'Yellowstone' Injunctions

Ruling Shows Approval Not Foregone Conclusion

Warren A. Estis, a founding partner at Rosenberg & Estis, and William J. Robbins, a partner at the firm, write that while denial of a *Yellowstone* motion may occur far less frequently than the granting of such a motion, when such a denial occurs, the subsequent litigation can often become a multiforum tangled web.

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Once again, we address the subject of the *Yellowstone* injunction. 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.

In a previous column,[2] we focused on two cases, *Victory Taxi Garage, Inc. v. Butaro*[3] and *Gristede's Operating Corp. v. Centre Financial LLC*[5] also held that a tenant was not entitled to a *Yellowstone* injunction. This article discusses the reasoning of the court in *Gristede's* and some of the case precedent it cites. All these cases demonstrate that while the common wisdom is that a *Yellowstone* injunction is routinely granted, and while more often than not it may be granted, such an outcome is not necessarily a foregone conclusion.

In *Gristede's,* the landlord sent the tenant a notice of default, dated May 3, 2007. The alleged lease violations set forth in the notice included (1) failure to pay a 4 percent late charge arising out of late payment of minimum rent due April 1, 2007, and (2) failure to continuously and uninterruptedly keep the premises fully stocked and staffed during all business hours on all business days when the shopping center where the store is located is open for business. Specifically, the landlord claimed that the continuous operations clause of the lease was violated by Gristede's shutting down the butcher and fresh meat departments entirely, and sharply curtailing the bakery department.

Before the notice of default was served, the tenant had served a demand to arbitrate the issue of whether the landlord had acted unreasonably in refusing to consent to Gristede's request to assign the lease on the grounds that Gristede's allegedly was in default in the payment of rent and additional rent and that the proposed assignee purportedly was not a "high quality chain grocery store" as required under the lease. In the notice of default, the landlord asserted that the tenant had no right to arbitrate the reasonableness of the landlord's refusal to consent to the proposed assignment until all defaults had been cured and the tenant was in full compliance with the terms and conditions of the lease.

Asserting that the tenant had failed to cure within the allotted time the defaults specified in the notice of default, the landlord served a notice of termination, dated May 25, 2007. After receiving the notice of termination, the tenant commenced a Supreme Court action seeking (i) a declaration that it was not in material default of the lease and that the landlord did not have the right to terminate the lease, (ii) money damages and (iii) a permanent injunction barring the landlord from taking any action to terminate the lease and/or to interfere with the tenant's possession of the premises. It moved for a *Yellowstone* injunction. The landlord opposed the motion and sought to stay the arbitration, arguing that if the arbitration and the Supreme Court action proceeded concurrently, there was a risk of conflicting determinations on the

issue of whether the tenant was in default under the lease. (The arbitration had commenced but had been suspended after a full day's testimony.)

The court set forth the well-known four-prong standard of what the tenant must show to obtain *Yellowstone* relief, namely that:

> (1) it holds a commercial lease; (2) the landlord served a notice to cure, or a notice of default on the tenant, or faces the threat of lease termination; (3) it sought injunctive relief prior to expiration of the cure period and termination of the lease; and (4) it has the ability and desire to cure the alleged default by any means short of vacating the premises.[6]

The court concluded that the tenant had failed to satisfy the element of willingness and ability to cure the alleged default. Citing the Appellate Division, First Department decision in *WPA/Partners LLC v. Port Imperial Ferry Corp.,*[7] the court stated that:

> While a tenant is not required to prove its ability to cure the claimed default prior to obtaining a *Yellowstone* injunction, there must be a basis for believing that the tenant desires to cure and has the ability to do so through any means short of vacating the premises.[8]

Justice Austin concluded that Gristede's had fallen short of the required showing because:

> Here, it appears that Gristede's primary interest is in closing its store, selling its assets and assigning the lease. Its allegations do not indicate that it has any interest, inter alia, in remaining at the premises and curing the alleged violation of the Continuous Operation provision.[9]

The court cited two Appellate Division, First Department cases, *JH Parking Corp. v. East 112th Realty Corp.*[10] and *403 W. 43 Street Rest. Inc. v. Ninth Avenue Realty, LLC*,[11] where *Yellowstone* relief had been denied because of failure to satisfy the willingness and ability to cure criterion. In *JH Parking Corp.*, the defaults alleged were the tenant's failure to secure an amended certificate of occupancy for use of the premises as a parking lot, failure to legalize the premises and secure the necessary permits, and illegal sublet of the premises. The appellate court held that:

> [T]he record supports the motion court's conclusion that plaintiff would not or could not cure the alleged default by means short of vacating the premises, and therefore could not establish its entitlement to *Yellowstone* relief."[12]

In denying *Yellowstone* relief in *JH Parking Corp.*, New York County Supreme Court Justice Jane S. Solomon had stated:

> But even if I discount the [alleged illegal sublet], it is pretty hard to discount a history from 1994 through today [August 6, 2001] of the tenant signing documents undertaking to legalize its use of the property as a parking lot which, as of not only the initiation of this proceeding on June 27th but through to today, August 6th, it has not done, and that it will do so and cure the matter of getting the license or whatever the Department of Consumer Affairs document is issued in the proper name and have an architect engage in a concededly lengthy process which will regularize the use of a vacant lot for a parking lot strikes me as too little too late and speculative.[13]

In other words, Justice Solomon apparently doubted the tenant's willingness to cure, based on the tenant's past history of inaction. Justice Solomon's conclusion was upheld by the Appellate Division.

In *403 W. 43 Street Rest. Inc. v. Ninth Avenue Realty LLC*, the facts, as relevant to the issue of a *Yellowstone* injunction, are that the lease included a provision (Article 65) stating that at any time the landlord intended to demolish or substantially remodel or rehabilitate the building in which the demised premises were situated, the landlord "shall have the absolute right, option and privilege to terminate this lease and the demised term hereof" by giving written notice at least 180 days prior to the date specified in the termination notice for the termination of the lease. The provision also stated that upon the termination date, the lease and its term would come to an end and the tenant was obligated to quit and vacate the premises and surrender them to the landlord. When the landlord served a termination notice, the tenant, before the termination date, commenced a Supreme Court lawsuit and moved for various relief including a *Yellowstone* injunction.

In opposing the *Yellowstone* injunction, the landlord argued that such relief was not applicable since there was no right or ability to cure. New York County Supreme Court Justice Faviola A. Soto agreed with the landlord, holding:

> As to the *Yellowstone*, the landlord has exercised its rights pursuant to Article 65 of the lease, and served its notice of termination. The *Yellowstone* injunction sought by the plaintiff tenant is not an appropriate relief, as there is no default to cure.[14]

On appeal, the Appellate Division, First Department, affirmed the Supreme Court, stating:

> As plaintiff retained no ability to cure, the court properly denied its application for a *Yellowstone* injunction . . . .[15]

In *Gristede's*, the court held there was a second basis for denying the *Yellowstone* injunction. The tenant's application for *Yellowstone* relief "was made beyond the applicable cure periods under the lease." Citing *King Party Center of Pitkin Ave., Inc. v. Minco Realty LLC*[16] and *S.E. Nichols, Inc. v. American Shopping Centers, Inc.,*[17] the court stated that "[t]here is no basis for a *Yellowstone* injunction where it is sought after the expiration of the period to cure or after the service of a Notice of Termination."

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

> Although Justice Austin did not do so in *Gristede's,* he could have cited earlier decisions of his own in which he denied *Yellowstone* injunctions on the same grounds as in *Gristede's*. In *BAS Communications, Inc. v. YTK Corp.*,[18] he held the movant had failed to demonstrate willingness and ability to cure. There, the notice alleged that a subtenant had defaulted in paying rent and additional rent to its sublessor for a convenience store. The court noted the subtenant did not dispute having made no payments to the sublessor for the period at issue, and also that the subtenant stated that lease fixtures, inventory and good will of the convenience store were its only assets. The court concluded that "[t]hese allegations do not demonstrate a willingness and ability to cure the default in payments due to [the sublessor], which now exceed $100,000."

In *B.M.G. Bagels Inc. v. Vorillas Properties LLC*,[19] the landlord sent a notice of termination under a lease clause giving it the right to terminate the tenancy on 60 days' notice if it elected to demolish the building or rehabilitate an entire floor. The tenant did not commence its lawsuit until after the termination date. The court stated that the tenant "cannot obtain a *Yellowstone* injunction . . . because its lease had been terminated prior to the commencement of this action."

