Motion No. 2020-745
Queens County Clerk's Index No. 707612/15
Appellate Division–Second Department Docket No. 2017-10961

Court of Appeals

of the

State of New York

JUVENAL REIS,

Plaintiff-Respondent,

– against –

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

Defendants-Appellants.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1 of the Rules of the Court of Appeals, defendants-appellants J.B. KAUFMAN REALTY CO., LLC and 43-01 22nd STREET OWNER LLC ("Defendants-Appellants") advise the Court that the following are corporate parents, subsidiaries or affiliates of J.B. Kaufman Realty Co., LLC and 43-01 22nd Street Owner LLC:

J.B. Kaufman Realty Co., LLC
RK Realty Queens LLC
LSK Realty Queens LL
JK Realty Queens LLC
Blocks and Bricks, Inc.

44-01 22nd Street Owner
43-01 22nd Street Holdings LLC
Olmstead Arnow 4301 LLC
Olmstead Investor 4301 LLC
Arnow 4301 LLC
43-01 22nd Street GFI Owner LLC*
43-01 22nd Street CIRE SRB LLC*

*Please note that these entities are part of the GFP Real Estate family of companies.

Dated: New York, New York
October 30, 2020

STEMPEL BENNETT CLAMAN & HOCHBERG, P.C.

By: 

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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.	Queens Co. Index No. 707612/15 App. Div. Second Department Docket No. 2017-10961 Court of Appeals Mo. No. 2020-17445 (Pin No. 80030) **AFFIRMATION IN OPPOSITION TO PLAINTIFF-RESPONDENT'S MOTION FOR LEAVE TO APPEAL**

Richard Claman, an attorney admitted to practice before the Courts of this State, under the penalties of perjury, affirms:

1. I am a principal of Stempel Bennett Claman & Hochberg, P.C., attorneys for J.B. Kaufman Realty Co., LLC ("Prior Owner") and 43-01 22nd Street Owner LLC ("Current Owner") (collectively, "Defendants" or "Landlord"), as prior and current owner of the commercial building known as 43-01 22nd Street, Long Island City, New York (the "Building"); and I am familiar with the matters relevant here, having, inter alia, argued Defendants' appeal before the Second Department on October 7, 2019, leading to the UNANIMOUS Decision and Order of that Court dated March 11, 2020 (the "Decision," 181 A.D.3d 740).[1]

[1] The Second Department, by Decision and Order on Motion dated September 16, 2020 (M 273016), denied reargument and leave to appeal.

2. This affirmation is respectfully submitted in opposition to the motion by Mr. Juvenal Reis, d/b/a Reis Studios -- who has been engaged in the business of subleasing space in the Building ("Reis" or "Plaintiff") -- for leave to appeal to this Court from that Decision.

A. INTRODUCTION

3. As reviewed herein, and as had been set forth in our initial and reply appellate briefs to the Second Department ("Init.Br." and "ReplyBr.," respectively), this case concerns a straightforward application of the "Martin Delicatessen" decision[2] to the 'lease extension' language at issue here, on its face.

4. In short, there is a central 'hole' in Plaintiff's claim to hold an ongoing lease extension through 2030 -- viz., the absence of a definite agreement between the parties as to the rent amount to be paid during the alleged extension period of March 1, 2016 (-- i.e., after the one-year-only extension agreed-to in certain emails in November 2014 - February 2015; see R.54-56 and Exh. 1 hereto) through February 28, 2030.

5. Before the Second Department, Plaintiff advanced a

[2] Joseph Martin, Jr. Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105 (1981), reversing 70 A.D.2d 1 (2d Dep't 1979), which had reversed 1978 WL 403147 (Sup. Ct. Suffolk Co.).

variety of theories in an attempt to distract attention from that 'hole': but the Second Department was not distracted, and concluded that an essential term of the 'renewal agreement' was missing, for no rent was established, nor was there any agreement upon an "objective" means for fixing that seat (slip op. at 2).

6. The moving affirmation of Thomas Lambert, Esq. ("Lambert affirm"), now principally relies upon yet another theory for trying to side-step Martin Delicatessen -- and as reviewed herein, that theory is different from what Plaintiff argued to the Second Department.[3] Plaintiff now asserts that

[3] As further reviewed infra, ¶ 35 Plaintiff's argument to the Second Department had two steps, viz., (i) that the phrase 'to be determined" must be construed to mean – 'to be determined unilaterally by the landlord'; and (ii) landlord supposedly made such a determination, applicable for 14 more years, when it billed Plaintiff during the one-year-only agreed-upon extension period of March 1, 2015 – February 29, 2016. Plaintiff's argument in respect of this 'first-step' reappears now as part of its second reason why it thinks leave to appeal is warranted; and its argument as to the 'second-step' reappears now in its supposed 'third reason' for seeking leave to appeal; see infra).

As we showed below, however, both steps in Plaintiff's argument to the Second Department were mistaken. In short: (i) the phrase "to be determined" calls for a future mutual agreement, and not unilateral determination; and (ii) the rate billed and paid during the one-year-only agreed-upon extension (from March 1, 2015 – February 29, 2016) say nothing about the rent rate for the following 14 years -- as to which Plaintiff himself, in a February 20, 2015 email, conceded that there was no agreement. See further infra.

where parties have agreed to the maximum amount that could be charged in future, then, in the words of Lambert Affirm. ¶ 35, "the definiteness requirement is met where the landlord is obligated to set the [rent-increase] rate, at least at one end [i.e., the maximum end] of a spectrum."[4]

7. [To be sure, Lambert affirm. ¶ 33 tries to hide the novelty of his new theory (relative to what Plaintiff actually argued to the Second Department) by asserting (but without citation to, and without quotation from, the Decision) that the Second Department expressly rejected this new theory[5]. But the Second Department did not do so expressly, although it surely did so implicitly, as reviewed herein.]

