

LANDLORD-TENANT

Yellowstone Injunctions: Timeliness Is Critical



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Attorneys who practice landlord-tenant law in New York should be familiar with what is known as the Yellowstone injunction. A Yellowstone injunction—first established by the New York Court of Appeals in the landmark decision *First Nat. Stores v. Yellowstone Shopping Center*, 21 N.Y.2d 630, 290 N.Y.S.2d 721 (1968)—operates to maintain the status quo by tolling the commercial tenant’s time to cure an alleged lease default as set forth in a notice to cure, so that, upon an adverse determination on the merits, the tenant may cure the default and avoid the forfeiture of its leasehold.

It is well-established that to obtain a Yellowstone injunction, the tenant must demonstrate that (1) it holds a commercial lease, (2) it received from the landlord a notice to cure threatening the termination of the lease, (3) it requested injunctive relief prior to the expiration of the cure period in the notice to cure, and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises.¹

Because the tenant’s burden on a motion for a Yellowstone injunction is far less than what must be shown on a motion for a “normal” preliminary injunction (among other things, the tenant need not establish a likelihood of success on the merits or irreparable harm), it is not surprising that motions for Yellowstone relief are routinely granted.

‘Riesenburger’

Yellowstone motions, however, will be denied where the tenant has failed to establish one or more of the necessary elements for the granting of such relief. One such instance was recently the subject of a decision by Justice Martin E. Ritholtz of Supreme Court, Queens County, in *Riesenburger Properties v. Pi Associates*.² In *Riesenburger*, the court was constrained to deny the commercial tenant’s motion for a Yellowstone injunction because (1) the motion was untimely made after the expiration of the cure period in the notice to cure, and (2) the default alleged in the notice was not subject to being cured.

‘Riesenburger’ is a very potent reminder of the critical importance of filing a motion for Yellowstone relief and obtaining the Yellowstone temporary restraining order prior to the expiration of the cure period set forth in the subject notice to cure.

The pertinent facts as recited by the court in *Riesenburger* are as follows.

On April 25, 2003, Alkus I. Riesenburger, as landlord, and Pi Associates, as tenant, entered into a lease for the properties known as 39-09 Main Street and 39-11 Main Street, Flushing, New York (the lease). The lease was for a term of 19 years and 10 months, expiring on May 31, 2031.

There was no dispute that by assignment and assumption of the lease dated May 1, 2011, Pi Associates assigned all of its rights



under the lease to 2909 Main Street LLC (Main Street). Shortly thereafter, on June 17, 2011, Main Street entered into a sublease agreement with Carat & Co., for the entire premises demised under the lease, for a 10-year term with a renewal option, so that the sublease term could end on July 31, 2021.

Prior to Pi Associates entering into the assignment with Main Street, it did not seek the consent of the landlord, and the landlord had not given its written consent to the assignment, as required under the terms of the lease. Furthermore, neither Pi Associates nor Main Street informed the landlord of the sublease with Carat

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prior to the execution of the sublease. The landlord contended that it first learned of the existence of the assignment when its counsel received a letter from Pi Associates' counsel which made reference to the assignment.

On Oct. 7, 2014, the landlord served eight separate notices of default on Pi Associates, Main Street and James Pi, and demanded that each of the defaults be cured within 15 days of receiving said notice. The defaults alleged in the notices pertained to the assignment of the lease without landlord's consent, the sublease, and various other claimed defaults. In a letter dated Oct. 17, 2014, counsel for the tenant, identified in the letter as Main Street, objected to each of the default notices and asserted, in essence, that no default had occurred.

On Dec. 1, 2014, the landlord served four notices of termination of the lease requiring the surrender of the premises by Dec. 6, 2014.

On Dec. 2, 2014, the landlord commenced a plenary action in Supreme Court, Queens County asserting causes of action for, among other things, breach of contract, quantum meruit, unjust enrichment, and to recover possession of the premises. The defendants thereafter, on Dec. 4, 2014, moved for a Yellowstone injunction.

As noted above, an essential requirement in obtaining Yellowstone relief is that the request for injunctive relief be made prior to the expiration of the cure period in the notice to cure. Thus, a critical issue on the motion was whether the motion was timely.

