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'Yellowstone' Injunction Case Law Update


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One of the mainstays of New York real estate litigation practice is the *Yellowstone* injunction. First announced in the landmark case of *First Nat. Stores, Inc. v. Yellowstone Shopping Ctr., Inc.* (21 NY2d 630 [1968]), a *Yellowstone* injunction—available to commercial tenants—tolls the running of the cure period set forth in a default notice so that the tenant can challenge the notice and litigate the merits of the alleged default without losing its valuable commercial tenancy.

The *Yellowstone* standard is easier to satisfy than the traditional three-pronged preliminary injunction standard. A *Yellowstone* injunction will be granted where a tenant (1) holds a commercial lease; (2) received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) requested injunctive relief prior to the expiration of the cure period set forth in the notice; and (4) is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises (*see Gap, Inc. v. 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 576 [1st Dept. 2021]).

A significant and ever-evolving body of *Yellowstone* case law has arisen in the past half-century. Below, we discuss several interesting and notable recent rulings that have further developed the law in this area.

'Tuckahoe Realty'

Any tenant seeking a *Yellowstone* injunction must first seek a temporary restraining order (TRO) stopping the running of the cure period before the underlying motion is briefed and heard. What happens when the tenant gets through the courthouse door on the last day of the cure period, but the Court does not entertain the TRO application until after the cure period has expired?

The Appellate Division, First Department addressed that question in *Tuckahoe Realty, LLC v. 241 E. 76 Tenants Corp.* (200 AD3d 629 [1st Dept. 2021]). In *Tuckahoe Realty*, the tenant made the TRO application on the final day of the cure period, but Court advised counsel that it was unavailable to hear argument that afternoon before having to close the courthouse, and instructed counsel to return the following day (*id.*). The next day, after the cure period had expired, the Court

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signed the tenant's proposed order and awarded a TRO, and later granted the *Yellowstone* injunction (*id.*).

The Appellate Division affirmed, holding that the application was timely made and that any delay in obtaining the TRO was due to "issues within the courthouse:"

The motion court providently exercised its discretion in concluding that plaintiff's application for a *Yellowstone* injunction was timely. We agree with the court that timeliness was established by the fact that the application was made on the last day of the cure period, notwithstanding defendant's argument that plaintiff failed to obtain relief prior to the expiration of the cure period because the court did not sign the order until the next day.

(*id.*)

Thus, *Tuckahoe Realty* stands for the proposition that the timeliness of a *Yellowstone* motion turns on the date the tenant seeks the injunction, and *not* the date on which the court entertains the TRO application and signs the order.

'255 Butler'

In *255 Butler Associates, LLC v. 255 Butler, LLC* (___ NYS3d ____, 2022 NY Slip Op 05066 [App Div. 2nd Dept. Aug 31, 2022]), the Appellate Division, Second Department considered whether a previously-granted *Yellowstone* injunction should be modified based on allegedly changed circumstances.

In *255 Butler*, the parties entered into a commercial lease which recited, *inter alia*, that it was the tenant's intention to convert the property into a multi-unit property, perhaps including a hotel (*see id.* at *1). The landlord had served the tenant with a "Notice to Cure Lease Default," alleging several defaults, including that the plaintiff failed to "diligently pursue" the planned conversion (*id.*). The tenant moved for and was granted a *Yellowstone* injunction, which the Appellate Division had affirmed in a prior decision (*id.*; *see 255 Butler Assoc., LLC v. 255 Butler, LLC*, 173 AD3d 649 [2d Dept. 2019]).

> Therefore, whether the governing standard is "compelling," "changed" or "extraordinary" circumstances, '255 Butler' reinforces that once a 'Yellowstone' injunction is granted, it is not easily undone.

Thereafter, the landlord moved to vacate the *Yellowstone* injunction on the grounds that the tenant had allegedly failed to "diligently pursue" the property's conversion in the two-year period after the Court granted the injunction (*see* https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=Z0/Z6ud226vYL9vbjJZiEg==). Supreme Court, however, denied the motion, and the Appellate Division affirmed.

The Appellate Division recited the relevant legal standard: "A motion to vacate or modify a *Yellowstone* injunction is addressed to the sound discretion of the court and may be granted upon compelling or changed circumstances that render continuation of the injunction inequitable" (2022 NY Slip Op 05066, at *2). The Appellate Division then held: "Here, the landlord failed to point to any compelling circumstance or new evidence which would warrant vacatur of the *Yellowstone* injunction. Consequently, the Supreme Court properly denied its motion to vacate the *Yellowstone* injunction" (*id.*).

Although the court did not detail the allegations underlying the landlord's argument, it did cite the Appellate Division, First Department's ruling

in *Med. Bldg. Assoc., Inc. v. Abner Properties Co.*, which held that no "extraordinary circumstances" were present warranting the vacatur of the *Yellowstone* injunction in that case (186 AD3d 407, 408 [1st Dept. 2020]).

Therefore, whether the governing standard is "compelling," "changed" or "extraordinary" circumstances, *255 Butler* reinforces that once a *Yellowstone* injunction is granted, it is not easily undone.

'Bonomo'

Typically, a tenant's default in the maintenance of insurance is incurable and thus does not warrant a *Yellowstone* injunction (*see e.g. JT Queens Carwash, Inc. v. 88-16 N.-Blvd., LLC*, 101 AD3d 1089 [2d Dept. 2012]; *Kyung Sik Kim v. Idylwood, N.Y., LLC*, 66 AD3d 528 [1st Dept. 2009]). However, as the Court's ruling in *2875 W. 8th St. Assoc., L.P. v. Bonomo* (2022 NY Slip Op. 32932[U] [Sup Ct, Kings County 2022]) illustrates, an insurance default does not lead inexorably to a lease termination in all instances.

In *Bonomo*, the landlord served notices to cure alleging that the tenant defaulted under the lease by failing to maintain adequate insurance, and the tenant timely sought a *Yellowstone* injunction (*id.* at **1-2). The Court (Leon Ruchelsman, J.) acknowledged the general rule that insurance defaults are typically incurable, but, citing a number of cases, went on to distinguish between "situations where no insurance existed at all . . . and situations where insurance existed but some deficiency likewise exists" (*id.* at **5).

In reliance on *Lex Retail LLC v. 71st Street Lexington Corp.* (2020 WL 2557862 [Sup Ct New York County 2020]), the Court held that because the tenant maintained inadequate insurance—as opposed to totally lacking insurance—a cure was possible and a *Yellowstone* injunction was warranted if the tenant "agrees either to bond the defendant for losses incurred as a result of a purportedly insured claim or states that it can secure retroactive insurance to protect the landlord" (2022 NY Slip Op. 32932[U] at **6). Accordingly, the Court "conditionally granted [the *Yellowstone* injunction motion] upon evidence presented to the court of either retroactive insurance or the posting of a bond protecting the landlord for any claims in excess of the coverage amounts" (*id.*).

Thus, in advising their clients, practitioners representing both owners and tenants should not immediately deem an insurance default to be incurable, and should instead analyze the exact nature of the default—and, if theoretically curable, the tenant's actual ability to cure—before charting a path forward.

Conclusion

As with so many other aspects of real estate litigation and landlord-tenant practice, the law surrounding *Yellowstone* injunctions does not stay static, and it is therefore imperative that practitioners keep track of the latest case law developments.