Expiration of Cure Period Has Dire Consequences

Warren A. Estis and William J. Robbins, partners at Rosenberg & Estis, review a recent First Department decision that underscores the determinative significance to *Yellowstone* litigation of expiration of the cure period. It also shows the importance of practitioners paying attention to the ready and able to cure prong of the *Yellowstone* standard.

Warren A. Estis and William J. Robbins

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A *Yellowstone* injunction allows a tenant[1] that has been served with a notice to cure an alleged lease default to litigate in Supreme Court whether or not there has been a default, without the risk of losing the lease if the court finds a default. The injunction tolls the running of the period of time the tenant has to cure the alleged default. Thus, even after an adverse determination at the end of the lawsuit, the tenant still has time to cure and save the lease.

The well known four-prong standard of what a tenant must show to obtain *Yellowstone* relief was stated by the Court of Appeals in *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Associates*[2] as follows:

(1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) it requested injunctive relief prior to the termination of the lease;[3] and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises.[4]

A recent decision by the Appellate Division, First Department in *166 Enterprises Corp. v. IG Second Generation Partners, L.P.*[5] underscores the determinative significance to *Yellowstone* litigation of expiration of the cure period. It also shows the importance of practitioners paying attention to the ready and able to cure prong of the *Yellowstone* standard. The decision was written by Justice Rosalyn H. Richter, with Justices Angela M. Mazzarelli, Rolando T. Acosta, Sheila Abdus-Salaam and Nelson S. Roman concurring.

'166 Enterprises'

In *166 Enterprises*, there was a commercial lease between the landlord and tenant for two stores. The tenant subleased the premises to an entity operating a chain clothing store. On Sept. 10, 2002, the landlord served a 15-day notice to cure alleging that the tenant had failed to pay rent and late fees and failed to procure the required amount of liability insurance. On Sept. 24, 2002, one day before the cure period was to expire, the tenant brought an action seeking declaratory relief and sought a *Yellowstone* injunction. A TRO was issued staying the cure period pending the hearing and determination of the motion.

In an order dated Jan. 8, 2003, the Supreme Court (Marilyn Shafer, J.) denied the *Yellowstone* motion on the ground that the tenant had failed to show that it was ready and able to cure the default concerning the liability insurance. Since there was only one day remaining in the cure period when the TRO was initially obtained, that cure period expired the next day, Jan. 9, 2003. On Jan. 15, 2003, the landlord served the tenant with a notice of termination, effective Jan. 20, 2003.

Even though the lease had already been terminated, on Jan. 21, 2003, the tenant moved to renew and reargue its application for a *Yellowstone* injunction. As stated in the Appellate Division decision, the tenant, in its motion, conceded that the original motion papers "had inadvertently failed to address its ability to cure the alleged insurance default" and "belatedly attached a copy of a certificate of liability insurance to its moving papers." Justice Shafer found that the tenant's submission of the insurance certificate demonstrated that it was ready and able to cure the default and, by order dated April 17, 2003, granted the *Yellowstone* motion.

The Appellate Division commented that the Supreme Court "did not address whether it was empowered to issue a *Yellowstone* injunction where the cure period had expired and the lease had been terminated" and neither did the Supreme Court "discuss whether the injunction could be made retroactive to the date of the original *Yellowstone* motion."

The tenant's declaratory judgment action proceeded to trial and, in a decision entered Oct. 21, 2008, the Supreme Court (Judith J. Gische, J.) found that the tenant had breached the insurance provision, justifying termination of the lease. Justice Gische interpreted Justice Shafer's April 17, 2003 decision as having granted the *Yellowstone* injunction nunc pro tunc as of Sept. 24, 2002, the date of the tenant's original *Yellowstone* application. Thus, Justice Gische concluded that the tenant still had a right to cure, namely, the one day that remained in the cure period at the time the first *Yellowstone* application was brought.