In support of the motion, the defendants claimed that the purported service of the default notices on Pi Associates was "procedurally defective," because they were addressed and delivered to a former address rather than the new address that the landlord was allegedly advised of in an email dated June 19, 2013. The defendants further maintained that the service of the default notices was defective because they were not served in accordance with the provisions of Real Property Actions and Proceedings Law (RPAPL) §735(1). Notably, however, the defendants did not claim that they did not receive copies of the notices of default. In opposition to the defendants' contentions, the landlord maintained that the notices of default were properly delivered in accordance with the terms of the lease at their last known addresses.

Supreme Court ruled against the defendants and denied their motion for a Yellowstone injunction.

Analysis

First, the court held that contrary to defendants' contention, RPAPL 735(1) was inapplicable, as the matter before the court was a plenary action, not a summary holdover proceeding. Therefore, "the issue to be determined is whether notice was properly given to the defendants pursuant to the terms of the [lease]."³ The court found that the lease permitted notices to be delivered by overnight delivery to the last known addresses of the parties and that the notices at issue, delivered by FedEx to such last known addresses, were properly delivered.

Furthermore, the court rejected the defendants' reliance on the June 19, 2013 email that had been sent as being a notice of a change of address. The court found that the email was sent by a different entity, Pi Capital Partners LLC, and only informed the landlord that said entity had moved to a different address. The court further noted that the email did not identify Pi Capital Partners LLC as the agent for either Pi Associates or James Pi, and did "not set forth a new address for Pi Associates, James Pi or 3909 Main Street LLC."⁴

The court therefore concluded that the "notices of default requiring defendants to cure within 15 days of its receipt, as well as the notices of termination, were properly addressed under the terms of the lease, and were not procedurally defective."⁵

Given the court's rejection of the defendants' contentions concerning the service of the notices, the court went on to conclude that the defendants' motion for Yellowstone relief was untimely made after the expiration of the cure period:

As the notices of default were served no later than October 13, 2014, the 15-day period in which to cure or move for a Yellowstone injunction expired on October 28, 2014. It is undisputed that the defendants did not seek to cure the defaults, and did not file the motion for Yellowstone injunction, until December 4, 2014.⁶

The court also found that the assignment of the lease by Pi Associates to Main Street without the landlord's consent was a violation of the lease that was not capable of being cured. The court stated:

With respect to assignment of the 2003 lease by Pi Associates to 3909 Main Street LLC, it is undisputed that Pi Associates did not seek the landlord's consent to said assignment. Contrary to defendants' assertions the provisions of the 2003 lease do not permit Pi Associates or Mr. Pi to assign the lease without the landlord's consent.... Thus, although the landlord could not object to Mr. Pi's transferring his interest in the lease..., the lessee was still required to seek the landlord's consent prior to assigning the lease. The failure to obtain the landlord's prior consent to the assignment is not capable of being cured by the defendants.⁷

Thus, the court held that because the motion was "untimely, and defendants did not take any steps to cure the default prior to the expiration of the 15-day cure period set forth in the lease and notice, the motion for a Yellowstone injunction is, in all respects, denied."⁸

Conclusion

Riesenburger is a very potent reminder of the critical importance of filing a motion for Yellowstone relief and obtaining the Yellowstone temporary restraining order prior to the expiration of the cure period set forth in the subject notice to cure. The tenants in *Riesenburger* made the fatal mistake of waiting to make the motion until after the cure period had expired, with the hope that the court would agree with them that the subject notice to cure was not properly delivered. This is not a chance that any commercial tenant served with a notice to cure should take. To avoid the possibility of a Yellowstone motion being denied as untimely, the motion for Yellowstone relief should always be made prior to the earliest possible time in which the cure period in the notice could be deemed to expire.

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1. See *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 93 N.Y.2d 508, 693 N.Y.S.2d 91 (1999).

2. 47 Misc.3d 1224(A) (Sup. Ct. Queens Co. 2015).

3. *Id.* at *4.

4. *Id.* at *5.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*