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

By Muhammad U. Faridi, Esq., Jacqueline L. Bonneau, Esq., Nadav D. Ben-Zur, Esq., and Wolete Moko, Esq., Patterson Belknap Webb & Tyler LLP[1]

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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 below traces this historical background of this unique remedy and sets forth the essential elements of a claim for *Yellowstone* relief. Part Two will discuss 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 one: Historical background and key elements of *Yellowstone* injunctions

The history of *Yellowstone* injunctions in New York

Yellowstone injunctions take their name after the 1968 Court of Appeals case that first formally recognized the possibility of granting injunctive relief to stay the cure period in a commercial lease — *First National Stores Inc. v. Yellowstone Shopping Center*.[2]

The case involved a dispute between the landlord and tenant regarding which party was responsible for installing an automatic sprinkler system. Rather than install the sprinkler system after receiving a notice of default, the tenant filed a declaratory judgment action and a motion for preliminary injunction, which the tenant made returnable after the cure period had passed.

While the motion for preliminary injunction was pending, the landlord terminated the lease. The trial court ultimately held, and the Appellate Division affirmed, that the tenant was in fact responsible for installing the sprinkler system. Nonetheless, the Appellate Division refused to uphold the termination of the lease because the "tenant was acting in good faith when it brought the declaratory judgment action."[3]

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The Court of Appeals reversed, holding that the Appellate Division had no power to reinstate the lease after it had been properly terminated in accordance with its terms. In doing so, however, the Court of Appeals recognized that the tenant could have sought a temporary restraining order before the cure period expired in order to preserve its rights to the lease while the underlying dispute was adjudicated.[4] Thus was born the *Yellowstone* injunction.

The essential elements of a *Yellowstone* injunction

Since that time, New York courts have routinely granted (and denied) *Yellowstone* injunctions to tenants seeking to challenge the validity of a notice of default.[5] In order to obtain such relief, a tenant must establish four essential elements:

(1) The existence of a commercial lease;

(2) The tenant received a notice of default, a notice to cure, or a threat of termination of the lease;

(3) The tenant sought the injunction prior to the termination of the lease and the expiration of the specified cure period; and

(4) The tenant is willing and able to cure the alleged default.[6]

New York courts have recognized that "*Yellowstone* injunctions are available on a far lesser showing than preliminary injunctions."[7] Thus, a tenant typically will not be required to show a likelihood of success on the merits, irreparable injury or that the balance of the equities favors preliminary relief.[8]

Rather, to obtain *Yellowstone* relief, a tenant "can simply deny the alleged breach of its lease" without showing a likelihood of success on the merits,[9] because the "the threat of termination of the lease and forfeiture, standing alone, has been sufficient to permit maintenance of the *status quo*," by injunction.[10]

Notice

As set forth above, the landlord's proper notice to a tenant is a prerequisite for a *Yellowstone* injunction. Generally speaking, such notice will be valid on its face when it advises the tenant of "its purported violations of the subject lease, the conduct required for compliance, the time allowed for compliance, and the consequences of failing to comply with the notice to cure."[11]

Moreover, "where a notice of termination is premature under the terms of a lease, the notice is invalid, and thus the service of the notice will not bar a tenant from obtaining *Yellowstone* relief."[12]

Timeliness

As demonstrated by the case after which these injunctions are named, it is of paramount importance that a tenant seeking a *Yellowstone* injunction ensure that its motion is timely. Specifically, a tenant must file for a *Yellowstone* injunction before the termination of the subject lease and prior to the expiration of the cure period established in both the lease and the landlord's notice to cure.[13]

Where a tenant fails to file a timely motion for a temporary restraining order, "a court is divested of its power to grant a *Yellowstone* injunction," and the tenant risks losing its interest in the lease.[14]

Nonetheless, some leases recognize that a particular default may not be curable within the standard "cure period" and provide an additional, unspecified period to cure such longer-term defaults.

In such circumstances, courts have found that a tenant may be entitled to a *Yellowstone* injunction after the standard cure period has passed if the tenant "with good faith and diligence commences curing within the specified period of time, but cannot complete the cure within that period."[15]

Ability and willingness to cure

A tenant must also demonstrate an ability and willingness to cure the default in order to obtain a *Yellowstone* injunction.[16] As is set forth in greater detail below, whether the tenant is in fact able and willing to cure the alleged default will often be the central disputed issue in a *Yellowstone* proceeding.

