

SUMMARY STATEMENT ON APPLICATION FOR EXPEDITED SERVICE AND/OR INTERIM RELIEF

(SUBMITTED BY MOVING PARTY)

Date: March 31, 2021

Case # 2021-01099

Title Valentino U.S.A., Inc. v.

Index/Indict/Docket # 652605/2020

of

Matter 693 Fifth Owner LLC

Appeal by Plaintiff from Order Judgment of Decree

Supreme Surrogate's Family

County New York Court entered on Jan. 27, 2021

Name of Judge Andrew S. Borrok

Notice of Appeal filed on February 17, 2021

If from administrative determination, state agency

Nature of action or proceeding Real Estate

Provisions of order judgment decree appealed from granting of defendant-respondent's motion to dismiss the action.

This application by appellant respondent is for an interim stay, tolling appellant's time to answer or otherwise move in the related action between the parties in Sup. Ct. N.Y. County index no. 651158/2021, pending the Court's determination of appellant's appeal.

If applying for a stay, state reason why requested appellant's deadline to answer or otherwise move in the related action is April 6, 2021, and Appellant will likely be precluded from raising crucial claims and/or defenses in the related action absent a stay.

Has any undertaking been posted no If "yes", state amount and type

Has application been made to court below for this relief no Disposition
Has there been any prior application here in this court no If "yes", state dates and nature

Has adversary been advised of this application yes Does he/she consent no

Attorney for Movant

Attorney for Opposition

Name Newman Ferrara LLP

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Appearing by Jarred I. Kassenoff, Esq.

Andrew Pistor, Esq.

(Do not write below this line)

DISPOSITION

The interim application for a stay is granted. The motion for a stay pending appeal is referred to a full bench of this Court.

Motion Date April 19, 2021 Opposition April 12, 2021 Reply April 19, 2021 (by 10:00 a.m.)

EXPEDITE _____ PHONE ATTORNEYS _____ DECISION BY _____

ALL PAPERS TO BE SERVED PERSONALLY.

Justice LG

1 April 2021

Date

Eud
Court Attorney

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

VALENTINO U.S.A., INC.,

Plaintiff-Appellant,

-against-

693 FIFTH OWNER LLC,

Defendant-Respondent.

Appellate Division Case No.
2021 – 01099

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

**NOTICE OF MOTION
FOR STAY PENDING
APPEAL AND INTERIM
RELIEF**

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Jarred I. Kassenoff, dated March 30, 2021, the exhibits annexed thereto, and upon all the papers and proceedings heretofore had herein, plaintiff-appellant VALENTINO U.S.A., INC. (“Appellant”), shall move this Court, the Supreme Court of the State of New York, Appellate Division, First Department, located at 27 Madison Avenue, New York, New York 10010, on _____, 2021, at 10:00 a.m. or as soon thereafter as counsel can be heard, for an Order:

- (a) pursuant to CPLR 5518 and/or 5519(c), issuing a preliminary injunction and/or otherwise temporarily enjoining, staying and tolling the running of the Decision and Order on Motion, dated and entered on January 27, 2021 (Hon. Andrew S. Borrok, J.S.C.), pending this Court’s hearing and determination of the within motion and five days after the service of notice of entry thereupon (or as otherwise directed by this Court);
- (b) pursuant to CPLR 5519(c) and/or CPLR 2201, staying and tolling all proceedings, including but not limited to tolling Appellant’s time to answer and/or otherwise move, in the related action between the parties captioned *693 Fifth Owner, LLC v. Valentino U.S.A., Inc.*, Sup. Ct. N.Y. County, Index No. 651158/2021 (“Respondent’s Action”), pending the Court’s determination of this appeal; and
- (c) granting such other and further relief that the Court deems just, proper and equitable under the circumstances.


PLEASE TAKE FURTHER NOTICE that any answering papers shall be served upon Appellant, via electronic filing, on or before _____, 2021.

PLEASE TAKE FURTHER NOTICE that Appellant's reply papers shall be served, via electronic filing, on or before _____, 2021.

Dated: New York, New York
March 31, 2021

Yours, etc.,

NEWMAN FERRARA LLP
Attorneys for Plaintiff-Appellant

By: 
Jarred I. Kassenoff
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

VALENTINO U.S.A., INC.,

Plaintiff-Appellant,

- against-

693 FIFTH OWNER LLC,

Defendant-Respondent.

Appellate Division Case
No. 2021-01099

Supreme Court
Index No. 652605/2020

**AFFIRMATION IN SUPPORT OF
APPELLANT’S MOTION FOR
STAY PENDING APPEAL**

JARRED I. KASSENOFF, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the truth of the following under the penalties of perjury and pursuant to CPLR 2106:

1. I am a partner of Newman Ferrara LLP, attorneys for plaintiff-appellant VALENTINO U.S.A., INC. (“Appellant”), and am fully familiar with the facts and circumstances set forth below.

