

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

VICTORIA’S SECRET STORES, LLC successor in interest to VICTORIA’S SECRET STORES, INC.; and L BRANDS INC., successor in interest to THE LIMITED, INC. and INTIMATE BRANDS, INC.,

Plaintiffs,

-against-

HERALD SQUARE OWNER LLC successor in interest to 1328 BROADWAY, LLC,

Defendant.

Index No.: 651833/2020

NOTICE OF APPEAL

PLEASE TAKE NOTICE that pursuant to Article 55 of the CPLR, Plaintiffs Victoria’s Secret Stores, LLC successor in interest to Victoria’s Secret Stores, Inc., and L Brands Inc., successor in interest to The Limited, Inc. and Intimate Brands, Inc. hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, from the Decision + Order on Motion dated January 7, 2021, which was duly entered in the office of the Clerk of this Court on January 7, 2021, where Notice of Entry was filed on January 8, 2021.

Dated: New York, New York
February 5, 2021

DAVIDOFF HUTCHER & CITRON LLP

By: /s/ William H. Mack

William H. Mack
605 Third Avenue
New York, New York 10158
(212) 557-7200
*Attorneys for Plaintiffs/Appellants
Victoria’s Secret Stores, LLC and L
Brands Inc.*

TO: All counsel of record (via NYSCEF)

Clerk of the Court (via Regular Mail)
Supreme Court of the State of New York County
60 Centre Street
New York, NY 10007

Stephen B. Meister (via Regular Mail)
Meister Seelig & Fein LLP
125 Park Avenue, 7th Floor
New York, New York 10017
Attorneys for Defendant/Respondent
Herald Square Owner LLC

Supreme Court of the State of New York

Appellate Division: First Judicial Department

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

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.

VICTORIA'S SECRET STORES, LLC successor in interest to VICTORIA'S SECRET STORES, INC.; and L BRANDS INC., successor in interest to THE LIMITED, INC. and INTIMATE BRANDS, INC.,
 - against -
 HERALD SQUARE OWNER LLC successor in interest to 1328 BROADWAY, LLC,

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type	Filing Type
<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<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"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input checked="" type="checkbox"/> Commercial	<input checked="" type="checkbox"/> Contracts
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law	<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous	<input type="checkbox"/> Prisoner Discipline & Parole
<input checked="" type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation	<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"/> Amended Judgement <input type="checkbox"/> Amended Order <input type="checkbox"/> Decision <input checked="" type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment
<input type="checkbox"/> Order <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment	<input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):
Court: Supreme Court	County: New York
Dated: 01/07/2021	Entered: 1/7/2021
Judge (name in full): Andrew Borrok	Index No.: 651833/2020
Stage: <input type="checkbox"/> Interlocutory <input checked="" type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury
Prior Unperfected Appeal and Related Case Information	
Are any appeals arising in the same action or proceeding currently pending in the court? <input type="checkbox"/> Yes <input type="checkbox"/> 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: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> 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	
<p>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.</p> <p>This is an appeal of a Decision and Order granting Defendant/Respondent Herald Square Owner LLC's motion for summary judgment. This appeal seeks to reverse the Order and Judgment based upon Defendant/Respondent's failure to meet its burden to show that summary judgment in its favor was appropriate. Specifically, the trial court misinterpreted the plain meaning of Paragraph 26 of the Lease Agreement, and failed to properly consider Plaintiffs/Appellants assertion of the Frustration of Purpose and Impossibility of Performance Doctrines.</p>	

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.

1. Whether the trial court misinterpreted the meaning of Paragraph 26 of the Lease Agreement?
2. Whether the trial court failed to properly consider Plaintiffs/Appellants assertion of the Frustration of Purpose and Impossibility of Performance Doctrines?

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	Victoria's Secret Stores, LLC	Plaintiff	Appellant
2	L Brands Inc.	Plaintiff	Appellant
3	Herald Square Owner LLC	Defendant	Respondent
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			

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: William H. Mack/Davidoff Hutcher & Citron LLP

Address: 605 Third Avenue

City: New York

State: New York

Zip: 10158

Telephone No: 212-557-7200

E-mail Address: WHM@DHCLegal.com

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 1,2

Attorney/Firm Name: Stephen B. Meister/Meister Seelig & Fein LLP

Address: 125 Park Avenue, 7th Floor

City: New York

State: New York

Zip: 10017

Telephone No: 212-655-3500

E-mail Address: sbm@msf-law.com

Attorney Type: Retained Assigned Government Pro Se Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above): 1,2

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): 1,2

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): 1,2

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): 1,2

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): 1,2

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

VICTORIA'S SECRET STORES, LLC,
successor in interest to VICTORIA'S SECRET
STORES, INC.; and L BRANDS INC., successor
in interest to THE LIMITED, INC. and
INTIMATE BRANDS, INC.,

Plaintiffs,

v.

HERALD SQUARE OWNER LLC, successor in
interest to 1328 BROADWAY, LLC,

Defendant.

Index No. 651833/2020

NOTICE OF ENTRY

(Mot. Seq. No. 001)

PLEASE TAKE NOTICE that the Decision and Order on Motion of the Honorable Andrew Borrok dated January 7, 2021, a true copy of which is annexed hereto, was duly filed and entered in the office of the Clerk of the Supreme Court, New York County on January 7, 2021.

Dated: New York, New York
January 8, 2021

MEISTER SEELIG & FEIN LLP

By: /s/ Stephen B. Meister
Stephen B. Meister, Esq.
Howard S. Koh, Esq.
Amit Shertzer, Esq.
125 Park Avenue, 7th Floor
New York, New York 10017
Tel: (212) 655-3500

*Attorneys for Defendant
Herald Square Owner LLC*

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

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.

-----X

INDEX NO. 651833/2020
MOTION DATE 06/30/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, the defendant's motion for summary judgment dismissing the complaint is granted in its entirety.

The Complaint is premised on the mistaken theory that the parties did not allocate the risk of tenant not being able to operate its business and that tenant is therefore somehow forgiven from its performance by virtue of a state law. This is contrary to the express allocation of these risks set forth in Paragraph 26 of the Lease Agreement, dated as of August 22, 2001, by and between Herald Square Owner LLC's predecessor-in-interest, as landlord, and Victoria's Secret Stores, LLC's predecessor-in-interest, as tenant, as amended (collectively, hereinafter, the Lease; NYSCEF Doc. Nos. 9-10). It is of no moment that the specific cause for the government law was not enumerated by the parties because the Lease as drafted is broad and encompasses what happened here — a state law that temporarily caused a closure of the tenant's business (see, e.g.,

Urban Archeology, Ltd. v 207 E. 57th St. LLC, 2009 WL 8572326, at *5 (Sup Ct NY Cnty Sept. 10, 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)]. The parties agreed that this would not relieve the tenant’s obligation to pay rent. Thus, the Complaint must be dismissed in its entirety.

Accordingly,

ORDERED that defendant's motion for summary judgment 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 accordingly; and it is further

ORDERED that the parties appear for a preliminary conference with respect to the counterclaims on February 9, 2021 at 2 pm.

1/7/2021
DATE



20210107123044ABORROK5A65F1FDE6104A7588D900FC858F5015

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK - CIVIL TERM - PART 53

3 -----X

4 VICTORIA'S SECRET STORES, LLC
5 successor in interest to
6 VICTORIA'S SECRET STORES, INC.;
7 and L BRANDS, INC., successor
8 in interest to THE LIMITED,
9 INC. and INTIMATE BRANDS, INC.,

10 Plaintiffs

11 v.