A tenant can generally meet its burden with respect to this element by submitting an attestation of ability and willingness to cure in support of its request for emergency relief.[17] If a tenant fails to explain how it would cure the alleged lease violation or to "indicate whether it was willing and able to do so," however, the court may refuse to grant the requested *Yellowstone* injunction.[18]

New York case law provides many examples of denied injunctions where a tenant was unable to demonstrate an ability and willingness to cure the default, including where the tenant failed affirmatively to declare its ability to cure the alleged defaults;[19] where the tenant made no offer to cure the alleged defaults;[20] and where the tenant continued violating the lease during the cure period.[21]

On the other hand, demonstrating past or present efforts to cure the alleged default generally strengthens a tenant's application for a *Yellowstone* injunction.[22]

Additional legal considerations

Venue and jurisdiction

As with any other legal action in New York, a tenant must satisfy the requirements of venue in order to maintain a successful action for a *Yellowstone* injunction.

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Because the New York City Civil Court does not have jurisdiction to grant injunctive relief, *Yellowstone* applications should be brought in New York Supreme Court "in conjunction with an action for declaratory judgment or for a reformation of the lease."[23]

Where a commercial lease is an asset of an estate, such an action may also be maintained in the Surrogate's Court.[24]

A tenant seeking a *Yellowstone* injunction must similarly satisfy the requirements of personal jurisdiction, including proper service of process, in order to obtain injunctive relief.[25] Nonetheless, improper service of a *Yellowstone* injunction will not necessarily void the tenant's claim for substantive relief. Rather, improper service creates the risk that in the event of an unfavorable ruling, the cure period will not have been tolled.[26]

Bond

Tenants should also be aware of the financial requirements that may accompany a *Yellowstone* injunction. If a *Yellowstone* injunction is granted, the tenant typically must pay a monthly use and occupancy fee in the amount of the rent stated in the subject lease and post a bond while the case is pending.[27] Generally, the amount of the bond is subject to the discretion of the court.[28]

Under certain circumstances, a court may find that a bond is not necessary. For example, in *River Rest, Inc. v. Empire State Building Co.*, the court denied the landlord's request that the tenant post bond for three reasons: (i) the length (twenty-nine years) and nature

of the lease at issue; (ii) the tenant's "presumed and apparent solvency"; and (iii) the seriousness of the issues the tenant raised in its complaint — namely that the landlord already "partially evicted" the tenant from the premises and that the landlord's actions to prevent the tenant to use the rented space was in retaliation for an "unrelated dispute" between affiliates of both parties.[29]

Should a tenant prevail in its declaratory judgment action, it is within the court's discretion to award costs for the premium paid on a bond secured in connection with the *Yellowstone* injunction.[30]

Preservation of rights

Once a tenant has obtained an initial *Yellowstone* injunction, it must take proactive steps to preserve that relief throughout the pendency of the dispute.

Thus, when commencing the declaratory judgment action to adjudicate the validity of the alleged default, the tenant should be careful to seek extensions of any temporary restraining order tolling the cure period. Failure to do so could cause the cure period to lapse and the lease to be terminated, thereby divesting the court of the ability to extend the cure period in the event of an adverse ruling.[31]

Once a tenant has obtained an initial Yellowstone injunction, it must take proactive steps to preserve that relief throughout the pendency of the dispute.

Similarly, if a party appeals the final judgment in the declaratory action, a tenant should obtain an additional temporary stay pending the appeal.[32]

Although an order granting a *Yellowstone* injunction is not a final appealable order, the grant or denial of a *Yellowstone* injunction is frequently litigated in appellate court on interlocutory appeal of the interim order granting or denying the injunction. Even if the cure period has expired, the appellate court may still grant a *Yellowstone* injunction based on the lower court's erroneous denial of relief.[33]

Parties should also be aware that a *Yellowstone* injunction does not affect all substantive rights and remedies. Importantly, a *Yellowstone* injunction will not nullify a landlord's remedies under the lease. For example, self-help may still be available if permitted by the lease.[34]

Similarly, if a lease provides that the landlord is entitled to attorney's fees in any action "brought" by the landlord in the event the tenant fails to cure a default, a tenant cannot typically avoid the payment of attorneys' fees by first commencing its own action and obtaining a *Yellowstone* injunction.[35]

Furthermore, independent agreements, such as a letter of credit, may still be enforceable even where a *Yellowstone* injunction has been granted.[36]

Notes

[1] Muhammad U. Faridi is a partner at Patterson Belknap Webb & Tyler. Jacqueline L. Bonneau is a counsel, and Wolete Moko and Nadav D. Ben-Zur are associates at the firm.

[2] 21 N.Y.2d 630 (1968).

[3] *Id*. at 637.

[4] *Id*.

[5] *Post v. 120 E. End Ave. Corp.*, 62 N.Y.2d 19, 25 (1984) ("Whatever their merits, the courts have granted them routinely to avoid forfeiture of the tenant's interest and in doing so they accepted far less than the normal showing required for preliminary injunctive relief.").

