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

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| LITTLE FISH CORP. a/k/a LITTLE FISH INC., Plaintiff, -against- PARAMOUNT LEASEHOLD LP, Defendant. | Index No. 150164/21<br>Assigned Judge: Barbara Jaffe<br>Motion Sequence 001 |

**MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR *YELLOWSTONE* INJUNCTION AND IN SUPPORT OF CROSS-MOTION FOR AN ORDER DIRECTING PAYMENT OF *PENDENTE LITE* RENT AND/OR USE AND OCCUPANCY AND FOR THE POSTING OF AN UNDERTAKING TO SECURE ARREARAGES**

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Defendant Paramount Leasehold LP ("Landlord") submits this memorandum of law (a) in opposition to the motion by plaintiff Little Fish Corp. a/k/a Little Fish Inc. ("Tenant") for a *Yellowstone* injunction; and (b) in support of Landlord's cross-motion for an order directing payment of *pendente lite* rent and/or use and occupancy and for the posting of an undertaking to secure arrearages. As explained herein, and in the accompanying affidavit of Matthew K. Harding (the "Harding Affidavit"), Tenant's motion should be denied, and Landlord's cross-motion should be granted in all respects.

## PRELIMINARY STATEMENT

Tenant is seeking a *Yellowstone* injunction with respect to Landlord's Notice of Default dated December 9, 2020 (the "Default Notice"), whereby Landlord informed Tenant that Tenant was in default of certain provisions of its lease with Landlord (the "Lease") for restaurant premises (Carmine's) occupied by Tenant in the building located at 1501 Broadway in Manhattan (the "Premises"). The defaults at issue related to (a) Tenant's failure to commence and complete the installation of a sprinkler system within the Premises as required under the Lease at Tenant's sole

cost and expense, and (b) Tenant's failure to remain in "continuous operation" at the Premises to the extent permitted under the various Executive Orders issued during the pandemic. While the Default Notice mentioned Tenant's substantial arrearages in rent and additional rent due under the Lease as of the date hereof amount to $3,322,481.79 (the "Arrears"), Landlord made it clear in the Default Notice that Landlord was merely reserving its rights and remedies with respect to the default in the payment of rent and additional rent and was not threatening to terminate the Lease based on a default in payment.

As explained in more detail in the accompanying Harding Affidavit, Landlord's primary concern was Tenant's failure to commence and complete the installation of a sprinkler system at the Premises as required under the terms of the Lease as well as under the provisions of Local Law 26. Tenant apparently obtained a proposal for the work in August 2020, which Tenant annexes as an exhibit to its *Yellowstone* papers, but neither signed the proposal nor proceeded with the work. As Mr. Harding explains, sprinkler work is proceeding apace in other portions of the building and it is critical for Tenant's work within the Premises to be commenced and completed in compliance with Local Law 26. Further, this would be an opportune time for Tenant to do work within the Premises, when indoor dining has been suspended temporarily, as the installation of a sprinkler system is of critical importance, as it relates to the health, welfare and safety of Tenant's employees, building occupants and others who may enter upon the Premises and/or the Building.

Tenant's papers recite, in conclusory fashion, the four elements necessary to be satisfied for a *Yellowstone* injunction to issue. However, as is apparent from Tenant's own exhibit (the unsigned August 10, 2020 proposal to install a sprinkler system) and Tenant's repeated complaints that complying with its obligation under the Lease to remain in "continuous operation" to the extent permissible under the various Executive Orders issued during the City's phased reopening would cost too much money. As such, Tenant's breach relates back to financial concerns rather than to any

substantive concerns or issues that would be supported by either the facts or the terms and provisions of the Lease.

Tenant's failure to establish its readiness, willingness and ability to cure the Lease violations specified in the Default Notice is, in itself, fatal to Tenant's application for *Yellowstone* relief. Mere "lip service" to this important requirement for a *Yellowstone* injunction is insufficient. Here, Tenant has not yet signed a proposal that it obtained in August 2020 for the installation of the sprinkler system. This unsigned proposal evinces Tenant's bad faith and lack of credibility in its conclusory allegation that it is supposedly "ready, willing and able" to cure the Lease violations at issue if this Court so directs.

*Yellowstone* relief should be dependent on the movant coming into court with clean hands and in good faith. Tenant has failed on both counts. First, as explained above, Tenant has not even committed to install the sprinkler system which, as will be shown herein, is clearly Tenant's sole responsibility under the terms of the Lease. With respect to the continuous operation violation, Tenant states that it is reluctant to operate at a loss, putting its own financial interests ahead of its explicit and clear contractual obligations.

