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'Yellowstone' Update: When Courts Deny Relief

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This year marks the 45th anniversary of the landmark decision of the New York Court of Appeals in *First Nat. Stores v. Yellowstone Shopping Center*, 21 N.Y.2d 630, 290 N.Y.S.2d 721 (1968). That decision first established the right of a commercial tenant, when served with a notice to cure threatening the termination of its lease, to obtain what has become known as a *Yellowstone* injunction, which maintains the status quo by tolling the tenant's time to cure an alleged lease default so that, upon an adverse determination on the merits, the tenant may cure the default and avoid the forfeiture of its leasehold.

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. On this 45th anniversary of *Yellowstone*, however, we thought it time to examine some recent decisions in which courts have denied *Yellowstone* relief in certain circumstances.

Incurable Defaults

Courts have denied motions for *Yellowstone* relief in circumstances where the court finds that the alleged default is incapable of being cured.

For example, in *JT Queens Carwash v. 88-16 Northern Blvd. LLC*,[2] the landlord had alleged that the tenant was in default under its lease by failing to maintain a policy of insurance naming the landlord as an additional insured. The tenant commenced an action for a declaratory judgment, and moved in Supreme Court, Queens County for a *Yellowstone* injunction. In support of its motion, the tenant submitted certificates of insurance to show that it maintained the requisite insurance (and was thus not in default under the lease) and was otherwise capable of curing the alleged default.

Supreme Court, Queens County (Nahman, J.) denied the tenant's motion and, in a decision handed down just last month, the Appellate Division, Second Department, affirmed. The Appellate Division held that "the failure to maintain the requisite insurance would be an incurable default that formed an independent basis for the denial of *Yellowstone* relief." In so holding, the court found that "certificates of insurance, which were issued as a matter of information only, were insufficient to establish that it maintained the requisite insurance or was capable of curing its default."

Notably, while a tenant on a motion for *Yellowstone* relief is not required to establish a likelihood of success on the merits, in *JT Queens*, the Appellate Division found that the tenant was not entitled to *Yellowstone* relief because it "failed to demonstrate that it was not in breach of the provision of the lease agreement requiring it to maintain a policy of insurance naming the defendant as an additional insured." It seems that the court may have applied a higher burden on the tenant with respect to the underlying merits of the alleged default than is typically required on a motion for a *Yellowstone* injunction.

In *Kyung Sik Kim v. Idylwood, N.Y.*,[3] the landlord had alleged that the tenant was in default under the lease by having previously failed to continuously maintain insurance coverage as required by the lease. The tenant commenced an action in Supreme Court, New York County, and moved for a *Yellowstone* injunction. The Supreme Court (Stallman, J.) denied the tenant's motion, finding that the tenant had not "previously and continuously maintained insurance" as required by the lease and that this alleged violation was "not curable, or not curable within the remaining period of the 15 day cure period."[4]

The Appellate Division, First Department affirmed, agreeing with the Supreme Court that the violation was "incurable:"

The motion court found, after a hearing, that plaintiffs had not previously and continuously maintained insurance coverage as required by their commercial lease. This violation was a material breach of the lease and, in these circumstances, an incurable violation that is an independent basis for the denial of *Yellowstone* relief.[5]

In so holding, the First Department relied on its previous decisions in [Grenadeir Parking v. Landmark Assocs.]()[6] and [Zona Inc. v. SoHo Centrale]()[7] where *Yellowstone* relief had been denied because the alleged defaults were not curable. In *Grenadeir,* the First Department, in reversing Supreme Court, New York County, denied the tenant's motion for a *Yellowstone* injunction where the tenant had conceded that the alleged failure to maintain and produce certain financial records, whose disclosure was required by the lease, was "not curable." In *Zona*, the First Department, in denying the tenant *Yellowstone* relief, held that the tenant's assignment of the lease without obtaining the landlord's prior written consent constituted an incurable default, particularly because the tenant had failed to assert that it could undo the prohibited assignment.

While the First Department in *Kyung Sik Kim* held that the tenant's failure to continuously maintain any insurance was "incurable," two years later, Supreme Court, New York County (Bernard Fried, J.) held in [Federated Retail Holdings v. Weatherly 39th St. LLC]()[8] that the tenant's maintenance of insufficient insurance (which contained certain self-insurance retention provisions that were not in compliance with the lease) was a curable default. The court found that the default was curable because the policy could be amended to provide greater insurance retroactively. In so holding, the Supreme Court distinguished the First Department's decision in *Kyung Sik Kim*:

The cases cited by [landlord] to support its position are distinguishable. In those cases, the insureds had not maintained any insurance, pursuant to their lease obligations, and were attempting to acquire insurance prospectively. Conversely, in the instant matter, [tenant] always had insurance, and merely amended their existing policies to provide for greater insurance. Moreover, courts have found valid insurance endorsements that retroactively cover real estate leases.[9]

After the Cure Period Expires

Prior to the February 2010 decision of the Appellate Division, Second Department, in [Korova Milk Bar of White Plains v. Pre Properties](), that court had issued several decisions suggesting that a motion for *Yellowstone* relief could be timely if made after the expiration of the cure period in the notice to cure, so long as it was made prior to the termination of the lease. For example, in *Goldstein v. Kohl's*,[10] the Second Department stated that "an application for a *Yellowstone* injunction…must be made prior to the termination of the lease" and held that the motion was untimely because the tenants "commenced this action after the defendant properly issued a notice of termination of the lease."[11]

In [Marathon Outdoor v. Patent Const. Systems Div. of Harsco](),[12] the court stated that "[a] tenant seeking *Yellowstone* relief must demonstrate that…the application for a temporary restraining order was made prior to the termination of the lease." In [Purdue Pharma v. Ardsley Partners](),[13] the Second Department reiterated that "[a] tenant seeking *Yellowstone* relief must demonstrate [that]…the application for a temporary restraining order was made prior to the termination of the lease."

