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Yellowstone Injunctions: Not Always So Routine

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Any practitioner handling landlord-tenant litigation should be familiar with Yellowstone injunctions. Under the Yellowstone doctrine, a commercial tenant, when served with a notice to cure threatening the termination of its lease, may apply for a Yellowstone injunction maintaining 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.

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]

In our February 2013 column in this publication, we observed that Yellowstone injunctions are routinely granted, and that there was a paucity of decisions in which Yellowstone injunctions are denied where the motion is otherwise timely made prior to the expiration of the cure period in the subject notice to cure. Thus, it certainly piqued our interest when, on Oct. 27, 2014, Justice Daniel R. Palmieri of Supreme Court, Nassau County issued his decision denying Yellowstone relief in *LIDC I v. Sunrise Mall* (*LIDC*).[2] In *LIDC*, the court denied the commercial tenant's motion for a Yellowstone injunction with respect to a notice to cure alleging a rent default, based on the court's finding that the tenant had failed to establish "that they are prepared and have the ability to cure the rent default."[3]

Background

The facts as recited by the court in *LIDC* are as follows. The three plaintiffs were the tenants under separate leases entered into in March 2012 with the defendant Sunrise Mall, which was the owner and landlord of a shopping center in Massapequa, New York. The plaintiffs leased the premises under the leases for the purpose of opening three restaurants in the separate premises. The leases contemplated a period of construction of the restaurants, during which period rent would not be charged. Under the leases, rent first became due as of the earlier of (1) the date when each restaurant opened for business, or (2) certain fixed dates (depending on the lease) in January, March and April 2014 (the "commencement dates"). The leases also contained a force majeure clause excusing a delay in performance based on, among other things, "restrictive government laws or controls; delayed government or municipal action."[4] Financial hardship, however, was specifically excluded as a force majeure event.[5] The clause also stated that the occurrence of any such force majeure event shall not excuse the tenants' obligation to pay rent from and after the commencement dates.

After tenants had already commenced their construction of the restaurants, in August 2013, the Town of Oyster Bay issued a stop-work order based on the tenants' contractor's alleged violation of the town code's requirement that the contractor have an apprenticeship program in place. The contractor thereafter filed an Article 78 proceeding challenging the town's actions which was also assigned to Justice Palmieri. On Nov. 8, 2013, the court granted the contractor's Article 78 petition and allowed work to continue. The court directed the submission of a judgment. The court also offered to immediately "so-order" the transcript prior to a judgment being entered.

According to the tenants' affidavit in support of their motion for a Yellowstone injunction, the town had been taking actions against other mall tenants and that construction at the mall had been in "lockdown" because of those actions. Thus, tenants maintained that the mall had informed them to wait to submit a judgment until the mall was able to resolve its issues with the town. The mall also asked the tenants' contractor (represented by the same attorneys who represented the tenants) not to submit a judgment in light of the discussions with the town. Ultimately, the parties in the Article 78 proceeding each submitted proposed judgments, and a judgment was signed on July 28, 2014.

> Based on 'LIDC,' a tenant seeking a Yellowstone injunction with respect to an alleged monetary default should be mindful of making a sufficient showing that it has a sufficient source of funds to cure the monetary default at issue.

Months prior to the issuance of the judgment in the Article 78 proceeding, the tenants had already notified its landlord, the mall, in January 2014, that the tenants had experienced "extreme difficulty with construction of any kind" due to the town's actions, which allegedly essentially prevented tenants' contractors from working at the mall. The tenants claimed that the town's actions prevented the tenants from fulfilling their construction obligations under the leases, in order to permit the tenants to open for business. Thus, the tenants claimed that a force majeure event had occurred, which

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"toll[ed]" all of tenants' obligations under the leases, including the commencement of rent, until the matter was resolved.

The mall responded by stating that the construction delays were caused by tenants' own conduct in failing to hire union labor with an apprenticeship program, which the mall claimed was a breach of the leases. The mall further maintained that even if the force majeure clause could be invoked it did not excuse the payment of rent.

The mall thereafter served notices of default on the tenants, threatening termination of the leases unless rent was paid prior to the cure period. The tenants thereafter commenced an action against the mall and moved for Yellowstone relief.

In opposition to the motion, the mall did not deny that it had asked to delay the submission of a judgment in the Article 78 proceeding, but contended that there was no legal impediment to construction of the restaurants after the court acted in rendering its decision. The mall also stated that the tenant's contractor was no longer on the job as of November 2013, and that the mall had urged the tenants to hire a new contractor and resume construction while the mall continued to work to resolve the issues with the town. The mall also maintained that the reason for the tenants' "failure to perform [was] not a force majeure event, but rather an inability to fund the construction."[6] The mall further argued that payment of rent was a stated exception to a force majeure event, and thus tenants were required to pay rent as of the commencement dates in the leases.