It is telling that Tenant has engaged in take-out and delivery service and in fact outdoor and indoor dining at its location on the Upper West Side of Manhattan. Thus, Tenant should be well aware of what it could do and still can do within the scope of the applicable Executive Orders. Tenant, however, offers nothing in the way of compliance. Instead, Tenant attempts to foist its sprinkler obligation on Landlord and relies improperly on the health emergency involving COVID-19 and certain Executive Orders and Acts to avoid its leasehold obligations. This is not what the Executive Orders, Acts and accommodations to be made to small businesses were intended to achieve. In short, Tenant, a successful restauranteur having done, according to its papers, tens of millions of dollars of business at the Premises and its other locations within the City, is not the small business that was

intended to be protected under the Executive Orders, and it perverts the intention of the Executive Orders, and also the City Council enactment regarding commercial tenant harassment, for Tenant to try to fit within the scope of these remedial measures. Even if Tenant did fit within the scope of the Executive Orders and the City Council legislation regarding commercial tenant harassment, these orders merely defer Tenant's rental obligations based on the financial impact of the forced closures on tenants during the health emergency. The orders do not defer a Tenant's obligation to comply with other provisions of its Lease, such as keeping the Premises safe, complying with applicable laws and safety requirements and complying with the non-monetary obligations of its tenancy.

This Court has previously, in a similar pandemic-related lease default situation, granted a *Yellowstone* injunction conditioned on the continued payment of rent and/or use and occupancy during the pendency of the action and the posting of an undertaking to secure the arrears.[1] A similar conditioning of any *Yellowstone* relief is appropriate here for the same reasons as this Court previously articulated in that decision (a copy of which is annexed hereto as Exhibit "A" for the Court's convenience). In any event, Landlord has cross-moved for *pendente lite* rent and/or use and occupancy and for an undertaking securing the Arrears irrespective of how this Court may rule on the *Yellowstone* motion. Clearly, Tenant having moved for *Yellowstone* relief ostensibly to secure its valuable leasehold and prevent its forfeiture, must preserve that leasehold and tenancy by the payment of rent and additional rent at the rates specified in the Lease while this action is pending. Tenant should also be required to secure the Arrears so that Landlord is assured of a recovery of the Arrears

[1] The case is *Rame, LLC v Metropolitan Realty Management, Inc.*, Index No. 157438/20.

in the event Landlord's anticipated counterclaim for rent, subsequently to be interposed herein, is adjudicated in Landlord's favor.[2]

**FACTS**

The pertinent factors set forth in the accompanying Harding Affidavit, to which the Court is respectfully referred.

**POINT I**

**TENANT IS NOT ENTITLED TO A *YELLOWSTONE* INJUNCTION**

A *Yellowstone* injunction will be granted only where the moving party establishes that it: (1) holds a commercial lease; (2) has received a notice to cure, notice of default or concrete threat of termination of the lease from the landlord; (3) requested injunctive relief prior to the expiration of the cure period in the notice; and (4) has the desire and ability to cure the alleged default by any means short of vacating the premises. See, *Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Associates*, 93 NY2d 508 (1999); *Aegis Holding Lipstick LLC v Metropolitan 885 Third Ave. Leasehold LLC*, 95 AD3d 708 (1st Dept 2012).

A *Yellowstone* injunction is an equitable remedy dependent on the movant acting in good faith and without unclean hands. *Yellowstone* relief was never intended to afford a breaching tenant carte blanche to continue to violate the terms of its lease. It was intended rather to protect the interests of both parties and assure that *bona fide* disputes as to the parties' respective duties and responsibilities could be adjudicated without the tenant facing a forfeiture of its valuable leasehold interest. *Yellowstone* relief is not a substitute for bankruptcy protection, nor should it be used as a sword by defaulting tenants to avoid their leasehold obligations. A good-faith dispute must underlay any

[2] Landlord will also be asserting a counterclaim for specific performance of Tenant's obligation to install a sprinkler system at the Premises, as the completion of such installation is critical to the health, safety and welfare of Tenant, its employees and other tenants and occupants of the Building.

*Yellowstone* application, which is why a declaratory judgment cause of action is a prerequisite. *276-43 Gourmet Grocery, Inc. v 250 West 43 Owner LLC*, 143 AD3d 432, 433 (1st Dept 2016).

If Tenant does not qualify for a *Yellowstone* injunction under the more liberal standards applicable to such relief, Tenant certainly cannot meet the stricter requirements for obtaining a traditional CPLR 6301 preliminary injunction for which the movant must establish: (1) a likelihood of success on the merits; (2) that irreparable injury will result unless the relief sought is granted; and (3) that a balancing of the equities lies in the movant's favor. See, *Aetna Insurance Co. v Capasso*, 75 NY2d 860 (1990). Thus, under either the *Yellowstone* criteria or the three-pronged test applied with respect to a regular preliminary injunction, Tenant is not entitled to the relief sought on the instant motion.