Index No. 651833/2020

12 HERALD SQUARE OWNER, LLC
13 successor in interest to
14 1328 BROADWAY, LLC,

15 Defendants.

16 -----X

Via MS Teams
January 7, 2021

17 B E F O R E:

18 H O N O R A B L E A N D R E W B O R R O K,

19 Justice

20 A P P E A R A N C E S:

21 DAVIDOFF HUTCHER & CITRON, LLP
22 605 Third Avenue

23 New York, New York 10158
24 BY: WILLIAM H. MACK, ESQ.,
25 BY: BENJAMIN S. NOREN, ESQ.,
Attorneys for Plaintiffs

MEISTER SEELIG & FEIN, LLP
125 Park Avenue, 7th Floor
New York, New York 10017

BY: STEPHEN B. MEISTER, ESQ.,
BY: HOWARD S. KOH, ESQ.,
Attorneys for Defendants

Reported by: Anthony Armstrong, Official Court Reporter

Anthony Armstrong, Official Court Reporter

Proceedings

2

1 THE COURT: This is Victoria's Secret Stores
2 LLC, successor in interest to Victoria's Secrets
3 Stores, Inc., et al. versus Herald Square Owner LLC,
4 successor in interest to 1328 Broadway LLC, Index
5 651833-2020.

6 Your appearances, please, for the record.

7 MR. MACK: Good afternoon, your Honor. For the
8 plaintiff, my name is William Mack of Davidoff Hutcher
9 & Citron. I'm accompanied by Benjamin Noren of my
10 firm.

11 MR. MEISTER: Good morning, your Honor.
12 Stephen Meister, Meister Seelig & Fein, for the
13 defendant. I'm joined by my partner Howard Koh.

14 And if I may, Howard, were you able to email our
15 appearances for both of us to the reporter?

16 THE COURT: I will state for the record he has
17 nodded. Good morning to you both as well. We're here
18 on your motion.

19 I am prepared to hear your motion, Counselor.

20 MR. MEISTER: Okay, your Honor. Stephen
21 Meister again. Thank you.

22 Your Honor, I would start by noting that in the
23 very first sentence of the plaintiff's brief in
24 opposition, the plaintiff references the motion's
25 significance and the quote, "sweeping consequences" of

Anthony Armstrong, Official Court Reporter

Proceedings

3

1 the decision on the motion.

2 We would respectfully disagree with that. We
3 don't think your Honor is tasked with writing a law
4 review article or legislation but rather simply
5 deciding this case based on this lease and this
6 tenant. And indeed, we think it's an easy case to
7 decide --

8 THE COURT: Do you want me to focus on
9 paragraph 26?

10 MR. MEISTER: Yes, sir. Paragraph 26 (i) and
11 (ii), and to a lesser extent, paragraph I believe it's
12 2(c)(v)(i).

13 If I can turn to 26, which is page 45 - and I
14 think that's Exhibit A to the Kassner affidavit - it
15 says, "Except," and I'll quote --

16 THE COURT: Not to interrupt you. But for the
17 purposes of the record, NYSID Docket No. 9, page 45 of
18 the lease. I understand.

19 MR. MEISTER: Thank you, your Honor. Thank you
20 for that assistance.

21 So Paragraph 26 begins (i), "Except as expressly
22 provided in subparagraph (ii) below, this lease and
23 the obligation of tenant to pay rent and additional
24 rent hereunder," it goes on to reference the other
25 convenance, "by tenant shall in nowise be affected,

Anthony Armstrong, Official Court Reporter

Proceedings

4

1 impaired or excused because landlord is unable to
2 fulfill any of its obligations under the lease."

3 And I would stop for a moment. Obviously one of
4 the landlord's obligations is to provide quiet
5 enjoyment and the access and use of the premises.

6 And it goes on to say, "Even if the landlord is
7 unable to perform those covenants, it says, by reason
8 of strikes or labor trouble or accident," and then it
9 goes on, "or by any cause whatsoever, reasonably
10 beyond landlord's control," and then it says,
11 "including but not limited to governmental preemption
12 in connection with a national emergency or by reason
13 of any rule, order or regulation of any federal,
14 state, county or municipal authority, or any
15 department or subdivision thereof or any government
16 agency." And then it defines all of that as
17 unavoidable delay.

18 And then I guess let me just reference 26 (ii)
19 before I argue why I think this cause is dispositive.

20 Twenty-six (ii) says, "If landlord fails to
21 provide any service or perform any obligation that
22 landlord is obligated to provide or perform," and I'm
23 paraphrasing, and as a result, tenants not able to
24 operate and is closed, then it goes on in this
25 section, "to provide a proration of rent obligations."

Anthony Armstrong, Official Court Reporter

Proceedings

5

1 But there is a proviso at the end of 26(ii) that says,
2 "tenant shall not be entitled to an abatement of rent.
3 In the event of such failure," meaning failure of
4 landlord to provide any services or perform any
5 required obligation, "results from, in relevant part,
6 casualty or an unavoidable delay."

7 So what this lease says -- and I think somewhat
8 unusual in this regard. It says even if there is a
9 casualty, meaning the building, God forbid, were to
10 burn to the ground, or in the event of unavoidable
11 delay, which is this defined term that includes any
12 cause beyond landlord's control, a national emergency,
13 government preemption, et cetera, there is no
14 abatement of rent.

15 So we think it's quite clear, your Honor, that
16 this is a bargain for contractual risk allocation that
17 an uber sophisticated tenant entered into. This is a
18 tenant who operates on the order of a thousand stores
19 and is a publicly-traded company with a multi-billion
20 dollar market cap, and presumably bargained for a rent
21 which reflected these absolute obligations.

22 And then if you turn to an earlier part of the
23 lease, it's 3(c) -- give me one second, please, to get
24 to it. It's 3(c)(iv), just to round out the
25 discussion, which is called -- this is on page three.

Anthony Armstrong, Official Court Reporter

Proceedings

6

1 I think it's NYSCEF 9, Operation of Business, there's
2 a continuous operation covenant. And then that's in
3 paragraph I. It's a default for tenant not to operate
4 except, of course, for making alterations.

5 And then in subparagraph (vi), which is at the
6 bottom of page four. The parties agreed -- and they
7 began this clause, "Because of the difficulty or
8 impossibility of determining landlord's damages due to
9 diminished saleability or mortgageability."

10 And then it goes on to say, "Should tenant fail
11 to operate," which they define as a failure to do
12 business. That's a separate default from the date to
13 pay rent.

14 And then it goes on to say that landlord were to
15 be excused from that in a parenthetical in the event
16 of a casualty or the business is shut down to make a
17 repair or an alteration.

18 So I think -- and then of course I think it's
19 paragraph, which I won't turn to, but it's --
20 paragraph 1(a) simply says that the rent is paid
21 without offset or abatement at all.

22 I think these four provisions together, but
23 particularly Paragraph 26, as your Honor pointed out,
24 should be read and really have to be read, your Honor,
25 as a contractual -- allocation of risk --

Anthony Armstrong, Official Court Reporter

Proceedings

7

1 THE COURT: We're losing you, Mr. Meister. I
2 understand. I got it.

3 MR. MEISTER: Okay. So let me go on. And I
4 apologize for the technical difficulty. I can wrap up
5 my argument fairly quickly.

6 Your Honor handed down a decision not too long
7 ago. I think it was called the Vector Media case,
8 which wasn't a lease case. I am sure your Honor
9 remembers it. It wasn't long ago. But you did
10 discuss frustration of purpose and impossibility.

11 You cited five cases. Two Court of Appeals
12 cases - Kel Kim and the Savoy Hotel case, 407 East
13 61st. And then three First Department cases - Crown
14 IT, Urd Right, and the Valenti case.

