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Yellow Injunction Waiver Upheld by Court of Appeals

Stephen Lasser · Friday, August 2nd, 2019

In New York, the *Yellowstone* injunction has long been a form of legal relief used by commercial tenants who have been served with a notice to cure by their landlord to obtain an extension from a court to cure the default and prevent the landlord from terminating the lease until the dispute is settled or determined by the court. The *Yellowstone* injunction takes its name from the landmark case *National Stores, Inc. v. Yellowstone Shopping Center,* 21 N.Y.2d 630 (1968). In *National Stores, Inc.,* New York's Court of Appeals ruled that a commercial tenant, after receiving a notice to cure from its landlord, could seek a court injunction preventing the landlord from terminating its lease, which is an important legal remedy available to tenants because, once a lease is terminated, the courts are generally with little power to revive it. In addition, the courts have routinely granted *Yellowstone* injunctions as long as the tenant can show it received a notice to cure, the time to cure has not expired, and the tenant has expressed the desire and ability to cure the alleged default. As a result, for the past 50 years, the *Yellowstone* injunction has served as a powerful legal remedy for commercial tenants to use protect their leasehold interests and challenge an alleged default claimed by landlord without risking forfeiture of its lease.

However, in August 2018 (see link: /yellowstone-relief/), we reported on the New York Appellate Division, Section Department's decision in *159 MP Corp. v. Redbridge Bedford, LLC,* 71 N.Y.S.3d 87 (2nd Dept. 2018), which held that a commercial tenant's waiver via a lease provision of the right to seek declaratory relief was legally enforceable, and by waiving its right to declaratory relief, the tenant also waived its right to seek a *Yellowstone* injunction. This decision in *159 MP Corp.* is significant because it provided landlords with clear appellate law precedent making such *Yellowstone* injunction waiver provisions in leases binding and enforceable on tenants. This decision has greatly strengthened a landlord's ability to enforce certain lease provisions such as those requiring tenants to correct violations, complete alterations properly and maintain required insurance because, once a landlord serves a notice to cure, a tenant has a limited window to cure the default and, should it fail to do so, the tenant may have its lease terminated and then be evicted without the safety net of a *Yellowstone* injunction to fall back on. However, since the appellate court decision in *150 MP Corp.* was appealed, it has been unclear to commercial landlords and tenants whether the Court of Appeals would uphold the decision in *159 MP Corp.* or find such declaratory relief waiver provisions unenforceable and void against public policy.

Recently, on May 7, 2019, New York's Court of Appeals, in a divided 4-3 decision, affirmed the Appellate Division, Second Department's ruling in *159 MP Corp.*, effectively limiting the power of *Yellowstone* injunctions by giving landlords the right to require tenants to agree in their leases to a waiver of the tenants' right to seek declaratory relief and a *Yellowstone* injunction.

In reaching its decision, the New York Court of Appeal's majority opinion held that "In New York, agreements negotiated at arm's length by sophisticated, counseled parties are generally enforced according to their plain language pursuant to [New York's] strong public policy favoring freedom of contract," and a contract clause may only be voided against public policy "where the public policy in favor of freedom of contract is overridden by another weighty and countervailing public policy." The Court of Appeals went on to state that, in this context, while declaratory relief is a "useful tool" available to commercial tenants that "benefits the parties as well as society in quieting disputes," it is merely one form of relief for enforcing a contract since the dispute could still be adjudicated through summary proceedings, and the tenant could still sue the landlord for tort and breach of contract damages. Moreover, the Court reasoned that "In codifying the right to seek declaratory relief, the Legislature neither expressly nor impliedly made access to such a claim nonwaivable with respect to any party, much less sophisticated commercial tenants."

In a lengthy dissent, the dissenting judges opined that such provisions waiving a commercial tenants right to seek declaratory relief and a *Yellowstone* injunction are unenforceable and void against public policy since declaratory relief "is an essential part of the policy of freedom of contract" which allows parties to conclusively clarify their rights and duties in a contract before a breach occurs, and by allowing this right to be waived "by contrast, creates instability by undermining the purposes and benefits of the freedom of contract, and the enforcement of such a waiver violates that very public policy," even if other judicial remedies remain available. The dissent also expressed practical concerns that the majority opinion's decision will make it easier for landlords to terminate leases so that they can replace existing commercial tenants with ones willing to pay higher rents "whenever rent values in the neighborhood have increased sufficiently to entice landlords to shirk their contractual obligations" and "The majority's decision will alter the landscape of landlord-tenant law, and of neighborhoods, throughout the state for decades to come, absent legislative action."

Due to the Court of Appeals' decision in *159 MP Corp.*, lease provisions affecting a tenant's right to obtain a *Yellowstone* injunction are likely to become an important term of lease negotiations. Landlords will now insist that their leases and renewals contain a provision waiving their tenants' rights to seek declaratory relief and a *Yellowstone* injunction. In response, tenant's attorneys will try to negotiate a provision enabling the tenant to file a *Yellowstone* injunction or other safeguards upon alleged defaults.

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