In reply, the tenants did not dispute that they had been urged to resume construction after the contractor prevailed in the Article 78 proceeding. Tenants also did not deny that "the actual reason that work stalled at the mall was not the instruction/request of the mall not to submit a judgment, but rather that the tenants simply did not have the funds to continue."[7] The tenants also maintained that the mall's alleged failure to provide certain "financial assistance" promised in the leases led to the tenants' inability to complete performance.

The court denied the tenants' motion for a Yellowstone injunction.

The Court's Analysis

At the outset, the court set forth the above mentioned elements that must be established by a tenant in seeking Yellowstone relief, and noted that "a demonstration of probable success on the merits is not a prerequisite for relief."[8] The court stated, however, that all the required showings must be made, "including the ability to cure a rent default, if that is the basis of the landlord's action against the tenant, or the injunction will be denied."[9]

The court rejected the tenants' claim that it was justified in failing to pay rent after the commencement dates, based on the force majeure clause in the leases. The court found that the payment of rent after the commencement dates was specifically excepted under that clause. Thus, the court found that the "key issue" was whether the commencement dates were "valid and should be enforced" which, according to the court, was "predicated on what, if anything, the mall did to interfere with the [tenants'] ability to proceed and open their businesses so that they could pay the rent as of those dates."[10]

The court found that the actions allegedly taken by the mall were "immaterial to the tenants' performance."[11] The court stated that even assuming that the tenants were asked to hold off on entering a judgment in the Article 78 proceeding, the tenants did not deny that its contractor was no longer on the job as of November 2013, and that the tenants did not replace the contractor. The court also found it critical that the tenants did not deny that the mall urged them to hire a new contractor and proceed with construction after the court vacated the town's stop-work order.

After finding that there was no excuse for the tenants' failure to pay rent, the court then concluded that the tenants had failed to establish "that they are prepared and have the ability to cure the rent default" and therefore were not entitled to Yellowstone relief.

The court further observed that because the court had offered to "so-order" the transcript when it decided the Article 78 proceeding in favor of the contractor (and in fact did so two weeks later), the contractor (who was represented by the same attorneys that represented the tenants) "did not have to wait for entry of a judgment to proceed with construction as a legal matter, if the enforceable nature of the November 8 determination was a concern."[12] Thus, the court found that:

> because there is no proof that the defendant did not also urge plaintiff tenants to delay the resumption of construction, any direction from defendant to plaintiffs not to have a final judgment entered does not provide either a legal or equitable basis for finding here that the landlord is estopped from enforcing the rent obligation on the commencement dates established in the leases/amendments. Any negotiations between the town and the mall, what ever their character or goal, does not affect the foregoing.[13]

After finding that there was no excuse for the tenants' failure to pay rent, the court then concluded that the tenants had failed to establish "that they are prepared and have the ability to cure the rent default" and therefore were not entitled to Yellowstone relief.[14] In so ruling, the court stated:

> Thus, and without establishing a cause attributable to the mall, the plaintiffs have not completed construction, have no operating businesses generating income, and have not pointed to any other independent source of funds, or that access to sufficient funds to cure the rent default is imminent. The court accordingly finds that they have failed to satisfy that prong of the required showings for a Yellowstone injunction that they are prepared and have the ability to cure the rent default. The application for such an injunction is therefore denied.[15]

Finally, the court also denied the tenants' alternative request for a preliminary injunction, finding that "plaintiffs have failed to show likelihood of success on the merits."[16]

Conclusion

In denying the tenants' motion for a Yellowstone injunction, the court in *LIDC* spent much of its decision dealing with the merits of the tenants' claim that the failure to pay rent after the commencement dates was excused. On its face, this appears contrary to Yellowstone jurisprudence, in which the merits of the underlying claim of a default under the lease is not supposed to be at issue. In addition, the court, in finding that the tenants failed to establish that they were prepared and had the ability to cure, relied on the fact that the tenant, which was not open for business, did not establish that it had an independent source of funds to cure the rent default. Thus, based on *LIDC*, a tenant seeking a Yellowstone injunction with respect to an alleged monetary default should be mindful of making a sufficient showing that it has a sufficient source of funds to cure the monetary default at issue.

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. 2014 N.Y. Slip. Op. 24431, 2014 WL 5642245 (Sup. Ct. Nas. Co. Oct. 27, 2014).
3. Id. at *5.
4. Id. at *1.
5. Id.
6. Id. at *3.
7. Id.
8. Id. at *4.
9. Id.
10. Id.
11. Id.
12. Id. at *5.
13. Id.
14. Id.
15. Id. [internal citation omitted].
16. Id.