'Yellowstone' Injunction

Court Refuses to Enforce Waiver in Lease

BY WARREN A. ESTIS AND WILLIAM J. ROBBINS

A *Yellowstone* injunction allows a commercial 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.

The *Yellowstone* injunction is governed by different standards than the rules governing general applications for injunctive relief under CPLR §6301, i.e., probability of success, danger of irreparable injury and a balancing of equities in favor of the movant. Rather, the showing that a tenant must make to obtain a *Yellowstone* injunction is that: (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; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises.[1]

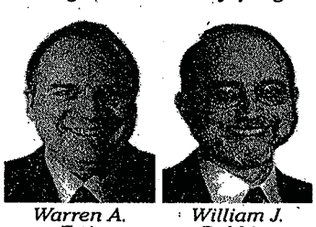
The requirement of posting an undertaking, applicable pursuant to CPLR §6312(b) to CPLR §6301 injunctions, does not apply to *Yellowstone* injunctions. (As a discretionary matter, some courts have conditioned *Yellowstone* relief on the payment of rent or use and occupancy and/or the posting of an undertaking.)[2]

Moreover, the status quo preserved by the *Yellowstone* remedy typically favors the tenant in the sense that, during the pendency of the lawsuit, the tenant is permitted to maintain its tenancy based on its own view of how the lease should be interpreted. For example, if the landlord alleges, and the tenant disputes, that certain alterations made by the tenant violate the lease, a *Yellowstone* injunction generally allows the tenant to keep the alterations in place during the pendency of the lawsuit. Ultimately, the court will determine whether the alterations constitute a breach of the lease, but, in the meantime, the alterations remain. Also, while there certainly are cases where *Yellowstone* injunctions have been denied, a *Yellowstone* injunction has been described as "commonplace" and relief granted "routinely."[3]

In light of all these factors, landlords obviously would prefer to avoid having to litigate *Yellowstone* injunction motions. A recent decision by Nassau County District Court Judge Scott Fairgrieve in *Malik v. Toss 29 Inc.*[4] addressed a novel approach taken by the landlord there, i.e., including a clause in the lease making it a violation of a substantial obligation of the tenancy, and grounds for termination of the lease, to seek a *Yellowstone* injunction.

The facts in *Malik,* as set forth in the District Court decision, are as follows. The tenant leased a bar and grill. Paragraph 42 of the Supplemental Rider to the lease provided that:

> Tenant waives his right to bring a declaratory judgment action with respect to any provision of this lease, or with respect to any notice pursuant to the provisions of this 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.
>
> Any breach of this paragraph shall constitute a violation of a substantial obligation of the tenancy, and shall be grounds for the immediate termination of this Lease. It is further agreed that in the event injunctive relief is sought, or if a 'Yellowstone' injunction (*First National Stores, Inc. v. Yellowstone Shopping Centers, Inc.*, 21 N.Y.2d 630) is sought, such relief shall be denied, and Landlord shall be entitled to recover the costs of opposing such an application or action, including its attorneys' fees actually incurred. The Landlord may not cancel this lease pursuant to the bankruptcy clause as long as the Tenant is not in default in the payment of his monthly rent.[5]



Warren A. Estis *William J. Robbins*

LANDLORD—TENANT

An integral part of the District Court's discussion of unconscionability is the fact that the landlord willfully breached the lease by allowing sewage and waste to partially evict the tenant.

A major dispute arose between the landlord and tenant over sewage and waste flowing into the tenant's premises over a number of years. The tenant claimed a loss of business and good will. When the landlord "threatened to terminate the Lease for non-payment of the rent," the tenant moved in Nassau County Supreme Court for a *Yellowstone* injunction. In a decision dated April 15, 2005, Justice Ira B. Warshawsky granted the *Yellowstone* injunction, stating as follows with respect to the lease provision barring application for a *Yellowstone* injunction:

> Toss 29 has established the criteria necessary for a *Yellowstone* injunction. Mohammad A. Malik's reliance upon various lease provisions in its attempt to defeat this application fails. The applicability and enforceability of the relied upon waivers in the lease is not clear at this juncture so as to preclude the maintenance of the status quo.[6]

The Supreme Court decision granting the *Yellowstone* injunction also stated that the landlord "did...plead guilty before the Village Court of the Village of Hempstead to causing raw sewage to discharge onto the floors of the stores at the strip mall, thereby endangering the welfare of the occupants and pedestrians in violation of section 74-24 of the Village Code."

The tenant's Supreme Court case came on for joint trial in August 2006 with a related matter involving another tenant in the strip mall that had also experienced sewage and waste problems. In an October 2006 decision, the Supreme Court concluded that the landlord had willfully violated the lease, and breached a stipulation of settlement entered into between the parties in 2003 in a prior District Court proceeding, by failing to repair the sewer line. The Supreme Court dismissed the tenant's seventh cause of action for injunction, stating that "There is no basis for such an order and it would be precluded by the lease."

