter § § 120, 127-f, or 129
- [ ] 2 Eminent Domain Procedure Law § 207
- [ ] 3 General Municipal Law § 712
- [ ] 4 Labor Law § 220
- [ ] 5 Public Service Law § § 128 or 170
- [ ] 6 Other

I. Torts

- [ ] 1 Assault, Battery, False Imprisonment
- [ ] 2 Conversion
- [ ] 3 Defamation
- [ ] 4 Fraud
- [ ] 5 Intentional Infliction of Emotional Distress
- [ ] 6 Interference with Contract
- [ ] 7 Malicious Prosecution/ Abuse of Process
- [ ] 8 Malpractice
- [ ] 9 Negligence
- [ ] 10 Nuisance
- [ ] 11 Products Liability
- [ ] 12 Strict Liability
- [ ] 13 Trespass and/or Waste
- [ ] 14 Other

J. Wills & Estates

- [ ] 1 Accounting
- [ ] 2 Discovery
- [ ] 3 Probate/Administration
- [ ] 4 Trusts
- [ ] 5 Other

V2.0.060293

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Appeal

Paper Appealed From (check one only):

☐ Amended Decree	☐ Determination	☒ Order	☐ Resettled Order
☐ Amended Judgment	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: Queens
Dated: September 25, 2017	Entered: October 3, 2017
Judge (name in full): Robert J. McDonald	Index No.: 707612/2015
Stage: ☒ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ☒ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal Information

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

Original Proceeding

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

Statute authorizing commencement of proceeding in the Appellate Division:

Proceeding Transferred Pursuant to CPLR 7804(g)

Court:	County:
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order

Court:	County:
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

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

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

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

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

See next page.

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

Use Form B for Additional Appeal Information

Party Information

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

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

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

Instructions: Fill in the names of the attorneys or firms of attorneys for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: LAMBERT & SHACKMAN, PLLC

Address: 274 MADISON AVENUE, SUITE 1302

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

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 1

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

Address: 675 THIRD AVENUE, 31ST FLR.

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

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number[s] from table above or from Form C): 2 3

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

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

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

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

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

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

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No.:

Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

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

Use Form C for Additional Party and/or Attorney Information

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

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212-719-0990

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

Form B - Additional Appeal Information

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

Paper Appealed From (check one only):

☐ Amended Decree	☐ Determination	☐ Order	☐ Resettled Order
☐ Amended Judgment	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court:	County:
Dated:	Entered:
Judge (name in full):	Index No.:
Stage: ☐ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ☐ No If Yes: ☐ Jury ☐ Non-Jury

Description of Appeal

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

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

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

V2.0.060293

Form B - RADI - Civil

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212-719-0990

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

Form C - Additional Party and Attorney Information

Additional Party Information

No.	Party Name	Original Status	Appellate Division Status
21			
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26			
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29			
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Additional Attorney Information

Attorney/Firm Name:
Address:
City: State: Zip: Telephone No.:
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number[s] from table above or from Form C):

Attorney/Firm Name:
Address:
City: State: Zip: Telephone No.:
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number[s] from table above or from Form C):

Attorney/Firm Name:
Address:
City: State: Zip: Telephone No.:
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number[s] from table above or from Form C):

Attorney/Firm Name:
Address:
City: State: Zip: Telephone No.:
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number[s] from table above or from Form C):

V2.0.060293

Form C - RADI - Civil

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AFFIDAVIT OF SERVICE

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

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

by e-mail on October 11, 2017 to:

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

Edmond P. O'Brien

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

Notary Public

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

EXHIBIT B

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

D62077
L/htr

_____AD3d_____

Argued - October 7, 2019

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

2017-10961

DECISION & ORDER

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

(Index No. 707612/15)

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

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

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

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

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

space within the subject building.

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

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

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

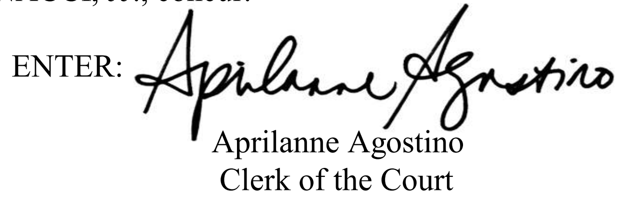
Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting, inter alia, a copy of the 2012 letter agreement, which demonstrated that the renewal provision was an unenforceable agreement to agree (*see Joseph Martin, Jr., Delicatessen v Schumacher*, 52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

The plaintiff's remaining contentions are without merit.

