PRACTICAL ADVICE ON LITIGATING A YELLOWSTONE INJUNCTION ACTION ONCE ISSUED:

By: DAVID B. ROSENBAUM, ESQ.[1]

We have all faced this scenario:

Your client comes to you complaining that his/her commercial tenant is violating the lease between them. You take down the list of purported breaches of the lease, draft a notice of default and ultimately serve the notice. Prior to the cure period in the notice expiring, the tenant serves your client with an order to show cause seeking Yellowstone[2] relief. Your client sends you the papers. You make the initial appearance at the *Ex Parte* Clerk's office and are sent to a judge to argue over the interim stay. The Judge grants the T.R.O. and you either prepare opposition to the motion or a cross motion seeking dismissal. You vociferously argue against the Yellowstone injunction but ultimately the judge grants the tenant the relief but conditions it on the tenant posting a token bond and the payment of ongoing rent while the action is litigated. The Court gives you a date for a preliminary conference.

Now what? Your client is disappointed and feels the tenant will drag its feet in litigating all the while taking advantage of the Yellowstone injunction. The disappointment is not uncalled for. The Court of Appeals in Post v. 120 East End Avenue Corp., 69 N.Y.2d 19 (1984) lamented:

> Yellowstone *injunctions have impaired the effectiveness of summary proceedings, however, by enabling tenants to go into Supreme Court where delay may be encountered because of crowded calendars and the pretrial proceedings available in plenary actions. Moreover, if the landlord prevails in Supreme Court, he must still go into Civil Court to evict the tenant.*

What is the Landlord's attorney to do? This article addresses suggestions on bringing the litigation to a successful conclusion, and offers several areas of concentration to defeat the action or to accelerate the vacating of the interim stay.

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[2] First National Stores, Inc. v Yellowstone Shopping Center, Inc., 21 N.Y.2d 630 (1968):

I. BRIEF CASE LAW HISTORY OF YELLOWSTONE AND ITS PROGENY:

Remarkably, the Yellowstone case spawned countless decisions granting a commercial tenant the right to a toll of a served notice to cure while it challenged the propriety of the notice. But were one to carefully read the holding in Yellowstone, one should question where the authority was drawn to grant such drastic relief.

In Yellowstone, the Landlord served a notice to cure demanding the tenant install sprinklers in the demised premises. The tenant failed to cure challenging its obligation under the lease to do so. Without a stay in place, the landlord terminated the lease. The tenant commenced an action for an injunction and declaratory judgment that it was not in breach of its lease obligations. The Court of Appeals found there was an actual breach, and since the tenant did not move for an injunction prior to termination of lease, landlord's termination of the tenancy was proper was proper:

> *… [i]t cannot grant equitable relief if there is no acceptable basis for doing so. Here, the lease had been terminated in strict accordance with its terms. The tenant did not obtain a temporary restraining order until after the landlord acted. The temporary restraining order merely preserved the* status quo *as of the date it was obtained. Once the Appellate Division determined that the tenant had in fact defaulted by not installing the sprinkler system, the conclusion had to be drawn that the lease was terminated in accordance with its terms. The Appellate Division could not revive it unless it read into the lease a clause to the effect that the tenant could have an additional 20 days to cure its default before the landlord could commence summary eviction proceedings. This the court was powerless to do absent a showing of fraud, mutual mistake or other acceptable basis of reformation. The sympathetic attitude of the majority below is understandable, but must be rejected. Article Twelfth of the lease, which gives the landlord the right to terminate after a 10-day notice of default, is neither harsh nor inequitable; a landlord's right to terminate a lease based upon a tenant's breach of his covenant is commonplace. In essence, this*

*clause allowed the landlord to accelerate the term of the lease if the tenant failed, after notice, to cure his default… Stability of contract obligations must not be undermined by judicial sympathy. To allow this judgment to stand would constitute an interference by this court between parties whose contract is clear" (*Graf v. Hope Bldg. Corp.*, 254 N. Y. 1, 4-5, [emphasis added];* Weirfield Holding Corp. v. Pless & Seeman*, 257 N. Y. 536).Should we hold that the termination of this lease is harsh and inequitable, then the same conclusion can be reached in every instance where a landlord exercises his contractual rights, and, in that event, the right of termination or any other right specified in a lease would be rendered meaningless and ineffectual (cf.* Matter of Feist & Feist v.Long Is. Studios*, 29 A D 2d 186).Accordingly, the order appealed from should be modified to the extent of reversing so much of the order which preserves the lease and enjoins the landlord from instituting summary proceedings to evict the tenant, and, as so modified, affirmed.*

In *Wilen v. Harridge House Associates, 94 A.D. 2d123,463 N.Y.S 2d 453(1stDep't 1983),*the Appellate Division reversed the lower court's denial of a preliminary injunction where the landlord served a notice to cure alleging the tenant was using residential space for commercial purposes. The lower contended an injunction was not required as the tenant was protected by RPAPL 753(4):

A Yellowstone injunction should still be available where a tenant is entitled to affirmative equitable relief such as specific performance, lease reformation where the controversy exceeds $10,000, a mandatory injunction or a situation in which the 10-day mandatory stay is insufficient to cure a breach, as, for instance, to remove illegal alterations or to eliminate an unauthorized use. There is nothing in the language of the statute or the sponsor's memorandum to provide a basis for the conclusion that it was the intention to divest the Supreme Court of plenary jurisdiction where such jurisdiction is warranted. It has been repeatedly held that Yellowstone (supra) is intended only to preserve the status quo until the parties' rights can be fully adjudicated while the tenancy remains in effect without consideration of the merits of the parties' contentions (Ameurasia Int. Corp. v Finch Realty Co., 90

AD2d 760; Physicians Planning Serv. Corp. of Conn. v 292 Estates, 88 AD2d 852; Podolsky v Hoffman, 82 AD2d 763; Wuertz v Cowne, 65 AD2d 528; Madison Ave. Specialties v Seville Enterprises, 40 AD2d 784).In dealing with the question now before the court, we need not resolve all of these issues. It is sufficient to conclude only that the statute was not intended to eliminate the power to render Yellowstone injunctions, but merely to make available an additional remedy to protect the tenant where appropriate, where a breach has been adjudicated against him.

In June 1983, the Appellate Division, Second Department, reversed the denial of injunctive relief where the tenant failed to seek a further stay pending an appeal. Therein, in *Mann Theatres Corporation of California v. Mid-Island Shopping Plaza Co., 94 A.D.2d 466,464 N.Y.S2d 793(2d Dep't1983*) it found that Yellowstone relief is equitable in nature and:

Here, the tenancy interests moved expeditiously to toll the cure period by obtaining an ex parte temporary restraining order pending the hearing of their motion for injunctive relief prior to the termination date set forth in the landlord's notice. Thereafter, even though a bond was posted and the moving papers requested a continuation of the restraining order, Special Term failed to continue the toll on the date of the hearing of the motion and it is now argued that the time expired before the temporary injunction was issued. Unlike Yellowstone *(*supra*), where no restraint was obtained, the instant tenancy interests obtained a temporary order prior to expiration of the cure period but the order was permitted to lapse either by judicial error, inadvertence or the assumption that a subsequently issued preliminary injunction order would continue the former ex parte toll. In declining to hold the lapse fatal, we adopt the result in* Physicians Planning Serv. Corp. of Conn. v 292 Estates *(88 AD2d 852) where Special Term's erroneous refusal to grant a timely sought temporary restraining order to toll a cure period did not result in the extinction of the time to cure. In similar fashion, we now hold that an erroneous or inadvertent failure to continue a properly granted ex parte toll will not extinguish a tenant's opportunity to cure, if the appellate tribunal ultimately decides that the toll should have been continued. Despite our determination that the lease has been violated, we conclude that on the basis of the showing made in their moving papers, the tenancy interests were entitled to an interim toll pending resolution of the substantive issues in the case (see* Finley v Park Ten Assoc*., 83 AD2d 537).*
In so deciding, we rely on the fact that the Yellowstone *rule is equitable in nature, and in equity the erroneous denial of a timely sought temporary toll or the inadvertent failure to continue one*

already granted, should not result in the forfeiture of a leasehold, even if the tenant has failed to obtain a further temporary restraint pending appeal (see, e.g., Physicians Planning Serv. Corp. of Conn. v 292 Estates, supra; Madison Ave. Specialties v Seville Enterprises*, 40 AD2d 784;* 150 East 57th St. Assoc. v Fletcher*, 35 AD2d 947,* supra*). That is not to say that a further temporary restraint pending appeal lacks purpose. The failure to obtain such a restraint places the tenant entirely at the mercy of the appellate court, for if it is decided that the denial of the original toll application was warranted, no further time will be available to effect a cure. A successful appeal, however, restores to the tenant whatever cure time remained when the original temporary toll application was made. Since the instant tenancy interests did obtain a timely temporary restraining order, they still may cure their violation within the time that remained for cure when their original toll order was obtained. There is no merit, however, to their contention that a separate notice to terminate will be required of the landlord once the cure time expires. Unlike the cases cited by the tenancy interests (see* Kirschenbaum v M-T-S Franchise Corp*., 77 Misc 2d 1012;* Granet Constr. Corp. v Longo*, 42 Misc 2d 798,* supra*), the landlord's notice expressly provided for the automatic termination of the leasehold at the end of the cure period (see* Apparel Center Bldg. Corp. v Super Parking Corp*., NYLJ, Dec. 7, 1979, p 5, col 2).*