In December 2006, the landlord issued a notice of termination to the tenant based on the above-quoted paragraph 42 of the supplemental rider to the lease. The tenant's acts which the landlord claimed constituted a violation of a substantial obligation of the tenancy and grounds for the immediate termination of the lease were (1) its moving for a *Yellowstone* injunction, and (2) its seeking, in the complaint in the Supreme Court *Yellowstone* action, a declaratory judgment with respect to provisions of the lease.

When the tenant did not vacate the premises, the landlord, based on the notice of termination, commenced a holdover proceeding. In the decision that is the subject of this article, the District Court granted the tenant's motion for summary judgment dismissing the holdover proceeding, with prejudice, based on its conclusion that (1) the landlord had

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

waived its right to enforce paragraph 42 of the supplemental rider to the lease, (2) the landlord had unclean hands, and (3) enforcement of lease paragraph 42 would be unconscionable under the circumstances.

After emphasizing that the Supreme Court had found that the landlord breached its agreement with the tenant by failing to maintain the sewer pipe, the District Court stated:

> Since petitioner willfully breached its own obligation under the lease agreement, the provisions of Paragraph 42 are not valid and enforceable against respondent.[7]

In support of that conclusion, the District Court cited *DeCapua v. Dinea-Mate, Inc.*[8] In that case, there was a contract between plaintiff independent contractor and defendant book publisher which granted the independent contractor exclusive rights to sell the publisher's books in a particular geographic area and required him to pay royalties based upon books delivered and sold. The plaintiff's lawsuit alleged, inter alia, breach of the restrictive covenant. In ruling against the plaintiff, the Appellate Division, Second Department, stated:

> The plaintiff was not entitled to enforce the restrictive covenant in the contract since he breached the contract first by failing to make royalty payments. When a party benefiting from a restrictive covenant in a contract breaches that contract, the covenant is not valid and enforceable against the other party because the benefiting party was responsible for the breach....[9]

The District Court in *Malik* also cited, in support of its conclusion that landlord's breach of its obligation to repair the sewer pipe resulted in a waiver of any right to enforce lease paragraph 42, *Cornell v. TV Development Corp.*[10] and *Broad Properties v. Wheels Incorporated, Inc.*,[11] as well as two treatises, i.e., Dolan, "Rasch's Landlord & Tenant"[12] and Finkelstein and Ferrara, "Landlord and Tenant Practice in New York."[13]

The second ground on which the District Court in *Malik* based its dismissal of the holdover proceeding was the landlord's unclean hands, as to which it stated:

> Since petitioner seeks the aid of the Court with unclean hands, this Court will not assist nor reward petitioner for its outrageous and willful violations of its contractual obligations.
>
> ***
>
> Petitioner has violated the principles of good faith and fair dealing by allowing sewage and waste to be a major headache for respondent in direct violation of its contractual obligations to repair the sewer pipe. This type of behavior cannot be rewarded by enforcement of Paragraph 42.[14]

In support of this prong of its analysis, the District Court cited various authorities for the proposition that there is in every contract, including leases, a covenant of good faith and fair dealing.[15] The court also cited a well-known treatise for the proposition that a "party to a contract who fails to perform a material obligation of the contract is not in court with clean hands and may not seek the aid of a court of equity in the protection of alleged rights arising out of or connected with the contract."[16]

The final ground on which the District Court in *Malik* based its dismissal of the holdover proceeding was unconscionability, as to which the District Court stated:

> Lastly, this Court finds that it would be unconscionable to allow respondent to be evicted under these circumstances where the petitioner seeks to cause respondent to lose its entire investment in the leased premises because petitioner violated the Lease by allowing sewage and waste to partially evict respondent.[17]

As pointed out in the treatises cited by the District Court, Real Property Law §235-c applies the doctrine of unconscionability to leases.[18] That statutory section, titled "Unconscionable lease or clause," provides, inter alia, that:

> If the court as a matter of law finds a lease or any clause of the lease to have been unconscionable at the time it was made, the court may refuse to enforce the lease, or it may enforce the remainder of the lease without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

In its discussion of unconscionability, the District Court cited *Ultrashmere House, Ltd. v. 38 Town Associates.*[19] In that case, the Supreme Court, New York County struck down as "clearly unconscionable as a matter of law, and hence unenforceable under Real Property Law Section §235-c" a lease clause which it described as "going so far as to even prohibit the tenant from asserting a 'defense' to any action or summary proceeding."

Justice Fairgrieve also cited *Pyramid Centres and Company Ltd. v. Kinney Shoe Corp.*[20] There, the Appellate Division, Third Department, struck down as an unreasonable penalty a liquidated damage clause in a lease which provided that the landlord would be entitled to double the amount of fixed rent for the remainder or unexpired portion of the term if the tenant breached the lease by ceasing operation prior to the termination date of the lease.

