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Yellowstone Injunctions When Prompt Cure Is Impossible

By Alexander Lycoyannis

Most real estate practitioners are well acquainted with the *Yellowstone* injunction and its importance in preserving the status quo while allegations that a commercial tenant has breached its lease are litigated. For the uninitiated, Supreme Court will issue a *Yellowstone* injunction tolling the running of a cure period and staying the landlord's efforts to evict the tenant, pending the litigation and resolution of the underlying action, where the plaintiff: 1) holds a commercial lease; 2) was served with a default notice threatening to terminate the tenancy; 3) sought a *Yellowstone* injunction prior to the expiration of the cure period set forth in the notice; and 4) is prepared to, and maintains the ability to, cure the alleged lease violation(s) by any means short of vacating the subject premises. *See, e.g., Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*, 93 NY2d 508.

TIMELINESS OF THE MOTION

While all four factors must be satisfied, the third *Yellowstone* prong — timeliness of the motion — is especially important. Where a tenant fails to seek a Yellowstone injunction prior to the expiration of the cure period set forth in the default notice, the motion will be denied, the lease will terminate and Supreme Court will be powerless to reinstate the tenancy. *See, e.g., Three Amigos SJL Rest., Inc. v. 250 West 43 Owner LLC*, 144 AD3d 490; *166 Enterprises Corp. v I G Second Generation Partners, L.P.*, 81 AD3d 154. One day, or even one hour, can make all the difference between saving a long-term commercial tenancy into which vast resources have been invested, and subjecting the tenant to possible eviction in a holdover proceeding.

However, what some practitioners may not realize is that even if the tenant does not obtain a *Yellowstone* injunction prior to the expiration of the cure period asserted in the default notice, all hope may not be lost. Specifically, where: 1) the alleged default is of a nature that it is incapable of being cured within the time

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period provided in the default notice; and 2) with respect to defaults of such nature, the lease requires only that the tenant commence diligent efforts to cure — rather than complete a cure — within the allotted time, service of a notice of termination does not necessarily bar subsequent *Yellowstone* relief.

A Case in Point

This is well illustrated by the Appellate Division, First Department's decision in *Village Center for Care v Sligo Realty and Service Corp*, 95 A.D.3d 219. There, the lease required the tenant to perform certain electrical, plumbing and HVAC work. Ten years after the tenant completed the work, the landlord served a 10-day notice to cure, alleging that the tenant had failed to prove that the Landmarks Preservation Commission (LPC) had approved such work, and, further, that the tenant had failed to provide a mechanical ventilation certificate, proof of the structural stability of such work, and proof of a sprinkler hydrostatic test. The lease provided, in relevant part:

> If the Tenant defaults in fulfilling any of the covenants of this lease other than the covenants for the payment of rent or additional rent ... upon Owner serving a written ten (10) days' notice upon Tenant specifying the nature of said default and upon the expiration of said ten (10) days, if Tenant shall have failed to comply with or remedy said default, *or if the said default or omission complained of shall be of a nature that the same cannot be completely cured or remedied within said ten (10) day period and if Tenant shall not have diligently commenced curing such default within such ten (10) day period, and shall not thereafter with reasonable diligence and in good faith, proceed to remedy or cure such default*, then Owner may serve a written five (5) days' notice of cancellation of this lease upon Tenant … [emphasis supplied].

In response to the notice to cure, the tenant provided the landlord with an LPC permit, work plans stamped approved by the DOB, and other documentation relating to the work. Nevertheless, upon the expiration of the 10-day cure period, the landlord served a notice of termination. The landlord subsequently agreed to a 30-day extension of the termination date, during which period all defaults except for one were cured. With respect to this last default, the tenant was required to submit certain building-wide documentation that it requested from, but was never provided by, the landlord.

The tenant thereafter moved for a *Yellowstone* injunction. Supreme Court denied the motion as untimely, since the tenant interposed the motion after the expiration of the fixed 10-day cure period asserted in the notice to cure, and dismissed the action. However, the Appellate Division, First Department reversed, granted the *Yellowstone* injunction and reinstated the action, emphasizing that the lease provided for a longer period of cure 'if the said default or omission complained of shall be of a nature that the same cannot be completely cured or remedied within said ten (10) day period.' The court noted that when cure within 10 days was impossible, the lease required only that tenant commence diligent efforts to cure the defaults within the allotted time. Because the tenant did that, it was entitled to *Yellowstone* relief.