In May 1984, the Court of Appeals again weighed in on the issue in *Post v. 120 East End Avenue Corp., 69 N.Y.2d 19 (1984)*. Therein the Court interpreted the then recently enacted RPAPL 753(4). Tenant, a psychiatrist and residential tenant pursuant to a proprietary lease was using his apartment to see patients. The landlord demanded he stop seeing patients there. The tenant commenced an action in Supreme Court seeking a permanent injunction barring the landlord from interfering with his tenancy. The court granted an interim stay but during the proceedings the Legislature passed RPAPL 753(4). The Court of Appeals held the new statute does apply to residential defaults:

We interpret the statute as impressing its terms on residential leases and, in effect, authorizing Civil Court at the conclusion of summary proceedings to impose a permanent injunction in favor of the tenant barring forfeiture of the lease for the violation in dispute if the tenant cures within 10 days. Under this interpretation the statute would necessarily protect against any other losses incident to forfeiture, including in this case, the loss of plaintiff's stock in the

cooperative which could result from the termination of his lease. To this extent the statute limits our holding in First Nat. Stores v Yellowstone Shopping Center (21 NY2d 630, supra). There are sound policy reasons for interpreting the statute in this way. Civil Court has jurisdiction of landlord tenant disputes (see CCA 204) and when it can decide the dispute, as in this case, it is desirable that it do so (Lun Far Co. v Aylesbury Assoc., 40 AD2d 794). Yellowstone *injunctions have impaired the effectiveness of summary proceedings, however, by enabling tenants to go into Supreme Court where delay may be encountered because of crowded calendars and the pretrial proceedings available in plenary actions. Moreover, if the landlord prevails in Supreme Court, he must still go into Civil Court to evict the tenant. Under the amended statute the tenant's claims may properly be alleged as defenses to the summary proceedings and complete relief may be obtained in Civil Court. The procedure adopted is expeditious and it permits both parties to avoid the expense and duplication of effort involved in proceeding in two courts.The rationale of our decision necessarily presumes that Civil Court can grant full relief and that the tenant will be unable to make the necessary showing to invoke the equitable powers of Supreme Court. If the tenant is unable to obtain complete relief in Civil Court, then the jurisdiction of Supreme Court is still available (see Wilen v Harridge House Assoc., 94 AD2d 123, supra).*

NOTE: Although *Post* merely recognized RPAPL 753(4) as the vehicle to grant a residential tenant a post lease termination cure and restoration of the tenancy, it continues to be cited for the general proposition that the supreme court has the equitable jurisdiction to grant Yellowstone relief to commercial tenants.

Thereafter, on December 10, 1985 the Appellate Division, First Department, *in Jemaltown of 125th Street, Inc. v. Leon Betesh/Park Seen Realty Associates 115 A.D.2d 381,496 N.Y.S 2d1691st Dep't 1985)* affirmed the standard of obtaining Yellowstone relief was less stringent that that of a preliminary injunction.

> *We need not consider here the merits of the list of purported lease violations or the vagueness of the notice as to time to cure. In denying a* Yellowstone *injunction* (cf. First Natl. Stores v. Yellowstone Shopping Center*, 21 NY2d 630) which would have given plaintiff an opportunity to challenge the notice to cure before the time to cure expired, Special Term applied the traditional criteria for obtaining preliminary injunctive relief, viz., the likelihood of ultimate success on the merits, a balancing of the equities, and the danger of irreparable harm* (Albini v. Solork Assoc.*, 37 AD2d 835). But the purpose of the* Yellowstone *injunction is to maintain the status quo, by means of a temporary stay, while challenging the landlord's notice* (Finley v. Park Ten Assoc.*, 83 AD2d 537). Rather than requiring the tenant to prove, on his application, that he can cure the alleged defects, all he need do to obtain the* Yellowstone *injunction is convince the court of his desire and ability to cure the defects by any means short of vacating the premises* (Herzfeld & Stern v. Ironwood Realty Corp.*, 102 AD2d 737). A sufficient showing has been made here. It is plaintiff's substantial property interest in this lease that warrants preservation of its right to cure, in order to ensure that should plaintiff ultimately prevail on the merits, that victory will not have been nullified by prior termination of the lease* (Podolsky v. Hoffman*, 82 AD2d 763).In denying a* Yellowstone *injunction, Special Term applied the wrong standard for the relief sought. In so ruling, it is unnecessary for us to address the issue of the validity of the notice to cure by reason of its being sent by defendant's attorney, rather than by defendant itself.* (See, Siegel v. Kentucky Fried Chicken*, 108 AD2d 218,* lv granted *by 2d Dept on Aug. 23, 1985.)*

Shortly thereafter, in August 1984, the Second Department addressed application of RPAPL 753(4) to a residential tenant's Yellowstone injunction application. In *Brodsky v 163-35 Ninth Ave. Corp.* **,** the court upheld the denial of the residential tenant's application holding;

> *Applying the holding in* Post *(supra.) to the case now before us, we conclude that Special Term properly denied plaintiffs' motion for a* Yellowstone *preliminary injunction. Unlike* Post*, the motion for injunctive relief in this case was made after the effective date of the new statute. Thus, the question of whether the particular violation of the lease alleged herein could be cured within 10 days was before Special Term when it decided that the statutory remedy adequately protected plaintiffs' rights. On the record before us, there is no basis for disturbing that determination. Plaintiffs have failed to show that*

they did not have an adequate remedy at law, i.e., that the 10-day period would have been too short for purposes of terminating the subtenancy and thus curing the breach.
Accordingly, we conclude that RPAPL 753 (subd 4) sufficiently protects the plaintiffs, and we therefore affirm the order of Special Term which denied the motion for a Yellowstone *preliminary injunction.*

In *Charles Garland et al. v. Titan West Associates147 A.D. 2d 304,543 N.Y.S 2d 56(1st Dep't 1989*)[3], the First Department in a lengthy analysis reiterated the commercial tenant's right to Yellowstone relief and reversed the lower court's order for the parties to resolve the issues within 60 days or the relief is denied.

The purpose of a Yellowstone *injunction is to maintain the status quo so that the tenant served with a notice to cure an alleged lease violation may challenge the propriety of the landlord's notice while protecting a valuable leasehold interest. (*First Nat. Stores v. Yellowstone Shopping Center, *21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868;* Ameurasia Int. Corp. v. Finch Realty Co., *90 A.D.2d 760, 455 N.Y.S.2d 900;* Podolsky v. Hoffman, *82 A.D.2d 763, 441 N.Y.S.2d 238.) The grant of* Yellowstone *relief effectively tolls the running of the cure period so that in the event of an adverse determination on the merits the tenant may still cure the defect and avoid a lease forfeiture. (*Post v. 120 East End Ave. Corp., *62 N.Y.2d 19, 475 N.Y.S.2d 821, 464 N.E.2d 125;* Wilen v. Harridge House ***Assoc***., *94 A.D.2d 123, 463 N.Y.S.2d 453.)In granting* Yellowstone *injunctions to avoid a forfeiture of the tenant's interest, courts have generally accepted far less than the showing normally required for the grant of preliminary injunctive relief. (*Post v. 120 East End Ave. Corp., supra, *62 N.Y.2d at 25, 475 N.Y.S.2d 821, 464 N.E.2d 125.) Thus, a tenant seeking to avoid forfeiture of its lease is less likely to be required to demonstrate a likelihood of success, irreparable injury, and a balancing of the equities in its favor, as those terms are traditionally understood. (*Id.; see, Ameurasia Int. Corp. v. Finch Realty Co., supra, *90 A.D.2d 760, 455 N.Y.S.2d 900;* Finley v. Park Ten ***Assoc***., *83 A.D.2d 537, 538, 441 N.Y.S.2d 475;* Podolsky v. Hoffman, supra, *82 A.D.2d 763, 441 N.Y.S.2d 238.) The mere threat of termination and forfeiture of the lease has been held sufficient to justify maintenance of the status quo by injunction. (*Post v. 120 East End Ave. Corp., supra, *62 N.Y.2d at 26, 475 N.Y.S.2d 821, 464 N.E.2d 125.) We find that*

[3] A case the author successfully litigated on behalf of the appellant and for which the court gave, albeit unknowingly, an excellent wedding anniversary present (June 22, 1989).

