

# SHORT-TERM RENTING

## In the Sharing Economy

From **Airbnb** to Homeaway

From Upstate to Downstate

From Landlords to Tenants

From Hosts to Guests

How the Law is Struggling to Keep Up  
with Short-Term Residence Sharing

*Summer 2017*

Itkowitz PLLC

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# Short-Term Renting in the Sharing Economy

*From Airbnb to HomeAway*

*From Upstate to Downstate*

*From Tall Buildings to Single Family Homes*

*From Landlords to Tenants*

*From Home Owners' Associations to Zoning Boards*

*From Hosts to Guests*

**How the Law is Struggling to Keep Up with Short-Term Residence Sharing**

**A Presentation Prepared for the New York State Bar Association  
Real Property Section, Summer Meeting 2017**

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## I. INTRODUCTION

This booklet is about short-term renting of residential property in New York State, courtesy of the sharing economy. I would say that the booklet is about “Airbnb”, but it’s not fair to either pick exclusively on Airbnb or to pretend that it is the only player in a rapidly growing space. Airbnb is big in New York City, but HomeAway, which owns VRBO, is big upstate. And, frankly, I have had “Airbnb cases”, as they have come to be called, that had nothing to do with Airbnb because the short-term gigs were booked on Craig’s List or some other platform. Below is a chart my paralegal is in the process of making of all the home sharing sites and how we can subpoena them in a litigation. This is NOT a complete list. When the chart was finished, there were 58 companies listed thereon! I include only the first 20 to show you an example of how many sits there are.

### ADVERTISING PLATFORMS LIKE AIRBNB

Subsidiary Company	Parent Company	Entity Status	Location	How to Subpoena
HomeAway	Expedia, Inc.	Active	Headquarters - Texas (877) 228-3145	Registered Agent: National Registered Agents Inc. 111 Eighth Avenue, New York, New York 10011
VRBO	HomeAway		Headquarters - Texas (877) 228-3145	Only does arbitration, not in court - information is the same as HomeAway
VacationRentals.com	HomeAway			
Homelidays	HomeAway		France	
OwnersDirect	HomeAway		United Kingdom	
Abritel HomeAway	HomeAway		France	
FeWo-direkt	HomeAway		Deutschland	
Toprural	HomeAway		Spain	
bookabach	HomeAway		New Zealand	
stayz	HomeAway			
travelmob	HomeAway			
Alugue Temporada	HomeAway		Brasil	
craigslist.com	craigslist	Active	Delaware	No business entities were found for craigslist.com in NYS. legal@craigslist.org - Fax: 415-504-6394
Zumper	Zumper, Inc.	Active	Zumper, Inc. c/o General Counsel 49 Geary Street, Suite 350, San Francisco CA 94108	No Registered Agent in NYS
PadMapper	Zumper	Active	San Francisco, CA	No Registered Agent in NYS
			Georgia - RentPath, LLC Attn: General Counsel's Office - Privacy Policy Questions 950 E. Paces Ferry Road NE, Suite 2600, Atlanta,	Registered Agent: C T CORPORATION SYSTEM, 111 EIGHTH AVENUE

The booklet is weighted towards the New York City multi-family space, but with a healthy dose of upstate New York law concerning zoning and homeowner associations.

I represent BOTH landlords and tenants, both commercial and residential, in New York City. This booklet, as with all my publications, is as useful for tenant's counsel as it is for landlord's counsel. I think that's worth saying. Both because I staunchly resist choosing a "side", and because I think a lot of L&T CLE is skewed for landlords. Near the end of the booklet, I cover the short-term *guest's* legal perspective. When does a "guest" legally morph into a Rent Stabilized tenant with rights? Oh yeah this is going to get crazy!

I kept my personal opinions on short-term renting and the politics surrounding it out of the booklet. Who cares what I think? The reality is that home sharing is not going away. The law is now struggling to catch up with this new paradigm. And we, as real estate lawyers, must struggle to make sense of where the evolving law on short-term rentals is taking us.

There is a whole lot of law here, so let's get down to business.

## II. NEW YORK CITY – THE SHORT TERM LEASING LAW – WHAT EXACTLY IS PROHIBITED?

There still seems to be a great deal of confusion surrounding the prohibition in New York City against short-term renting. Let us demystify what can and cannot be done, by starting with the relevant statutes – the New York State Multiple Dwelling Law (“MDL”) and the New York City Housing Maintenance Code (“HMC”).

### A. The Statutes

#### 1. The Multiple Dwelling Law

The statutory prohibition against short-term occupancy is found in the NYS Multiple Dwelling Law, which applies to buildings with three or more units. Thus, we have already learned one important thing – the law that prohibits short-term leasing does NOT apply to single family homes or two-family homes. Moreover, because the prohibition against short-term leasing is embodied in the Multiple Dwelling Law, it does NOT apply to Lofts, “interim multiple dwellings”. Aurora Associates, LLC v. Mark Hennen and Piano Magic Company, No. 154644 slip op. (Sup. Ct. N.Y. County 2017).

MDL § 4(8)(a), the relevant statute, states:

A “class A” multiple dwelling is a multiple dwelling [3 units] 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. The following uses of a dwelling unit by the permanent occupants thereof shall not be deemed to be inconsistent with the occupancy of such dwelling unit for permanent residence purposes:

**(1)(A) occupancy of such dwelling unit for fewer than thirty consecutive days by other natural persons *living within the***

***household of the permanent occupant such as house guests or lawful boarders, roomers or lodgers; or (B) incidental and occasional occupancy of such dwelling unit for fewer than thirty consecutive days by other natural persons when the permanent occupants are temporarily absent for personal reasons such as vacation or medical treatment, provided that there is no monetary compensation paid to the permanent occupants for such occupancy.***

[Emphasis supplied.]