**A. Tenant does not Satisfy the Criteria for a *Yellowstone* Injunction**

While there is no dispute that Tenant holds a commercial lease, has received the Default Notice and has sought *Yellowstone* relief before the January 11, 2021 expiration of the cure period, Tenant has failed to establish its desire and ability to cure the defaults specified in the Default Notice by any means short of vacating the Premises. Instead, Tenant disputes its obligations and attempts to use the situation created by the Pandemic to avoid its contractual commitment to remain in "continuous operation" at the Premises, to the extent permissible under the various Executive Orders issued during the City's phased reopening. Tenant also alleges that it would cost too much money to comply with its leasehold obligations. Financial considerations do not, as will be shown herein, excuse a tenant's obligation to comply with its leasehold obligations. A tenant is not guaranteed a profitable operation in the premises and it is presumed that sophisticated parties would account for any potential financial difficulties and operating when they negotiated the terms of the lease. The Lease at issue here is no exception.

For example, the so-called "inability to perform" provision (Article 23) which may also be referred to as a "force majeure" clause, specifically exempts the payment of rent and additional rent as an excusable obligation. Thus, no matter what conditions specified in Article 26 may occur, the rent and additional rent must still be paid.

Similarly, Articles 6 and 29, relating to Tenant's obligation to comply with all relevant laws, rules and regulations, and specifically Article 29 which requires the installation of the sprinkler system within the Premises at Tenant's sole cost and expense, are not qualified by whether Tenant's duty to comply with said provisions is dependent on Tenant making a profit through its operations at the Premises. These are unconditional obligations, as is a commercial tenant's independent and unconditional obligation to pay rent. See *Universal Communications Network, Inc. v 229 W. 28th Owner, LLC*, 85 AD3d 668, 669 (1st Dept 2011).

Tenant's conclusory statement of its desire and ability to cure the Lease violation relating to sprinklers, is in fact belied by Tenant's annexation, as an exhibit to its moving papers, of an unsigned proposal to install a sprinkler system in the Premises for the cost of $195,000. The proposal (Exhibit D to Tenant's moving papers) is dated August 10, 2020, months before Landlord's service of the Default Notice. As explained in the Harding Affidavit, Landlord was compelled to serve the Default Notice after its amicable discussions with Tenant failed to result in Tenant's binding commitment to install the sprinkler system. Tenant's argument that it is not Tenant's obligation but rather Landlord's obligation to install a sprinkler system is contradicted by the express terms of Article 29 of the Lease, which relates specifically to the installation of sprinkler systems. The obligation to install sprinklers within the Premises is clearly a legal requirement both under the New York Code of Fire Underwriters as well as Local Law 26. While Local Law 26 imposes such obligation on owners and landlords, Article 29 squarely shifts the obligation to Tenant. Tenant even obtained a proposal to install a sprinkler system at the Premises in August 2020 but never signed the proposal.

With respect to the "continuous operation" default, Tenant's purported "defense" is similarly disingenuous. There is no issue as to Tenant's violation, because Tenant concedes that the Premises is totally closed and not operational. Tenant argues that it has a kitchen capable of feeding over 400 people yet says nothing about whether that kitchen could also serve to accommodate a lesser number of people (say 25% of capacity as permitted by the various Executive Orders once indoor dining was allowed). Tenant's purported defense to its lack of outdoor dining is also disingenuous. Tenant claims that it can only seat about 20 people outside the Premises but does not indicate that it ever tried to seek more and blames a construction project undertaken by Con Edison for Tenant's inexcusable failure even to attempt outdoor dining. Con Edison's work was largely completed by the time the pandemic hit and was conducted during off hours when it was ongoing, to minimize any interference with Tenant's business. As stated in the accompanying Harding Affidavit, Tenant never even asked Landlord about outdoor dining and is using the Con Edison project as a contrivance to obscure Tenant's deliberate noncompliance with the Lease. This Court can take judicial notice, just walking through the streets of Manhattan, how restaurants have used their ingenuity to construct outdoor dining spaces both on the sidewalk and into the street with the permission of the City. The Carmine's restaurant on the Upper West Side did exactly that, availing itself to the extent possible of whatever scope of operations were permissible.

The case of *Cemco Restaurants, Inc. v Ten Park Ave. Tenants Corp.*, 135 AD 2d 461, 463 (1st Dept 1987), is pertinent here. In *Cemco Restaurants, Inc*., the court held that the plaintiff "has not made the requisite showing of its willingness to cure the lease violations, which it denied existed, and the evidence of record raises considerable doubt as to plaintiff's good faith". *Id*. at 463; see also *Linmont Realty, Inc. v Vitocarl, Inc*., 147 AD2d 618, 620 (2d Dept 1989) ("In the absence of a good faith showing of a willingness to cure, the *Yellowstone* injunction was properly denied").

