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Commercial Real Estate

New York Appellate Court Upholds Waiver of Yellowstone Action

SUMMARY

In a recent decision by the Second Department of the New York Appellate Division, a tenant's waiver of its right to bring a so-called "Yellowstone" proceeding was held to be enforceable and not contrary to public policy. Thus, commercial landlords that can include those waivers in their leases would have a substantial edge in subsequent disputes with tenants over alleged lease defaults.

DISCUSSION

New York courts have facilitated the development of the somewhat unique "Yellowstone" injunction and motion for declaratory relief. This procedure allows a commercial lease tenant to "stop the clock" on a lease cure period triggered by a landlord's default notice. The clock restarts only upon the court's issuance of a declaratory judgment that the default alleged in the landlord's notice exists; if the court finds that there is no default, that ruling resolves the matter (putting aside a tenant's claim for attorneys' fees, if the lease contains a prevailing-party provision). Without a Yellowstone injunction, tenants would be required either (i) to forego the fight and cure the alleged default, which can be especially burdensome if the required "cure" is expensive or difficult, or (ii) to not "cure" in the hope that the tenant will persuade the court in the landlord's subsequent summary eviction proceeding that there was no default. Significantly, to obtain a Yellowstone injunction, a tenant need not prove "probable success on the merits" (the standard in proceedings seeking a temporary restraining order or preliminary injunction), but only that the tenant is ready, willing and able to cure the default if it is found to exist.

In an attempt to eliminate the prospect of a Yellowstone action, landlords have at times included in their leases a tenant waiver of the right to commence Yellowstone proceedings or generally to commence "declaratory judgment actions." One tenant whose lease included the latter type of waiver nevertheless initiated a Yellowstone proceeding and argued, among other things, that the waiver was unenforceable as

a matter of public policy. The Appellate Division disagreed, focusing on the facts that (i) the tenant was a sophisticated party acting in the highly negotiated context of a lease transaction and (ii) even without a Yellowstone, the tenant had other sufficient remedies, especially the ability to assert the absence of the default in the landlord's summary proceeding to evict. *159 MP Corp. v. Redbridge Bedford, LLC*, 2018 NY Slip Op. 00537 (2d Dept. January 31, 2018).[1] A single justice dissented,[2] arguing that declaratory judgments, being of a societal (not personal) benefit, should not be waivable and that in the specific context of commercial landlords and tenants, the Yellowstone serves "a valuable public policy role" and provides "a mechanism for a commercial tenant to protect its valuable property interest in the lease while challenging the landlord's assessment of its rights."

Both the majority and dissenting opinions note that the enforceability of the waiver has not been previously addressed by a New York appellate court. Although cited by neither opinion, a First Department case, in addressing another Yellowstone issue, noted that "the Court of Appeals has acknowledged that courts routinely grant Yellowstone relief to reflect this State's policy against forfeiture." *Village Ctr. for Care v. Sligo Realty & Serv. Corp.*, 95 A.D.3d 219 (1st Dept. 2012).

It is possible that the New York Court of Appeals (New York's highest court) will take this appeal if the tenant continues to pursue it. If not, the issue may be addressed in future cases at the Appellate Division, First Department and/or the Court of Appeals. In the meantime, the significance of the Second Department's decision will be subject to landlords' bargaining power to obtain tenant agreement to these waivers and the level of sophistication of tenants and their counsel in discerning the implication of any such waivers (including waivers only to "declaratory judgment actions" generally rather than to Yellowstone proceedings specifically).

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[1] The Second Department covers Queens, Brooklyn, Staten Island and Nassau, Suffolk, Dutchess, Orange, Putnam, Rockland and Westchester counties; the First Department covers Manhattan and The Bronx.

[2] The single-justice dissent means that an appeal to the New York Court of Appeals will be heard only by leave of that court.

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