Multiple Dwelling Law § 4 (7) & (8)(a) prohibit people from dwelling in buildings with three or more units for less than thirty consecutive days. But there are two exceptions:

- Exception One – A tenant may have a guest for less than thirty consecutive days if the guest does NOT pay tenant. For example, if tenant is on vacation for a week and tenant’s cousin Sophie stays in the apartment and does not take any money for the favor, then there is no violation of the short-term leasing law.
- Exception Two – Tenant may have a guest for less than thirty days and get paid for it IF tenant is at home while the guest is with tenant. This would be the classic bed-and-breakfast gig where a tenant lives with the guest and gives them a bagel in the morning and points out the sights in the neighborhood. The exact language of MDL 4(8)(a)(1)(a) is this – the guest has to be, “***living within the household of the permanent occupant such as house guests or lawful boarders, roomers or lodgers.***”

Next, we need to understand what the statute means by “*lawful boarders, roomers or lodgers*”. MDL § 4(5) defines “***Lawful boarders, roomers or lodgers***” as “***a person living within the household who pays a consideration for such residence and does not occupy such space within the household as an incident of employment therein.***” That definition still leaves us with some questions, for example: How many lawful boarders, roomers or lodgers can you have and still be ok under MDL § 4(8)(a)? And what does “living within a household” mean? For these answers we need to turn to the New York City Housing Maintenance Code (“HMC”) and the administrative decisions interpreting it.



## 2. **The Housing Maintenance Code**

The HMC applies to all dwellings.<sup>1</sup> Under HMC § 27-2004(14), an “*Apartment shall mean one or more living rooms, arranged to be occupied as a unit separate from all other rooms within a dwelling, with lawful sanitary facilities and a lawful kitchen or kitchenette for the exclusive use of the family residing in such unit.*” Under HMC § 27-2004(4), a “*family*” is:

- (a) A single person occupying a dwelling unit and maintaining a common household with not more than two boarders, roomers or lodgers; or
- (b) Two or more persons related by blood, adoption, legal guardianship, marriage or domestic partnership; occupying a dwelling unit and maintaining a common household with not more than two boarders, roomers or lodgers; or
- (c) Not more than three unrelated persons occupying a dwelling unit and maintaining a common household; or....

Moreover, under HMC § 27-2078, “***a family may rent one or more rooms in an apartment to not more than two boarders, roomers or lodgers, ... Where a tenant rents any part of an apartment in a multiple dwelling to more than two boarders, roomers or lodgers, such rental shall constitute a use of the apartment for single room occupancy and such rental in an apartment of a converted dwelling shall constitute an unlawful use as a rooming unit.***”

Let us next look at two examples of how these laws play out.

In NYC v. Carrey, ECB Appeal Nos. 1300602 & 1300736 (2013), the New York City Environmental Control Board (“ECB”) held that in an apartment with two roommates, when one roommate went away and rented his room to two (2) tourists for less than thirty days, that this constituted the guests, “*living within the household of the permanent occupant*”. This works in light of the above statutes. The roommates were a “family” according to the HMC (not more than three unrelated persons occupying a dwelling unit and maintaining a common household) with not more than two lodgers.

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<sup>1</sup> N.Y. ADC. LAW § 27-2003.

*But see* NYC v. 488 West 57<sup>th</sup> Associates, ECB Appeal No. 1400043, (2014), where, in an apartment with two roommates, they rented parts of the apartment simultaneously to four (4) tourists for less than thirty days. ECB held, that this did NOT constitute, “*living within the household of the permanent occupant*”. Four boarders were two too many and, thus, the apartment was being improperly utilized as an unlawful rooming unit.

## **B. The Bottom Line – What You Can and Cannot Do in New York City**

Therefore, it is only permissible for not more than two guests to stay within the household of a permanent occupant of a multiple dwelling for less than 30 days under two circumstances:

- (1) If the guest is (or two guests are) “living within the household of the permanent occupant”, *i.e.* the tenant is home.
- (2) If the permanent occupant is temporarily away and the guest does NOT pay.

## **C. NYC Rent Stabilized Tenants Have Further Prohibitions Against Short-Term Leasing**

Rent Stabilized tenants experience further restrictions on short term leasing.

When an apartment is Rent Stabilized, using it as a hotel room and profiteering off it is an incurable ground for eviction, as it undermines a purpose of the Rent Stabilization Code. In, the Appellate Term agreed that:

The integrity of the rent stabilization scheme is obviously undermined if tenants, who themselves are the beneficiaries of regulated rentals, are free to sublease their apartments at market levels and thereby collect the profits which are denied the main landlord.

Furthermore, in Bpark v. Durena, N.Y.L.J. May 6, 2015,p. 8 No.100145/2014, (Civ. Ct., Kings County 2015). Judge Lau held that the tenant had "engaged in profiteering by renting out the apartment or allowing his children to rent out the apartment, to a series of short-term transient tenants for commercial purposes on Airbnb." The court explained that, "[s]uch brazen and commercial exploitation of a Rent Stabilized apartment significantly undermines the purpose and integrity of the Rent Stabilization Law and Code and is therefore incurable."

A difficulty arises, however, over what is “profiteering”?

In 13775 v. Foglino, No. 50335(U), slip op. (N.Y.Sup.App.Term 1st Dept. 2016), the Appellate Term held, that an issue of what constituted profiteering should:

**... be decided at a plenary trial, and not on summary judgment.**

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 pre-discovery record now before us are the number of times tenant sublet the premises through Airbnb or otherwise and the amount of any overcharges.

[Emphasis supplied.]

In 335-7 LLC v. Steele, 993 N.Y.S.2d 646 (N.Y.Sup.App.Term 1st Dept. 2014), the Appellate Term held that the issue of what constituted profiteering should:

...be decided at a plenary trial, and not on summary judgment. The present record raises but does not resolve several mixed questions of law and fact, including whether the series of short-term occupants allowed periodically by tenant to stay in the apartment between March 2010 and December 2010 were roommates or, instead, subtenants (*see and compare BLF Realty Holding Corp.*, 299 A.D.2d 87, 94–95 [2002], *lv dismissed* 100 N.Y.2d 535 [2003]; *see also First Hudson Capital, LLC v. Seaborn*, 54 AD3d 251 [2008], *appeal dismissed* 11 NY3d 894 [2008] ) and, if subtenants, whether the claimed overcharges were so substantial and pervasive as to constitute incurable rent profiteering (*see Ginezra Assocs. LLC v. Ifantopoulous*, 70 AD3d 427, 430 [2010]; *see also Cambridge Dev., LLC v. Staysna*, 68 AD3d 614 [2009]). This latter issue hinges on factual matters relating to the extent, chronology and duration of the overcharges, matters best adjudicated on a more complete record.