8. As further shown herein, however, this new theory does not warrant review by this Court, for (at least) two reasons.

9. First: 'leave to appeal' is not, we submit, intended to provide an opportunity for a party that has lost in the

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[4] See likewise Plaintiff's first 'question presented' (asserting that an agreement should be deemed sufficiently definite if "the tenant is willing to renew at the highest end of the range"); Lambert affirm. ¶ 3 (asserting that Plaintiff should have been held entitled to "definitely get renewal if it accepts the [maximum] end point of the range"); id. ¶ 9 (arguing that an agreement must be deemed definite "at least at one end of a spectrum").

[5] Lambert affirm. ¶ 33 thus asserts (-- his italics) that "The Appellate Division below has held that Landlord is not obligated to *renew even at 8%*."

Appellate Division to change its position; and

10. Second, and in any event, this Court already held, in one of the foundational decisions underlying Martin Delicatessen,[6] that an agreement on a maximum price does not constitute a sufficiently definitive agreement on price. Thus in United Press v. New York Press Co., 164 N.Y. 406 (1900), the parties, in 1892, had entered into an 8-year agreement for a news service, per which defendant agreed to pay plaintiff "'therefor a sum not exceeding three hundred dollars during each and every week'" (at 408). After one-and-a-half years, however, defendant notified plaintiff to cease delivery of its news reports (at 409). This Court held that even though there was "a figure stated as the limit which the price to be paid each week must not exceed[,] [t]here is thus no rate of compensation nor price fixed" (at 411).[7]

11. As noted in our Init.Br. at 40-42, the Courts faced with the question have, accordingly, consistently held that

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[6] See, e.g., Dolan, Rasch's New York Law and Practice of Real Property (2d ed.) § 21:8 (citing both United Press and Martin Delicatessen.

[7] In the present case, Plaintiff sought in effect a declaration that would have granted it specific performance of an indefinite agreement, so that United Press applies a fortiori. See Martin Declaration, 52 N.Y.2d at 110 ("the rule applies all the more, and not the less, when, as here, the extraordinary remedy of specific performance is sought").

'agreement' upon a price range would not constitute a sufficiently definite agreement on price, for purposes of Martin Delicatessen.

12. Indeed, the Lambert affirm. now admits that Plaintiff is seeking to change the established law, by "expansion" (¶ 7), and/or reliance upon a novel "hybrid" (¶ 5) approach.[8] [See also Lambert affirm. ¶ 15, asserting that this Court should create a novel "third way" by which a plaintiff can establish definiteness, relative to Martin Delicatessen and In re 166 Mamaroneck,[9] see infra.]

13. As this Court has repeatedly held, however: particularly in the context of commercial real estate matters, parties should be entitled to bargain in the context of, and against a background of, established rules; see, e.g., Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc., 987 N.Y.2d 130, 134 (1995). See also Martin Delicatessen, 52 N.Y.2d at 111 ("Stability is a hallmark of the law controlling" real estate agreements, including leases).

14. And Plaintiff does not suggest any reason why this Court should now change a 100-year-old foundational principle,

[8] All emphasis in material quoted herein is added, unless otherwise noted.

[9] In re 166 Mamaroneck Ave. Corp. v. 151 East Post Road Corp., 78 N.Y.2d 8 (1991).

as consistently implemented in the subsequent case-law of this Court and of the Appellate Division.

15. As for the other 'reasons' advanced in the Lambert Affirm. As warranting review by this Court, they rest, as will be reviewed herein, on either (i) purporting to re-write the words of the documents at issue; and/or (ii) purporting to re-write the chronology of the relevant events.

16. Plainly, however, such efforts, already rejected by the Second Department, do not warrant further review by this Court.

17. Accordingly, it is respectfully submitted that Plaintiff's motion should in all respects be denied.

* * *

18. Since our articulation of the foregoing points depends on the record below -- and insofar as Plaintiff's contentions are largely efforts to re-write the factual and procedural record as shown in the Record on Appeal to the Second Department, the next section of this affirmation will review that factual and procedural record. (This review will also show, as a general matter, that the attempt in Lambert affirm. ¶¶ 20-33 to 'anticipate' our present analysis is also misguided.)

19. We will then re-visit each of the four 'questions' that Plaintiff proposes now for review by this Court, to show

that none warrants review relative to the criteria set forth in Court Rules 500.22(b)(4).[10]

THE PROCEDURAL AND RECORD FACTS

20. To put Plaintiff's present arguments into perspective, we review briefly (a) the key uncontroverted facts of this matter, as shown in the 'Record,' and (b) the prior proceedings herein. (References herein to "R.__" are to the Record on Appeal. References to "OppBr" are to Plaintiff's opposition brief to the Second Department.)

(I) The Parties

21. Prior Owner is a family business, whose principal, at the times relevant here, was Roger Kaufman (see, e.g., R.839-843). [In an attempt to avoid any question from Plaintiff in this regard, we had included the full transcript of Plaintiff's Plaintiff's deposition of Mr. Kaufman in our summary judgment

[10] We understand that there are no hard-and-fast rules in respect of this Court granting or denying leave to appeal. But the general principle, to our understanding, is that disputes turning on the particular language of individual contracts, and/or on other individual features of a case, do not warrant leave to appeal. See generally N.Y.Jur.2d Appellate Review §§ 293-294.

And a fortiori, purported 'questions' that simply do not correspond to the issues that had been presented to the Appellate Division, and/or that rest upon 'facts' that otherwise diverge from the Record, do not warrant further consideration.

motion, and hence in the Record (R. 834-953) -- but as we repeatedly have explained (see infra), neither Mr. Kaufman's subjective intent, nor Mr. Reis's, is relevant here.][11]

22. The subject building, located on 22nd Street, between 43rd and 44th Avenues, in Long Island City, is a six-story commercial building, offering approximately 222,000 sq. ft. of commercial space, first constructed in 1925, and subsequently renovated by Current Owner -- a privately-owned real estate company that acquired the Building in 2016 (see R.12, ¶ 1). As will be noted infra, as of the last of the letter agreements made between the parties expanding Reis's space, i.e., the 'June 2012 Letter Agreement' (see infra), Reis leased approximately 43% of the Building, for his studio-subletting business.

