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Are Yellowstone Waivers Enforceable?

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The Appellate Division, First Department, in *Universal Communications Network, Inc. v. 229 West 28th Owner, LLC*, 85 A.D.3d 668 (1st Dept. 2011), explained that the "sole purpose of a Yellowstone injunction is to maintain 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 so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture." *First National Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630 (1968)

Any attorney who has served a notice to cure in the context of a commercial lease can readily attest to the ease with which a tenant can secure a "Yellowstone" injunction. "As a matter of policy, the courts have routinely granted 'Yellowstone' injunctions in order to avoid forfeiture of a tenant's interest, and, in so doing, have accepted far less than the normal prerequisites for preliminary injunctive relief..." Rasch's *Landlord & Tenant*, §23:53, Robert F. Dolan, Fourth Edition, 1998.

Some commercial landlords have demanded and obtained specific language in commercial leases whereby the tenant purports to waive its right to seek a Yellowstone injunction. The exact wording of the waiver may vary but the effect is the same—the tenant is putatively barred from moving for injunctive relief which would stay, extend, or otherwise toll the period within which the tenant must cure.

The question arises, however, as to whether such waivers are enforceable. Strikingly, as of the date of this writing, there is no appellate authority directly on point. Instead, lower courts have taken three different approaches to this issue: (a) denial of Yellowstone relief on other grounds; (b) refusal to enforce the waiver, on public policy or other grounds; and (c) enforcement of the waiver.

Denial on Other Grounds

In *JMC Pizza v. 243 W. 98 St. Realty Corp.*, (Sup. Ct. N.Y. Co., Index No. 601339/00, York, J., April 26, 2000) the court observed that the tenant had purported to waive its right to seek a Yellowstone injunction, but the court did not address the waiver issue. Instead, it denied the tenant's motion for Yellowstone relief on the ground that "there is little likelihood of success on the merits."

In [Hempstead Video v. 363 Rockaway Associates](#), 38 A.D.3d 838 (2d Dept. 2007), the tenant appealed the trial court's denial of its motion for a Yellowstone injunction. The Second Department, in affirming the trial court's order, held that it "need not pass upon the applicability of the plaintiff's purported waiver, pursuant to the terms of the lease, of its right to Yellowstone relief because the plaintiff was unable to establish its entitlement to Yellowstone relief..."

In *Nimir v. ATN Fulton*, 2012 WL 871866 (Sup. Ct. Nassau Co., Driscoll, J.), the tenant sought a Yellowstone injunction staying and tolling its time to cure various alleged defaults. The landlord opposed the motion, inter alia, on the ground that the tenant, in its commercial lease, waived its right to seek injunctive relief. The court, in denying the tenant's request for a Yellowstone injunction, held:

Even assuming arguendo the unenforceability of paragraph 43 of the Lease which prohibits Plaintiff from seeking a Yellowstone Injunction, the Court nonetheless denies

Plaintiff's application for a Yellowstone Injunction based on the Court's conclusion that Plaintiff has not established that it has the desire and ability to cure the alleged default by any means short of vacating the premises.

The Court denies Plaintiff's remaining applications based on the Court's conclusion that Plaintiff has not demonstrated a likelihood of success on the merits.

Waiver Held Unenforceable

In *Aurelian Surdeanu v. 137 East 110th Street*, (Sup. Ct. N.Y. Co., Index No. 116029/02, Richter, J., April 11, 2003), Justice Rosalyn H. Richter—now an associate justice of the Appellate Division, First Department—was faced with a lease provision by which the tenant "waives his right to bring a declaratory judgment action with respect to any provision of the lease, or with respect to any notice sent pursuant to the provisions of the lease, and expressly agrees not to seek injunctive relief which would stay, extend or otherwise toll any of the time limitations or provisions of this lease, or any notice sent pursuant thereto."

Notwithstanding, the tenant moved for a Yellowstone injunction seeking to enjoin the landlord from taking any action to terminate its commercial lease predicated on a notice to cure. In opposition, the landlord argued that the tenant waived its right to bring a motion for a Yellowstone injunction by virtue of the aforementioned language.

Richter granted the tenant's motion for a Yellowstone injunction, holding:

The Court concludes that this provision is unenforceable as against public policy. Since plaintiff is a commercial tenant, he is not able to avail himself of the automatic ten day stay available to residential tenants in Civil Court under R.P.A.P.L. §753[4]. Thus, a Yellowstone injunction is the only way 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 so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture." Moreover, the waiver provision here is not limited to Yellowstone injunctions; it would also prevent plaintiff from instituting any declaratory judgment action with respect to the lease. The Court concludes that such a wide ranging waiver of the right to use the court system to seek redress is unenforceable. (Citations omitted).

