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Recently, the City of New York has been ramping up enforcement of its illegal transient occupancy laws. The City's enforcement efforts are aimed at curbing illegal occupancies stemming from websites such as Airbnb. Curiously, the City is not going after the illegal short-term occupant or the individual illegally renting out his or her apartment. Rather, the City is ticketing—and sometimes even suing—the landlord of the building in which the illegal transient occupancy is occurring. Illegal transient occupancies present an extraordinary legal and financial risk to landlords, especially out-of-possession landlords. Luckily, there are measures that landlords can take to protect themselves in the face of City enforcement efforts.

First of all, what is an illegal transient occupancy?

The law on illegal transient occupancies is rather counter-intuitive. The State legislature did not enact a law specifically banning illegal transient occupancies. Instead, the legislature amended the statute that provides the definition for Class-A Multiple Dwellings, which are residential buildings where there are three or more individual units for rent. The “Class-A” designation is memorialized in a Certificate of Occupancy. Therefore, as a threshold matter, landlords owning buildings with two or less units for rent are not subject to the City's enforcement efforts.

However, landlords owning buildings with three or more units for rent are subject to the enforcement efforts. Section 4.8.a. of the Multiple Dwelling Law restricts the use of Class-A Multiple Dwellings for only “permanent residence purposes.” This consists of occupancy of an apartment or other dwelling unit by the same individual or family for thirty consecutive days.

There are two important exceptions to this restriction. First, an occupancy of fewer than thirty days is permissible if a lawful permanent occupant remains in the apartment. For example, if a tenant in a ten apartment building with a lawful one-year lease (Tenant A) rents out one room in her two bedroom apartment to a guest staying for only three days (Tenant B), there is no illegal transient occupancy as long as Tenant A is still living in the apartment during that time. The fact that Tenant A is receiving monetary compensation from Tenant B is irrelevant if Tenant A is living in the apartment with Tenant B during those three days. This may constitute a violation of a subleasing prohibition in Tenant A's lease, but it is not illegal. The second exception relates to short-term tenancies where there is no monetary compensation. In those circumstances, the permanent occupant can be absent from the apartment for personal reasons such as vacation or medical treatment. Using the previous example, if Tenant B did not pay Tenant A, then Tenant B can stay in Tenant A's apartment while Tenant A is on vacation or absent for some other personal reason.

Thus, what is illegal is an occupant paying for and staying in a Class-A Multiple Dwelling for less than thirty days while the permanent occupant is absent from the apartment or dwelling unit. Tenant A's landlord can face fines and legal action if Tenant A, for monetary compensation, rents her entire apartment to Tenant B for the weekend via Airbnb while Tenant A is out of town.

What if Tenant A's landlord is not aware of Tenant A's activities?

Section 28-210.3 of the New York City Administrative Code ("Admin. Code") makes it unlawful "for any person *or entity who owns* or occupies a multiple dwelling or dwelling unit classified for permanent residence purposes to use or occupy, offer *or permit the use or occupancy* or to convert for use or occupancy such multiple dwelling or dwelling unit for other than permanent residence purposes" (emphasis added). The City is using the word "permit" to levy fines and commence litigation against out of possession landlords who had no knowledge of their tenants' activities. For example, in *The City of New York v. NYC Midtown LLC, et al.* the City fined the owner of a three floor walk-up building for a three-day Airbnb occupancy occurring in one of the units behind the landlord's back.

What is at stake for landlords?

Landlords risk thousands of dollars in fines and, in extreme situations, complex litigation commenced by the City. If the City suspects an illegal transient occupancy, they will send a Department of Buildings ("DOB") inspector to the building to investigate and issue Environmental Control Board ("ECB") violations. These violations can result in thousands of dollars in fines and legal fees— and City will not issue just a single violation. To go back to our earlier example, the City operates under the theory that Tenant A's landlord is running an illegal hotel and then not only issues the violation for an illegal transient occupancy, but also several fire safety violations. Hotels have to comply with more stringent fire safety laws than Class-A Multiple Dwellings, so the City will issue violations to Tenant A's landlord for "permitting" a transient occupancy and failing to comply with the fire safety laws related to hotel accommodations/lawful transient occupancies. Tenant A's landlord will receive additional fines for failing to have two means of egress, lack of adequate sprinklers, failure to provide a special fire alarm system for transient occupants, lack of evacuation plans, and more. DOB scrutiny may naturally—and often does—lead to additional violations for any other irregularities existing in the building, even those unrelated to transient occupancies. The fines resulting from these violations can cost landlords tens of thousands of dollars.

In extreme situations, where there are continuous and numerous transient occupancy violations, the City will commence a nuisance abatement action against the landlord. A nuisance abatement action is law suit against the landlord and the building itself in what is called an *in rem* proceeding, which is a legal action against a physical space. In these proceedings, the City alleges that pervasive illegal transient occupants constitutes a threat to public safety, health and welfare. To demonstrate how seriously the City takes this issue, in papers supporting one of their nuisance abatement actions, the City wrote that illegal transient occupancies "adversely impacts the quality of life for the non-transient permanent residents of those [b]uildings who are

lawfully occupying the [b]uildings due to the inhospitable conditions created by transient short-term occupants whose tourist lifestyle is usually not compatible and presents greater risks for permanent residents of a building.” As of now, Courts are relatively deferential to the City’s legal position, with one judge even commenting that illegal transient occupancies presents a situation where “people’s lives are at risk.” As a part of these nuisance abatement actions, the City seeks millions of dollars in damages, permanent injunctions against illegal short-term occupancies in the subject buildings, and court appointed receivers to manage the buildings. These injunctions are especially troublesome because if a tenant, without the landlord’s knowledge, illegally rents her apartment via Airbnb, then the landlord can be held in civil and criminal contempt of court, which can result in additional fines and potentially incarceration. Court appointed receivers can be equally troublesome. Appointment of a receiver is an event of default under many mortgage and loan agreements. Receivers, therefore, place landlords at risk of foreclosure or a costly refinancing.

How can landlords protect themselves?

The City’s enforcement policy puts landlords in the unfortunate and untenable position of prohibiting something that realistically cannot be stopped. There is nothing a landlord can do to stop its tenants from using Airbnb. However, there are measures that landlords can take to establish their diligence in not “permitting” illegal transient occupancies.

These measures include regularly sending agents or employees to buildings to knock on doors and speak with tenants, keeping a detailed and contemporaneous log of all visits to the building by the landlord or her agents, keeping a log book for all visitors in doorman buildings, signing up for services such as subletalert.com that track Airbnb advertisements occurring in specific buildings, and placing clear anti-subleasing provisions in their leases.

Most importantly, however, landlords must contact their tenants as soon as they discover that an illegal occupancy is occurring in the building. Specifically, landlords should serve their tenants with a ten-day notice to cure. This notice informs tenants that their leases will be terminated unless they cease subletting their apartments to illegal transient occupants. If a tenant continues to illegally sublease her apartment, then it is in the landlord’s best interest to immediately terminate the lease and, if necessary, commence an eviction proceeding against the tenant.

In short, illegal transient occupancies present a tremendous legal and financial risk to a vast majority of New York City landlords. Please contact Frank Carone, Anthony Genovesi or Joshua Stricoff at (718) 215-5300 if you wish to seek further guidance on this issue.