

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Gische, J.P., Moulton, González, Scarpulla, JJ.

13134N THE GAP, INC., et al.,
 Plaintiffs-Respondents,

Index No. 652549/20
Case No. 2020-03361

-against-

44-45 BROADWAY LEASING CO., LLC,
Defendant-Appellant.

Rosenberg & Estis, P.C., New York (Warren A. Estis of counsel), for appellant.

Davis & Gilbert LLP, New York (Joshua H. Epstein of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered July 22, 2020, which granted plaintiffs’ motion for a *Yellowstone* injunction, conditioned on the posting of an undertaking, unanimously modified, on the law, to provide that pending the termination of the *Yellowstone* injunction ongoing future use and occupancy shall be paid to defendant, and otherwise affirmed, without costs.

Plaintiffs demonstrated their entitlement to a *Yellowstone* injunction because each respectively showed that “(1) it holds a commercial lease; (2) it received from the landlord . . . a notice of default . . . ; (3) it requested injunctive relief prior to the termination of the lease; and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises” (*Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999] [internal quotation marks omitted]). Contrary to defendant’s contention, plaintiffs may plead in the alternative that the leases were terminated without abandoning their

request for *Yellowstone* relief, as they asserted that if found in default, they were ready, willing, and able to cure, and the purpose of a *Yellowstone* injunction is to preserve the status quo, not to resolve the underlying merits of the parties' dispute (CPLR 3014; *Bliss World LLC v 10 W. 57th St. Realty LLC*, 170 AD3d 401, 402 [1st Dept 2019]).

We disagree with defendant that the motion court abused its discretion in setting use and occupancy at a rate of approximately 90% of the lease rates. “[T]he remedy for any over or underpayment [of use and occupancy] is a speedy trial” (*Mushlam, Inc. v Nazor*, 104 AD3d 483, 483 [1st Dept 2013]). We also find that the trial court did not abuse its discretion in directing that rental arrears be deposited with the clerk of the court while the parties resolve their dispute (*Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, 124 [1st Dept 2000]; Real Property Actions and Proceedings Law § 745[2][a]). Because, however, plaintiff is continuing to use and occupy the premises as a retail business while the *Yellowstone* injunction is in place, the Court abused its discretion in failing to require that ongoing use and occupancy, at the temporarily reduced amount, be paid directly to defendant (*see 61 West 62nd Owners Corp. v Harkness Apt. Owners Corp.*, 173 AD2d 372 [1st Dept 1991]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: February 16, 2021



Susanna Molina Rojas
Clerk of the Court