

Real Estate

New York Court Enforces Provision Waiving Tenant's Right to Yellowstone Injunction, Providing Commercial Landlords Possible Path To Strengthen Eviction Rights

By: [Anthony B. Borich](#), [Kristen M. Boike](#) and [Abraham M. Salander](#)

Commercial landlords in New York often find that their efforts to evict defaulted tenants are frustrated when, after serving the defaulting tenant a notice to cure, the tenant obtains a “Yellowstone” temporary restraining order (TRO) pursuant to *First National Stores v. Yellowstone Shopping Center*, 21 N.Y.2d 630 (1968). As discussed below, a recent New York decision may allow a landlord to avoid a *Yellowstone* injunction by including lease language waiving the tenant’s rights to declaratory and injunctive relief.

As many commercial landlords know, once a landlord serves a tenant with a notice to cure a lease default in advance of terminating a lease under New York law, a tenant can apply for a *Yellowstone* TRO, which extends the cure period available to the tenant, and delays lease termination and physical eviction while a commercial lease dispute is pending. Lease disputes in these circumstances typically relate to whether the tenant has defaulted under lease. If certain conditions are satisfied and a tenant is successful in obtaining a *Yellowstone* TRO, the tenant will be able to use the time while the lease dispute is pending (which could be many weeks or months) to cure the breach of the lease, as opposed to only having the period provided for in the lease, which is often substantially shorter. Thus, even if the tenant loses the lease dispute many months later, it may be able to avoid eviction if it cures the alleged breach while the dispute is pending. By contrast, without a *Yellowstone* TRO, the landlord can terminate the lease and complete the eviction as soon as the cure period expires, provided that the lease default remains uncured at that point in time. Therefore, avoiding a *Yellowstone* injunction can mean the difference between successfully evicting a tenant or not, being able to complete the eviction on a timely basis, and preserving settlement leverage for the landlord if a negotiated resolution is possible.

In *159 MP Corp. v. Redbridge Bedford, LLC*, 2018 WL 635946 (N.Y. App. 2d Dep’t Jan. 31, 2018), the leases at issue contained a provision prohibiting the tenant from seeking declaratory relief and allowing the landlord to recover its costs and lawyers’ fees if the tenants were to request, and were denied, an injunction. The provision also required the parties to resolve disputes using “summary proceedings,” which referred to certain expedited proceedings as provided under New York’s Real Property Actions and Proceedings Law. When the landlord served the tenants with notices to cure various breaches of each lease, the tenants filed suit in New York’s trial court, seeking (a) declaratory relief that they were not in breach of the leases and (b) a *Yellowstone* TRO to stay and toll the cure period and prevent the landlord from terminating the leases. In response, the landlord argued that the lease provision preventing the tenants from seeking declaratory relief required dismissal of the action.

The trial court enforced the tenants’ waiver of declaratory relief and dismissed the action, and the Second Department appellate court affirmed. The Second Department found that the provision barred the tenants from seeking a *Yellowstone* TRO, even though the provision only facially barred the tenant from seeking declaratory relief, because a *Yellowstone* injunction is “inextricably intertwined” with deciding whether there is a lease dispute and “cannot exist” if the court cannot provide declaratory relief. The court also held that the lease provision did not violate public policy because the right to *Yellowstone* relief was judicially created, and parties to a lease are generally permitted to waive whatever rights they choose (except in certain instances not applicable here). Therefore, the court held that the trial court properly dismissed the action, and the leases were properly terminated. The court also ordered the tenants to pay the costs of the action.

Although the court enforced the waiver provision contained in the leases, it did indicate that some waiver provisions might not be enforceable. In particular, the court explained that a waiver provision is subject to review for unconscionability and fraud and requires a “clear manifestation of intent” to relinquish a right

to relief. The court noted that the parties in *159 MP Corp.* were sophisticated entities negotiating at arms-length, and the lease was not entirely boilerplate. There were also no facts indicating that the tenant had received no consideration for the waiver.

Based on *159 MP Corp.*, a commercial landlord may be able to avoid a *Yellowstone* injunction after it serves a notice to cure by including in the lease a provision waiving the tenant's right to declaratory relief. To increase the likelihood that such a provision will be enforced, landlords may use language like the provision in *159 MP Corp.* Further, waiver language may be more likely enforced if:

- it is clear, unequivocal, and in capital letters;
- the tenant receives consideration for the waiver, which is explicitly confirmed in the lease;
- the lease containing the language is at least partly negotiated by the tenant rather than entirely boilerplate and provided by the landlord;
- a tenant initials the waiver language or otherwise indicates specific agreement to the language; and
- the language explicitly confirms the tenant's understanding of the consequences of the waiver language.

