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Yellowstone injunctions in the era of COVID-19 - by Josh Sohn, Daniel Lewkowicz and Kerry Cooperman

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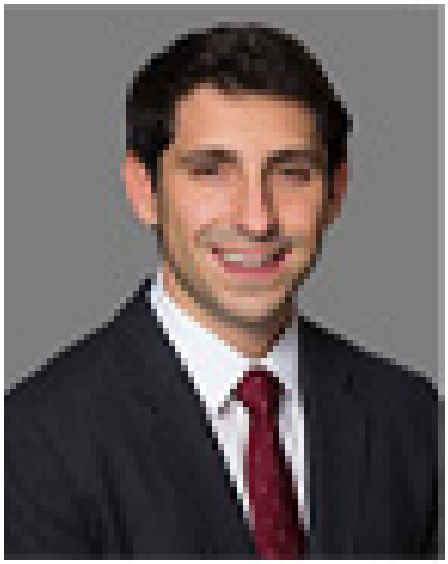

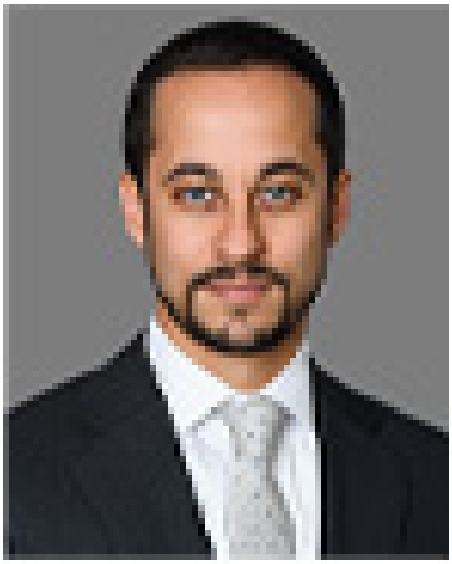

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The economic devastation wrought by COVID-19 has profoundly disrupted landlord-tenant relations across New York State. Thousands of businesses that were thriving just eight months ago have been forced to close permanently. Many commercial tenants bound by long-term leases, often backed by personal guarantees, can no longer generate the revenue to pay their monthly rent. And commercial landlords that count on rental income to meet their fixed expenses have been notified by tenants that future rent payments will be delayed, reduced, or suspended. Compounding these challenges, landlords and tenants have been forced to adapt to ever-changing governmental emergency measures: mandated businesses closures, restrictions on the occupancy of commercial spaces, moratoriums on eviction proceedings, new health and safety regulations, new anti-tenant-harassment laws, new government aid programs, suspended statutes of limitations, and limited court operations. The landscape, for landlords and tenants alike, is one of uncertainty.

For over 50 years, the Yellowstone injunction—named for the New York Court of Appeals' decision in First Nat. Stores, Inc. v. Yellowstone Shopping Ctr., Inc., 21 N.Y.2d 630 (1968)—has been a bedrock protection for commercial tenants. It is the tool by which tenants in New York who receive a notice to cure alleged defaults under a lease may obtain both a judicial toll of their cure period and an injunction temporarily barring the landlord from terminating the lease. Without this remedy, a

tenant who receives a notice to cure would be forced either: (i) to cure the alleged default by the deadline provided in the lease or the landlord's notice (even if the alleged default was legally excusable or did not occur), or (ii) to allow the lease to terminate (and later attempt to persuade a court to revive the leasehold or hold the landlord liable for improperly terminating the lease).1

The circumstances surrounding COVID-19 have raised questions about the availability of, and need for, Yellowstone relief. Among these questions are:

Do governor Cuomo's executive orders declaring a temporary moratorium on evictions of commercial tenants, and tolling certain statutes of limitation, suspend a tenant's obligation or deadline to seek Yellowstone relief?
Is a tenant's alleged nonpayment of rent resulting from circumstances arising from COVID-19 a basis for Yellowstone relief?
Do government-mandated business closures or other government restrictions arising from COVID-19 eliminate the need to seek a Yellowstone injunction?
How have courts dealt with Yellowstone injunction applications in the era of COVID-19?

This article addresses these questions.

