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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.

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

Part two: The ability to cure common default scenarios

While courts can typically quickly resolve the first three requirements of a *Yellowstone* injunction — the existence of a lease, proper notice of default and a timely request for relief — the fourth requirement — a tenant's ability and willingness to cure — usually requires a more in-depth, fact-specific analysis.

Nonetheless certain types of defaults occur with sufficient frequency that a survey of the case law involving such defaults provides insight into the considerations that typically animate a court's resolution of the case and the type of proof that may be sufficient to demonstrate ability and willingness to cure.

Non-payment

New York courts have recognized that *Yellowstone* relief is proper even where the only alleged default is non-payment of rent, provided a tenant can demonstrate an ability and willingness to repay the arrears if ordered to do so.[2] In such cases, courts may also order the tenant to pay all undisputed rent, and any additional rent due in the past or future, during the pendency of the proceedings.[3]

Because of these parallel avenues for relief, courts may have to contend with the simultaneous filing of a Yellowstone injunction and summary nonpayment proceedings.

Such relief is still available despite the fact that a landlord may also elect to commence a summary nonpayment proceeding pursuant to § 711(2) of New York's Real Property Actions and Proceedings Law.

In a nonpayment summary proceeding, the landlord seeks to remove a tenant in possession after the tenant's failure to pay rent. Prior to filing the petition, however, the landlord must serve the tenant with a notice of failure to pay rent — or rent demand — affording the tenant the statutory-requisite notice period to pay the arrears.[4]

Under the statute, a tenant may stay the summary proceeding at any time before an eviction warrant is issued by paying the amount due.[5] As a result, courts often find that "the need for *Yellowstone* relief is obviated by the procedural safeguards extant within the context of the summary nonpayment proceeding."[6]

Thus, in *M.B.S. Love Unlimited, Inc. v. Jaclyn Realty Assocs.*, for example, the court denied a *Yellowstone* injunction, explaining that the purpose of the injunction is to provide for a cure period, but:

> [t]here was no need for such injunctive relief in this case, however, as the notice served by the landlord was the statutory prerequisite to a summary nonpayment proceeding rather than

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a notice of default and a notice to cure the default within a specified period of time.[7]

Where, however, the landlord issues a notice of default as a prerequisite to terminating the lease, rather than commencing a summary nonpayment proceeding subject to the statutory stay provisions, *Yellowstone* relief will still be available.[8]

Because of these parallel avenues for relief, courts may have to contend with the simultaneous filing of a *Yellowstone* injunction and summary nonpayment proceedings. In these rare situations, the court may stay one action because there are two filings seeking the same relief and "judicial economy dictates that both actions not proceed simultaneously."[9]

Improper assignment and subleases

New York courts have also granted *Yellowstone* injunctions where the alleged default is a tenant's improper assignment or sublease. Such relief is typically only available where the tenant has taken steps to cure the default prior to the commencement of *Yellowstone* proceedings.

For example, in *Reade v. Highpoint Assocs. IX, LLC*, the lease agreement prohibited the operation of a "surplus" or "discount" store. When the tenant subleased the premises to a thrift shop, the landlord issued a notice of default.

The tenant responded by filing for *Yellowstone* relief. The court granted the injunction on the grounds that the tenant had served the subtenant with its own notice of default and threatened to terminate the subtenant's sublease unless the use violation ceased, which was sufficient to demonstrate the tenant's ability and willingness to cure the alleged violation of the lease.[10]

Moreover, where the tenant has the legal ability under the lease to obtain the landlord's consent to the challenged assignment, courts have granted *Yellowstone* relief.[11]

By contrast, in *Pergament Home Centers, Inc. v. Net Realty Holding Tr.*, the court denied a *Yellowstone* injunction because the tenant "did not manifest its desire to cure until the instant appeal."[12]

Similarly, in *JSM Capital Holding Corp. v. Vandergrand Properties Co., L.P.*, the court denied a *Yellowstone* injunction because the tenant "did not state any willingness to cancel the [] Sublease and remove [tenant] from the Premises."[13]

It should also be noted that the terms of the lease may provide that a sublease is an incurable default — such as by providing for automatic termination of the lease in the event of an improper assignment or sublease — in which case *Yellowstone* relief will typically be unavailable.[14]

Unauthorized alterations of the premises

Where a tenant is alleged to have violated a lease by making unauthorized alterations of the premises, the availability of *Yellowstone* relief will typically turn on the extent of the alterations and the tenant's willingness to restore or repair the existing structure.

