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Let Freedom (of Contract) Ring: *Yellowstone* Waivers Are Enforceable

By Joshua Kopelowitz and Richard Corde

This is the third in a series of articles exploring whether parties to a commercial lease can contractually waive a tenant's right to seek a *Yellowstone* injunction. The first article, "Are *Yellowstone* Waivers Enforceable?," *NYLJ*, April 10, 2014, at 4, col. 1 (http://bit.ly/2WV4m1X), was written before any appellate authority existed on the issue. Our second article, "As it Turns Out, *Yellowstone* Waivers Are Enforceable," 34 *NY Real Estate Law Reporter* 5 (April, 2018) (http://bit.ly/2WOXUcA), written four years later, discussed the evolution of the law following the seminal holding in *159 MP Corp. v Redbridge Bedford, LLC*, 160 AD3d 176 (2d Dept 2018). (Both prior articles were co-authored by Joshua Kopelowitz and Jeffrey Turkel.) In *Redbridge*, the Appellate Division Second Department, citing our article, held that parties to a commercial contract are free to limit a tenant's ability to seek a declaratory judgment and, specifically, a *Yellowstone* injunction. On May 7, 2019, the Court of Appeals, in *159 MP Corp. v Redbridge Bedford, LLC*, 2019 NY Slip Op 03526, affirmed the Second Department's ruling and reasoning, thereby leaving no doubt that a contractual waiver of a right to seek a declaratory judgment and/or a *Yellowstone* injunction in a commercial lease is enforceable.

What Is a *Yellowstone* Injunction?

A *Yellowstone* injunction is a remedy, created by case law, that allows a commercial tenant to seek a judicial determination regarding an alleged default under its lease after receipt of a notice to cure from their landlord. "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." *Universal Communications Network, Inc. v 229 West 28th Owner, LLC*,

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85 AD3d 668, 669 (1st Dept 2011).

Yellowstone Waivers Are Enforceable in New York

In *Redbridge*, the plaintiffs sought and obtained leave to appeal to the Court of Appeals from the Second Department's decision. On May 7, 2019, in a 4-3 decision written by Chief Judge DiFiore, the Court of Appeals affirmed the Second Department's determination that a tenant may contractually waive its right to declaratory relief, including its right to a *Yellowstone* injunction.

The foundation of the Court of Appeals' decision is the longstanding principle that the agreement of two parties to a contract should be enforced according to its terms. "By disfavoring judicial upending of the balance struck at the conclusion of the parties' negotiations, our public policy in favor of freedom of contract both promotes certainty and predictability and respects the autonomy of commercial parties in ordering their own business arrangements." *Id*. at 3.

The Court, in its discussion, noted that where two separate public policy concerns are present (*i.e.*, freedom of contract and the unenforceability of contractual provisions that violate public policy), the most important function of the judicial system "is to enforce contracts rather than invalidate them on the pretext of public policy unless they clearly … contravene public right or the public welfare." *Id*. at 3 (citations omitted).

Analyzing the contractual provision in *Redbridge*, which waived the tenants' right to seek any declaratory relief, the majority held:

> The declaratory judgment waiver is clear and unambiguous, was adopted by sophisticated parties negotiating at arm's length, and does not violate the type of public policy interest that would outweigh the strong public policy in favor of freedom of contract. Although plaintiffs argue otherwise, there is simply nothing in our contemporary statutory, constitutional, or decisional law indicating that the interest in access to declaratory judgment actions or, more generally, to a full suite of litigation options without limitation, is so weighty and fundamental that it cannot be waived by sophisticated, counseled parties in a commercial lease.
>
> *Id*. at 5.

The majority likened *Yellowstone* injunction waivers to arbitration clauses stating that "despite the waiver clause, the judicial review available to plaintiffs is more generous than that available to parties whose contracts contain arbitration clauses," which courts routinely enforce. *Id*. at 6. Because the issue of whether the commercial lease has been breached must still be determined in the context of a litigation, the majority held that the *Redbridge* plaintiffs' "inability in this case to obtain *Yellowstone* relief does not prevent them from raising defenses in summary proceedings if commenced and thus vindicating their rights under the leases if the owners' allegations of default are baseless." *Id*. at 7.

In conclusion, the majority stated that "the right to commence a declaratory judgment action, although a useful litigation tool, does not reflect such a fundamental public policy interest that it may not be waived by counseled, commercial entities in exchange for other benefits or concessions." *Id*. at 7.