The Yellowstone Injunction

A Yellowstone injunction is a form of equitable relief that a commercial tenant may request upon receiving a notice of default, notice to cure, or other threats of lease termination. Its function is to toll the tenant's contractual cure period so that, in the event a court ultimately finds the tenant in default, the tenant has an opportunity to cure the defaults.2

To establish entitlement to a Yellowstone injunction, a commercial tenant must show that:

There is a valid commercial lease;
The tenant received a notice of default, a notice to cure, or a threat of termination of the lease;
The tenant sought the injunction prior to both termination of the lease and expiration of the cure period specified in the lease or the notice to cure; and
The tenant is able to cure the alleged default by means short of vacating the premises.3

Yellowstone injunctions are "routinely" granted.4 Unlike ordinary injunctions, they do not require likelihood of success on the merits, irreparable harm, or a balance of equities.5 This is because, as New York courts have consistently emphasized, "equity abhors forfeitures of valuable leasehold interests."6 In December 2019, New York enacted a statute rendering the availability of this relief non-waivable in commercial leases.7

Tenants generally must seek a Yellowstone injunction before the expiration of the cure period specified in the lease and the notice to cure, and courts will often deny late-filed motions.8 Courts may grant a Yellowstone injunction, despite the lapse of the cure period, where the alleged defaults are not curable within that time period despite the tenant's diligent efforts.9 This rationale may be asserted by commercial tenants who are unable to cure alleged defaults within the contractual cure period due to circumstances arising from COVID-19.

How COVID-19 Impacts Yellowstone Relief

Does governor Cuomo's temporary moratorium on eviction proceedings suspend the need to seek a Yellowstone injunction?

On March 20, 2020, governor Cuomo issued Executive Order 202.28, establishing a temporary moratorium on the initiation of eviction proceedings or enforcement of an eviction of a commercial tenant for nonpayment of rent. That moratorium has since been extended until October 20, 2020.10

While Executive Order 202.28 temporarily bars the commencement of eviction proceedings for nonpayment of rent, it neither prohibits a landlord from issuing a notice to cure or terminating a lease, nor prohibits a landlord from initiating an eviction proceeding after the eviction moratorium is lifted based on a lease termination during the period of eviction moratorium. Accordingly, commercial tenants may not confidently rely on existing state executive orders as extensions of their time to seek Yellowstone relief.

Nevertheless, a tenant that belatedly moves for a Yellowstone injunction (after expiration of the cure period) may argue that flexibility in the timing of the motion is warranted in light of the current eviction moratorium. This is because a landlord that terminates a lease cannot, at present, give practical effect to that termination by enforcing the eviction of the tenant. In Prestige Deli & Grill Corp. v. PLG Bedford Holdings LLC, the trial court appears to have adopted this rationale, in part, upon granting a commercial tenant's motion for a Yellowstone injunction despite the tenant's failure to respond to the landlord's notice to cure and subsequent notice of termination.11 The court explained, in awarding the relief, that Executive Order 202.28 "clearly prohibits the enforcement of a termination of a commercial lease . . . ."12

Does governor Cuomo's tolling of limitations periods suspend the time limit to seek a Yellowstone injunction?

Governor Cuomo's Executive Order No. 202.8 further provides that:

[A]ny specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state . . . or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020.

This tolling period has been extended to October 4, 2020.13

While courts have yet to construe the scope of Executive Order No. 202.8, a commercial tenant should not assume that this order tolls (or tolled) the time limit to seek a Yellowstone injunction. On its face, the order applies to time limits prescribed either by "the procedural laws of the state" or by "any other statute, local law, ordinance, rule, or regulation." The time limit to seek a Yellowstone injunction is not prescribed in any statute, local law, ordinance, rule, or regulation, but rather is governed by the cure period contained in the parties' lease or the landlord's notice to cure. While a tenant may argue that time limits governing Yellowstone relief arise under common law (and are therefore tolled by Executive Order No. 202.8), the conservative approach for a tenant seeking to avoid the termination of a leasehold is to seek this relief before the expiration of the contractual cure period.

Is a tenant's alleged non-payment of rent due to circumstances arising from COVID-19 a basis for a Yellowstone injunction?