A bare and conclusory statement is not enough for a tenant to satisfy the fourth prong requirement of obtaining a *Yellowstone*. (see *Good Fortune Restaurant, Inc. v Kissena Group LLC*, 2019 WL 1975696, at *2 (plaintiff's "bare statement that it is willing and able to cure" DOB violations and to perform alterations and installations was not sufficient where plaintiff failed to describe or provide "proof of any efforts undertaken to correct the issues"), *affd* 185 AD3d 1013 (2d Dept, July 29, 2020) ("Here, the plaintiff failed to demonstrate that it was willing and able to cure its default").

As recently explained by the Appellate Division, "[a] necessary lynchpin of a *Yellowstone* injunction is that the claimed default is capable of cure. Where the claimed default is not capable of cure, there is no basis for a *Yellowstone* injunction" (*Bliss World v 10 West 57th Street Realty*, 170 AD3d 401 (1st Dept 2019) [emphasis supplied]). In turn, in *Bliss World*, on a motion for a *Yellowstone* injunction, the Court held that a tenant's general statement of a willingness to cure is insufficient to meet its burden where the tenant does not explain how it will cure, holding:

> although the tenant has generally stated that it is willing to cure any assignment violation, it does not explain how it will undo the assignment or indicate whether it is willing or able to do so (see *Zona, Inc. v. Soho Centrale, LLC*, 270 A.D.2d 12, 14, 704 N.Y.S.2d 38 [1st Dept. 2000], *compare Artcorp Inc. v. Citirich Realty Corp.*, 124 A.D.3d 545, 546, 2 N.Y.S.3d 109 (1st Dept. 2015) ). Although some of our decisions have indicated that seeking late consent from the landlord remains a cure in assignment cases, even were that theoretically true, there is no claim made here that this tenant would pursue that cure (see Gettinger Assoc., LLC v. Abraham Kamber & Co., LLC, 103 A.D.3d 535, 535, 960 N.Y.S.2d 37 (1st Dept. 2013)).

Under these circumstances, it is clear that there has been no satisfaction by Tenant of the fourth requirement regarding its readiness, willingness and ability to cure the lease violations specified in the Default Notice. This is fatal to Tenant's application for *Yellowstone* relief requiring that the application be denied in all respects.

**B. A Preliminary Injunction under CPLR 6301 is also Inappropriate**

The law is well settled that when a *Yellowstone* injunction is not available, the tenant cannot obtain a preliminary injunction to prevent the landlord from exercising its rights with respect to the terminated lease. See *B. Boman & Co., Inc. v Professional Data Management, Inc.*, 218 AD2d 637, 638 (1st Dept 1995) (when a *Yellowstone* application is not served during the cure period, if any, "a preliminary injunction would also have been unavailable"); *Manhattan Parking System-Service Corp. v Murray House Owners Corp.*, 211 AD2d 534, 535 (1995) ("we note our disagreement with the practice of granting preliminary injunctive relief pursuant to CPLR 6301 when *Yellowstone* relief is unavailable because of the untimeliness of the application, and disavow our previous holdings to the contrary"); *R.P.S.P. Pasta Corp. v Tor Valley, Inc.*, 229 AD2d 783, 784 (3d Dept 1996) ("[p]laintiff's failure to seek injunctive relief…before defendant acted to terminate the lease is fatal and, in our view, forecloses any opportunity for subsequent statutory injunctive relief") (emphasis supplied); *Goldcrest Realty Co. v 61 Bronx River Road Owners, Inc.*, 83 AD3d 129, 135 (2d Dept 2011) (Appellate Division, Second Department expressly "agree[s] with the Appellate Division, First and Third Departments, that motions for preliminary injunctions pursuant to CPLR 6301, like motions for *Yellowstone* injunction, must also be made prior to the expiration of the cure period"); *319 Smile Corp.*, *v Forman Fifth, LLC*, 37 AD3d 245 (1st Dept 2007); *403 W. 43 St. Rest. Inc. v Ninth Ave. Realty, LLC*, 36 AD3d 464 (1st Dept 2007).

While Tenant's application was timely, its apparent unwillingness to cure and the meritless nature of its underlying claims render Tenant's satisfaction of the more vigorous three-pronged test for a CPLR 6301 injunction unlikely.

