

A “Victory” For Airbnb: Why Owners Should Care

By Jeffrey H. Seiden, Esq.

In what some see as a surprising settlement, the Attorney General of the State of New York in conjunction with the New York City Mayor's Office has agreed that new legislation prohibiting the posting of advertisements will not be enforced against the platforms (i.e., web sites) on which those advertisements are posted. Some see this as letting Airbnb and other online travel broker sites off the hook. Although the most efficient way to curb illegal transient occupancy would be to shut down the platforms through which these occupancies are advertised, it may not be legal to do so under federal law.

Rather than litigating the issue, the city agreed to this limitation, and enforcement will be targeted at the individuals who use the platforms – the people who post their apartments on Airbnb for illegal transient occupancies. If the new law is properly enforced, it could still have a deterrent effect and reduce the amount of illegal rentals, thereby limiting an owner's exposure to fines and penalties, in addition to aiding an owner in evicting the offending tenant. However, politics play an unusually influential role here, given that enforcement will be handled by the Mayor's Office, and it remains unclear how aggressive the administration is willing to be, and against whom. Building owners and their tenants who follow the law and seek quiet enjoyment of their apartments should be calling on the Mayor for responsible enforcement of the new law.

Even before the new prohibition against advertising illegal transient occupancies, the Multiple Dwelling Law and New York City Administrative Code prohibited a Class “A” multiple dwelling for use other than permanent residential occupancy. Bill No. S06340A signed into law by Gov. Cuomo, amended Multiple Dwelling Law §121 and §27-287.1 of the New York City Administrative Code, thereby prohibiting the mere advertisement of units in Class “A” dwellings for uses other than permanent residential use, and instituting fines and penalties against the offender for each violation.

Prior to these amendments, buildings owners were the only enforcement targets of the government agencies. The sole remedy for the owner to avoid fines and penalties for the illegal acts of their tenants was to commence an eviction proceeding against the offending tenant, and seek their removal from their apartment, before the enforcement agencies were involved. Generally, the Courts have taken a hard stance against short-term rentals, especially the commercialization of rent-regulated apartments. Courts have recognized not only the illegality of this practice pursuant to the Rent Stabilization Code, Multiple Dwelling Law, Building Code and Fire Code, but the significant safety risks posed by these illegal occupancies to other tenants. However, the offending tenant was free to keep its “profits” as there was no financial disincentive for violating the law.

Despite the new law, and the institution of fines against the offending tenants, building owners still carry the heavy burden of monitoring their buildings and rooting out any illegal transient use. Enforcement

of the prohibition on advertising is now the task of the Mayor's Office of Special Enforcement, whose mandate is to address quality of life issues citywide. While the law signaled a collaborative effort among the City, building owners, and tenants to root out the commercialization of rent-regulated apartments, where tenants are collecting rents that exceed what is permitted by the state agency governing regulated units, that message will resonate only if the law is properly enforced, without exception. Crucially, the new law did not impose any criminal liability on any offending tenant, nor does it require the offending tenant to return the money generated from the illegal rental. So prompt enforcement is necessary, even on first-time offenders, so that the monetary fines act as an economic deterrent, rather than simply a cost of doing business. But again, it is unclear if enforcement will be as robust as necessary to achieve this goal. Assemblywoman Linda B. Rosenthal, who drafted the legislation, stated in her press release, “I expect the City will now get down to the important business of enforcing the law against the serial lawbreakers on the site.” By using the words “serial lawbreakers”, Assemblywoman Rosenthal has implied to the public that this practice is acceptable, even though illegal, as long as you don't do it too often. However, this standard has not been applied to landlords, who are liable for fines and penalties if one apartment is found to be occupied for illegal transient use.

Unfortunately, however, the new law has done nothing to shift liability and enforcement away from the innocent and unknowing building owner. The owner is still liable for any illegal occupancy in place at the building that is discovered by the enforcement agencies. A tenant can be fined for advertising an illegal rental, but an owner can still be fined if the illegal occupants are observed in the apartment.

This new law was designed to eradicate the problem of illegal short-term rentals. But nothing is simple in politics. The Assemblywoman's statements and the settlement with Airbnb are clear examples of “lawmakers” capitulating to requests for selective enforcement by constituents and lobbyist dollars, respectively. While on the one hand, lawmakers cry that there is an affordable housing “crisis” in New York City, that is made worse by turning rent-regulated apartments into commercial short-term rentals, yet on the other hand, they are unwilling to enforce the laws that are intended prevent the “removal” of affordable apartments from the rental market. ♦

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