In light of this precedent, Justice Fairgrieve ruled in *Malik* that "Paragraph 42 operates as a penalty and thus is unconscionable." He expressly noted his awareness "of the Supreme Court's language concerning the validity of Paragraph 42," but construed that language as "limited to the specific factual circumstances before the Supreme Court," which did not include a request for eviction of the tenant for bringing the *Yellowstone* injunction. Noting that the Supreme Court has specifically held that the landlord was not entitled to attorneys' fees due to its breach of the lease by failing to repair or replace the sewer line, the District Court expressed its belief "that the Supreme Court would have refused to evict the respondent because of the petitioner's willful default."

The following are additional points to consider in reviewing the reasoning of the District Court in *Malik*. Real Property Law §235-c(2) provides that:

> When it is claimed or appears to the court that a lease or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination.

While nothing on the face of the District Court decision in *Malik* expressly reflects that such evidence was presented, presumably such evidence was included in the papers submitted to the District Court by the respective parties in support of and in opposition to the summary judgment motion.

An integral part of the District Court's discussion of unconscionability is the fact that the landlord willfully breached the lease by allowing sewage and waste to partially evict the tenant. Would the District Court have found lease paragraph 42 unconscionable absent such a breach of lease by the landlord?

In *Ultrashmere House*, one of the cases cited by the District Court, for example, the court held that a lease clause prohibiting consolidation of actions was against public policy. It rejected an argument that consolidation primarily affected the interests only of the immediate parties and thus could be waived, and stated its belief that the parties could not infringe upon a procedure that involved the court's administration of judicial business. Is there a public policy behind the *Yellowstone* doctrine that would be violated by a clause making it a breach of lease to seek a *Yellowstone* injunction? Does such a lease clause in and of itself infringe on the court's administration of judicial business? Or, does a *Yellowstone* injunction primarily affect the interests only of the immediate parties and thus is something that can be waived?

While the answers to these questions may be uncertain, what is clear is that clauses such as lease paragraph 42 in *Malik* are rare. Surely, that is not because of a lack of imagination by the landlord's bar. Rather, it is testimony to the fact that tenants and their counsel attribute major significance to being able to pursue *Yellowstone* relief and are unwilling to forego seeking such relief.

1. See, e.g., *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Avenue Associates*, 93 N.Y.2d 508, 514, 693 N.Y.S.2d 91, 94 (1999).

2. See, e.g., *1286 RR Operating Inc. v. McAlpin Associates*, 169 A.D.2d 450, 564 N.Y.S.2d 153 (1st Dep't 1991); *61 West 62nd Owners Corp. v. Harkness Apartment Owners Corp.*, 173 A.D.2d 372, 570 N.Y.S.2d 8 (1st Dep't 1991).

3. See, e.g., *Post v. 120 East End Avenue Corp.*, 62 N.Y.2d 19, 24, 25, 475 N.Y.S.2d 821, 823 (1984).

4. N.Y.L.J. April 18, 2007, p. 23, col. 1 (Dist. Ct. Nassau Co.).

5. Id.

6. Id., at cols. 1-2.

7. Id., at col. 3.

8. 292 A.D.2d 489, 744 N.Y.S.2d 417 (2nd Dep't 2002).

9. 292 A.D.2d at 491, 744 N.Y.S.2d at 420.

10. 17 N.Y.2d 69, 268 N.Y.S.2d 29 (1966).

11. 43 A.D.2d 276, 351 N.Y.S.2d 15 (2nd Dep't 1974), order aff'd, 35 N.Y.2d 821, 362 N.Y.S.2d 859 (1974).

12. The *Malik* decision did not cite to any particular section of the treatise. The passage quoted was as follows: "On the other hand, where the covenants are dependent, performance of his own covenants is a condition precedent to the right of either party to recover for breach of covenant by the other party."

13. At Section 10:8.

14. N.Y.L.J. April 18, 2007, p. 23, at col. 4.

15. *Gray v. Wallman & Kramer*, 184 A.D.2d 409, 585 N.Y.S.2d 46 (1st Dep't 1992); Finkelstein and Ferrara, "Landlord and Tenant Practice in New York" §10:11.

16. 55 N.Y. Jur2d Equity §115.

17 N.Y.L.J., April 18, 2007, p. 23, at col. 4.

18. Finkelstein and Ferrara, "Landlord and Tenant Practice in New York" §10:12; Dolan, "Rasch's Landlord & Tenant" (4th ed.) §6:13.

19. 123 Misc.2d 102, 473 N.Y.S.2d 120 (Sup. Ct. N.Y. Co. 1984).

20. 244 A.D.2d 625, 663 N.Y.S.2d 711 (3rd Dep't 1997).