2. This Affirmation is respectfully submitted in support of Appellant’s motion, which seeks an Order:

- (a) pursuant to CPLR 5518 and/or 5519(c), issuing a preliminary injunction and/or otherwise temporarily enjoining, staying and tolling the running of the Decision and Order on Motion, dated and entered on January 27, 2021 (Hon. Andrew S. Borrok, J.S.C.) (the “Dismissal Order,” annexed, with Notice of Appeal, as **Exhibit 1**), pending this Court’s hearing and determination of the within motion and five days after the service of notice of entry thereupon (or as otherwise directed by this Court);
- (b) pursuant to CPLR 5519(c) and/or CPLR 2201, staying and tolling all proceedings, including but not limited to tolling Appellant’s time to answer and/or otherwise move, in the related action between the parties captioned *693 Fifth Owner, LLC v. Valentino U.S.A., Inc.*, Sup. Ct. N.Y. County, Index No. 651158/2021 (“Respondent’s Action”), pending the Court’s determination of this appeal; and

- (c) granting such other and further relief that the Court deems just, proper and equitable under the circumstances.

3. As set forth in more detail below, it is respectfully submitted that the lower court's Dismissal Order improperly granted defendant-respondent 693 FIFTH OWNER LLC ("Respondent")'s pre-Answer motion to dismiss the above-captioned action (the "Action").

4. First, Respondent failed to meet the governing dismissal standard espoused by CPLR 3211(a)(1) or (7).

5. Appellant adequately pleaded each of its causes of action with sufficient particularity – including claims relating to frustration of purpose, impossibility of performance, failure of consideration and a constructive eviction. And each of those causes of action raised material factual issues that should have been resolved through the fact-finding process, not on a pre-answer motion to dismiss, prior to any discovery.

6. Indeed, dismissal of Appellant's constructive eviction claim was particularly flawed, given that cause of action's fact-specific inquiry could not be summarily determined or decided on a motion to dismiss.

7. Second, the court below erred in finding that the lease somehow precluded Appellant's claims.

8. Contrary to that court's ruling, the lease provisions cited in the Dismissal Order do **not** assign all risk associated with the COVID-19 public-health crisis to Appellant.

9. Specifically, the Dismissal Order incorrectly holds 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[.]"

10. However, while Section 21.11 provides that certain “Unavoidable Delays” would not excuse payment of rent, the parties’ agreement does **not** reference “pandemics,” and does **not** expressly or unequivocally provide that Appellant preemptively waived any and all contractual, quasi-contractual and/or equitable claims -- including constructive eviction and/or frustration of purpose.

11. Furthermore, neither Section 21.11, nor any other Lease provision, contains any waiver of Appellant’s claims seeking rescission -- the central relief sought by Appellant.

12. Simply stated, the court below erred by reading into this “Delays” provision a broader acceptance of all unknown risks that the parties, and Appellant’s guarantor, simply never anticipated or guarded against when the Lease was executed back in 2013.

13. Finally, the pandemic was simply not foreseeable, and the court erred in allocating all pandemic-related risks to Appellant when the parties neither contemplated nor agreed to such a scenario.

14. For those reasons, Respondent’s motion should have been denied, in its entirety, and Respondent should have been sanctioned for its frivolous, bad-faith procedural maneuvering undertaken during the height of an unprecedented public-health crisis.

15. Appellant also urgently requests a stay of both (a) the running of the Dismissal Order, and (b) Respondent’s Action, commenced shortly after the Dismissal Order was issued.

16. Absent such a stay, Appellant will likely be precluded from raising crucial claims and/or defenses in response to Respondent’s Action, and any later reversal of the Dismissal Order would be rendered academic.

RELEVANT HISTORY

17. Appellant commenced the Action for declaratory and injunctive relief after the COVID-19 pandemic and ongoing business restrictions, executive orders (“EOs”), and related COVID-19 related protocols made it impossible for Appellant to operate its retail boutique pursuant to a commercial lease, as the parties had initially envisioned.

18. The subject lease was executed in 2013 for certain retail premises (the “Premises”) in the building located at 693 Fifth Avenue, New York, New York 10022 (the “Building”), pursuant to a written agreement, dated May 3, 2013 (the “Lease”), between Appellant, as tenant, and Respondent’s predecessor-in-interest, as landlord.

19. After Governor Andrew Cuomo declared a state of disaster emergency on March 7, 2020, pursuant to EO 202, and closed all non-essential businesses on March 20, 2020, pursuant to EO 202.8, the very purpose of the Lease (Plaintiff’s ability to use of the Premises to operate a high-end fashion retail boutique), was completely frustrated.

20. Accordingly, by letter dated June 1, 2020, Appellant notified Respondent that it would be vacating and surrendering the Premises at the end of the year.

21. In response, by letter dated June 19, 2020, Respondent rejected Appellant’s surrender.

22. Appellant therefore commenced this Action by filing a Summons and Complaint, dated June 21, 2020.

23. Rather than interpose an answer, Respondent moved, by notice of motion dated July 27, 2020, for pre-answer dismissal.