After *Steele* was remanded and tried, the court ruled for landlord. Tenant appealed and lost. At trial, landlord showed that tenant: (1) listed the apartment on the Airbnb website at a nightly

rate starting at \$215 plus other charges; (2) provided linens, towels, wifi, TV, and housekeeping service; (3) had rented the apartment at least 120 nights in a 14-month period, with groups as large as seven adults staying up to 10 days and paying \$375 per night; and (4) had reported Airbnb rental income on tax returns for 2009 and 2010 while deducting apartment expenses against that income. The trial court found that tenant's conduct constituted subletting, profiteering, and commercialization of the premises. This constituted an incurable violation of the Rent Stabilization Law. 335-7 LLC v. Steele, 993 N.Y.S.2d 646 (N.Y. Supp. App. Term 1st Dept. 2014).

Here is a recent profiteering case – PWV Acquisition v. Poole, No. 152612/2015 2017 WL 550196 (Sup. Ct. N.Y. County 2017) in which the special referee found that, in 2014, the tenant made \$32,603 in income from Airbnb-ing her Rent Stabilized apartment. Her rent was \$12,511.32 that year. The court found profiteering. The interesting twist in *Poole* was that tenant tried to mount this defense – had I known that I would lose my Rent Stabilized apartment over this, I would not have done it. The court said that this didn't make a difference, and the tenant was evicted.

Finally, the most recent and highest level profiteering case has been much publicized and it is very sad. In Goldstein v. Lipetz 53 N.Y.S.3d 296 (App. Div. 1st Dept. 2017), a sick and elderly woman lost her Rent Stabilized apartment of forty years. The tenant engaged in substantial profiteering with respect to her Rent Stabilized apartment, and thus landlord was entitled to terminate the lease. Tenant sublet apartment to 93 different customers recruited online for 338 days spread over period of 18 months. Tenant's *per-diem* stabilized rent was \$57.80, and tenant charged \$95 per night for single guests and \$120 per night for couples, far exceeding the 10% lawful premium for subletting. The Appellate Division confirmed that once substantial profiteering has been established, the tenant is subject to eviction, without a right to cure.

*Goldstein v. Lipetz* is very important because it clarified that a court will focus on *per diem* profiteering, rather than looking at how much the tenant earned on the subletting in a month. The Division held that:

Defendant also argues that her profiteering was “insubstantial” because her Airbnb income did not exceed her legal regulated rent plus 10% during several months of the subletting. We find the point unavailing. Defendant sublet her apartment on a daily basis and, perforce, she had less Airbnb revenue in months during which her apartment was sublet for fewer days. **To determine defendant's profit from the subletting, her income from the subletting should be compared to the**

**share of her rent attributable to the days she was actually hosting a subtenant in the apartment, not to her rent for the entire month during which the subletting occurred.**

[Emphasis supplied.]

**D. Do NOT Confuse Short Term Leasing with a Tenant’s Right to a Roommate or to Sublet**

Nothing protects a tenant’s right to do short-term leasing in the way that a tenant’s right to a roommate or a subtenant is protected by other statutes. Under certain very specific circumstances, a residential tenant has the right to a roommate and/or to sublet his or her apartment.<sup>2</sup> Neither the right to a roommate nor the right to sublet, however, exists when the terms is for less than thirty days. The prohibition on short-term leasing trumps the roommate law or the sublet law by defining who may occupy a Multiple Dwelling. Brookford, LLC v. Penraat, N.Y.S.3d 859 (Sup. Ct. N.Y. County 2014).

**E. Lofts**

The prohibition against short-term leasing does not apply to Interim Multiple Dwellings, lofts. Aurora Associates, LLC v. Mark Hennen and Piano Magic Company, No. 154644 slip op. (Sup. Ct. N.Y. County 2017).

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<sup>2</sup> Under New York Real Property Law § 235(f), often referred to as the “Roommate Law”, a residential lease entered into by one tenant implicitly permits that tenant to share the apartment with either his/her immediate family or unrelated persons. This is true even if a residential lease says otherwise.

If a landlord violates the Roommate Law, a tenant may seek an injunction to enjoin and restrain such unlawful practice and, the tenant can recover actual money damages sustained as a result of such unlawful practice, including tenant’s court costs and, depending on the lease, attorney fees.

Under New York Real Property Law 226-b, a tenant renting a residence in a building with four or more residential units has a right to sublease the apartment subject to the written consent of the landlord in advance of the subletting. Furthermore, the landlord is prohibited from unreasonably withholding consent.

The devil is in the details with respect to RPL § 226-b(2). A tenant does indeed have a right to sublet. But it’s a lot of work to exercise that right. There is a specific procedure that the tenant must follow, which is detailed in RPL § 226-b(2), when requesting the landlord’s permission to sublet the apartment.

You can find more information of this in a booklet on the author’s website at: <http://www.itkowitz.com/booklets/THERE-ARE-TOO-MANY-PEOPLE-IN-THAT-APARTMENT-Who-besides-the-tenant-on-the-lease-has-a-right-to-be-in-an-apartment-and-for-how-long.pdf>

## F. NYC No Advertising Law

A very new piece of legislation (October 21, 2016) in this area is MDL § 121, which states that:

1. It shall be unlawful to advertise occupancy or use of dwelling units in a class A multiple dwelling for occupancy that would violate subdivision eight of section four of this chapter defining a “class A” multiple dwelling as a multiple dwelling that is occupied for permanent residence purposes.
2. Any person found to have violated the provisions of subdivision one of this section shall be liable for a civil penalty of not more than one thousand dollars for the first violation, five thousand dollars for the second violation and seven thousand five hundred dollars for the third and subsequent violations.
3. For the purposes of this section, the term “advertise” shall mean any form of communication for marketing that is used to encourage, persuade or manipulate viewers, readers or listeners into contracting for goods and/or services as may be viewed through various media including, but not limited to, newspapers, magazines, flyers, handbills, television commercials, radio, signage, direct mail, websites or text messages.
4. Notwithstanding the provisions of section three hundred three of this chapter, in a city with a population of one million or more the provisions of this section shall be enforced by the mayor’s office of special enforcement.

Almost immediately after the new law was enacted, Airbnb filed suit against New York City Mayor Bill DeBlasio, New York Attorney General Eric Schneiderman, and New York City<sup>3</sup>, claiming, among other things that the law violates its First Amendment free speech protections.

The case settled and was terminated in December 2016 as against the City. A *pro se* litigant, however, tried to intervene and was denied and is now seeking to overturn that decision on appeal

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<sup>3</sup> The complaint in the SDNY (No. 16 CV 8239) can be found at 2016 WL 6138101 (S.D.N.Y.).

as of April 2017. According to the Second Circuit website, nothing has been decided yet and it looks like the next brief is due in August.

As per the settlement, “The City...will permanently refrain from taking any action to enforce the Act, including retroactively and/or under any theories of direct or secondary liability, as against Airbnb”.