15 With regard -- so I just want to be clear: The
16 defendant's position is that both of these common law
17 defenses are precluded by the express allocation of
18 risk that I just referenced in those --

19 THE COURT: I got it. I really -- Mr. Meister,
20 I am absolutely clear. I understand your other
21 argument, which was the fact that there isn't a force
22 majeure clause, and the lease should also be a bar.
23 As a fallback, your first position is -- look, there's
24 a specific allocation of risk in the lease. Your
25 fallback position is if I don't find that paragraph 26

Anthony Armstrong, Official Court Reporter

Proceedings

8

1 is an absolute bar to the plaintiff's claims in the
2 case, the fact that the parties didn't negotiate a
3 force majeure clause is also significant in the
4 context of sophisticated parties, which you often see
5 in the context of commercial leases.

6 MR. MEISTER: Thank you, your Honor.

7 The only thing I would add to that is, let's
8 remember that this is a 3212 motion, not a 3211
9 motion. We waited for an answer and then we
10 immediately filed. So issue has been joined.
11 Therefore, although we do think that the allocation of
12 risk meets the 3211 standard where under the lower bar
13 of 3212 where the plaintiff must bear its proof and
14 raise a triable issue of fact, here I just want to
15 note for the record, your Honor, that the -- there is
16 no affidavit other than an attorney affidavit or
17 affirmation attaching some COVID-related articles by
18 my partner --

19 THE COURT: I understand. Your view is that
20 you could have come in on 3211(a)(1) motion, and you
21 should have won on documentary evidence alone?

22 MR. MEISTER: Correct.

23 THE COURT: I got it, Mr. Meister. I am clear.
24 You explained this to me when this case was first
25 filed. This case has a little bit of history. At

Anthony Armstrong, Official Court Reporter

Proceedings

9

1 this point we have talked about it at a number of
2 conferences. I have to do some checking about some
3 issues.

4 I've looked into those issues. We dealt with
5 those issues. Putting that aside for a minute, I am
6 fully clear on what your issue is.

7 MR. MEISTER: Last quick point is there has
8 been no surrender of the premises. The lease was
9 amended 10 times since it was entered into, which was
10 after 9/11, Ebola, SARS, the H1N1. And I just want to
11 point out on this claim for discovery, they are the
12 original tenant. We are not the original landlord,
13 but they are the original tenant. If either party
14 here would have any relevant -- although we don't
15 think there is no ambiguity, it would be the tenant
16 not the landlord.

17 So we think - I don't want to belabor it - all
18 the claims should be dismissed. And with that, I'll
19 yield, your Honor.

20 THE COURT: Thanks. I will give you time if
21 you think there's anything that you wish to address
22 that Mr. Mack raises or his partner raises that you
23 don't think I am clear on.

24 Mr. Mack or Mr. Noren, I am all ears.

25 MR. MACK: Good morning, your Honor. William

Anthony Armstrong, Official Court Reporter

Proceedings

10

1 Mack for the plaintiff.

2 I would like to start by noting, as the Court is
3 aware, we are here on a prediscovery summary judgment
4 motion. This we all know is a drastic remedy --
5 whenever a Court is faced with this type of
6 application, it's recognized that it deprives -- it's
7 granting the deprived, the non-moving party, of its
8 day in court. If there's any doubt as to the
9 propriety of the relief requested, it should be
10 denied.

11 Before I address section 26, I do want to point
12 out that Victoria's Secret has been a tenant in this
13 case for nearly two decades. The cases dealing with
14 frustration and impossibility that the moving party
15 has advanced, they deal with financial difficulty, ups
16 and downs of the economy, things like that.

17 We moved into this space just after 9/11. We
18 were in this space throughout the challenges of
19 the 2008 meltdown. Through all those periods the rent
20 was paid. The reason for that is because those were
21 not frustrating events. Those were not circumstances
22 in which our use of the space has been restricted and
23 deprived by law. They are completely different
24 circumstances than what we face here.

25 Now, with respect to -- turning to section 26,

Anthony Armstrong, Official Court Reporter

Proceedings

11

1 this section is entitled inability to perform. It
2 deals, Judge, with what happens when the landlord
3 cannot or does not do something that it is required to
4 do. Some landlord breaches do not result in the
5 excusal of rent, and others do. And right on the
6 first page of the landlord's papers, they point out
7 that -- I don't claim that the landlord didn't do
8 something. That's not what we are talking about. So
9 the invocation of this section is entirely
10 inapplicable.

11 It seems to be their position that merely
12 because section 26 mentions the possibility of a store
13 closure, that that is something that -- that allocated
14 the risk in some way or another with respect to that
15 which is entirely unforeseeable.

16 THE COURT: I don't think that that's their
17 position. I think their position is that paragraph 26
18 says that the obligation to pay rent won't be affected
19 by any state law, is essentially what it is that their
20 position is. It is explicit. And to the extent that
21 Governor Cuomo may have issued some laws, orders that
22 temporarily closed your client's business, that that
23 shouldn't -- as a non-essential business, that that
24 shouldn't affect your client's obligation to pay rent.
25 That's their position in a nutshell.

Anthony Armstrong, Official Court Reporter

Proceedings

12

1 MR. MACK: I understand, your Honor. We say
2 that this section doesn't deal with what the governor
3 did in this case.

4 THE COURT: I understand. I am just saying to
5 the extent that you are characterizing their position,
6 I -- respectfully I think that their position is
7 slightly different than the way that you are
8 characterizing it.

9 MR. MACK: That's fine. We don't think the
10 section applies for the reasons that I stated. In
11 addition, all this lengthy list of items at the bottom
12 of 26(i), I'm sure it's not lost on anyone that the
13 word pandemic isn't referenced anywhere --

14 THE COURT: It's not the pandemic that caused
15 the temporary closure of your store. It's the
16 governor's order that caused the closure of your
17 store, right? It was the governor's order which said
18 that only essential businesses could be open. That
19 was on a temporary basis. That's what caused the
20 temporary closure of your client's store. It's not
21 the pandemic.

22 Your client's store could be opened once we've
23 moved from the non-essential businesses to being open,
24 right?

25 MR. MACK: Well, actually, your Honor, that

Anthony Armstrong, Official Court Reporter

Proceedings

13

1 brings me to a point I wanted to make today.

2 THE COURT: Was that wrong? It's the
3 Governor's order that was for not only essential
4 central businesses could be opened. That's what
5 caused the closure or temporary closure of your
6 client's store?

7 MR. MACK: That's right, your Honor. And we're
8 still not able to operate the store that we leased.
9 The retail store of this lease is not the one that we
10 are allowed to operate today.

11 THE COURT: All tenants in New York should be
12 allowed not to -- should be allowed to get out of
13 their rent-paying obligations because of the way that
14 they have to operate is different today is what your
15 argument is?

16 MR. MACK: Yes. We're not allowed to -- I am
17 looking at the governor's guidelines for non-essential
18 retail business --

19 THE COURT: Right. It's not specific, my point
20 is, to Victoria's Secret. He didn't single out
21 Victoria's Secret?

22 MR. MACK: No. There are 35 --

23 THE COURT: -- safety concerns that he is
24 trying to address based on science and data. He is
25 trying to make sure that the public is safe in the way

Anthony Armstrong, Official Court Reporter

Proceedings

14

1 that they operate. He is being guided and he's
2 enacted certain protocols, right?

3 MR. MACK: That's right, Judge. Right now
4 there are 35 different mandatory requirements spanning
5 five different categories from the governor's office,
6 one of which is that the workforce and customer
7 presence in a retail store have to be limited to no
8 more than 50 percent maximum occupancy.

9 The landlord makes a big deal in their papers
10 about going around taking and taking pictures of other
11 businesses and saying that you could be open if you
12 wanted to, but I cannot be opened -- I am charged a
13 million dollars a month for rent that I cannot use for
14 what I bargained for, Judge.