> *plaintiffs have shown their entitlement to* Yellowstone *relief by demonstrating that they hold a valuable commercial lease; that they received a notice to cure; that they requested injunctive* relief prior to the termination of their lease; and that they are prepared and maintain the ability to cure the alleged default by any means short of vacating the premises. (*See, Continental Towers Garage Corp. v. Contowers Assocs. Ltd. Partnership,* 141 A.D.2d 390, 529 N.Y.S.2d 322; *see, also, Jemaltown of 125th Street v. Leon Betesh/Park Seen Realty Assocs.,* 115 A.D.2d 381, 496 N.Y.S.2d 16; *Finley v. Park Ten Assoc., supra,* 83 A.D.2d 537, 441 N.Y.S.2d 475.) They have a substantial property interest in their lease. Equity demands that their right to cure be preserved so that if they prevail on the merits their success will be more than a hollow victory. (*Wuertz v. Cowne,* 65 A.D.2d 528, 409 N.Y.S.2d 232; *Podolsky v. Hoffman, supra.*)
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> *Rather than grant the requested relief, however, the motion court ordered a sixty-day preliminary injunction so that the parties might, on their own, resolve the matter. This was error since plaintiffs, at the very least, made a prima facie showing that they were not in violation of their lease, and of their entitlement to an opportunity to cure if indeed any violation existed. The interests of justice would best be served by granting the requested* Yellowstone *injunction pending a judicial determination of the issues. Insofar as can be discerned, the landlord will not be aggrieved, nor suffer any measure of perceptible damage, if enjoined from terminating the lease until plaintiffs have their day in court. Moreover, the motion court's imposition of a sixty-day limitation on the grant of* Yellowstone *relief, however well intentioned, itself creates undue delay which benefits neither side because, had plaintiff not sought relief in this court, the parties, unable to reach a mutually agreeable resolution, would find themselves waiting for the expiration of the sixty-day period and the inevitable renewal motion for full* Yellowstone *relief. Thus, the decision tends to spawn further motions and to place an additional burden on the judicial system.*

In 1995, the Second Department upheld the granting of Yellowstone relief conditioned on the tenant posting security, and paying arrears and future rent while the action was pending. In *Sportsplex of Middletown v Catskill Regional Off-Track Betting Corp., 221 A.D.2d 428, 633 N.Y.S.2d 588(2d Dep't 1995),* the court held:

> *In granting* Yellowstone *relief, the court may impose reasonable conditions, including the posting of an undertaking by the party seeking relief* (see, Peron Rest. v Young & Rubicam, *179 AD2d*

469) in an amount rationally related to the quantum of damages which the nonmoving party would sustain in the event the moving party is later determined not to have been entitled to the injunction (see, 61 W. 62nd Owners Corp. v Harkness Apt. Owners Corp., *173 AD2d 372, 373). The requirement that the movant also pay "outstanding and prospective use and occupancy fees" in addition to a bond may not be excessive* (61 W. 62nd Owners Corp. v Harkness Apt. Owners Corp., supra). *Absent a showing that the court improvidently exercised its discretion by imposing conditions in excess of those necessary to protect the nonmoving party's interests, the conditions imposed will not be disturbed* (see, *7A Weinstein-Korn-Miller, NY Civ Prac ¶ 6312.11;* Donald Shaffer, Inc. v Shaffer, *44 AD2d 725).Here, because the conditions imposed by the court in granting the injunctive relief are in an amount rationally related to the damages the defendant would incur if it is determined that the plaintiffs were not entitled to injunctive relief, the court *429 did not improvidently exercise its discretion, and the conditions will not be disturbed.*

II. VARIOUS APPLICATIONS OF YELLOWSTONE INJUNCTIONS:

A. DICHOTOMY BETWEEN FIRST AND SECOND DEPARTMENTS:

Second Department Rulings:

Korova Milk Bar of White Plains, Inc. v PRE Props., LLC, *70 A.D.3d 646, 894 N.Y.S.2d 499, 2010 N.Y. (App. Div. 2nd Dept. 2010)*. The Second Department set a red lined rule that Yellowstone relief may not be had after the time to cure has expired, no exceptions.

*Since "courts cannot reinstate a lease after the lapse of time specified to cure a default" (*Goldstein v Kohl's*, 16 AD3d 622, 623 [2005]), an application for* Yellowstone *relief must be made not only before the termination of the subject lease—whether that termination occurs as a result of the expiration of the term of the lease, or is effectuated by virtue of the landlord's proper and valid*

*service of a notice of termination upon the tenant after the expiration of the cure period—but must also be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure (*see Xiotis Rest. Corp. v LSS Leasing, LLC*, 50 AD3d 678, 679 [2008];* Hempstead Video, Inc. v 363 Rockaway Assoc., LLP*, 38 AD3d 838 [2007];* Gihon, LLC v 501 Second St.*, 306 AD2d 376 [2003];* King Party Ctr. of Pitkin Ave. v Minco Realty*, 286 AD2d 373, 374 [2001];* Mayfair Super Mkts. v Serota*, 262 AD2d 461 [1999];* Terosal Props. v Bellino*, 257 AD2d 568 [1999])."*

Goldcrest Realty Co. v 61 Bronx Riv. Rd. Owners, Inc. 83 A.D.3d 129, 920 N.Y.S.2d 206, (App. Div. 2nd Dept. 2011).Owner of unsold shares of cooperative could move for injunctive relief:

In *Korova Milk Bar of White Plains, Inc. v PRE Props., LLC* (70 AD3d 646 [2010]), this Court recently clarified that an application for a *Yellowstone* injunction (*see First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 [1968]) not only must be made before the termination of the subject lease, but also must be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure. The plaintiff in this case contends that this rule should not apply to applications for *Yellowstone* relief made by owners of unsold shares in residential cooperatives. We reject this contention… *In* Korova Milk Bar of White Plains, Inc. v PRE Props., LLC *(70 AD3d 646 [2010]), this Court recently clarified that "[s]ince 'courts cannot reinstate a lease after the lapse of time specified to cure a default' (*Goldstein v Kohl's*, 16 AD3d 622, 623 [2005]), an application for* Yellowstone *relief must be made not only before the termination of the subject lease—whether that termination occurs as a result of the expiration of the term of the lease, or is effectuated by virtue of the landlord's proper and valid service of a notice of termination upon the tenant after the expiration of the cure period—but must also be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure" (*id*. at 647;* see also Xiotis Rest. Corp. v LSS Leasing Ltd. Liab. Co.*, 50 AD3d 678, 679 [2008];* Hempstead Video, Inc. v 363 Rockaway Assoc., LLP*, 38 AD3d 838 [2007];* Gihon, LLC v 501 Second St.*,*

306 AD2d 376 [2003]). In Korova Milk Bar, *this Court "expressly reject[ed]" the construction of any of its prior decisions, including* Purdue Pharma v Ardsley Partners *(5 AD3d 654 [2004]) and* Long Is. Gynecological Servs. v 1103 Stewart Ave. Assoc. Ltd. Partnership *(224 AD2d 591 [1996]), the two cases cited by the Supreme Court in this case, as fixing a different or longer period of time in which an application for* Yellowstone *relief must be made (*see Korova Milk Bar of White Plains, Inc. v PRE Props., LLC*, 70 AD3d at 648).*

Contrast First Department rulings:

KB Gallery, LLC v. 875 W. 181 Owners Corp., 76 A.D.3d 909 (1st Dept. 2010):

The motion court properly found that plaintiff did not timely seek Yellowstone *relief (*see First Natl. Stores v. Yellowstone Shopping Ctr., *21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868 [1968]), since plaintiff did not make its application until after the applicable cure period had expired and the notice of termination had been served (*see 319 Smile Corp. v. Forman Fifth, LLC, *37 A.D.3d 245, 245, 831 N.Y.S.2d 118 [2007];* JH Parking Corp. v. East 112th Realty Corp., *298 A.D.2d 258, 748 N.Y.S.2d 478 [2002]). We reject plaintiff's contention that a* Yellowstone *application brought after the expiration of the applicable cure period will be deemed timely as long as it is made before the lease in question is actually terminated (*see Korova Milk Bar of White Plains, Inc. v. PRE Props., LLC, *70 A.D.3d 646, 647–48, 894 N.Y.S.2d 499 [2010]).*

Village Center for Care v. Sligo Realty and Service Corp., 95 A.D.3d 219 (1st Dept. 2012): First Department outwardly rejects application of *Korova Milk and holds that as long as tenant has commenced diligent effort to cure the court has the power to stay notice to cure:*

Tenant commenced curing the violation within the 10 days by providing landlord with the documentation tenant believed would remedy its default, and it was error for Supreme Court to deny Yellowstone *relief "since all that the lease terms require from the tenant is commencement of diligent efforts to cure the defaults within the allotted time" (*Becker Parkin, *284 A.D.2d 112, 725 N.Y.S.2d 547 [2001])… Although we cited the Second Department's* Korova *decision, there is nothing in* KB Gallery *which*

indicates that we intended to overrule Becker Parkin. *The issue of whether the notice of termination was valid under the lease's cure provision was not before this Court in* KB Gallery. *Rather, the issue was whether* Yellowstone *relief could be granted after service of a valid notice of termination, but before the lease has been "actually" terminated (*KB Gallery, *76 A.D.3d 909, 907 N.Y.S.2d 672). In this regard, the tenant in* KB Gallery *argued that it was actually not in default, not that its time to cure under the lease had not yet expired. In* Becker, *however, defaults in the notice were not capable of being cured within the time provided in the notice and we held, "Under these circumstances, all that the lease terms require from the tenant is commencement of diligent efforts to cure the defaults within the allotted time" (284 A.D.2d 112, 725 N.Y.S.2d 547) Here, the plain language of the lease similarly provides for a scenario where tenant may not be able to cure a defect within the 10 day period; landlord should be bound by the terms of the agreement (*see Empire State Building, supra, *245 A.D.2d at 228, 667 N.Y.S.2d 31 ("the existence of a period in which a violation may be cured* does not depend on the contents of the notice of default, but upon the terms of the lease *" (emphasis added).*

BECKER PARKIN DENTAL SUPPLY COMPANY, INC., v. 450 WESTSIDE PARTNERS, LLC, 284 A.D.2d 112, 725 N.Y.S. 2d 547(1st Dep't 2001):