## POINT II

## TENANT HAS FAILED TO SET FORTH A *BONA FIDE* CLAIM FOR A DECLARATORY JUDGMENT

A *Yellowstone* injunction is intended to allow a tenant and a landlord to obtain a judicial resolution of a *bona fide* dispute, without the tenant risking a forfeiture of its valuable lease and tenancy, if it is later adjudicated that the tenant was, in fact, in default. As a *Yellowstone* injunction is clearly an equitable remedy, the underlying dispute to be preserved for a declaratory judgment must be a *bona fide* dispute submitted in good faith. Here, Tenant's purported disputes as set forth in the second and third causes of action of Tenant's verified complaint, are neither bona fide nor asserted in good faith. Rather, it is clear from the provisions of the Lease that Tenant's position is utterly without merit and that Landlord should, at the proper procedural moment, be entitled to a summary determination in Landlord's favor.

While Tenant argues that the merits of the underlying dispute are not a consideration on a *Yellowstone* application, courts do examine the nature of the default and routinely deny *Yellowstone* relief where the default is incurable. That determination requires some analysis of the merits. Similarly, in determining whether a cure period has expired or whether it was deemed extended by a tenant's commencing in good faith to cure the lease violations and continuing in that regard beyond the stated cure period, the underlying merits are also considered.

Where, as here, the underlying merits of Tenant's position are unsustainable, the question of bad faith arises, as well as a potential abuse of the *Yellowstone* remedy. That is why *Yellowstone* injunctions are routinely conditioned on the payment of *pendente lite* rent and/or use and occupancy and the posting of undertakings, as this Court did in *Rame, LLC v Metropolitan Realty Management Inc.*, 2020 WL 6290556 (2020), a copy of which is annexed for the Court's convenience as Exhibit "A" hereto.

Thus, while a tenant seeking *Yellowstone* relief does not have to establish a likelihood of success on the underlying claim for declaratory relief, a non-meritorious claim by a tenant should be a factor in imposing significant conditions to a *Yellowstone* injunction. As explained in Point III hereof, Landlord is cross-moving for exactly such an order.

## POINT III

## TENANT SHOULD BE REQUIRED TO POST A BOND AND PAY RENT AND/OR USE AND OCCUPANCY GOING FORWARD, IRRESPECTIVE OF THIS COURT'S RULING ON THE *YELLOWSTONE* INJUNCTION

Conditions are frequently imposed when a *Yellowstone* injunction is granted. This Court has recently, in *Rame, LLC v Metropolitan Realty Management, Inc.*, *supra*, required a commercial tenant, as a condition to the issuance of a *Yellowstone* injunction to pay its

> "current rent and other rental obligations to defendant as they become due on a monthly basis, beginning on November 1, 2020, and on the additional condition that, within 20 days of the date of this order, [Tenant] post an undertaking in the sum of $1,092,156.33, representing 50% of the amount due as of October 1, 2020, and provide proof thereof to the Court, at which point an supplemental order will issue."

In *Rame*, this Court issued such relief notwithstanding that it might ultimately be determined that the tenant was entitled to an abatement of rent under the lease. The Court stated that whether or not a tenant prevails "is irrelevant to whether it is entitled to a *Yellowstone* injunction. Rather, the key issue is [the Tenant's] willingness and ability to cure its default, and it has indicated both." Here, unlike in *Rame LLC*, Tenant relies on an unsigned proposal for the installation of a sprinkler system dated August 10, 2020 and argues that the installation of a sprinkler system is Landlord's responsibility and not the responsibility of Tenant. Tenant similarly seeks to avoid, rather than establish or even commit, to any desire to comply with its "continuous operation" requirements under the Lease, arguing that its kitchen is too big to accommodate small crowds and that Tenant would

lose money if it were forced to operate at a limited indoor capacity or for take-out and delivery orders only.

Regardless of how the underlying disputes are ultimately determined, Landlord is entitled to be compensated for Tenant's continued occupancy of the Premises during the pendency of this action, by an award of *pendente lite* rent and/or use and occupancy, at the rate specified under the Lease ($275,898.52 per month). Landlord is also entitled to be secured for any potential monetary recovery (to be counterclaimed for subsequently in this action) and is seeking an order directing Tenant to post a $3,500,000.00 surety bond or undertaking to secure the outstanding arrears of $3,322,481.79 that accrued from June 2019 up through and including January 2021. The Arrears include pre-COVID charges for utilities supplied to the Premises at Landlord's expense while the restaurant was fully operational. Tenant's failure to pay these pre-COVID charges is yet another example of Tenant's bad faith and unclean hands.

CPLR 6312(b) states, in relevant part, that:

> "…prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction, including… (2) if the injunction is to stay proceedings in an action to recover real property … all damages and costs which may be, or which have been, awarded to the defendant in the action in which the injunction was granted, including the reasonable rents and profits of, and any wastes committed upon, the real property which is sought to be recovered…"

As the Court of Appeals has explained, "the purpose and function of an undertaking given by a plaintiff pursuant to the provisions of CPLR 6312 … is to reimburse the defendant for damages sustained if it is later finally determined that the preliminary injunction was erroneously granted." *Margolies v Encounter, Inc.*, 42 NY2d 475 (1977).

