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Airbnb Encounters Legal Barriers in NYC



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One of the hot topics in New York City real estate is the popular website Airbnb.com. For the uninitiated, Airbnb seeks to provide tourists with an alternative to traditional hotels by allowing “hosts” of residential real estate (i.e., owners or tenants in possession) to list their residences for short-term rental. The site contains appealing pitches to both tourists and hosts. Airbnb invites tourists to enjoy “unique travel experiences” by staying in “an apartment for a night, a castle for a week, or a villa for a month,” and to do so “at any price point, in more than 34,000 cities and 190 countries.”¹ For hosts, Airbnb offers the opportunity “to monetize their extra space and showcase it to an audience of millions.”² The site affords hosts control over listing prices, allows them to screen potential guests, provides a platform for payment, and charges hosts only a three percent service fee when a reservation is confirmed.³

The appeal of Airbnb in a tourist haven such as New York City is easy to understand. From the traveler’s perspective, Airbnb provides advantageous pricing. For instance, a search on Airbnb.com for accommodations in New York City for the weekend of Friday, April 15, 2016 through Sunday, April 17, 2016 returned “300+ rentals” at an average price of \$139 per night.⁴ By contrast, a search for New York City hotel rooms for the same dates on kayak.com revealed that even many two-star hotel rooms listed for well over \$200 per night, with prices for better rooms increasing steeply from there.⁵

For a tenant paying the notoriously high rents and enduring the high cost of living typical of New York City, renting some or all of his or her apartment to transient guests can provide welcome financial relief. And for an owner, renting an apartment to short-term guests as opposed to signing leases with tenants for one year or longer has the potential

to drastically increase the asset’s productivity.

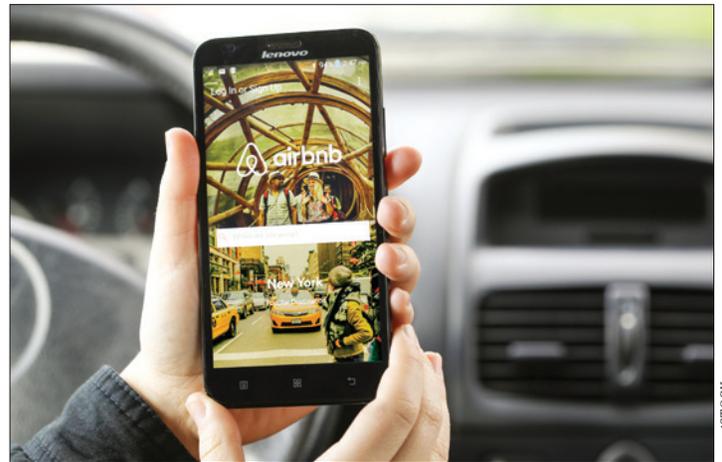
Airbnb, in short, hits an economic “sweet spot” where everyone involved has the potential to financially benefit from short-term lodging transactions. It is no surprise, then, that Airbnb has boomed in New York City. According to an October 2014 report from the Office of the New York State Attorney General (the Attorney General report), short-term rentals on Airbnb in New York City have experienced “explosive growth,” with bookings increasing tenfold between January 2010 and June 2014, and revenue to Airbnb and its hosts nearly doubling every year between 2010 and 2013.⁶ In fact, revenue to New York City Airbnb hosts has

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been estimated at \$420 million in the 12-month period between August 2014 and July 2015, and \$451.4 million in 2015.⁷

Legal Implications

However, while short-term rental transactions via Airbnb provide clear financial benefits for both sides of the transaction, further analysis reveals another inescapable fact: most Airbnb transactions involving New York City



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residential apartments appear to violate the law.

The most significant law implicated by short-term rentals in New York City residential apartments via Airbnb is Multiple Dwelling Law (MDL) §4(8)(a), which defines a “Class A” multiple dwelling (i.e. residential apartment buildings with three or more apartments) under state law. The law provides, in relevant part: A ‘Class A’ multiple dwelling is a multiple dwelling that is occupied for permanent residence purposes.... A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this definition, ‘permanent residence purposes’ shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more and a person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit (emphasis supplied).

Given that a “Class A” multiple dwelling in New York State “shall” only consist of occupancies of 30 days or greater, most Airbnb transactions in New York City—72 percent of bookings between 2010 and June, 2014, according to the Attorney General report⁸—appear to

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have violated the law, insofar as they involved the rental of an entire apartment for less than 30 days in violation of MDL §4(8)(a) and/or a similar provision of the New York City Administrative Code.⁹

As a result, most residential tenants who rent their apartments for fewer than 30 days may be subject to eviction for violating lease prohibitions against the illegal use of their apartments. For instance, one widely available form residential lease (prepared by the Real Estate Board of New York) requires the tenant to, *inter alia*, “obey and comply...with all present and future city, state and federal laws and regulations, which affect the building or the apartment.”¹⁰

MDL §4(8)(a) does provide two limited exceptions to the 30-day rule. First, the statute permits occupancy by natural persons living within the permanent occupant’s household while the permanent occupant remains in occupancy, “such as house guests or lawful boarders, roomers or lodgers.” Note, however, that the permanent occupant must remain in occupancy—which is often not the case with New York City Airbnb transactions. Further, any such guest must be “lawful.” This exception does not override, for example, the provisions of the rent laws prohibiting rent-regulated tenants from profiteering on their tenancies by overcharging subtenants or roommates in excess of the apartment’s legal regulated rent—a not-infrequent source of litigation in New York City’s landlord-tenant courts.