### III. UPSTATE NEW YORK AND HOME SHARING

Upstate New York is struggling with the short-term renting of homes, occasioned by the sharing economy. These battles play out over zoning regulations and condominium bylaws that were not drafted in contemplation of home sharing.

#### A. Zoning Resolutions

1. *Garretson v. Zoning Board of Appeals of the Town of Geneva, et al., Supreme Court of the State of New York, County of Ontario, Index No. 111943*

For much of this section, I must thank and acknowledge Alan J. Knauf, Esq. of Knauf Shaw LLP<sup>4</sup>. Alan sent me the *Garretson* case from Ontario County. As per Alan's June 3, 2017 email to me:

I represented homeowners on Seneca Lake in the Town of Geneva after the Town refused to let them rent their lakefront houses on a weekly basis.... Attached is the decision annulling the Zoning Appeals Board decision and our briefing, which led to the attached new Town regulations of short-term rentals that our clients acquiesced to, so the dispute ended.

Garretson v. Zoning Board of Appeals of the Town of Geneva, et al., Supreme Court of the State of New York, County of Ontario, Index No. 111943, was a fascinating case. I am only going to hit the highlights here.

Petitioners were the owners of five houses on Seneca Lake, which were in an R-1 Residence District. On December 2, 2014 the ZBA affirmed a decision of a Town zoning officer

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that determined that the houses had become “vacation resorts” not permitted in an R-1 district and that the houses could no longer be rented. The Petitioners filed an Article 78 to annul the order.

The Town code stated that “One-Family Dwellings” were allowed in R-1 districts. “One Family Dwellings” were defined as, “buildings contained one dwelling unit only”. Although the code went on to clarify that “dwelling” shall not be deemed to include motel, hotel, or rooming houses, or other accommodations used for transient occupancy. “Hotel” is defined as a “building or any part thereof, which contains living and sleeping accommodations for transient occupancy, has common exterior or entrances and which may contain one or more dining rooms.” And “transient” is NOT defined in the Town code. Thus, the zoning ordinance did NOT contain any minimum amount of days that one family could rent a One-Family Dwelling.

Petitioners’ position was that the Town may not disallow Petitioners’ rental of the houses by attempting to classify the rentals as “transient”. Petitioner’s homes all contained only one dwelling unit each. Petitioners’ contention was that nothing changed the houses from One-Family Dwellings just because they were rented to a family on vacation.

Petitioners backed up their position with a lot of appellate case law, including case law that the un-defined term “transient” could not be construed against Petitioners, especially since the renters were screened by the homeowners, which is something a hotel would not do. Neither the Town’s definition of resort nor Wikipedia’s definition comported with the use Petitioners were making of their homes by renting them to other families on vacation while owners were away from the houses.

Petitioners got the proceeding remanded! The Supreme Court said:

Inasmuch as all renting is not forbidden by the code (only transient occupancy is disallowed), the Zoning Board of Appeals must determine whether the individual Petitioners were properly issued a compliance order based upon the manner in which each individual Petitioner was renting his or her property. Further testimony before the ZBA is needed to determine this issue.

Inherent in the definition of transient is a focus on the length of stay for each guest at the accommodation. The record of the proceeding before the ZBA is lacking testimony regarding the length each of Petitioners' renter(s) stayed at the premises.

Notably, in the case cited by Petitioners, Atkinson v Wilt (94 AD3d 1218), the Appellate Division, in determining that the petitioners' property did not constitute a tourist accommodation (the definition of which included "transient facility"), was presented with facts that the petitioners rented their home on a weekly basis.

As Mr. Knauf told us above, the story ended with the Town of Geneva re-writing the local regulations on short-term rentals, to which the homeowners acquiesced. Before I read the new regulations, I thought that the Town would do what NYC did and simply define "transient". Instead, Town of Geneva Code §165-28.6 now requires an owner to obtain a revocable short-term rental permit whenever a dwelling unit is to be used for short-term rental purposes. "Short-term" still is not defined. Among other things, the property owners must, however, certify compliance with the following standards:

There shall be one functioning smoke detector in each sleeping room and at least one functioning smoke detector in at least one other room, one functioning fire extinguisher in the kitchen and at each exit, and at least one carbon monoxide detector.

Exterior doors shall be operational and all passageways to exterior doors shall be clear and unobstructed.

Electrical systems shall be serviceable with no visual defects or unsafe conditions. All fireplaces, fireplace inserts or other fuel-burning heaters and furnaces shall be vented and properly installed.

Each sleeping room shall have an exterior exit that opens directly to the outside, or an emergency escape or rescue window...

The new regulations also address:

- the number of people who can occupy the dwelling based upon the number of sleeping rooms,
- the sufficiency of a private septic system,
- the provision of off-street parking,
- the removal of garbage, and
- compliance with noise level requirements between 10:00 pm and 7:00 am

Owners must be clearly identified and contactable. Guests must be given information about the rules, including things such as, "all fires must be attended" and "littering is illegal".

Several of the cases cited by petitioners in *Garretson* reveal that there are zoning regulations in various jurisdictions upstate that assign a specific durational limit to “transient” rentals. My best guess is that the Town of Geneva did not do when rewriting the code because it does not want to stunt short-term vacation rentals of single-family homes. The Town, however, obviously does want to prevent fires, overcrowding, septic system overflows, too much on-street parking, excessive garbage, excessive noise, and littering. Therefore, the Town dealt with those things explicitly.

As a lawyer involved in litigating cases in NYC where “transient” is clearly defined, I can see why the Geneva Town Code has its advantages. All of the things that permanent tenants and landlords hate about an apartment with a steady stream of short-term guests can still be problematic if the guest stays 31 days. The guests can still have loud parties. The guests can still damage a building that they have no stake in. And, G-d forbid, they can be confused on their way out in a fire.

2. *Fruchter v. Zoning Bd. of Appeals of Town of Hurley, 133 A.D.3d 1174 (3<sup>rd</sup> Dept. 2015)*

Another relevant upstate case is *Fruchter v. Zoning Bd. of Appeals of Town of Hurley*, 20 N.Y.S.3d 701 (App. Div. 3rd Dept. 2015). *Fruchter* is another great example of how a town’s zoning regulations were not ready for short-term residential sublets.

