Return of Yellowstone: The New York State Legislature Revives the Yellowstone Injunction

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For more than 50 years, a commercial tenant in New York that was threatened with eviction could count on obtaining a *Yellowstone* injunction tolling its time to cure alleged lease defaults while challenging the legitimacy of those defaults. The result was that a commercial tenant could bring such a challenge without risking its lease should it be found in default. That all changed in May 2019, when the New York Court of Appeals ruled that commercial leases waiving the right to seek *Yellowstone* injunctions did not violate public policy. Seven months after that decision, the status quo ante has been restored, with the New York State Legislature enacting a law stating that such waivers are "null and void as against public policy." N.Y. Real Prop. Law § 235-h. This article discusses the importance of *Yellowstone* injunctions to commercial tenants in New York and the significance of the Legislature's decision to revive them.

A *Yellowstone* injunction—named after the Court of Appeals decision First Nat. Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 21 N.Y.2d 630 (1968)—is available to a commercial tenant that has been issued a notice of default, and disputes that it is in default during the cure period, but is willing and able to cure if the default is found to exist. A *Yellowstone* injunction stops the running of the cure period during the litigation. Without an injunction, a commercial tenant must choose between challenging the default and trying to cure it. There is rarely time to do both. With the injunction, a tenant can challenge the default while preserving the opportunity to cure if the court ultimately finds in favor of the landlord. Moreover, a tenant seeking a *Yellowstone* injunction does not need to satisfy the typical elements required for a preliminary injunction, such as likelihood of success on the merits and irreparable harm. See Ameurasia Int'l Co. v. Finch Realty Co., 90 A.D.2d 760 (1st Dep't 1982).

A *Yellowstone* injunction is typically sought in support of a declaratory judgment action, brought in New York State Supreme Court, which asks the court to declare that the tenant is not in default. New York courts have been issuing *Yellowstone* injunctions with regularity for decades, and they have become a generally accepted part of New

York's commercial real estate practice. That all changed last May, when the New York Court of Appeals, in 159 MP Corp v. Redbridge Bedford, LLC, 33 N.Y.3d 353 (2019), enforced a lease provision waiving a tenant's right to bring a declaratory judgment action, which necessarily prevented the tenant from obtaining a *Yellowstone* injunction. The court justified its decision by noting that "the Legislature has made certain rights nonwaivable in the context of landlord-tenant law . . . but has not precluded a commercial tenant's waiver of interim *Yellowstone* relief." Redbridge, 33 N.Y.3d at 367.

The court's decision in *Redbridge* turned *Yellowstone* injunctions into a hotly contested point of lease negotiations. Commercial tenants attempted to retain their ability to obtain *Yellowstone* injunctions, giving them an important tool to dispute the merits of alleged defaults while mitigating the risk of eviction. Landlords, for obvious reasons, negotiated to have their leases contain *Yellowstone* waivers. As a practical matter, inclusion of *Yellowstone* waivers in commercial leases became a matter of negotiating leverage.

However, just seven months after the *Redbridge* decision, *Yellowstone* waivers have been rendered null and void. On December 20, 2019, the New York State Legislature enacted N.Y. Real Prop. Law § 235-h, dictating: "No commercial lease shall contain any provision waiving or prohibiting the right of any tenant to bring a declaratory judgment action with respect to any provision, term or condition of such commercial lease." The Legislature enacted the new law as a direct response to *Redbridge*. In explaining its justification for Section 235-h, the Legislature cited the Appellate Division, Second Department's decision in *Redbridge*, which the Court of Appeals later affirmed, and noted that the Second Department "found that the legislature 'has not enacted any specific or blanket statutory provision prohibiting as void or unenforceable a tenant's waiver of declaratory judgment remedies.'" 2019 Legis. Bill Hist. NY A.B. 2554 quoting 159 MP Corp. v. Redbridge Bedford, LLC, 160 A.D.3d 176 (2d Dep't 2018). The Legislature explained that "[t]his legislation seeks to enact such a provision as a matter of public policy and restore the right of commercial tenants to cure under a declaratory judgment action as has been the practice since 1968." Id.

Some might argue that the wording of the statute—which only explicitly addresses "declaratory judgment action[s]," not *Yellowstone* injunctions—leaves the door open for lease provisions that continue to restrict *Yellowstone* rights. For example, we expect at some point an enterprising landlord will attempt to enforce a lease provision that either bars injunctive relief altogether or makes injunctions only obtainable under the more rigorous standards applicable to ordinary injunctions, rather than the easier to satisfy *Yellowstone* requirements. However, given the Legislature's clear desire to resurrect *Yellowstone*, as reflected in Section 235-h's legislative history, we expect the courts will reject any landlord-imposed hurdles making *Yellowstone* relief effectively impossible for a tenant to obtain.

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