The Second Department put any uncertainty in this regard to rest in *Korova Milk Bar*. In that case, the tenant moved for *Yellowstone* relief nearly two weeks after the expiration of the landlord's notice to cure. Supreme Court, Westchester County (Scheinkman, J.) denied the tenant's motion as untimely because it was made after the expiration of the cure period in the notice. The Second Department affirmed and, in doing so, expressly rejected any construction of its prior decisions as fixing a longer time to move for *Yellowstone* relief beyond the expiration of the cure period:

Since "courts cannot reinstate a lease after the lapse of time specified to cure a default." an application for *Yellowstone* relief must be made not only before the termination of the subject lease—whether that termination occurs as a result of the expiration of the term of the lease, or is effectuated by virtue of the landlord's proper and valid service of a notice of termination upon the tenant after the expiration of the cure period—but must also be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure. To the extent that any of our prior decisions may be construed as fixing a different or longer period of time in which an application for *Yellowstone* relief must be made (see [Goldstein v. Kohl's](), 16 A.D.3d at 623, 792 N.Y.S.2d 182; *Purdue Pharma v. Ardsley Partners*, 5 A.D.3d 654, 655, 774 N.Y.S.2d 540; *Marathon Outdoor v. Patent Constr. Sys. Div. of Harsco*, 306 A.D.2d 254. 255, 760 N.Y.S.2d 528; [Empire State Bldg. Assoc. v. Trump Empire State Partners](), 245 A.D.2d 225, 229, 667 N.Y.S.2d 31; [Long Is. Gynecological Servs. v. 1103 Stewart Ave. Assoc. Ltd. Partnership](), 224 A.D.2d 591, 638 N.Y.S.2d 959), we expressly reject any such construction.[14]

Licensee Not Entitled to Relief

In [CC Vending v. Berkeley Educational Services of New York](),[15] the plaintiff was a licensee of the defendant which had an exclusive right to operate various concessions in the defendant's premises. The licensee moved for a *Yellowstone* injunction to prevent the defendant from terminating the license. Supreme Court, New York County (Friedman, J.) denied the motion, and the Appellate Division, First Department affirmed, holding that a licensee under a license agreement is not entitled to *Yellowstone* relief:

Plaintiff has failed to show entitlement to a *Yellowstone* injunction. It is well settled that "the purpose of a *Yellowstone* injunction is to allow a tenant confronted by a threat of termination of the lease to obtain a stay tolling the running of the cure period so that, after a determination on the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold…." The contract at issue gives plaintiff an exclusive right to

operate various concessions. Because "such exclusive right is not a lease," plaintiff was not a commercial lessee but rather "a licensee or concessionaire without interest in the realty." Since plaintiff has no control over defendant's premises where the vending machines are located, it has no tangible interest in the property, and thus no right to a *Yellowstone* injunction.[16]

Conclusion

While there is no doubt that *Yellowstone* injunctions are routinely granted to a commercial tenant served with a notice to cure threatening the termination of the lease, the above described decisions are recent examples of where the courts deny such relief where the movant fails to make the requisite showing on its motion. As demonstrated above, the courts will deny a motion for *Yellowstone* relief as untimely where the tenant moves for such relief after the expiration of the cure period in the notice to cure. In addition, courts will deny *Yellowstone* relief in circumstances where the court finds that the alleged default is incapable of being cured, such as the tenant's failure to continuously maintain insurance. Finally, as demonstrated in *CC Vending*, supra, courts will deny such relief where the subject agreement is merely a license, and not a lease. Thus, while the granting of *Yellowstone* relief may be routine, it is by no means a certainty.

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Endnotes:

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. 101 A.D.3d 1089, 956 N.Y.S.2d 536 (2d Dept. 2012).

3. 66 A.D.3d 528, 886 N.Y.S.2d 337 (1st Dept. 2009).

4. *Kyung Sik Kim v. Idylwood, N.Y*, Sup. Ct. N.Y. Co., Index No. 104392/08.

5. 66 A.D.3d at 529.

6. 294 A.D.2d 313, 743 N.Y.S.2d 95 (1st Dept. 2002).

7. 270 A.D.2d 12, 704 N.Y.S.2d 38 (1st Dept. 2000).

8. 32 Misc. 3d 247, 920 N.Y.S.2d 896 (Sup. Ct. N.Y. Co. 2011).

9. 32 Misc. 3d at 253-54 (internal citations omitted).

10. 16 A.D.3d 622, 792 N.Y.S.2d 182 (2d Dept. 2005).

11. 16 A.D.3d at 623.

12. 306 A.D.2d 254, 760 N.Y.S.2d 528 (2d Dept. 2003).

13. 5 A.D.3d 654, 774 N.Y.S.2d 540 (2d Dept. 2004).

14. 70 A.D.3d at 647-48 (internal citations omitted]

15. 74 A.D.3d 559, 903 N.Y.S.2d 37 (1st Dept. 2010).

16. 74 A.D.3d at 559-60 (internal citations omitted).

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