Thus, in *ERS Enterprises, Inc. v. Empire Holdings, LLC*, where the landlord did not dispute that the alterations could be reversed, and the tenant clearly stated its "willingness to restore the premises to their prior condition," the First Department reversed the trial court's denial of a *Yellowstone* injunction and remanded for further proceedings.[15]

Conversely, in *Metropolis Westchester Lanes, Inc. v. Colonial Park Homes, Inc.*, the Second Department reversed the lower court's grant of injunctive relief because the tenant indicated that it planned to extensively renovate the premises and had no intention of repairing the existing structure.[16]

Repairs

Disputes involving repairs arise frequently in the context of *Yellowstone* litigation. Indeed, the Court of Appeals faced just such a dispute in the landmark *Yellowstone Shopping Center* case.

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In the typical case, courts grant a *Yellowstone* injunction to maintain the status quo while the dispute regarding which party bears responsibility for undertaking the necessary repairs is adjudicated.

For example, in *Zaid Theatre Corp. v. Sona Realty Co.*, the court granted a *Yellowstone* injunction where the tenant established that it had already undertaken certain repairs recommended by its insurance carrier and that it had the ability and desire to effectuate any additional necessary repairs in the event that it was found to be responsible for such repairs under the terms of the lease.[17]

Similarly, where a tenant begins a repair prior to seeking a *Yellowstone* injunction, courts will typically issue a *Yellowstone* injunction even if the tenant cannot complete the repairs within a statutorily mandated notice period.[18]

Noise

Where the alleged default at issue is based on excessive noise, the court's analysis will typically turn on whether the tenant is genuinely willing to attempt to cure the default, rather than on establishing that the excessive noise can be fully eliminated.

For example, in *Garuda Thai Corp. v. Great Canal Realty Corp.*, the court noted that "[f]ull evidentiary proof of the ability to cure is not required when seeking a *Yellowstone* injunction."[19] Rather, "the court must be convinced of [the tenant's] desire and ability to cure

the defects."[20] The court found that the tenant had demonstrated sufficient efforts to cure the problem such as instructing teachers to minimize noise and cancelling children's classes.[21]

It therefore granted a *Yellowstone* injunction even though it acknowledged that the tenant may in fact have been generating excessive noise and consequently required the tenant to provide an undertaking.[22]

By contrast, in *146 Broadway Assocs., LLC v. Bridgeview at Broadway, LLC*, the court denied *Yellowstone* relief even where the tenant promised to undertake certain remedial measures, because it found that the tenant had failed to act on its own acoustic expert's recommendations as to necessary remediation measures during the pendency of the motion.[23]

Building code violations

New York courts will also grant *Yellowstone* relief in cases involving an alleged default related to building code violations — even where the work necessary to cure the violation is extensive and difficult to complete, provided that a tenant has made a good faith effort to cure the default by the time the proceedings have commenced.

Under certain circumstances, a tenant may be able to obtain a Yellowstone injunction where it is alleged to have violated the lease by encumbering the property with a lien.

For example, in *Baruch, LLC v. 587 Fifth Ave., LLC*, the Appellate Division overturned the lower court's refusal to issue a *Yellowstone* injunction. The tenant and landlord were advised by the Department of Buildings that a building wall was in hazardous condition and needed immediate maintenance work.

The landlord served a notice to cure and the tenant had undertaken initial steps to perform the work, including hiring a contractor, but because the necessary repairs to cure the violation were more extensive than anticipated, the work could not be completed within the cure period, and was expected to take several months or longer.

