'Yellowstone' Injunction

Application Frequently, But Not Always, Granted

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We return here to a subject that we have addressed numerous times before, i.e., the *Yellowstone* injunction. A *Yellowstone* injunction allows a tenant' 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.

In a 1999 decision in *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Associates*,[2] the Court of Appeals referred to "the limited purpose of a *Yellowstone* injunction" as being "to stop the running of the applicable cure period." If, then, a notice served on a tenant provides no cure period, because the lease provision upon which it is based does not include provision for a cure, is a *Yellowstone* injunction available? A recent decision by Kings County Supreme Court Justice Herbert Kramer in *Victory Taxi Garage, Inc. v. Butaro*[3] addressed that question.

In *Victory Taxi*, the tenant ran a taxi garage on property consisting of a parking lot and a building used as a one-story office and garage. Paragraph 9(d) of the lease provided in relevant part that:

> [I]f the demised premises are rendered wholly unusable or (whether or not the demised premises are damaged in whole or in part) if the building shall be so damaged that the landlord shall decide to demolish it or rebuild it, then, in any of such events, Landlord may elect to terminate this lease by written notice to tenant given within 90 days after such fire or casualty specifying a date for the expiration of the lease, which date shall not be more than 60 days after the giving of such notice, and upon the date specified in such notice the term of this lease shall expire as fully and completely as if such date were the date set forth above for the termination of this lease...[4]

The landlord sent a notice of termination pursuant to paragraph 9(d) of the lease. The notice recited that as a result of a fire that had taken place, the Department of Housing Preservation and Development had ordered the premises sealed, that the premises had become wholly unusable because of a hole in the roof of the building and damage to the bricks compromising the structural integrity of the building, and that the inside of the building was completely gutted. The notice of termination, which was served on April 11, 2007, specified May 15, 2007 as the termination date of the lease. Prior to that date, the tenant moved for a *Yellowstone* injunction.

The tenant argued that paragraph 9(d) of the lease did not apply because, at most, the fire had damaged the contents of the building and the roof but did not render the structure unsafe or the premises unstable. The tenant also asserted that, in any event, the fire had only been in the 800-square-foot structure and did not affect the remaining usable space constituting about 80 percent of the leased premises. The tenant stated that it was ready, willing and able to continue its commercial leasehold and repair the fire damage to the building, which it claimed to be a right it had based upon a lease clause which, subject to specified limitations, authorized the tenant to make repairs without the landlord's consent.

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LANDLORD -TENANT

Whenever a tenant's attorney has a concern that any element needed for a "Yellowstone" exemption may be absent or tenuous, it would be advisable to argue, in the alternative, that the tenant satisfies the requirements for a preliminary injunction pursuant to CPLR 6301.

The landlord asserted that a *Yellowstone* injunction was not available because paragraph 9(d), under which the notice of termination had been sent, contained no cure period or election for the tenant to repair the fire damage. The court began its analysis by quoting from *Health N Sports, Inc. v. Providence Capitol Realty Group, Inc.*,[5] where the Appellate Division, Second Department stated:

> In order to preserve the right to cure a default under the lease by a declaratory judgment action, the tenant must obtain a stay of the period within which the default may be cured.[6]

Justice Kramer noted that the facts in the *Victory Taxi* case did "not fit neatly within the *Yellowstone* paradigm since the occurrence of a fire is not a 'default' by the tenant in the classical sense and there is no potential for cure built into the clause upon which the defendant [landlord] is relying..." The court continued:

> Thus, while the plaintiff, who holds a commercial lease, has received a 'concrete threat to terminate the lease' in the form of the Notice of Termination,...the motion for a temporary restraining order did not toll the curative period since no such period existed and as such the court has no power to grant [*Yellowstone*] injunctive relief.[7]

Although there was no cure period to toll, there certainly was, as the court recognized, a dispute to be adjudicated between the parties. The court described what "remain[ed]" as "a proceeding to ascertain whether there was total or only partial destruction of the building on the premises as the term used in paragraph 9 of the lease and what sort of repairs would be necessary to rehabilitate this building." The findings on these issues would determine whether the landlord was entitled to evict under paragraph 9(d) of the lease or had to repair the premises at its own expense, and whether the tenant would be entitled to make repairs without the landlord's consent.

Justice Kramer, however, made clear that it was the Civil Court, not the Supreme Court, that would have to resolve those issues. He disposed of the motion, and the Supreme Court case, as follows:

> The plaintiff's motion for a preliminary injunction pending the determination in this Court of plaintiff's action for a declaratory judgment is granted to the extent that the temporary restraining order contained in the order to show cause is continued pending a determination of the matter in Civil Court and the motion is otherwise denied and the complaint is dismissed in anticipation of the conduct of a dispositive summary proceeding in Civil Court.[8]

The *Victory Taxi* case was not within the *Yellowstone* paradigm because there was no cure period to be tolled, since a cure period did not exist pursuant to the lease provision under which the notice was sent. In a recent decision by Nassau County Supreme Court Justice Ira B. Warshawsky in *Metal Tek Products Inc. v. M&S Properties LP*,[9] the court held that the tenant was not entitled to a *Yellowstone* injunction because there was no longer a cure period to be tolled, it having expired before the tenant moved for *Yellowstone* relief.