Although the court in *159 MP Corp.* enforced a waiver provision that only expressly waived the tenant's right to declaratory relief without explicitly stating that the tenant's right to *Yellowstone* injunctive relief was also waived, it may also be advisable to include language expressly waiving the right to pursue such injunctive relief as well.

159 MP Corp. may not be the last word by the New York courts on this issue, given that the decision was issued by an intermediate appellate court and New York's highest court has not weighed in. Moreover, given that part of the *159 MP Corp.* court's reasoning for enforcing the waiver provision was that the tenant was a sophisticated entity and that the parties negotiated at arms-length, it is unclear whether the court's holding would apply in a scenario where a tenant is not a sophisticated corporate entity or where a boilerplate lease is used. Regardless, a landlord may still choose to include a waiver in a lease to discourage the tenant from seeking declaratory or injunctive relief.

A more detailed discussion of the facts and the court's decision in *159 MP Corp.* follows.

Yellowstone Injunctions Generally

Under New York law, a tenant's right to so called *Yellowstone* relief is not based on statute, but on the opinion of the New York Court of Appeals in *First National Stores v. Yellowstone Shopping Center*, 21 N.Y.2d 630 (1968).

In *Yellowstone*, the landlord served the tenant with a 10-day notice to cure its alleged failure to comply with a sprinkler order issued by the fire department. In response, the tenant initiated an action seeking declaratory relief that the landlord was the party responsible for complying with the fire department's order. The tenant subsequently sought a preliminary injunction to prevent the landlord from enforcing its remedies under the lease. Significantly, the tenant never sought a TRO to prevent the landlord from terminating the lease while the motion for a preliminary injunction was pending. Before the court ruled on the motion, the cure period expired, and the landlord terminated the lease.

Following various decisions by the lower courts, the Court of Appeals held that the tenant was in fact responsible for the sprinkler compliance, and therefore was in breach of the lease. The Court also denied the tenant's request for a preliminary injunction given that the cure period had expired and the lease had terminated. The Court noted, however, that the tenant had not sought a TRO while the dispute over the lease obligations was pending.

Subsequent courts have interpreted *Yellowstone* as implicitly endorsing the notion that a commercial tenant is presumptively entitled to a TRO to extend a cure period and delay lease terminations and evictions while a commercial lease dispute is pending. Courts have articulated the four elements for a *Yellowstone* injunction as follows: "(1) the existence of a commercial lease, (2) the issuance by the landlord of a notice of default, notice to cure, or threat of termination of the lease, (3) an application for a

TRO made prior to the expiration of the cure period, and (4) the tenant's desire and ability to cure any alleged default by means short of vacating the premises."

Decision in *159 MP Corp. v. Redbridge Bedford, LLC*

159 MP Corp. v. Redbridge Bedford, LLC involved leases for 10,000 square feet of retail and 3,000 square feet of storage space in Brooklyn, New York. In March 2014, the landlord provided the tenants with 15-day notices to cure alleged breaches of the leases that included "the failure to obtain various permits, the arrangement of the premises in a manner that created fire hazards, the existence of nuisances and noises, and the failure to allow for sprinkler system inspections by the fire department." The notices stated that, if the tenants failed to cure the breaches, the landlord would terminate the leases and commence summary proceedings to evict the tenants.

Seven days later, the tenants commenced an action seeking a declaration that they were not in violation of the leases, a preliminary and permanent injunction preventing the landlord from terminating the leases, and monetary damages for breach of contract.

The tenants subsequently sought a *Yellowstone* injunction to stay and toll the cure period and enjoin the landlord from terminating the leases or commencing a summary proceeding for eviction. Unlike the tenant in *Yellowstone*, the tenants in *159 MP Corp.* timely sought a TRO prior to expiration of the cure period. The tenants alleged that they had not violated the leases because the landlord was responsible for the necessary permits and certificates of occupancy and that the landlord had waived any other alleged breaches by having accepted years of rent payments with knowledge of the alleged violations. The tenants further stated that they were nevertheless ready, willing, and able to cure any breaches of the leases.