24. By Dismissal Order dated January 27, 2021, the court below erroneously granted Respondent's request.

25. Specifically, Justice Borrok incorrectly held that: (1) the parties expressly allocated all risk of business closure related to the COVID-19 pandemic to Appellant (they did not); (2) Section 21.11 of the Lease somehow waived or barred equitable and/or quasi-contractual claims to rescind or terminate the Lease (it does not); (3) there could not be a constructive eviction without a contemporaneous abandonment of the Premises (to the contrary, controlling law permits tenant time to vacate); and (4) Appellant failed to allege that Respondent substantially interfered with Appellant's use of the Premises (Respondent expressly made such allegations).

26. Appellant timely filed a Notice of Appeal, dated February 17, 2021.

27. Two days later, Respondent's Action was then commenced by the filing of a Summons and Complaint, dated February 19, 2021. Respondent's Action, which seeks damages for rent and other amounts that would purportedly be due for the remainder of the Lease term and centers around various breach of contract claims arising from the termination of the Lease.¹

28. Indeed, Respondent's Action involves almost exactly identical issues to the instant Action:

- (a) the same Lease;
- (b) the same facts; and
- (c) the same parties.

¹ Respondent's Action alleges five breach of contract claims against Appellant relating to alleged unpaid rent, property damages and attorneys' fees and interest, and eight breach of contract claims against Appellant's guarantor premised upon the same claims. Eleven of the thirteen causes of action rest upon Respondent's argument that the Dismissal Order precludes Appellant from asserting that the Lease has been terminated and that Appellant was therefore entitled to vacate and surrender the Premises.

The two actions are therefore inherently interrelated, and the appeal of the Dismissal Order will have a material impact on both matters.

29. Absent a stay by this Court, Appellant’s answer to the Complaint in Respondent’s Action is due on or before April 6, 2021.

ARGUMENT

I.

APPELLANT IS ENTITLED TO A PRELIMINARY INJUNCTION AND/OR A STAY OF ENFORCEMENT OF THE DISMISSAL ORDER AND RESPONDENT’S ACTION PENDING APPEAL FROM THE DISMISSAL ORDER

30. In order to obtain preliminary injunctive relief, a party is required to demonstrate: (a) a likelihood of success on the merits; (b) irreparable injury in the absence of such injunctive relief; and (c) that a balancing of the equities falls in its favor. See CPLR 6301, *et seq.*; see also *Seitzman v. Hudson Riv. Assoc.*, 126 A.D.2d 211 (1st Dep’t 1987).

31. As demonstrated below, Appellant can satisfy those elements, and enforcement of the Dismissal Order and Respondent’s Action should both be stayed pending the appeal.

A. Likelihood of Success

32. Appellant is likely to prevail on the underlying appeal on the grounds that the court below incorrectly found that Respondent met the standard for dismissal pursuant to CPLR 3211(a)(1) and (7), and that the Lease somehow precluded or vitiated Appellant’s claims.

(i) The governing legal standards were not applied.

33. Pursuant to *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994), the court below erred in failing to “accord [Appellant] the benefit of every possible favorable inference and determine only if the facts as alleged fit into any cognizable legal theory[.]”

34. In this instance, the Complaint plainly and sufficiently alleges each of Appellant's eight (8) cause of action for declaratory and injunctive relief.²

a. Appellant adequately pleaded frustration of purpose

35. Appellant expressly pleaded each requisite element of a frustration claim by alleging that: (1) the COVID-19 pandemic undermined and frustrated Appellant's principal purpose in entering into, and continuing with, the Lease – the ability to conduct retail business (see Complaint, ¶29); (2) Appellant and Respondent never anticipated or assumed that a global pandemic would occur during the Lease term, and accordingly did not address or otherwise provide for the such risks in the Lease (see Complaint, ¶¶6, 10, 29 and 39); and (3) Appellant was not at fault for the pandemic-related turn of events (see Complaint, ¶30).

36. Clearly, such allegations adequately established the claim and were sufficient to withstand dismissal.

37. In fact, frustration of purpose arguments raised by commercial retail tenants during the pandemic have withstood summary judgment challenges, a far higher standard than the one applicable to a pre-answer motion to dismiss. See, for example, *The Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 2020 N.Y. Slip Op. 33623[U], 1 (Sup. Ct. N.Y. County 2020).³

38. Accordingly, it was reversible error for the court below to dismiss this claim, particularly at a pre-Answer litigation stage.

² Seven (7) of Appellant's causes of action sought declaratory judgments, pursuant to, *inter alia*, CPLR 3001, while the eighth (8th) cause of action sought an injunction, pursuant to, *inter alia*, *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630 (1968). The eighth (8th) cause of action seeking a *Yellowstone* injunction has been rendered moot by Appellant's surrender of the Premises on or about December 31, 2020.