We reject defendant landlord's argument that the tenant is not entitled to a Yellowstone *injunction because it did not make the instant application therefor until after its time to cure had expired and the lease was terminated. The defaults described in the landlord's notice to cure are such as not to be capable of complete cure within the time provided in the notice, even as extended by the parties' subsequent agreements. Under these circumstances, all that the lease terms require from the tenant is commencement of diligent efforts to cure the defaults within the allotted time (*see, Long Is. Gynecological Servs. v. 1103 Stewart Ave. Assocs. Ltd. Partnership, *224 A.D.2d 591, 638 N.Y.S.2d 959;* VB Mgt. v. AD 1619 Co., *256 A.D.2d 84, 681 N.Y.S.2d 257,* lv. denied *93 N.Y.2d 810, 694 N.Y.S.2d 632, 716 N.E.2d 697). The record shows that plaintiff complied with this obligation by, among other things, retaining architects, engineers and contractors and submitting plans to the landlord for approval. We have considered defendant's other arguments and find them unavailing.*

B. NOT APPLICABLE TO FAILURE TO PAY MAINTENANCE IN COOPERATIVE APARTMENT:

Kanner v. West 15th Street Owners, Inc. 236 A.D.2d 341, 653 N.Y.S. 2d 600 (1st Dep't, 1997):

> *The motion court properly denied plaintiff's request for* Yellowstone *relief as unnecessary in view of the 10-day cure period available in RPAPL 753 (4) should defendant commence a summary proceeding based upon plaintiff's failure to pay the assessments (*see, Post v 120 E. End Ave. Corp., *62 NY2d 19, 27). Denial of plaintiff's request to stay her obligation to pay *342 the subject assessments pending determination of her action for breach of warranty of habitability was also proper, where withholding the assessments would jeopardize the funding for the construction project that is necessary to save the building from sinking. Should it be determined in the underlying action that plaintiff has been over-assessed, or is entitled to an abatement, a monetary adjustment can be made at that point.*

C. NOT APPLICABLE TO RENT DEMANDS:

Rainbow Travel, Inc. v. Omabuld N.V. and Cushman& Wakefield, 139 Misc. 2d 278, 528 N.Y.S.2d 791 (Sup. N.Y. 1988):

> The purpose of the *Yellowstone* injunction is to preserve the tenant's right to possession pending a determination as to whether a breach of the lease has occurred, and if so determined, pending the tenant's cure of the breach *(Finley v Park Ten Assocs*., 83 AD2d 537, 538). A tenant seeking a *Yellowstone* injunction must also "convince the court of his desire and ability to cure the defects by any means short of vacating the premises". *(Jemaltown of 125th St. v Leon Betesh/Park Seen Realty Assocs., supra*, at 382.) Here, there is *no* dispute as to the breach of the lease inasmuch as the plaintiff may not be relieved of the obligation to pay rent so long as it occupies the premises *(see, Barash v Pennsylvania Term. Real Estate Corp*., 26 NY2d 77, 80-86). Nor has plaintiff shown its willingness to cure its default by prompt payment *(see, Cemco Rests. v Ten Park Ave. Tenants Corp*., 135 AD2d 461, 463). *To grant the plaintiff's application under these circumstances would be an abuse of the power to enjoin. It would be tantamount to an*

unauthorized attachment of the rent due to the landlord as security for the plaintiff's independent cause of action for damages. The very fact that the plaintiff's complaint herein seeks monetary damages and only damages demonstrates the inappropriateness of the remedy of injunctive relief. Where plaintiff may be adequately compensated for its damages by monetary relief for the defendant's negligence, as it seeks in its complaint, and where there is no present condition that interferes with its enjoyment of the leasehold, then relief pursuant to CPLR 6301 should not be granted (Yan's Video v Hong Kong TV Video Programs*, 133 AD2d,* supra*, at 578).*

Top-All Varieties, Inc. v. Raj Development Co., 151 A.D.2d 470, 542 N.Y.S. 2d 259 (2d Dep't,1989):

The purpose of a Yellowstone *injunction is to enable a tenant confronted by a notice of default, a notice to cure, or a threat of termination of the lease to obtain a stay tolling the running of the cure period so that after a determination of the merits, the tenant may cure the defect and avoid a forfeiture of the leasehold* (see, Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 24-25;* Heavy Cream v Kurtz*, 146 AD2d 672;* Hollymount Corp. v Modern Business Assocs.*, 140 AD2d 410). There was no need for such injunctive relief in this case, however, as the rent demand served by the landlord was the statutory prerequisite to a summary nonpayment proceeding, rather than a notice of default and a notice to cure the default within a specified period* (see*, RPAPL 711 [2];* Sal De Enters. v Stobar Realty*, 143 AD2d 180;* Parksouth Dental Group v East Riv. Realty*, 122 AD2d 708). The landlord was thus seeking to commence a rent nonpayment proceeding, and such proceedings are separate from a holdover summary proceedings and carry their own distinct cure provisions, obviating the need for* Yellowstone *relief* (see, Hollymount Corp. v Modern Business Assocs.*, 140 AD2d 410, supra.;* Parksouth Dental Group v East Riv. Realty*, 122 AD2d 708, supra.).Furthermore, although it is well settled that a court in equity may stay a summary proceeding pending the outcome of a suit in equity where the tenant has some equity or defense that could not be raised in the summary proceeding* (see, Sal De Enters. v Stobar Realty*, 143 AD2d 180, supra.;* Amoo v Eastlake Realty Co.*, 133 AD2d 657), a stay is not necessitated upon these grounds in the instant case, as the tenant would be able to obtain full redress of his legal rights under the lease in the event that a summary nonpayment proceeding were to be commenced.*

NOTE: Court provides a defense a Landlord's attorney can assert in defending a Yellowstone application, that is, the civil court has jurisdiction to adjudicate landlord-tenant disputes and can hear all defenses tenant may assert in defense to payment of rent or violation of tenancy.

R.S.V.P. Pasta Corporation v.Tor Valley Inc., 229 A.D.2d 783, 645 N.Y.s.2d 575(3rd Dep't 1996):

> *On December 28, 1994 defendant commenced summary proceedings, pursuant to RPAPL article 7, in the Town of Clarkstown Justice Court. On December 30, 1994 plaintiff commenced the instant declaratory judgment action seeking a declaration of the rights of the parties under the lease. Plaintiff moved, by an order to show cause containing,* inter alia, *a stay of the summary proceeding, for a preliminary injunction pursuant to CPLR 6301 as well as a* Yellowstone *injunction (*see, First Natl. Stores v Yellowstone Shopping Ctr., *21 NY2d 630)*784 and consolidation of the instant action with the summary proceedings. Defendant cross-moved for an order denying the injunctive relief and, pursuant to CPLR 3211, the dismissal of the complaint. Supreme Court denied plaintiff's motion for a* Yellowstone *injunction but granted plaintiff's request for a statutory preliminary injunction enjoining defendant from disturbing plaintiff's possession pending a determination regarding plaintiff's alleged breach of the lease. Plaintiff was directed to post an undertaking, pursuant to CPLR 6312 (b), in the amount of $15,000. Supreme Court denied the remainder of defendant's cross motion and consolidated the summary proceedings with the instant action. Defendant appeals. It is well settled that there is no basis for the relief provided by a* Yellowstone *injunction where the injunction is sought after expiration of the period to cure or after the service of the notice of termination (*see, Long Is. Gynecological Servs. v 1103 Stewart Ave. Assocs. Ltd. Partnership, *224 AD2d 591;* Rappa v Palmieri, *203 AD2d 270). Here, plaintiff lost its opportunity to cure the alleged defaults by failing to respond to the notice of default in a timely fashion. Once a lease has been terminated a court is without power to revive the lease (*see, First Natl. Stores v Yellowstone Shopping Ctr., supra, *at 637). Plaintiff's failure to seek injunctive relief during the cure period and before defendant acted to terminate the lease is fatal and, in our view, forecloses any opportunity for subsequent statutory injunctive relief (*see, Bowman & Co. v Professional Data Mgt., *218 AD2d 637, 637-638;* Manhattan Parking Sys.-Serv. Corp. v Murray House Owners Corp., *211 AD2d 534). Defendant's cross motion should have been*

granted. Accordingly, defendant is entitled to prosecute the summary proceedings in the local Justice Court forthwith.

Gabai v 130 Diamond St. LLC,32 Misc.3d 1207(A), 932 N.Y.S.2d 760, 2011 N.Y. Slip Op. 51207(U),(Sup. Ct. Kings Co. 2011):

Just like RPAPL 753 (4) in the case of summary holdover proceedings, RPAPL 751 (1) in the case of summary nonpayment proceedings "obviat[es] the need for *Yellowstone* relief" (*see Top-All Varieties v Raj Dev. Co.*, 151 AD2d 470, 471 [2d Dept 1995].) Where as here, therefore, the landlord serves "a mere notice of nonpayment" (*see Purdue Pharma, LP v Ardsley Partners*, *LP*, 5 AD3d 654, 655 [2d Dept 2004]) as a prerequisite to a statutory nonpayment proceeding, a *Yellowstone* injunction is unavailable, unless "the tenant has some equity or defense that could not be raised in the summary proceeding" (*see Top-All Varieties v Raj Dev. Co.*, 151 AD2d at 471; *see also M.B.S. Love Unlimited v Jocelyn Realty Assoc*., 215 AD2d 537, 538 [2d Dept 1995]; *Hollymount Corp. v Modern Business Assocs*., 140 AD2d at 411.)

