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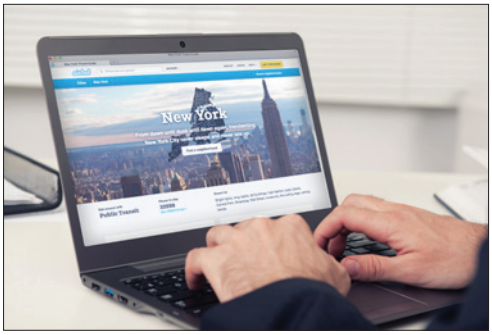
LANDLORD-TENANT

Airbnb Faces Strong Headwinds in N.Y. Courts

By **Warren A. Estis**
And **Alexander Lycoyannis**

In our last Landlord-Tenant column ("Airbnb Encounters Legal Barriers in NYC," April l 6, 2016), we discussed some of the statutes and regulations that posed legal barriers to Airbnb's operations in New York City. This column will explore some recent court decisions concerning the short-term rental of residential apartments via Airbnb.

Given the relatively recent growth and popularity of Airbnb, there are few reported decisions on the topic by New York courts. The decisions that do exist, where they involve rent-regulated tenants, build on prior case law prohibiting tenants from profiteering on their below-market tenancies and renting their apartments on a short-term basis. While there is little dispute that tenants engaging in short-term rentals via Airbnb are violating the law and their leases, the main issue emerging in the case law is whether, based on the circumstances of each case, the tenant should be afforded an opportunity to cure the default.



'Brookford'

Judge Carol R. Edmead's decision in *Brookford v. Penraat*[1] contains the most comprehensive analysis of the legal issues implicated by Airbnb, and is a must-read for any practitioner unfamiliar with the topic.

In *Brookford*, the defendant was the rent-controlled tenant of a four-bedroom duplex apartment in a residential building situated on Central Park West. The legal rent for the apartment was $4,477.47, with a small exemption owing to the tenant being a senior citizen. The tenant lived in one bedroom in the apartment, but rented three of the apartment's four bedrooms on a short-term basis via Airbnb.

The tenant, in virtually all respects, ran her operation as a hotel. She advertised the "Lovely Small Bedroom in Huge Apartment" on Airbnb for $75 per night or $450 per week; the "Sunny Bedroom, Central Park View" was available for $100 per night or $600 per week; and the "Gorgeous Master Bed/Bath on Park" was available for $150 per night or $1,000 per week. Based on the rates charged by the tenant, if the three bedrooms on offer were fully rented on a weekly basis, the tenant would have received yearly income of $106,599.96, and, if fully rented on a nightly basis, $118,300—both sums being more than double the legal rent paid by the tenant. Over the two years prior to the landlord's commencement of suit, the tenant booked 135 short-term rentals of her apartment via Airbnb, which rentals lasted from three to 21 days.

Moreover, rooms could be reserved and paid for via Airbnb's website, with a confirmation number provided upon reservation. Room deposits were required, and the tenant maintained a formal cancellation policy. Check-in time was 2 p.m., and check-out time was 1 a.m. The tenant provided many of the accoutrements of a typical hotel room within the apartment, such as fresh linens and towels, toiletries, a hair dryer, television, and wireless Internet. The tenant also offered many

WARREN A. ESTIS *is a founding member of Rosenberg & Estis.* ALEXANDER LYCOYANNIS *is a member of the firm.*

other features commonly found in New York City hotels, such as luggage dollies, a map of New York City, and information on discounted Broadway tickets.

The landlord (represented by this law firm), without first serving a notice to cure, served a 30-day notice of termination upon the tenant on the ground that, by her conduct, she was violating a substantial obligation of her rent-controlled tenancy. The landlord thereafter commenced an action in Supreme Court, New York County seeking, inter alia, (1) a declaration that the tenant's use of her apartment as a hotel room violated, inter alia, the Rent Control Law and associated regulations, Multiple Dwelling Law § 4(8)(a) (discussed in our last column), the New York City Building Code and Housing Maintenance Code, and/or the building's certificate of occupancy (COO), and (2) to permanently enjoin the tenant from utilizing her apartment as a hotel room. In connection therewith, the landlord also sought a preliminary injunction and temporary restraining order enjoining such conduct during the pendency of the action.

Justice Edmead, in a decision and order dated Dec. 19, 2014, granted the landlord's motion on an interim basis and set the matter down "for a hearing on the issue of whether a preliminary injunction should issue."[2] The court based its decision "on the strength of a showing of a likelihood of success of the merits" by the landlord.[3]

Citing prior rulings prohibiting (1) the use of residential apartments for short-term rental and (2) rent-regulated tenants from profiteering on their below-market tenancies,[4] the court held, inter alia, that "plaintiff has sufficiently demonstrated, at this juncture, that defendant's 135 rentals to transients for the past year and a half for more than the legal regulated rent, constitutes an incurable violation of the Rent Control Law."[5] Noting that the tenant "advertises to tourists and other visitors to book rooms in her apartment, a Class A dwelling unit, for stays of less than 30 days" in violation of MDL §4(8)(a), and "provides all of the items commonly provided by a typical hotel, and other useful amenities to facilitate a visitor or tourist's stay in New York City" the court found that "[t]he record supports [the landlord's] claims that [the tenant's] rentals are in direct violation of the COO and are unsafe inasmuch as they are unaccompanied by any of the fire and safety protections applicable to short-term rentals of less than 30 days."[6] The court further found that the tenant was illegally profiteering, given that her own records "indicate that she has been profiteering from a rent-controlled apartment partially subsidized by another government program[,] SCRIE [Senior Citizen Rent Increase Exemption]."[7]

> While there is little dispute that tenants engaging in short-term rentals via Airbnb are violating the law and their leases, the main issue emerging in the case law is whether, based on the circumstances of each case, the tenant should be afforded an opportunity to cure the default.

