

REAL ESTATE

The world is changing, as is the global real estate industry and as time goes on, the industry is subject to evolution and development, such as the recent rise in popularity of Airbnb. To find out more about Airbnb and the issues surrounding it, *Lawyer Monthly* speaks to Michael Pensabene, from Rosenberg & Estis, P.C. Michael joined the firm in August 2000, and is active in all aspects of the firm's practice, including commercial litigation, landlord and tenant litigation, rent regulation, real estate development and construction, assemblages, co-op/condo law, partnership disputes, title issues, foreclosures, workouts, and bankruptcy.

The last year has seen a huge rise in popularity of Airbnb. Can you briefly explain this concept?

There's a difference in what Airbnb was intended to be and what it is actually used for. Put simply, Airbnb allows people to occasionally share their home with lawful borders and make a couple of bucks. What it has actually become is a sub rosa industry that people use to profiteer and, more often than not, illegally. It is not uncommon for people to rent several apartments in the City for the sole purpose of renting them out themselves on Airbnb, while earning multiple times the agreed upon rent, and in some instances the legal regulated rent, for the units. I've heard of people leaving their jobs to make much more money using Airbnb "full-time" with numerous apartments throughout the City, similar to running a non-contiguous hotel. There are also rent-regulated tenants who realize the cash benefits of their below-market rent by charging people to use their apartment at rates similar to a hotel, which is more than the fair-market would otherwise yield.

Why do you think it is so popular?

Airbnb is a big time money maker for a lot of people, and Airbnb cloaking itself as a "social media" website enables the participants to keep these transactions "off the grid." It's a way to make "easy money" in a city with a very high cost of living, where the temptation becomes so strong one has to ask why wouldn't you do it. We've seen cases where people actually need to do it to supplement their income in order to maintain their standard of living in the city. For example, our client had a tenant living in a four bedroom apartment off Central Park who was regularly renting three bedrooms on Airbnb in order to meet her expenses after she lost her business. To this tenant, she would rather keep her Central Park apartment and live with continuous Airbnb guests, rather than move into a less expensive apartment in another neighborhood.

What potential legal problems does it bring?

There are some very serious legal issues involving Airbnb. First and foremost, the frequency with

which Airbnb guests stay in an apartment may be problematic when the occupancy rate rises to a level of becoming a "transient" use analogous to a hotel. A certificate of occupancy for a multifamily building does not permit transient hotel use because additional fire and safety measures are required; and the transient use of an apartment without these additional fire safety measures puts everyone in the building at risk. For this reason, the City has issued fines to building owners who have tenants violating this law by reason of the tenants' rentals on Airbnb. In this way, the tenants reap the benefits of breaking the law, but at the owner's risk, since the owner gets the violation, not the tenant. Moreover, with respect to rent regulated tenancies, the problem is compounded by tenants who are "profiteering" on an apartment by charging in excess of the legal rent for the apartment, in violation of law.

Overall, the Airbnb practice is undermining public policy, in addition to permitting tenants to use their apartments as hotels and profiteer. The city and state governments are deprived of the ability to tax and oversee this transient use of housing, as they do with hotels. Tenants' use of Airbnb to remain in rent-regulated housing that they would otherwise be required to surrender depletes the housing inventory on the market and frustrates policies of rent regulation, all to the detriment of the public at large.

Do you see the need for any changes? If so, please explain.

The New York State Legislature needs to address



Section 4.8(a) of the Multiple Dwelling Law, which permits a tenant to house "lawful borders" in an apartment for less than 30 days, which is a primary tenant defense. That statute has been subject to quite a bit of litigation. The Legislature can also address this problem in Sections 226-b and 235-f of the Real Property Law, concerning a tenant's right to sublet and have permitted occupants in their apartments. With respect to rent-regulated tenancies, the Rent Stabilization Law and Rent Control Law should strictly prohibit short-term rentals which permit rent regulated tenants to participate on Airbnb by charging significantly more per night than the per diem rent.

Is there anything else you would like to add?

Airbnb is not a form of "social media;" it is an industry. People don't access Airbnb to socialize or to make "friends," they access it for only one purpose – to conduct a real estate transaction. In this way, Airbnb acts as a broker more than a social media site, and there should be some accountability or regulation in place, similar to brokers. Unlike brokers, Airbnb is presently permitted to disclaim significant responsibility in connection with the transactions procured through its website. I fear that one day something terrible will happen as a result of these many short-term transactions made through Airbnb, without any procedure in place to safeguard the participants. **LM**



Michael A. Pensabene

Rosenberg & Estis, P.C., 733 Third Avenue, New York NY 10017

Phone: 212-551-8406 | Fax: 212-551-8484

Email: mpensabene@rosenbergestis.com



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