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'Yellowstone' Will Live on Through Creative Practitioners

While the commentators have bemoaned the court's decision (especially those representing tenants), the issue before us practitioners is what do we do when negotiating a lease and more specifically, the waiver of declaratory relief?

By **Menachem J. Kastner** | June 04, 2019

I write in connection with the article appearing in the NYLJ of May 31, 2019, titled "'Yellowstone' No More." Since the Court of Appeals decision in *159 MP Corp. v. Redbridge Bedford* was handed down, there has been much talk amongst real estate litigation attorneys as to the impact of the decision and with regard to drafting these provisions.



Apartment buildings in New York City.
(Photo: Victor J. Blue/Bloomberg)

Simply stated, under *Redbridge*, a tenant's waiver of declaratory judgment relief effectively waives the right to seek a *Yellowstone* Injunction, as long as the lease provides for an alternative forum to litigate the dispute. In the *Redbridge* situation, the lease expressly provided that, while the tenant was waiving its right to seek declaratory relief, all disputes between the landlord and tenant would be relegated to the jurisdiction of the Civil Court. However, the problem still exists that, if the dispute is litigated in the Civil Court and the tenant loses, the tenant has no opportunity to cure the default. Unless reversed on appeal, the Civil Court's determination that in fact there was a default is the death knell to the tenant's lease and tenancy.

While the commentators have bemoaned the court's decision (especially those representing tenants), the issue before us practitioners is what do we do when negotiating a lease and more specifically, the waiver of declaratory relief? A tenant's attorney will respond "no way, no how" to a landlord's request for a waiver as found in *Redbridge*. On the other hand, the landlord's attorney will see the strength of including such a provision and will insist on its inclusion. So what happens? The deal tanks and leasing comes to a halt?

In light of *Redbridge*, real estate practitioners should explore ways to get around *Redbridge* while satisfying the needs of both landlord and tenant.

Some drafting possibilities come to mind. I have advised my landlord clients that if there is a strong pushback on the inclusion of a *Yellowstone* waiver, the parties can simply agree that *Yellowstone* relief has been waived and jurisdiction will be relegated to the Civil Court, but add to the provision that in the event that the tenant loses in Civil Court, the tenant automatically gets 20 days to cure the default. This gives the tenant the comfort of not losing its leasehold, and it gives the landlord the comfort of an expedited process in the Civil Court. Many cases in the Civil Court are adjudicated on summary judgment motions, and building in a cure period upon the disposition by the

court may give comfort to both sides. And, I would not include the “diligently commence curing” found in paragraph 17(1) of the REBNY lease form. Otherwise, we are back to square one.

Another solution: The lease can provide that in the event the tenant defaults under the lease two times in a 12-month period, and even if the tenant cures the default within the cure period, then the *Yellowstone* waiver will kick into place. Again, the landlord has the comfort of knowing that the tenant gets certain shots at defaulting, but that judgment day will arrive, and the *Yellowstone* waiver will kick in, after a certain number of defaults within a designated period of time. The tenant, on the other hand, is well advised not to default under the lease for fear of the *Yellowstone* waiver kicking in after a certain period of time with a certain number of notices of default or notices to cure. And the parties can negotiate for what period of time the waiver is effective if the tenant behaves for a certain period of time.

I am sure that the creative practitioners amongst us can come up with various other ways to satisfy both the landlord and tenant, by the inclusion of a limited *Yellowstone* waiver. Instead of bemoaning the holding of *Redbridge* (and killing deals), let us come together in finding ways of satisfying both sides of the table.

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