23. As explained in his own deposition testimony, Juvenal Reis -- who holds, inter alia, a Master's degree in hotel

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[11] The Lambert affirm. (e.g., in ¶ 3 fn. 3 and ¶ 8) again repeatedly notes that the Record does not also include any further affidavit from Mr. Kaufman. The reason is simple: as further reviewed (again) herein, this case simply does not turn on the subjective view of either Mr. Reis or of Mr. Kaufman, but rather on the dispositive documentary facts here concerning, in particular, the absence, from the 'extension' clause of the 'June 2012 Letter Agreement,' of any definite rent amount; see infra.

We included the complete transcript of Roger Kaufman's deposition, however, precisely so that Plaintiff should not be able to allege that we had sought to hide anything -- in contrast to Plaintiff's conduct here (see Init.Br. 34-35).

management from Florida International University, as well as marketing/management degrees earned in Brazil and Switzerland, and a Masters of Fine Arts from Southern Methodist University, (R.90-92) -- conceived the idea of renting space in the Building, and then sub-letting portions thereof for use as artist studio space, to (over the years) hundreds of different subtenants (R.99, 337). [Reis finally produced various of those subleases after prolonged resistance on his part; see Init.Br.35. The reason for Reis's reluctance was immediately apparent: as noted infra, those subleases confirm that Reis plainly knew how to draft lease clauses that refer to 'formula' concepts such as "fair market value" (R.966-967, ¶ 3), and "current market price" (R.971, ¶ 22); but no such formulas were included in the critical 'extension' sentence here; see infra and Init.Br. 5 fn. 9.]

(II) The Lease

24. In 2002, Prior Owner and Reis entered into their first lease agreement -- starting with the so-called "REBNY" form lease, plus 'riders' and other modifications (R.57-69).

25. During the period 2002-2007, Prior Owner and Reis then entered into a sequence of short expansion/extension letter agreements (R.70-79). At that point, Reis was renting eight different spaces, located in various portions of the 2nd, 3rd,

4th, 5th and 6th Floors, totaling around 39% of the Building's rentable area.

These different expansion/extension agreements provided that Reis's term of possession for all of the demised premises would end on a single end-date -- February 28, 2015. (See, e.g., R.75, R.80).

26. The focus of this litigation is the so-called 'June 2012 Letter Agreement' (R.80-81), and the prior (signed) 'draft' thereof, made earlier that same date (R.78-79).

27. That first 'draft' (R.78-79) added (relative to the previous 2007 letter agreement; R.77) a ninth space, likewise for a term of possession to expire on February 28, 2015.

28. And then, on that same day in June 2012 -- according to, inter alia, Reis's own affidavit in opposition to Defendants' summary judgment motion (R.985, ¶ 22) -- Reis asked Roger Kaufman to also add to that 'draft' another sentence, on the subject of an 'extension'; and after Kaufman did so, that agreement was also executed.

29. That 'extension' sentence (the "T-B-D Sentence") states:

> Lease terms to be extended to now terminate on February 28, 2030; *terms to be determined* at the expiration of this initial lease

> consolidation period [i.e., which 'period' would expire as of February 28, 2015].

30. [As we already noted (e.g., Init.Br. 17-18 fn. 20; 39-40 fn. 45; and 49 fn. 56), any question as to the thinking of either Mr. Reis or Mr. Kaufman in including this T-B-D Sentence is irrelevant here, per Martin Delicatessen. Likewise, Defendants' 'motive' for insisting that the T-B-D Sentence is unenforceably indefinite is also irrelevant; see ReplyBr. 25-26.]

31. In his Opp.Br., Reis argued that this T-B-D Sentence, as thus added in June 2012, should be deemed to incorporate-by-reference a 'range' statement that had already been included as part of a separate (-- but otherwise irrelevant)[12] 'option' provision already included in the parties' agreements, first appearing in 2006 (R.75; see also R.76 and R.77). That provision gave Plaintiff an option to renew "at expiration" of the agreed-upon lease term, to be exercised by "written notification" to be given one year in advance, with

> 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.

[12] See, e.g., Opp.Br. 11 fn. 7 (noting how that option was "separate").

(We have referred to this last sentence as the "Range Provision").

32. We had argued (see, e.g., Init.Br. 2-3, fn. 4; and 18-19) that, as a preliminary matter, this Range Provision should not be read-into the T-B-D Sentence. In the Decision, however, the Second Department -- perhaps to make the point that Reis's ultimate argument failed even if the Range Provision were to be deemed incorporated into the T-B-D Sentence -- treated the Range Provision as so incorporated. (If this dispute were to proceed any further, we would, however, respectfully reserve our argument, as an 'alternative' basis for upholding the Decision, that the Range Provision should not be 'incorporated' into the T-B-D Sentence.)

33. In any event, however: there is no dispute but that Plaintiff never exercised its separate 'option' right. See, e.g., Opp.Br. at 32: "The case at bar does not concern an 'option.'"

(III) Plaintiff's Contention That He Held A Binding 15-Year extension

34. Rather, Reis's claim herein is only that the T-B-D Sentence itself, as set forth in the June 2012 Letter Agreement (and incorporating the Range Provision), established a binding agreement for an extension term that would not expire until the end of February 2030.

35. In particular, Reis contended to the Second Department:

a. that the phrase "to be determined" must be understood to mean -- to be determined "unilaterally" by Landlord (Opp.Br. 36; see also, e.g., Opp.Br. 11[13]; at 21 ["Prior Landlord was to set the precise amount of the annual rent increase for the extended term"]; and at 32 ["which was to be set by Prior Landlord"]; and

b. that Landlord supposedly in fact 'determined" the rent-increase rate for each of the fourteen years after February 29, 2016, when Landlord billed, and Reis paid, a rate of less than 8% per the one-year-only agreement that the parties reached for March 1, 2015 – February 29, 2016, as described in the next paragraphs. (E.g., Opp.Br. 33-34.[14])

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[13] Thus Opp.Br.at 11 asserted:

> 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 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.