Furthermore, the court held that the landlord was not required to serve a notice to cure prior to terminating the tenancy. While a notice to cure is generally required prior to commencing an eviction proceeding against a rent-regulated tenant, the court noted two exceptions to that rule: (1) where the tenant has willfully violated a substantial obligation of the tenancy and inflicted serious and substantial injury upon the owner within a three-month period immediately prior to the commencement of the proceeding, and (2) where a rent overcharge is so egregious that it rises to the level of "commercial exploitation."[8] The court held that the tenant's illegal hotel operation had inflicted "serious and substantial injury" upon the landlord and, further, that it rose to the level of "commercial exploitation" of the tenant's rent-controlled apartment, which factors obviated the need for the landlord to serve a notice to cure.[9]

In finding that the tenant's conduct constituted "commercial exploitation" of a regulated tenancy, the court contrasted the facts in *Penraat* with the facts in *156-158 Second Ave. v. Delfino*,[10] where two of the apartment's three bedrooms were rented for a proportionate share of the rent, any alleged overcharge did not exceed 17.33 percent and was thus "small," the notice of termination did not allege that the tenant "profiteered or received a lucrative windfall," the amount collected from a single individual was "well shy of the total legal regulated rent for the apartment," and the tenant did not "commercially exploit his apartment by renting rooms as a hotel or bed and breakfast."[11]

By contrast, in *Penraat*, "defendant's guests are transient, the plaintiff alleges that defendant received a

lucrative windfall, the amount defendant collected was in excess of the legal regulated rent, and defendant exploited her apartment on a 'bed and breakfast' Internet website," warranting the conclusion that no notice to cure was necessary.[12]

Practitioners should also take note of two recent decisions authored by Judge Geoffrey Wright—*IP Mortg. Borrower, v. Pesenti*[13] and *IP Mortg. Borrower v. Sharif,*[14] in which the court enjoined tenants from renting their apartments via Airbnb.

'CLAC America II'

The unreported decision in *CLAC America II, Inc. v. Sky Worldwide*,[15] in which this firm represented the landlord, provides another legal basis by which a landlord has successfully enjoined a tenant's Airbnb usage.

CLAC America II involved the net lease of an entire residential building to a corporate tenant, which, in turn, utilized the building for short-term rentals via multiple websites, including Airbnb, in violation of the lease. The landlord terminated the tenancy and commenced a holdover proceeding, and the case went to trial before Judge James E. d'Auguste.

While the decision was pending, the landlord, inter alia, moved for an injunction enjoining the tenant from operating a hotel at the building pursuant to Civil Court Act §110(c). That statute provides, in relevant part:

> Regardless of the relief originally sought by a party the court may recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest… The court may retain continuing jurisdiction of any action or proceeding relating to a building until all violations of law have been removed.

The court granted the landlord's motion and ordered that the tenant "is enjoined from advertising or renting apartments/units in the subject premises to tourists or other visitors for stays of less than 30 days" and "operating an illegal hotel in violation of law."[16] Relying on Justice Edmead's decision in *Penraat*, supra, Judge d'Auguste noted that apartments in the subject residential apartment building were being listed for $449 per night and that the city of New York had issued five violations relating to the tenant's illegal hotel operation. The court concluded that such illegal use "not only violate[s] the law, but as a practical matter constitute[s] a threat to public safety."[17]

> The landlord's victory in any given Airbnb case should not be considered a foregone conclusion, especially where the tenant may have been entitled to, but was not afforded, an opportunity to cure the default.

'Ikezi'

The decision of Judge Jack Stoller in *42nd and 10th Associates v. Ikezi*[18] was the first reported case awarding a final judgment of possession and warrant of eviction based on a tenant's short-term rentals via Airbnb.