The *Tap Tap* Case

The First Department recently reaffirmed the continuing vitality of the *Village Center for Care* rule. In *Tap Tap, LLC v 558 Seventh Ave. Corp.*, 144 AD3d 409, the landlord served a default notice upon the tenant, alleging five open violations of law with respect to the leased premises. The alleged defaults were of a nature that they could not be

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cured within the 15-day period set forth in the notice, and the parties' lease contained language virtually identical to the provision that was at issue in *Village Center for Care*.

After such 15-day period expired, the landlord served a notice of termination. Over one month later, the tenant moved for a Yellowstone injunction, but Supreme Court ultimately dismissed the action *sua sponte*. In reversing, the Appellate Division, First Department held, citing *Village Center*, "Accordingly, the matter is reopened, the complaint reinstated, and the matter remanded to Supreme Court to consider whether, under the circumstances, plaintiff's *Yellowstone* injunction was timely filed … and otherwise warranted on the merits … "

Conclusion

Notwithstanding the lifeline provided by cases such as *Village Center for Care* and *Tap Tap* in the *Yellowstone* context, practitioners should make every attempt to avoid having to rely on them. When a client has been served with a default notice threatening to terminate its commercial tenancy, the diligent advocate will promptly prepare *Yellowstone* motion papers, get into court prior to the expiration of the cure period, and obtain a temporary restraining order tolling the obligation to cure. Even if there is a good argument that the alleged default cannot be cured within the requisite time period, an attorney should not subject the client's valuable commercial tenancy to the vicissitudes of the court system. That said, where, for whatever reason (such as, for example, through the inaction of an attorney unfamiliar with commercial landlord-tenant practice), a tenant served with a default notice did not obtain a temporary restraining order prior to the expiration of the cure period, *Village Center for Care* and *Tap Tap* provide a roadmap out of purgatory.

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DEVELOPMENT

Environmental Judgment

Matter of Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan

NYLJ 1/23/17, p. 18, col. 6
AppDiv, First Dept.
(3-1 decision; majority memorandum; dissenting opinion by Gesmer, J.)

In an article 78 proceeding by a parents group seeking to annul a findings statement issued by the Department of Health proposing to construct a 20-story nursing home adjacent to an elementary school, the Department of Health and the nursing home appealed from Supreme Court's grant of the petition. A divided Appellate Division reversed, concluding that the trial court had improperly substituted its analysis for that of the lead agency.

Developer applied to the Department of Health (DOH) to build a nursing home in Manhattan adjacent to an elementary school. Parents raised questions about the noise levels the project would generate during construction. DOH issued a Draft Environmental Impact Statement concluding that the project would not generate adverse noise impacts. When parent groups retained experts who concluded that background noise in excess of specified decibel levels would interfere with wellness of students, and that central air conditioning would be necessary to abate the noise issues, DOH responded by requiring installation of new acoustical windows and new window air conditioning units on the façade facing the school. DOH conceded that even with those new windows and window units, the noise would exceed recommended decibel levels, but noted that the manual setting those levels provided that increased noise levels would not constitute a significant adverse impact if the noise lasted for less than two years.

DOH also concluded, after reviewing soil sampling from the site, that a two-foot cap of clean soil would have to be placed over ground left exposed after construction to reduce lead levels in children play areas. DOH also required dust control measures, including watering of the soil during demolition and excavation. The parents group then brought this article 78 proceeding challenging DOH's findings. Supreme Court granted the petition, prompting this appeal by DOH and the nursing home developer.

In reversing and dismissing the proceeding, the Appellate Division majority concluded that DOH had taken a hard look at the project's environmental impact, and had provided a reasoned elaboration of its basis for approving the project, and for requiring its mandated remedial measures. The majority noted that failing to respond to all of the conclusions of the consultants hired by the parents group did not mean that DOH had failed to take a hard look at the issues raised by those consultants.

Justice Gesmer, dissenting, argued that DOH had not provided evidence to support some of its findings, including its finding that installation of central air conditioning would be infeasible because of cost and timing considerations. She also contended that DOH had failed to comply with the CEQR technical manual on exposure to contamination by vulnerable populations.

Challenge to SEQRA Determination Ripe

Matter of Cor Route 5 Co., LLC. v. Village of Fayetteville

2017 WL 460613
AppDiv, Fourth Dept., 2/3/17
(memorandum opinion)

In neighboring landowner's article 78 proceeding to annul a zoning amendment for inconsistency with the State Environmental Quality Review Act (SEQRA), petitioner landowner appealed from Supreme Court's dismissal of the petition. The

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