Goodbye 'Yellowstone' Road: Is This the End of the '*Yellowstone*' Doctrine?

David Saxe and Danielle Lesser discuss '159 MP Corp. v. Redbridge Bedford,' a case in which the Appellate Division, Second Department acknowledged that commercial landlords may employ a strategy that prevents tenants from exercising Yellowstone rights.

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Yellowstone injunctions have long constituted important protection for commercial tenants in New York. Originating with the 1968 Court of Appeals decision in *First Nat'l Stores v. Yellowstone Shopping Ctr*, 21 N.Y.2d 630 (1968), New York courts permit a commercial tenant who has been served with a notice to cure or a notice of a default from its landlord to obtain a stay tolling the cure period and enjoining the landlord from terminating the lease or commencing a summary proceeding. See, e.g., *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assocs.*, 93 N.Y.2d 508, 514 (1999). A *Yellowstone* injunction thus preserves the status quo while the tenant challenges the validity of the landlord's actions. *Yellowstone* injunctions are "routinely" granted and courts "accept[] far less than the normal showing required for preliminary injunctive relief." *Post v. 120 E. End Ave.*, 62 N.Y.2d 19, 25 (1984). *Yellowstone* injunctions are creatures of case law and not statute or regulation.

'159 MP Corp.'

Recently, however, the Appellate Division, Second Department acknowledged that commercial landlords may employ a strategy that prevents tenants from exercising *Yellowstone* rights. In *159 MP Corp. v. Redbridge Bedford*, No. 2015-01523, 2018 N.Y. App. Div. LEXIS 557 (2d Dept. Jan. 31, 2018), the Second Department upheld a contractual waiver of the right to bring a declaratory judgment action as enforceable and not violative of public policy. The court determined that by waiving the right to bring a declaratory judgment, the tenants also waived their right to bring a motion for a *Yellowstone* injunction. Unless a contrary result is reached in the Court of Appeals, such waivers could begin to become routine in commercial leases.

Plaintiffs 159 MP Corp. and 240 Bedford Ave Realty Holding (collectively, the tenants) executed 20-year commercial leases with a 10-year renewal option. The landlord was originally BFN Realty Associates, and was later succeeded by Redbridge Bedford (the landlord).

The riders of each lease contained a provision that tenants "waive[] [their] 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, [landlord] 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 landlord issued a 10-day notice to cure violations to tenants, alleging that tenants failed to obtain various permits, arranged the premises in a manner that created fire hazards, failed to allow for sprinkler system inspections, and allowed the existence of nuisances and noises. The notice to cure demanded that the tenants cure the violations or else landlord would take steps to terminate the leases.

Tenants initiated an action in Kings County Supreme Court, and asserted causes of actions for declaratory and injunctive relief, and to recover damages for breach of contract. Tenants separately moved for a *Yellowstone* injunction, which would toll the cure period and enjoin landlord from commencing summary eviction proceedings. Tenants argued that they met the criteria for obtaining a *Yellowstone* injunction: (1) they held commercial leases; (2) they received from the landlord a notice to cure and a threat of termination of the leases; (3) they requested injunctive relief prior to the termination of the leases; and (4) they were prepared and maintained the ability to cure the alleged default by any means short of vacating the premises. See *Graubard*, 93 N.Y.2d at 514 (listing *Yellowstone* injunction factors). The Supreme Court denied tenants' motion, reasoning that tenants had waived their right to such relief in the riders quoted above.

The Appellate Division, Second Department—in an opinion by Associate Justice Mark C. Dillon and joined by Associates Justices Cheryl E. Chambers and Colleen E. Duffy—affirmed the Supreme Court's decision. The majority found that even though the waiver did not explicitly refer to *Yellowstone* injunctions, a "tenant's preemptive action to have the court determine that the lease has not been breached is in the nature of declaratory judgment" because "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." *159 MP Corp.*, 2018 N.Y. App. Div. LEXIS 557, at *12. The court noted that the portion of the waiver stating "it is the intention of the parties hereto that their disputes be adjudicated via summary proceedings" was further evidence that the parties intended to waive the right to seek a *Yellowstone* injunction. Id. at *13.