Ikezi involved a rent-stabilized apartment with a monthly preferential rent of $6,670 and a legal monthly rent of over $9,000. The evidence adduced at trial established that the apartment was listed for short-term rental on Airbnb for $649 per night. Thus, if the apartment were rented every night at that price, the tenant would fetch over $19,000 per month in income—well in excess of both the actual and preferential rents. After trial, the Civil Court found that the tenant had profiteered on his rent-stabilized apartment in violation of the Rent Stabilization Code, and, further, that such violation was incurable, "as it undermines a purpose of the Rent Stabilization Code."[19]

When called as a witness on the landlord's case, the tenant—to put it kindly—did not acquit himself well before the court:

> When questioned on Petitioner's case whether Respondent charged anyone money to stay in the subject premises, Respondent first testified that he could not recall if he ever charged anyone money to stay in the subject premises for a tenancy, and then testified that he does not know if he ever charged anyone money to stay in the subject premises. Given that Respondent was being sued for eviction, that Respondent testified as such on January 21, 2015, and that Respondent's tenancy commenced on October 10, 2014, three months and eleven days before his tenancy, Respondent's inability to remember or know if he had charged anyone to sleep in the subject premises defies common sense. Such incredible testimony was of a piece with other testimony Respondent offered, such as his response to a question about how many nights he has slept in the

> subject premises with the answer that he does not keep a log of where he sleeps, Respondent's inability to determine whether a photograph of a comforter on a bed in the ad was a comforter that he owned, Respondent's lack of knowledge as to other addresses that might be his wife's address, and Respondent's testimony that he does not have an email address at the company that he is the president of. If Respondent was actually profiteering by renting out the subject premises as a hotel room, wanted to avoid testifying as such, and was trying to be clever about technically avoiding committing perjury, it is hard to imagine how Respondent would testify differently.[20]

The Civil Court, in issuing a judgment of possession and warrant of eviction, thus held:

> The Court finds that Respondent engaged in profiteering, either by renting out the subject premises himself on Airbnb or by causing his employees to rent out the subject premises on Airbnb, that respondent's relentlessly evasive answers on his direct testimony on Petitioner's case constituted an attempt to withhold this information, and that Respondent did not present a case because there was no case for Respondent to present.[21]

The Appellate Term, First Department affirmed for the reasons stated by Judge Stoller.[22]

'Foglino'

Notwithstanding the substantial weight of authority in favor of landlords on claims relating to Airbnb, the landlord's victory on any such claim cannot be presumed.

For example, in *13775 Realty v. Foglino*,[23] the Appellate Term, First Department affirmed the Civil Court's denial of the landlord's summary judgment motion on its possessory claim based, in part, on allegations that the tenant listed her rent-stabilized apartment on Airbnb and engaged in rent profiteering. The mere fact that the tenant may have listed her apartment on Airbnb was not enough; whether the nature and extent of such listings rose to the level of "commercial exploitation," thus rendering the default incurable (as discussed in *Penraat*, supra), remained unresolved on the summary judgment record:

> Landlord's submission below, consisting largely of hearsay evidence, was insufficient to satisfy its initial burden of establishing, prima facie, that tenant engaged in commercial exploitation or rent profiteering. Among the issues that remain unresolved on the prediscovery record now before us are the number of times tenant sublet the premises through Airbnb or otherwise and the amount of any overcharges. Given landlord's failure to meet its initial burden of demonstrating entitlement to judgment as a matter of law, summary judgment was properly denied, irrespective of the sufficiency of tenant's opposing papers.[24]

Conclusion

Based on the current state of both statutory and decisional law, landlords asserting claims against tenants based on Airbnb usage are on very favorable legal ground. Short-term rentals in residential apartments are clearly illegal under any number of statutes and regulations, and well-settled case law prohibits rent-regulated tenants from profiteering on their protected tenancies. The landlord's victory in any given Airbnb case, however, should not be considered a foregone conclusion, especially where—based on the current state of the case law—the tenant may have been entitled to, but was not afforded, an opportunity to cure the default.

1. 47 Misc.3d 723 (Sup Ct New York County 2014).
2. 47 Misc.3d at 746. It should be noted that the case settled prior to a final ruling on the preliminary injunction motion.
3. Id.
4. See *220 West 93rd Street v. Stavrolakes*, 2006 WL 4758817 (Sup Ct New York County), affd 33 AD3d 491 (1st Dept. 2006), lv den 8 NY3d 813 (2007); *151-155 Atl. Ave., Inc. v. Pendry*, 308 AD2d 543 (2d Dept. 2003); *City of New York v. Smart Apts.,* 39 Misc.3d 221 (Sup Ct New York County 2013); *Peck v. Lodge*, 2003 NY Slip Op 30230(U) (Sup Ct New York County).
5. 47 Misc.3d at 736.
6. Id. at 735-36.
7. Id. at 736.
8. Id. at 743-44.
9. Id.
10. 18 Misc.3d 1144(A), 2008 NY Slip Op 50440(U) (Civ Ct New York County).
11. 47 Misc.3d at 744.
12. Id.
13. 2015 WL 5084872 (Sup Ct New York County).
14. 2015 WL 6566605 (Sup Ct New York County).
15. Civil Court, New York County, Index No. L&T 080695/14 (decided Jan. 22, 2015).
16. Id.
17. Id.
18. 46 Misc.3d 1219(A), 2015 NY Slip Op 50124(U) (Civ Ct New York County).
19. Id. at *6.
20. Id. at *5.
21. Id. at *6.
22. 50 Misc. 3d 130(A), 2015 NY Slip Op 51915(U) (App Term 1st Dept).
23. 51 Misc.3d 126(A), 2016 NY Slip Op 50335(U) (App Term 1st Dept.).
24. Id. (citations omitted).