In *Fruchter* the subject homeowner owned and considered as his permanent residence a two-bedroom single-family residence located on about four acres in the Town of Hurley, Ulster County. The residence was in an area zoned A-4 residential. In 2012, the homeowner began listing the property on the internet, offering to rent it for terms ranging from one night to a month or an entire season. According to the homeowner, he always rented the entire residence, he did not stay there when the residence was rented, and he did not serve or offer any food or beverages.

The Town issued the homeowner an order to remedy for illegally operating a bed-and-breakfast or hotel. The homeowner appealed to the Zoning Board of Appeals of the Town of Hurley (“ZBA”), which determined that, under the Town Code, owner’s short-term rentals were not allowed unless he obtained a special use permit. Owner commenced a combined CPLR Article 78 proceeding and action for declaratory judgment. The Supreme Court dismissed the petition and declared that petitioner’s due process and equal protection rights were not violated.

Petitioner appealed, contending that the Town Code does not require a special use permit for the type of short-term rentals that he provides.

The Appellate Division found that Petitioner's activity did not fit neatly into the definitions in the Town Code, noting that the Town Code did not appear to have been updated to consider the ramifications of the emergence of the "sharing economy".

The Appellate Division found that the residential uses of one-family dwellings are permitted in the relevant A-4 district under the Town Code. And, absent the challenged short-term rentals, petitioner's property was undisputedly a one-family dwelling. The issue thus distilled to whether the rentals removed the property from the definition of residential one-family dwellings and whether such activity fit under another definition in the Town Code.

The Appellate Division found that the ZBA did not determine the category of use that petitioner's activity constituted under the Town Code, which had labeled the use as either a bed and breakfast or hotel. However, petitioner's use of the property did not fall under the definitions in the Town Code of either of these. Petitioner's residence, among other things, did not have "a common exterior entrance or entrances" as set forth in the definition of a hotel. Moreover, since petitioner always rented the entire premises and he did not remain on the premises when rented, it was not an "owner-occupied dwelling" in which only "rooms" were being rented as provided in the definition of a bed-and-breakfast. Although the definitions of "dwelling" and "residences" excluded various activities, including motel, hotel and "transient" occupancy, the term transient is not defined and, when considered in the context of the entire Town Code, did not clearly apply to petitioner's activity. Inasmuch as petitioner's use did not fall within the definition of activities requiring a special use permit, and the Town Code did not otherwise "expressly prohibit petitioner from renting his residence to vacationers, the Division was not willing to find that petitioner's decision to do so placed his otherwise obviously residential structure outside the Town's definition of a residential one-family dwelling. Thus, the ZBA decision was annulled.

## **B. Homeowner's Associations**

Condominium associations are another place that the debate about short-term residential rentals is playing out. The next case we are going to look at is Olszewski v. Cannon Point Ass'n, Inc., 49 N.Y.S.3d 571 (App. Div. 3rd Dept. 2017).

*Olszewski* concerned a condominium in Lake George. The community's common areas, including tennis and basketball courts, picnic areas, a club house (known as the Manor House), the beach (together with adjacent docks and boat slips) and roadways, are managed by the condo's Home Owner's Association board of directors.

By letter dated March 25, 2014, the HOA board of directors advised condominium owners that they had unanimously approved the "Cannon Point House Rules and Regulations" ("the 2014 Rules") effective April 1, 2014. Insofar as is relevant here, the 2014 Rules imposed numerous limitations and restrictions upon condominium owners wishing to lease their properties, including, but not limited to, **a requirement that no unit may be rented for a period of less than two weeks** and a prohibition barring renters from access to the Manor House. Lessees who rented a condominium for less than 90 days also were precluded from having guests or pets on the property. Owners who elected to rent their properties were required to pay a rental fee and an administrative fee to the HOA, and owners who failed to comply with the provisions of the 2014 rules were subject to fines and penalties.

Certain owners challenged the rules. The Supreme Court, Warren County, granted summary judgment for owners. The HOA appealed. The Appellate Division, Third Department, held that, absent an amendment to the bylaws, the board of directors for the association exceeded its authority by adopting those rules, where the condominium association's bylaws had granted each homeowner the right to convey or lease his or her home "free of any restrictions," provided common charges or HOA expenses assessed against each unit had been paid. Rules can't change bylaws and unauthorized actions of a board of directors are not protected by the business judgment rule.

#### IV. WHY SHOULD LANDLORDS CARE IF THEIR TENANTS ARE ENGAGING IN ILLEGAL SHORT TERM LEASING?

##### A. Violations and Fines

New York City has a task force cracking down on illegal hotels.<sup>5</sup> If the New York City Department of Buildings (“DOB”) inspects and finds that even one apartment is violating the short-term leasing law, then it can issue violations that result in fines to the landlord. In *NYC v. ECC Realty LLC*<sup>6</sup>, the DOB issued violations against apartment 5B for being transiently occupied and classified the violations as “immediately hazardous”.

In *City of New York v. City Oases, LLC*, ECB Appeal No. 1400626, (Aug. 28, 2014), the City sued landlord for illegally converting two buildings into illegal short-term hotels, claiming that landlord created a nuisance that must be abated. The court denied landlord’s request to dismiss the case.

In *NYC v. JJNK Corp.*, ECB Appeal No. 1500708, (Sept. 25, 2015), DOB issued 12 violations notices based on transient occupancy of two apartments. In *JJNK*, the ECB held that:

*Ignorance of the violations not a defense*

According to Code Section 28-301.1, an "owner shall be responsible at all times to maintain the building and its facilities...in a safe and code-compliant manner." The owner may not shift this responsibility to a tenant. See *NYC v. Jasol Properties, Ltd.* (ECB Appeal No. 0900192, October 29, 2009). Respondent, as the building's owner, is ultimately responsible for keeping the property in a Code-compliant manner, even if its tenants caused the violating conditions and it had no knowledge of the tenants' actions. See *NYC v. Mosco Holding LLC* (ECB Appeal No. 1500169, April 30, 2015) (premises owner liable despite lack of knowledge that

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<sup>5</sup> <http://www.nydailynews.com/new-york/nyc-spend-10m-crack-illegal-hotels-article-1.2436047>; Very recent example = 7/5/2017 Commercial Observer, *City Sues Alleged Illegal UWS Hotel Operator*, (“The Mayor’s Office of Special Enforcement (OSE) filed a suit in New York State Supreme Court against Hank Freid, the founder and chief executive officer of hospitality company Impulsive Group, on Wednesday for allegedly illegally converting 250 affordable rentals into three Upper West Side hotels.”) [https://commercialobserver.com/2017/06/city-sues-alleged-illegal-uws-hotel-operator/?utm\\_source=Sailthru&utm\\_medium=email&utm\\_campaign=CO%207/5&utm\\_term=Commercial%20Observer%20Newsletter](https://commercialobserver.com/2017/06/city-sues-alleged-illegal-uws-hotel-operator/?utm_source=Sailthru&utm_medium=email&utm_campaign=CO%207/5&utm_term=Commercial%20Observer%20Newsletter).

apartments in its premises were being used illegally for transient occupancy). Consequently, Respondent's ignorance of its tenant's short-term rental activities is not a defense.