Public Policy Argument

The majority then rejected tenants' argument that the waiver violated public policy, an argument raised for the first time on appeal. The court explained "[n]ot only is the freedom to contract constitutionally protected, but federal and New York courts have recognized that the autonomy of parties to contract is *itself* a sacred and protected public policy that should not be interfered with lightly." Id. at *16 (citations omitted, emphasis in original). The court listed numerous rights that parties are permitted to waive in contracts, such as the right to a jury trial,

the right to appeal, the right to bring counterclaims, and many more. *Id.* at *16-17. The court concluded that the "right to a declaratory judgment, inclusive of the *Yellowstone* relief sought here, is not so vaulted as to be incapable of self-alienation," especially because "*Yellowstone* remedies are not a creature of any constitution or statute." Id. at *19-20. "To hold that the waiver of declaratory judgment remedies in contractual leases between sophisticated parties is unenforceable as a matter of public policy does violence to the notion that the parties are free to negotiate and fashion their contracts with terms to which they freely and voluntarily bind themselves." Id. at *20. "Declaratory and *Yellowstone* remedies are rights private to the plaintiffs that they could freely, voluntarily, and knowingly waive." Id. at *21.

The court added that the "waiver provision is, itself, a limited one, thereby mitigating the public policy concerns." Id. at *22. Tenants "had the contractual right to receive notices to cure and an opportunity to correct any claimed breaches. [Tenants] did not expressly surrender the right to seek monetary damages from [landlord] if [landlord] were to breach the contract or commit tortious conduct injurious to persons or property. [Tenants] also did not surrender the right to fully litigate and defend themselves in any summary proceeding that [landlord] might commence in Civil Court." Id. at *22-23.

Finally, the majority affirmed the Supreme Court's dismissal of the fourth cause of action, which alleged breach of contract. Tenants had alleged that landlord breached the leases by "failing to complete necessary work to obtain a new certificate of occupancy, which was required to convert the premises from an interim multiple dwelling under the 'Loft Law' to commercial space." Id. at *26. The court concluded that the "true nature of the [cause of action for breach of contract], while cloaked in breach of contract nomenclature, was, in fact, a disguised request for declaratory judgment, which [tenants] waived." Id. at *27.

Dissent

Associate Justice Francesca E. Connolly dissented. She explained that "concerning the waivability of rights, a distinction has been drawn between rights which benefit an individual and rights which benefit society in general." Id. at *43. A "party may waive a rule of law, a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right which is involved, and no considerations of public policy come into play." Id. (quoting *Hammelburger v. Foursome Inn*, 76 A.D.2d 646, 649 (2d Dept. 1980)). On the other hand, "when a right has been created for the betterment or protection of society as a whole, an individual is incapable of waiving that right; it is not to waive." 159 MP Corp., 2018 N.Y. App. LEXIS 557, at *43 (quoting *Hammelburger*, 76 A.D.2d at 649) (emphasis omitted).

Connolly explained that "the right to bring a declaratory judgment action is not personal to an individual, but, rather, such action serves important societal functions.... The declaratory judgment action serves an important public policy function in resolving controversies before they escalate into a breakdown of the contractual relationship." *159 MP Corp.*, 2018 N.Y. App.

LEXIS 557, at *45. Further, "the declaratory judgment action, together with the *Yellowstone* injunction, serve a valuable public policy role in relations between commercial landlords and tenants, providing a mechanism for a commercial tenant to protect its valuable property interest in the lease while challenging the landlord's assessment of its rights." Id. at *46 (citation and internal quotation marks omitted).