³ And, even when courts have rejected a frustration of purpose claim or defense, they note that the applicability of that doctrine is a fact-specific inquiry that will vary from case-to-case. See *1140 Broadway LLC v. Bold Food, LLC*, 2020 N.Y. Slip Op. 34017(U) (Sup. Ct. N.Y. Co. 2020) (rejecting a frustration defense on summary judgment, rather than a motion to dismiss).

b. Appellant adequately pleaded impossibility of performance

39. Appellant also sufficiently pleaded a cause of action for impossibility of performance, by alleging that performance: (1) has been rendered impossible, by (2) an unforeseeable event outside of that party's control that could not have been guarded against. See *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900 (1987).

40. Furthermore, Complaint ¶¶ 17, 23 and 25 reinforce that the unprecedented governmental orders and restrictive regulations issued in response to the COVID-19 pandemic rendered Appellant's performance of its Lease obligations impractical.

41. And, because these allegations should have been accepted as true, particularly on a pre-Answer motion, dismissal for failure to state a cause of action was reversible error.⁴

c. Appellant adequately pleaded failure of consideration

42. The court below further erred by dismissing Appellant's rescission claim predicated upon a failure of consideration,⁵ as Appellant additionally met its burden of alleging that cause of action. See Complaint, ¶¶ 10, 62-64.

43. Appellant alleged that (a) a global pandemic that would decimate its business was neither anticipated nor contemplated when the Lease was signed, and (b) it had not received valuable consideration, such as a cancellation option, or reduced rent, as a direct and proximate result of that risk.

⁴ To the extent that Respondent argued in its moving papers that Section 21.11 of the Lease barred an impossibility claim, the court below did not cite any such reasoning in the Dismissal Order, and for the reasons set forth below, Section 21.11 of the Lease does **not** bar an impossibility claim.

⁵ A failure of consideration "depends on what the parties had in contemplation at the time of the lease." *Elk Realty Co. v. Yardney Elec. Corp.*, 153 N.Y.S2d 730, 731 (App. Term, 1st Dep't 1956). See also *Say-Phil Realty Corp. v. De Lignemare*, 131 Misc.827, 828-29 (N.Y. Mun. Ct. 1928) (holding that, "[t]he doctrine of failure of consideration is predicated upon the happening of events which materially change the rights of parties, which events were not within the contemplation of the parties, at the time of the execution of the contract."). Again, this claim raises factual issues concerning the parties' expectations and assumptions that could not be resolved on a motion to dismiss.

44. Once again, the Dismissal Order failed to address those claims, in any manner, reinforcing the erroneous nature of that determination.

d. Appellant adequately pleaded constructive eviction

45. Lastly, the court below erred in holding that Appellant failed to adequately plead a constructive eviction claim – which simply requires a party to allege that: (a) its use of the subject premises has been disrupted by its landlord and/or a condition that is the landlord’s obligation to remediate, (b) the disruption is substantial, and (c) the disruption has resulted in at least a partial abandonment of the premises. See *NYC Goetz Realty Corp. v. Martha Graham Ctr. of Contemporary Dance*, 39 A.D.3d 356 (1st Dep’t 2007); see also *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 208 A.D.2d 394 (1st Dep’t 1994), *aff’d*, 87 N.Y.2d 130 (1995).

46. Appellant’s Complaint recites each of the forgoing elements. See Complaint, ¶¶ 70-71.

47. Such allegations raised factual issues that could not properly be decided on a pre-Answer motion to dismiss, and the Dismissal Order’s conclusion, that no further inquiry was warranted, was fundamentally flawed.

48. Notably, the court below observed that: “[t]he [Appellant]’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.”

49. However, Appellant **did** allege that Respondent disrupted its use of the Premises.

50. Specifically, Complaint ¶¶ 70-71 proffer as follows:

70. [Respondent] has failed to properly maintain the Building and Premises pursuant to the Lease and/or take reasonable and/or necessary precautions and/or measures in light of the COVID-19

pandemic, to ensure that [Appellant] could safely occupy the Premises and/or operate, as originally contemplated by the Lease.

71. As a result of the foregoing, [Respondent] has breached the Lease's covenant of quiet enjoyment and/or has actually or constructively evicted [Appellant] from all and/or part of the Premises.

51. The court below also incorrectly held that the failure to plead that Appellant had abandoned the Premises precluded its constructive eviction claim.

52. As a matter of law, following an act of partial or complete constructive eviction, a commercial tenant has a "reasonable" time to abandon its leased premises, and any question of reasonableness is an issue of fact. See *Joseph P. Day Realty Corp. v. Franciscan Sisters for Poor Health Sys., Inc.*, 256 A.D.2d 134, 135 (1st Dep't 1998) (denying motion to dismiss over factual dispute concerning "reasonableness" of tenant's delay in abandoning).

53. Unfortunately, the court below ignored such controlling precedent.

54. The Dismissal Order warrants reversal, because Appellant's six (6) month wind-down and vacatur, during the course of an unprecedented pandemic, falls squarely within the parameters that courts have found "reasonable" under the circumstances.⁶

55. For the foregoing reasons, it is clear that Appellant's constructive eviction claim was properly pleaded and should have survived dismissal.