15 And the other point about those stores --

16 THE COURT: You didn't bargain for -- their
17 point is in paragraph 26. You didn't bargain for a
18 proportion of reduction of rent if you're only --
19 that's their point. That's exactly the point as it
20 relates to there's no abatement of rent -- the
21 obligation to pay rent shall in nowise be affected,
22 impaired or excused by virtue of any state law.
23 That's exactly their point. If you wanted to do that
24 -- if you thought that -- if there was a change in
25 your ability to use the premise, their point is you

Anthony Armstrong, Official Court Reporter

Proceedings

15

1 shouldn't have negotiated that. You didn't. That's
2 their point in a nutshell.

3 MR. MACK: That section talks about landlord
4 being unable to fulfill its obligations. That's not
5 what we are talking about. We don't say anywhere that
6 they didn't fulfill an obligation. We say that we
7 have been stripped of the ability to operate in this
8 space that we are now being asked to pay money for.

9 I point out --

10 THE COURT: I don't read section 26 the way
11 that you want me to. I think that this is -- this
12 provision deals with when you are entitled not to pay
13 rent. That's the way I view section 26. I don't
14 agree with your assessment.

15 MR. MACK: Most respectfully, Judge, it talks
16 about what is excused because landlord is unable to
17 fulfill any of its obligations --

18 THE COURT: That's one of the things. But it
19 also says or -- it's very broad. The language here is
20 very broad. "Or by any cause whatsoever beyond
21 landlord's control including but not limited to state
22 laws." That's very broad language.

23 MR. MACK: Judge, we set forth in our papers
24 why we don't think this applies. We don't think this
25 risk has been allocated.

Anthony Armstrong, Official Court Reporter

Proceedings

16

1 In a nearly identical case, just before the
2 holidays Judge Feinman of this court issued an opinion
3 wherein the court -- I am reading from International
4 Plaza Associates versus Amorepacific, which is 155158
5 of 2020. "Defendant argues that there are factual
6 issues necessary to seek out through discovery,
7 especially due to what if anything is the role played
8 by the COVID 19 pandemic and its resultant government
9 shutdown and the restrictions of retail sales of the
10 goods sold by defendant. Contrary to landlord's
11 claims, COVID could not have been foreseen, and a
12 clause in the lease could not have been designed by
13 defendant. Plaintiff also does not state that it
14 would have agreed to such a clause. It is unlikely
15 that it would have.

16 "Also, contrary to plaintiff's claim, the
17 defense's loss and at times lack of income due to
18 COVID is not just part of the ups and downs of the
19 commercial lease."

20 They made an unavoidable delay cause argument in
21 that case. Language was similar. And the Court found
22 that the shutdown of the defendant's shop and the
23 continuing restrictions made it impossible to fulfill
24 the function for which the lease was signed. That's
25 exactly what position we found ourselves in.

Anthony Armstrong, Official Court Reporter

Proceedings

17

1 I would add that in that same opinion the Court
2 recognizes the second wave of COVID 19, which it
3 cannot be foreseen when the situation will return to
4 normal. A good part of this defense requires the
5 defendant to present facts and how it is to conduct
6 its business and to which to do so for a reason.
7 Never imagined, not alone foreseen by either plaintiff
8 or defendant, these changes and circumstances cannot
9 be shown by legal memoranda or oral arguments. They
10 require discovery.

11 Does the Court have any further questions for me
12 about section 26?

13 THE COURT: Nope.

14 MR. MEISTER: Your Honor, very briefly.

15 Justice Feinman's decision is one of about 10
16 decisions that have happened since the onset of the
17 virus. Obviously these are all courts of concordant
18 jurisdiction. I didn't raise these cases. There are
19 at least four cases that go the other way, including a
20 trilogy of cases decided by Justice Bluth and a case
21 by Justice Love.

22 The lease in the Feinman case was not the same.
23 The landlord was saying that COVID was a casualty in
24 trying to bring it under a pro-landlord casualty
25 clause.

Anthony Armstrong, Official Court Reporter

Proceedings

18

1 In any event, I think the more important point
2 is that paragraph 26 -- counsel seems to be hanging a
3 lot on the heading, which is inability to perform.
4 And there is another section I didn't cite, section
5 33, which is that classic boilerplate provision that
6 says that the captions are not limiting and they are
7 for the convenience of the parties. And as your Honor
8 pointed out, or at least said, that we were arguing,
9 and we are, that it is a very broad clause. It is not
10 limited to a landlord inability to perform. It has to
11 do with events outside of landlord's control, causing
12 an inability on the part of the tenant to occupy the
13 premises.

14 And indeed in paragraph (ii) 26, it references
15 if the tenant shall not be able to operate its store
16 at the premises. We think it's quite clear that this
17 clause is broad. It covers all events outside of the
18 landlord's control. It references orders of the
19 government, which certainly Governor Cuomo's order
20 would qualify under. And I do want to point out the
21 business shutdown was for 97 days from March 16 to
22 June 22nd.

23 This is not an abatement case. They are looking
24 to annul a lease --

25 THE COURT: I understand. I think there are

Anthony Armstrong, Official Court Reporter

Proceedings

19

1 one, two, three, four, five, six causes of action,
2 right?

3 MR. MEISTER: Correct.

4 THE COURT: The first one is for rescission by
5 frustration of purpose. The second one is rescission
6 due to impossibility. The third one is for -- the
7 fourth one is for breach of the lease. The fifth one
8 deals with prepayment of rent. And the last one is
9 the unjust enrichment claim.

10 The underpinning of all of this is, are there --
11 what happens as it relates to the enactment of
12 Governor Cuomo's orders.

13 MR. MEISTER: Right. I do want to address
14 briefly. I did not in my -- intentionally in my
15 initial presentation. We did -- and counsel
16 referenced this. We did supply an affidavit by Mr.
17 Koh. He went, I think it was in August, to the Herald
18 Square area, Urban Outfitters, H&M, and Macy's --

19 THE COURT: Your screen is freezing. We have
20 lost you, Mr. Meister.

21 MR. KOH: Your Honor, Mr. Meister is dialing in
22 on another device.

23 THE COURT: He is back.

24 MR. MEISTER: Your Honor, sorry about that.

25 THE COURT: It's okay. Let me tell you where

Anthony Armstrong, Official Court Reporter

Proceedings

20

1 we lost you. I don't think you need me to reach what
2 you are about to get to.

3 Your view is that I need not look outside the
4 four corners of the lease. You were about to tell me
5 you supplied an affidavit of Mr. Koh who visited...
6 And then you froze.

7 MR. MEISTER: Sorry about that.

8 THE COURT: You don't need to apologize.

9 MR. MEISTER: He visited several stores in the
10 immediate vicinity of the store in question near
11 Macy's, including H&M and Urban Outfitters. But he
12 also went to the Victoria's Secret store at 125th
13 Street. And this is the point I -- which was open and
14 he bought some merchandise there.

15 I understand Mr. Mack's concern, and frankly I
16 am sympathetic to it. It's much harder to run a
17 profitable store with these rules, but that's exactly
18 the point is that the pressure on profits is not an
19 excuse here. Especially in light of 26(i). But even
20 in the absence of 26, the pressure on profits is not a
21 sufficient basis under the common law doctrine.

22 We think even on our backup position, if you
23 will, the motion should be granted. We just see the
24 clause as dispositive and the Governor's orders as not
25 following June 22nd as not qualifying under the

Anthony Armstrong, Official Court Reporter

Proceedings

21

1 common law doctrines for either impossibility or
2 frustration.

3 THE COURT: I understand what you are saying.
4 I really got it.

5 MR. MEISTER: I understand. Thank you, your
6 Honor.

7 THE COURT: Mr. Mack, is there anything else
8 you want to add?

9 MR. MACK: Yes. I want to respond to a couple
10 of things.

11 Counsel suggested that our emphasis on the title
12 of section 26 is somehow meaningful. I want to state
13 it's not the case. I'm simply pointing out that if
14 you look in this section at -- where it says laws,
15 governmental preemption, that applies if landlord is
16 prevented or delayed --

17 THE COURT: No. I'm sorry. Look, you are not
18 clarifying something for me at this point. I am very
19 clear. I have a very different reading of paragraph
20 26 than you are suggesting. It deals with the -- the
21 lead in is when rent is abated, when rent is otherwise
22 not due. I just don't read paragraph 26 the way that
23 you want me to.