In *Metal Tek*, the default provision in the lease, which was

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referred to in the notice of default, provided for a cure period of 20 days and, upon a failure to cure, termination or cancellation of the lease on five days' notice. The tenant waited to apply for the *Yellowstone* injunction until after the 20-day cure period had expired, and even until after it had been served the five day notice of termination.

Citing the Appellate Division, Second Department, decision in *King Party Center of Pitkin Avenue v. Minco Realty Co LLC*,[10] the court set forth the basis of its denial of the *Yellowstone* motion:

> It is well established that there is no basis for a *Yellowstone* injunction where it is sought after the expiration of the period to cure or after the service of the notice of termination [citation omitted]. The purpose of a *Yellowstone* injunction to allow a tenant confronted by a threat of termination of the lease to 'toll' the running of the cure period until after a determination of the merits has been made.[11]

The court in *Metal Tek* also cited *Long Island Gynecological Services, P.C. v. 1103 Stewart Avenue Associates Limited Partnership*,[12] where that same appellate court had stated:

> By failing to seek a restraining order before the cure period has expired and before the landlord acted to terminate the lease—even though such an order was obtained between the time of the notice of termination was served and its expiration date—a tenant divests the court of its power to grant a *Yellowstone* injunction.[13]

The following are additional points to consider in reviewing the reasoning of the court in these cases:

The temporary restraining order in *Victory Taxi*, as it appears in the order to show cause scanned onto the court's Web site, enjoins the landlord "from taking any action, or commencing any proceeding, to evict Plaintiff, to terminate Plaintiff's lease and/or to otherwise declare a default or take any action adverse to Plaintiff's rights or otherwise disturb Plaintiff's possession and quiet enjoyment of the subject premises." (In signing the order to show cause, the court expressly crossed out the traditional *Yellowstone* language in the proposed TRO, i.e., "that the May 15, 2007 lease expiration date continue in Defendants' Notice to Terminate dated April 11, 2007, be stayed and tolled.")

The court's decision in *Victory Taxi* held that the tenant's motion was granted "to the extent that the temporary restraining order contained in the order to show cause is continued pending a determination of the matter in Civil Court." It would seem that there is a certain ambiguity in that relief. Clearly, the court in *Victory Taxi* contemplated and intended that the landlord commence a summary proceeding, presumably a holdover proceeding predicated on the lease having expired pursuant to the notice of termination. Such a proceeding, however, is seemingly inconsistent with the language of the temporary restraining order as quoted above. Perhaps what the Supreme Court meant by its holding was to enjoin the landlord from evicting the tenant based on the notice of termination other than by bringing a summary proceeding. In any event, to the extent that the Supreme Court dismissed the Supreme Court action in favor of adjudication in Civil Court, the outcome is surely not *Yellowstone* relief.

The *Victory Taxi* and *Metal Tek* cases are instances where the court found missing an element needed for *Yellowstone* relief. Whenever a tenant's attorney has a concern that any element necessary to obtain a *Yellowstone* injunction may be absent or tenuous, it would be advisable to argue, in the alternative, that the tenant satisfies the requirements for a preliminary injunction pursuant to CPLR 6301. That way, a tenant's attorney avoids an outcome such as occurred in *Kings Party Center of Pickin Avenue, Inc v. Minco Realty Co LLC*, where the appellate court stated:

> We do not pass on [the tenant's] argument, raised for the first time on appeal, that, separate and apart from the *Yellowstone* injunction, [the tenant] satisfied the requirements for the issuance of a preliminary injunction pursuant to CPLR 6301.[14]

There is nothing on the face of the court's decisions in either *Victory Taxi* or *Metal Tek* indicating that the motions were presented or treated as motions for an ordinary preliminary injunction. There is no discussion in the decision of the threefold criteria for such an injunction (likelihood of success on the merits, balancing of the equities in favor of the movant, and irreparable harm absent an injunction) and whether or not those criteria have been satisfied. Quite the contrary, the decisions focus on the elements for *Yellowstone* relief— and find an element absent.

In short, these cases remind the practitioner that while the common wisdom is that a *Yellowstone* injunction is routinely granted, there are still circumstances where such a motion is denied.

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, 693 N.Y.S.2d 91 (1999).

3. NYLJ, July 12, 2007, p. 19, col. 3 (Sup. Ct. Kings Co.)

4. Id., at ftn. 1.

5. 75 A.D.2d 884, 428 N.Y.S.2d 288 (2nd Dep't 1980).

6. 75 A.D.2d at 884.

7. NYLJ, July 12, 2007, p. 19. at cols. 3-4.

8. Id., at col. 4.

9. NYLJ, July 11, 2007, p. 19, col. 3 (Sup. Ct. Nassau Co.)

10. 286 A.D.2d 373, 729 N.Y.S.2d 183 (2nd Dep't 2001).

11. NYLJ, July 11, 2007, p. 19, at col. 4.

12. 224 A.D.2d 591, 638 N.Y.S.2d 959 (2nd Dep't 1996).

13. 224 A.D.2d at 593.

14. 286 A.D.2d at 375, 729 N.Y.S.2d at 186.