[6] *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 93 N.Y.2d 508, 514 (1999).

[7] *Bliss World LLC v. 10 W. 57th St. Realty LLC*, 170 A.D.3d 401, 402 (1st Dep't 2019). *See* also *Trump on the Ocean, LLC v. Ash*, 81 A.D.3d 713, 716 (2d Dep't 2011) (collecting cases).

[8] Post, 62 N.Y.2d at 25-26. *See also Jemaltown of 125th St., Inc. v. Leon Betesh/Park Seen Realty Assocs.*, 115 A.D.2d 381, 381 (1st Dep't 1985) (overturning a Special Term's denial of a Yellowstone injunction because the Special Term applied the criteria for obtaining a preliminary injunction, rather than the Yellowstone standard).

[9] *Artcorp Inc. v. Citrich Realty Corp.*, 124 A.D.3d 545, 545 (1st Dep't 2015).

[10] *Post*, 62 N.Y.2d at 25-26; *Graubard*, 93 N.Y.2d at 514 (explaining that a "Yellowstone injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period.")

[11] *NY Kids Club 125 5th Ave., LLC v. Three Kings, LLC*, 133 A.D.3d 580, 580 (2d Dep't 2015); *225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp.*, 211 A.D.2d 420, 421 (Sup.Ct. N.Y. Cty. (1995)).

[12] *Village Ctr. For Care v. Sligo Realty & Serv. Corp.*, 95 A.D.3d 219, 222 (1st Dep't 2012); *see also Empire State Bldg. Assoc. v. Trump Empire State Partners*, 245 A.D.2d 225, 229 (1st Dep't 1997).

[13] *Riesenburger Properties, LLLP v. Pi Associates, LLC*, 155 A.D.3d 984, 985-86 (2d Dep't 2017).

[14] *Id*. at 986; *Korova Milk Bar of White Plains, Inc. v. PRE Properties, LLC*, 70 A.D.3d 646, 647 (2d Dep't 2010).

[15] *Village Ctr*. 95 A.D.3d at 222.

[16] *Prinkipas LLC v. Charlton Tenants Corp.*, 142 N.Y.S.3d 805 (1st Dep't 2021); *Bliss World*, 170 A.D.3d at 401 ("A necessary lynchpin of a *Yellowstone* injunction is that the claimed default is capable of cure.").

[17] *W & G Wines LLC v. Golden Chariot Holdings LLC*, 46 Misc. 3d 1202(A), 7 N.Y.S.3d 245 (N.Y. Sup. 2014); *Koedderitzsch v. 541 Const. Corp.*, Index No. 0602562/2007, 2008 WL 1998656 at *3, (Sup. Ct. N.Y. Cty. Apr. 28, 2008).

[18] *See Bliss World*, 170 A.D.3d at 401-02.

[19] *See* e.g., *Zona, Inc. v. Soho Centrale LLC*, 270 A.D.2d 12, 14 (1st Dep't 2000); *Confidence Beauty Salon v. 299 Third SA*, 148 A.D.3d 439, 439-40 (1st Dep't 2017).

[20] *See Metropolis Westchester Lanes, Inc. v. Colonial Park Homes, Inc.*, 187 A.D.2d 492, 493 (2nd Dep't 1992) (reversing a lower court's grant of a Yellowstone injunction since "[t]he tenant here concedes that because it plans to sublease and extensively renovate the entire premises, it therefore has no intention of investing money into the timely repair of the existing structure.") *See also Linmont Realty v. Vitocarl*, 147 A.D.2d 618, 620 (2nd Dep't 1989).

[21] *See, e.g., IP Int'l Prod. v. 275 Canal St. Assocs.*, 139 A.D.3d 464, 464 (1st Dep't 2016); *Cemco Restaurants v. Ten Park Ave Tenants*, 135 A.D.2d 461, 462 (1st Dep't 1987).

[22] *See, e.g., Brownskin Shoe v. Ladies Mile*, 15 A.D.3d 220, 221 (1st Dep't 2005) (noting that tenant had removed most of offending signs from storefront windows); *Terosal Prop. v. Bellino*, 257 A.D.2d 568, 568 (2d Dep't 1999) (noting that tenant offered "proof of substantial efforts" to address majority of conditions listed in cure notice); *Rugs on Stone, Inc. v. MBA, LLC*, Index No. 0118894, 2007 WL 2176931 (Sup. Ct. N.Y. Apr. 12, 2007) (noting "proof of the substantial efforts" tenant had "already made" to address "any defective condition found by the court"); *W & G Wines LLC v. Golden*

Chariot Holdings LLC, 46 Misc.3d 1202(A) (Sup. Ct. N.Y. Cty. Dec. 19, 2014) (noting that tenant had already reversed "most of the alterations it [] made to the [p]remises that were claimed as defaults).

