

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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Index No.

LITTLE FISH CORP. a/k/a LITTLE FISH
INC.,

Plaintiffs,

-against-

PARAMOUNT LEASEHOLD LP,

Defendant.

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**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
ITS MOTION FOR A YELLOWSTONE INJUNCTION**

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PRELIMINARY STATEMENT

Plaintiff, by its attorneys, submits this memorandum of law in support of the application for a *Yellowstone* injunction.

In the midst of the nationwide COVID-19 emergency, defendant-landlord served a notice of default improperly claiming that plaintiff is in default of various provisions of its long-term commercial lease and threatening that if such purported defaults were not cured on or before January 11, 2021, the lease would be terminated. Plaintiff brings this motion by order to show cause seeking a *Yellowstone* injunction tolling the Notice of Default and enjoining any acts by defendant to terminate the lease, recover the premises, and tolling the time period within which to cure the defaults, if the court determines any exist.

STATEMENT OF FACTS

The facts are set forth in the accompanying affidavit Jeffrey Bank dated January 6, 2021 and the attached exhibits.

ARGUMENT**PLAINTIFF IS ENTITLED TO A *YELLOWSTONE*
INJUNCTION TO PERMIT IT TO LITIGATE THE
MERITS OF THE UNDERLYING DISPUTE**

New York courts have long recognized the necessity of an action to test the propriety of a landlord's Notice of Default before termination of a valuable commercial lease. In particular, the courts have repeatedly endorsed the issuance of preliminary injunctive relief to preserve the *status quo* pending adjudication of an alleged default under a lease. *First National Stores, Inc. v Yellowstone Shopping Center, Inc.*, 21 NY2d 630 (1968); see also *Herzfeld & Stern v Ironwood Realty Corp.*, 102 AD2d 737 (1st Dep't 1984) [*Yellowstone* injunction should have been granted so as to maintain the *status quo* and to afford plaintiff the opportunity to cure should it be found in default in its lease obligations]. The First Department has held:

Yellowstone relief is available to protect against leasehold forfeiture, provided that the tenant has the ability to cure by means short of vacatur in the event the tenant is

found to be in default of its obligation under a lease.

Village Center for Care v Sligo Realty and Service Corp., 95

AD3d 219, 222 (1st Dep't 2012).

As a matter of policy, courts have routinely granted *Yellowstone* injunctions in order to avoid forfeitures of tenants' interests and, in doing so, have accepted far less than the normal prerequisites for preliminary injunctive relief . . . "The threat of termination of the Lease and forfeiture, standing alone, has been sufficient to permit maintenance of the *status quo* by injunction". Inasmuch as tenants have a substantial property interest in their leaseholds, the right to cure violations must be preserved in order to ensure that if they prevail on the merits, their success will not be nullified by virtue of the Lease having been terminated.

Times Square Stores Corp. v Bernice Realty Co., 107 AD2d 677, 680

(2d Dep't 1985).

Following the Court of Appeals decision in *Yellowstone*, courts have carefully noted that the period within which a tenant is permitted to cure an alleged default must be tolled in order to preserve the efficacy of other remedies and to allow the underlying dispute to be fully adjudicated on the merits:

Where a summary proceeding is bottomed upon violation of a substantial covenant of the Lease the proceeding may not be instituted until after the time to cure has expired. If the tenant

has improperly assessed the circumstances, the result may well be disastrous for the time to cure has run and the Lease is at an end. **However, where a Yellowstone temporary injunction has been granted, the period within which to cure is tolled. If then it be determined that the tenant's evaluation was improper, there still remains time to cure.**

Finley v Park Ten Associates, 83 AD2d 537, 538 (1st Dep't 1981) [emphasis added]; see also *Village Center for Care*, supra ["this disinclination against forfeitures serves to promote the economy and business of our City"]; *Podolsky v Hoffman*, 82 AD2d 763 (1st Dep't 1981).

Yellowstone relief should issue as long as a tenant shows:

- (1) it holds a commercial lease; (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease;
- (3) it requested injunctive relief prior to the termination of the lease;
- and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises.

Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc., 93 NY2d 508, 514 [1999], quoting *225 E. 36th Street Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 (1st Dep't 1995); see *3636 Greystone Owners, Inc. v Greystone Bldg.*, 4 AD3d 122 (1st Dep't 2004).

Plaintiff has met each and every one of these criteria: it has a commercial lease; it received a Notice of Default; the time to cure has not expired; and, if found in default, plaintiff is prepared and has the ability to cure. Accordingly, plaintiff is entitled to *Yellowstone* relief.

A *Yellowstone* injunction is required to toll the period within which plaintiff may cure any purported violations of the lease. Absent an order tolling the cure period, plaintiff will face the imminent loss of the lease - and its valuable business and investment. It is this very predicament that the *Yellowstone* injunction was designed to protect against.

CONCLUSION

For the reasons set forth above the court must grant the motion and enter an order tolling the time for plaintiff to cure the alleged violations of lease set forth in the Notice of Default dated December 9, 2020, staying the notice and staying defendant from terminating the lease pending the final determination of this action or otherwise recovering possession of the premises and granting such other and further relief as may be just and proper.

Dated: New York, New York
January 7, 2021

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