



**December 21, 2015**

**CLIENT ALERT**

**FURTHER TRAVELS ALONG THE  
YELLOWSTONE BRICK ROAD**

This is a follow-up to our September 2014 Client Alert entitled “A Primer on *Yellowstone* Injunctions.” This Client Alert discusses the availability in the New York State Supreme Court of *Yellowstone* injunctions in cases involving residential (as opposed to commercial) leases, and in cases when the alleged “default” is solely monetary in nature, such as, the nonpayment of rent or additional rent.

As noted in the prior Client Alert, the 1968 decision of the New York Court of Appeals in First National Stores Inc. v. Yellowstone Shopping Center, Inc.<sup>1</sup> spawned a new species of injunctions for tenants faced with termination of their leases based on alleged lease “defaults.” 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.<sup>2</sup> 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.<sup>3</sup> The Court of Appeals has stated that a *Yellowstone* injunction serves the limited purpose of tolling the cure period.<sup>4</sup>

In order to obtain a *Yellowstone* injunction in the New York Supreme Court, a tenant must satisfy the following well-established criteria, specifically, that the 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.<sup>5</sup> Notably, the standard for obtaining a *Yellowstone* injunction is far less onerous than the showing required for a preliminary injunction under Article 63 of the CPLR.<sup>6</sup>

Because the cases that set forth the criteria for obtaining a *Yellowstone* injunction refer to “commercial leases,” there is a misconception that *Yellowstone* injunctions are available only in commercial lease cases. Indeed, in order to stem the tide of *Yellowstone* injunction cases that were being filed by residential tenants in the New York Supreme Court, (because of the lack of jurisdiction of the New York Civil Court [Landlord-Tenant court] to grant injunctive or declaratory relief), the New York Legislature in 1982 amended the Real Property Actions and Proceedings Law (RPAPL) to add a new section 753(4). RPAPL 753(4) is applicable only to summary holdover proceedings in the Landlord-Tenant courts in New York City, and provides a losing tenant with a ten day “stay” of the issuance of the warrant of eviction, after the conclusion of the trial, during which time tenant may cure the violation.<sup>7</sup> This provision was intended to eliminate (or, at least, reduce) the need for residential tenants to commence actions and file motions for a *Yellowstone* injunction in state Supreme Court by giving them in the Landlord-Tenant court effectively the same (or similar) remedy they could have obtained in the state Supreme Court, namely, a period of time in which to cure the violation prior to being subject to eviction.<sup>8</sup> For this reason, some state Supreme Court justices are reluctant to grant *Yellowstone* injunctions to residential tenants and will refer them to Landlord-Tenant court.<sup>9</sup>

Appellate courts, however, have long recognized a narrow exception to the general rule against granting *Yellowstone* injunctions in residential cases, when the ten day stay provided by RPAPL 753(4) would be either insufficient or inadequate. Thus, in *Stolz v. 111 Tenants Corp.*,<sup>10</sup> the First Department held that a *Yellowstone* injunction should have been granted when the removal of the disputed structure (a greenhouse) could not be accomplished within the 10-day period provided by RPAPL 753(4), because of the requirements of the New York City Building Code. Likewise, in *Abramowitz v. 145 E. 16<sup>th</sup> St. LLC*,<sup>11</sup> the First Department, held that granting a *Yellowstone* injunction to a residential tenant was proper, “despite the availability of RPAPL 753[4].”<sup>12</sup>

Notably, courts have issued *Yellowstone* injunctions in residential cooperative cases when the tenant owns shares in a cooperative apartment and injunctive relief is necessary in order to avoid “forfeiture of [the tenant’s] valuable leasehold interest while it challenges the propriety of the landlord’s default notice.”<sup>13</sup>

The key to obtaining a *Yellowstone* injunction in a case involving a residential lease appears to be the ability to demonstrate that tenant would be unable, for whatever reason, to “cure” the alleged violation within the short ten day stay provided by RPAPL 753(4).

Another misconception is that monetary lease defaults by commercial tenants do not qualify for *Yellowstone* injunctive relief. Once again, this misconception stems from cases that refer to there being a “threat of termination of the lease” in order for a *Yellowstone* injunction to be issued.

In fact, courts have granted *Yellowstone* relief when the default alleged is monetary and involves only alleged nonpayment of rent.<sup>14</sup> When the landlord does not serve a mere notice of nonpayment (which would be a predicate for the commencement of a nonpayment proceeding in Landlord-Tenant court), but rather a notice threatening termination of the lease, “[u]nder such

circumstances, *Yellowstone* injunctions are routinely granted in order to maintain the *status quo* and prevent forfeiture of the lease while the parties litigate their dispute.”<sup>15</sup>

The key to obtaining such relief is whether the lease contains a “conditional limitation” provision, pursuant to which the lease automatically terminates upon tenant’s failure to cure the default, which could be the failure to pay rent or additional rent.<sup>16</sup> Thus, if the predicate notice served by the landlord references a conditional limitation provision in the lease, namely, that the lease will terminate if tenant fails to pay the stated amount within the cure period, tenant may seek, and obtain, a *Yellowstone* injunction, provided that tenant has the ability to cure, that is, to pay the disputed amount.

