

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

VALENTINO U.S.A., INC.,

Plaintiff,

- against-

693 FIFTH OWNER LLC,

Defendant.

Sup. Ct. New York Co. Index No.  
652605/2020

**NOTICE OF APPEAL**

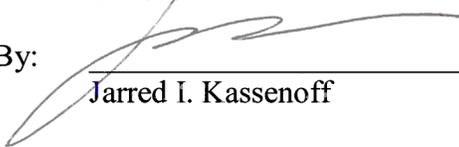
**PLEASE TAKE NOTICE** that Plaintiff VALENTINO U.S.A., INC. (“Appellant”), hereby appeals to the Supreme Court of the State of New York, Appellate Division, First Department, from the Decision and Order of the Supreme Court of the State of New York, County of New York (Andrew S. Borrok, J.S.C.), dated January 27, 2021 and entered on January 27, 2021, a true copy of which is annexed hereto. Appellant appeals from each and every part of the aforesaid Decision and Order.

Dated: New York, New York  
February 17, 2021

Yours, etc.,

NEWMAN FERRARA LLP  
*Attorneys for Plaintiff*  
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(212) 619-5400

By:

  
Jarred I. Kassenoff

To: CYRULI SHANKS HART & ZIZMOR LLP  
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420 Lexington Avenue, Suite 2320  
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(212) 661-6800  
[VIA NYSCEF]

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM**

*Justice*

-----X INDEX NO. 652605/2020

VALENTINO U.S.A., INC. MOTION DATE 07/27/2020

Plaintiff, MOTION SEQ. NO. 001

- v -

693 FIFTH OWNER LLC, **DECISION + ORDER ON MOTION**

Defendant.  
-----X

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 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.



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1/27/2021  
DATE

**ANDREW BORROK, J.S.C.**

CHECK ONE:

- |                                     |                            |                          |                       |
|-------------------------------------|----------------------------|--------------------------|-----------------------|
| <input checked="" type="checkbox"/> | CASE DISPOSED              | <input type="checkbox"/> | NON-FINAL DISPOSITION |
| <input checked="" type="checkbox"/> | GRANTED                    | <input type="checkbox"/> | GRANTED IN PART       |
| <input type="checkbox"/>            | SETTLE ORDER               | <input type="checkbox"/> | OTHER                 |
| <input type="checkbox"/>            | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
|                                     |                            | <input type="checkbox"/> | REFERENCE             |

APPLICATION:

CHECK IF APPROPRIATE:

# Supreme Court of the State of New York

## Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

<b>Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.</b>		For Court of Original Instance
VALENTINO U.S.A., INC.,  <p style="text-align: center;">- against -</p> 693 FIFTH OWNER LLC.		Date Notice of Appeal Filed
		For Appellate Division
<b>Case Type</b>	<b>Filing Type</b>	
<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278
<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review		
<b>Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.</b>		
<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous
<input checked="" type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation
		<input type="checkbox"/> Contracts
		<input type="checkbox"/> Estate Matters
		<input type="checkbox"/> Prisoner Discipline & Parole
		<input type="checkbox"/> Torts

**Appeal**

Paper Appealed From (Check one only):

If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

- |  |   |   |   |
|--|---|---|---|
| <input type="checkbox"/> Amended Decree    | <input type="checkbox"/> Determination          | <input checked="" type="checkbox"/> Order   | <input type="checkbox"/> Resettled Order  |
| <input type="checkbox"/> Amended Judgement | <input type="checkbox"/> Finding                | <input type="checkbox"/> Order & Judgment   | <input type="checkbox"/> Ruling           |
| <input type="checkbox"/> Amended Order     | <input type="checkbox"/> Interlocutory Decree   | <input type="checkbox"/> Partial Decree     | <input type="checkbox"/> Other (specify): |
| <input type="checkbox"/> Decision          | <input type="checkbox"/> Interlocutory Judgment | <input type="checkbox"/> Resettled Decree   |   |
| <input type="checkbox"/> Decree            | <input type="checkbox"/> Judgment               | <input type="checkbox"/> Resettled Judgment |   |

Court: **Supreme Court**

County: **New York**

Dated: 01/27/2021

Entered: 01/27/2021

Judge (name in full): Andrew S. Borrok

Index No.: 652605/2020

Stage:  Interlocutory  Final  Post-Final

Trial:  Yes  No If Yes:  Jury  Non-Jury

**Prior Unperfected Appeal and Related Case Information**

Are any appeals arising in the same action or proceeding currently pending in the court?  Yes  No  
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

**Original Proceeding**

Commenced by:  Order to Show Cause  Notice of Petition  Writ of Habeas Corpus Date Filed:

Statute authorizing commencement of proceeding in the Appellate Division:

**Proceeding Transferred Pursuant to CPLR 7804(g)**

Court: **Choose Court**

County: **Choose County**

Judge (name in full):

Order of Transfer Date:

**CPLR 5704 Review of Ex Parte Order:**

Court: **Choose Court**

County: **Choose County**

Judge (name in full):

Dated:

**Description of Appeal, Proceeding or Application and Statement of Issues**

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

This appeal is taken from the Decision and Order rendered January 27, 2021, and entered in the Office of the Clerk of the Supreme Court of the State of New York, New York County, on January 27, 2021 (Andrew S. Borrok, J.S.C.) which granted landlord-defendant-respondent's motion to dismiss and dismissed tenant-plaintiff-appellant's complaint.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

The court below erred in granting Defendant's motion to dismiss the complaint, and Plaintiff seeks denial of Defendant's motion.

The court below misapplied the legal standard for a motion to dismiss. Specifically, Plaintiff adequately pled each of its causes of action for (i) frustration of purpose, (ii) impossibility of performance, (iii) rescission based upon failure of consideration, (iv) constructive eviction and (v) other declaratory and/or injunctive relief that should not have been dismissed at that juncture.

The court below mistakenly held that these claims were vitiated by the subject lease, but (a) the risks of the COVID-19 pandemic were not allocated to Plaintiff in any provision of the subject lease, and (b) the lease does not waive or bar any of Plaintiff's equitable and/or quasi-contractual causes of action.

**Party Information**

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	VALENTINO U.S.A., INC.	Plaintiff	Appellant
2	693 FIFTH OWNER LLC	Defendant	Respondent
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: NEWMAN FERRARA LLP

Address: 1250 Broadway, 27th Floor

City: New York State: New York Zip: 10001 Telephone No: (212) 619-5400

E-mail Address: jkassenoff@nflp.com

Attorney Type: [X] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 1

Attorney/Firm Name: CYRULI SHANKS & ZIZMOR LLP

Address: 420 Lexington Avenue, Suite 2320

City: New York State: New York Zip: 10170 Telephone No: (212) 661-6800

E-mail Address: apistor@cszlaw.com

Attorney Type: [X] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 2

Attorney/Firm Name:

Address:

City: State: Zip: Telephone No:

E-mail Address:

Attorney Type: [ ] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:

Address:

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E-mail Address:

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E-mail Address:

Attorney Type: [ ] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice

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City: State: Zip: Telephone No:

E-mail Address:

Attorney Type: [ ] Retained [ ] Assigned [ ] Government [ ] Pro Se [ ] Pro Hac Vice

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