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## Yellowstone waivers are enforceable

By MICHAEL E. FEINSTEIN

Counsel who practice in the area of commercial landlord-tenant litigation are surely familiar with the fundamental procedural device known as the “Yellowstone injunction.”

A Yellowstone injunction tolls the time to cure under a notice to cure or notice of default served by a landlord on the tenant, so that the tenant can litigate the merits of the alleged defaults and retain the ability to cure if the court ultimately rules that the tenant is in default of the lease.

This article addresses an important decision which was handed down this year in the area of Yellowstone practice.

In *159 MP Corp. v. Redbridge Bedford, LLC*, 2019 NY Slip Op 03526 (May 7, 2019) (“*159 MP Corp.*”), the New York Court of Appeals (New York’s highest court) ruled that a commercial tenant may, in its lease, waive its right to bring a declaratory judgment action with respect to the lease.

As such, because a Yellowstone injunction requires the existence of an underlying action seeking a declaratory judgment as to whether the tenant is in default under the lease, such a waiver precludes the tenant from obtaining a Yellowstone injunction.

The facts in *159 MP Corp.* are as follows:

### Legal Viewpoints

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The plaintiffs were the tenants under two, 20-year commercial leases demising to plaintiffs 13,000 square feet in a building located in Brooklyn to operate a Foodtown supermarket. Most importantly, each lease contained a rider, which included a provision stating as follows:

“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... [I]t is the intention of the parties hereto that their disputes be adjudicated via summary proceedings.”

The landlord sent notices to cure to the tenants alleging various defaults under the leases and providing the tenants with 15 days to cure in order to avoid lease termination. The tenants commenced a declaratory judgment action in Supreme Court and moved for a Yellowstone injunction to toll the time to cure.

The landlord answered the complaint and cross-moved for summary judgment dismissing the complaint, maintaining that the action, and thus the motion for Yellowstone relief, was barred by the waiver provision in the leases. The tenants argued in response that the waiver clause was unenforceable.

Supreme Court denied the tenants’ motion for a Yellowstone injunction and the Appellate Division, Second Department affirmed (with one Justice dissenting), holding that the declaratory judgment waiver was enforceable. The Second Department granted the tenants leave to appeal to the Court of Appeals.

The Court of Appeals, in its majority opinion, affirmed, holding that the declaratory judgment waiver was enforceable and not violative of public policy.

The Court rejected the tenants’ argument that the declaratory judgment waiver was void as against public policy.

The Court observed that freedom of contract is a “deeply rooted” public policy of this state and that “our courts have long deemed the enforcement of commercial contracts according to the terms adopted by the parties to be a pillar of the common law.”

The Court held that in the case before it, the declaratory judgment waiver was “clear and unambiguous, was adopted by sophisticated parties at negotiating arm’s length, and does not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract.”

The Court went on to explain that “there is simply nothing in our contemporary statutory, constitutional, or decisional law indicating that the interest in access to declaratory judgment actions or, more generally, to a full suite of litigation options without limitation, is so weighty and fundamental that it cannot be waived by sophisticated, counseled parties in a commercial lease.”

In addition, the Court found that it was “critical” that the declaratory judgment waiver clause did not “preclude access to the courts” and “permits plaintiffs to raise defenses to allegations of default in summary proceedings in Civil Court...”

The Court further noted that the waiver did not impair the tenants’ ability to seek damages based on breach of contract or tort theories. The Court observed that “despite the waiver clause, the judicial review available to plaintiffs is more generous than that available to parties whose contracts contain arbitration clauses -- yet we routinely enforce arbitration clauses.”

### Conclusion

There is little doubt that many landlords will now attempt to add declaratory judgment waivers into their commercial leases, and that such waivers will become more commonplace.

It will of course depend on, among other things, the relative bargaining power of the parties, and the sophistication of counsel, as to whether such waivers are ultimately included in a lease.

It remains to be seen how widespread such waivers will become in future commercial lease transactions.

