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THE FUTURE OF AIRBNB IN NEW YORK

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One of the most controversial and popular topics in real estate today involves Airbnb, the online home rental service, and the concept of transient rentals. In New York City, Airbnb's largest market in the United States, this issue has come to the forefront when on October 21, 2016, New York Governor Andrew Cuomo took a firm stance on this issue signing into law one of the most stringent measures in the fight against Airbnb. Proponents of the Bill have argued that Airbnb has intensified the widespread issue of affordable housing in New York, hurt the hotel industry and has resulted in safety concerns for residents while opponents have argued that the service has served as both an innovative solution for tourists who don't want to pay the often hefty price of a hotel stay, and for homeowners (or renters) who are looking to make some extra cash by renting out their home, room, or couch (or even a closet to store someone's luggage on an hourly basis).

The fight against Airbnb in New York has been ongoing for quite some time, and the behavior which will now be fined by the new Bill has actually been illegal since 2010. In particular, the New York State Multiple Dwelling Law prohibits the rental of an apartment in a "Class A" multiple dwelling for less than 30 days, unless a permanent resident of the dwelling is present during the rental period. Likewise, New York City Administrative Code, §28-118.3.2 prohibits changes to the use or occupancy of a building, and requires that short-term use must be permitted by the building's certificate of

occupancy. The Bill will now additionally enforce fines on the individuals who are renting the apartments of up to \$7,500 for advertising such renting.

In a 2014 report issued by the Office of New York State Attorney General Eric Schneiderman, "Airbnb in the City", most of the short-term rentals booked in New York during January 1, 2010 through June 2, 2014 were found to violate state and local laws prohibiting certain short-term rentals. Such laws are designed to protect residents' safety. For example, the requirements imposed by the New York City Fire Code are more stringent in hotels and buildings designated for transient use as compared to those applicable to permanent residences, where familiarity with the property can result in better handling of any risks.

In addition to legislators' safety concerns, proponents of the Bill also argued that in New York City there is a substantial financial basis to support the Bill. New York City places a 5.875% occupancy tax on hotel rooms and other short term room rentals. "Airbnb in the City" estimates that from January 1, 2010 through June 2, 2014, New York City missed out on approximately \$33 million dollars in tax revenue resulting from unpaid hotel room occupancy taxes associated with Airbnb transactions. It should be noted that the Airbnb website includes information for potential hosts in New York City, with links to navigate zoning and tax laws which may be applicable. New York City's Department of Finance has stated that Airbnb is

not itself required to collect such hotel room occupancy tax because, Airbnb “is neither a hotel operator nor a room remarketer. Rather the Company is an Internet platform service provider through which the hotels using its services have the ability to display to a Traveler the available accommodations and to communicate with a Traveler in order to reach agreement on a rental transaction.” Therefore, the burden is on the individual hosts to properly remit any taxes due.

While the passing of the Bill and the resultant steep fines will likely lead many residents of New York to think twice before listing their unit as a short-stay rental on Airbnb, prior to the Bill passing, hosts in New York City already risked being sued by their landlords and having their tenancy terminated as the result of illegal Airbnb activities. In *42nd & 10th Assoc. LLC v. Ikezi*, the first case of its kind, the Court found that “using a residential apartment as a hotel room and profiteering off of it is ground for eviction and it is incurable, as it undermines the purpose of the Rent Stabilization Code.”

This issue is even more pertinent in relation to rent stabilized apartments. In *335-7 LLC v. Tracy Steele*, the respondent had rented out rooms in her rent stabilized apartment on Airbnb. She had claimed that these individuals were “temporary roommates.” The court stated that “she was completely oblivious to the problems that her hoteling was causing the landlord and her neighbors the most serious of which is the fact she gave the front security code to nearly a hundred strangers who the landlord never knew. Moreover, Respondent’s utter disregard for the safety of her neighbors is further evidenced when she continued to rent out the apartment even after being served with the instant Notice of Termination.” The court referenced Rent Stabilization Code §2524.3(h) which allows a “landlord to terminate a lease and tenancy if the tenant has overcharged a subtenant more than the legal regulated rent plus no more than ten percent if the apartment is fully furnished.” Further the Court referenced the findings in *Brookford, LLC v.*

Penraat that a hotel guest is an individual who “stays [for] less than 30 days.”

Co-op boards and management companies are also cracking down on the use of Airbnb by shareholders and renters alike. Many rental buildings are including provisions in their leases with tenants or riders to their leases which expressly prohibit the use of sites such as Airbnb. For example, in an effort to prevent its tenants from using Airbnb, a large owner of residential real estate properties in New York City advised its managers in a presentation to create an account and search the Airbnb listings and examine same for fixtures or flooring that would indicate that it was one of their buildings. In addition, management companies have also issued requests to immediately report any knowledge of building units advertised on Airbnb.

Within hours of when the Bill was passed, Airbnb filed a federal lawsuit in the Federal District Court of the Southern District of New York against Eric Schneiderman, Mayor Bill de Blasio and the City of New York. In its lawsuit, Airbnb alleges that the Bill causes “irreparable harm” and is a violation of the company’s constitutional rights to free speech and due process. Airbnb also alleges a violation of its protection under the Communications Decency Act which states that a “websites cannot be held accountable for content published by their users. State Senator Liz Krueger states that lawmakers had considered the Communications Decency Act when making the law and that the Bill is not a violation since it is the individual that is fined and held responsible and not the company. Airbnb argues that “in order to be assured of avoiding liability, including potential criminal prosecution, Airbnb would be required to screen and review every listing a host seeks to publish.”

The outcome of Airbnb’s lawsuit and the response by the City of New York will prove critical to determining the future of Airbnb in New York. No matter the result, this promises to give rise to interesting developments in New York real estate law over the next few months. ◆

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