

## Yellowstone Injunctions Aren't Always Routine

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Any practitioner handling landlord-tenant litigation should be familiar with Yellowstone injunctions. Under the Yellowstone doctrine, a commercial tenant, when served with a notice to cure threatening the termination of its lease, may apply for a Yellowstone injunction maintaining the status quo, by tolling the tenant's time to cure an alleged lease default so that, upon an adverse determination on the merits, the tenant may cure the default and avoid the forfeiture of its leasehold.



It is well established that to obtain a Yellowstone injunction, the tenant must demonstrate that (1) it holds a commercial lease, (2) it received from the landlord a notice to cure threatening the termination of the lease, (3) it requested injunctive relief prior to the expiration of the cure period in the notice to cure and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*, 93 N.Y.2d 508 (1999).

Yellowstone injunctions are fairly routinely granted, and decisions are few and far between in which timely Yellowstone motions are denied. A decision just rendered by the Appellate Division, First Department, however — *IP International Products Inc. v. 275 Canal Street Associates*, 2016 N.Y. Slip. Op. 03668 (1st Department May 10, 2016) — provides a potent reminder that Yellowstone injunctions will not necessarily be granted where the lease violations are both serious and clear, and the tenant has failed to make a sufficient showing of its good faith desire and ability to cure.

The facts as recited by the court in *IP International* are as follows. The plaintiff was the net-tenant of the entire building located on Canal Street in Manhattan, pursuant to a 50-year lease with the defendant landlord. The lease did not expire until 2031.

In June 2015, the landlord delivered a notice to cure to the tenant. The notice to cure alleged that the tenant had violated the lease by having (1) without landlord's consent, built-out portions of the upper floors of the building for residential apartments, despite the fact that the certificate of occupancy for the building did not permit residential use, (2) failed to provide the landlord with the required permits and approvals for the construction, (3) failed to provide the landlord with proof of insurance required under the lease and (4) failed to cure certain violations issued by the Department of Buildings.

The tenant thereafter commenced an action in New York state trial court for a declaratory judgment, and moved by order to show cause for a temporary restraining order and a Yellowstone injunction

tolling the tenant's time to cure under the notice to cure and preventing the landlord from terminating the lease based on the notice to cure. The tenant claimed in its motion that it was entitled to a Yellowstone injunction because it satisfied the well-established four elements (set forth above) for the granting of such relief.

While the court (Hon. Shirley Werner Kornreich) initially granted the tenant's request for a temporary restraining order, the court, at the oral argument of the motion, denied the tenant's motion for Yellowstone relief.

Initially, the court observed that it is not "so simple" that a tenant merely needs to show that it received a notice to cure, that a timely application for Yellowstone relief was made and that the tenant was "ready, willing and able to cure." The court stated:

... [i]t's not as simple as you say, what you have to prove is, this is an important piece, a tenant seeking a Yellowstone injunction must also convince the court "of his desire and ability to cure the defects by any means short of vacating the premises."

The court then went on to find that in the instant case there were clear, serious violations of the lease — some of which were not disputed by the tenant — and that these violations presented a "danger:"

My problem with this case is the allegations are violations, clear violations of the lease. ... There was no prior written consent to do any kind of building or construction ... under a lease that is a commercial lease and that requires ... the landlord's consent to do construction. Secondly, clearly [the lease] requires the tenant to submit permits, approvals ... to the landlord before construction was to be done. There is none clearly here and none was submitted. ... There are pictures that clearly show that these floors were built out as apartments. ...

[T]here is no general liability insurance, there's no workers compensation, there is no disability. ... I mean ... there has been an admission of wrongdoing. ... There's a clear violation of the certificate of occupancy. This is a commercial space that's been used for residential. No applications to the government, nothing to show that there has been any ... attempt to change the certificate of occupancy ... This is a danger."

Thus, based on these facts, and the fact that the tenant failed to even submit an affidavit from the tenant itself in opposition to the motion, the court found that the tenant had failed to demonstrate a good faith desire and ability to cure. The court also took the extraordinary step of sua sponte issuing an injunction in favor of the landlord that all work at the building must stop unless there are required permits and insurance in place.

I am ... denying the Yellowstone. This is the first time I have done that, and I think this is a case that doesn't even require a hearing because there is nothing in the papers to show that there should be a hearing. ... At this point, I am denying the Yellowstone because there is no showing of a desire or ability to correct the violations, and there is a clear showing both by the defendant ... and the movant itself that there have been violations, and there's really — and at this point I am also not only denying the Yellowstone, I am issuing an injunction that all work at this building must stop unless there are the required permits, the required government oversight and insurance. You can't just do this. It's dangerous.

The tenant appealed to the Appellate Division, First Department. In a decision issued on May 11, 2016, the Appellate Division unanimously affirmed, stating:

The court providently exercised its discretion in denying the plaintiff's application for a Yellowstone injunction, because the plaintiff failed to demonstrate a willingness to cure. The plaintiff's assertions to the contrary are belied by its continued violation of the alterations provision of the lease, even as it purports to "cure" defects (internal citations omitted).

There is strong lesson to be learned from IP International.

There is no doubt that as a general matter, courts routinely grant Yellowstone injunctive relief to commercial tenants which dispute that they are in default under the lease as alleged in the notice to cure, and seek such relief prior to the expiration of the cure period. Indeed, in the trial court decision in IP International, the court observed that it was the "first time" the court had denied Yellowstone relief. IP International, however, instructs that in cases where the violations are both serious and clear, and the tenant fails to adequately demonstrate a good faith willingness to expeditiously remedy the violations, the courts will not necessarily grant a Yellowstone injunction in such circumstances.

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