56. Accordingly, given the failure to meet the standard for dismissal required by CPLR 3211(a)(1) and (7), and because each of Appellant's claims raised factual issues that cannot be

⁶ See *S.E. Nichols, Inc. v. New Plan Realty Tr.*, 160 A.D.2d 251, 252 (1st Dep't 1990) (holding that, "the abandonment of a department store in an orderly manner may be a lengthy process and that a delay of even several months might be reasonable under certain circumstances (see, *Leider v. 80 Williams St. Co., Inc.*, 22 A.D.2d 952, 255 N.Y.S.2d 999)."); *Zurel U.S.A., Inc. v. Magnum Realty Corp.*, 279 A.D.2d 520, 521 (2d Dep't 2001) (holding that, "[a] delay of three or four months for a commercial tenant to move in an orderly fashion may be considered reasonably prompt[.]"); *135 E. 57th St., LLC v. Calypso Capital Mgt., LP*, 2018 WL 4381741 (Sup. Ct., N.Y. County 2018) (delay of almost nine months not unreasonable).

resolved on a motion to dismiss, a stay pending appeal (and reversal of the underlying determination) is now warranted.

(ii) **The Lease does not shift the pandemic's risks to Appellant.**

57. While the Dismissal Order purports that Section 21.11 of the Lease bars all of Appellant's claims, that provision neither addresses the pandemic, nor provides for such a purported outcome.

58. Specifically, Section 21.11 provides, in pertinent part, as follows:

Section 21.11. Unavoidable Delays and Postponement of Performance. In the event that either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reasons of strikes, labor troubles, inability to procure labor or materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war, acts of terrorism, acts of God, floods, hurricanes, windstorms, fire or other casualty, condemnation or other reason of a similar or dissimilar nature beyond the reasonable control of the party delayed in performing work or doing acts required under the terms of this Lease (each an "Unavoidable Delay"), then performance of such act shall be excused for the period of the Unavoidable Delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such Unavoidable Delay. Notwithstanding the foregoing, after the Commencement Date, which date shall be subject to an Unavoidable Delay occasioned by the above causes, **nothing contained in this Section** shall operate to excuse Tenant from the prompt payment of Rent or any other payments or charges required by the terms of this Lease (**except as otherwise specifically provided for pursuant to the terms of this Lease**), or shall operate to extend the Term. Delays or failures to perform resulting from lack of funds shall not be deemed Unavoidable Delays. (Emphasis added.)

59. Clearly, the purpose of this provision was to afford *Appellant* an extension of time to perform its Lease obligations under certain scenarios – not to be used by *Respondent* as a sword to dismiss any and all of Appellant's common law claims.

60. Furthermore, Section 21.11 does **not** reference “pandemics,” and fails to address claims for rescission – which is the primary relief that Appellant is seeking in this case.

61. Five (5) of Appellant’s causes of action seek rescission and/or a declaration that the Lease was/is void: (a) the first cause of action seeks termination/rescission based on the doctrine of frustration of purpose; (b) the third cause of action seeks termination/rescission based on impossibility; (c) the fifth cause of action seeks rescission based on a failure of consideration; (d) the sixth cause of action seeks a declaration that the Lease is void based on constructive eviction; and, (e) the seventh cause of action seeks a declaration that the Lease guaranty is void based on the frustration of purpose doctrine.

62. How can the court below deem such rescission claims “waived” by Section 21.11 when that provision is silent regarding a pandemic and does not expressly address a purported waiver?

63. The court below attempted to overcome that hurdle by reading an impermissible and exceedingly broad “waiver” into that provision; a waiver that is not only violative of public policy but belied by the Lease’s plain language.

64. Section 21.11 provides that certain “Unavoidable Delays” may not excuse the payment of rent, but that provision does **not** set forth that Appellant preemptively waives, or otherwise prohibits or restricts the assertion of, any and all contractual, quasi-contractual and/or equitable claims, including frustration of purpose, impossibility and/or failure of consideration.

65. Furthermore, it is axiomatic that a waiver must be clear and unequivocal, and no such language is present herein. See *Granite Broadway Dev. LLC v. 1711 LLC*, 44 A.D.3d 594 (1st Dep’t 2007).

66. In fact, nothing in Section 21.11 indicates, in any manner, that Appellant recognized or anticipated that a global pandemic, and related governmental shut-down orders, would thwart its ability to operate at the Premises.

67. Furthermore, at a minimum, the absence of any reference to a “pandemic” or “epidemic” anywhere in the Lease minimally rendered Section 21.11 ambiguous, and the trier of fact must determine whether the parties intended to impose an unassailable duty to continue to pay rent, under all circumstances, without reprieve, during this “unique” and “unprecedented” COVID-19 pandemic. See *Seawright v. Bd. of Elections in City of New York*, 35 N.Y.3d 227 (2020).