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

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

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

ENTER: 

Aprilanne Agostino
Clerk of the Court

Dick Bailey Service, Inc.
APPELLATE SERVICES

718.522.4363 800.531.2028
5202 Third Avenue, 2nd Floor | Brooklyn, NY 11220
P.O. Box 023030| Brooklyn, NY 11202

Affidavit of Service by E-Mail

Juvenal Reis against JB Kaufman Realty Co. LLC and 43-01 22nd Street Owner LLC

State of New York }
County of Kings }

Docket No. 2017-10961

Christina Anthony **, being duly sworn, deposes and says that he is over the age of 18 years of age, is not a party to the action and is employed at Dick Bailey Service, Inc.**

on Friday, May 8, 2020 **deponent served:**

Brief [ ] Record [ ] Appendix [ ] Notice [ ] Other [x] Notice of Motion, with Supporting Papers

upon:

Stempel Bennett Claman & Hochberg, P.C.

675 Third Avenue

New York, New York 10017

eobrian@sbchlaw.com

rclaman@sbchlaw.com

By emailing the digital copy of the documents upon the above parties at the email addresses designated by said parties. All parties consent to email service.

Friday, May 8, 2020

Christina Anthony

Sworn to before me:

LYNNE BAILEY
Notary Public, State of New York
No. 01BA6311579
Qualified in Richmond County
Commission Expires Sept. 15, 2022

92702

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

JUVENAL REIS,

Plaintiff,

-against-

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

Defendants.

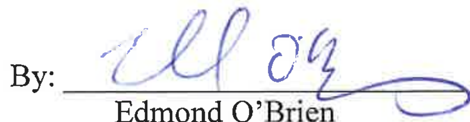
Index No.: 707612/2015

NOTICE OF ENTRY

PLEASE TAKE NOTICE that a Decision and Order on Motion, dated September 16, 2020 (the "Order") rendered in connection with an appeal from this action, was entered in the Office of the Clerk of the Supreme Court of the State of New York, Appellate Division, Second Department, on September 16, 2020. A true and accurate copy of the Order is annexed hereto as Exhibit A.

Dated: New York, New York
September 16, 2020

STEMPEL BENNETT CLAMAN & HOCHBERG, P.C.

By: 
Edmond O'Brien
Attorneys for Defendants-Appellants
675 Third Avenue
New York, New York 10017
(212) 681-6500

To: LAMBERT & SHACKMAN, PLLC
Attorneys for Plaintiff/Respondent
274 Madison Avenue, Suite 1302
New York, New York 10016
(212) 370-4040

336056.docx

EXHIBIT A

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

M273016
MB/

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

2017-10961 DECISION & ORDER ON MOTION

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

(Index No. 707612/2015)

Appeal from an order of the Supreme Court, Queens County, entered October 3, 2017, which was determined by decision and order of this Court dated March 11, 2020. Motion by the respondent for leave to reargue the appeal, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this Court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with $100 costs.

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

ENTER:

Aprilanne Agostino
Clerk of the Court

September 16, 2020

REIS v J.B. KAUFMAN REALTY CO., LLC

EXHIBIT D

The language in the parties' 2012 letter agreement (R997-998) is as follows:

1. 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 …."
2. 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]."
3. Sentence 3: "Any percentage increase will not be less than 5% annually and not to exceed a maximum cap of 8% annually."[3]
4. Sentence 4: "…the signing of same [the 2012 Letter Agreement] is considered legal and binding to the parties involved."

The deposition testimony of Landlord's agent is as follows:

> Q. And then there's also a sentence that says, quote, "Any percentage increase will not be less than 5 percent annually and not to exceed a maximum cap of 8 percent annually." unquote. Isn't that a fact?
> A. That's a fact also for the same period of time.
> Mr. O'Brien: Are you finished with your answer?

[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).

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

Q. The percentage was never agreed to.

A. Only the range.

R902-903.