On Dec. 10, 2008, judgment was entered consistent with the decision. The judgment also expressly found that the Jan. 15, 2003 notice of termination was a nullity because, the running of the cure period having been retroactively tolled, that cure period had not expired on Jan. 9, 2003. Thus, the notice of termination had been served while the cure period was still applicable and, accordingly, did not effect a termination of the lease on Jan. 20, 2003. The judgment provided that the *Yellowstone* injunction and cure period remained in effect until a copy of the judgment with notice of entry was served on the tenant's attorney.

When no cure was made by the tenant within that cure period, the landlord then served a second notice of termination, terminating the lease as of Dec. 31, 2008. Subsequently, the landlord commenced an ejectment action and moved for summary judgment. In an order and judgment entered Jan. 20, 2010, the Supreme Court (Louis B. York, J.) awarded the landlord possession of the premises.

The landlord and tenant cross-appealed from the 2008 judgment in the tenant's declaratory judgment action.[6] The tenant also appealed from the 2010 order and judgment in the ejectment action. Citingits own decision in *C&N Camera and Elecs. Inc. v. Farmore Realty Inc.*,[7] the Appellate Division held that Justice Gische had correctly found that the tenant failed to obtain insurance in the required amount and that such a failure constituted a substantial breach of the lease. In that earlier 1991 case, the court had stated that "[p]ursuant to the lease terms herein, failure to provide defendant-landlord with proof of the specified insurance coverage is a material breach of the lease and a basis for its termination."

In *166 Enterprises*, the Appellate Division continued, the default would not have been cured even if the tenant had been able to prove that its subtenant was carrying adequate insurance in the landlord's favor. Again, the court cited one of its own earlier decisions, in *Federated Retail Holdings Inc. v. Weatherly 39th Street, LLC*,[8] where it had stated that a "landlord is not required to accept subtenant's performance in lieu of tenant's." The court also noted that the landlord was not required to obtain its own insurance and bill it to the tenant as additional rent; that remedy was to be exercised at the landlord's option. In support of that proposition, the court cited *Jackson 37 Co., LLC v. Laumat, LLC*.[9]

The Appellate Division, however, rejected the Supreme Court's conclusion that the tenant still had the right to cure its breach. Citing its decisions in *KB Gallery, LLC v. 875 W. 181 Owners Corp.*[10] and *Retropolis Inc. v. 14th Street Development, LLC*,[11] the court explained that "[i]t is well settled that a tenant is not entitled to a *Yellowstone* injunction after the cure period has expired." In *KB Gallery*, the Appellate Division, First Department had stated:

We reject plaintiff's contention that a *Yellowstone* application brought after the expiration of the applicable cure period would be deemed timely as long as it is made before the lease in question is actually terminated.[12]

Applying that doctrine to the facts in *166 Enterprises*, the Appellate Division pointed out that after the initial *Yellowstone* application was denied, the stay of the cure period was lifted and the cure period expired on Jan. 9, 2003. Since the tenant's motion to renew/reargue its *Yellowstone* application was brought after that date, "the court could not grant *Yellowstone* relief in this case."

The Appellate Division also concluded that the Supreme Court should not have given retroactive effect to the *Yellowstone* injunction. It reasoned as follows:

This case does not fall within the limited exceptions for which such nunc pro tunc relief has been authorized. In each of the cases relied upon by Tenant [citations omitted], retroactive relief was allowed as a result of the improper actions by the court or due to judicial inadvertence. Here, in contrast, no such court error was shown. Justice Shafer's initial denial of the *Yellowstone* application was entirely proper since even Tenant concedes that it failed to establish in its original motion that it was ready and able to cure the default.[13]

Rather than court inadvertence or error, the Appellate Division viewed the failure to ensure that the cure period did not lapse as being "Tenant's fault." It "waited almost two weeks" before filing its motion to renew/reargue after denial of the first *Yellowstone* application. It "never sought any further stay of the running of the cure period either from the trial court or from this Court." Citing *T.W. Dress Corp. v. Kaufman*,[14] the Appellate Division stated that, given these circumstances, the *Yellowstone* injunction should not have been given retroactive application.