*But see* W 47 Realty LLC, ECB Appeal No. 1600535 (July, 28, 2016), where the DOB issued five violation notices to landlord based on conversion to transient use of two Class A apartments at landlord's building. At a hearing, DOB showed documentation of Airbnb information for short-term rentals at the building. DOB also showed prior violations for transient use at the building and sought aggravated penalties. ECB ruled against landlord and fined it \$27,300 for the violations, including violations of the building and fire codes. Landlord appealed and won, in part. Landlord argued that DOB's proof of Airbnb reservations was insufficient proof of transient use, especially since DOB's inspector didn't testify at the hearing. Landlord also argued it had inadequate notice that DOB was seeking aggravated penalties. The Airbnb photos documented the short-term rental of the apartments and it was reasonable to conclude that the apartments were occupied during the periods in question. Landlord presented no proof in opposition, except proof that the violations had been corrected. But landlord was given insufficient notice of aggravated penalties. DOB merely checked a box stating "recurring condition" on the violation notice. While daily penalties were properly imposed, ECB reduced the total penalties by \$6,300.

## **B. Potential Liability**

As of this writing in July 2017, there are no reported cases where a tenant sued a landlord because he or she was harmed in a multi-family building by another tenant's short-term leasing guest. Depending on the factual circumstances of such a hypothetical occurrence, however, it is possible that a landlord would be liable.

In Bello v. Campus Realty LLC, 953 N.Y.S.2d 41 (App. Div. 1st Dept. 2012), a multi-family building's residents brought a premises security action against the owner after they were robbed by intruders. The appellate court held that genuine issues of material fact existed that precluded summary judgment in the tenants' premises security action. The question the trial court needed to contemplate was whether the landlord breached its duty to take minimal security precautions to protect residents from foreseeable criminal acts by failing to remedy an allegedly broken lock on the building's front door entrance, despite notice of the dangerous condition, and whether the robbery of the residents was foreseeable, given the evidence of prior crimes, including robberies in and around the building.

The appellate court made the same decision in Carmen P. by Maria P. v. PS & S Realty Corp., 687 N.Y.S.2d 96 (App. Div. 1st Dept. 1999), when a fourteen-year-old tenant brought negligence action against landlord for breaching his duty to take precautions against foreseeable criminal assaults on tenant after she was raped by an unknown assailant who forced his way into her apartment. There was evidence that intruders loitered in the hallways, committed robberies, assaults, and drug crimes in the building, and that tenants complained about lack of security.

I have had landlords report to me that their tenants are complaining repeatedly in writing to them about illegal short-term guests of other tenants loitering in the hallways and having raucous parties. The question remains open as to whether such a landlord would be liable if a tenant of the subject building was harmed by a short-term leasing guest.

In NYC v. Lorimer LLC, ECB Appeal No. 1400672, (Sept. 18, 2014; aff'd Nov. 20, 2014), a tenant who rented four apartments in a multiple dwelling converted them to transient use, resulting in violations and fines. The landlord testified that he had no idea that the tenant had done this and it would have been impossible for him to access these apartments. The ECB did not find this testimony credible, because increased traffic in the building should have alerted landlord to the problem, and landlord did not show that he either physically or legally attempted to gain access and deal with the problem.

### **C. Insurance Coverage Issues**

I am NOT an insurance lawyer. I offer this paragraph, however, based upon my experience as a business owner who has occasionally needed to make a claim to her insurance policy. Insurance companies like to deny claims. I doubt many insurance policies will cover a loss that occurs while the policy holder or her tenants are violating the law. Therefore, if a short-term guest burns a building down, owner may not be covered.

### **D. Inability to Refinance**

A recent article suggests that Airbnb activity makes refinancing harder.<sup>7</sup>

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<sup>7</sup> <http://therealdeal.com/2016/08/29/residential-lenders-think-twice-about-refinancing-an-airbnb-home>.



V. “PROFESSIONAL OPERATORS” – NOT REGULAR FOLKS ENGAGING IN THE “SHARING ECONOMY” AND AN EVEN BIGGER PROBLEM FOR LANDLORDS AND OTHER TENANTS OF THE BUILDING

At this point, when a landlord calls me about an Airbnb problem in her or his building, my first question is this – am I dealing with real human beings attempting to engage in the “sharing economy” or am I dealing with a *de facto* hotelier, a “professional operator” – someone who rents a whole bunch of apartments, which he or she never lives in, and which he or she continuously illegally short-term sublets.

According to the office of the New York State Attorney General, Eric T. Schneiderman, almost half of Airbnb’s \$1.45 million in 2010 revenue in the city came from hosts who had at least three listings on the site.<sup>8</sup> An analysis of global Airbnb listings in 2014 showed that hosts offering multiple listings made up over 40% of the company's business.<sup>9</sup> A 2016 report from Penn State researchers for the American Hotel and Lodging Association determined that \$378M of Airbnb's total revenue—nearly 30%—was generated from "full-time operators" listing rentals year-round.<sup>10</sup>

Dealing with a professional operator is completely different from dealing with a regular person. I had a client recently who discovered that one of his tenants, let’s call him “John”, had rented three apartments in the building, using his wife’s name for one unit and his friend’s name for another. John did not live in any of the three units and all three were continuously rented on Airbnb. The landlord was furious. When he confronted John, John said, “*When the Marshal comes, I will stop. I have a lawyer and have been in this situation before.*” The landlord then made a terrible mistake – (without consulting a lawyer) he hired a security guard to prevent guests of the three units from entering. John took the landlord immediately to court on three illegal lockout proceedings and won. **You can never use self-help eviction against a residential tenant in New York City.** You can NOT lock a tenant out of their apartment. In New York State, in the context of a residential lease, a landlord is forbidden from resorting to self-help under any circumstances and can be subject to compensatory, punitive, and treble damages.<sup>11</sup>

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<sup>8</sup> [http://www.nytimes.com/2014/11/30/magazine/the-business-tycoons-of-airbnb.html?mwrsm=Email&\\_r=0](http://www.nytimes.com/2014/11/30/magazine/the-business-tycoons-of-airbnb.html?mwrsm=Email&_r=0).

