

Yellowstone injunctions: tolling the cure period in New York lease disputes

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For business enterprises, a commercial lease often represents one of their most valuable assets — obtaining and keeping a lease is critical to the success of the enterprise. An alleged lease violation can represent an existential threat to a business because once a lease is terminated it typically cannot be revived.

While the legislative history of RPL § 235-h mentions Yellowstone injunctions expressly, the text of the law itself does not specifically ban waivers of Yellowstone injunctions or other injunctive relief, only waivers of declaratory judgment actions.

When a landlord serves a notice to cure an alleged default, a commercial tenant may only have a matter of days to resolve the problem before facing termination, making it nearly impossible for the tenant to challenge the validity of the alleged default without losing the lease. New York courts have created a legal remedy to avoid this Hobson's choice — the *Yellowstone* injunction.

A *Yellowstone* injunction tolls the tenant's time to cure the alleged default while the tenant pursues a legal determination as to whether cure is in fact required under the terms of the lease.

By pursuing this injunctive relief, a commercial tenant can avoid the potentially unnecessary cost of curing the alleged default, while ensuring that its interest in the lease is protected until a court has had a chance to weigh in on the merits of the dispute.

This three-part series provides an overview of the key legal considerations in obtaining or defending against a *Yellowstone* injunction. Part One traced this historical background of this unique remedy and sets forth the essential elements of a claim for *Yellowstone* relief.

Part Two discussed whether injunctive relief can be obtained in certain common default scenarios. Finally, Part Three below highlights some recent developments in this area of law.

Part three: Recent developments in *Yellowstone* injunction jurisprudence

Waiver

In an attempt to circumvent the legal protections provided to New York commercial tenants via *Yellowstone* injunctions, it became a more common practice in recent years for landlords to insist upon waiver provisions in commercial leases that would foreclose a tenant's ability to seek *Yellowstone* relief.

The enforceability of such waivers as against public policy was hotly contested, and in 2019, the issue reached a head. That year, the Court of Appeals held in *159 MP Corp. v. Redbridge Bedford* that the inclusion of a *Yellowstone* waiver in a commercial lease did not violate the public policy of the State of New York.²

*More recently, the COVID-19 pandemic has upended the commercial real estate market and has unsurprisingly left an impact on *Yellowstone* jurisprudence.*

This victory on behalf of landlords was short-lived. In response to the Court of Appeals ruling, the New York legislature quickly enacted Real Property Law § 235-h, which provides that

[n]o commercial lease shall contain any provision waiving or prohibiting the right of any tenant to bring a declaratory judgment action with respect to any provision, term or condition of such commercial lease. The inclusion of any such waiver provision in a commercial lease shall be null and void as against public policy.³

Although this legislation seemingly settles the issue of *Yellowstone* waivers going forward, the legislature may have inadvertently left the door open to such waivers under certain circumstances.

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This ambiguity leaves open the possibility that a landlord could include a waiver specific to *Yellowstone* injunctions, outside the context of a declaratory judgment action, in a commercial lease.⁴ Nonetheless, New York courts would likely weigh the policy behind Real Property Law § 235-h and the express terms of its legislative history before deciding to enforce such a waiver.

The impact of the COVID-19 pandemic

More recently, the COVID-19 pandemic has upended the commercial real estate market and has unsurprisingly left an impact on *Yellowstone* jurisprudence.

Some courts have appeared more willing to consider a tenant's financial condition and grant an injunction to provide further opportunity to cure the alleged nonpayment default over a longer period of time.

At the outset of the pandemic, the government issued various executive and administrative orders to protect public health. For example, on March 22, 2020, Chief Administrative Judge DiFiore issued Administrative Order 78/20 (AO/78/20) temporarily suspending the filing of all new “non-essential” actions while the New York court system took steps to adapt to a remote work environment.

Although, the order did not expressly identify *Yellowstone* proceedings as “essential” actions, New York County Supreme Court did permit the filing of at least one such action during the pendency of the Administrative Order, thereby reaffirming the importance of this legal remedy.⁵

Similarly, on May 7, 2020, Governor Cuomo issued Executive Order 202.28, which suspended all eviction and foreclosure proceedings for residential and commercial tenants as a result of nonpayment of rent.⁶ Since that time, courts have cited the order as additional support for the granting of *Yellowstone* injunctions in the context of alleged nonpayment defaults.⁷

Although the eviction moratorium ended on February 26, 2021, it was extended through May 1, 2021 for tenants who were able to demonstrate hardship.⁸ The expiration of this moratorium is expected to bring with it a flood of new foreclosure and eviction

proceedings as a result of nonpayment, and consequently, a raft of new *Yellowstone* injunctions.

Moreover, as a result of the undeniable impacts of the pandemic on businesses throughout the state, some courts have appeared more willing to consider a tenant’s financial condition and grant an injunction to provide further opportunity to cure the alleged nonpayment default over a longer period of time.

For example, in *Healthy Choice Concepts Inc. v. Glens Falls Hosp.*, the tenant sought a *Yellowstone* injunction in response to a notice of default relating to failure to pay rent and maintain the requisite hours of operation.

The tenant disputed the arrears on the ground that its ability to operate had been impacted by the global pandemic, and demonstrated that it had the ability to pay at least the undisputed portion of the past-due rent.

In granting the requested *Yellowstone* relief, the court relied in part on the realities of the pandemic: “plaintiff has satisfied the fourth element necessary to obtain a *Yellowstone* injunction . . . plaintiff’s contentions in this regard are at least reasonable. Indeed, many businesses are struggling to survive amidst the ongoing pandemic.”⁹

Conclusion

Yellowstone injunctions allow commercial tenants to avoid termination while they contest the validity of an alleged default, and they represent a thorn in the side of the landlords. It is important for both tenants and landlords to understand the key issues surrounding *Yellowstone* injunctions before evaluating the merits of the relief available.

Notes

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² 33 N.Y.3d 353 (2019). See *Sharply Divided Court of Appeals Upholds Waiver of Declaratory Relief by Commercial Tenants*, Commercial Division Blog <https://bit.ly/2VjVoLU> (June 3, 2019).

³ RPL § 235-h. See *New Legislation Bans Waivers of Declaratory Relief in Commercial Leases on Public Policy Grounds*, Commercial Division Blog, <https://bit.ly/3lAsOjU> (Feb. 3, 2020).

⁴ *Id.*

⁵ *Philippe MP LLC v. Sahara Dreams, LLC*, Index No. 0153043/2020 (Sup. Ct. N.Y. Cty.) (Dkt. No. 50)

⁶ N.Y. Comp. Codes R. & Regs. tit. 9, § 8.202.28 (2020)

⁷ *188 Ave. A Take Out Food Corp. v. Lucky Jab Realty Corp.*, 2020 WL 7629597, (N.Y. Sup. Ct. Dec. 21, 2020) (*Yellowstone* injunction to a tenant in arrears citing Governor Cuomo’s Executive Order and further holding that *Yellowstone* injunction was proper because landlord likely violated the recently passed prohibition on commercial harassment).

⁸ New York State COVID-19 Emergency Protect Our Small Businesses Act of 2021 (S471A/A320).

⁹ *Healthy Choice Concepts Inc. v. Glens Falls Hosp.*, No. EF2020-68127, 2020 WL 7393417, at *4 (Sup. Ct. Warren Cty. Dec. 16, 2020).

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