68. Even if the Court were to deem Section 21.11 unambiguous, the Dismissal Order should still be reversed because the court below failed to address each of the following key factual questions, required pursuant to *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002):

- (a) Did the parties anticipate or guard against the global COVID-19 pandemic and/or resulting restrictive governmental orders and/or regulations?
- (b) Was the Lease entered into based on the fundamental assumption that Fifth Avenue would remain a heavily-trafficked focal point of high-end New York City fashion retail?
- (c) Has the pandemic fundamentally changed, destroyed and/or drastically altered the basic consideration for which Appellant bargained?
- (d) Has Appellant been forced to abandon its premises?
- (e) Did Appellant’s guarantor assume or agree to take on liability arising from, or attributable to, an unprecedented global pandemic?

69. Simply, because the Lease does not “conclusively” resolve any of one or more of those material factual inquiries in Respondent’s favor, dismissal pursuant to CPLR 3211(a)(1) was highly irregular and inappropriate, and the Dismissal Order should be reversed.

(iii) The COVID-19 pandemic was not foreseeable as a matter of law.

70. The court below further erred in holding that the Lease “encompasses the present situation,” essentially opining that the COVID-19 pandemic was, or somehow should have been, foreseeable when the Lease was drafted in 2013.

71. However, as the Court of Appeals has noted, this pandemic is “unique” and “unprecedented.” See *Seawright v. Bd. of Elections in City of New York*, 35 N.Y.3d 227 (2020).

72. The impact that the COVID-19 pandemic, and related EOs, have had on our city and state were anything but “foreseeable.” And, if nothing else, that fundamental truth raises yet another material factual issue.

73. To permit the Dismissal Order to stand would basically eviscerate the concept of “foreseeability” and the frustration of purpose doctrine entirely, as any event, no matter how improbable, would theoretically be “foreseeable” with sufficient perfect hindsight.

74. Accordingly, Respondent’s pre-Answer motion to dismiss should have been denied in its entirety, as a matter of law.

75. As Appellant is therefore likely to prevail on the merits of the appeal, injunctive relief should now be granted.

B. Failure to Stay the Dismissal Order and Respondent’s Action Would Effectively Render the Appeal Moot

76. Appellant would be irreparably harmed if Respondent were improperly permitted to continue litigating its action, which springs from the Dismissal Order, while this Appeal is pending.

77. Significantly, whether Respondent is entitled to relief in Respondent’s Action, hinges upon whether the Lease was terminated, nullified and/or voided by the COVID-19 pandemic – the precise claims that were erroneously dismissed by the court below.

78. Thus, if Respondent's Action were permitted to proceed, before this Appeal were decided, Appellant would effectively be left without its central defenses to the litigation.

79. These are exactly the type of circumstances where this Court has previously granted stays pending appeal.

80. In *OneBeacon Am. Ins. Co. v. Colgate-Palmolive Co.*, 96 A.D.3d 541 (1st Dep't 2012), the enjoining of action to proceed pending an appeal of a related case, was affirmed, with the Appellate Division noting that:

Supreme Court properly stayed this action pending the resolution of an appeal in a related action among the parties in Massachusetts (*see* CPLR 2201; *Asher v Abbott Labs.*, 307 AD2d 211 [2003]). The issues, relief sought, and parties in the two actions are substantially identical (*see id.*). Plaintiff's argument that the Massachusetts action is no longer pending because it was dismissed is unavailing, since an appeal was taken from the order of dismissal (*see Rael Automatic Sprinkler Co. v Solow Dev. Corp.*, 58 AD2d 600 [1977]; *D'Aprile v Blythe*, 53 AD2d 1059, 1060 [1976]).

81. Here, the circumstances are almost identical, and a stay should be granted pursuant to CPLR 2201 and/or 5519(c).

82. Indeed, this Court has held that failure of lower courts to grant such a stay is reversible error. *See Asher v. Abbott Labs*, 307 A.D.2d 211 (1st Dep't 2003).

83. Given that Respondent's Action concerns the same parties, the same Lease, and the same issues directly arising from the COVID-19 pandemic and Appellant's surrender of the Premises, any ruling by the court below in Respondent's Action would be impacted by this Action if this Court were to subsequently find that dismissal was improper, and the parties would then be left with a procedural morass; not to mention the waste of judicial resources and unnecessary legal costs for the parties.

84. On that additional, and independent, basis, Appellant has demonstrated its entitlement to a stay pending appeal. See *People ex rel. Smalls v. Tekben*, 193 A.D.2d 828 (2d Dep't 1993) (held appeal was subject to dismissal when failure to obtain stay rendered appeal moot); *Van Amburgh v. Curran*, 73 Misc.2d 1100 (Sup. Ct. Albany Cty. 1973) (held stay pending appeal of Order denying certain deponents' proceeding to modify certain subpoenas was appropriate as the appeal would be rendered moot if the deponents were forced to appear); *Niagara Mohawk Power Corp. v. New York State Dept. of Environmental Conservation*, 169 A.D.2d 943 (3d Dep't 1991) (dismissed appeal noting that appellant's failure to obtain stay pending appeal rendered appeal moot).