24 The complaint is dismissed. Let me just cut to
25 it.

Anthony Armstrong, Official Court Reporter

Proceedings

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I will be uploading an order in about 10 minutes
stating forth the reason.

The complaint is dismissed.

We're going to go off the record now and we are
going to discuss where we are on the counterclaims.

Thank you very much.

Thank you, Mr. Armstrong.

(Whereupon, the proceedings
concluded.)

Anthony Armstrong, Official Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, ANTHONY ARMSTRONG, a Senior Court Reporter,
do hereby certify that the foregoing is a true
and accurate transcript of the testimony as taken
stenographically by and before me at the time, place and
on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative
nor employee nor attorney nor counsel of any of the parties
to this action, and that I am neither a relative nor
employee of such attorney or counsel, and that I am not
financially interested in this action.

(Not certified unless signed in blue ink.)



Anthony Armstrong, CSR
Official Court Reporter

Anthony Armstrong, Official Court Reporter

	15:14	3:20	2:23	10:18
*	agreed (2) 6:6;16:14	Associates (1) 16:4	briefly (2) 17:14;19:14	change (1) 14:24
***** (1) 22:11	al (1) 2:3	attaching (1) 8:17	bring (1) 17:24	changes (1) 17:8
A	allocated (2) 11:13;15:25	attorney (1) 8:16	brings (1) 13:1	characterizing (2) 12:5,8
abated (1) 21:21	allocation (5) 5:16;6:25;7:17,24; 8:11	August (1) 19:17	broad (5) 15:19,20,22;18:9, 17	charged (1) 14:12
abatement (5) 5:2,14;6:21;14:20; 18:23	allowed (4) 13:10,12,12,16	authority (1) 4:14	Broadway (1) 2:4	checking (1) 9:2
ability (2) 14:25;15:7	alone (2) 8:21;17:7	aware (1) 10:3	building (1) 5:9	circumstances (3) 10:21,24;17:8
able (4) 2:14;4:23;13:8; 18:15	alteration (1) 6:17	B	burn (1) 5:10	cite (1) 18:4
absence (1) 20:20	alterations (1) 6:4	back (1) 19:23	Business (8) 6:1,12,16;11:22,23; 13:18;17:6;18:21	cited (1) 7:11
absolute (2) 5:21;8:1	although (2) 8:11;9:14	backup (1) 20:22	businesses (4) 12:18,23;13:4; 14:11	Citron (1) 2:9
absolutely (1) 7:20	ambiguity (1) 9:15	bar (3) 7:22;8:1,12		claim (4) 9:11;11:7;16:16; 19:9
access (1) 4:5	amended (1) 9:9	bargain (3) 5:16;14:16,17	C	claims (3) 8:1;9:18;16:11
accident (1) 4:8	Amorepacific (1) 16:4	bargained (2) 5:20;14:14	called (2) 5:25;7:7	clarifying (1) 21:18
accompanied (1) 2:9	annul (1) 18:24	based (2) 3:5;13:24	can (2) 3:13;7:4	classic (1) 18:5
action (1) 19:1	apologize (2) 7:4;20:8	basis (2) 12:19;20:21	cap (1) 5:20	clause (9) 6:7;7:22;8:3;16:12, 14;17:25;18:9,17; 20:24
actually (1) 12:25	Appeals (1) 7:11	bear (1) 8:13	captions (1) 18:6	clear (8) 5:15;7:15,20;8:23; 9:6,23;18:16;21:19
add (3) 8:7;17:1;21:8	appearances (2) 2:6,15	began (1) 6:7	case (17) 3:5,6;7:7,8,12,14; 8:2,24,25;10:13;12:3; 16:1,21;17:20,22; 18:23;21:13	client's (5) 11:22,24;12:20,22; 13:6
addition (1) 12:11	application (1) 10:6	begins (1) 3:21	cases (7) 7:11,12,13;10:13; 17:18,19,20	closed (2) 4:24;11:22
additional (1) 3:23	applies (3) 12:10;15:24;21:15	belabor (1) 9:17	casualty (5) 5:6,9;6:16;17:23,24	closure (6) 11:13;12:15,16,20; 13:5,5
address (4) 9:21;10:11;13:24; 19:13	area (1) 19:18	below (1) 3:22	categories (1) 14:5	commercial (2) 8:5;16:19
advanced (1) 10:15	argue (1) 4:19	Benjamin (1) 2:9	cause (5) 4:9,19;5:12;15:20; 16:20	common (3) 7:16;20:21;21:1
affect (1) 11:24	argues (1) 16:5	beyond (3) 4:10;5:12;15:20	caused (4) 12:14,16,19;13:5	company (1) 5:19
affected (3) 3:25;11:18;14:21	arguing (1) 18:8	big (1) 14:9	causes (1) 19:1	complaint (2) 21:24;22:3
affidavit (5) 3:14;8:16,16;19:16; 20:5	argument (4) 7:5,21;13:15;16:20	bit (1) 8:25	causing (1) 18:11	completely (1) 10:23
affirmation (1) 8:17	arguments (1) 17:9	Bluth (1) 17:20	central (1) 13:4	concern (1) 20:15
afternoon (1) 2:7	Armstrong (1) 22:7	boilerplate (1) 18:5	certain (1) 14:2	concerns (1) 13:23
again (1) 2:21	around (1) 14:10	both (3) 2:15,17;7:16	certainly (1) 18:19	concluded (1) 22:10
agency (1) 4:16	article (1) 3:4	bottom (2) 6:6;12:11	cetera (1) 5:13	concordant (1) 17:17
ago (2) 7:7,9	articles (1) 8:17	bought (1) 20:14	challenges (1)	conduct (1) 17:5
agree (1)	aside (1) 9:5	breach (1) 19:7		
	assessment (1) 15:14	breaches (1) 11:4		
	assistance (1)	brief (1)		

