OUTSIDE COUNSEL

The Dos and Don’ts of 'Yellowstone' Injunctions: A Brief Survey

In this Outside Counsel column, Daniel A. Cohen and Fielding Huseth survey decisions across a variety of asserted breaches, to aid practitioners in determining when a court will issue a 'Yellowstone' injunction.

By Daniel A. Cohen and Fielding Huseth, New York Law Journal | November 08, 2017

Daniel A. Cohen and Fielding Huseth

In a Yellowstone injunction proceeding, a commercial tenant seeks to enjoin the landlord from evicting the tenant for an alleged breach of the lease. This temporary relief preserves the tenant’s ability to cure should the court determine that the tenant is in breach, and thus avoid forfeiting its substantial investment in the leasehold. See *Zaid Theatre v. Sona Realty Co.*, 18 A.D.3d 352, 355 (1st Dep’t 2005); *Marathon Outdoor v. Patent Constr. Sys. Div. of Harsco*, 306 A.D.2d 254, 255 (2d Dep’t 2003). As with any other injunction, the tenant normally will be required to post an injunction bond if its application is granted. New York Civil Practice Law and Rules §6312(b)(2). See *Barsyl Supermarkets v. Ave. P. Assocs.*, 86 A.D.3d 545, 546 (2d Dep’t 2011).

To obtain relief, the tenant must demonstrate four elements: (1) The tenant holds a commercial lease; (2) the landlord provided the tenant with either a notice of default, notice to cure, or threat of termination; (3) the tenant requested an injunction prior to the termination of the lease; and (4) the tenant is "prepared and maintains the ability to cure the alleged default by any means short of vacating the premises." *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 93 N.Y.2d 508, 514 (1999). See also *Ray & W Cut v. 240 West 37*, 58 A.D.3d 415, 415 (1st Dep't 2009); *Barsyl Supermarkets*, 86 A.D.3d at 546.

The fourth element above is perhaps the most heavily scrutinized. Absent a demonstration both that the alleged breach is curable, and that the tenant is prepared to cure, no injunction will issue. See *Am. Youth Dance Theater v. 4000 East 102nd St.*, 140 A.D.3d 630, 630 (1st Dep't 2016) (injunction affirmed where the trial court "properly found that [tenant's] defaults were curable"); *WPA/Partners v. Port Imperial Ferry*, 307 A.D.2d 234, 237 (1st Dep't 2003) (the tenant need not "prove its ability to cure; rather, '[t]he proper inquiry is whether a basis exists for believing that the tenant … has the ability [to cure]") (internal quotations omitted).

The devil, of course, is in the details. Accordingly, this article surveys decisions across a variety of asserted breaches, to aid practitioners in determining when a court will issue a *Yellowstone* injunction.

Some Preliminary Issues

The Quantum of Proof. The proof required for a *Yellowstone* injunction is "far less than the normal showing required for preliminary injunctive relief." *Marathon*, 254 A.D.2d at 255. The tenant need not show a likelihood of success on the merits, i.e., that it will prevail in its claim that no breach has occurred. The tenant need only deny that a breach—or, at least, an incurable one—has occurred. See *Artcorp v. Citirich Realty*, 124 A.D.3d 545, 545 (1st Dep't 2015).

Timeliness. The tenant must demonstrate that it continues to hold a valid lease, and that the time to cure has not elapsed. If the lease has expired, or the cure period has elapsed, then the tenant generally cannot obtain an injunction. See *Korova Milk Bar of White Plains v. PRE Props.*, 70 A.D.3d 646, 647 (2d Dep't 2010) ("an application for *Yellowstone* relief must be made not only before the termination of the subject lease … but must also be made prior to the expiration of the cure period set forth in the lease"); *Goldcrest Realty Co. v. 61 Bronx Riv. Rd. Owners*, 83 A.D.3d 129, 132-33 (2d Dep't 2011) (stating the same).