The Appellate Division held that even though the tenant did not cure the violation in the time required by the notice to cure, the tenant had made a sufficient showing of willingness to cure, and therefore, *Yellowstone* relief was warranted.[24]

Encumbering the premises with a lien or indebtedness

Under certain circumstances, a tenant may be able to obtain a *Yellowstone* injunction where it is alleged to have violated the lease by encumbering the property with a lien.

For example, in *Pomodoro Grill, Inc. v. I.M.V.*, the court granted a *Yellowstone* injunction where the mechanics lien in question had been imposed by an affiliate of the landlord during an ongoing dispute with the tenant, but the court required the tenant to either post a bond or place the entire amount of the lien in escrow pending final adjudication of the case, to ensure that the tenant had the ability to cure if necessary.[25]

Nonetheless, where the tenant cannot demonstrate that it has the financial wherewithal to repay the debt if ordered to do so, a court may decline to grant *Yellowstone* relief on the grounds that the tenant has failed to establish its ability and willingness to cure the alleged default.[26]

Failure to maintain liability insurance

Several New York courts have concluded that, unlike the alleged defaults discussed above, the failure to maintain liability insurance is an incurable default, and that accordingly, *Yellowstone* relief is not available in cases involving such a default.[27]

This is true even where the tenant is willing to obtain insurance going forward because it "does not protect [the landlord] against the unknown universe of any claims arising during the period of no insurance coverage."[28]

Nonetheless, at least one court has granted *Yellowstone* relief in a case involving the failure to maintain liability insurance, where certain conditions were met. In that case, the tenant was able to demonstrate that it was able and willing to obtain insurance that eliminated the coverage gap, which the court found rendered the alleged default curable, thus entitling the tenant to a *Yellowstone* injunction.[29]

Notes

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[2] *3636 Greystone Owners, Inc. v. Greystone Bldg.*, 4 A.D.3d 122, 123 (1st Dep't 2004); *Runes v. Douglas Elliman-Gibbons & Ives*, 83 A.D.2d 805, 805 (1st Dep't 1981).

[3] *Fifth Ave. Rest. Corp. v. RCPI Landmark Properties, LLC*, 13 Misc. 3d 1206(A), 824 N.Y.S.2d 753 (Sup. Ct. 2006); *Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating, Inc.*, 205 A.D.2d 421, 423 (1st Dep't 1994).

[4] RPAPL § 711(2).

[5] RPAPL § 751(1).

[6] F.N.Y. Prac, Landlord and Tenant Practice in New York § 10:118.

[7] 215 A.D.2d 537, 538 (2d Dep't 1995).

[8] *Lexington Ave. & 42nd St. Corp.*, 205 A.D.2d at 423-24.

[9] *Bennigan's of New York, Inc. v. Great Neck Plaza, L.P.*, 223 A.D.2d 615 (2d Dep't 1996).

[10] 1 A.D.3d 276, 276-77 (1st Dep't 2003); *see also East Best Food v. NY 46th*, 56 A.D.3d 302, 303 (1st Dep't 2008) (granting injunction where tenant's shareholders agreed to cure default by undoing transaction to transfer shares).

[11] *See Artcorp v. Citirich Realty*, 124 A.D.3d 545, 546 (1st Dep't 2015); *NNA Rest. Mgmt. v. Eshaghian*, Index No. 602568/02, 2002 WL 34460625 (Sup. Ct. N.Y. Cty. Sept. 30, 2002).

[12] 171 A.D.2d 736, 737 (2d Dep't 1991). *See also Bliss World LLC v. 10 W. 57th St. Realty LLC*, 170 A.D.3d 401, 402 (1st Dep't 2019) (denying a Yellowstone injunction because "although the tenant has generally stated that it is willing to cure any assignment violation, it does not explain how it will undo the assignment or indicate whether it is willing or able to do so"); *St. Luke's-Roosevelt Hosp. Ctr. v. WestSide Radiology Assocs., P.C.*, 65 Misc. 3d 129(A), 118 N.Y.S.3d 909 (N.Y. App. Term. 2019).

[13] Index No. 0115850/2007, 2008 WL 1844280, at *4 (Sup. Ct. N.Y. Cty. Apr. 15, 2008).

