

**Victoria's Secret Stores, LLC v Herald Sq. Owner
LLC**

2022 NY Slip Op 31355(U)

April 22, 2022

Supreme Court, New York County

Docket Number: Index No. 651833/2020

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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VICTORIA'S SECRET STORES, LLC SUCCESSOR IN
INTEREST TO VICTORIA'S SECRET STORES, INC.,L
BRANDS INC.,SUCCESSOR IN INTEREST TO THE
LIMITED, INC. AND INTIMATE BRANDS, INC.

Plaintiff,

- v -

HERALD SQUARE OWNER LLC SUCCESSOR IN
INTEREST TO 1328 BROADWAY, LLC,

Defendant.

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INDEX NO. 651833/2020
MOTION DATE 09/15/2021,
03/30/2022
MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 160, 161, 162, 163, 164, 165, 166, 167, 168, 169

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, Herald Square Owner LLC successor-in-interest to 1328 Broadway, LLC (the **Landlord**)’s motion for partial summary judgment (Motion 003) seeking additional holdover damages for the period February 21, 2021 through September 30, 2021 is granted, and Victoria Secret Stores, LLC (the **Tenant**)’s cross motion is denied.

Pursuant to Article 24 of the Lease, the parties expressly agreed that any potential of surrender by the Tenant under the Lease needed to be done in writing by the Landlord:

No act or thing done by Landlord or Landlord’s agents during the Term shall be deemed an acceptance of a surrender of the Premises, and no agreement to accept such surrender shall be valid unless in writing signed by Landlord

[NYSCEF Doc. No. 142, §24].

It is undisputed that the Landlord never accepted the Tenant's purported offer of surrender in writing. The Tenant's argument that this clause does not apply to holdovers misses the point.

The point is that on the record before the court, following its purported surrender of the demised premises, the Tenant continued to exercise dominion and control of the demised premises to the exclusion of the Landlord, the Landlord needed to advise and request access when it needed access *and* the Landlord never otherwise manifested its assent to any purported surrender.

Among other things, as of at least May, 2021, after the Tenant's purported surrender, the Landlord still did not have the security code (NYSCEF Doc. Nos. 155 and 157), advised the Tenant when its electricians would need access to the 6th Avenue vaulted space to install lights for future sidewalk work, advised when its other workers would need access to install carbon monoxide detectors and amber strobe lights, and otherwise advised when it would need access to the space. Additionally, the Tenant did not surrender the space and merely enter the space for maintenance. Among other things, they did not surrender all keys and they added two additional security cameras (NYSCEF Doc. No. 121 Paragraph 8). Put another way, a surrender did not occur where the Tenant accessed the space merely to perform its maintenance obligation. The Landlord has therefore met its *prima facie* burden of coming forward with evidence entitling it to judgment. The Tenant's notice of surrender (NYSCEF Doc. No. 166) fails to raise a material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]) to the contrary because their

purported surrender was never accepted by the Landlord and is otherwise belied by the record. It does not matter that the letter indicated that they planned only to enter the space to transition maintenance (*cf. Charlebois v Carisbrook Indus.*, 23 AD.3d 821 [2005]).

Finally, to the extent that the Landlord offered to set a surrender date and gave the Tenant the right to reserve its rights to challenge that the Tenant had previously surrendered the space (NYSCEF Doc. No. 150), the Tenant rejected it.

The Court has considered the Tenant's remaining arguments and finds them unavailing.

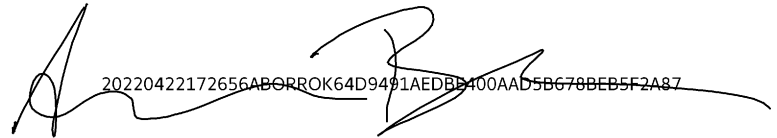
Accordingly, the Landlord is entitled to summary judgment on its claim for additional holdover damages as calculated in the sum of \$17,589.819.91 for the retail portion of the Premises and \$2,331,106.71 for the office portion of the Premises pursuant to Article 21(A) of the Lease for the period ending September 30, 2021.

Accordingly, it is hereby

ORDERED that the Landlord's motion for partial summary judgment (Motion 003) is granted and the Tenant's cross motion for partial summary judgment and sanctions is denied; and it is further

ORDERED that the Tenant’s motion for partial summary judgment (Motion 004) is denied as moot; and it is further

ORDERED that the Landlord submit judgment, on notice, within 14 days of the date of this decision and order.



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4/22/2022

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE