

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

NEW WTC RETAIL OWNER LLC,

Plaintiff,

v.

VICTORIA'S SECRET STORES, LLC,

Defendant.

Index No.

SUMMONS

TO THE ABOVE-NAMED DEFENDANT;

YOU ARE HEREBY SUMMONED to answer the Verified Complaint in this action and to serve a copy of your answer on the Plaintiff's attorneys within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after service is complete if the summons is not personally delivered to you within the State of New York). If you fail to appear or answer, judgment will be taken against you by default of the relief demanded herein.

The Plaintiff designates New York County as the place of trial pursuant to CPLR §§ 503(a) and (c).

Dated: New York, New York
May 28, 2021

BLANK ROME LLP

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COMPLAINT

Plaintiff New WTC Retail Owner LLC (“Westfield” or “Landlord”), by and through its counsel, Blank Rome LLP, as and for its Complaint against defendant Victoria’s Secret Stores, LLC (“Victoria’s Secret” or “Tenant”), alleges as follows:

NATURE OF THE ACTION

1. This is a commercial lease dispute. Westfield, as landlord, seeks damages arising from Victoria Secret’s breaches of its contractual obligations and improper termination of a retail lease, as amended, for certain commercial space in the Westfield World Trade Center Shopping Center in Manhattan (the “Westfield WTC Mall”).

2. Following temporary tenant closures related to the COVID-19 pandemic, Victoria’s Secret purported to invoke an early lease-termination right that is available only after 12 consecutive months of what is known as “co-tenancy failure.”

3. The Westfield WTC Mall was never in co-tenancy failure for 12 consecutive months—a fact Westfield proved to Victoria’s Secret—and therefore Victoria’s Secret had no right to early termination of its lease. Nonetheless, Victoria’s Secret refused to pay rent and abandoned its leased premises with years remaining, all in breach of its lease.

4. As a result of Victoria's Secret's breaches, Westfield has been damaged in an amount that exceeds \$30 million.

THE PARTIES

5. Westfield is a foreign limited liability company duly authorized to do business in New York with a place of business located in Manhattan.

6. Upon information and belief, Victoria's Secret is a limited liability company formed under the laws of Delaware, with a principal place of business at 3 Limited Parkway, Columbus, Ohio, 43218.

JURISDICTION

7. This Court has jurisdiction over this action pursuant to CPLR §§ 301 and 302(a)(1) and (4).

8. Venue is proper within this judicial county pursuant to CPLR §§ 503(a) and (c) because all parties have places of business located in New York County.

FACTUAL BACKGROUND

The Lease

9. On February 26, 2015, Westfield as landlord and Victoria's Secret as tenant executed a written lease agreement for Store No. LL4410 at the Westfield World Trade Center Mall, as amended by Lease Amendment No.1 dated December 6, 2017 (together, the "Lease").

10. The term of the Lease is for twelve years (the "Term") and expires on January 31, 2029.

11. The Lease requires Victoria's Secret to pay "Rental," which includes "Minimum Annual Rental, Percentage Rental and Additional Rental." (Lease §§ 2.01(a), 2.06, 2.08(b).) The Lease allows Westfield to recover interest on past due amounts. (*Id.* § 27.13.)

12. Section 7.02(a) of the Lease requires Victoria's Secret to be open for business and to operate in the Premises during the entire term of the Lease:

Subject to [7.02(f)], Tenant agrees to be open for business and to operate in all of the Premises during the entire Term following the Rental Commencement Date, except for brief periods due to delays as provided in Section 27.04 and events of casualty and condemnation, and Tenant agrees to conduct its business at all times in a first class and reputable manner, adequately staffed and stocked in accordance with sound mercantile practices. Subject to the terms of paragraph (f) below, Tenant shall be obligated to be open for business and to operate continuously seven (7) days per week, from 10:00 AM to 9:00 PM from Mondays to Saturdays and from 11:00 AM to 7:00 PM on Sundays (such hours and days, the "Basic Operating Days and Hours") days and hours, and during all such other hours established by Landlord as Retail Component business hours from time to time.

Lease § 7.02(f).

13. Section 7.02(f) of the Lease allows Victoria's Secret to pay alternate, reduced rent if the "Co-tenancy Requirements," which only apply to areas of the Westfield World Trade Center Mall that are "available for tenants . . . to then be open and operating" are not met:

The "Co-tenancy Requirements" shall mean that tenants occupying at least seventy-five percent (75%) of the gross leasable Floor Area in the below ground level portion of the Retail Component **that is then available for tenants of the Retail Component to then be open and operating** (including the Premises), are open for business and operating continuously during such hours. Landlord intends to open the Retail Component on the Grand Opening Date other than the areas delineated on "Exhibit A-3". If the Co-Tenancy Requirements are not met, then for the period (hereinafter referred to as the "Co-tenancy Percentage Period") beginning on the date the Co-tenancy Requirements are not met and ending on the date the Co-tenancy Requirements are again fully satisfied, except as provided hereinbelow (but only if Tenant is open for business and operates continuously as otherwise required hereinabove), Tenant shall pay in lieu of Minimum Annual Rental only, an amount equal to (i) five percent (5%) of Gross Sales (not to exceed the Minimum Annual Rental otherwise payable hereunder) plus (ii) the

Applicable CAM Amount (hereinafter defined) ((i) and (ii), collectively, “Alternate Rent”) for each month or fraction thereof during the Co-tenancy Percentage Period . . .

Lease § 7.02(f) (emphasis added).

14. If the Co-tenancy Requirements “are not satisfied for twelve (12) consecutive months,” then Victoria’s Secret is allowed to terminate the Lease, but only if Victoria’s Secret provides Westfield at least ninety (90) days’ written notice within seventy-five (75) days after the expiration of the twelve (12) month period:

Tenant shall have the right to terminate this Lease, by written notice to Landlord, within seventy-five (75) days after the expiration of the twelve (12) month period, the effective date of such termination to be no sooner than ninety (90) days after such notice. Such right of termination shall be nullified in the event the Co-tenancy Requirements are satisfied during the ninety (90) day period.

Lease § 7.02(f)(ii).

15. If Victoria’s Secret were to elect to terminate the Lease pursuant to such Section 7.02(f)(ii), that election “shall be nullified” if Westfield meets the Co-tenancy Requirements “during the ninety (90) day period” after notification of such election. (*Id.*)

16. On January 4, 2021, Victoria’s Secret informed Westfield that it was electing to terminate the Lease as of January 1, 2021 because the Co-tenancy Requirements were purportedly not met for a period of twelve consecutive months.

17. Westfield responded with documentation evidencing that there was no failure to meet the Co-tenancy Requirements for 12 consecutive months that would entitle Victoria’s Secret to terminate the Lease.

18. Victoria’s Secret nevertheless maintained that, based on nothing more than “physical observ[ations] on multiple occasions by [Victoria’s Secret] personnel,” the Co-tenancy Requirements were not met.

19. By letter dated April 5, 2021, Westfield provided additional, detailed data confirming that (i) the Co-tenancy Requirements were not unsatisfied for a period of twelve consecutive months, and (ii) further, the Co-tenancy Requirements were satisfied during the 90-day period from January 1, 2021 through April 1, 2021, thereby nullifying any purported right to terminate predicated on Victoria Secret's claim that the Co-tenancy requirements had not been met for the prior twelve months. (Lease § 7.02(f)(iii).)

20. During this period, Victoria's Secret also stopped paying rent.

21. On March 11, 2021, Westfield sent Victoria's Secret a Notice of Default pursuant to Section 19.01(a) of the Lease for failure to pay Rental in the amount of \$4,318,277.87 and informed Victoria's Secret that the failure to operate continuously in the Premises would constitute an additional default.

22. Victoria's Secret failed to cure its default within the cure period, resulting in an Event of Default.

23. On or about April 30, 2021, Victoria's Secret ceased operations and abandoned the Premises.

24. By letter dated May 17, 2021, Westfield advised Victoria's Secret that its surrender was in violation of the Lease and reserved all rights and remedies including the right to recover all rental under the Lease through the Lease term, which expires on January 31, 2029.

25. By notice dated May 24, 2021, Westfield informed Victoria's Secret that it was terminating the Lease as of May 27, 2021 due to Victoria's Secret's default.