In *Malik v. Toss 29, Inc.*, 15 Misc. 3d 1112(A) (Dist. Ct. Nassau Co., Fairgrieve, J., 2007), the district court held that a Yellowstone waiver was unenforceable because of the landlord's unclean hands and waiver. Prior to the subject holdover proceeding, the parties were involved in a dispute in which the tenant claimed that the landlord intentionally caused sewage and waste to discharge into the tenant's premises over a number of years. The tenant alleged that it suffered a loss of business and began to withhold rent. Thereafter, the landlord threatened to terminate the commercial lease for non-payment of rent and the tenant sought a Yellowstone injunction.

Supreme Court granted the Yellowstone relief, notwithstanding the purported waiver because the tenant established, among other things, a likelihood of success. In granting the tenant's motion for a Yellowstone injunction, the court noted that the landlord previously pleaded guilty before the Village Court of the Village of Hempstead to causing raw sewage to discharge into the premises. After trial, the court held that the landlord willfully violated the lease by failing to repair the sewer line.

Notwithstanding the foregoing, the landlord, subsequently, served a notice of termination upon the tenant for seeking a Yellowstone injunction in violation of the commercial lease and, subsequently, commenced a holdover proceeding. Thereafter, the tenant moved for summary judgment to dismiss the landlord's petition. Justice Scott Fairgrieve, in an opinion that did not hide the court's disdain for the landlord's tactics, granted the tenant's motion and held:

[Landlord] breached its obligations to repair the sewer pipe causing sewage and waste to flow into [tenant's] premises. This breach by [landlord] is a waiver of any right to enforce Paragraph 42 to evict [tenant].

[Landlord] has unclean hands and by its willful failure to repair the sewer pipe has violated the implied covenant of good faith and fair dealing.

Enforcement of Paragraph 42 would be unconscionable and cause [tenant] to lose its entire investment while [landlord] has acted in complete disregard of its contractual obligations.

Waiver Held Enforceable

Some lower courts have found in favor of the landlord and have enforced the Yellowstone waiver. In *Liebman v. Duell LLC and 100-106 LLC*, (Sup. Ct. N.Y. Co., Index No. 603437/98, Cohen, J., Nov. 9, 1998), Justice Jeffrey A. Cohen denied the tenants' motion for a Yellowstone injunction, holding:

Plaintiffs specifically waived their right to bring this application pursuant to ¶ 25.2, p. 19 of the lease, each page of which was initialed by them and which they signed. Although the plaintiffs claim that the waiver violates public policy, they cite no binding precedent for that proposition and research has disclosed none.

In *Hamza v. Alphabet Soup Associates*, 2011 WL 1527179 (Sup. Ct. N.Y. Co., Mills, J.), the tenant sought, inter alia, a Yellowstone injunction in response to a notice to cure served by the landlord. The court denied the tenant's motion for a Yellowstone injunction based on a Yellowstone waiver in the lease. Specifically, Justice Donna Mills held:

First of all, plaintiff cannot move for a Yellowstone injunction here because, pursuant to Section 72 of the lease, he waived his right to seek such an injunction in the event of a situation like this case. Plaintiff is confined to obtaining a regular preliminary injunction pursuant to CPLR 6301.

In *Aloyts v. 601 Tenant's Corp.*, 2007 WL 6938117 (Sup. Ct. Kings Co., Demarest, J.), the landlord opposed the tenants' motion for Yellowstone relief, citing language of the lease whereby "Tenants waive [their] right to bring a declaratory judgment action with respect to any provision of this lease, or with respect to any notice sent pursuant to the provision of this lease, and expressly agree not to seek injunctive relief which would stay, extend or otherwise toll any of the time limitations or provisions of this lease, or any notice sent pursuant thereto." The tenants argued that the waiver was unenforceable as against public policy because it denied them due process and access to the courts to obtain a declaratory judgment.

Justice Carolyn E. Demarest denied tenants' motion on both grounds and held:

The right to a Yellowstone injunction is not a constitutional due process right, but merely a remedy afforded by case law where it is warranted by the circumstances. A tenant's rights are determined by the lease agreement, the contractual terms of which form the conditions of the tenancy. "A lease agreement, like any other contract, essentially involves a bargained-for exchange between the parties." (Citations omitted).

The language of the subject lease is unambiguous. [Tenants] expressly waived their right to seek a Yellowstone injunction to stay, extend, or toll the time limitations of the lease and the five-day notice sent pursuant thereto. While such waiver precludes the defensive tactic of seeking a Yellowstone injunction prior to the expiration of the lease, it was part of the contract which was fully negotiated at arms-length between represented parties. As such, it would not be contrary to public policy to enforce the provisions of the lease under the circumstances. (Citations omitted).

The court further noted that the Yellowstone waiver does not deny the tenants access to the courts because the tenants may raise any defense they have in a commercial holdover summary proceeding.

Conclusion

The enforceability of Yellowstone waivers in commercial leases is far from settled. Thus, practitioners are advised that the inclusion of such a waiver may or may not be enforced depending on which court hears your case. Unfortunately, this unpredictability will continue until such time as an appellate court squarely addresses the issue.

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