conferences (1) 9:2	18:19;19:12	21:16	5:22	4:1;6:15;14:22; 15:16
connection (1) 4:12	customer (1) 14:6	denied (1) 10:10	ears (1) 9:24	Exhibit (1) 3:14
consequences (1) 2:25	cut (1) 21:24	department (2) 4:15;7:13	East (1) 7:12	explained (1) 8:24
context (2) 8:4,5	D	deprived (2) 10:7,23	easy (1) 3:6	explicit (1) 11:20
continuing (1) 16:23	damages (1) 6:8	deprives (1) 10:6	Ebola (1) 9:10	express (1) 7:17
continuous (1) 6:2	data (1) 13:24	designed (1) 16:12	economy (1) 10:16	expressly (1) 3:21
contractual (2) 5:16;6:25	date (1) 6:12	determining (1) 6:8	either (3) 9:13;17:7;21:1	extent (3) 3:11;11:20;12:5
Contrary (2) 16:10,16	Davidoff (1) 2:8	device (1) 19:22	else (1) 21:7	F
control (5) 4:10;5:12;15:21; 18:11,18	day (1) 10:8	dialing (1) 19:21	email (1) 2:14	face (1) 10:24
convenience (1) 3:25	days (1) 18:21	different (6) 10:23;12:7;13:14; 14:4,5;21:19	emergency (2) 4:12;5:12	faced (1) 10:5
convenience (1) 18:7	deal (3) 10:15;12:2;14:9	difficulty (3) 6:7;7:4;10:15	enacted (1) 14:2	fact (3) 7:21;8:2,14
corners (1) 20:4	dealing (1) 10:13	diminished (1) 6:9	enactment (1) 19:11	facts (1) 17:5
counsel (3) 18:2;19:15;21:11	deals (4) 11:2;15:12;19:8; 21:20	disagree (1) 3:2	end (1) 5:1	factual (1) 16:5
Counselor (1) 2:19	dealt (1) 9:4	discovery (3) 9:11;16:6;17:10	enjoyment (1) 4:5	fail (1) 6:10
counterclaims (1) 22:5	decades (1) 10:13	discuss (2) 7:10;22:5	enrichment (1) 19:9	fails (1) 4:20
county (1) 4:14	decide (1) 3:7	discussion (1) 5:25	entered (2) 5:17;9:9	failure (3) 5:3,3;6:11
couple (1) 21:9	decided (1) 17:20	dismissed (3) 9:18;21:24;22:3	entirely (2) 11:9,15	fairly (1) 7:5
course (2) 6:4,18	deciding (1) 3:5	dispositive (2) 4:19;20:24	entitled (3) 5:2;11:1;15:12	fallback (2) 7:23,25
COURT (38) 2:1,16;3:8,16;7:1, 11,19;8:19,23;9:20; 10:2,5,8;11:16;12:4, 14;13:2,11,19,23; 14:16;15:10,18;16:2, 3,21;17:1,11,13; 18:25;19:4,19,23,25; 20:8;21:3,7,17	decision (3) 3:1;7:6;17:15	Docket (1) 3:17	especially (2) 16:7;20:19	federal (1) 4:13
courts (1) 17:17	decisions (1) 17:16	doctrine (1) 20:21	essential (2) 12:18;13:3	Fein (1) 2:12
covenant (1) 6:2	default (2) 6:3,12	doctrines (1) 21:1	essentially (1) 11:19	Feinman (2) 16:2;17:22
covenants (1) 4:7	defendant (6) 2:13;16:5,10,13; 17:5,8	documentary (1) 8:21	et (2) 2:3;5:13	Feinman's (1) 17:15
covers (1) 18:17	defendant's (2) 7:16;16:22	dollar (1) 5:20	Even (4) 4:6;5:8;20:19,22	fifth (1) 19:7
COVID (5) 16:8,11,18;17:2,23	defense (1) 17:4	dollars (1) 14:13	event (4) 5:3,10;6:15;18:1	filed (2) 8:10,25
COVID-related (1) 8:17	defenses (1) 7:17	doubt (1) 10:8	events (3) 10:21;18:11,17	financial (1) 10:15
Crown (1) 7:13	defense's (1) 16:17	down (2) 6:16;7:6	evidence (1) 8:21	find (1) 7:25
Cuomo (1) 11:21	define (1) 6:11	downs (2) 10:16;16:18	exactly (4) 14:19,23;16:25; 20:17	fine (1) 12:9
Cuomo's (2)	defined (1) 5:11	drastic (1) 10:4	Except (3) 3:15,21;6:4	firm (1) 2:10
	defines (1) 4:16	due (5) 6:8;16:7,17;19:6; 21:22	excusal (1) 11:5	first (6) 2:23;7:13,23;8:24; 11:6;19:4
	delay (4) 4:17;5:6,11;16:20	E	excuse (1) 20:19	five (3) 7:11;14:5;19:1
	delayed (1)	earlier (1)	excused (4)	focus (1)

<p>3:8 following (1) 20:25 forbid (1) 5:9 force (2) 7:21;8:3 foreseen (3) 16:11;17:3,7 forth (2) 15:23;22:2 found (2) 16:21,25 four (5) 6:6,22;17:19;19:1; 20:4 fourth (1) 19:7 frankly (1) 20:15 freezing (1) 19:19 froze (1) 20:6 frustrating (1) 10:21 frustration (4) 7:10;10:14;19:5; 21:2 fulfill (5) 4:2;15:4,6,17;16:23 fully (1) 9:6 function (1) 16:24 further (1) 17:11</p>	<p>10:7 ground (1) 5:10 guess (1) 4:18 guided (1) 14:1 guidelines (1) 13:17</p>	<p>8:10 impaired (2) 4:1;14:22 important (1) 18:1 impossibility (5) 6:8;7:10;10:14; 19:6;21:1 impossible (1) 16:23 inability (4) 11:1;18:3,10,12 inapplicable (1) 11:10 Inc (1) 2:3 includes (1) 5:11 including (4) 4:11;15:21;17:19; 20:11 income (1) 16:17 indeed (2) 3:6;18:14 Index (1) 2:4 initial (1) 19:15 intentionally (1) 19:14 interest (2) 2:2,4 International (1) 16:3 interrupt (1) 3:16 into (4) 5:17;9:4,9;10:17 invocation (1) 11:9 issue (3) 8:10,14;9:6 issued (2) 11:21;16:2 issues (4) 9:3,4,5;16:6 items (1) 12:11</p>	<p>Justice (3) 17:15,20,21</p> <p>K</p> <p>Kassner (1) 3:14 Kel (1) 7:12 Kim (1) 7:12 Koh (4) 2:13;19:17,21;20:5</p>	<p>limited (4) 4:11;14:7;15:21; 18:10 limiting (1) 18:6 list (1) 12:11 little (1) 8:25 LLC (3) 2:2,3,4 long (2) 7:6,9 look (4) 7:23;20:3;21:14,17 looked (1) 9:4 looking (2) 13:17;18:23 losing (1) 7:1 loss (1) 16:17 lost (3) 12:12;19:20;20:1 lot (1) 18:3 Love (1) 17:21 lower (1) 8:12</p>
<p>G</p> <p>God (1) 5:9 goes (6) 3:24;4:6,9,24;6:10, 14 Good (5) 2:7,11,17;9:25;17:4 goods (1) 16:10 government (4) 4:15;5:13;16:8; 18:19 governmental (2) 4:11;21:15 Governor (4) 11:21;12:2;18:19; 19:12 governor's (6) 12:16,17;13:3,17; 14:5;20:24 granted (1) 20:23 granting (1)</p>	<p>H</p> <p>H&M (2) 19:18;20:11 H1N1 (1) 9:10 handed (1) 7:6 hanging (1) 18:2 happened (1) 17:16 happens (2) 11:2;19:11 harder (1) 20:16 heading (1) 18:3 hear (1) 2:19 Herald (2) 2:3;19:17 hereunder (1) 3:24 history (1) 8:25 holidays (1) 16:2 Honor (23) 2:7,11,20,22;3:3, 19;5:15;6:23,24;7:6, 8;8:6,15;9:19,25; 12:1,25;13:7;17:14; 18:7;19:21,24;21:6 Hotel (1) 7:12 Howard (2) 2:13,14 Hutcher (1) 2:8</p>	<p>J</p> <p>joined (2) 2:13;8:10 Judge (6) 11:2;14:3,14;15:15, 23;16:2 judgment (1) 10:3 June (2) 18:22;20:25 jurisdiction (1) 17:18</p>	<p>L</p> <p>labor (1) 4:8 lack (1) 16:17 landlord (17) 4:1,6,20,22;5:4; 6:14;9:12,16;11:2,4, 7;14:9;15:3,16;17:23; 18:10;21:15 landlord's (9) 4:4,10;5:12;6:8; 11:6;15:21;16:10; 18:11,18 language (3) 15:19,22;16:21 Last (2) 9:7;19:8 law (7) 3:3;7:16;10:23; 11:19;14:22;20:21; 21:1 laws (3) 11:21;15:22;21:14 lead (1) 21:21 lease (18) 3:5,18,22;4:2;5:7, 23;7:8,22,24;9:8; 13:9;16:12,19,24; 17:22;18:24;19:7; 20:4 leased (1) 13:8 leases (1) 8:5 least (2) 17:19;18:8 legal (1) 17:9 legislation (1) 3:4 lengthy (1) 12:11 lesser (1) 3:11 light (1) 20:19</p>	<p>M</p> <p>MACK (18) 2:7,8;9:22,24,25; 10:1;12:1,9,25;13:7, 16,22;14:3;15:3,15, 23;21:7,9 Mack's (1) 20:15 Macy's (2) 19:18;20:11 majeure (2) 7:22;8:3 makes (1) 14:9 making (1) 6:4 mandatory (1) 14:4 March (1) 18:21 market (1) 5:20 maximum (1) 14:8 may (2) 2:14;11:21 meaning (2) 5:3,9 meaningful (1) 21:12</p>

