



September 24, 2014

CLIENT ALERT

A PRIMER ON *YELLOWSTONE* INJUNCTIONS

When faced with a notice to cure or a notice of default that may result in the termination of a valuable commercial leasehold interest, tenants must seek and obtain from the court a so-called *Yellowstone* injunction. In addition, Tenants must act quickly and seek such relief *before* the expiration of the cure period set forth in the predicate notices.

In 1968, the New York Court of Appeals, in First National Stores Inc. v. Yellowstone Shopping Center, Inc.,¹ created a new remedy for tenants faced with termination of their leases based upon alleged lease “defaults.” Interestingly enough, in that case the Court actually denied tenant’s request for an injunction, because tenant had belatedly sought such relief *after* the cure period already had expired.

Simply stated, a *Yellowstone* injunction preserves the *status quo* pending adjudication of the underlying lease dispute, without regard to the likelihood of success on the merits.² Its very purpose is to “toll” the cure period in order to allow a tenant, confronted by a threat of termination of its lease, to obtain a stay extending the cure period, so that a determination of the merits can be made without the tenant risking forfeiture of its leasehold.³ Indeed, the Court of Appeals has stated that a *Yellowstone* injunction serves the limited purpose of stopping the running of the cure period.⁴

To be sure, a *Yellowstone* injunction does not nullify the remedies to which a landlord otherwise would be entitled under the parties’ lease.⁵ Thus, if the tenant is in default of an obligation under its lease, tenant still would have to cure the default in order to avoid termination of the lease. The *Yellowstone* injunction merely permits tenant time, during the pendency of the litigation, in which to cure the alleged default and avoid termination of the lease.

In order to obtain a *Yellowstone* injunction, a tenant must satisfy the following well-established criteria, i.e., that tenant: (i) holds a commercial lease; (ii) has received a notice of default, a notice to cure or a threat of termination of the lease; (iii) has requested injunctive relief *prior to* the termination of the lease; and (iv) is prepared and has the ability to cure the alleged default by any means short of vacating the premises.⁶ Courts have held that the standard for obtaining a *Yellowstone* injunction is far less than the showing required for a preliminary injunction under Article 63 of the CPLR.⁷

In a recent case involving a dispute concerning commercial office space in Midtown Manhattan, in which this Firm successfully represented the tenant, the New York Supreme Court, in *Essex Capital Partners, Ltd. v. Ironwood Realty Corp.*,⁸ granted tenant's motion for a *Yellowstone* injunction (and also for a regular preliminary injunction). The Court found that tenant had demonstrated all of the necessary elements in order to obtain a *Yellowstone* injunction, including that tenant maintained the ability to cure the alleged "defaults" by any means short of vacating the premises. Thus, the Court in *Essex Capital* rejected landlord's assertion that the tenant could cure the alleged default only by surrendering to landlord a portion of the disputed demised premises.

The *Essex Capital* Court also found that tenant had demonstrated entitlement to a preliminary injunction under CPLR § 6301, i.e., probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balancing of the equities in its favor.⁹ It sometimes is necessary or prudent to request such relief, in the alternative, in the event *Yellowstone* relief is not available for any reason.

The lesson here is clear. When served with a notice to cure or a notice of default that may result in the termination of a valuable lease, *time is of the essence*, as an action, together with a motion for a *Yellowstone* injunction, must be filed *before* the expiration of the cure period.¹⁰ Such relief is not available after the cure period has expired.¹¹

If you have any questions concerning *Yellowstone* injunctions or any other real estate-related litigation matters, please contact the following attorneys at our firm:

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¹ 21 N.Y.2d 630, 290 N.Y.S.2d 721 (1968).

² See Post v. 120 East End Avenue Corp., 62 N.Y.2d 19, 475 N.Y.S.2d 821 (1984); Stuart v. D & D Assocs., 160 A.D.2d 547, 554 N.Y.S.2d 197 (1st Dep't 1990).

³ See, e.g., Empire State Bldg. Associates v. Trump Empire State Partners, 245 A.D.2d 225, 667 N.Y.S.2d 31 (1st Dep't 1997); Mann Theatres Corp. v. Mid Island Shopping Plaza, 94 A.D.2d 466, 464 N.Y.S.2d 793 (2d Dep't 1983), aff'd, 62 N.Y.2d 930, 479 N.Y.S.2d 213 (1984); Garland v. Titan West Assocs., 147 A.D.2d 304, 543 N.Y.S.2d 56 (1st Dep't 1989).

⁴ See Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates, 93 N.Y.2d 508, 693 N.Y.S.2d 91 (1999).

⁵ Id.

⁶ See First National Stores, Inc. v. Yellowstone Shopping Center, Inc., 21 N.Y.2d 630, 290 N.Y.S.2d 721 (1968); 225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp., 211 A.D.2d 420, 621 N.Y.S.2d 302 (1st Dep't 1990); Graubard Mollen, *supra*.

⁷ 225 E. 36th St. Garage, *supra*.

⁸ Sup. Ct., N.Y. Co., Index No. 152489/2014.

⁹ Doe v. Axelrod, 73 N.2d 748, 536 N.Y.S.2d 44 (1988).

¹⁰ The motion should be made by Order to Show Cause (with an “affirmation of emergency”) and it should include an application for a Temporary Restraining Order, staying and tolling the cure period pending the hearing of the motion for a *Yellowstone* injunction.

¹¹ Daashur Associates v. December Artists Apartment Corp., 226 A.D.2d 114, 114, 640 N.Y.S.2d 65, 65 (1st Dep't 1996); JH Parking Corp. v. East 112th Realty Corp., 298 A.D.2d 258, 748 N.Y.S.2d 478 (1st Dep't 2002).