New York Courts have routinely required tenants to post bonds as conditions of *Yellowstone* injunctions. See, *e.g. Metropolis Seaport Assocs., L.P. v South Street Seaport Corp.*, 253 AD2d 663 (1st Dept 1998) (requiring *Yellowstone* undertaking in the amount of $1.5 million); *575 First Ave. Corp. v Bd. Of Managers of the Kips Bay Towers Condominium*, 2009 WL 5243689 (Sup Ct, NY County 2009) ("the granting of the *Yellowstone* injunction is conditioned upon plaintiff's posting of a bond in the amount of $2.5 million…").

In fact, this Court and others have recently required bonds to be posted for rental arrears accrued during the Pandemic. See *The Gap and Old Navy LLC v 44-45 Broadway Leasing Co., LLC* (Supreme Court of the State of New York, Index No. 652549/2020) (Where the tenants argued that the Pandemic made it impossible to operate their stores, but the Court nonetheless required the tenants to post an undertaking in the amount of $5,842,531 to secure the arrears and awarded use and occupancy *pendente lite*).

As stated by the First Department in *Universal Communications Network, Inc. v 229 W. 28th Owner, LLC*, 85 AD3d 668, 669-70 (1st Dept 2011):

> "*Yellowstone* injunctions, however, also protect landlords like defendant because, 'much like a bond, [the *Yellowstone* injunction] ensure[s] that [a landlord gets] paid when the day of reckoning finally arrive[s] in…protracted litigation' (*Graubard*, 93 NY2d at 515). Plaintiff's day of reckoning is upon it" (brackets in original).

New York courts have routinely required tenants to pay ongoing rent and/or use and occupancy to the landlord as a condition to issuing a *Yellowstone* or preliminary injunction. This Court did so in the *Rame, LLC* case. Similarly, in *51 Park Place LH, LLC v Consolidated Edison Company of New York*, 34 Misc 3d 590 (Sup Ct, NY County 2011), the court conditioned the *Yellowstone* injunction upon Tenant's payment of use and occupancy, stating:

> "The *Yellowstone* injunction is conditioned on the payment of use and occupancy of $25,875 per month during the pendency of the action, the undisputed amount of monthly rent, and, as sought by defendant, the posting of an undertaking but, in a lesser amount of $781,519, which is the undisputed amount of the claimed arrears minus $100,000 [the amount already posted as condition of the temporary restraining order]".

*Id.*; see also, *Metropolitan Transportation Authority v 2 Broadway LLC*, 279 AD2d 315 (1st Dept 2001) (noting that the tenants should have been required to pay use and occupancy as a condition to the issuance of the *Yellowstone* injunction); *61 West 62nd Owners Corp. v Harkness Apartment Owners Corp.*, 173 AD2d 372 (1st Dept 1991) (finding that the lower court did not err in conditioning the issuance of the *Yellowstone* injunction upon future payment of use and occupancy).

The amount of an undertaking must be "rationally related to the quantum of damages which plaintiff would sustain in the event that defendant is later determined not to have been entitled to the injunction." See *61 West 62nd Owners Corp. v Harkness Apartment Owners Corp*., *supra* (1st Dept 1991). Here, a $3,500,000.00 surety bond or undertaking to secure the Arrears now totaling $3,322,481.79 is certainly reasonably related to Landlord's potential damages if a judgment for such amount is unenforceable.

The court in *Lexington Ave. & 42nd St. Corp. v 380 Lexchamp Operating, Inc.,* 205 AD2d 421, 421(1st Dept 1994), granted a *Yellowstone* injunction for a default in payment. There, the court directed the movant, as a condition to the relief, "to pay all undisputed rent and additional rent due, both past and future, directly to plaintiff while continuing to pay disputed submetered electrical charges to plaintiff's attorney, to be held in escrow." See also, *Fifth Ave. Rest. Corp. v RCPI Landmark Props., LLC*, 13 Misc 3d 1206(A), 824 NYS2d 753 (Sup Ct, NY County 2006) (tenant granted *Yellowstone* injunction on condition that tenant, *inter alia*, pay to landlord both the rent arrears and timely pay the rent during the course of the litigation).

Moreover, Tenant cannot expect to continue in possession of the Premises and use the valuable space without paying rent and/or use and occupancy going forward. It is well established that courts have the authority to direct a tenant to make *pendente lite* rent or use and occupancy payments directly to the landlord during litigation. See, *e.g., Eli Haddad Corp. v Cal Redmond Studio*, 102 AD2d 730, 731 (1st Dept 1984) (finding that "Having entered into possession fully cognizant of the existing realities, Tenant should not now be permitted to reap the benefits of occupancy and, at the same time, avoid the payment of rent"); see also*, Corris v 129 Front Co.*, 85 AD2d 176, 180 (1st Dept 1982) (finding that "…Tenants who receive services must expect to pay rent"). Tenant should certainly not be allowed to remain in possession of the Premises "rent free" while this action is pending.