[23] 14 Warren's Weed New York Real Property § 154.04.

[24] *Id.*; *See also Matter of Langfur*, 198 A.D.2d 355, 355 (2d Dep't 1993) (affirming that the Surrogate's Court has the authority to grant the injunctive relief sought by an estate).

[25] *Id.*; *see also Pergament Home Ctrs. v. Net Realty Holding Tr.*, 171 A.D.2d 736 (2d Dep't 1991).

[26] *Norlee Wholesale Corp. v. 4111 Hempstead Turnpike Corp.*, 138 A.D.2d 466 (2d Dep't 1988); see also *Scheller v. MacMarty, Inc.*, 177 A.D. 689 (2d Dep't 1991).

[27] *Dublin Underground SP, Inc. v. Harmony Mills S., LLC*, 36 Misc. 3d 1229(A) (Sup. Ct. 2012); *Koedderitzsch*, 2008 WL 1998656, at *3.

[28] *See 93 South Street Rest. Corp v. South Street Seaport Limited Partnership*, 2013 WL 3816525, at *3 (N.Y. Sup. Ct. July 22, 2013) (explaining that a court may order the posting of a bond and that the "amount ordered deposited must be rationally related to the quantum of damages the landlord would sustain in the event that the tenant is later determined not to have been entitled to an injunction"); *see also 1286 R.R. Operating, Inc. v. McAlpin Assocs.*, 169 A.D.2d 450 (1st Dep't 1991).

[29] Index No. 31071/92, 1994 WL 16857191, at *5 (Sup. Ct. N.Y. Cty. June 16, 1994). *See also WPA/Partners LLC v. Port Imperial Ferry Corp.*, 307 A.D.2d 234, 237 (1st Dep't 2003) (holding that "in view of the considerable value already invested by plaintiff in improvements on the property, we dispense with the requirement of a bond.")

[30] *Two Guys from Harrison, N.Y. v. S.F.R. Realty Assocs.*, 186 A.D.2d 186, 189 (2nd Dep't 1992) (lower court "properly awarded the premium for the injunction bond as a reasonable and necessary expense of the action").

[31] *TW Dress Corp. v. Kaufman*, 143 A.D.2d 900 (2d Dep't 1988). *See also 166 Enterprises Corp. v. I G Second Generation Partners, L.P.*, 81 A.D.3d 154, 159 (1st Dep't 2011).

[32] *Mann Theatres Corp. v. Mid-Island Shopping Plaza Co.*, 94 A.D.2d 466 (2d Dep't 1983), aff'd, 62 N.Y.2d 930 (1984); *Mucchi v. Eli Haddad Corp.*, 101 A.D.2d 724, 727 (1st Dep't 1984).

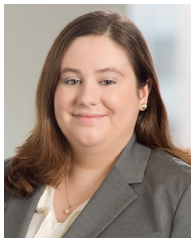
[33] *See SHS Baisley, LLC v. Res Land, Inc.*, 18 A.D.3d 727 (1st Dep't 2005).

[34] *See Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 19 A.D.3d 148 (1st Dep't 2005); *see also Graubard*, N.Y.2d at 515 "a Yellowstone injunction does not nullify the remedies to which a landlord is otherwise entitled under the parties' contract."

[35] *See Duane Reade v. 405 Lexington, LLC*, 5 Misc. 3d 1030A (Sup.Ct. N.Y. Cty. 2004), *aff'd*, 19 A.D.3d 179 (1st Dep't 2005); *Reade v. York Towers, Inc.*, 22 A.D.3d 246, 247 (1st Dep't 2005).

[36] *Titleserv, Inc. v. Zenobio* (Case I), 210 A.D.2d 311 (2d Dep't 1994).

About the authors

(L-R) **Muhammad U. Faridi** is a partner in **Patterson Belknap Webb & Tyler LLP**'s Litigation Department. He litigates disputes relating to breaches of contract and fiduciary duty, commercial real estate, and structured finance transactions, among others. He can be reached at mfaridi@pbwt.com. **Jacqueline L. Bonneau** is counsel in the firm's Litigation Department. Her practice focuses on complex commercial litigation, white collar defense and internal investigations, and employment law. She can be reached at jbonneau@pbwt.com. **Nadav D. Ben-Zur** is an associate in the Litigation Department and can be reached at nbenzur@pbwt.com. **Wolete Moko** is an associate in the firm's Corporate Department, where he represents clients in a wide variety of transactional matters. He can be reached at wmoko@pbwt.com. All the authors are based in New York City.

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