The First Department, however, has recognized a limited exception for relief after the cure period has passed—specifically, where the lease requires the tenant to make diligent efforts to cure during the period, but the tenant (despite making diligent efforts) is unable to cure in time. See *Village Ctr. for Care v. Sligo Realty and Serv.*, 95 A.D.3d 219, 222-23 (1st Dep't 2012); *Becker Parlin Dental Supply Co. v. 450 Westside Partners*, 284 A.D.2d 112, 112-13 (1st Dep't 2001).

The landlord may not avoid a *Yellowstone* injunction through an unseasonable termination notice. Similarly, once it issues a proper cure notice or default notice, the landlord may not terminate the lease until the cure period prescribed in the lease expires. Courts will treat a premature termination notice as a notice to cure, and thus afford *Yellowstone* relief if the tenant otherwise makes the required showing. See *Empire State Bldg. Assoc. v. Trump Empire State Partners*, 245 A.D.2d 225, 228 (1st Dep't 1997); *Village Ctr. for Care*, 95 A.D.3d at 222 (noting that "where a notice of termination is premature under the terms of a lease, the notice is invalid, and thus the service of the notice will not bar a tenant from obtaining *Yellowstone* relief").

Willingness to Cure. If the tenant fails to demonstrate a willingness to cure the alleged breach, an injunction may be denied. See, e.g., *Confidence Beauty Salon v. 299 Third SA*, 148 A.D.3d 439, 439-40 (1st Dep't 2017) (injunction denied where tenant failed to aver its ability to cure its alleged defaults); *Rappa v. Palmieri*, 203 A.D.2d 270, 270-71 (2d Dep't 1994) (injunction denied where tenant commenced the action to "rescind[] the lease and not to … cure the default"); *Linmont Realty v. Vitocarl*, 147 A.D.2d 618, 620 (2d Dep't 1989) (injunction denied where tenant denied responsibility for the alleged defaults and made no offer to cure). Continuing violations during the "cure" period may also preclude *Yellowstone* relief. *IP Int'l Prod. v. 275 Canal St. Assocs.*, 139 A.D.3d 464, 464 (1st Dep't 2016) (injunction denied where tenant continued violating alteration provisions of lease during cure period); *Cemco Restaurants v. Ten Park Ave Tenants*, 135 A.D.2d 461, 462 (1st Dep't 1987) (injunction vacated where restaurant continued violating lease during pendency of injunction). The tenant aids its application considerably by demonstrating past or present efforts to cure the alleged breach. See, e.g., *Brownskin Shoe v. Ladies Mile*, 15 A.D.3d 220, 221 (1st Dep't 2005) (noting that tenant had removed most of offending signs from storefront windows); *Terosal Prop. v. Bellino*, 257 A.D.2d 568, 568 (2d Dep't 1999) (noting that tenant offered "proof of substantial efforts" to address majority of conditions listed in cure notice).

Survey of Recurring Cases Concerning Curability

Having discussed the basic legal framework, below we address some recurring types of cases where the courts have addressed the availability of *Yellowstone* relief.

Improper Assignment or Sublease. Courts will grant an injunction to permit a tenant to cure an assignment or sublease in violation of the lease, where the tenant demonstrates that it either can undo the transaction or otherwise cure the alleged default. For example, injunctions have been upheld where the tenant's shareholders, having transferred their shares in the tenant to another shareholder, have agreed to cure any default by undoing the transaction (*East Best Food v. NY 46th*, 56 A.D.3d 302, 303 (1st Dep't 2008); *Artcorp,* 124 A.D.3d at 546), and where the tenant has demonstrated willingness and ability to terminate an unlawful sublease (*Reade v. Highpoint Assoc. IX*, 1 A.D.3d 276, 277 (1st Dep't 2003)). Courts also have granted or upheld injunctions where the tenant has the legal ability to obtain the landlord's consent to the challenged assignment. See *Artcorp*, 124 A.D.3d at 546 ("consent may be obtained after the assignment and even in the absence of a lease provision authorizing this post-assignment cure"); *NNA Restaurant Mgmt. v. Eshaghian*, 2002 WL 34460625 (Sup. Ct. N.Y. Cty. Sept. 30, 2002) (injunction granted where lease provided that "consent to assign shall not be unreasonably withheld").