C. A Balance of the Equities Falls in Appellant's Favor

85. Finally, a balancing of the equities undoubtedly falls in Appellant's favor.

86. The COVID-19 pandemic has presented our state with a complex and multifaceted crisis.

87. Among other things, the historically unprecedented public-health challenges, extremely restrictive governmental orders and regulations, and accompanying economic decline all triggered as a direct and proximate result, differentiate the present set of circumstances from any memorable event in the past century.

88. Appellant's business operations at the Premises were entirely disrupted because of the health crisis.

89. Upon information and belief, unlike many New York City landlords, Respondent failed to meaningfully work, or negotiate, with Appellant to enable Appellant to remain in the Premises in the face of all the existing adversity.

90. Appellant would be severely prejudiced if its claims cannot be heard.

91. Conversely, a stay would result in no irreparable harm to Respondent, as Respondent's monetary claims for breach of contract are all compensable, should the appeal ultimately be denied.⁷

92. Additionally, Respondent's Action is in direct violation of the commercial tenant eviction moratorium in effect since May 7, 2020, originally set forth in Governor Cuomo's EO 202.28.

93. EO 202.28, provides, in relevant part:

There shall be no initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, owned or rented by someone that is eligible for unemployment insurance or benefits under state or federal law or otherwise facing financial hardship due to the COVID-19 pandemic for a period of sixty days beginning on June 20, 2020. (Emphasis added.)

94. Clearly, a plain reading of this moratorium, demonstrates that Respondent's initiation of its action (which primarily seeks relief based on Appellant's alleged nonpayment of rent) – is not properly maintainable.

95. Thus, a stay of Respondent's Action cannot possibly prejudice Respondent – since Respondent's Action, commenced in direct violation of Governor Cuomo's EO, should not have even been brought in the first instance.

⁷ Should the Court permit Respondent's Action to proceed pending the outcome of the Appeal, Appellant respectfully asks that only Respondent's fifth (5th), seventh (7th) and eighth (8th) causes of action, concerning purported property damage at the Premises allegedly caused by Appellant during its surrender, be permitted to continue.

II.

A TOLLING OF THE DISMISSAL ORDER AND APPELLANT'S TIME TO ANSWER OR OTHERWISE MOVE SHOULD BE GRANTED

96. Pending this Court's hearing and determination of this motion, Appellant respectfully requests interim relief tolling the Dismissal Order and Appellant's time to answer or otherwise move in Respondent's Action, and that Respondent be enjoined from taking any steps to proceed with Respondent's Action.

97. Pursuant to NYCRR 1250.4(b)(2), Appellant provided notice of this instant application to Respondent. Specifically, by letter, dated March 30, 2021 (the "Notification Letter," along with proof of delivery, annexed as **Exhibit 2**), Appellant's counsel advised Respondent's counsel that the instant application would be electronically filed on March 31, 2021 at 2:30 p.m.

98. The Notification Letter was sent to Respondent's counsel on March 30, 2021, via email. Upon information and belief, Respondent opposes the requested interim relief.

WHEREFORE, Appellant respectfully submits that the Court should grant the instant motion, in its entirety, together with such other relief in Appellant's favor as this Court deems just, proper, and equitable under the circumstances including, but not limited to, an award of Appellant's costs and fees.

Dated: New York, New York
March 30, 2021


Jarred I. Kassenoff

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

<p>PRESENT: <u>HON. ANDREW BORROK</u></p> <p align="center"><i>Justice</i></p> <p>-----X</p> <p>VALENTINO U.S.A., INC.</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>693 FIFTH OWNER LLC,</p> <p align="center">Defendant.</p> <p>-----X</p>	<p>PART IAS MOTION 53EFM</p> <p>INDEX NO. <u>652605/2020</u></p> <p>MOTION DATE <u>07/27/2020</u></p> <p>MOTION SEQ. NO. <u>001</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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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.

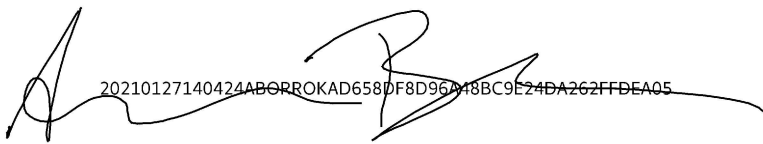
Valentino U.S.A., Inc.’s (**Valentino**) complaint is dismissed pursuant to CPLR §§ 3211 (a)(1) and (a)(7) because pursuant to Section 21.11 of the Lease, dated as of May 3, 2013, by and between Thor 693 LLC and Valentino (the **Lease**; NYSCEF Doc. No. 5) the parties expressly allocated the risk that 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.