[14] Thus Opp.Br. 33-34 assertion:

> As shown above, after the 2012 Letter Agreement was made the parties performed in a manner which shows
>
> [footnote continues]

36. Indeed, Plaintiff was so convinced of this two-step theory -- which, however, its present principal argument contradicts -- that Plaintiff asked the Second Department to search the record and grant summary judgment to Plaintiff on the basis of this two-step theory. (Opp.Br. 33-34.)

37. There is no dispute but that the June 2012 Letter Agreement was performed by both parties, from June 2012 through February 2015: Reis did occupy the additional space added in that June 2012 Letter Agreement; and Prior Owner did perform the referenced work to build-out that space for Reis. (See ReplyBr. 26-27.)

38. In late 2014, a dispute arose between Reis and Kaufman, as shown in the emails exchanged between them in the period November 2014 through February 2015 (R.54-56, Exh. 1 hereto quoted at Init.Br. 25-26, fns. 31 and 32). In short: (a) on November 15, 2014, Reis sent an email asserting that he and Kaufman had orally reached an agreement on the rent "for the coming years" [sic]; (b) by responsive email (two days later, on November 17, 2014), however, Kaufman denied any such long-term agreement, and stated that his only rent agreement was "based on

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> that Prior Landlord sets 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 Plaintiff's payments inn such amount. That was shown by the undisputed documentary evidence (the bills and checks, R1043-1059) ....

a single one year renewal," "to expire February 29, 2016"; and (c) on February 20, 2015, Reis emailed to confirm that, while there was agreement for one year, the parties "were unable to agree" beyond that (R.54):

> while ... the fixed rent for 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.*[15]

39. [Lambert Affirm. ¶ 26 argues that Reis's concession that "we were unable to agree on the rent for the [14 future] years" must now be ignored, in favor of Reis's subjective belief, and Reis's continued assertion, that despite this absence of agreement upon the rent rate, Reis was still entitled to hold a lease through February 2030. But the fact that Reis is arguing that, in effect, Martin Delicatessen must be ignored, is not, of course, a reason to ignore Martin Delicatessen, nor to ignore the requirement that, for an extension agreement to be effective, there needs to be an agreement upon price.

[Moreover, as we noted, Reis did not himself say, in his February 20 email – 'since we cannot agree on the rents for the

[15] In his deposition, and in his affidavit in opposition to Landlord's summary judgment motion, Reis authenticated these emails, and confirmed that they indeed showed an extension agreement for only one year; see R.350-351; see also his 'opp.aff.,' R.992-993, ¶ 11. See also, e.g., ReplyBr. at 22-23.

following 14 years, I simply accept 8% as the maximum rent increase rate for each of those years.' His own email thus shows, by contrast the new argument now made in the Lambert Affirm., that even Reis recognized that there needed to be an agreement for the following 14 years -- but there wasn't.]

40. In March 2015, following this 'email' one-year-only agreement, Prior Owner sent a rent bill to Reis (R.1044). The March 2015 rent bill underbilled Reis, relative to the 6% increase that had been agreed-upon in the November 2014 – February 2015 emails, by approximately $434, or 00.59%. Reis did not complain at the time of this underbilling -- and indeed did not even refer to it in his verified Complaint (compare ¶ 30, R.37). As we showed below, this slight underbilling by Kaufman, relative to the one-year-only extension agreement reached in the November – February 2015 emails, simply cannot be deemed to constitute a binding agreement as to the rent to be paid for the ensuing 14 years (i.e., from March 1, 2016 through February 28, 2030), in the face of, inter alia, the statute of frauds as applicable to any lease agreement for a term of more than one year. (Init.Br. 29-30; 50 fn. 47; 52-55).

(IV) Prior Proceedings

41. In July 2015, Reis filed a complaint (R.29-41) seeking a declaration that he held a valid and binding lease extension

running through February 28, 2030. Reis's key allegation was that Landlord's billing in March 2015 must be deemed to show an agreement by Landlord that the rent would increase for each and every year through February 2030 at a rate of 5.4%.[16] In so alleging, Reis simply pretended, however, that the November 2014 – February 2015 emails did not exist; and he likewise pretended that there had not been a one-year-only extension agreement underlying that March 2015 billing. Prior Owner, in making a pre-answer motion to dismiss, sought to inform the Motion Court of Reis's key (and misleading) 'omission': but under the Second Department's precedents (-- at least at the time), emails were not 'admissible' as documentary evidence on a CPLR 3211(a)(1) motion.[17] Obviously, however, for purposes of a summary judgment motion, following discovery, Reis's own February 20, 2015 email, confirming that an agreement had been reached for one-year-only -- but admitting that "we were unable to agree on the rent for the following years" (R.54) -- is decisive against Reis in this regard.

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[16] See, in more detail, the affidavit of Juvenal Reis in opposition to Prior Owner's motion to dismiss, NYSCEF #14, at ¶¶ 51-52.

[17] And of course denial of a motion to dismiss is not, contrary to Reis's contention, 'law of the case' on a subsequent summary judgment motion; see ReplyBr. 23-24 fn. 25.

42. Defendants' eventual summary judgment motion rested on a very simple point: looking at the face of the June 2012 Letter Agreement, there clearly was no definite agreement on the essential element of the rent to be paid during the 'extension' period March 2015 – February 2030; and (b) the one-year-only agreement reached in the 2014-2015 emails did not constitute an agreement for the ensuing 14 years. Hence, under Martin Delicatessen, Reis's claim to hold an enforceable lease extension through February 2030 was without basis; and his lease thus expired on February 29, 2016.