However, some courts have denied *Yellowstone* relief where, under the express terms of the lease, an assignment or sublease without prior consent of the landlord constitutes an incurable default. See *Zona v. Soho Centrale*, 270 A.D.2d 12, 14 (1st Dep't 2000) (holding that where owner of tenant's shares transferred ownership of the shares to a third party without landlord's consent, the transfer constituted an assignment under the lease and, as such, an incurable default); *Excel Graphics Tech. v. CFG/AGSCB 75 Ninth Ave.*, 1 A.D.3d 65, 71 (1st Dep't 2003) (holding that tenant's willingness to terminate subleases if the court found that tenant breached the lease did not warrant injunction, where lease provided that if tenant sought permission to sublease, landlord had absolute right to terminate the lease); *Pergament Home Ctrs. v. Net Realty Holding Trust*, 171 A.D.2d 736, 737 (2d Dep't 1991) (holding that the tenant lacked the ability to cure the improper assignment because the lease gave the landlord the absolute right to "terminate the lease at any time if [tenant] assigned without its consent"). Absent such a lease provision, the tenant cannot obtain a *Yellowstone* injunction unless it demonstrates an asserted willingness and ability to terminate or unwind the transaction. See *Zona*, 270 A.D.2d at 14 (noting that the tenant "failed to assert that it has the ability to cure its default, *i.e.*, by undoing the assignment").

Nonpayment of Rent or Other Monies Owed. Courts may grant *Yellowstone* relief to tenants allegedly in arrears, where the tenant receives a default or cure notice or is otherwise threatened with lease termination. See *3636 Greystown Owners v. Greystone Bldg.*, 4 A.D.3d 122, 123 (1st Dep't 2004) ("*Yellowstone* relief is proper even where nonpayment of rent is the only issue"); *Magno Sound v. 729 Acq.*, 819 N.Y.S.2d 210 (Sup. Ct. N.Y. Cty. April 20, 2006). If, however, the landlord commences a summary nonpayment proceeding after giving a rent demand containing the statutory three-day notice under Real Property and Proceedings Law §711(2), courts will usually deny *Yellowstone* relief. See *M.B.S. Love Unlimited v. Jaclyn Realty Assoc.*, 215 A.D.2d 537, 538 (2d Dep't 1995); *Gabai v. 130 Diamond St.*, 932 N.Y.S.2d 760 (Sup. Ct. Kings Cty. July 1, 2011). Summary nonpayment proceedings provide comparable protections, in a way, because the tenant can retain the leasehold by depositing with the court or paying the landlord any amounts owed, so long as paid before the court issues an eviction warrant. See Real Property and Proceedings Law §751(1); *Hollymount v. Modern Bus. Assocs.*, 140 A.D.2d 410, 411 (2d Dep't 1988).

Unauthorized Alterations. Unauthorized alterations may span the gamut from cosmetic changes, such as removing a light fixture, to major structural changes, such as installing a commercial kitchen. Regardless, courts have issued *Yellowstone* injunctions upon a showing that the tenant will remove or undo the offending alteration if it is found to breach the lease. See *Britti v. Perry Thompson Third*, 26 A.D.3d 235, 236 (1st Dep't 2006) (injunction affirmed where tenant was willing to remove unapproved commercial kitchen equipment and ventilation system); *ERS Enter. v. Empire Holdings*, 286 A.D.2d 206, 207 (1st Dep't 2001) (injunction issued where tenant was willing to restore premises to their prior condition if a lease violation were found).