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

Maxwell K. Breed	<a href="mailto:mbreed@wbcsk.com">mbreed@wbcsk.com</a>	(212) 984-7747
Slava Hazin	<a href="mailto:shazin@wbcsk.com">shazin@wbcsk.com</a>	(212) 984-7810
Bruce H. Wiener	<a href="mailto:bwiener@wbcsk.com">bwiener@wbcsk.com</a>	(212) 984-7807

**Warshaw Burstein, LLP**

© Warshaw Burstein, LLP, 2015. All rights reserved.

*This memorandum was prepared as a service to clients and other friends of Warshaw Burstein to report on recent developments that may be of interest to them. The information in it is therefore general, and should not be considered or relied on as legal advice. Throughout this memorandum, "Warshaw Burstein" and the "firm" refer to Warshaw Burstein, LLP.*

---

<sup>1</sup> 21 N.Y.2d 630, 290 N.Y.S.2d 721 (1968).

<sup>2</sup> See Post v. 120 East End Ave. Corp., 62 N.Y.2d 19, 475 N.Y.S.2d 821 (1984); John Stuart, Div. of Robert Allen Fabrics v. D & D Assocs., 160 A.D.2d 547, 554 N.Y.S.2d 197 (1<sup>st</sup> Dep’t 1990).

<sup>3</sup> See, e.g., Empire State Bldg. Assocs. v. Trump Empire State Partners, 245 A.D.2d 225, 667 N.Y.S.2d 31 (1<sup>st</sup> Dep’t 1997); Mann Theatres Corp. v. Mid-Island Shopping Plaza Co., 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 Assoc., 147 A.D.2d 304, 543 N.Y.S.2d 56 (1<sup>st</sup> Dep’t 1989).

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

<sup>5</sup> See, e.g., 225 E. 36th St. Garage Corp. v. 221 E. 36th Owners Corp., 211 A.D.2d 420, 421, 621 N.Y.S.2d 302, 303-304 (1<sup>st</sup> Dep’t 1990); Graubard Mollen, *supra*.

---

<sup>6</sup> 225 E. 36th St. Garage, *supra*.

<sup>7</sup> RPAPL753(4) provides that where a summary holdover proceeding to recover possession “is based upon a claim that the tenant or lessee has breached a provision of the lease, the court shall grant a ten day stay of issuance of the warrant, during which time the [tenant or lessee] may correct such breach.”

<sup>8</sup> See 120 East End Ave., 62 N.Y.2d at 26, 475 N.Y.S.2d at 824 (1984).

<sup>9</sup> See, e.g., 120 East End Ave., *supra*; Kanter v. E. 62<sup>nd</sup> St. Assocs., 111 A.D.2d 26, 488 N.Y.S.2d 692 (1<sup>st</sup> Dep’t 1985); Brodsky v. 163-35 Ninth Ave. Corp., 103 A.D.2d 105, 478 N.Y.S.2d 1017 (2d Dep’t 1984).

<sup>10</sup> 3 A.D.3d 421, 772 N.Y.S.2d 3 (1<sup>st</sup> Dep’t 2004).

<sup>11</sup> 50 A.D.3d 594, 855 N.Y.S.2d 365 (1<sup>st</sup> Dep’t 2008).

<sup>12</sup> See Seligmann v. Parcel One Co., 170 A.D.2d 344, 566 N.Y.S.2d 45 (1<sup>st</sup> Dep’t 1991) (First Department holding that a 10-day stay available to residential tenants in Housing Court was insufficient); Wisoff v. 170-176 West 89<sup>th</sup> Street Apartment Corp., 2014 N.Y. Misc. LEXIS 4688, 2014 N.Y. Slip Op. 32773(U) (Sup. Ct., N.Y. Co.) (Oct. 21, 2014) (Supreme Court may grant *Yellowstone* injunctive relief to residential tenants when, as here, the 10-day cure period provided by RPAPL 753[4] is either unavailable or insufficient).

<sup>13</sup> Wisoff, *supra*, quoting Marathon Outdoor v. Patent Constr. Systems Div. of Harsco Corp., 306 A.D.2d 254, 255, 760 N.Y.S.2d 528 (2d Dep’t 2003); Hopp v. Raimondi, 51 A.D.3d 726, 858 N.Y.S.2d 300 (2d Dep’t 2008); Wilén v. Harridge House Associates, 94 A.D.2d 123, 463 N.Y.S.2d 453 (1<sup>st</sup> Dep’t 1983).

<sup>14</sup> See 3636 Greystone Owners, Inc. v. Greyston Bldg., 4 A.D.3d 122, 123, 771 N.Y.S.2d 341, 342 (1<sup>st</sup> Dep’t 2004) (First Department holding that “*Yellowstone* relief is proper even where nonpayment of rent is the only issue”); Lexington Ave. & 42<sup>nd</sup> Street Corp. v. 380 Lexchamp Operating Inc., 205 A.D.2d 421, 613 N.Y.S.2d 402 (1<sup>st</sup> Dep’t 1994) (holding that *Yellowstone* relief is proper even where nonpayment of rent is the only issue); P.J. Clarke’s On The Hudson LLC v. WFP Retail Co., L.P., 2014 N.Y. Misc. LEXIS 3163, 2014 Slip Op. 31864(U) (Sup. Ct., N.Y. Co.) (July 17, 2014) (citing 3636 Greystone, *supra*).

<sup>15</sup> Purdue Pharma, LP v. Ardsley Partners, LP, 5 A.D.3d 654, 656, 774 N.Y.S.2d 540, 541 (2d Dep’t 2004).

<sup>16</sup> See Lexington Ave. & 42<sup>nd</sup> Street Corp., *supra*.