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# COA Has Spoken: 'Yellowstone' Relief Can Be Waived

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This column has on numerous occasions addressed the fundamental procedural device known as the "*Yellowstone* injunction" under New York landlord-tenant law (in fact, we addressed a *Yellowstone* issue in our most recent, April, 2019 column). First established by the Court of Appeals over 50 years ago in *First Nat. Stores v. Yellowstone Shopping Center*, 21 N.Y.2d 630 (1968), a *Yellowstone* injunction tolls the time to cure under a notice to cure or notice of default, so that the tenant can litigate the merits of the alleged defaults and retain the ability to cure if the court ultimately rules that the tenant is in default of the lease.

Under the *Yellowstone* doctrine, all a tenant need show in order to obtain such relief is that it: (1) holds a commercial lease; (2) received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) requested injunctive relief prior to the expiration of the cure period; and (4) 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).

## Landmark Decision

*Yellowstone* practice, however, appears to have been permanently changed by the recent, landmark decision of the New York Court of Appeals in *159 MP Corp. v. Redbridge Bedford, LLC*, 2019 NY Slip Op 03526 (May 7, 2019). In a 4-3 majority opinion written by Chief Justice Janet DiFiore, the Court of Appeals ruled that a commercial tenant may, in its lease, waive its right to bring a declaratory judgment action with respect to the lease. As such, because a *Yellowstone* injunction requires the existence of an underlying action seeking a declaratory judgment as to whether the tenant is in default under the lease, such a waiver precludes the tenant from obtaining a *Yellowstone* injunction. This decision will likely have a major impact on commercial landlord-tenant relations in New York, as landlords will now push to include such waivers in their leases.

The facts in *159 MP Corp.* are as follows: The plaintiffs were the tenants under two, 20-year commercial leases demising to plaintiffs 13,000 square feet in a building located in Brooklyn to operate a Foodtown supermarket. Most importantly, each lease contained a rider, which included a provision stating as follows:

Tenant waives its right to bring a declaratory judgment action with respect to any provision of this lease or with respect to any notice

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sent pursuant to the provisions of this lease… [I]t is the intention of the parties hereto that their disputes be adjudicated via summary proceedings.

In March 2014, the landlord sent notices to cure to the tenants alleging various defaults under the leases and providing the tenants with 15 days to cure in order to avoid lease termination. Before the expiration of the cure period in the notices, the tenants commenced a declaratory judgment action in Supreme Court and moved by order to show cause for a *Yellowstone* injunction to toll the time to cure and prevent the landlord from terminating the leases. The landlord answered the complaint and cross-moved for summary judgment dismissing the complaint, maintaining that the action, and thus the motion for *Yellowstone* relief, was barred by the waiver provision in the leases. The tenants argued in response that the waiver clause was unenforceable.

The Supreme Court denied the tenants' motion for a *Yellowstone* injunction and dismissed the action. The court held that, based on the plain language of the leases, the tenants had clearly waived their right to declaratory relief. The tenants appealed and the Appellate Division, Second Department affirmed (with one justice dissenting), holding that the declaratory judgment waiver was enforceable. In so holding, the Second Department emphasized that the waiver clause did not leave the tenants without other remedies, in that the tenants retained the right to notice under the leases and can defend themselves in summary proceedings. The Second Department granted the tenants leave to appeal to the Court of Appeals.

## Court of Appeals

The Court of Appeals, in its majority opinion, affirmed, holding that the declaratory judgment waiver was enforceable and not violative of public policy.

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The court at the outset rejected the tenants' argument that the declaratory judgment waiver was void as against public policy. The court observed that freedom of contract is a "deeply rooted" public policy of this state and that "our courts have long deemed the enforcement of commercial contracts according to the terms adopted by the parties to be a pillar of the common law." The court observed that its "usual and most important function is to enforce contracts rather than invalidate them on the pretext of public policy" and that it will not set aside agreements on the basis of public policy unless they "clearly contravene public right or the public welfare."

The court held that in the case before it, the declaratory judgment waiver was "clear and unambiguous, was adopted by sophisticated parties at negotiating arm's length, and does not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract." It went on to explain that "there is simply nothing in our contemporary statutory, constitutional, or decisional law indicating that the interest in access to declaratory judgment actions or, more generally, to a full suite of litigation options without limitation, is so weighty and fundamental that it cannot be waived by sophisticated, counseled parties in a commercial lease." The court noted that it had already held in *Kalisch-Jarco, Inc. v. City of New York*, 72 N.Y.2d 727 (1988), that a party can relinquish its right to commence a declaratory judgment action in favor of an alternative dispute resolution method.

In addition, the court found that it was "critical" that the declaratory judgment waiver clause did not

"preclude access to the courts" and "permits plaintiffs to raise defenses to allegations of default in summary proceedings in Civil court…." It further noted that the waiver did not impair the tenants' ability to seek damages based on breach of contract or tort theories. The court also observed that "despite the waiver clause, the judicial review available to plaintiffs is more generous than that available to parties whose contracts contain arbitration clauses—yet we routinely enforce arbitration clauses."

Finally, the court found that the declaratory judgment waiver was not rendered unenforceable because it resulted in the inability to obtain *Yellowstone* relief. In so holding, it reasoned:

Plaintiffs' inability in this case to obtain *Yellowstone* relief does not prevent them from raising defenses in summary proceedings if commenced and thus vindicating their rights under the leases if the owners' allegations of default are baseless. It is undisputed that the owner cannot evict plaintiffs without commencing a summary proceeding and establishing that plaintiffs materially breached the leases. Absent such a proceeding, plaintiffs remain in possession of the premises and their rights under the leases are undisturbed. If plaintiffs' defenses fail on the merits—if plaintiffs in fact breached the leases—then their interest in the tenancy would properly be extinguished under the plain language of the leases…. Thus, a *Yellowstone* injunction is not essential to protect property rights in a commercial tenancy which, of course, are governed by the terms of the lease negotiated by the parties. As this Court has recognized, *Yellowstone* injunctions are useful procedural tools for tenants seeking to litigate notices of default [citation omitted]. But there is no strong societal interest in the ability of commercial entities to seek such a remedy that would justify voiding an unambiguous declaratory judgment waiver negotiated at arm's length, merely because this incidentally precluded access to *Yellowstone* relief.

## Conclusion

*Yellowstone* injunctions have over the past 50 years become a fundamental, and routinely granted procedural device allowing commercial tenants to litigate the merits of defaults claimed in a notice to cure, without fear of losing the lease if the court ultimately rules that the tenant was in violation of the lease, in that the tenant retains the right to cure the default after a trial on the merits. Without the ability to obtain a *Yellowstone* injunction, a tenant may be hesitant to fight the merits of a notice to cure, no matter how baseless—and instead simply take whatever steps are necessary to appease the landlord—because the risk of losing the lease after a trial on the merits is too great to absorb.

Now that the Court of Appeals has spoken in *159 MP Corp.*, there is little doubt that many landlords in this state will attempt to add declaratory judgment waivers into their commercial leases, and that such waivers will become more commonplace. It will of course depend on, among other things, the relative bargaining power of the parties, and the sophistication of counsel, as to whether such waivers are ultimately included in a lease. Certainly, *159 MP Corp.* has fundamentally altered *Yellowstone* jurisprudence in this state, and it remains to be seen just how significant the impact will be.