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LANDLORD TENANT LAW

Yellowstone Injunctions Not Available for Incurable Defaults

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This column has on several occasions addressed the fundamental procedural device known as the "*Yellowstone* injunction" under New York landlord-tenant law. First established by the Court of Appeals in *First Nat. Stores, Inc. v. Yellowstone Shopping Center, Inc.*, 21 N.Y.2d 630 (1968), a *Yellowstone* injunction tolls the time to cure under a notice to cure or notice of default, so that the tenant can litigate the merits of the alleged defaults and retain the ability to cure if the court ultimately rules that the tenant is in default of the lease.

Under the *Yellowstone* doctrine, all a tenant need show in order to obtain such relief is that it: (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; and (4) is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises. *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*, 93 N.Y.2d 508 (1999).

With respect to the fourth element—that the tenant is prepared and maintains the ability to cure the alleged default—what happens in the instance where the alleged default is simply not capable of being cured? In a decision issued just this month in *Bliss World v. 10 West 57th Street Realty*, 2019 WL 1028983 (1st Dept., March 5, 2019), [1] the Appellate Division, First Department addressed this issue head-on and, in reversing the Supreme Court (Ostrager, J.), held that a tenant cannot obtain a *Yellowstone* injunction where the alleged default is incapable of cure.

'Bliss World' Background

In *Bliss World*, the landlord delivered a notice to cure to the commercial tenant alleging that the tenant was in default under its lease by having (1) failed to maintain proper insurance on the demised premises, and (2) improperly assigned the lease without the landlord's consent. The tenant moved for a *Yellowstone* injunction tolling the period to cure in the notice to cure pending the determination of the action. The landlord opposed the motion, arguing that the tenant was not entitled to *Yellowstone* relief because, among other reasons, the defaults alleged in the notice to cure were incurable as a matter of law.

The Supreme Court (Ostrager, J.) granted the tenant's motion by continuing an existing *Yellowstone* injunction which had previously been issued in the action. The landlord appealed to the Appellate Division, First Department. The Appellate Division reversed and denied the tenant's motion for a *Yellowstone* injunction.

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No 'Yellowstone' Relief

At the outset, the Appellate Division observed that "[a] necessary lynchpin of a *Yellowstone* injunction is that the claimed default is capable of cure" and that "[w]here the claimed default is not capable of cure, there is no basis for a *Yellowstone* injunction." With this principle in mind, the court went on to analyze the defaults at issue in the subject notice to cure.

As to the tenant's alleged default in the procurement of proper insurance, the court observed that while the tenant provided "various steps that it will take to cure if it is ultimately found to be in material violation of the insurance provisions of the lease," none of the "proposed cures involve any retroactive change in coverage... ." The court concluded that the foregoing meant that the alleged insurance defaults "are not susceptible to cure."

With respect to the alleged default by tenant in having improperly assigned the lease, the court observed that while the tenant "generally" stated it was "willing to cure," it did not explain "how it will undo the assignment or indicate whether it is willing or able to do so." The court further observed that "[a]lthough some of our decisions have indicated that seeking late consent from the landlord remains a cure in assignment cases, even were that theoretically true, there is no claim made here that this tenant would pursue that cure." Thus, the tenant was not entitled to *Yellowstone* relief.

Putting the proverbial nail in the tenant's coffin, the court went on to reject the tenant's alternative argument, that "even if no *Yellowstone* injunction is warranted, it is still entitled to a preliminary injunction." It further observed that "*Yellowstone* injunctions are available on a far lesser showing than preliminary injunctions" and therefore "[b]ecause the *Yellowstone* injunction fails, the preliminary injunction does as well."

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Finally, the court specifically noted that its ruling did not resolve the parties' disputes as to whether any of the claimed defaults are meritorious, and that its reversal of the issuance of *Yellowstone* relief "does not relieve the landlord of proving the bona fides of the claimed default or prevent the tenant from defending himself."

Conclusion

The First Department has now made it crystal clear that where a default is incapable of cure, such as certain insurance defaults and prohibited assignments, *Yellowstone* relief may not be available to the tenant. Thus, tenants who, among other things, fail to maintain proper insurance, or assign the lease in violation of the lease's terms, face the prospect of lease forfeiture, with no right to cure, if a court ultimately finds that the tenant's conduct was a lease default.

1. One of the authors of this column, Warren A. Estis of Rosenberg & Estis, represented the landlord in this action.