The court in *Gristede's* concluded that the "most efficacious course" was to stay arbitration of the issue of the reasonableness of the landlord's refusal to approve the proposed assignment "until the issue of whether Gristede's is in default under the lease is resolved." It granted the landlord's motion to stay the arbitration "pending further order of this Court." The court commented that:

> Should it be determined that Gristede's did, in fact, default under the lease as noticed, failed to timely cure, and was given proper notice of termination, the reasonableness of [landlord's] refusal to approve the assignment would be moot.[20]

That comment raises an important factor to recognize about *Yellowstone* motions. A *Yellowstone* motion typically does not determine on the merits the issue of the purported default asserted in the notice that gave rise to the *Yellowstone* motion. Thus, even if a *Yellowstone* motion is denied, the tenant will still have the opportunity to show that it is not in default under the lease. The risk that results to the tenant from not obtaining a *Yellowstone* injunction is that, since the cure period will not be tolled, if the tenant loses on the issue of default, it will not have an opportunity to cure and save its lease.

If a *Yellowstone* motion is denied, in what forum will the issue of whether the tenant has defaulted be determined? Typically, a Supreme Court complaint in a *Yellowstone* action seeks a declaration that the tenant has not breached the lease as asserted in the notice of default. Therefore, the issue of whether a default occurred could be determined in Supreme Court.

However, a landlord who has been successful in defeating a *Yellowstone* motion presumably would not just sit by and let the default issue be adjudicated in Supreme Court. If there is no *Yellowstone* injunction, the cure period will expire, the lease will terminate and the landlord can commence a holdover proceeding in Civil Court. That should be a more expeditious proceeding than a Supreme Court lawsuit and, as such, advantageous to the landlord. By moving to Civil Court, however, the burden of proof on the issue of default shifts. In a Civil Court holdover proceeding, the burden of proof

is on the landlord/petitioner to show, among other things, that the tenant defaulted as asserted in the notice of default. In a tenant's Supreme Court *Yellowstone* action, by contrast, the burden of proof is on the tenant to prove in the action (as distinct from on the *Yellowstone* motion) that it is not in breach of the lease as claimed in the notice of default.

Depending on the circumstances, various other procedural issues may arise from denial of a *Yellowstone* motion and the resulting opportunity for the landlord to commence a summary proceeding. Should all claims be litigated in Civil Court? Can all claims be litigated in Civil Court? What if the tenant's Supreme Court action also includes damage claims and there is a no counterclaim clause in the lease which would bar the tenant from counterclaiming for damages in the landlord's holdover proceeding?

Suffice it to say that while denial of a *Yellowstone* motion may occur far less frequently than the granting of such a motion, when such a denial occurs, the subsequent litigation can often become a multiforum tangled web.

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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. Warren A. Estis and William J. Robbins, "*Yellowstone* Injunction: Application Frequently, but Not Always, Granted," NYLJ, Aug. 1, 2007, p. 5, col. 2.

3. 16 Misc. 3d 875, 840 N.Y.S.2d 292 (Sup. Ct. Kings Co. 2007).

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

5. 16 Misc.3d 1132(A), NYLJ Sept. 14, 2007, p. 27, col. 1 (Sup. Ct. Nassau Co.).

6. 16 Misc.3d 1132(A) at 3.

7. 307 AD2d 234, 763 N.Y.S.2d 266 (1st Dept. 2003).

8. 16 Misc.3d 1132(A) at 3.

9. Id.

10. 298 AD2d 258, 748 N.Y.S.2d 478 (1st Dept. 2002).

11. 36 AD3d 464, 827 N.Y.S.2d 655 (1st Dept. 2007).

12. 298 AD2d at 258.

13. Transcript of Order on the Record by The Hon. Jane S. Solomon, dated Aug. 6, 2001 (N.Y. Co. Clerk Index No. 112453/01), in *JH Parking Corp. v. East 112th Realty Corp.*, included in Record on Appeal, at p. 117.

14. Order entered July 13, 2006 in *403 W. 43 Street Rest. Inc. v. Ninth Avenue Realty LLC* (N.Y. Co. Clerk's Index No. 100081/06), included in Record on Appeal, at pp. 5-22.

15. 36 AD3d at 464.

16. 286 AD2d 373, 729 N.Y.S.2d 183 (2nd Dept. 2001).

17. 115 AD2d 856, 495 N.Y.S.2d 810 (3rd Dept. 1985).

18. 15 Misc.3d 1104(A), 836 N.Y.S.2d 497 (Sup. Ct. Nassau Co. 2007).

19. NYLJ, Nov. 9, 2005, p. 21, col. 1 (Sup. Ct. Nassau Co.).

20. 16 Misc.3d 1132(A) at 4.