The dissenting opinion also found that "a summary proceeding does not provide an adequate substitute for the important rights forfeited by the broad waiver at issue here." Id. at *49. A tenant "has no standing to bring a summary proceeding," so tenants "would be entirely dependent on [a landlord] commencing a summary proceeding in order to bring the issue of the validity of a notice to cure before a court.... the tenant would be faced with great uncertainties with respect to any decision-making related to improving the property, accepting deliveries of new stock or merchandise, or the negotiation of any type of long-term agreement with customers or suppliers." Id. at *50-51.

Justice Connolly further added "since public policy protects the rights of society, the sophistication of the parties is not an appropriate consideration." Id. at *51. She cautioned that many tenants are unsophisticated, and all tenants "should not be bound by harsh waivers that preclude them from affirmatively seeking meaningful judicial review to protect their leasehold, should a dispute with their landlord arise." Id. at *52. Finally, she noted that the majority's enumeration of rights that parties are permitted to waive in a contract did not "involve the fundamental and societally critical right of affirmative and meaningful access to the courts for judicial review, or a suitable substitute forum for dispute resolution." Id. at *52-53.

159 MP Corp. is the first instance in which the appellate division has examined the enforceability of a *Yellowstone* waiver. Prior to *159 MP Corp.*, the few Supreme Court decisions that considered the issue were split. See id. at *41 n.1 (noting that in *Surdeanu v. 137 E. 110th St.*, No. 116029/02 (Sup Ct. N.Y. Cty. 2003), Justice Rosalyn Richter, then a trial judge, found that a similar provision was "unenforceable as against public policy" because it would "prevent plaintiff from instituting any declaratory judgment action with respect to the lease.... [S]uch a wide ranging waiver of the right to use the court system to seek redress is unenforceable"); *Malik v. Toss 29*, 15 Misc.3d 1112(A), 1112(A) (Sup. Ct. Nassau Cty. 2007) (declining to enforce *Yellowstone* waiver due to landlord's violation of his contractual obligations.); *Hamza v. Alphabet Soup Assoc.*, No. 101398/2011, 2011 N.Y. Misc. LEXIS 1811, at *3-4 (Sup. Ct. N.Y. Cty. April 18, 2011) (enforcing *Yellowstone* waiver contained in lease).

Conclusion

The Second Department's decision raises important considerations for the practitioner. First, unless and until the Court of Appeals weighs in, the Second Department's decision will certainly result in the widespread use of the waiver language employed by the landlord here. Tenants and their counsel must be aware of the ramifications of this language while negotiating commercial leases and counsel must fully explain to tenant-clients the implications of giving up

the ability to move for a *Yellowstone* injunction. Termination of leases by commercial landlords could be far more widespread as the *Yellowstone* injunction may no longer be an option for tenants.

Second, waivers of the right to seek declaratory relief may have ramifications for a commercial tenant that wishes to seek a preliminary injunction against its landlord pursuant to Article 63 of the CPLR to prevent the landlord from violating its lease. Without the protection of a *Yellowstone* injunction, such a tenant must ensure that it is compliant with its lease—and continues to pay rent—prior to seeking an Article 63 preliminary injunction, or else it risks receiving a notice to cure from its landlord and possible termination of the lease.

Third, assuming the Court of Appeals ultimately weighs in on this issue, it will be faced with the prospect of revisiting the *Yellowstone* injunction doctrine which it created 50 years ago. The Court of Appeals might be wary of issuing a decision that would effectively undermine a policy of its own invention that protects tenants' rights.

Finally, the New York state Legislature could view this possibility as one which merits codifying the court-made *Yellowstone* doctrine or otherwise addressing the use of *Yellowstone* injunction waivers. The Legislature might also consider amending the RPAPL to require commercial landlords to provide tenants with a statutory right to cure a lease violation prior to instituting a summary proceeding.

For these reasons, counsel for tenants and landlords alike must keep abreast of this important development and its aftermath in the evolving law on *Yellowstone* injunctions.

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