D. CONCESSIONAIRE NOT ENTITLED TO YELLOWSTONE RELIEF:

CC Vending, Inc. v. Berkeley Educational Services of New York, Inc. 74 A.D.3d 559, 903 N.Y.S 2d37(1st Dep't, 2010):

*The contract at issue gives plaintiff an exclusive right to operate various concessions. Because "such exclusive right is not a lease," plaintiff was not a commercial lessee but rather "a licensee or concessionaire without interest in the realty" (*Senrow Concessions v Shelton Props.*, 10 NY2d 320, 325 [1961]). Since plaintiff has no control over defendant's premises where the vending machines are located, it has no tangible interest in the property, and thus no right to a* Yellowstone *injunction.*

E. FAILURE TO MAINTAIN COMPREHENSIVE LIABILITY INSURANCE:

NY GREATSTONE, INC V.TWO FULTON SQUARE LLC., ___ N.Y.S 3d ___, 2015 N.Y Slip op 25090(Sup.Ct. Queens Cty, 2015)[4]*:*

Essential to obtaining a Yellowstone *injunction is a demonstration by movant that it desires and has the ability to cure the alleged default. (*See, Xiotis Rest. Corp. v LLS Leasing Ltd. Liab. Co.*, 50 AD3d 678 [2d Dept. 2008].) In the instant case, the subject lease and rider*

[4] Author's firm represented successful party.

impose an obligation on the tenant to procure and maintain general liability insurance from the commencement of the lease throughout the term of the tenancy that names the landlord as an additional insured. Plaintiff has annexed a Certificate of Liability Insurance dated December 2, 2014 which provides coverage effective April 7, 2014 to April 7, 2015 and indicates defendant is an additional insured. Notwithstanding defendant's contention that the failure to deliver actual insurance policies rather than a certificate is also a violation of the lease, plaintiff's submission is clearly inadequate to evidence the maintenance of insurance coverage during the entire term of the lease which commenced on March 10, 2011.

*A tenant's failure to maintain insurance constitutes a material default of the terms of the lease. (*See, JT Queens Carwash, Inc.*,101 AD3d at 1090;* Jackson 37 Co., LLC v Laumat LLC*, 31 AD3d 609 [2d Dept. 2006];* see also, Nanomedicon, LLC v Research Found. of State Univ. of New York*, 112 AD3d 593 [2d Dept. 2013].) A default of this type is incurable as a prospective insurance policy does not protect a landlord against unknown claims that might arise during the period in which no coverage existed. (*Kyung Sik Kim v Idylwood, NY, LLC*, 66 AD3d 528 [1st Dept. 2009].) Although plaintiff points to that portion of the notice to cure which directs it to obtain general public liability insurance, it does not alter the specific terms of the lease which require insurance be maintained from the inception of its tenancy.*

KYUNG SIK KIM V. IDYLWOOD, N.Y.LLC,66 A.D.3d 528,886 N.Y.S.2d 337(1st Dep't 2009):

*The motion court found, after a hearing, that plaintiffs had not previously and continuously maintained insurance coverage as required by their commercial lease. This violation was a material breach of the lease (*see C & N Camera & Elecs. v Farmore Realty*, 178 AD2d 310, 311 [1991]) and, in these circumstances, an incurable violation that is an independent basis for the denial of* Yellowstone *relief (*see Grenadeir Parking Corp. v Landmark Assoc.*, 294 AD2d 313, 314 [2002],* lv denied *99 NY2d 553 [2002];* Zona, Inc. v Soho Centrale*, 270 AD2d 12, 14 [2000]). Plaintiffs' attempt to demonstrate their ability and readiness to cure the alleged violation by procuring, during the cure period, insurance coverage prospectively for the remaining 10 months of their lease term is unavailing, as such policy does not protect defendant against the unknown universe of any claims arising during the period of no insurance coverage.*

JT Queens Carwash, Inc. v. 88-16 Northern Blvd., LLC.101 A.D.3d 1089, 956N.Y.S.2d 535(2d dep't 2012):

Here, the plaintiff failed to demonstrate that it was not in breach of the provision of the lease agreement requiring it to maintain a policy of insurance naming the defendant as an additional insured. Under the circumstances of this case, the failure to maintain the requisite

insurance would be an incurable default that formed an independent basis for the denial of Yellowstone *relief (*see Kyung Sik Kim v Idylwood, N.Y., LLC*, 66 AD3d 528 [2009];* Grenadeir Parking Corp. v Landmark Assoc.*, 294 AD2d 313, 314 [2002];* Zona, Inc. v Soho Centrale*, 270 AD2d 12, 14 [2000]). Contrary to the plaintiff's contention, certificates of insurance, which were issued as a matter of information only, were insufficient to establish that it maintained the requisite insurance or was capable of curing its default (*see Penske Truck Leasing Co. v Home Ins. Co.*, 251 AD2d 478 [1998]).*

166 Enterprises Corp. v. IG Second Generation Partners, L.P., 81 A.D.3d 154,917 N.Y. S.2d 143 (1st Dept. 2011):

(*1) Initially, we reject Tenant's contention that Landlord's appeal is academic because, by serving a second notice of termination in 2008, Landlord waived any right to enforce the *158 2003 notice of termination, and because Landlord is judicially estopped from seeking to enforce the 2003 notice of termination by the January 20, 2010 order and judgment terminating the lease pursuant to the 2008 notice of termination. Landlord's service of a second notice of termination after losing at the trial on the first notice does not constitute a waiver of its argument that the decision on the first notice was in error. There is also no merit to Tenant's claim that Landlord's appeal is not properly before us. Because Justice Gische expressly reached the issue whether or not the court should give retroactive effect to the earlier order granting* Yellowstone *relief, Landlord may raise the issue on appeal from the resulting judgment.*

*(2) Justice Gische correctly found that Tenant failed to obtain insurance in the required amount and that such failure constituted a material breach justifying termination of the lease (*see C & N Camera & Elecs. v Farmore Realty*, 178 AD2d 310 [1991]). Even if Tenant had been able to prove that its subtenant was carrying adequate insurance in Landlord's favor, the defect would not have been cured, because "landlord is not required to accept subtenant's performance in lieu of tenant's" (*Federated Retail Holdings, Inc. v Weatherly 39th St., LLC*, 77 AD3d 573, 574 [2010]). Nor was Landlord required to exercise its option under the lease of obtaining its own insurance and billing it to Tenant as additional rent (*see Jackson 37 Co., LLC v Laumat, LLC*, 31 AD3d 609 [2006]). **3*

(3) However, Justice Gische improperly concluded that Tenant still had the right to cure its breach. It is well settled that a tenant is not entitled to a Yellowstone *injunction after the cure period has expired (*KB Gallery, LLC v 875 W. 181 Owners Corp.*, 76 AD3d 909 [2010];* Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209 [2005];* Prince Fashions, Inc. v 542 Holding Corp.*, 15 AD3d 214 [2005]). Here, after the initial* Yellowstone *application was denied,*

the stay of the cure period was lifted and the cure period expired on January 9, 2003. Since Tenant's motion to renew/reargue its Yellowstone *application was brought after this date, the court could not grant* Yellowstone *relief in this case (*see e.g. Gyncor, Inc. v Ironwood Realty Corp.*, 259 AD2d 363 [1999]).Nor, under the circumstances here, should Justice Gische have given retroactive effect to the* Yellowstone *injunction. This case does not fall within the limited exceptions for which such nunc pro tunc relief has been authorized. In each of the cases relied upon by Tenant (*159* SHS Baisley, LLC v Res Land, Inc.*, 18 AD3d 727 [2005];* Prince Lbr. Co. v CMC MIC Holding Co.*, 253 AD2d 718 [1998];* Mann Theatres Corp. of Cal. v Mid-Island Shopping Plaza Co.*, 94 AD2d 466 [1983],* affd *62 NY2d 930 [1984]), retroactive relief was allowed as a result of improper actions by the court or due to judicial inadvertence. Here, in contrast, no such court error was shown. Justice Shafer's initial denial of the* Yellowstone *application was entirely proper since even Tenant concedes that it failed to establish in its original motion that it was ready and able to cure the default.*

Moreover, the failure to ensure that the cure period did not lapse was entirely Tenant's fault. After Justice Shafer denied the first Yellowstone *application, Tenant waited almost two weeks before filing its motion to renew/reargue. By this time, the cure period had expired and the lease had already been terminated. Tellingly, after Justice Shafer initially denied* Yellowstone *relief, Tenant never sought any further stay of the running of the cure period either from the trial court or from this Court. Under these circumstances, the* Yellowstone *injunction should not have been afforded retroactive application (*see T.W. Dress Corp. v Kaufman*, 143 AD2d 900 [1988] [lapse of* Yellowstone *TRO was not a mere technicality where the plaintiff's counsel failed to obtain an extension of the TRO and allowed the cure period to expire]).*

*(4) Finally, Justice Gische should not have found that Landlord's 2003 notice of termination was a nullity. At the time Landlord served the notice, the cure period had expired and Tenant had not cured its breach. Since there was no temporary restraining order in place at that time, the notice was validly served and the lease was terminated. Once the lease was terminated in accordance with its terms, the court lacked the power to revive it (*see Dove Hunters Pub v Posner*, 211 AD2d 494 [1995];* Austrian Lance & Stewart v Rockefeller Ctr.*, 163 AD2d 125 [1990]).*

NOTE: THIS CASE STANDS FOR SEVERAL DISTINCT HOLDINGS IN DENYING YELLOWSTONE RELIEF:

F. YELLOWSTONE INJUNCTION APPLICABLE TO CONDITIONAL LIMITATION NOTICE:

Lexington Ave.& 42nd St. Corporation v.380 Lexchamp Operating,Inc. 205 A.D. 421,613 N.Y.S.2d 402(1st Dep't,1994):