The Appellate Division also found that the Supreme Court should not have held the landlord's 2003 notice of termination to be a nullity. The court reasoned that when the landlord had served the notice, the cure period had already expired and the tenant had not cured its breach. Since there was no TRO then in place, "the notice was validly served and the lease was terminated." Citing its decisions in *Dove Hunters Pub Inc. v. Posner*[15] and *Austrian Lance & Stewart, P.C. v. Rockefeller Center Inc.*,[16] the Appellate Division stated that "[o]nce the lease was terminated in accordance with its terms, the court lacked the power to revive it."

Accordingly, the Appellate Division modified the judgment in the tenant's declaratory judgment action to vacate the declarations concerning the *Yellowstone* injunction, the cure period and the notice of termination, and to declare instead that the cure period expired Jan. 9, 2003 and that, pursuant to the notice of termination served on Jan. 15, 2003, the lease was terminated on Jan. 20, 2003, and otherwise affirmed. The appeal from the order and judgment in the landlord's ejectment action, awarding the landlord possession of the premises, was dismissed as academic.

Points to Consider

The following are points to consider in reviewing the reasoning of the case:

A major problem for the tenant here was created because there was only one day left in the cure period when the TRO was initially obtained. A tenant's lawyer should get into court with the *Yellowstone* motion as early in the cure period as possible. Often, however, he can only get into court at the last minute. That may be because the tenant only brings the problem to him after much of the cure period has already run. Or, it may be because the cure period is so short as to make it unavoidable that any application would be made with very little time left in the cure period. As the latter situation underscores, the *Yellowstone* battle really begins with transactional lawyers negotiating the lease default clause.

As evident from the decision in *166 Enterprises*, from a tenant's point of view, it is imperative in a *Yellowstone* action that, throughout the court process, the cure period not lapse. With that in mind, a cautious tenant's attorney might well decide to include in the initial *Yellowstone* motion papers a request that, were the motion to be denied after the initial grant of a TRO, then the court should continue the TRO for a specified number of days after service of notice of entry of the court's order denying the *Yellowstone* injunction, so as to give the tenant time to go to an appellate court.

Such a request should certainly be made by the tenant's attorney at oral argument of the motion. Conceivably, in continuing a TRO from hearing of the motion until determination of the motion, the IAS court at that very time might qualify such extension to provide that if the *Yellowstone* motion is ultimately denied, the TRO is deemed extended until a certain number of days after service of notice of entry of the court order determining the motion.

In *166 Enterprises*, there was one day left in the cure period when, in its Jan. 8, 2003 order, the Supreme Court denied the *Yellowstone* injunction. The terms of the default clause in the lease at issue were not set out in the Appellate Division's decision. Often, a lease default clause provides that if a default is of such a nature that it cannot be completely remedied within the cure period, then, as long as the tenant commences curing within the cure period and thereafter diligently prosecutes the cure to completion, the landlord cannot serve a termination notice.

In a situation where there is such a default clause, could a tenant left with one day in a cure period take some step on that day to commence a cure and then argue that such step bars service by the landlord of a termination notice? For example, assuming there was such a provision in the lease at issue in *166 Enterprises*, after denial of the initial *Yellowstone* application, if the tenant had presented some evidence on the last day of the cure period that it was seeking insurance, would that have been sufficient to prevent lease termination upon expiration of the cure period?

Of course, a predicate issue would necessarily be whether obtaining the requisite amount of insurance is something that

could be completed in 15 days, i.e., the length of the cure period in *166 Enterprises*. If it could, then any "commence to cure" aspect of the default clause would not be relevant. If it could not, then the landlord might still raise an issue whether to invoke such a "commence to cure" provision, the tenant need to have commenced efforts to cure expeditiously rather than waiting until the last day of the cure period.

In short, as *166 Enterprises* illustrates, a *Yellowstone* action is not always of "cookie-cutter" uniformity. It can take twists and turns, sometimes of the litigants' own making.

