

In this decision involving a Yellowstone injunction, the Appellate Division, by its directed modification of the order appealed from, recognized that a claim for a declaratory judgment with respect to the lease violations at issue should be set forth in the complaint in the underlying action, so that the parties can obtain a judgment declaring their rights. There were no such claims asserted in the complaint in this action because the action had been commenced by the tenant before the notice to cure was served, and the claims that were asserted in the complaint involved issues unrelated to the lease violations described in the notice to cure. In response to our notice to cure, the tenant moved for a Yellowstone injunction on the existing complaint, without moving to amend the complaint, or starting a new action, to address the specific lease violations described in the notice to cure. Supreme Court granted the tenant a Yellowstone injunction, despite our argument that the Yellowstone injunction should be conditioned on the complaint being amended to include claims relating to the specific lease violations described in the notice to cure.

The modification that we obtained from the Appellate Division conditioned the Yellowstone injunction on the tenant's moving to amend its complaint to set forth the declaratory judgment claims with respect to the lease violations at issue, thus assuring that there will be judgment declaring the rights of the parties with respect to such violations. The Appellate Division obviously recognized that without the claimed violations being at issue in the case, there would be no opportunity for a resolution.

276-43 GOURMET GROCERY, INC., DOING BUSINESS AS LUCKY STAR CAF, plf-res, v. — 250 West 43 Owner LLC Defendants-Appellants

October 6, 2016

1821N. 276-43 GOURMET GROCERY, INC., DOING BUSINESS AS LUCKY STAR CAF, plf-res, v. — 250 West 43 Owner LLC Defendants-Appellants.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for appellants. Wagner Berkow LLP, New York (Ian Brandt of counsel), for respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about March 3, 2016, which granted plaintiff tenant's motion for a *Yellowstone* injunction, unanimously modified, on the law and in the exercise of discretion, to condition the continuance of the injunction on plaintiff's moving, within 30 days after service of a copy of this order with notice of entry, to amend the complaint to add a claim with respect to article 6 of the lease, and otherwise affirmed, without costs.

The four requirements for a *Yellowstone* injunction are set forth in *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc.* (93 NY2d 508, 514 [1999]). Contrary to defendants' claim, there is no fifth requirement that the tenant's complaint contain a claim for a declaration of rights with respect to the lease violations mentioned in the landlord's notice to cure. We note that, in the case at bar, defendants' first counterclaim deals with one of the two grounds mentioned in the notice to cure (article 43 of the lease). However, none of the pleadings deals with the other ground mentioned in the notice to cure (article 6 of the lease). Since the purpose of a *Yellowstone* injunction is to stay "the cure period before it expire[s] to preserve the lease" until resolution of the dispute on the merits (*Graubard*, 93 NY2d at 514), we exercise our discretion (*see e.g. 225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp.*, 211 AD2d 420 [1st Dept 1995]) to condition the continuance of the injunction upon plaintiff's moving, within the time period indicated, to amend the complaint to add a claim with respect to article 6. We note that plaintiff has evinced a willingness to amend its complaint.

Defendants' contention that plaintiff's unclean hands bar it from obtaining the equitable relief of an injunction is preserved but unavailing, since defendants made no showing that they had been injured by plaintiff's allegedly obtaining a liquor license under false pretenses (*see National Distillers & Chem. Corp. v. Seyopp Corp.*, 17 NY2d 12, 15-16 [1966]).

This constitutes the decision and order of the Supreme Court, Appellate Division, First Department.