> *Paragraph Fifteenth of the Lease was a conditional limitation which provided,* inter alia, *for the automatic termination of the Lease on the date specified in the notice to cure* (see, TSS-Seedman's, Inc. v Elota Realty Co., *72 NY2d 1024, 1026; 2 Rasch, New York Landlord and Tenant §§ 23:29, 23:30 [3d ed]). Plaintiff, rather than commencing a non-payment proceeding pursuant to RPAPL 711 (2), which would have allowed defendant to cure at any time prior to the issuance of a warrant of *424 eviction (RPAPL 751 [1]), instead chose to serve a notice to cure, a predicate notice to a holdover proceeding, alleging that non-payment was a breach of a substantial lease obligation. This would have allowed the termination of the lease, effectively eradicating defendant's interest in the leasehold, prior to the full adjudication of the parties' rights. As a result, a* Yellowstone *injunction was warranted to preserve the status quo* (Runes v Douglas Elliman-Gibbons & Ives, *83 AD2d 805;* Grand Liberty Coop. v Bilhaud, *126 Misc 2d 961, 964).*

G. YELLOWSTONE INJUNCTION DOES NOT AUTOMATICALLY TOLL RIGHT TO EXERCISE RENEWAL LEASE OPTION:

Waldbaum, Inc. v. Fifth Avenue of Long Island Realty Associates, Inc., 85 N.Y. 2d 600, *627 N.Y.S.2d 298 (1995):*

>) *We agree with defendant's position that, it having been established and found by the Referee that plaintiff had in fact *606 been in breach of its obligations under the lease, the Appellate Division erred in concluding that the continuation of a* Yellowstone *injunction to toll the cure period automatically also extended plaintiff's option to renew until the cure was completed. The* Yellowstone *injunction only served to forestall defendant from prematurely cancelling the lease during its initial term, in order to afford an opportunity for plaintiff to obtain a judicial determination of its breach and what would be required to cure it, and bring plaintiff in compliance with the terms of the lease. The injunction could not, in and of itself, relieve plaintiff of the necessity of complying with the condition precedent to renewal set forth in the lease, that plaintiff not be in default* (see, Jefpaul Garage Corp. v Presbyterian Hosp., *61 NY2d 442, 446, 448).*

III. RECOMMENDATIONS:

A. Insist on lease compliance:

The Court of Appeals has ruled consistently as to Yellowstone injunctions. It has been the lower courts that have broadened and expanded its application. This sentiment is clearly expressed by the Court of Appeals in *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc., 93 N.Y.2d 508 (1999)*:[5]

> *While seemingly unremarkable, the* Yellowstone *case ushered in a new era of commercial landlord-tenant law in New York State. As a result of this decision, tenants developed the practice of obtaining a stay of the cure period before it expired to preserve the lease until the merits of the dispute could be resolved in court (*Post v 120 E. End Ave. Corp., supra, *at 25). These injunctions have become commonplace, with courts granting them routinely to avoid forfeiture of the tenant's substantial interest in the leasehold premises (*id.*).* Yellowstone *gave rise to a creative remedy for tenants when confronted with a tangible threat of lease termination.*

In *Graubard,* the dispute between the commercial tenant, a law firm and its landlord about withholding of rent pending a determination of its offset claims due to alleged faulty elevator service. The high court rejected the tenant's claim that it was entitled to withhold the rent while the litigation was pending:

> *In* Waldbaum, Inc. v Fifth Ave. of Long Is. Realty Assocs. *(85 NY2d 600), we examined the nature of the parties' rights under a* Yellowstone *injunction. We reiterated that a* Yellowstone *injunction stays only the landlord's termination of a leasehold while the propriety of the underlying default is litigated. Significantly, a* Yellowstone *injunction does not nullify the remedies to which a landlord is otherwise entitled under the parties' contract: "The* Yellowstone *injunction only served to forestall defendant from prematurely canceling the lease during its initial term ... The injunction could not, in and of itself, relieve plaintiff of the necessity of complying with the condition precedent to renewal set forth in the lease" (85 NY2d, at 606).* Waldbaum *clearly indicates that the firm* always *was obligated to comply with the provisions of the lease, despite the court order. Conditions placed upon the grant of a* Yellowstone *injunction do not, contrary to the Appellate Division's reasoning, alter the rights and obligations of the parties. The point of reference for defining the rights of the parties is not the court order; rather, it is the lease itself. The*

[5] A case successfully argued by author's firm.

> Yellowstone *injunction at issue here did not supersede the lease provision calling for interest on rent arrears in the event of a default. The* Yellowstone *injunction protected the firm from eviction; it did not rewrite the lease. Although* Yellowstone *injunctions historically have been used to protect tenants from eviction, they provide a modicum of protection to landlords as well. The escrow account was simply a condition of the* Yellowstone *injunction, much like a bond, to ensure that Associates was paid when the day of reckoning finally arrived in this protracted litigation. A condition imposed along with a* Yellowstone *injunction has no bearing on the underlying rights of the parties…Fairness dictates that Associates (landlord) receive the interest due under the terms of the lease. To rule otherwise would place Associates in an unenviable position. Though victorious in this litigation, it would nevertheless suffer a substantial monetary loss. In addition to not receiving rental monies to which it was entitled for almost two years, Associates would forfeit interest due under the terms of the lease. Equity takes a dim view of such a result. When Associates prevailed, it was entitled to interest as agreed to by the parties in their lease.*

NOTE*: Graubard* provides a valuable lesson: a condition granted as part of Yellowstone relief does not alter the rights of the parties as to the balance of the lease. The landlord may insist on full performance of all other obligations under the lease, and can serve a separate notice to cure should the reason arise. Likewise, and as *Graubard* makes plain, the landlord can insist that all lease monetary obligations be performed notwithstanding the injunction.

B. Tenant must have the ability to cure; insist on it:

LIDCI, LLC, LIDC III, LIDC IV, LLC. v. Sunrise Mall, LLC. 46 Misc. 3d 885 (Sup.Ct. Nassau, 2014):

> *The plaintiffs' motion for a stay of termination of their commercial leasehold interests in defendant's shopping mall pendente lite pursuant to* First Natl. Stores v Yellowstone Shopping Ctr. *(21 NY2d 630 [1968]), or, in the alternative, for a preliminary injunction **2 pursuant to CPLR 6301, is denied in its entirety…Although there is some authority in the context of a* Yellowstone *application that actions of the landlord which serve to frustrate a tenant's performance under the lease may serve to bar enforcement based on the failure of a tenant to perform (*see WPA/Partners LLC v Port Imperial Ferry Corp. *at 237), the actions allegedly taken by the Mall are simply immaterial to the tenants' performance. Even assuming that the tenants were asked to "hold off" on entering a judgment,*

*there is no denial (and the Derrico affidavit on the intervention motion confirms) that the contractor was no longer on the job as of November 2013. That contractor was not replaced by the tenants. Critically, there is also no denial that the tenants were urged by the Mall to hire a new contractor and to proceed with the construction, as opposed to submission of the judgment, after the court vacated the Town's stop work order and directed reinstatement of the building permits… Accordingly, because there is no proof that the defendant did not also urge plaintiff tenants to delay the resumption of construction, any direction from defendant *892 to plaintiffs not to have a final judgment entered does not provide either a legal or equitable basis for finding here that the landlord is estopped from enforcing the rent obligation on the commencement dates established in the leases/amendments. Any negotiations/contacts between the Town and the Mall, what ever their character or goal, does not affect the foregoing. Thus, and without establishing a cause attributable to the Mall, the plaintiffs have not completed construction, have no operating businesses generating income, and have not pointed to any other independent source of funds, or that access to sufficient funds to cure the rent default is imminent. The court accordingly finds that they have failed to satisfy that prong of the required showings for a* Yellowstone *injunction that they are prepared and have the ability to cure the rent default. (*Definitions Personal Fitness, Inc. v 133 E. 58th St. LLC*.) The application for such an injunction is therefore denied*

NOTE: Mall Tenant was unable to prove an ability to complete construction of three stores as the municipality had issued a stop work order, and tenant was unable to pay rent after landlord served notice as to rent commencement date.

Pergament Home centers, Inc. v. Net Realty holding Trust, 171 A.D. 2d 736,171 N.Y.S 2d 292(2d Dep't 1991):

The court properly denied the request by Pergament for a Yellowstone *injunction. A leaseholder seeking* Yellowstone *relief must demonstrate that it holds a commercial lease, that it has received from the landlord a notice of default, a notice to cure or a threat of termination of the lease and that it has the desire and ability to cure the alleged default by any means short of vacating the premises* (see, Suarez v El Daro Realty, *156 AD2d 356, 358;* Linmont Realty v Vitocarl, Inc., *147 AD2d 618;* Heavy Cream v Kurtz, *146 AD2d 672;* Continental Towers Garage Corp. v Contowers Assocs. Ltd. Partnership, *141 AD2d 390). Under the circumstances at bar, Pergament neither had the ability to cure nor manifested a desire to cure. Section 14 of the lease entitled Net,*

upon 30 days notice, to terminate the lease at any time *if Pergament assigned without its consent. There was no clause in Section 14 permitting Pergament to cure once it had assigned the lease. Moreover, Pergament did not manifest its desire to cure until the instant appeal.*

NOTE: Assignee of lease could not cure on behalf of tenant of record and lease did not contain any right to cure after unlawful assignment.

