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[**1] **JUVENAL REIS, Plaintiff, - against - J.B. KAUFMAN REALTY CO., LLC, Defendant. Index No.: 707612/2015**

707612/2015

SUPREME COURT OF NEW YORK, QUEENS COUNTY

2015 N.Y. Misc. LEXIS 4805*; *2015 NY Slip Op 32479(U)

December 22, 2015, Decided
December 29, 2015, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

JUDGES: [*1] PRESENT: HON. ROBERT J. MCDONALD, Justice.

OPINION BY: ROBERT J. MCDONALD

OPINION

Plaintiff, Juvenal Reis, is the tenant and defendant, J.B. Kaufman Realty Co., LLC, is the landlord of the premises located at 43-01 22nd Street in Long Island City, New York. On or about July 20, 2015, plaintiff commenced this action by filing a lis pendens and summons and complaint, seeking a declaratory judgment that the term of plaintiff's lease is scheduled to expire on February 28, 2030 and the annual percentage rent under the lease shall increase at a rate of not less than 5% and not to exceed 8% annually.

The complaint alleges that by lease dated March 12, 2002, plaintiff entered into possession of the premises. The lease was for a term to expire on April 30, 2004. Between 2002 and 2008, the parties entered into letter agreements renewing and modifying the original lease by expanding the premises and extending the term of the lease.

[**2] At issue is a letter dated June 27, 2012 (hereinafter the 2012 Letter). In relevant part, the 2012 Letter provides 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." The 2012 Letter [*2] 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."

Defendant now moves to dismiss the plaintiff's complaint pursuant to *CPLR 3211(a)(1)* and (7) based on documentary evidence and failure to state a cause of action. Defendant contends that the 2012 Letter was only a letter of intention and that the lease term ended on February 28, 2015. Defendant further contends that the 2012 Letter conclusively establishes that the parties' agreement is unenforceable as there has been no meeting of the minds as the terms and length of the lease were to be determined in February 2015.

In opposition, plaintiff contends the 2012 Letter conclusively extended the lease term to February 28, 2030. Plaintiff states that the 2012 Letter added additional space to the leased premises and required

defendant to immediately perform construction to combine new space with the existing premises. Defendant did perform the construction and issued plaintiff [*3] bills for the construction. Plaintiff paid the construction bills and defendant accepted such. Plaintiff also remained in possession of the premises after February 28, 2015, paid a 5.4% rent increase, and defendant accepted the new rent checks. Accordingly, plaintiff contends that the parties have already performed under the 2012 Letter. Furthermore, plaintiff alleges that even assuming the rent was not set be defendant, the only potential indefiniteness in the 2012 Letter is the amount of rent to be paid from March 2015 through February 2030, and the objective range set forth in the 2012 Letter would be sufficient to comprise a binding enforceable agreement (citing *Luna v Lower East Side Mutual Housing Assoc., 293 AD2d 307, 740 N.Y.S.2d 317 [1st Dept. 2002])*.

It is well settled that in considering a motion to dismiss for failure to state a cause of action pursuant to *CPLR 3211(a)(7)*, the pleadings must be liberally construed. The sole criterion is whether, from the complaint's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*Leon v Martinez, 84 NY2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]*; *Guggenheimer v Ginzburg, 43 NY2d 268, 372 N.E.2d 17, 401 N.Y.S.2d 182 [1977]*; *Rochdale Vill., Inc. v Zimmerman, 2 A.D.3d 827, 769 N.Y.S.2d 386 [2d Dept. 2003])*. The facts pleaded are to [**3] be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are [*4] not entitled to any such consideration (see *Morone v Morone, 50 N.Y.2d 481, 413 N.E.2d 1154, 429 N.Y.S.2d 592 [1980]*; *Gertler v Goodgold, 107 AD2d 481, 487 N.Y.S.2d 565 [1st Dept. 1985]*, affirmed *66 NY2d 946, 489 N.E.2d 748, 498 N.Y.S.2d 779 [1985])*. The Court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (see *EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 832 N.E.2d 26, 799 N.Y.S.2d 170 [2005]*; *Guggenheimer v Ginzburg, 43 NY2d 268, 372 N.E.2d 17, 401 N.Y.S.2d 182 [1977]*; *Sokol v Leader, 74 AD3d 1180, 904 N.Y.S.2d 153 [2d Dept. 2010])*. When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (see *Guggenheimer v Ginzburg, 43 NY2d 268, 372 N.E.2d 17, 401 N.Y.S.2d 182 [1977])*.

"A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" (*Bregman v E. Ramapo Cent. Sch. Dist., 122 AD3d 656, 657, 997 N.Y.S.2d 91 [2d Dept. 2014]* [internal quotation marks omitted]). Where a cause of action is sufficient to invoke the court's power to render a declaratory judgment as to the rights and legal relations of the parties to a justiciable controversy, a motion to dismiss should be denied (see *DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC, 102 A.D.3d 725, 958 N.Y.S.2d 417 [2d Dept. 2013])*. Where no questions of fact are presented by the controversy, a court may reach the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action (see *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie, 87 AD3d 1148, 930 N.Y.S.2d 34 [2d Dept. 2011])*.

Here, viewing the factual [*5] allegations of the complaint as true, this Court finds that the complaint sufficiently sets forth a cause of action for a declaratory judgment. Declaratory judgments are a means to establish the respective legal rights of the parties (see *Thome v Alexander & Louisa Calder Foundation, 70 AD3d 88, 890 N.Y.S.2d 16 [1st Dept. 2009])*. Plaintiff properly asserted a claim for a declaratory judgment because plaintiff needs to quiet the disputed relation of the parties' present and prospective obligations.

In addition, a motion to dismiss a complaint based on documentary evidence may be granted only where the "documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co., 98 NY2d 314, 774 N.E.2d 1190, 746 N.Y.S.2d 858 [2002])*. The 2012 Letter does not utterly refute plaintiff's factual allegations as there are [**4] questions of fact including whether the 2012 Letter extended the lease term beyond February 28, 2015 and whether the parties already performed under the 2012 Letter.

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

ORDERED, that defendant J.B. KAUFMAN REALTY CO., LLC's motion for an order dismissing plaintiff's complaint based upon documentary evidence and for failure to state a cause of action is denied in its

entirety.

Dated: December 22, 2015

Long Island [*6] City, N.Y.

/s/ Robert J. Mcdonald

ROBERT J. MCDONALD

J.S.C.