20210127140424ABORROKAD658DF8D96A48BC9E24DA262FFDEA05

1/27/2021
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

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

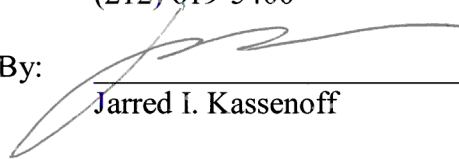
PLEASE TAKE NOTICE that Plaintiff VALENTINO U.S.A., INC. (“Appellant”), hereby appeals to the Supreme Court of the State of New York, Appellate Division, First Department, from the Decision and Order of the Supreme Court of the State of New York, County of New York (Andrew S. Borrok, J.S.C.), dated January 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
1250 Broadway, 27th Floor
New York, New York 10001
(212) 619-5400

By:


Jarred I. Kassenoff

To: CYRULI SHANKS HART & ZIZMOR LLP
Attorneys for Defendant
420 Lexington Avenue, Suite 2320
New York, New York 101
(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.

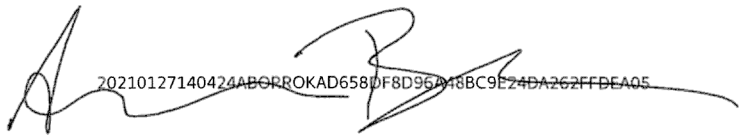
Valentino U.S.A., Inc.’s (**Valentino**) complaint is dismissed pursuant to CPLR §§ 3211 (a)(1) and (a)(7) because pursuant to Section 21.11 of the Lease, dated as of May 3, 2013, by and between Thor 693 LLC and Valentino (the Lease; NYSCEF Doc. No. 5) the parties expressly allocated the risk that Valentino 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.



20210127140424ABGRROKAD658DF8D96A48BC9E24DA262FFDEA05

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

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.		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
Case Type	Filing Type	
<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
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 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"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review
		<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
3			
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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:

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:

City: State: Zip: Telephone No:

E-mail Address:

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

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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):

From: [Robert Chester](#)
To: "APistor@CSHZLAW.COM"; [Robert Cyruli](#)
Cc: [Jarred I. Kassenoff](#); [Lucas Ferrara](#)
Subject: RE: Valentino U.S.A., Inc. v. 693 Fifth Owner LLC - Index No.: 652605/2020
Date: Tuesday, March 30, 2021 2:29:39 PM
Attachments: [Notification Letter 3-30-21 \(ex\).pdf](#)

Counselors:

Please see attached correspondence, sent on behalf on Jarred Kassenoff.

As further set forth therein, please be advised that we will be submitting a motion via NYSCEF to the Supreme Court of the State of New York, Appellate Division – First Department tomorrow at 2:30 p.m.

Sincerely,

Robert M. Chester, Esq. | Newman Ferrara LLP
1250 Broadway, 27th Floor | New York, NY 10001
P: 212.619.5400 | F: 212.619.3090
rchester@nflfp.com | www.nflfp.com

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NEWMAN FERRARA LLP

1250 Broadway, 27th Fl., New York, NY 10001
tel. 212-619-5400 • fax 212-619-3090
www.nflp.com

March 30, 2021

Via E-mail (RCyruli@cszlaw.com and APistor@cszlaw.com)

Cyruli Shanks & Zizmor LLP
420 Lexington Avenue, Suite 2320
New York, New York 10170
Attn: Robert J. Cyruli, Esq.
Andrew C. Pistor, Esq.

Re: *Valentino U.S.A., Inc. v. 693 Fifth Owner LLC*,
Supreme Court of the State of New York, County of New York,
Index No. 652605/2020;
Appellate Division: First Department

Dear Counsel:

As you know, this firm represents plaintiff, Valentino U.S.A., Inc. (“Plaintiff”), in connection with the above-referenced action.

Pursuant to 22 NYCRR 1250.4(b), please be advised that Plaintiff will be submitting a motion via NYSCEF to the Supreme Court of the State of New York, Appellate Division – First Department at the Courthouse located at 27 Madison Avenue, New York, New York 10010, on Wednesday, March 31, 2021 at 2:30 p.m. Such motion seeks: (a) a preliminary injunction temporarily enjoining, staying and tolling the running of the Decision and Order on Motion, dated and entered on January 27, 2021 (Hon. Andrew S. Borrok, J.S.C.), pending this Court’s hearing and determination of the motion and five days after the service of notice of entry thereupon (or as otherwise directed by this Court); and (b) a stay and tolling all proceedings, including but not limited to tolling Plaintiff’s time to answer and/or otherwise move, in the related action between the parties captioned 693 Fifth Owner, LLC v. Valentino U.S.A., Inc., Sup. Ct. N.Y. County, Index No. 651158/2021, pending the Court’s determination of this appeal.

We will endeavor to provide electronic copies of the papers we file with the Court at that time.

This letter is without prejudice to our client’s rights, remedies, claims and/or defenses, all of which are expressly reserved.

Very truly yours,

NEWMAN FERRARA LLP

By: 
Jarred I. Kassenoff, Esq.