Some courts have found that "Yellowstone relief is proper even where nonpayment of rent is the only issue."14 This is typically the case where, in response to a tenant's alleged non-payment of rent and pursuant to a lease, the landlord serves a notice of default (or notice to cure) declaring that the lease will terminate on a date certain unless the non-payment is timely cured.15 Yellowstone relief is, however, often deemed unavailable where, instead of serving a notice to cure, the landlord immediately commences a non-payment proceeding. In this circumstance, lease termination is generally not threatened and New York's Real Property Actions & Proceedings Law ("RPAPL") § 751(1) affords tenants an opportunity to cure their monetary default(s) after a judgment is issued in a non-payment proceeding.16

Because a tenant afflicted by economic hardship resulting from COVID-19 may have cognizable legal defenses to a landlord's allegation of default for non-payment of rent (see, infra, Section d), if a landlord issues a notice to cure threatening a lease termination based on payment defaults, the tenant can and should seek a Yellowstone injunction. It is important for tenants in these circumstances to consider that the court deciding the injunction application could—but does not have to—order the tenant to pay use and occupancy (and post a bond) as a condition to receiving the injunction.17

Do government-mandated closures, or other government-imposed restrictions, arising from COVID-19 eliminate the need for a Yellowstone injunction?

Commercial tenants who are (or were) unable to occupy their leased premises, or to operate their businesses on the premises, due to government-imposed restrictions arising from COVID-19 may have common law and contractual defenses to alleged lease defaults.

New York common law provides at least two potential justifications for non-performance of lease obligations due to circumstances arising from COVID-19. The doctrine of "impossibility" excuses contractual performance—permanently or temporarily—where unanticipated events beyond the control of the parties render performance objectively impossible.18 Courts have occasionally found

that unforeseeable government actions, in addition to unforeseeable calamitous events (e.g., 9/11), trigger this defense.19 Likewise, the doctrine of “frustration of purpose” excuses contractual performance where an unforeseeable change in circumstances as to which the contracting parties did not voluntarily assume the risk substantially frustrate the parties’ purpose in entering into the contract.20

Contracting parties, in various contexts, have asked courts to apply these defenses to excuse their non-performance of contractual obligations based on government restrictions arising from COVID-19.21 Likewise, commercial tenants may challenge alleged defaults where government mandates, which compelled the temporary shutdown of businesses or restricted the occupancy or use of commercial spaces, made compliance with lease obligations impossible or frustrated the fundamental purpose of the lease. Tenants, however, should be mindful that courts construe these doctrines narrowly.22 Mere economic hardship resulting from COVID-19 is unlikely to excuse non-performance of lease obligations.23 And, at least at the time of this article’s preparation, there appears to be no cases where a New York court has excused a tenant’s non-payment of rent, based on impossibility or frustration of purpose, due to business disruptions caused by COVID-19.

Commercial tenants may also have contractual justifications for non-performance of lease obligations resulting from COVID-19. For example, while commercial leases rarely contain a force majeure provision explicitly suspending a tenant’s payment of rent in the event of a health pandemic or related government restrictions, some leases define force majeure events broadly enough to encompass the effects of COVID-19 and suspend the tenant’s non-monetary obligations, such as a continuous operations covenant requiring the tenant to keep its store open at certain times. Likewise, while commercial leases authorizing the suspension of tenant obligations in the event of a “casualty” rarely specifically include health pandemics among the triggering events, some leases may define “casualty” broadly enough to encompass the effects of COVID-19. And, in the event that a commercial landlord fails to adhere to government-mandated health and safety regulations for the operation of a commercial premises, a tenant may contend that its non-performance was excused (in whole or in part) by rendering the premises untenantable or by the landlord’s breach of a contractual obligation to comply with government-issued rules.

Contractual and common law defenses to alleged lease defaults may be asserted by a tenant in a Yellowstone proceeding to establish that the alleged defaults did not occur, are excusable, and/or do not require a cure, and therefore that termination is unwarranted. However, the availability of these defenses should not cause a tenant to refrain from timely seeking Yellowstone relief.

Conclusion

The COVID-19 moratoriums presently in place under New York law do not prohibit a landlord from terminating a commercial lease. In recent months, New York courts have entertained numerous Yellowstone injunction applications and, while some applications have been granted,24 others have been denied.25 Even in the era of COVID-19, therefore, the conservative course of action for a commercial tenant that receives a written threat of lease termination based on alleged curable defaults is to seek a Yellowstone injunction in timely fashion.

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1 Titleserv v. Zenobio, 210 A.D.2d 311, 313-14 (2d Dept. 1994) (“The purpose of the Yellowstone injunction is to prevent termination of the lease because, once the lease expires, a court is powerless to revive it absent a showing of fraud, mutual mistake, or some other acceptable basis for the reformation of a contract.”).

