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"So You're Saying There's A Chance…": Yellowstone Injunctions Alive and Well in the New York Commercial Division Re: Landlord Tenant Issues

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In *Burlington Coat Factory of N.Y., LLC v. Majestic Rayon Corp.*, No. 652511/2012, the Supreme Court (J. Kornreich) granted plaintiff **Burlington Coat Factory**'s ("Burlington") motion for an injunction to stay and toll the expiration of a thirty-day default cure period and enjoin the defendant landlords **Majestic Rayon Corp. and Cudge Realty, LLC** ("Landlords") from terminating Burlington's lease or tenancy, despite uncertainty over Burlington's ability to cure the default. Specifically, the Court found that Burlington's professed "willingness to do whatever is necessary to cure [the] lease default," coupled with a potential means to cure, was sufficient to grant the injunctive relief.

By way of background, Burlington's predecessor in interest had tenancy of a building designated as a historical landmark, and installed a large exterior blade sign (the "Blade Sign") on September 7, 1995. The lease permitted installation of exterior signs with the permission of the governing municipal agencies. At that time, the New York Landmarks Preservation Commission ("LPC") issued a Certificate of Appropriateness with respect to the Blade Sign.

In April of 2006, Burlington inherited the lease, which stated that in the event Burlington defaulted in performing any of the terms or provisions, and failed to cure the default within the requisite time period, Landlords could cancel the lease on five days' notice. The lease also included an indemnity provision favoring Landlords. In March 2012, seventeen years after the installation of the Blade Sign, Landlords learned through a hired consultant that the New York Department of Buildings ("DOB") had not approved the Blade Sign.

As a result, on June 29, 2012, Landlords sent Burlington a thirty-day notice to cure the default based on the installation and retention of the unapproved Blade Sign. Landlords demanded a new or reissued certificate of approval from the LPC *and* approval from the DOB—or, alternatively, removal of the Blade Sign. Shortly thereafter, on July 19, 2012, Burlington filed a motion for an injunction seeking to stay and toll the expiration of the thirty-day cure period. This type of injunction, known in New York as a *Yellowstone* injunction, is designed to prevent a tenant's forfeiture of its valuable leasehold interests while it challenges or addresses a landlord's default notice. *See First Nat. Stores, Inc. v. Yellowstone Shopping Center, Inc*., 21 N.Y.2d 630 (1968).

While the motion was pending, Burlington obtained the requisite approval from the LPC and filed an application with the DOB on August 14, 2012, prompting Landlords to withdraw the notice without prejudice and Burlington to drop its request for injunctive relief. While the DOB rejected Burlington's application on August 22, issuing eleven objections to the exterior Blade Sign, Burlington met with officials at the DOB between September 2012 and May 2013, had the sign inspected at the DOB's request, and cured nine of the eleven objections.

On March 13, 2013, Landlords served a second notice to cure, now insisting that the only available cure was the removal of the Blade Sign. Burlington again moved for an injunction, claiming eligibility for *Yellowstone* relief because it 1) held a commercial lease, 2) received notice to cure, 3) received threats from Landlords to terminate the lease, and 4) had the ability to cure. Burlington claimed, based on its past experience in seeking such modifications, that it could cure the default by pursuing a waiver or a modification of the zoning requirements underlying the remaining two DOB objections. Landlords, on the other hand, claimed that Burlington's waiver or modification request was speculative and that Landlords had a right to "reasonably withhold" necessary signatures for any zoning waiver.

On June 17, 2013, the Court granted Burlington's motion for *Yellowstone* relief, holding that where, as here, a plaintiff "has professed a willingness to do whatever is necessary to cure a lease default, it is sufficient that there exists a potential means to cure the alleged default." Quoting *Herzfeld & Stern v. Ironwood Realty Corp.*, 102 A.D.2d 737, 738 (1st Dep't 1984), the Court noted that the "proper inquiry is whether a basis exists for believing that the tenant desires to cure and has the ability to do so through any means short of vacating the premises."

The Court further found it unnecessary to rule on the outcome of the zoning process, noting that there was a "fair amount of discretion" in the process and neither party had established what the response to Burlington's request for a waiver or modification would be. Finally, relying on the indemnification clause in the lease, the Court required the posting of an undertaking of $10,000 to pay any damages and costs in the event that Burlington cannot cure the default.

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