

The 'Yellowstone Injunction'

A primer for utilizing, defending the court order

BY JACK MALLEY

The recession has caused decreased leasing activity in Westchester County's commercial real estate market and landlords have responded by offering incentives and concessions to retain or attract tenants. But what happens when a tenant is allegedly in default of the lease and the landlord is not willing to negotiate a concession? What legal procedures come into play and what strategies can landlords and tenants utilize with respect to those procedures to protect their interests?

When a landlord claims a tenant is in default, that tenant's best option is often an application for a court order known as a "Yellowstone Injunction." The name is derived from a 1968 decision by the New York Court of Appeals in *First National Stores Inc. v. Yellowstone Shopping Center Inc.*, 21 N.Y.2d 630.

The injunction enjoins the landlord's termination of the lease until a lawsuit initiated by the tenant determines the merits of the alleged default, which can take two or three years in some circumstances. These injunctions are typically sought when the tenant is allegedly in non-monetary default, such as for breach of a non-assignment, maintenance or exclusive-use clause. These types of defaults often arise when a financially strapped tenant seeks alternative ways of obtaining income or cutting costs.

A landlord who seeks to terminate a lease must first send a "notice to cure" to

the tenant, which states that the lease will be terminated unless the tenant cures the alleged default within a period of days that is set forth in the lease. To avoid the termination, the tenant can then apply for a Yellowstone Injunction. Under New York state law, in order to obtain the injunction,

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the tenant must demonstrate that: (1) it holds a lease, (2) the landlord served a notice to cure, (3) the tenant sought the Yellowstone Injunction prior to the expiration of the cure period, and (4) the tenant has the ability and desire to cure the alleged default.

In practice, New York courts are often inclined to grant the application to avoid a

forfeiture of a tenant's interest in a valuable asset – a commercial lease. A tenant is best able to take advantage of this inclination by emphasizing its "ability and desire" to cure the alleged default. This type of argument, which is often utilized by savvy tenants, is difficult to overcome for landlords because the tenant gives the court comfort that it will ultimately address the problem if need be.

However, the tenant will have difficulty manipulating the "desire and ability" to cure test where it is apparent that the default cannot be cured. For example, one tenant's Yellowstone Injunction application was rejected by the appellate court because the tenant's prior assignment of the lease without the landlord's consent, in violation of the lease, "constituted an incurable default."

In addition, the requirement that the tenant submit its application before the expiration of the cure period is strictly enforced. New York courts have repeatedly denied applications submitted after the expiration of the cure period, holding that it is beyond the power of the court to revive a terminated lease.

Commercial landlords and tenants, who are facing default issues more frequently during the recession, should be aware of how the Yellowstone Injunction can be utilized and defended.

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