2 Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs., 93 N.Y.2d 508, 514 (1999) (“A Yellowstone injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture.”).

3 Id.; Good Fortune Rest., Inc. v. Kissena Grp., LLC, 185 A.D.3d 1013 (2d Dep’t 2020). Courts have generally held that a Yellowstone injunction cannot be obtained with respect to an incurable defect. Fong & Zhou Supermarket, Inc. v. 1769 LLC, No. 522419/2018, 2020 WL 5088191, at *1 (N.Y. Sup. Ct. Kings Cnty. Aug. 20, 2020).

4 Graubard Mollen Horowitz Pomeranz & Shapiro, 93 N.Y.2d at 514.

5 Post v. 120 E. End Ave. Corp., 62 N.Y.2d 19, 25 (1984) (“Whatever their merits, the courts have granted them routinely to avoid forfeiture of the tenant’s interest and in doing so they accepted far less than the normal showing required for preliminary injunctive relief.”).

6 Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 355 (1st Dep’t 2005) (internal citations and quotations omitted).

7 See New York Real Property Law §235-h.

8 Daashur Assocs. v. Dec. Artists Apartment Corp., 226 A.D.2d 114, 114–15 (1st Dep’t 1996) (“It is well settled that there is no basis for the preliminary injunctive relief provided by a Yellowstone injunction, where the injunction is sought after expiration of the period to cure and after service of the notice of termination.”); Korova Milk Bar of White Plains v. PRE Props., 70 A.D.3d 646, 647 (2d Dept. 2010).

9 Becker Parkin Dental Supply Co. v. 450 Westside Partners, LLC, 284 A.D.2d 112, 112-13 (1st Dep’t 2001) (“We reject defendant landlord’s argument that the tenant is not entitled to a Yellowstone injunction because it did not make the instant application therefor until after its time to cure had expired and the lease was terminated. The defaults described in the landlord’s notice to cure are such as not to be capable of complete cure within the time provided in the notice, even as extended by the parties’ subsequent agreements. Under these circumstances, all that the lease terms require from the tenant is commencement of diligent efforts to cure the defaults within the allotted time.”).

10 Executive Order No. 202.48 (“The directive contained in Executive Order 202.28, as extended, that prohibited initiation of a proceeding or enforcement of either an eviction of any residential or commercial tenant, for nonpayment of rent or a foreclosure of any residential or commercial mortgage, for nonpayment of such mortgage, is continued only insofar as it applies to a commercial tenant or commercial mortgagor”); Executive Order No. 202.64 (“The directive contained in Executive Order 202.48, which modified the directive in Executive Order in 202.28 that prohibited the initiation of a proceeding or enforcement of an eviction of any commercial tenant for nonpayment of rent or a foreclosure of any commercial mortgage for nonpayment of such mortgage is continued through October 20, 2020 .”).

11 restige Deli & Grill Corp. v. PLG Bedford Holdings LLC, No. 510220/20, 2020 WL 4059137, at *1 (N.Y. Sup. Ct. Kings Cnty. July 17, 2020).

12 Id. at *3.

13 See Executive Order No. 202.60.

14 3636 Greystone Owners, Inc. v. Greystone Bldg., 4 A.D.3d 122, 123 (1st Dep’t 2004).

15 Lexington Ave. & 42nd St. Corp. v. 380 Lexchamp Operating, Inc., 205 A.D.2d 421, 423 (1st Dep’t 1994) (“Plaintiff, rather than commencing a non-payment proceeding . . ., which would have allowed defendant to cure at any time prior to the issuance of a warrant of eviction, . . . instead chose to serve a notice to cure, a predicate notice to a holdover proceeding, alleging that non-payment was a breach of a substantial lease obligation. This would have allowed the termination of the lease, effectively eradicating defendant’s interest in the leasehold, prior to the full adjudication of the parties’ rights. As a result, a Yellowstone injunction was warranted to preserve the status quo.”)(citations omitted).

16 N.Y. Real Prop. Acts. Law § 751(1) (McKinney); see also Hollymount Corp. v. Modern Bus. Assocs., Inc., 140 A.D.2d 410, 411 (2d Dep’t 1988) (“The majority of the violations alleged in the notice to cure were for nonpayment or late payment of rents and additional rents. These violations do not require the protections of a Yellowstone injunction as rent nonpayment proceedings, which are separate from holdover summary proceedings . . . carry their own distinct cure provisions. Indeed, RPAPL 751(1) enables a tenant found to be in default in payment of his rent to deposit the rent with the court or to pay the landlord directly within 10 days of the judgment, thereby staying issuance of a warrant of removal and thus preserving the tenancy.”).