Cemco Restaurants, Inc. v. Ten Park Avenue Tenants Corp. 135 A.D. 2d 461, 522 N.Y.S.2d 461(1st Dep't, 1987):

We have reviewed the arguments raised by plaintiff in its appeal from the order vacating the temporary restraining order and denying its application for a Yellowstone *injunction, and find them to be without merit.* (See, First Natl. Stores v. Yellowstone Shopping Center*, 21 NY2d 630 [1968].) A tenant seeking a* Yellowstone *injunction must also convince the court "of his desire and ability to cure the defects by any means short of vacating the premises"* (Jemaltown of 125th St. v. Betesh/Park Seen Realty Assocs.*, 115 AD2d 381, 382 [1st Dept 1985]). 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… The lease permits the tenant to operate a restaurant and only a restaurant, not a Broadway theatre or a cabaret on the premises. Plaintiff's claim that defendant has permitted plaintiff to present such entertainment in the past is not supported by the record. Nearly two years before this action began, in May 1985, defendant notified plaintiff that it was in violation of the lease by using the premises as a "supper club featuring entertainment." Moreover, plaintiff is not licensed to operate a cabaret and, therefore, it may not do so without violating the lease covenant to operate the restaurant in accordance "with all applicable rules, laws and regulations".* (See*, Administrative Code of City of New York § 20-359 et. seq..)… Plaintiff has not refuted defendant's evidence that it breached the lease by operating an unlicensed cabaret and by permitting excessively loud music, therefore, it is not entitled *465 to judgment declaring that it is in compliance with the lease. Judgment should be entered in favor of defendant on this second cause of action* (Lanza v. Wagner*, 11 NY2d 317, 334 [1962];* McKechnie v. Ortiz*, 132 AD2d 472 [1*st Dept 1987]).

NOTE: Seek compliance with the lease's use clause. Often a commercial tenant is unable to comply with the notice to cure by virtue of having to file with a municipal agency to obtain a zoning

change or change in certificate of occupancy, neither of which is possible.

Zona, Inc. v. Soho Centrale, L.L.C.270A.D. 2d 12, 704 N.Y.S.2d 38 (1st Dep't,2000):

> *Turning to the propriety of Supreme Court's grant of an injunction, the party seeking a* Yellowstone *injunction must demonstrate that: " '(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' " *14 (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs., *93 NY2d 508, 514, quoting 22*5 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp., *211 AD2d 420, 421). Here, tenant's assignment of the lease without obtaining landlord's prior written consent constituted an incurable default (*see, Pergament Home Ctrs. v Net Realty Holding Trust, *171 AD2d 736). Hence, the grant of a* Yellowstone *injunction was improper. This conclusion is particularly warranted since tenant has failed to assert that it has the ability to cure its default, i.e., by undoing the assignment of the lease (*Cemco Rests. v Ten Park Ave. Tenants Corp., *135 AD2d 461,* lv dismissed *72 NY2d 840).In view of the foregoing, tenant's motion for a* Yellowstone *injunction should have been denied, and landlord's cross-motion should have been granted to the extent of issuing a declaration in its favor.*

NOTE: Sometimes the tenant's default is merely incurable by virtue of lease language, municipal ordinances or case law. Determine whether the default is curable. If not, move to vacate the interim stay or for summary judgment dismissing the action.

Linmont Realty,Inc. v. Vitocarl, Inc. 147 A.D. 2d 618,538 N.Y.S.2d 277(2dDep't,2004):

> *To procure a* Yellowstone *injunction, a commercial tenant must demonstrate,* inter alia*, that "it has the desire and ability to cure the alleged default by any means short of vacating the premises"* (Continental Towers Garage Corp. v Contowers Assocs. Ltd. Partnership*, 141 AD2d 390, 394). The plaintiff herein has made no offer to cure any of the charged defaults, alleging instead that many of the alleged defaults listed in the "Notice of Termination of Lease" were not its responsibility, that various conditions did not exist as claimed by the defendants, and that the remainder of the defaults had been waived by the defendants acceptance of rent with knowledge of their existence. In the absence of a good-faith*

showing of a willingness to cure, the Yellowstone *injunction was properly denied* (Cemco Rests. v Ten Park Ave. Tenants Corp.*, 135 AD2d 461).*

NOTE: The commercial tenant, a gas station operator, challenged a notice to cure alleging, inter alia, it was not obligated to do the items alleged in the notice. The Court held the tenant did not demonstrate a desire to cure.

Often as is the case, the tenant mimics the language from the appellate cases as a mantra, a minimum requirement to obtain the temporary injunction. The landlord needs to challenge the allegation that the tenant actually desires to cure or has the means to do so short of vacating. Put the tenant to the challenge; insist on tenant disclosing the who, what, when and how it intends on complying. In the end, the facts may make clear the tenant truly does not have the desire.

Moreover, should a sufficient time pass, and it is apparent the tenant has not commenced or completed a cure of the default, move to vacate the Yellowstone injunction.

NOTE: Distinguish between alterations authorized under a lease and material changes amounting to "waste". In *Garland the court held the distinction as:*

In Harar Realty Corp. v Michlin & Hill *(86 AD2d 182), this court interpreted an identical lease provision: "A lease provision that a tenant may not make alterations without the landlord's consent is, however, 'only an undertaking imposed by law, which is to the effect that any material and substantial change or alteration of the nature of the property is waste.' ... Thus, a tenant 'is at liberty to erect structures for the purpose of carrying on his legitimate business upon the demised premises and remove them within the term, unless the effect will be to commit waste or to do serious injury to the realty.' ... This is true even where, as here, the lease has a provision that alterations may not be made without the landlord's consent." (Supra, at 185-186.) The impingement upon the reversionary estate of the landlord is the keynote to the definition of waste.* (Rumiche Corp. v Eisenreich*, 40 NY2d 174, 179.)Thus, whether the improvements effectuated by plaintiffs constitute alterations turns on whether they changed the nature and character of the demised premises so as to constitute waste.*

If the alterations done by the tenant alters the use to the extent it no longer conforms to the use clause or would qualify as “waste”, argue against the issuance of the stay or vacatur of it.

C. Lease may bar Yellowstone relief.

Some leases contain specific waiver language barring a commercial tenant from seeking injunctive relief no matter the circumstances. This waiver language is subject to controversy but no appellate court has weighed in on the enforceability of such a clause.

Hamza v. Alphabet Soup Assoc., LLC, 2011 NY Slip Op 30973(U) (Sup. Ct., N.Y. Cty, 2011)

> *Plaintiff cannot move for a Yellowstone injunction here because, pursuant to Section 72 of the lease, he waived his right to seek such an injunction in the event of a situation like this case. Plaintiff is confined to obtaining a regular preliminary injunction pursuant to CPLR 6301.*

Bella B. ALOYTS, et ano., v. 601 TENANT'S CORP., Index No. 30043/06(Sup. Ct., Kings, 1/24/07, Demarest, J.):

> *Plaintiffs' argument must be rejected. The right to a Yellowstone injunction is not a constitutional due process right, but merely a remedy afforded by case law where it is warranted by the circumstances (see Graubard Mollen Horowitz Pomeranz & Shapiro,93 NY2d at 514; Queen Art Publishers v Animazing Gallery, 2002 WL 452207, * 3, 2002 NY Slip Op. 40033 [U] [2002]). A tenant's rights are determined by the lease agreement, the contractual terms of which form the conditions of the tenancy (see generally United West LLC v Marguiles, 12 Misc 3d 1159 [A], * 2,2006 NY Slip Op. 50971 [U] [2006]). “A lease agreement, like any other contract, essentially involves a bargained-for exchange between the parties” (Rowe v Great Atlantic & PacificTea Co., 46 NY2d 62, 67 [1978]). Therefore, “[a]bsent some violation of law or transgression of a strong public policy, the parties to a contract are basically free to make whatever agreement they wish, no matter how unwise it might appear to a third party”(id. at 67-68).Thus, “[c]ommercial landlords and tenants can freely waive or modify their rights and obligations unless doing so is illegal, unconscionable or against public policy” (Queen Art Publishers, 2002 WL 452207 at * 3). “As a general proposition, unconscionability, a flexible doctrine with roots in equity.. requires some showing of ‘an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party’ ” (Matter of State of New York v Avco Fin. Serv. of N.Y., 50 NY2d 383,389 [1980], quoting Williams v Walker-Thomas Furniture Co., 350 F2d445,449 [D. C. Cir 1965]).Here, plaintiffs do not dispute that they were represented by counsel during the drafting of the lease agreement, and that the terms of*

the lease were fully negotiated for many months by such counsel and, thereafter, agreed to by them. There is no allegation of fraud, exploitive overreaching, or other unconscionable conduct on the part of 601 Tenant's Corp. in obtaining plaintiffs' agreement to these lease terms (see Grand Liberty Coop. v Bilhaud, 126 Misc 2d 961, 963 [1984]). Assent to and compliance with all of the lease terms were an essential part of the bargain reached between the parties.The language of the subject lease is unambiguous. Plaintiffs expressly waived their right to seek a Yellowstone injunction to stay, extend, or toll the time limitations of the lease and the five-day notice sent pursuant thereto. While such waiver precludes the defensive tactic of seeking a Yellowstone injunction prior to the expiration of the lease, it was part of the contract which was fully negotiated at arms-length between represented parties. As such, it would not be contrary to public policy to enforce the provisions of the lease under these circumstances (see George Backer Mgt. Corp. v Acme Quilting Co., 46 NY2d 211, 218.

