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Valentino U.S.A., Inc. v 693 Fifth Owner LLC
2021 NY Slip Op 50119(U)
Decided on January 27, 2021
Supreme Court, New York County
Borrok, J.
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Supreme Court, New York County

<p>Valentino U.S.A., Inc., Plaintiff,</p> <p>against</p> <p>693 Fifth Owner LLC, Defendant.</p>
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652605/2020

For Plaintiff, Newman Ferrara LLP, 1250 Broadway, 27th Floor, New York, NY 10001

For Defendant, Cyruli Shanks Hart & Zizmor LLP, 420 Lexington Ave., Suite 2320, New York, NY 10170

Andrew Borrok, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 were read on this motion to/for DISMISS.

Valentino U.S.A., Inc.'s (Valentino) complaint is dismissed pursuant to CPLR §§ 3211 (a)(1) and (a)(7) because pursuant to Section 21.11 of the Lease, dated as of May 3, 2013, by and between Thor 693 LLC and Valentino (the Lease; NYSCEF Doc. No. 5) the parties expressly allocated the risk that Valentino would not be able to operate its business and that Valentino is therefore not forgiven from its performance, including its obligation to pay rent by virtue of a state law (*Victoria's Secret Stores, LLC v Herald Sq. Owner LLC*, 2021 NY Slip Op 50010[U] [Sup Ct, NY County 2021]). The fact that the COVID 19 pandemic was not specifically enumerated by the parties does not change the result because the Lease is drafted broadly and encompasses the present situation by providing that nothing contained in the Section 21.11 of the Lease including "restrictive governmental laws or regulations," certain cataclysmic events, "or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed in performing work or doing acts required" shall excuse the payment of rent (NYSCEF Doc. No. 5 at § 21.11; *Victoria's Secret Stores, LLC, supra*; [Urban Archaeology Ltd. v 207 E. 57th St. LLC](#), 34 Misc 3d 1222[A], 122A, 2009 NY Slip Op 52825[U], *4-5 [Sup Ct NY County 2009]) (Sherwood, J. citing *General Electric Co. v Metals Resources Group Ltd.*, 293 AD2d 417 [1st [*2]Dept 2002]), *affd*, 68 AD3d 562 [1st Dept 2009]). For the avoidance of doubt, "[t]o be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises" ([7001 E. 71st St., LLC v Millennium Health Servs.](#), 138 AD3d 573, 573 [1st Dept 2016] [dismissing constructive eviction counterclaim because the defendant did not abandon the premises until the prime lease was terminated due to extensive damage from Super Storm Sandy]) *citing Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970] [tenant must abandon possession of premises to claim that there was a constructive eviction]). The Plaintiff's failure to plead that it moved out of the subject premises or that the landlord substantially interfered with its use and possession (i.e., as opposed to the temporary interference by a state law) dooms its claim for constructive eviction. On the record before the court (NYSCEF Doc. Nos. 10-11), it appears that the Valentino store continued to operate as of July 22, 2020. To wit, a sign was placed on the store indicating that it was open for curbside retail and by appointment. Valentino's conclusory and general allegation that the landlord failed to maintain the premises, even taken as true as court must at this stage of the proceeding, lacks causation. Finally, to the extent that Valentino indicated that after filing this action, it subsequently made the decision to move out and vacate the premises also does not change the result. No wrongful act of the landlord is alleged to have caused the necessity of this decision. Thus, the complaint must be dismissed.

Accordingly,

ORDERED that Defendant's motion to dismiss is granted and the complaint is dismissed with costs and disbursements to Defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of the Defendants on the complaint.

Dated: January 27, 2021

Andrew Borrok, J.S.C.

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