43. Reis, in opposition to Landlord's summary judgment motion, advanced multiple arguments -- each of which we carefully refuted (as shown in the Init.Br. and Reply Br.). In particular, and as relevant here (-- for the Lambert Affirm. now makes no reference to several of Plaintiff's other previous theories[18]): Reis argued that (a) he believed that the phrase "to be determined," in the T-B-D Sentence, meant 'to be determined unilaterally by Landlord' -- so that a 'methodology' did exist for picking a specific number within the 5%-8% Range Provision

[18] There is, to be sure, an oblique reference to one such other theory, in Lambert Affirm. ¶ 18 fn. 6 -- namely, that in a certain without-prejudice 'interim payment stipulation' made in March 2016 (R.1060-1061), Landlord supposedly conceded the entire case here. See however Init.Br. 31-34, 55-56; and Reply Br. 18-21, utterly refuting Plaintiff's misreading of that stipulation.

(e.g., ReplyBr. 2 fn. 6, citing to Plaintiff's Opp.Br.; and supra ¶ 35); and (b) Landlord must thereupon be deemed to have 'picked' its number, for all 15 renewal-period years, when Landlord issued its March 2015 invoice, showing (due to the slight underbilling) a 5.4% increase (e.g., Opp.Br. at 26-27, reviewed in ReplyBr. 21-22; see also the variant at Opp.Br. 3, 37, refuted at ReplyBr. 24-25; and see ¶ 35, supra).

44. In reply to these two points, we showed that (a) Reis's alleged subjective intent was in any event irrelevant, for Martin Delicatessen establishes an objective test (see, e.g., Init.Br. 39-40, fn. 45); and the parties clearly knew how to say that a particular determination would be made unilaterally by Landlord, if that had been their agreement -- for the Lease so provided in a different context, but plainly, objectively, did not so provide here;[19] and (b) the 5.4% increase reflected in the March 2015 billing plainly related only to the parties' one-year-only extension agreement as reached in the November 2014 – February 2015 email exchange, and could not, as a matter of law, in the face of the statute of frauds, constitute a sufficient memorialization of a binding 'agreement' for an additional 14 subsequent years (Init.Br.52-

[19] We pointed (Init.Br. 6 fn. 11), by contrast, to Lease ¶ 47 (R.63), where Plaintiff was obligated to provide extermination services "to the satisfaction of Landlord."

55; ReplyBr. 21-25).

45. Notwithstanding our showing, the Motion Court denied our summary judgment motion. For its primary basis, the Motion Court stated that, in that Court's view, the question whether the phrase "to be determined" could be read, in accordance with Reis's supposed subjective intent, to mean 'to be determined unilaterally by landlord,' constituted an "issue of fact" (R.8-9). As we demonstrated on appeal, however (see, e.g., Init.Br. 3-5; see also ReplyBr. 2-4), this was a plain error by the Motion Court, for (a) the issue of whether an extension clause is or is not sufficiently definite is an 'issue of law' under Martin Delicatessen; and (b) the subjective intent of one party is simply not a basis for the Court to write-in additional words (see, e.g., Init.Br. 46-50).

46. The Motion Court also speculated that the 5.4% March 2015 underbilling might represent some yet additional and separate agreement, somehow "supersed[ing]" (R.8) the one-year-only email agreement reached in November 2014 – February 2015 -- so that, according to the Motion Court, there was an "issue of fact" in this regard as well. But such speculation, of course, made no sense, since the material terms of any such supposed "supersed[ing]" agreement would need to have been duly memorialized in a writing that stated its material terms, in order to comply with the statute of frauds -- but obviously,

neither the Motion Court nor Reis could point to any document corresponding to the Motion Court's speculation concerning such a "supersed[ing]" agreement (see Init.Br. 10-12, 52-55; ReplyBr. 24-25).

47. In sum, we showed, in our appellate briefs, that (a) there was a fundamental 'hole' in Reis's claim of a binding lease extension through February 2030, in that the 'extension clause' of the June 2012 Letter Agreement, i.e., the T-B-D Sentence, was on its face, as an objective matter, indefinite under Martin Delicatessen; and (b) all of Plaintiff's various efforts (and those of the Motion Court) to try to cover-over that fundamental flaw were ultimately insufficient, as a matter of law, in the face of the documentary record.

48. And the Second Department, after an extensive and searching oral argument (on October 7, 2019), held for Defendants, recognizing the fundamental point that the T-B-D Sentence in the June 2012 Letter Agreement did not constitute a sufficiently definite extension agreement so as to 'support' a 14-year extension.

LEAVE TO APPEAL SHOULD BE DENIED

A. Reis's Argument For A Change In The Established Law Does Not Warrant Review

49. To review: in our Init.Br. (at 40-42), we cited to the consistent case-law for the point that (as stated by the First

Department in 1945) a contract's statement of "a range within minimum and maximum figures ... does not meet the test of definiteness."[20]

50. Plaintiff's Opp.Br. essentially conceded this point: for Plaintiff itself noted that, in addition to a 'range,' there also needed to be "an objective method for setting rent within a limited range." (Opp.Br. 26; see also our further discussion in ReplyBr. 13-15).

51. Lambert Affirm. ¶ 5 recognizes that In re 166 Mamaroneck provided for two ways of achieving the requisite objective definiteness. Under In re 166 Mamaroneck, there needs to be either (a) the specification in the writing of an objective procedure, such as arbitration, or (b) there needs to be the specification in the writing of an "extrinsic ... formula," e.g., 'fair market value.' (See also Init.Br. 38 fn. 44.)

52. But the June 2012 Letter Agreement does not provide for either of these two methods -- notwithstanding that, as noted above (¶ 23), Reis himself employed the standards of "fair market value" and "current market price" in his subleases (R.966-967, ¶ 3; R.971, ¶ 22; see Init.Br. at 5 fn. 9.) See

[20] Belasco Theatre Corp. v. Jelin Productions, 270 A.D. 202, 205 (1st Dep't 1945).

already Init.Br. 38 fn. 44, explaining that, accordingly, In re 166 Mamaroneck did not help Plaintiff here.

