

## LITIGATION

### >>ALERT

# NEW YORK APPELLATE COURT ENFORCES LEASE PROVISION WAIVING COMMERCIAL TENANTS' RIGHT TO SEEK *YELLOWSTONE* INJUNCTION, STRENGTHENING LANDLORDS' RIGHT TO EVICT

Earlier this year, a New York state intermediate appellate court held that a provision in a commercial lease waiving a tenant's right to bring a declaratory judgment action is an enforceable waiver of the tenant's right to seek a *Yellowstone* injunction, which stops the clock on a tenant's time to cure an alleged default. This should put commercial tenants on alert for language in draft leases that could, without immediately appearing to, waive important rights they would otherwise have under New York law.

### ***YELLOWSTONE* INJUNCTIONS**

A *Yellowstone* injunction is a temporary restraining order sought by a commercial tenant that effectively tolls the cure period that follows a notice of default until the landlord and tenant resolve—in a declaratory judgment action brought by the tenant with its TRO application—whether the tenant actually defaulted under the lease. If the tenant prevails in the declaratory judgment action by showing that no default occurred, it stays in possession. If the tenant loses, however, the tenant has the remainder of the cure period to cure the default and thereby remain in possession.

### ***159 MP CORP. V. REDBRIDGE BEDFORD, LLC***

In *159 MP Corp. v. Redbridge Bedford, LLC*,<sup>1</sup> the Appellate Division, Second Department, held that a provision in a commercial lease under which the tenant “waives its right to bring a declaratory judgment action

### **THE BOTTOM LINE**

Commercial tenants entering into new leases should review draft agreements carefully for:

- >> explicit waivers of the right to seek *Yellowstone* relief; and
- >> less obvious waivers of that right that are drafted more vaguely, such as provisions that:
  - waive a tenant's right to seek “declaratory” relief,
  - waive a tenant's right to seek “injunctive” relief, or
  - state that the parties “intend that their disputes be adjudicated through summary proceedings.”

Any of these or similar provisions will waive an important right New York law has afforded to commercial tenants for decades: the right to dispute a landlord's assertion of an event of default while maintaining the option to cure that default if upheld.

with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease” is an enforceable waiver that prevents the tenant from seeking a *Yellowstone* injunction.

In *Redbridge*, the landlord of several properties in Williamsburg, Brooklyn, issued to its tenants (related entities whose leases all contained the same

waiver quoted above) notices to cure alleging that the tenants committed fire code violations and failed to obtain certain permits. Within the cure period, the tenants sought *Yellowstone* relief. The Supreme Court, Kings County, denied the tenants' motions for *Yellowstone* relief, on the basis that the tenants had waived that right in the leases.

The tenants appealed, and the Second Department affirmed. The court supported its decision by extolling the importance in American jurisprudence of the right of parties to freely enter into contracts, and to have those contracts enforced as written. The court also emphasized that the lease in question was a commercial lease entered into by sophisticated businesses. The court then noted that the New York legislature had enacted many statutes giving tenants certain rights that cannot be waived, but that it had not enacted any legislation codifying the right to *Yellowstone* relief or declaring that the right to seek such relief may not be waived. The court finally supported its holding by pointing out the alternative remedies open to the tenants in the case: they could (1) sue the landlord for damages after vacating the premises; or (2) refuse to cure, remain in possession despite the landlord's termination of the lease, and raise their legal and factual defenses in a summary proceeding brought by the landlord in Civil Court to evict them.

One justice of five dissented, noting that the tenant's right to raise its arguments in a summary proceeding is not an adequate substitute for declaratory relief and a *Yellowstone* injunction, because a losing tenant is evicted if the landlord's notice of default is upheld, with no opportunity to cure. Moreover, the dissenter pointed out, a tenant served with a notice of default that the tenant believes is invalid has no right to commence a summary proceeding to challenge that alleged default; instead, the tenant must wait until the landlord commences such a proceeding to evict the tenant.

### IMPACT OF REDBRIDGE

The immediate impact of the *Redbridge* decision is limited, for now, to just those areas of New York under the Second Department's jurisdiction: Brooklyn, Queens, Staten Island, Long Island, and the five counties immediately north of New York City. Already, one judge in Queens has invoked *Redbridge* to enforce a waiver of the right to seek a *Yellowstone* injunction.<sup>2</sup>

With the uncertainty surrounding whether the Court of Appeals will affirm or reverse *Redbridge*, or whether any of the other departments will follow it, commercial tenants throughout New York should proceed cautiously, under the assumption that *Redbridge*'s holding could soon apply statewide.

1. 160 A.D.3d 176, 71 N.Y.S.3d 87 (2d Dep't 2018).

2. See *Xiu Lan Ni v. Fortune Plaza LLC*, No. 700113/2018, 2018 N.Y. Slip Op. 30916(U) (Sup. Ct. Queens Cty. Apr. 16, 2018).

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