Contrast: *Aurelian Sundeanu v. 137 East 110th Street (Sup. Ct., N.Y. Cty., Richter, J., Index No. 11629/02) ("The court concludes that this provision is unenforceable as against public policy.")*

NOTE: Encourage the client to draft the lease is such a way as to limit the tenant's rights upon the service of a notice to cure. The aforementioned waiver clause is useful. However, it is possible to encounter a judge who will not enforce the waiver provision. Insert a provision requiring the tenant to post an undertaking, which amount will cause the tenant to pause before seeking the relief knowing that a judge may require it to comply with the lease clause and be unable to meet the terms.

Edit the lease's default provision to delete any reference to tenant's right to seek an injunction provided it commenced curing, but that a full cure cannot not be completed within the notice period.

Include a clause requiring the tenant to post the equivalent of the lease term's yearly rent as a condition of the stay. The logic is that the landlord has a right to terminate the lease and wants to be protected in the event of tenant loses the case: having the tenant prepay the rent for the term is akin to a posting of a bond, but the amount has already been predetermined on consent of the parties. The court would be bound by the agreement of the parties. It is obvious a savvy tenant's lawyer negotiating the lease will balk at any such clause. Use it as a spring board to obtain compromise language that protects your client.

D. Cross move for posting of an undertaking and payment of rent.

Sportsplex of Middletown v Catskill Regional Off-Track Betting Corp., 221 A.D.2d 428, 633 N.Y.S.2d 588(2d Dep't 1995):

> In granting *Yellowstone* relief, the court may impose reasonable conditions, including the posting of an undertaking by the party seeking relief *(see, Peron Rest. v Young & Rubicam,* 179 AD2d 469) in an amount rationally related to the quantum of damages which the nonmoving party would sustain in the event the moving party is later determined not to have been entitled to the injunction *(see, 61 W. 62nd Owners Corp. v Harkness Apt. Owners Corp.,* 173 AD2d 372, 373). The requirement that the movant also pay "outstanding and prospective use and occupancy fees" in addition to a bond may not be excessive *(61 W. 62nd Owners Corp. v Harkness Apt. Owners Corp., supra).* Absent a showing that the court improvidently exercised its discretion by imposing conditions in excess of those necessary to protect the nonmoving party's interests, the conditions imposed will not be disturbed *(see,* 7A Weinstein-Korn-Miller, NY Civ Prac ¶ 6312.11; *Donald Shaffer, Inc. v Shaffer,* 44 AD2d 725).Here, because the conditions imposed by the court in granting the injunctive relief are in an amount rationally related to the damages the defendant would incur if it is determined that the plaintiffs were not entitled to injunctive relief, the court did not improvidently exercise its discretion, and the conditions will not be disturbed.

METROPOLIS SEAPORT ASSOCIATES, L.P., v. SOUTH STREET SEAPORT CORP., and Seaport Associates, L.P., et al., And The City of New York, 253 A.D.2d 663 **,** 678 N.Y.S.2d 317 *(1st Dep't ,1998):*

> *The amount of the undertaking set by the IAS Court was appropriate since it was rationally related to the damages sustainable by defendants in the event of a subsequent determination that preliminary injunctive relief had been erroneously granted (*see, Margolies v Encounter, Inc., *42 NY2d 475, 479). However, inasmuch as plaintiff failed to post the undertaking despite apparently being given over a month to do so, the IAS Court's vacatur of the preliminary injunction was proper. Nonetheless, plaintiff's cause of action for permanent injunctive relief is not rendered moot by the vacatur since plaintiff may yet be entitled to such permanent relief if ultimately successful on the merits.*

E. **Cross move or counterclaim for legal fees**:

Universal communications Network, Inc. v. 229 West 28th Owners, LLC, 85 A.D.2d 668,926 N.Y. S.2d479(1st Dep't,2011):

> *The court properly vacated the* Yellowstone *injunction and awarded defendant the* Yellowstone *escrow funds, which represented a portion of the rent that had been improperly withheld by plaintiff. The sole purpose of a* Yellowstone *injunction is to "maintain[ ] the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture" (*Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Assoc., *93 N.Y.2d 508, 514, 693 N.Y.S.2d 91, 715 N.E.2d 117 [1999]).* 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 N.Y.2d at 515, 693 N.Y.S.2d 91, 715 N.E.2d 117). Plaintiff's day of reckoning is upon it. *670 Because the lease provided for payment of reasonable attorneys' fees, the court erred in failing to grant defendant's application for such an award (*see Sun Mei Inc. v. Chen, *21 A.D.3d 265, 266, 800 N.Y.S.2d 133 [2005],* lv. denied *6 N.Y.3d 711, 814 N.Y.S.2d 600, 847 N.E.2d 1173 [2006]), and the matter should be remanded for calculation of attorneys' fees.*

NOTE: In drafting the lease, care should be taken to delineate the tenant's obligation to reimburse the landlord's fees and costs in the event the tenant commences a declaratory judgment action, including but not limited to a Yellowstone injunction action.

F. **Check the tenant's legal status to commence a suit**:

Kiamesha Development Corp. v. Guild Properties, Inc., 4 N.Y. 2d 378 (1958):

> *Without any exercise of corporate functions, without any colorable attempt to comply with the statutes governing incorporation before the issuance of the tax certificate, without any certificate of incorporation having been even prepared or acknowledged, it cannot be said that Guild Properties, Inc., was a de facto corporation on that date…The tax certificate was thus made to a nonexistent entity incapable of taking thereunder, and accordingly*

*could transfer no rights whatsoever it was void (internal citations omitted). Here we are dealing with neither a corporation de jure nor one de facto, but with a purported entity which 'cannot take title to real or to personal property, * * * acquire rights by contract or otherwise, incur debts or other liabilities either in contract or tort, sue or be sued' (internal citations omitted).*

Berlin v. New Hope Holiness Church of God, Inc., 93 A.D. 2d 798 (2d Dept. 1983):

Concededly, when these documents were executed by New Hope Holiness Church despite its specific designation as a religious corporation, it had no legal corporate existence, and no prior colorable attempt had been made to incorporate it. Thus, without corporate existence either de jure or de facto, it could not do any act whatsoever as a legal entity. It could not take title to real or to personal property acquire rights by contract or otherwise, incur debts or other liabilities either in contract or tort, sue or be sued (internal citations omitted) As a nonexistent entity incapable of acquiring any rights, it could not transfer any rights—its acts being void (internal citations omitted).

NOTE: Don't assume the tenant is compliant with Department of State filings. Many landlords are lax in their due diligence and often take the tenant at its word that it is a legal entity, authorized to do business in the state.

G. **Challenge service of the complaint where appropriate**.

Too often an attorney will assume that when his/her client was served with the order to show cause seeking a Yellowstone injunction, which motion attaches a copy of the summons and complaint, that the service of the OSC constitutes lawful service of the summons and complaint. It may not. Usually the court will set a specified method of serving the motion, but never address service of the complaint. The time begins to run on serving the complaint from the time the summons and complaint are filed with the clerk of the court.

Article 3 of the CPLR governs the methods of service and means of obtaining jurisdiction over parties in Supreme Court.

Specifically, CPLR §306-b requires service of a summons and complaint be made within 120 days of its filing.

CPLR §304(a) provides that:

> An action is commenced by filing a summons and complaint or summons with notice in accordance with rule twenty-one hundred two of this chapter. A special proceeding is commenced by filing a petition in accordance with rule twenty-one hundred two of this chapter. Where a court finds that circumstances prevent immediate filing, the signing of an order requiring the subsequent filing at a specific time and date not later than five days thereafter shall commence the action.

In order to resort to alternate methods of service pursuant to CPLR §308(5), a plaintiff must establish that service cannot be made under CPLR §308(1), (2) and (4). See *Dobkin v. Chapman*, 21 N.Y.2d 490 (1968); *Simens v. Sedrish*, 82 A.D.2d 915, 916, 440 N.Y.S.2d 687 (2nd Dept. 1981). *See also Silverman v. St. Vincent's Hospital & Medical Center***,** 197 A.D.2d 459, 603 N.Y.S.2d 39 (1st Dept. 1993), *Markoff v. South Nassau Community Hospital*, 91 A.D.2d 1064, 458 N.Y.S.2d 672 (2nd Dept. 1983)

In *Happy Age Shops v Matyas, 128 A.D.2d 754 (2d Dept. 1987),* the court signed an Order to Show Cause commencing a proceeding and directing service upon an attorney who had previously represented the defendant. The Appellate Division held this was not a valid means of obtaining jurisdiction over the defendants, stating:

> *That provision is not a vehicle for affecting service of process. Moreover, there is no basis for the plaintiff's claim that this service provision in the order to show cause was intended by the court to authorize expedient service of the summons pursuant to CPLR 308 (5). Nothing in the papers submitted in support of the order to show cause indicated that such relief was either necessary on the ground of impracticality or that it was being requested (see, Saulo v.Noumi, 119 A.D.2d 657).*

Skyline Agency Inc. v. Coppotelli, 117 A.D. 2d 135, 502 N.Y.S.2d 479 (2d Dept. 1986):

> *Notice of the suit received by means other than those provided in the CPLR cannot serve to confer jurisdiction over a defendant* (Feinstein v. Bergner*, 48 NY2d 234). Thus, the attempt to acquire jurisdiction by service of process in this case did not satisfy due process.*

CONCLUSION:

There is no magic formula to defending an application for Yellowstone relief. As always, defending an action, whether it is a Yellowstone injunction/declaratory judgment action, or other, requires good lawyering and a solid understanding of the case law precedent in the area. This article provides a guide to relevant case law in the area and offers suggestions based on previous litigation experiences.