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LANDLORD-TENANT

Court Allows Waiver of Right To Seek Yellowstone Relief


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As most landlord-tenant practitioners are aware, when a commercial tenant is served with a notice to cure threatening to terminate the lease if certain defaults under the lease are not cured within the time stated in the notice, the tenant may seek a *Yellowstone* injunction (*see First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 N.Y.2d 630 (1968). A *Yellowstone* injunction tolls the expiration of the cure period in the notice to cure, and prevents the landlord from terminating the lease, to permit the tenant to litigate the merits of the alleged defaults without suffering the risk of forfeiting its leasehold if the court ultimately rules that the tenant was in default. Thus, the equitable remedy of a *Yellowstone* injunction is a critical remedy, in that it allows the tenant to challenge the merits of the alleged defaults without the danger of losing its lease.

It has long been an unsettled question in the courts of this state as to whether a commercial tenant may, in its lease, waive its right to obtain a *Yellowstone* injunction. Several lower court decisions have decided this issue, with some courts finding that a *Yellowstone* waiver is enforceable, and others finding that such a waiver is violative of public policy.

In a milestone decision issued at the end of January of this year, the Appellate Division, Second Department has now become the first appellate court to decide this issue. In *159 MP Corp. v. Redbridge Bedford*, 2018 N.Y. Slip. Op. 00537 (2d Dept, Jan. 31, 2018) (*Redbridge*), the Second Department held that a commercial tenant *can* and, in the case before it, *did* waive its right to seek *Yellowstone* relief. This is an important ruling that will likely have significant consequences in the real estate industry in this state.

'Redbridge'

The facts as recited by the court in *Redbridge* were as follows. The plaintiff 159 MP Corp. was the commercial tenant of retail and storage space under two separate leases entered into in April 2010. The leases were long-term leases in that they each ran for a term of 20 years with 10-year renewal options.

A paragraph contained in the rider to each lease provided that the tenant:

> waives its 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 provisions of this lease. Any breach of this paragraph shall constitute a breach of substantial obligations 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 by Tenant and such relief shall be denied, the Owner shall be entitled to recover the costs of opposing such an application, including its attorney's fees actually incurred, it is the intention of the parties hereto that their disputes be adjudicated via summary proceedings.

Four years into the lease term, the landlord issued to the tenant notices to cure certain defaults under the leases relating to, among other things, the alleged failure to obtain certain permits, the existence of certain fire hazards, and the existence of nuisances and noises. The notices demanded that the tenant cure the alleged defaults within 15 days, or the landlord would terminate the leases.

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Thus, in response to the notices to cure, the tenant commenced an action in Kings County Supreme Court seeking, among other things, a declaratory judgment that it was not in default under the leases as alleged by the landlord. The tenant also moved for a *Yellowstone* injunction with respect to the notices to cure. In the motion, the tenant disputed the alleged lease defaults, but stated that it was ready, willing and able to cure any defaults found by the court. The landlord opposed and cross-moved for summary judgment dismissing the complaint, relying on the waiver language in the leases.

The Supreme Court ruled in favor of the landlord and held that the waiver language contained in the leases was enforceable and barred the tenant from obtaining either declaratory relief or a *Yellowstone* injunction. Notably, the Supreme Court did not address whether the waiver language violated public policy, as the issue had not been raised by the parties.

Second Department's Decision

The tenant appealed and the Second Department affirmed in a 3-1 majority opinion written by Justice Mark C. Dillon. The majority agreed with the Supreme Court that the waiver language in the leases was enforceable and barred the tenant from seeking either declaratory or *Yellowstone* relief.

First, the court found that the waiver of declaratory relief set forth in the leases necessarily included a waiver of the right to obtain a *Yellowstone* injunction. The court observed that contrary to the tenant's contention, there was no distinction "between a prohibited declaratory injunction action on the one hand, and permissible *Yellowstone* relief on the other," in that "the latter cannot exist without the former."

Second, and most importantly, the court rejected the tenant's contention (raised for the first time on appeal)[1] that the waiver provision in the leases violated public policy.

At the outset, the court observed that it is a "bedrock principle of our jurisprudence" that parties may freely

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contract with each other without interference from any state, and thus the law provides citizens with the "freedom and opportunity to abandon rights and privileges." The court then recited numerous examples in the law sustaining the ability of parties to abandon rights, both constitutional and statutory. Specifically with respect to leases, the court observed that "[l]eases, in particular, are known for the rights that tenants oftentimes waive within the four corners of the documents." The court cited, among other examples, that tenants can waive their right to a jury trial and their right to interpose counterclaims.

The court further found that while the state Legislature has enacted numerous protections for tenants that explicitly identify rights that cannot be waived – *e.g.*, a tenant cannot waive the warranty of habitability – the Legislature "has not enacted any specific or blanket statutory provision prohibitqing as void or unenforceable a tenant's waiver of declaratory judgment remedies."

Lastly, the court found that "[t]he right to a declaratory judgment, inclusive of the *Yellowstone* relief sought herein, is not so vaulted as to be incapable of self-alienation" and thus:

> [t]o hold that the waiver of declaratory judgment remedies in contractual leases between sophisticated parties is unenforceable as a matter of public policy does violence to the notion that the parties are free to negotiate and fashion their contracts with terms to which they freely and voluntarily bind themselves.

Conclusion

The significance of the Second Department's decision in *Redbridge* cannot be overstated. Landlords will be more likely to now demand that such *Yellowstone* waivers be included in leases, and tenants will need to understand the serious consequences which may result by agreeing to include such a provision. It would certainly seem that this is an issue that may very well end up being decided by the Court of Appeals.

1. The court observed that an argument that a contract provision is void as against public policy may be raised for the first time on appeal.