Warren A. Estis *is a founding partner at Rosenberg & Estis, and* **William J. Robbins** *is a partner at the firm.*

Endnotes:

1. Typically, a *Yellowstone* injunction is considered a doctrine applicable in the commercial landlord-tenant context. The standard recitation of what a tenant must demonstrate to obtain a *Yellowstone* injunction lists as the first factor that "it holds a commercial lease". See, e.g., *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*, 93 N.Y.2d 508, 514, 693 N.Y.S.2d 91, 94 (1999). However, there are circumstances where the remedy is also available to residential tenants. See, e.g., Warren A. Estis and William J. Robbins, "Curing the Lease Default: *Yellowstone* Has an Incomplete Double: RPAPL §753(4)," NYLJ, April 6, 1994, p. 5, col. 2; "Letters to the Editor: Tenants and *Yellowstone,*" NYLJ, July 16, 2007, p. 2, col. 6.

2. 93 N.Y.2d 508, 514, 693 N.Y.S.2d 91, 94 (1999).

3. Although this "prior to the termination of the lease" is often the language used, as made clear in this article, the application for *Yellowstone* relief must be made not only before lease termination, but also before expiration of the cure period. Reflecting that, in *Gristede's Operating Corp. v. Centre Financial LLC,* 16 Misc.3d 1132(A)(Sup. Ct. Nassau Co. 2007), for example, Justice Gerard B. Austin precisely enunciated this prong of the *Yellowstone* test as being: "it [tenant] sought injunctive relief prior to expiration of the cure period and termination of the lease."

4. 93 N.Y.2d at 514, 693 N.Y.S.2d at 94, quoting *225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp.*, 211 A.D.2d 420, 421, 621 N.Y.S.2d 302,303 (1st Dept. 1995).

5. 81 A.D.3d 154, 917 N.Y.S.2d 143, NYLJ 1202481859399, 211 NY Slip Op 00740, (1st Dept. 2011).

6. The landlord also appealed from the Supreme Court decision entered Oct. 21, 2008 underlying the judgment. The Appellate Division dismissed that appeal "as taken from a nonappealable paper."

7. 178 A.D.2d 310, 577 N.Y.S.2d 613 (1st Dept. 1991).

8. 77 A.D.3d 573, 911 N.Y.S.2d 5 (1st Dept.. 2010).

9. 31 A.D.3d 609, 820 N.Y.S.2d 281 (1st Dept. 2006).

10. 76 A.D.3d 909, 907 N.Y.S. 2d 672 (1st Dept. 2010).

11. 17 A.D.3d 209, 797 N.Y.S.2d 1 (1st Dept. 2005).

12. 76 A.D.3d at 909. Similarly, in *Korova Milk Bar of White Plains Inc. v. Pre Properties, LLC*, 70 A.D.3d 646, 647-648, 894 N.Y.S.2d 499, 501 (2d Dept. 2010), the Appellate Division, Second Department stated: "…an application for *Yellowstone* relief must be made not only before the termination of the subject lease…but must also be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure [citations omitted]… To the extent that any of our prior decisions may be construed as fixing a different or longer period of time in which an application for *Yellowstone* relief must be made [citations omitted], we expressly reject any such construction."

13. 917 N.Y.S.2d at 146. The cases the court cited as having been relied on by the tenant were *S&S Baisley, LLC v. Res Land Inc.*, 18 A.D.3d 727, 795 N.Y.S.2d 690 (2d Dept. 2005); *Prince Lumber Co. v. CMC MIC Holding Co., LLC*, 253 A.D.2d 718, 678 N.Y.S.2d 256 (1st Dept. 1998) and *Mann Theatres Corp. of Cal. v. Mid-Island Shopping Plaza Co.,* 94 A.D.2d 466, 464 N.Y.S.2d 793 (2d Dept. 1983), aff'd 62 N.Y.2d 930 (1984).

14. 143 A.D.2d 900, 533 N.Y.S.2d 548 (2d Dept. 1988).

15. 211 A.D.2d 494, 621 N.Y.S.2d 327 (1st Dept. 1995).

16. 163 A.D.2d 125, 558 N.Y.S.2d 521 (1st Dept. 1990).