<p>Media (1) 7:7 meets (1) 8:12 MEISTER (23) 2:11,12,12,20,21; 3:10,19;7:1,3,19;8:6, 22,23;9:7;17:14;19:3, 13,20,21,24;20:7,9; 21:5 meltdown (1) 10:19 memoranda (1) 17:9 mentions (1) 11:12 merchandise (1) 20:14 merely (1) 11:11 million (1) 14:13 minute (1) 9:5 minutes (1) 22:1 moment (1) 4:3 money (1) 15:8 month (1) 14:13 more (2) 14:8;18:1 morning (3) 2:11,17;9:25 mortgageability (1) 6:9 Most (1) 15:15 motion (8) 2:18,19;3:1,8;8,9, 20;10:4;20:23 motion's (1) 2:24 moved (2) 10:17;12:23 moving (1) 10:14 much (2) 20:16;22:6 multi-billion (1) 5:19 municipal (1) 4:14 must (1) 8:13</p>	<p>4:12;5:12 near (1) 20:10 nearly (2) 10:13;16:1 necessary (1) 16:6 need (3) 20:1,3,8 negotiate (1) 8:2 negotiated (1) 15:1 New (1) 13:11 nodded (1) 2:17 non-essential (3) 11:23;12:23;13:17 non-moving (1) 10:7 Nope (1) 17:13 Noren (2) 2:9;9:24 normal (1) 17:4 note (1) 8:15 noting (2) 2:22;10:2 nowise (2) 3:25;14:21 number (1) 9:1 nutshell (2) 11:25;15:2 NYSCEF (1) 6:1 NYSID (1) 3:17</p>	<p>6:21 often (1) 8:4 once (1) 12:22 one (13) 4:3;5:23;13:9;14:6; 15:18;17:15;19:1,4,5, 6,7,7,8 only (4) 8:7;12:18;13:3; 14:18 onset (1) 17:16 open (4) 12:18,23;14:11; 20:13 opened (3) 12:22;13:4;14:12 operate (9) 4:24;6:3,11;13:8, 10,14;14:1;15:7; 18:15 operates (1) 5:18 Operation (2) 6:1,2 opinion (2) 16:2;17:1 opposition (1) 2:24 oral (1) 17:9 order (7) 4:13;5:18;12:16,17; 13:3;18:19;22:1 orders (4) 11:21;18:18;19:12; 20:24 original (3) 9:12,12,13 others (1) 11:5 otherwise (1) 21:21 ourselves (1) 16:25 out (12) 5:24;6:23;9:11; 10:12;11:6;13:12,20; 15:9;16:6;18:8,20; 21:13 Outfitters (2) 19:18;20:11 outside (3) 18:11,17;20:3 Owner (1) 2:3</p>	<p>11:6 paid (2) 6:20;10:20 pandemic (4) 12:13,14,21;16:8 papers (3) 11:6;14:9;15:23 paragraph (15) 3:9,10,11,21;6:3,19, 20,23;7:25;11:17; 14:17;18:2,14;21:19, 22 paraphrasing (1) 4:23 parenthetical (1) 6:15 part (5) 5:5,22;16:18;17:4; 18:12 particularly (1) 6:23 parties (4) 6:6;8:2,4;18:7 partner (3) 2:13;8:18;9:22 party (3) 9:13;10:7,14 pay (7) 3:23;6:13;11:18,24; 14:21;15:8,12 percent (1) 14:8 perform (7) 4:7,21,22;5:4;11:1; 18:3,10 periods (1) 10:19 pictures (1) 14:10 plaintiff (6) 2:8,24;8:13;10:1; 16:13;17:7 plaintiff's (3) 2:23;8:1;16:16 played (1) 16:7 Plaza (1) 16:4 please (2) 2:6;5:23 point (20) 9:1,7,11;10:11; 11:6;13:1,19;14:15, 17,19,19,23,25;15:2, 9;18:1,20;20:13,18; 21:18 pointed (2) 6:23;18:8 pointing (1) 21:13 position (12) 7:16,23,25;11:11, 17,17,20,25;12:5,6;</p>	<p>16:25;20:22 possibility (1) 11:12 precluded (1) 7:17 prediscovery (1) 10:3 preemption (3) 4:11;5:13;21:15 premise (1) 14:25 premises (4) 4:5;9:8;18:13,16 prepared (1) 2:19 prepayment (1) 19:8 presence (1) 14:7 present (1) 17:5 presentation (1) 19:15 pressure (2) 20:18,20 presumably (1) 5:20 prevented (1) 21:16 proceedings (1) 22:9 profitable (1) 20:17 profits (2) 20:18,20 pro-landlord (1) 17:24 proof (1) 8:13 proportion (1) 14:18 proprietary (1) 10:9 proration (1) 4:25 protocols (1) 14:2 provide (5) 4:4,21,22,25;5:4 provided (1) 3:22 provision (2) 15:12;18:5 provisions (1) 6:22 proviso (1) 5:1 public (1) 13:25 publicly-traded (1) 5:19 purpose (2) 7:10;19:5</p>
	O			
N	<p>obligated (1) 4:22 obligation (7) 3:23;4:21;5:5; 11:18,24;14:21;15:6 obligations (7) 4:2,4,25;5:21; 13:13;15:4,17 Obviously (2) 4:3;17:17 occupancy (1) 14:8 occupy (1) 18:12 off (1) 22:4 office (1) 14:5 offset (1)</p>		P	
<p>name (1) 2:8 national (2)</p>		<p>page (5) 3:13,17;5:25;6:6;</p>		