[14] *Pergament Home Centers*, 171 A.D.2d at 737; *Excel Graphics Tech. v. CFG/AGSCB 75th Ninth Ave.*, 1 A.D.3d 65, 71 (1st Dep't 2003).

[15] 286 A.D.2d 206, 207 (1st Dep't 2001); *see also Britti v. Perry Thompson Third*, 26 A.D.3d 235, 236 (1st Dep't 2006) (affirming *Yellowstone* injunction where tenant was willing and able to remove unapproved ventilation system and equipment from premises); *Surdeanu v. 137 East 110th Street, LLC*, 2003 WL 27382042, at *1 (N.Y. Sup. Ct. Apr. 11, 2003).

[16] 187 A.D.2d 492, 493 (2d Dep't 1992).

[17] 18 A.D.3d 352, 354 (1st Dep't 2005).

[18] *Stolz v. 111 Tenants Corp.*, 3 A.D.3d 42, 422 (1st Dep't 2004).

[19] Index No. 0600724/2008, 2008 WL 1956103, at *2 (Sup. Ct. N.Y. Cty. Apr. 17, 2008).

[20] *Id.*

[21] *Id.* at *3.

[22] *Id.* at *4.

[23] 164 A.D.3d 1193, 1195 (2d Dep't 2018); *see also Cemco Rests. V. Ten Park Ave. Tenants*, 135 A.D.2d 461, 463 (1st Dep't 1987) (vacating *Yellowstone* injunction where tenant persisted in noisy activity); *Garcia v. Time Equities, Inc.*, 2008 WL 4972879 (N.Y. Sup. Ct. Nov. 13, 2008) (denying Yellowstone relief because Plaintiff failed to establish willingness to cure the noise problem).

[24] 44 A.D.3d 339, 340 (1st Dep't 2007). *See also New Cingular Wireless PCS, LLC v. Booth 15 Property, LLC*, 2009 WL 5225178 (N.Y. Sup. Ct. Dec. 16, 2009) (granting a Yellowstone injunction pending a resolution of a dispute between a landlord and tenant whether tenant violated the building code).

[25] 49 Misc. 3d 1202(A), 20 N.Y.S.3d 294 (Sup. Ct. N.Y. Cty. 2015). *See also Stix Restaurant Group, LLC v. Christos Realty Inc.*, 2013 WL 5290147, at *2 (N.Y. Sup. Ct. Sep. 16, 2013).

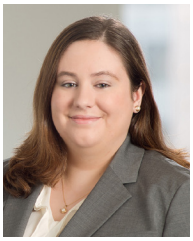
[26] *Yeladim 1319 Corp. v. Straw 57, Inc.*, 2020 WL 3033537, at *2 (N.Y. Sup. Ct. June 2, 2020); *Gyncor, Inc. v. Ironwood Realty Corp.*, 259 A.D.2d 363, 363 (1st Dep't 1999).

[27] *See Prince Fashions, Inc. v 60G 542 Broadway Owner, LLC*, 149 A.D.3d 529, 530 (1st Dep't 2017) ("Because plaintiff's evident failure to obtain insurance naming defendant as an additional insured constitutes an incurable default, were we to consider the merits, plaintiff would not be entitled to *Yellowstone* injunctive relief."); *Rui Qin Chen Juan v. 213 W. 28 LLC*, 149 A.D.3d 539 (1st Dep't 2017) (same); *JT Queens Carwash v. 88-16 Northern Blvd. LLC*, 101 A.D.3d 1089 (2d Dep't 2012) ("[T]he failure to maintain the requisite insurance would be an incurable default that formed an independent basis for the denial of *Yellowstone* relief.")

[28] *Federated Retail Holdings v. Weatherly 39th St, LLC*, 32 Misc.3d 247, (Sup. Ct. N.Y. Cty. Apr. 11, 2011), *aff'd* 95 A.D.3d 605 (1st Dep't 2012).

[29] *See Great Wall 384, Inc. v. 384 Grand Street Housing*, Index No. 654198/2016, 2016 WL 5672959, at *1 (Sup. Ct. N.Y. Cty. Sep. 29, 2016).

About the authors

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