The landlord responded that the court was required to dismiss all of the tenants' requests for declaratory and injunctive relief, including the request for a *Yellowstone* injunction, based on a rider to the parties' leases that provided that the tenant

"waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease. Any breach of this paragraph shall constitute a breach of substantial obligations of the tenancy, and shall be grounds for the immediate termination of this Lease. It is further agreed that in the event injunctive relief is sought by Tenant and such relief shall be denied, the Owner shall be entitled to recover the costs of opposing such an application, or action, including its attorney's fees actually incurred, it is the intention of the parties hereto that their disputes be adjudicated via summary proceedings."

The trial court enforced the lease provision, dismissing the tenants' requests for relief and ordering the tenants to pay costs.

On appeal, the Second Department first evaluated whether the lease provision prohibited a *Yellowstone* injunction, even though it only facially barred declaratory relief. The court stated that "[b]y nature and definition, a *Yellowstone* injunction is inextricably intertwined with the court's role in resolving whether a tenant has breached provisions of the lease and, if so, whether any such breach shall be cured." Therefore, the court concluded that the waiver provision barred *Yellowstone* relief because "a tenant's preemptive action to have the court determine that the lease has not been breached is in the nature of declaratory judgment" and because *Yellowstone* relief "cannot exist" if a court is barred from providing declaratory relief.

The Court next evaluated whether such a waiver provision violates public policy. As a general rule, tenants are permitted to waive their rights, except in certain instances where the legislature has declared such waivers invalid as a matter of public policy. The court noted that the legislature had not enacted any law barring a tenant from waiving its right to declaratory relief, and that it would be improper for the court to "create such a blanket prohibition here."

The court explained that a waiver of rights “should not be lightly presumed and, in the contractual context, must reflect a clear manifestation of intent to relinquish the protections that are otherwise afforded to the waiving party.” “[E]ven if the consideration for a waiver is grossly unequal or of dubious value, the adequacy of consideration is not subject to judicial review absent fraud or unconscionability.”

The court held that the waiver provision at issue was enforceable because the parties were “sophisticated entities that negotiated at arm’s length and entered into lengthy and detailed leases defining each party’s rights and obligations with great apparent care and specificity.” Although the lease was based on standardized lease forms and included 39 paragraphs of boilerplate terms, there were also “9 paragraphs of ‘Rules and Regulations’ incorporated into the leases by reference, a rider consisting of 36 paragraphs [including the waiver at issue], and several initialed handwritten changes and deletions.”

In addition, while the court noted that there was no evidence regarding what consideration, if any, the tenants received for the waiver, the court assumed, without finding, that any consideration received was included in the overall contractual bargain. Even so, the court indicated that, if a tenant could produce evidence that it did not receive consideration for such a waiver, it might be able to argue that the waiver was unconscionable.

The court also rejected the notion that the tenants would be left with no affirmative judicial remedies if the waiver provision were enforced. Namely, the tenants were still entitled to notices to cure and an opportunity to correct any claimed breaches. They could also seek monetary damages for breach of contract or torts, and they would also have the opportunity to litigate and defend themselves in any summary proceeding that the landlord commenced.

In sum, *159 MP Corp.* demonstrates that, under New York law, a lease provision waiving a tenant’s right to declaratory and *Yellowstone* relief may be enforceable. As described above, in drafting and negotiating leases regarding property located in New York, landlords may wish to take steps to increase the likelihood that such a waiver provision will be enforced. Landlords may also wish to include such a provision in leases regarding property in other states should courts in those jurisdictions provide tenants with the opportunity for *Yellowstone*-type relief.

Contact Us



Anthony B. Borich

aborich@jenner.com | [Download V-Card](#)



Kristen M. Boike

kboike@jenner.com | [Download V-Card](#)



Abraham M. Salander

asalander@jenner.com | [Download V-Card](#)

© Copyright 2018 Jenner & Block LLP, 353 North Clark Street, Chicago, IL 60654, 312 222-9350. Jenner & Block is an Illinois Limited Liability Partnership including professional corporations. Under professional rules, this communication may be considered advertising material. The material contained in this document has been authored or gathered by Jenner & Block for informational purposes only. It is not intended to be and is not considered to be legal advice. Transmission is not intended to create and receipt does not establish an attorney-client relationship. Legal advice of any nature should be sought from legal counsel.