REAL ESTATE

The End of Yellowstone Injunctions

By Andrew Lieb

The Appellate Division, Second Department, ruled on an issue of first impression in *159 MP Corp. v. Redbridge Bedford, LLC,* that commercial tenants may waive declaratory judgment remedies in their written lease agreements and as such, landlords can now avoid Yellowstone injunctions through carefully crafting their lease agreements.

A Yellowstone injunction, as explained by the dissent, "implicitly create[s] a strategic remedy for commercial tenants to preserve their valuable property interest in the leasehold when served with a notice to cure defaults that are in dispute. By obtaining an injunction staying the running of the cure period prior to its expiration, a tenant could adjudicate the merits of the alleged lease default and, even if the tenant was ultimately found in default, it could still utilize the unexpired cure period to avoid lease termination." Now, landlords can avoid this strategic remedy held by commercial tenants and box such tenants into a summary proceeding as their only form of judicial redress, which ironically a lessee faced with a notice to cure "has no standing to bring."

The operative lease rider language before the court was as follows:

Tenant waives its right to bring a declaratory judgment action with respect to any provision of this lease or with respect to any notice sent pursuant to the provisions of this lease. Any breach of this paragraph shall constitute a breach of substantial obligations of the tenancy and shall be grounds for the immediate termination of this lease. It is further agreed that in the event injunctive relief is sought by tenant and such relief shall be denied, the owner shall be entitled to recover the costs of opposing such an application, or action, including its attorney's fees actually incurred, it is the intention of the parties hereto that their disputes be adjudicated via summary proceedings.

Andrew Lieb

As background, the case before the Appellate Division involved a 20-year "Standard Form of Store Lease" for a supermarket and "a nearly identical" 20-year lease for a "supermarket accessory storage." Both leases contained 10-year options as well. The operative lease language appeared in a lease rider.

Approximately four-years into the lease term, the landlord served the tenant with a "Ten (10) Day Notice to Cure Violations" setting forth seven breaches concerning tenant's "failure to obtain various permits, the arrangements of the premises in a manner that created fire hazards, the existence of nuisances and noises, and the failure to allow for sprinkler system inspections by the Fire Department." Further, the Notice to Cure provided that landlord would terminate the tenancies if the tenant failed to cure the breaches within 15 days. In response, tenant commenced an action "for declaratory and injunctive relief, and to recover damages for breach of contract." Thereafter, tenant timely moved for a Yellowstone injunction, while obtaining a temporary restraining order. In response, the landlord cross-moved for summary judgment. The Supreme Court granted summary judgment.

In affirming the Supreme Court, the Appellate Court held that the operative lease language unequivocally expressed a clear waiver of the right to a declaratory judgment action. Further, the Appellate Division held that such operative lease language was valid as a matter of public policy. In supporting this affirmance, the court stated three independent rationales, including that freedom of contract is constitutionally protected, that certain lease provisions cannot be waived and declaratory judgment actions do not constitute such a provision, and that the tenant never submitted evidence in the record on appeal of the precise consideration that it received in consideration of the subject waiver provision so a finding of unconscionability cannot be reached.

Then, in pointing to the lease language that states "it is the intention of the parties hereto that their disputes be adjudicated via summary proceedings," the Appellate Division held that a waiver of declaratory judgment rights precludes Yellowstone relief. In reaching this conclusion, the court explained that since a "Yellowstone injunction springs from the declaratory judgment action that gives rise to it," if no declaratory judgment action is available, no Yellowstone injunction is likewise available. Nonetheless, the court limited its holding to Yellowstone relief and expressly noted that "breach of contract actions commenced by tenants lend themselves to standard injunctive remedies under CPLR article 63."

Moving forward, all landlord's counsel should include a provision in their leases mirroring the operative lease language from *159 MP Corp. v. Redbridge Bedford, LLC.* Still further, it would be wise for landlord's counsel to expressly set forth broad consideration for the waiver of declaratory relief so that it is not subject to unconscionability analysis. In all, the era of Yellowstone injunctions will soon be behind us.

Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb is a past Co-Chair of the Real Property Committee of the Suffolk Bar Association and is the Special Section Editor for Real Property in The Suffolk Lawyer.

PERSONAL INJURY

Does Reviewing a Privileged Document in Preparation for an EBT Waive Privilege?

By Paul Devlin

At a recent deposition, my client admitted that she prepared a written statement for her insurance carrier regarding the motor vehicle accident that is the subject of a personal-injury suit. She further admitted that she reviewed her report in preparation for the deposition as a defendant in that suit. Opposing counsel promptly called for production of the written statement. In response, I objected on the basis that the written statement is privileged. See my previous article regarding privileged communication between insurance carriers and their insureds published in the October 2017 edition of *The Suffolk Lawyer*. See also *Finegold v. Lewis*, 22 A.D.2d 447 (2nd Dep't 1965); *Weiser v. Krakowski*, 90 A.D.2d 847 (2nd Dep't 1982); and *Schneider v. Schneider*, 94 A.D.2d 700 (2nd Dep't 1983)

Opposing counsel retorted to my objection by asserting that any privilege had been waived by the fact that my client reviewed her written statement in preparation for litigation. I did not withdraw my objection but wondered, could my client have possibly waived the privilege merely by reviewing the document?

Paul Devlin

This article is a review of the law governing the following two issues: whether merely reviewing a document in preparation for a deposition renders the document discoverable; and whether review of a privileged document in preparation for a deposition renders the privilege waived.

As a general rule, any writing that is used to refresh recollection for testimony may be inspected by opposing counsel and may be used to test the credibility of the witness. This is based on the theory that once the witness' recollection has been refreshed, he testifies thereafter as a result of such refreshed recollection. This right of inspection has been held to apply to writings consulted by a witness while on the stand at trial (see *People v Gezzo*, 307 NY 385 [1954]) as well as to those writings consulted before trial. See *Doxtator v Swarthout*, 38 AD2d 782; *Alfredsen v Loomis*, 148 NYS2d 468 (N.Y. Sup. Ct. 1956). As the court stated in *Alfredsen*, at page 470: "The time when the memorandum . . . was referred to by the witness, whether at the trial or examination or prior thereto, would seem unimportant . . . The important fact is that it was used by him to refresh his recollection and that it accomplished that purpose. Certainly, the risk to an adversary is precisely the same whether the witness refreshes his recollection by consulting a writing before trial, as in the instant case, or by consulting it while on the witness stand during trial." See also NY CPLR 3113(c) which provides that "[e]xamination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court."

When the document used to refresh a witness' recollection is privileged, it presents a conflict with the disclosure rule set forth above. This issue was addressed in the case of *Fields v First Liberty Ins. Corp.*, 2012 N.Y. Misc. LEXIS 5314, *5-7, 2012 NY Slip Op 32795(U) (N.Y. Sup. Ct. 2012). First, the court cited CPLR 4503(a) which states that a privilege exists for confidential communications made between attorney and client in the course of professional employment. The court additionally cited to CPLR 3101(b) which vests privileged matter with absolute immunity (also citing *Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377, [1991]. The *Fields* Court went on to state that although there is a strong public policy in favor of full disclosure, a party seeking to withhold discovery on the ground of privilege has the burden of proving each element of the privilege asserted (citing *id.*; *Matter of Priest v Hennessy*, 51 NY2d 62, 409 N.E.2d 983, [1980], and *Koump v Smith*, 25 NY2d 287, [1968]). Thus, the *Fields* Court held, "where a party alleges that documents sought for production and inspection are shielded from disclosure by the attorney-client privilege, the party seeking to withhold such documents has

(Continued on page 21)