

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

2022 NY Slip Op 31356(U)

April 25, 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.

INDEX NO. 651833/2020

MOTION DATE 09/15/2021, 03/30/2022

MOTION SEQ. NO. 003 004

AMENDED AND RESTATED DECISION + ORDER ON MOTION

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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 Tenant reaffirmed that the Lease was in full, force and effect (such that Article 24 would require the Landlord's consent to any purported offer of surrender) and 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).

Furthermore, and significantly, by letter, dated July 30, 2021, the Tenant (i) advised the Landlord that L. Brands was consolidating its intimate apparel business and spinning off certain Victoria Secret entities and (ii) that the Lease will continue in full force and effect after the spin-off and otherwise updated the address for notices to the Tenant:

We are pleased to inform you that, as described in the press release attached as Exhibit A, L Brands, Inc. ("LB") will consolidate its intimate apparel business, including Victoria's Secret Lingerie, PINK and Victoria's Secret Beauty, into Victoria's Secret & Co. ("VS & Co."), which will be an independent publicly-traded company via a tax-free spin-off (the "Spin-Off") to the shareholders of LB. Following certain internal restructuring transactions and consummation of the Spin-Off (all of which is expressly permitted under the Lease), VS & Co. will be the indirect parent company of Tenant, with shares of VS & Co. publicly traded on the NYSE.

The Lease will continue in full force and effect after the Spin-Off in accordance with its terms. Please send all statements, invoices, and other electronic correspondence to VSLeaseAdmin@victoria.com. Please be advised that upon completion of the Spin-Off, which is expected to occur in August 2021, Tenant's address for purposes of all notices, demands, or other communications with respect to the Lease or the Premises shall be revised to:

Victoria's Secret Stores, LLC
P.O. Box 183146 Columbus, OH 43218-3146
Attn: Real Estate

If sent via overnight courier, to:

Victoria's Secret Stores, LLC
4 Limited Parkway East, Reynoldsburg, OH 43068
Attn: Real Estate

(NYSCEF Doc. No. 143 [emphasis added]).

Put another way, a surrender did not occur in February, 2021, where subsequently, 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) from February, 2021, 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. Under the circumstances, 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. Having done so, and having acknowledged as of July, 2021, that the Lease continued in full force and effect, they fail to raise any issue of fact as to a prior surrender.

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

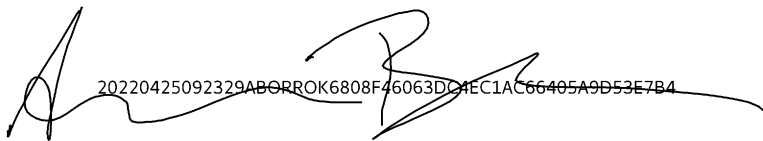
Accordingly, the Landlord is entitled to summary judgment on its claim for additional holdover damages as calculated in the sum of \$17,589.819.91 for the retail portion of the Premises and \$2,331,106.71 for the office portion of the Premises pursuant to Article 21(A) of the Lease for the period ending 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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4/25/2022

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