Dissent

In a lengthy and scathing dissent, Judge Wilson argued that freedom of contract is not an individual right, but rather a benefit for society as a whole; a consideration the majority failed to take into account. The dissent states that a party's right to declaratory relief is an essential element to the freedom of contract and that by allowing parties to waive

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the right to seek same, the majority "creates instability by undermining the purposes and benefits of the freedom of contract." *Id*. at 11. The dissent reasoned that a declaratory judgment action provides the parties "a conclusive determination, without the attachment of any damages or injunction" predated common law. *Id*. at 11.

By waiving the right to seek declaratory relief, the dissent argues, a commercial tenant is dependent on the landlord bringing a summary proceeding to determine the validity of the notice to cure. In closing, Judge Wilson admonishes the majority, stating that "the majority has now undone the faithful work of the courts over the past 50 years in creating the *Yellowstone* injunction …." *Id*. at 18.

Analysis

Pursuant to *Redbridge*, commercial leases contracting a waiver of the right to seek a declaratory judgment, including a *Yellowstone* injunction, will be enforced provided the lease was entered into by sophisticated business parties represented by counsel. It remains to be seen whether *Yellowstone* injunction waivers will become a negotiating point in every commercial lease. However, parties choosing to include these types of waivers would be wise to follow *Redbridge* closely and make sure the inclusion of the *Yellowstone* injunction waiver is the result of an arms' length transaction for which consideration is received.

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CO-OPS & CONDOMINIUMS

Merger Doctrine Precludes Unit Owner's Action Against Sponsor

Von Ancken v. 7 East 14 LLC
NYLJ 4/8/19, p. 18, col. 1
AppDiv, First Dept.
(memorandum opinion)

In co-op unit owner's action against sponsor for breach of contract, misrepresentation, and fraud, unit owner appealed from Supreme Court's dismissal of the complaint. The Appellate Division affirmed, holding that the merger doctrine precluded breach of contract claims and that unit owner could not establish reasonable reliance on any misrepresentations.

The listing for unit owner's apartment was accompanied by a floor plan, prepared by sponsor, which stated that the unit was " ~1,966 " square feet when, in fact, the unit was approximately 1,495 square feet. Unit owner contends that the floor plan was incorporated by reference into the offering plan, which was, in turn incorporated by reference into the purchase agreement. Based on the misrepresentation in the listing, unit owner brought this action for breach of the purchase contract, for misrepresentation and fraud, and for violations of the Martin Act. Supreme Court dismissed the complaint.

In affirming, the Appellate Division first rejected the breach of contract claim on two grounds: 1) the listing was not identified in any of the purchase documents and was therefore not incorporated by reference; and 2) the purchase agreement itself provided that sponsor was making no representations and that the unit was purchased as is with the buyer's obligation to inspect the premises to determine actual determinations. The court then noted that because the unit owner had the opportunity to measure the apartment, they could not reasonably have relied on any misrepresentation by sponsor. Finally, the court concluded that the type of misrepresentation involved in this case is not the type of deceptive act covered by the Martin Act.

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DEVELOPMENT

Denial of Site Plan Upheld

Matter of Sagaponack Ventures LLC v. Board of Trustees
NYLJ 4/5/19, p. 27, col. 1
AppDiv, Second Dept.
(memorandum opinion)

In landowner's article 78 proceeding challenging denial of a site plan application, landowner appealed from Supreme Court's denial of the petition and dismissal of the proceeding. The Appellate Division affirmed, holding that the Board of Trustees had not abused its discretion.

Landowner owns a 43.5 acre waterfront parcel. In 2004, landowner, under a different corporate name, applied to build four single-family residences on the parcel, three on the oceanfront portion and the fourth on the northwestern portion of the property, In 2008, the board conditionally approved a site plan that relocated the fourth house from the northwestern portion to another area. Landowner abandoned that site plan. In 2013, landowner submitted another site plan application to build four homes, largely in the same location as the original application, but abandoned the application when the board made it clear that it would compare the application with the 2008 conditional approval. Landowner then submitted the instant application to build a 13,000 square foot house on the northwestern portion of the parcel. The board rejected the application, concluding that the northwestern portion was not suitable for development. Landowner brought this article 78 proceeding. When Supreme Court denied the petition, landowner appealed.

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