26. Lease Section 19.03(c) provides that Victoria's Secret shall be liable for Rental "as if this Lease had not been terminated":

Notwithstanding any termination of this Lease or termination of Tenant's rights to possession, or re-entry of the Premises by Landlord or its agents or servants, Tenant shall pay to Landlord all Rental and other charges payable under this Lease by Tenant to Landlord to the date upon which this Lease and the Demised Term shall have terminated, expired and come to an end or to the date of re-entry upon the Premises by Landlord, as the case may be and (y) Tenant shall pay and be liable for (on the days originally fixed herein for the payment thereof) the installments of Rental as if this Lease had not been terminated and as if Landlord had not entered . . .

Lease § 19.03(c).

27. Lease Section 19.03(f) provides that Westfield shall be entitled to accelerate unpaid Rental for the balance of the Term in lieu of receiving monthly payments.

28. Lease Section 27.22 provides that Westfield is entitled to recover its attorneys' fees if it prevails in an action against Victoria's Secret related to the Lease:

If at any time after the date that this Lease has been executed by Landlord and Tenant, either Landlord or Tenant institutes any action or proceeding against the other relating to the provisions of this Lease or any default hereunder, the non-prevailing party in scorch action or proceeding shall reimburse the prevailing party for the reasonable expenses of attorneys' fees and all costs and disbursements incurred therein by the prevailing party, including, without limitation, any such fees, costs or disbursements incurred on any appeal from such action or proceeding. Subject to the provisions of local law, the prevailing party shall recover all such fees, costs or disbursements as costs taxable by the court or arbiter in the action or proceeding itself without the necessity for a cross-action by the prevailing party.

FIRST CAUSE OF ACTION
Breach of Contract (Pre-Surrender Amount)

29. Westfield incorporates the allegations in paragraphs 1 through 28 as if fully restated herein.

30. The Lease is a valid and enforceable contract.
31. Westfield has performed all of its obligations under the Lease.
32. Victoria's Secret breached the Lease by failing to pay Rental in full when due pursuant to Lease §§ 2.01(a), 2.06, 2.08(b), and 19.01(a).
33. Victoria's Secret breached the Lease by failing to stay open and operate under Sections 7.02(a) and 19.01(f) of the Lease.
34. Victoria's Secret breached the Lease by abandoning the Premises years before the expiration of the Term.
35. Victoria's Secret's breaches of the Lease have directly and proximately damaged Westfield.
36. Westfield is entitled to recover damages, including, without limitation, past Rental in the amount of at least \$4,265,858, plus interest.
37. Westfield is entitled to recover its attorneys' fees and costs pursuant to Section 27.22 of the Lease.

SECOND CAUSE OF ACTION
Breach of Lease (Post-Surrender Amount)

38. Westfield incorporates the allegations in paragraphs 1 through 37 as if fully restated herein.
39. The Lease is a valid and enforceable contract.
40. Westfield has performed all of its obligations under the Lease.
41. Victoria's Secret breached the Lease by failing to pay Rental in full when due pursuant to Lease §§ 2.01(a), 2.06, 2.08(b), and 19.01(a).
42. Victoria's Secret breached the Lease by failing to stay open and operate under Sections 7.02(a) and 19.01(f) of the Lease.

43. Victoria's Secret breached the Lease by abandoning the Premises years before the expiration of the Term.

44. By virtue of Victoria's Secret's impermissible surrender of the Premises, failure to continuously open for business and operate and failure to pay Rental as it became due and owing, Westfield terminated the Lease effective May 27, 2021.

45. As a result of Victoria Secret's defaults under the Lease and the resulting termination, Westfield is entitled to accelerate all Rental as if the Lease had not been terminated.

46. Accordingly, Westfield is entitled to recover damages, including, without limitation, accelerated Rental in the amount of at least \$28,123,223, plus interest and reletting costs.

47. Westfield is entitled to recover its attorneys' fees and costs pursuant to Section 27.22 of the Lease.

WHEREFORE, Westfield demands judgment against Victoria's Secret as follows:

- a) On the First Cause of Action, an award of damages in an amount to be determined at trial, but in no event less than \$4,265,858, plus interest,
- b) On the Second Cause of Action, an award of damages in an amount to be determined at trial, but in no event less than \$28,123,223, plus interest and reletting costs;
- c) An award of attorneys' fees, costs, and expenses incurred in connection and this action; and

d) Such other and further relief as the Court deems just and proper.

Dated: New York, New York
May 28, 2021

BLANK ROME LLP

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