53. The Lambert Affirm. (e.g., ¶ 5 and ¶ 7), now admits that Plaintiff indeed cannot rely on either 'prong' of In re 166 Mamaroneck. And so Plaintiff is, instead, now arguing for (what Lambert now calls) a "hybrid" theory (¶ 5); and Lambert Affirm. ¶ 7 effectively concedes that such a "hybrid" theory would indeed constitute (in his words) an "expansion" of the existing law, so as to constitute a "third way" (¶ 15).

54. Lambert Affirm. ¶ 8 still does not, however, explain how a Court, looking at the "range" here (i.e., between 5% and 8%), is supposed to pick a specific number 'in between.' And Plaintiff does not dispute that the fundamental point of this Court's decision in Martin Delicatessen (-- reversing the Appellate Division there) is that the Court will not make an agreement for the parties when the parties themselves could have made, but failed to make, a definite agreement for themselves. (See Init.Br. at 39 and fn. 45, reviewing how the Appellate Division in Martin Delicatessen indeed had proposed to change the law, but this Court declined to do so.)

55. Lambert Affirm. ¶ 3 now argues that In re 166 Mamaroneck should be expanded to declare that the Court can make a 'range' agreement into a definite contract by declaring that

the "end point" least favorable to the plaintiff to be the contract price. But Lambert cites no support for the idea that the Court should thus make a contract for the parties, when that the parties did not do so themselves. (See Init.Br. 39.) And as noted above, the idea that the parties' agreement upon an 'upper limit' should be deemed a definite price agreement was rejected already in United Press.

56. As for the attempt in Lambert affirm. ¶¶ 5-6 to suggest that In re 166 Mamaroneck somehow overturned Martin Delicatessen: While Reis indeed previously tried to so argue (see Opp.Br. 24-25, pointing to the phrase "last resort" therein), we already refuted that attempt in our ReplyBr. (at 15-16), citing three Appellate Division cases, and a federal case, all decided subsequent to In re 166 Mamaroneck, which all held, in effect, that In re 166 Mamaroneck did not diminish the force of Martin Delicatessen as relevant here.[21] And of course

[21] In our opposition to Plaintiff's motion to the Second Department for lease to appeal/reargument, we also noted Douglas Elliman LLC v. Firefly Entertainment Inc., 729 Fed. Appx. 64, 2019 WL 6271547 (2d Cir., Nov. 25, 2019), which, after discussing both In re 166 Mamaroneck and Martin Delicatessen, concluded that the writing pointed-to by that plaintiff was too indefinite to constitute a binding contract: "even if there was sufficient intent shown ..., it would be inappropriate to read in missing terms," including the commission amount.

We infer, from the fact that the Second Circuit dealt with that dispute by way of a "summary order," that the Second Circuit saw no issue in this regard that was novel, or of [footnote continues]

the Second Department's Decision properly cited to both Martin Delicatessen and In re 166 Mamaroneck. Nor does the Lambert Affirm. now even attempt to present any authority contrary to the authorities that we previously noted in this regard.

57. At bottom, then, the Lambert Affirm. is (again) just making some of the same arguments for a change in the law that the Appellate Division had made in its decision in the Martin Delicatessen case -- but which this Court, in Martin Delicatessen, rejected. (See Init.Br. at 39-40 and fn. 45).

58. Accordingly, Plaintiff's proposed 'first question' does not warrant review.

B. The Phrase "To Be Determined" Does Not Mean 'To Be Determined "Unilaterally" By Landlord'

59. For Plaintiff's second proposed question, Lambert Affirm. ¶¶ 8-10 repeats Plaintiff's contention that the phrase "to be determined," as used in the T-B-D Sentence, must -- because such was supposedly Plaintiff's own subjective "understanding" -- be deemed to mean 'to be determined "unilaterally" by the landlord.' (Lambert Affirm. ¶ 8, quoting.) And Lambert Affirm. ¶ 9 then contends that Landlord must be

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public importance, or necessary to otherwise clarify any conflict in the law.

The various other cases cited in Plaintiff's Opp.Br. are all distinguished in Defendant's ReplyBr.

deemed to have acted "in bad faith" for failing to have unilaterally set the annual rent-rate increase at the 'upper limit' of 8%. (Id. ¶ 10). [Lambert's present 'second step' contention thus contradicts, of course, Plaintiff's argument to the Second Department that there was supposedly a determination by Prior Owner to fix a 5.4% rate for 15 years; see supra, ¶ 35 and Opp.Br. at, e.g., 26, 32.]

60. As we already explained at some length, however (-- focusing only on the 'first step' in Plaintiff's present two-step argument, as just outlined): if the parties had meant to say, in respect of the 15-year extension period, that the rent was 'to be determined unilaterally by landlord,' they could of course have simply said that -- and indeed, in a different context in the Lease, they did agree that Landlord would control the decision in a particular respect (see ¶ 45, fn. 19, supra). But that is not what the parties said in this regard, in the T-B-D Sentence. And the phrase "to be determined" clearly requires some further agreement by and between the parties, and hence is indefinite for purposes of Martin Delicatessen. (See Init.Br. at 42-45, and ReplyBr. 11-12, reviewing case-law in this regard.) In sum, the phrase used in the T-B-D Sentence, i.e., "to be determined [in the future]," clearly meant that there was no present agreement when the T-B-D Sentence was added in June 2012, and hence no binding agreement as to a 15-year

extension. Even now Plaintiff proffers no case-law to support its theory that the phrase actually used in the June 2012 Letter Agreement must be re-written by the Court based upon Reis's supposed subjective understanding thereof.[22]

61. And the clear point of the 2012 requirement that the parties had to negotiate was to avoid a situation where the Landlord would unilaterally charge so much that Reis was forced out of business -- for that would not benefit either Landlord or Reis.

