Reis v J.B. Kaufman Realty Co., LLC

Supreme Court of New York, Queens County

September 25, 2017, Decided

707612/2015

Reporter
2017 N.Y. Misc. LEXIS 5426 *; 2017 NY Slip Op 32865(U) **

[1]** JUVENAL ***REIS***, Plaintiff, - against - J.B. ***KAUFMAN*** REALTY CO., LLC and 43-01 22nd STREET OWNER LLC, Defendants. Index No.: 707612/2015

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

Prior History: *Reis v. J.B. Kaufman Realty Co., LLC, 2015 N.Y. Misc. LEXIS 4805 (N.Y. Sup. Ct., Dec. 22, 2015)*

Core Terms

letter agreement, rent, prior owner, lease, percent increase, annual, parties, expiration, terms, negotiate, emails, issues

Judges: **[*1]** PRESENT: HON. ROBERT J. MCDONALD, J.S.C.

Opinion by: ROBERT J. MCDONALD

Opinion

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).

[2]** 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, **[*2]** 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, **[*3]** 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.

[3]** 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 **[*4]** 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 **[*5]** 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, 417 N.E.2d 541, 436 N.Y.S.2d 247 [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 A.D.3d 573, 859 N.Y.S.2d 61 [1st Dept. 2008]*; *Belasco Theatre Corp. v Jelin Productions, 270 AD 202, 205, 59 N.Y.S.2d 42 [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, 865 N.E.2d 1210, 834 N.Y.S.2d 44 [2007]*; *151 West Associates v Printsiples Fabric Corp., 61 N.Y.2d 732, 460 N.E.2d 1344, 472 N.Y.S.2d 909 [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 **[**4]** 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 **[*6]** 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, 501 N.E.2d 572, 508 N.Y.S.2d 923 [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 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]*). All reasonable inferences will be drawn in favor of the non-moving party (see *Dauman Displays v Masturzo, 168 AD2d 204, 562 N.Y.S.2d 89 [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, **[*7]** but feigned" (*Conciatori v*

Port Auth. of N.Y. & N.J., 46 AD3d 501, 846 N.Y.S.2d 659 [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 **[**5]** 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 **[*8]** 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.

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