Just recently, in *138-77 Queens Blvd v QB Wash LLC*, Supreme Court, Queens County (McDonald, J.), Index No. 715071/20, the Court awarded *pendente lite* use and occupancy in an ejectment action and directed that the tenant post an undertaking to secure the arrears, rejecting the tenant's arguments that the Executive Orders relieved the tenant of the obligation to pay use and occupancy. The Court found that permitting the tenant to remain in possession of the subject premises without paying for its use and occupancy would be "manifestly unfair," citing *MMB Assocs. v Dayan*, 169 AD2d 422, 422 (1st Dept 1991). A similar ruling is appropriate here.

Accordingly, and irrespective of whether this Court grants *Yellowstone* relief, Tenant should be required to pay the rent and/or use and occupancy to Landlord directly, in advance and on the first day of each and every month during the pendency of this action, in the monthly amount of $275,898.52 and to post a surety bond or undertaking of at least $3,500,000.00 to secure the Arrears and to cover any potential damage to Landlord as a result of the injunction.

## CONCLUSION

Based on the foregoing, Tenant's motion for a *Yellowstone* injunction should be denied and Landlord's cross-motion should be granted in all respects.

Respectfully submitted,

Dated: New York, New York
January 19, 2021

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# EXHIBIT A

2020 WL 6290556 (N.Y.Sup.), 2020 N.Y. Slip Op. 33538(U) (Trial Order)
Supreme Court of New York.
New York County

**1 RAME, LLC, Plaintiff,
v.
METROPOLITAN REALTY MANAGEMENT, INC., Metropolitan Life Insurance Company, 200 Park, L.P., Defendants.

No. 157438/2020.
October 27, 2020.

**Decision + Order on Motion**

Present: Hon. Barbara Jaffe, Justice.

**MOTION DATE _____**

**MOTION SEQ. NO. 001**

***1** The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 15, 17, 25-29 were read on this motion for injunction/restraining order.

By order to show cause, plaintiff moves for an order enjoining defendant from terminating its lease (*see* *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]). Defendant opposes. The action was discontinued against defendants Metropolitan Realty Management, Inc. and Metropolitan Life Insurance Company, leaving the current owner/landlord as the only remaining defendant. (NYSCEF 16).

## I. PERTINENT BACKGROUND

By lease dated January 1, 1984, plaintiff-tenant leased the premises at issue from defendant-landlord/owner. (NYSCEF 21).

On or about September 2, 2020, defendant sent plaintiff a notice of default, alleging that it owes unpaid rent from December 1, 2017 through September 1, 2020 in the amount of $1,863,821.70, and provided plaintiff with a deadline of on or before September 14, 2020 to cure the default. (NYSCEF 27). Plaintiff commenced the instant action on September 14, 2020, at **2 10:17 pm, by summons and complaint (NYSCEF 1, 2), and also electronically filed its proposed order to show cause seeking the *Yellowstone* injunction, with an affidavit in support and a memorandum of law (NYSCEF 7, 8, 13).

Although plaintiff had requested a temporary restraining order (TRO) in its motion papers, there is no indication in the record that it complied with the notice requirements set forth in 22 NYCRR § 202.7(f). Rather, on September 17, 2020, plaintiff's counsel filed an application in support of plaintiff's request, and provided therein that at 4:20 pm on September 14, counsel had attempted to contact an attorney who apparently represented defendant but as he was unable to reach him or her, he left a voicemail advising that plaintiff would be seeking a TRO. (NYSCEF 15).

On September 21, 2020, after oral argument on the TRO application, the TRO was granted and defendant was given time to

 

oppose the motion. (NYSCEF 17).

## II. CONTENTIONS

### A. Plaintiff (NYSCEF 8, 13)

Plaintiff contends that it is entitled to a *Yellowstone* injunction as it holds a commercial lease and received a notice of default, the cure period set forth therein has not yet expired, and it is able and willing to cure its default. It alleges that it operates numerous restaurants in the premises, all of which depend on in-person and indoor dining which, as of March 2020, have been prohibited and/or severely curtailed due to the Covid-10 pandemic pursuant to executive orders issued by the Governor of the State of New York. As a result, plaintiff's business and profits have declined, and it has been unable to pay its rent, a circumstance which it characterizes as a frustration and impossibility of performance of the lease.