Second, the statute permits “incidental and occasional occupancy” by transient occupants for less than 30 days “when the permanent occupants are temporarily absent for personal reasons such as vacation or medical treatment....” There is, however, a crucial additional requirement: such occupancy is only permitted if “there is no monetary compensation paid to the permanent occupants for such occupancy”—which, of course, would undermine the very reason that most hosts list their apartments on Airbnb.

Landlord’s Consent

Another provision of New York law that most, if not all, Airbnb transactions in New York City may violate is Real Property Law (RPL) §226-b. RPL §226-b provides that a tenant renting a residence pursuant to an existing lease in a dwelling having four or more residential units shall have the right to sublease the residence subject to the landlord’s advance written consent, which consent may not be unreasonably withheld.¹¹ RPL §226-b goes on to prescribe the specific manner by which the tenant must request permission to sublet, and further prescribes deadlines for the landlord to request further information and to either decide on the request or be deemed to have consented thereto.¹² Crucially, any sublet undertaken without complying with the provisions of RPL §226-b “shall constitute a substantial breach of lease or tenancy.”¹³

Given that New York City tenants rarely, if ever, seek consent from their landlords prior to listing their apartments on Airbnb for short-term rental, RPL §226-b provides an additional ground for eviction. (It should also be noted that RPL §226-b permits a landlord to reasonably deny consent to a sublease. It seems apparent that in the unlikely event a landlord were to receive a request to sublet via short-term Airbnb rentals, the landlord would be well within its rights to deny consent based on, *inter alia*, the many ways that the typical Airbnb rental violates New York law, as described herein).

Tenants of New York City’s more than one million rent-stabilized apartments face an additional legal hurdle: short-term rentals at market rates via Airbnb may also violate various provisions of the Rent Stabilization Code (RSC). For instance, RSC §2525.6(b) provides that the rent charged by a rent-stabilized tenant to a subtenant “shall not exceed the legal regulated rent plus no more than a ten percent surcharge payable to the tenant if the housing accommodation is sublet fully furnished.” Additionally, RSC §2525.7 prohibits a rent-stabilized tenant from charging a roommate in excess of that roommate’s “proportionate share of the legal regulated rent charged to and paid by the tenant.” Rent-stabilized tenants, in short, are prohibited from utilizing scarce rent-regulated housing to profiteer on their tenancies and collecting the arbitrage profit between the regulated and market rents that their landlords are denied under the rent laws—which, again, is often the very purpose of listing apartments on Airbnb (e.g. Airbnb’s exhortation for tenants to “monetize their extra space”).

Fire Code

Yet another hurdle to Airbnb’s legal operation in New York City residential apartments is the fact that residential apartment buildings are usually not constructed to the heightened standards that the New York City Fire Code requires with respect to hotels. While residential apartment buildings are constructed to house non-transient permanent residents who will presumably acquire a familiarity with their surroundings that will allow them to vacate quickly in the event of a fire or other emergency, hotels, by nature, are populated by transient guests without such familiarity.

Thus, the fire code requires that hotels be constructed with certain additional safeguards not present in residential apartment buildings, such as, for example, photoluminescent exit path markings for exits and stairwells, the posting on every hotel room entrance door of diagrams showing the route to two stairwells or other means of egress, and the provision of portable fire extinguishers.¹⁴ The use of residential apartments without these required safeguards to house transient guests is not only contrary to the fire code, but, based on the apparent widespread usage of Airbnb in New York City,

could present a public health hazard and a potential danger to FDNY personnel.

Conclusion

It is clear that, unless radical change occurs, the short-term rental of New York City apartments via Airbnb may continue to result in the violation of both the law and most residential leases, potentially subjecting tenants to eviction. While there are several proposed and pending bills which would further restrict and/or punish Airbnb usage, the fact remains that Airbnb is a well-capitalized company—valued at approximately \$25.5 billion—and has retained top lobbying firms to represent its interests before the New York state and city governments.¹⁵ Whether the law will liberalize to permit short-term Airbnb rentals in New York City residential apartments (over the vehement objections of the hotel industry, hotel trade unions and many elected officials) or further discourage Airbnb usage in New York City is the subject of intense debate and, at this point, is anyone’s guess.

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1. <https://www.airbnb.com/about/about-us> (last visited March 25, 2016).

2. *Id.*

3. <https://www.airbnb.com/host> (last visited March 25, 2016).

4. <https://www.airbnb.com/s/New-York-NY-United-States> (last visited March 25, 2016).

5. <https://www.kayak.com/hotels/New-York,NY-c15830/2016-04-15/2016-04-17> (last visited March 25, 2016).

6. New York State Office of the Attorney General, *Airbnb in the City* (October 2014), available at <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf> (the “Attorney General report”), at 7.

7. Rich Bockmann, “Airbnb is not Taking it Lying Down,” *The Real Deal*, March 2016, at 52.

8. Attorney General report, at 8.

9. See N.Y.C. Admin. Code §27-2004(a)(8)(a).

10. Available at http://www.the1onteamnyc.com/uploads/1/4/0/3/14033950/rebny_non_stab_lease.pdf (last visited March 25, 2016); see Article 10(A).

11. Real Property Law §226-b(2)(a).

12. *Id.*, §226-b(2)(b), (c).

13. *Id.*, §226-b(5).

14. See New York City Fire Code, §§ 405.5, 505.4.4 and 906.1.

15. Bockmann, “Airbnb is not Taking it Lying Down,” at 51.