62. As a variation on the foregoing, Lambert affirm. ¶ 32 suggests that, as a matter of the implied "covenant of good faith," the phrase "to be determined [in the future]" should be read so as to have imposed upon Landlord a good faith obligation to have picked 8% as the annual rent-increase rate for the ensuing 14 years. As we noted previously, however (Init.Br. 48), a plaintiff cannot rely on an implied covenant of good faith unless it is first shown that an enforceable contract exists. See, e.g., Mocca Lounge, Inc. v. Missak, 94 A.D.2d 761,

[22] Lambert Affirm. ¶ 8 quotes a couple snippets of deposition testimony by Reis. But Reis's subjective "understanding," even if those snippets were credible (cf. Init.Br. 21-22, quoting from Reis's earlier and contrary testimony), is in any event legally irrelevant (Init.Br. 17-18 fn. 20; 39-40 fn. 45, and 49 fn. 50). As explained in Init.Br. 46-50, a key element of the Martin Delicatessen rule is that the absence of definiteness is not an ambiguity, but rather simply a failure of definiteness.

763 (2d Dep't 1983) (explaining that the implied covenant of good faith only applies if and when "the parties are under a duty to perform an obligation which is definite and certain"; but where the objective criteria necessary to create a sufficiently definite and binding agreement are just missing, then such "objective criteria or standards ... may not be implied ...."). Accord, e.g., American-European Art Associates, Inc. v. Trend Galleries, Inc., 227 A.D.2d 170 (1st Dep't 1996) ('implied covenant' claim properly dismissed "for lack of a valid and binding contract from which such a duty would arise"). And see also Mandarin Trading Ltd. v. Wildenstein, 65 A.D.3d 448, 451 (1st Dep't 2009) (explaining that since there was no contract, there could not be a claim based on an implied good faith covenant, citing to American-European Art Assoc., supra), aff'd, 16 N.Y.3d 173 (2011).

63. Accordingly, Lambert's 'second question' does not warrant further review.

C. The Prior Owner's Billing In March 2015 For The One-Year-Only Extension Did Not Somehow Set The Rate For The Ensuing 14 Years

64. As noted above, Plaintiff did not argue to the Second Department that Plaintiff was willing to pay an annual increase at the rate of 8%: rather, Plaintiff argued that Landlord had set the rate, for each of 2015-2016 and the following 14 years, at 5.4%. And Lambert Affirm. ¶¶ 11-16 now

argues -- contradicting his own proposed 'first question' -- that the Second Department just misunderstood the facts in this latter regard.

65. Lambert Affirm. ¶¶ 12-16 thus argues that Prior Owner must be deemed to have in fact set the annual rent-rate increase for each year in the 14-year period March 2016-February 2030 (i.e., following the one-year-only extension that had been agreed-upon in the November 2014-February 2015 emails) when Prior Owner invoiced Plaintiff for March 2015 at a rent increase of approximately 5.4% above the prior year's rent.

66. In short, Plaintiff just pretends, however (yet again), to entirely ignore the point that, in the email exchange in November 2014 – February 2015 (reviewed supra), the parties agreed on a one-year-only extension of the lease term, through February 2016. Indeed, as quoted above, Reis admitted, in his February 20, 2015 email (R.54), that "we were unable to agree on the rent for the following years" -- i.e., for the 14 years after the one-year-only extension.

And the fact that Landlord underbilled Plaintiff by a de minimis amount during the term of that one-year-only extension likewise does not show an agreement, binding against Landlord, for the ensuing 14 years. Among other things, Plaintiff's theory would violate the statute of frauds, which requires that

any lease agreement, for more than one year, and a fortiori for 14 more years, be memorialized in a writing that sets forth all the material (and definite) terms of such an extension agreement. (See Init.Br. 50 fn. 57, and 52-55; ReplyBr. 21-25.)

67. Lambert Affirm. ¶ 28 now argues that we have also mischaracterized Reis's own February 20 email, in a second respect (compare ¶ 39, supra): according to Lambert, we are arguing "that this 6% argument was made *in lieu* [sic; Lambert's italics] of the renewal to 2030." No: the one-year-only agreement was not "in lieu" of any supposed already-existing and already binding 15-year "renewal to 2030 [sic]," for there was no such binding 'renewal"; nor did we ever argue for any sort of "in lieu" theory -- nor, of course, does Lambert Affirm. provide any support for this mischaracterization.

68. Accordingly, Plaintiff's reliance, again, upon a supposed 'fact' theory that simply, as reviewed herein, rests on a distortion of the documentary record, warrants rejection of Plaintiff's present motion in reference to Plainiff's 'third question' as well.

D. The Second Department Did Not Somehow Overlook Any Facts

69. Lastly, Lambert Affirm. ¶ 17 -- repeating an argument that he previously made to support reargument -- asserts that the Second Department must be deemed to have "overlooked the

facts" because the Motion Court supposedly had "found" (¶ 18) that there were two triable "issues of fact."

70. As noted above (in fn. 1) the Second Department denied, however, reargument. And, to our understanding, this Court's function is not to hear reargruments of 'fact' issues already rejected by the Appellate Division.

71. In any event, Plaintiff's repeated assertion that the Second Department overlooked a 'finding' by the Motion Court is mistaken, on multiple levels. First, a determination by a motion court that there exists an issue of fact is of course not a finding by that court of any fact.

72. Second, and more critically, we had carefully explained in our appellate briefs (see ¶¶ 45-46, supra) why the supposed "issues" of "fact" noted by the Motion Court were not indeed relevant issues of fact: rather, (a) the question whether the T-B-D Sentence was sufficiently definite was not (as the Motion Court mistakenly thought) an 'issue of fact,' but instead (under Martin Delicatessen) an issue of law, to be determined by looking simply at the existing words of the T-B-D Sentence, without the court adding more words thereto (e.g., Init.Br. 3-4); and (b) the Motion Court's 'speculation' that the March 2015 billing might show that there might have been some subsequent and "supersed[ing]" agreement between the parties, i.e., even

after Reis's own February 2015 email, is baseless -- for again, the statute of frauds should preclude any such speculative subsequent 'agreement.'