Repairs. Landlords and tenants not infrequently dispute who is responsible under the lease to remediate a property defect. The tenant may obtain an injunction upon showing its willingness to repair any damage or address any defective conditions. Merely challenging whether a default exists or whether the repairs demanded by the landlord are required does not preclude relief, so long as the tenant expresses willingness to cure the alleged defaults if a breach is found. See *Zaid Theatre v. Sona Realty Co.*, 18 A.D.3d 352, 354 (1st Dep't 2005); *Terosal Prop. v. Bellino*, 257 A.D.2d 568, 568 (2d Dep't 1999).

Noise and Odor. Tenants may obtain an injunction to permit them to abate noise or odors that violate the lease. See *Boi to Go v. Second 800 No. 2*, 58 A.D.3d 482, 482 (1st Dep't 2009) (injunction granted where tenant was willing to cure offensive odors if it were determined that they emanate from the tenant's restaurant); *TSI West 14 v. Samson Assoc.*, 8 A.D.3d 51, 51 (1st Dep't 2004) (injunction granted to fitness center pending determination of whether its facility emitted excessive noise or vibration). Of course, actively persisting in the very conduct that underlies the landlord's grievance during the proceedings may vitiate the right to *Yellowstone* relief. *Cemco*, 135 A.D.2d at 463 (injunction vacated where restaurant continued noisy activity during pendency of injunction).

Permit, Violations, and Public Filings. Courts have issued *Yellowstone* injunctions to afford tenants an opportunity to obtain a required government license or permit. See *Am. Youth Dance Theater*, 140 A.D.3d at 630 (certificate of occupancy); *Remedy Hospitality Grp v. Street Five 116*, 2017 WL 1493894 (Sup. Ct. Kings Ct. April 26, 2017) (same); *Heon Lee v. TT & PP Main St. Realty*, 286 A.D.2d 665, 666 (2d Dep't 2001) (video arcade license); *Marathon*, 306 A.D.2d at 256 (billboard permit). Courts also may issue injunctions to permit the tenant to address violations issued by government authorities (See *Tap Tap v. 558 Seventh Ave.*, 144 A.D.3d 409, 411 (1st Dep't 2016); *Baruch v. 587 Fifth Ave.*, 44 A.D.3d 339, 340 (1st Dep't 2007)), or to cure defective public filings (See *Empire State Bldg. Assoc.*, 245 A.D.2d at 229 (injunction granted to permit tenant to cure any allegedly improper information filed to obtain variance)).

Failure to Maintain Liability Insurance. Courts have held that the failure to obtain proper liability insurance naming the landlord as an additional insured is an incurable breach. The breach cannot be cured merely by obtaining coverage on a going-forward basis, as the landlord remains exposed to an "unknown universe" of past claims for which the tenant has failed to procure insurance. See *Rui Qin Chen Juan v. 213 West 28*, 149 A.D.3d 539, 540 (1st Dep't 2017) (citing *Kyung Sik Kim v. Idylwood, N.Y.*, 66 A.D.3d 528, 529 (1st Dep't 2009)); *JT Queens Carwash v. 88-16 N. Blvd.*, 101 A.D.3d 1089, 1090 (2d Dep't 2012).

Some case law, however, suggests that the tenant may be able to cure the default if it obtains retroactive coverage that eliminates any such coverage gap. See *Federated Retail Holdings v. Weatherly 39th St.*, 32 Misc.3d 247 (Sup. Ct. N.Y. Cty. April 11, 2011), aff'd, 95 A.D.3d 605 (1st Dep't 2012); *Discount Columbia v. Bogopa-Columbia*, 2017 WL 2909360 (Sup. Ct. Kings Cty. July 6, 2017); *W & G Wines v. Golden Chariot Holdings*, 2014 WL 7203220, at *6 n.2 (Sup. Ct. Kings Cty. Dec. 19, 2014).

Daniel A. Cohen is senior counsel to Walden Macht & Haran. He is the author of "New York Motion Practice Handbook & Forms" (New York Law Journal Books). Fielding E. Huseth is an associate at the firm.