Plaintiff observes that the lease specifically permits a rent abatement in the event that it is ****3** unable to operate its business in the premises due to, among others, a national emergency or a governmental agency's order or rule, and it argues that it therefore does not owe defendant the amount of rent set forth in the default notice.

***2** Nevertheless, plaintiff maintains that it "has the ability to cure the alleged default and/or subsequent amounts that become due while this action is pending, separate and apart from the amounts allegedly due and owing Defendants as a result of the COVID-19 pandemic which Plaintiff does not believe it owes due to the frustration of its Lease with Defendants."

### B. Defendant (NYSCEF 25, 29)

Defendant denies that plaintiff was prohibited from operating its business as a take-out restaurant, which has been permitted for several months, or from offering outdoor dining, which has been permitted since July 2020, or limited indoor dining has been permitted since the end of September 2020. Nonetheless, plaintiff has kept its been business completely closed since March 2020. Thus, any inability on its part to conduct its business and earn money is entirely plaintiff's fault.

According to defendant, the lease also requires that plaintiff pay rent without a deduction or offset for any reason. Absent a dispute that plaintiff owes it rent, and will continue to owe it rent, defendant requests that the *Yellowstone* injunction, if any, be conditioned on plaintiff paying the amount of rent it owes into court, as well as continuing use and occupancy.

Defendant also argues that plaintiff's application is untimely, as the cure period expired on September 14, 2020, and plaintiff did not file its application until after the close of business that day. Moreover, defendant claims that plaintiff did not fully interpose its application until September 17 and that the TRO was not granted until September 21, by which time the cure period had expired. And, absent a good faith dispute that plaintiff owes rent, defendant contends ****4** that there is no basis on which to grant a *Yellowstone* injunction.

## III. ANALYSIS

A party seeking a stay of the period within which an alleged default must be cured until the merits of the dispute are resolved in court and to avoid the forfeiture of a substantial leasehold interest, must demonstrate that it: (1) holds a commercial lease; (2) received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease; (3) requested injunctive relief prior to the termination of the lease; and (4) 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. Assocs.*, 93 NY2d 508, 514 [1999]).

It is the movant's burden to "convince the court of his desire and ability to cure the defects by any means." (*Jemaltown of 125th St., Inc. v Leon Betesh/Park Seen Realty Assocs.*, 115 AD2d 381, 381 [1st Dept 1985]). That the movant denies a default is not dispositive, as long as it evinces a good faith willingness to cure. (*Artcorp. Inc. v Citirich Realty Corp.*, 124 AD3d 545, 546 [1st Dept 2015]).

**A. Timeliness**

Defendant offers no authority for the proposition that the cure deadline set forth in its notice of default expired at 5 pm on September 14. Moreover, that plaintiff filed an additional affidavit on September 17 and that the court heard argument and issued the TRO on September 21 does not annul the filing of the application for a *Yellowstone* injunction before the cure period had ended. (*See e.g., Austrian Lance & Stewart, P.C. v Rockefeller Ctr. Inc.*, 163 AD2d 125 [1st Dept 1990] [cure period did not end until midnight on final day of period, as notice to cure provided cure period in days and not hours]; General Construction Law § 19 [calendar day runs from midnight to midnight]).

****5 B. *Yellowstone***

***3** Whether plaintiff is entitled to an abatement of rent under the lease, i.e., whether it will ultimately prevail in proving that it owes less than defendant asserts, is irrelevant to whether it is entitled to a *Yellowstone* injunction. Rather, the key issue is plaintiff's willingness and ability to cure its default, and it has indicated both.

However, as plaintiff allegedly owes defendant a large sum of money in back rent and continues to accrue significant monthly arrears, an undertaking is appropriate, as is its payment of use and occupancy going forward and pending the determination of this action. (*See Metro. Tr. Auth. v 2 Broadway LLC*, 279 AD2d 315 [1st Dept 2001] [while tenant properly granted *Yellowstone* injunction, it should have been ordered to pay use and occupancy notwithstanding dispute as to whether it was entitled to offsets against rent]; *61 W. 62nd Owners Corp. v Harkness Apt. Owners Corp.*, 173 AD2d 372 [1st Dept 1991] [court properly conditioned *Yellowstone* relief on tenant's payment of undertaking and payment of use and occupancy]).

**IV. CONCLUSION**

Accordingly, it is hereby

ORDERED, that plaintiff's application for a *Yellowstone* injunction is granted on the condition that that it pay its current rent and other rental obligations to defendant as they become due on a monthly basis, beginning on November 1, 2020, and on the additional condition that, within 20 days of the date of this order, it post an undertaking in the sum of $1,092,156.33, representing 50 percent of the amount due as of October 1, 2020, and provide proof thereof to the court, at which point a supplemental order will issue.

****6 10/27/2020**

**DATE**

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**BARBARA JAFFE, J.S.C.**

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