<sup>9</sup> <https://www.fastcompany.com/3043468/the-secrets-of-airbnb-superhosts>.

<sup>10</sup> <https://www.bisnow.com/national/news/hotel/report-professional-operators-make-a-killing-off-airbnb-59859>.

<sup>11</sup> See Real Property Actions and Proceedings Law (“RPAPL”) § 853; *Romanello v. Hirschfeld*, 63 N.Y.2d 613, 615 (1984).

In the within section, “Evicting AND Enjoining Tenants for Engaging in Illegal Short-Term Subleasing” I offer some solutions for dealing with professional operators.

## **VI. PREVENTING TENANTS FROM ENGAGING IN ILLEGAL SHORT-TERM LEASING**

It is better to prevent tenants from engaging in illegal short-term subleasing then to have to clean up the mess that short-term leasing creates.

### **A. Education of Tenants**

Many people, tenants included, simply do not understand what is prohibited. Ownership and management should seek to educate the tenants through email memos and flyers. Tenants should be educated about the illegality of short-term leasing as well as the dangers to themselves and their fellow residents. Tenants should be encouraged to report other tenants who violate the short-term leasing law to management.

### **B. Adding a Specific Lease Clause**

I recommend that landlords add a special section to the riders of their residential leases prohibiting short-term rentals. Below is a sample of the language contained in the BODY of a lease I drafted and inserted in the “Use Clause.”

#### **USE OF THE APARTMENT**

...Tenants shall not violate Multiple Dwelling Law § 4(8)(a) or similar statute, which, among other things, prohibits short-term leasing of an apartment....

Moreover, the lease can further curb a tenant’s right to engage in short-term leasing by clarifying that if a tenant violates that clause of the lease, then he or she’ lease can be immediately terminated without the benefit of a cure period.

## **VII. HOW CAN LANDLORDS TELL IF (AND PROVE THAT) THEIR TENANTS ARE ENGAGED IN ILLEGAL SHORT TERM LEASING?**

For all of the reasons discussed above, a landlord needs to know if its tenants are violating the short-term leasing law. Once short-term leasing law violations are discovered, landlords also need to carefully document the infractions. If you want to win in Housing Court, you need proof, NOT speculation.

### **A. Third Party Companies that Use Algorithms and Building Façade Recognition to Find Airbnb in Your Building**

There are companies that use building façade recognition software to find a particular building and then produce reports that contain printouts of all the Airbnb pages associated with the listings in such building. For a particular unit the report may contain:

- The listing, including rules that go with the listing and photographs
- Reviews of former guests of the apartment, explaining what it was like to stay there
- Reports of when and for how much the unit was rented

You need as much documentation as you can possibly get from the short-term sublet platform itself because, “Airbnb reservations [alone are] insufficient proof of transient use.”<sup>12</sup>

### **B. Other Tenants and Building Personnel**

The testimony of onsite personnel and other tenants is helpful evidence in these cases.

In 42nd & 10th Assoc. LLC v Ikezi, W 47 Realty LLC, ECB Appeal No. 1600535 (July 28, 2016), the tenant effectively transformed his Rent Stabilized apartment into a luxurious lodging suite for those willing to pay a \$649.00 nightly fare. The landlord uncovered a listing posted online that advertised the apartment as available for rent. The ad solicited guests who were interested in a lavish stay in Hell’s Kitchen. Potential guests agreed to pay tenant \$649.00 per night, check-in before 4:00 p.m., check-out by 11:00 a.m., pay \$95.00 per extra guest, and include a \$150.00 cleaning fee. The landlord sent a written request to tenant demanding that he remove the ad and

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refrain from renting the property. Tenant refused. In response, the landlord commenced an action to terminate tenant's lease agreement as a violation of the Rent Stabilization Law and to re-possess the apartment. **At trial, the landlord called both its senior residential service specialist and the building concierge to testify.** Each testified that tenant was rarely, if ever, seen in the building, and that overnight, non-family member guests were frequently seen on the premises. **The building's amenities manager also testified that tenant tried to convince her to allow his guests to have access to the gym, screening room, game room, business center and basketball court, which were off limits to guests without a tenant present.** The landlord also submitted the pictures used to depict the apartment online, and the written contents contained in the ad, to solidify that tenant published the ad with the intent of collecting rental fees for the premises.

See also Board of Managers of South Star v. Grishanova, 969 N.Y.S.2d 801 (Sup. Ct. N.Y. County 2013); ("According to the affidavit of the Board's president ... these instructions show that since January 31, 2012, defendant asked the Condominium staff to provide access and keys to 48 different visitors (an average of four per month), some with international and out-of-state driver's licenses provided upon their visits, who stayed in her Unit for several days at a time. Defendant also requested that a housekeeper be given access between these visits. All of such activity is observed by the Condominium's front desk staff.")

### C. Question the Guests

As you can see from the fact patterns in the cases included throughout this article, sometimes the short-term guests are the best evidence possible that a tenant is engaged in short-term leasing. Owners, managers, and building personnel should readily ask strangers in the building, especially those with suitcases, who they are and why they are in the building. If the guest shows an online booking receipt, take a picture of it and or scan it with your PDA.!

**D. Public Social Media Data**

This author was hired by a residential landlord to prosecute a case against a tenant who was engaging in illegal short-term leasing. We included all of the evidence gathered – from the short-term leasing platform, social media, and cameras – in the termination notice. We had video of the short-term guests coming and going from the subject apartment at the same time that the tenant was posting public Instagram pictures of himself on a beach far away from New York. The tenant decided that he did not wish to fight about it, so he left before the landlord had to sue him.

**E. Private Investigators Who Book the Apartment**

Another way of proving these cases is to have a licensed private investigator book the apartment for a short-term sublet and create a detailed report of the experience. Why doesn't this author love this as a strategy? I have no objection to adding an investigator into the mix for an already strong case, but I don't like relying on an investigator as my main evidence. Investigators are humans. Humans sometimes make good witnesses, and sometimes they make crappy witnesses. Sometimes they are unavailable. Sometimes they have checkered pasts.