<p>purposes (1) 3:17 Putting (1) 9:5</p>	<p>reflected (1) 5:21 regard (2) 5:8;7:15 regulation (1) 4:13 relates (2) 14:20;19:11 relevant (2) 5:5;9:14 relief (1) 10:9 remedy (1) 10:4 remember (1) 8:8 remembers (1) 7:9 rent (20) 3:23,24;4:25;5:2, 14,20;6:13,20;10:19; 11:5,18,24;14:13,18, 20,21;15:13;19:8; 21:21,21 rent-paying (1) 13:13 repair (1) 6:17 reporter (1) 2:15 requested (1) 10:9 require (1) 17:10 required (2) 5:5;11:3 requirements (1) 14:4 requires (1) 17:4 respect (2) 10:25;11:14 respectfully (3) 3:2;12:6;15:15 respond (1) 21:9 restricted (1) 10:22 restrictions (2) 16:9,23 result (2) 4:23;11:4 resultant (1) 16:8 results (1) 5:5 retail (4) 13:9,18;14:7;16:9 return (1) 17:3 review (1) 3:4 Right (11)</p>	<p>7:14;11:5;12:17,24; 13:7,19;14:2,3,3;19:2, 13 risk (7) 5:16;6:25;7:18,24; 8:12;11:14;15:25 role (1) 16:7 round (1) 5:24 rule (1) 4:13 rules (1) 20:17 run (1) 20:16</p>	<p>4:21 services (1) 5:4 set (1) 15:23 several (1) 20:9 shall (4) 3:25;5:2;14:21; 18:15 shop (1) 16:22 shown (1) 17:9 shut (1) 6:16 shutdown (3) 16:9,22;18:21 signed (1) 16:24 significance (1) 2:25 significant (1) 8:3 similar (1) 16:21 simply (3) 3:4;6:20;21:13 single (1) 13:20 situation (1) 17:3 six (1) 19:1 slightly (1) 12:7 sold (1) 16:10 somehow (1) 21:12 somewhat (1) 5:7 sophisticated (2) 5:17;8:4 sorry (3) 19:24;20:7;21:17 space (4) 10:17,18,22;15:8 spanning (1) 14:4 specific (2) 7:24;13:19 Square (2) 2:3;19:18 standard (1) 8:12 start (2) 2:22;10:2 state (7) 2:16;4:14;11:19; 14:22;15:21;16:13; 21:12 stated (1)</p>	<p>12:10 stating (1) 22:2 Stephen (2) 2:12,20 still (1) 13:8 stop (1) 4:3 store (13) 11:12;12:15,17,20, 22;13:6,8,9;14:7; 18:15;20:10,12,17 Stores (5) 2:1,3;5:18;14:15; 20:9 Street (1) 20:13 strikes (1) 4:8 stripped (1) 15:7 subdivision (1) 4:15 subparagraph (2) 3:22;6:5 successor (2) 2:2,4 sufficient (1) 20:21 suggested (1) 21:11 suggesting (1) 21:20 summary (1) 10:3 supplied (1) 20:5 supply (1) 19:16 sure (3) 7:8;12:12;13:25 surrender (1) 9:8 sweeping (1) 2:25 sympathetic (1) 20:16</p>
<p style="text-align: center;">Q</p>				
<p>qualify (1) 18:20 qualifying (1) 20:25 quick (1) 9:7 quickly (1) 7:5 quiet (1) 4:4 quite (2) 5:15;18:16 quote (2) 2:25;3:15</p>				
<p style="text-align: center;">R</p>		<p style="text-align: center;">S</p>		
<p>raise (2) 8:14;17:18 raises (2) 9:22,22 rather (1) 3:4 reach (1) 20:1 read (4) 6:24,24;15:10; 21:22 reading (2) 16:3;21:19 really (3) 6:24;7:19;21:4 reason (5) 4:7,12;10:20;17:6; 22:2 reasonably (1) 4:9 reasons (1) 12:10 recision (2) 19:4,5 recognized (1) 10:6 recognizes (1) 17:2 record (5) 2:6,16;3:17;8:15; 22:4 reduction (1) 14:18 reference (2) 3:24;4:18 referenced (3) 7:18;12:13;19:16 references (3) 2:24;18:14,18</p>		<p>safe (1) 13:25 safety (1) 13:23 saleability (1) 6:9 sales (1) 16:9 same (2) 17:1,22 SARS (1) 9:10 Savoy (1) 7:12 saying (4) 12:4;14:11;17:23; 21:3 science (1) 13:24 screen (1) 19:19 second (3) 5:23;17:2;19:5 Secret (5) 2:1;10:12;13:20,21; 20:12 Secrets (1) 2:2 section (16) 4:25;10:11,25;11:1, 9,12;12:2,10;15:3,10, 13;17:12;18:4,4; 21:12,14 seek (1) 16:6 Seelig (1) 2:12 seems (2) 11:11;18:2 sentence (1) 2:23 separate (1) 6:12 service (1)</p>	<p>shutdown (3) 16:9,22;18:21 signed (1) 16:24 significance (1) 2:25 significant (1) 8:3 similar (1) 16:21 simply (3) 3:4;6:20;21:13 single (1) 13:20 situation (1) 17:3 six (1) 19:1 slightly (1) 12:7 sold (1) 16:10 somehow (1) 21:12 somewhat (1) 5:7 sophisticated (2) 5:17;8:4 sorry (3) 19:24;20:7;21:17 space (4) 10:17,18,22;15:8 spanning (1) 14:4 specific (2) 7:24;13:19 Square (2) 2:3;19:18 standard (1) 8:12 start (2) 2:22;10:2 state (7) 2:16;4:14;11:19; 14:22;15:21;16:13; 21:12 stated (1)</p> <p style="text-align: center;">T</p> <p>talked (1) 9:1 talking (2) 11:8;15:5 talks (2) 15:3,15 tasked (1) 3:3 technical (1) 7:4 temporarily (1) 11:22</p>	

<p>temporary (4) 12:15,19,20;13:5 tenant (14) 3:6,23,25;5:2,17, 18:6;3,10;9:12,13,15; 10:12;18:12,15 tenants (2) 4:23;13:11 term (1) 5:11 Thanks (1) 9:20 Therefore (1) 8:11 thereof (1) 4:15 third (1) 19:6 thought (1) 14:24 thousand (1) 5:18 three (3) 5:25;7:13;19:1 throughout (1) 10:18 times (2) 9:9;16:17 title (1) 21:11 today (3) 13:1,10,14 together (1) 6:22 triable (1) 8:14 trilogy (1) 17:20 trouble (1) 4:8 trying (3) 13:24,25;17:24 turn (3) 3:13;5:22;6:19 turning (1) 10:25 Twenty-six (1) 4:20 Two (3) 7:11;10:13;19:1 type (1) 10:5</p>	<p>18:20;20:21,25 underpinning (1) 19:10 unforeseeable (1) 11:15 unjust (1) 19:9 unlikely (1) 16:14 unusual (1) 5:8 up (1) 7:4 uploading (1) 22:1 ups (2) 10:15;16:18 Urban (2) 19:18;20:11 Urd (1) 7:14 use (4) 4:5;10:22;14:13,25</p>	<p>16:3 Whereupon (1) 22:9 William (2) 2:8;9:25 wish (1) 9:21 without (1) 6:21 won (1) 8:21 word (1) 12:13 workforce (1) 14:6 wrap (1) 7:4 writing (1) 3:3 wrong (1) 13:2</p>	<p>5:1 2cvi (1) 3:12</p>
			3
			<p>3211 (2) 8:8,12 3211a1 (1) 8:20 3212 (2) 8:8,13 33 (1) 18:5 35 (2) 13:22;14:4 3c (1) 5:23 3civ (1) 5:24</p>
		Y	4
	V	<p>yield (1) 9:19 York (1) 13:11</p>	<p>407 (1) 7:12 45 (2) 3:13,17</p>
	<p>Valenti (1) 7:14 Vector (1) 7:7 versus (2) 2:3;16:4 vi (1) 6:5 vicinity (1) 20:10 Victoria's (6) 2:1,2;10:12;13:20, 21;20:12 view (3) 8:19;15:13;20:3 virtue (1) 14:22 virus (1) 17:17 visited (2) 20:5,9</p>	1	5
		<p>10 (3) 9:9;17:15;22:1 125th (1) 20:12 1328 (1) 2:4 155158 (1) 16:4 16 (1) 18:21 19 (2) 16:8;17:2 1a (1) 6:20</p>	<p>50 (1) 14:8</p>
		2	6
	W	<p>2008 (1) 10:19 2020 (1) 16:5 22nd (2) 18:22;20:25 26 (21) 3:9,10,13,21;4:18; 6:23;7:25;10:11,25; 11:12,17;14:17; 15:10,13;17:12;18:2, 14;20:20;21:12,20,22 26i (2) 12:12;20:19 26ii (1)</p>	<p>61st (1) 7:13 651833-2020 (1) 2:5</p>
			9
			<p>9 (2) 3:17;6:1 9/11 (2) 9:10;10:17 97 (1) 18:21</p>
U			
<p>uber (1) 5:17 unable (4) 4:1,7;15:4,16 unavoidable (4) 4:17;5:6,10;16:20 under (6) 4:2;8:12;17:24;</p>	<p>waited (1) 8:9 wave (1) 17:2 way (8) 11:14;12:7;13:13, 25;15:10,13;17:19; 21:22 whatsoever (2) 4:9;15:20 whenever (1) 10:5 wherein (1)</p>		