17 Compare Metropolitan Transp. Auth. v. 2 Broadway LLC, 279 A.D.2d 315 (1st Dept. 2001), with Global Business School, Inc. v. R.E. Broadway Real Estate, II, LLC, 38 A.D.3d 451 (1st Dept. 2007)

18 Conversion Equities, Inc. v. Sherwood House Owners Corp., 151 A.D.2d 635, 637 (2d Dep’t 1989).

19 E.g., A & S Transp. Co. v. Cnty. of Nassau, 154 A.D.2d 456, 459 (2d Dep't 1989) (emphasizing that "the law of impossibility provides that performance of a contract will be excused if such performance is rendered impossible by intervening governmental activities . . . if those activities are unforeseeable"); Bank of Boston Intern. of Miami v Arguello Tefel, 644 F. Supp 1423 (E.D.N.Y. 1986) (finding that a temporary impossibility of performance had resulted from currency restrictions imposed by a foreign government); Metpath Inc. v. Birmingham Fire Ins. Co. of Pennsylvania, 86 A.D.2d 407, 413 (1st Dep't 1982) (finding that impossibility of contractual performance had resulted from President Reagan's unforeseeable decision to terminate the employment of striking air traffic controllers); Hoosier Energy Rural Elec. Co-op., v. John Hancock Life Ins. Co., 588 F. Supp. 2d 919 (S.D. Ind. 2008) (applying New York law and finding that temporary impracticability of contractual performance had resulted from the 2008 credit crisis); Bush v. Protravel Int'l, Inc., 192 Misc. 2d 743, 753 (N.Y. Civ. Ct. Richmond Cnty. 2002) (determining that the doctrine of temporary impossibility may be triggered by the aftermath of the 9/11 terrorist attacks).

20 Gelita, LLC v. 133 Second Ave., LLC, 42 Misc. 3d 1216(A), at *3 (N.Y. Sup. Ct. N.Y. Cnty. 2014) ("[T]o invoke frustration of purpose as a defense for nonperformance, the frustrated purpose must be so completely the basis of the contract that, as both parties understood, without it, the transaction would have made little sense."); Rockland Dev. Assocs. v. Richlou Auto Body, Inc., 173 A.D.2d 690, 691 (2d Dep't 1991); Frenchman & Sweet, Inc. v. Philco Disc. Corp., 21 A.D.2d 180, 182 (4th Dep't 1964).

21 For example, the parties in Maesa LLC v. TPR Holdings LLC, No. 652685/2020 (Sup. Ct. N.Y. Cnty) recently argued the applicability of these doctrines in a breach-of-contract case arising from an alleged non-payment of agreed on sums.

22 Reed Found., Inc. v. Franklin D. Roosevelt Four Freedoms Park, LLC, 108 A.D.3d 1, 7 (1st Dep't 2013) (emphasizing that the impossibility doctrine is "applied narrowly such that performance is excused only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible")(internal quotations omitted).

23 407 E. 61st Garage v. Savoy Fifth Ave. Corp., 23 N.Y.2d 275, 281 (1968) ("[W]here impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused.").

24 For example, in The Gap Inc. v. 44-45 Broadway Leasing Co. LLC, No. 652549/2020 (Sup. Ct. N.Y. Cnty), the New York County Supreme Court issued a Yellowstone injunction, conditioned on the tenant's posting of a substantial undertaking. The Gap, Inc. v. 44-45 Broadway Leasing Co. LLC, No. 652549/2020, 2020 WL 4207345, at *1 (N.Y. Sup. Ct. Kings Cnty. July 21, 2020).

25 E.g., Fong & Zhou Supermarket, Inc., 2020 WL 5088191 at *1 (denying a Yellowstone injunction motion because the alleged default was incurable); The Shack Collective Inc. v. Dekalb Market Hall LLC, No. 506326/20, 2020 WL 3799131, at *2 (N.Y. Sup. Ct. Kings Cnty. July 06, 2020) (denying a Yellowstone injunction motion because there was no "ability to cure").