73. Accordingly, even if, Lambert's 'fourth question' were a proper basis to ask this Court to take 'review,' the premises asserted by Plaintiff as the basis therefor are simply mistaken, relative to the Record, and the established law.

CONCLUSION

74. In sum: as shown by the dozens of cases cited in the Init.Br. and ReplyBr., the question of the effect (or non-effect) of an indefinite 'extension sentence' is not "novel" [cf. Court of Appeals Rule 500.22(b)(4)]; nor does Plaintiff point to any feature of this particular case that is somehow of "public importance" (id.) relative to the longstanding requirement of definiteness. Plaintiff does not point to any conflict amongst the Departments of the Appellate Division in this regard (id.). (See, e.g., Init.Br. 41-42 fn. 48, and ReplyBr. 11, discussing First Department developments to the same effect as the Decision here.)

75. And Plaintiff's concession that it is arguing for a "third way" – i.e., beyond the 'two ways' recognized in In re 166 Mamaroneck -- is a concession that the Decision does not present any "conflict with prior decisions of this Court" (Rule 500.22(b)(4)).

76. To the contrary, the character of Plaintiff's assertions -- in how they (i) are repeatedly shifting, (ii) contradict the Record, and are self-contradictory -- is good reason to deny further review.

77. Accordingly, it is respectfully submitted that Plaintiff's motion should be denied.

Dated: New York, New York
October 30, 2020

Richard Claman

Exhibit 1

From: JUVENAL REIS <juvenalreis@mac.com>
Date: February 20, 2015 at 16:43:40 EST
To: "maddstorkk@aol.com" <maddstorkk@aol.com>
Subject: Re: Last meeting

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

Regards
Juvenal Reis

On Feb 11, 2015, at 14:20, JUVENAL REIS <juvenalreis@mac.com> wrote:

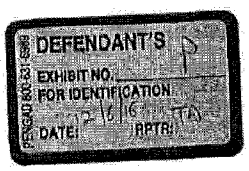
Roger, attached is the last letter agreement with extension.
REISSTUDIOS
43-01 22ND STREET
LONG ISLAND CITY, NY 11101
718-784-5577
718-570-3663
REISSTUDIOS.COM
INFO@REISSTUDIOS.COM
The information in this electronic message is legally privileged, confidential and intended only for the use of the person to which it is addressed. The reader of this message is hereby notified that any copying, dissemination or distribution of this document is strictly prohibited. If you receive this copy in error, please notify us and delete this original message from your system.

On Feb 11, 2015, at 07:13 AM, maddstorkk@aol.com wrote:

I forwarded the paperwork to my attorney, could you send me the most recent copy of the extension you are referring to? I need to review it myself.
Thanks

-----Original Message-----
From: JUVENAL REIS <juvenalreis@mac.com>
To: maddstorkk <maddstorkk@aol.com>
Sent: Wed, Feb 11, 2015 9:59 am
Subject: Re: Last meeting

Sorry for the delay in getting back to you on this, but I have been consulting with my lawyers to make sure I understand my rights. 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. Our agreement dated June 27, 2012 states: "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."



There is a sentence in our June 27, 2012 agreement that reads: "Tenant will have the option to renew entire lease at expiration of above with written notification to Landlord within 1 year period to expiration of present lease." There may be an ambiguity with respect to whether the words "at expiration of above" refer to the current extension or the situation that will exist in 2030. I think the plain language makes clear that it refers to the situation that will exist in 2030, and that was certainly my intent. For the avoidance of doubt, however, this is written notice that I am exercising the option to extend the lease to February 28, 2030. I hope we don't have a problem with this because, as you know, I have invested heavily in renovations for the space and building a brand to attract a community of artists. I have also subleased space to artists through 2018. I would not have done all of that if I thought the general lease expired February 29, 2016, as you suggest. We have had a good relationship for more than 12 years now, and I want to continue to work together productively under the terms to which we have agreed. Let me know within the next few days if you feel differently so that we can avoid the possibility of legal proceedings. (I am sending you a copy of this by certified mail.)

Thank you.

Juvenal Reis
REISSTUDIOS
43-01 22ND STREET
LONG ISLAND CITY, NY 11101
718-784-5577
718-570-3663
REISSTUDIOS.COM
INFO@REISSTUDIOS.COM

On Nov 17, 2014, at 08:01 AM, maddstorkk@aol.com wrote:

Yes this is correct but based on a single one year renewal at the present time. General lease extended to expire Feb. 29,2016.
As to electric work as discussed, Bobby to issue a schedule for work in both gallery and 4th floor. Since the panel is being replaced on 4N, those tenants effected will be out of power for a period of time that he will designate so they can know in advance. He will need access to the 2nd floor gallery to perform the work there. Please be advised that we are sharing the expense for the panel upgrade only. The cost for the electric run to 402 for the additional power requirement is not a shared expense with us.
Roger

-----Original Message-----
From: JUVENAL REIS <juvenalreis@mac.com>
To: Roger Kalfman <maddstorkk@aol.com>
Sent: Sat, Nov 15, 2014 1:29 pm
Subject: Last meeting

Hi Roger,

I wanted to follow up on our last meeting regarding my lease rate adjustment for the coming years. I am confirming that we have agreed on a 6% rent increase starting February 28th 2015.

Based on our agreement, I am communicating to my artists the new rent increase for the 2015.
Please let me know if this is correct.
Thank you
Juvenal Reis
REISSTUDIOS
43-01 22ND STREET
LONG ISLAND CITY, NY 11101
718-784-5577
718-570-3663
REISSTUDIOS.COM
INFO@REISSTUDIOS.COM
<Last Agreement.pdf>