**F. Cameras**

**1. Why cameras?**

There are certain cases that I refuse to bring on behalf of a landlord-client if the client has not properly installed cameras outside of the subject apartment. These include:

- non-primary residence cases
- illegal sublet cases
- illegal short-term sublet cases (like Airbnb)
- succession rights cases, and
- many types of nuisance cases.

Such cases are almost un-winnable without a camera.

Let us consider an airbnb case, for example. The following is a sample colloquy between a lawyer and a landlord-client on this topic:

Landlord: The tenant in B5 is doing Airbnb.

Lawyer: How do you know that tenant is doing Airbnb?

Landlord: Because he is.

Lawyer: I heard you say that already. But *how* do you know? What is the source of your knowledge?

Landlord: The super.

Lawyer: The super lives on the same floor as the tenant and is home all day long?

Landlord: No the super doesn't live on tenant's floor and he is obviously out and about all day.

Lawyer: The super lives in the building at least?

Landlord: No, the super lives in another building.

Lawyer: OK, so the super attends to only the tenant's building?

Landlord: No, the super cares for ten buildings, tenant's building is one of the ten.

Lawyer: So, if the super works 40 hours per week, and tenant's building is one of ten, at best he or she spends about 4 hours per week in tenant's building?

Landlord: I don't know; maybe more.

Lawyer: So what is the super (who is already a biased witness because he is testifying on behalf of his employer) going to testify to, that in the four hours per week that he is in the building he sees Airbnb guests?

Landlord: Something like that, I guess.

Lawyer: Then you lose. Because tenant will come in and testify that she is present while the guests are there, and you have not done anything significant to discredit her. Your psychic knowledge or strong hunch is NOT admissible evidence. You need ADMISSIBLE PROOF in a court.

A picture (or a video) is worth a thousand words, or a thousand guesses and speculations.

Cameras are cheaper than legal fees. If a landlord is not willing to pay for cameras, he is not going to be willing to pay legal fees for a protracted trial that landlord is likely to lose.

## 2. *How to do cameras correctly.*

Cameras should be set up by a professional licensed private investigations and/or security firm. The more experience the company has with this type of work, the better.

First, the camera must be set up so that it does NOT look into the tenant's apartment when the door is opened, thus invading tenant's privacy. See more about that below.

The camera must be set up so that it gets a clear view of the subject apartment, but not so that multiple apartments are under surveillance, because then there will be a lot of unnecessary footage to review.

The camera should be motion activated; otherwise, it will be difficult to review all the footage.

Landlord's counsel needs to work closely with the surveillance camera technologists to streamline both the technical and legal process involved with utilizing cameras, or the evidence obtained from the cameras might not be admissible. A videotape must be "authenticated" before it can be used as evidence in a court proceeding. Testimony from someone who has knowledge of the circumstances and who actually reviewed the footage is usually sufficient. See Zegarelli v. Hughes, 781 N.Y.S.2d 488 (App. Ct. N.Y. County 2004).

I strongly prefer that the same person:

- install the camera;
- maintain the camera (i.e. changes its batteries);
- retrieves the data card from the camera and take it to where it will be stored;
- superintend the storage system;
- review the footage; and
- produces a detailed log of what each incident reveals.

This person is your witness in court!

Landlord's counsel can see why attending to the details of this type of thing BEFORE a case gets started is vital to bringing a healthy case. Tenant's counsel can also see how useful it is when landlord's counsel leaves this important evidentiary work unattended to until trial.

### 3. Cameras Legality

Courts in New York have ruled that tenants have an expectation of privacy inside their apartment behind the closed entry door. Otero v. Houston Street Owners Corp., 624 N.Y.S.2d 157 (App. Div. 1st Dept. 1995) *see also* People v. Mercado, 470 N.Y.S.2d 441 (App. Div. 2nd Dept. 1986) (“Once the door is closed, an individual is entitled to assume that while inside he or she will not be viewed by others”).

On the other hand, New York courts have found that residents in multi-family buildings lack a reasonable expectation of privacy in the building’s common areas, such as lobbies, stairwells and hallways because it is accessible to other persons. People v. Funches, 772 N.Y.S.2d 62 (App. Div. 1st Dept. 1997).

## VIII. EVICTING AND ENJOINING TENANTS FOR ENGAGING IN ILLEGAL SHORT TERM SUBLEASING

I usually recommend that prevention and summary proceeding strategies be used when regular folks engage in illegal short-term subleasing. Often (but certainly not always) these cases can be settled early. Professional operators, however, will only go when a Marshal comes to the door. Therefore, Professional Operators may justify the expense of seeking an injunction.

### A. Summary Holdover Proceedings

#### 1. *Predicate Notices – No Notice to Cure Needed, But Notice Must Be Based on Facts and not Just Speculation*

If the proof amassed is solid, a summary proceeding to evict for violations of the short-term leasing law is relatively simple, when compared with other types of holdovers – such as regular illegal sublet cases. This is because there is no requirement for providing a cure period, and the case can begin with a notice of termination of tenancy, followed by a holdover proceeding. Brookford, LLC v. Penraat, 8 N.Y.S.3d 859 (Sup. Ct. N.Y. County 2014).

Next, we have a recent Appellate Term First case that illustrates an important point about doing this work on behalf of landlords correctly, and/or on behalf of tenants, correctly! And that



very important point is that landlords MUST do their homework before serving these predicate termination notices. As you will in the “Camera” section of these materials, I will not accept one of these cases without camera evidence coupled with some other type of evidence, either from the internet or from competent witnesses. I have been saying it for years – Housing Court cases are won or lost BEFORE they are filed, in the predicate notice stage. So here we have 128 Second Realty LLC v. Dobrowolski, 41 N.Y.S.3d 450 (App. Term 1st Dept. 2016). *Dobrowolski* let a holdover based on short-term illegal sublet be dismissed because, “it failed to plead facts to state a cause of action.” It stated:

To defeat tenant’s dismissal motion, landlord exclusively rested on an investigator’s photographs depicting eight different individuals entering and/or exiting tenant’s apartment with overnight bags and luggage from February to June 2014 while tenant was admittedly away which inferentially suggested short term rentals were taking place in violation of tenant’s lease and various laws. As gleaned from the record, landlord anticipated future discovery would help him factually fill in the missing pieces, namely, the identity of the depicted visitor-licensees, short term rental agreements, the rental sums paid in excess of tenant’s stabilized monthly rent, tenant’s other residence, if any, and any other relevant information to support a commercial exploitation and profiteering claim.

At first blush, the unchallenged photographs eliminated tenant’s contention that this proceeding was a frivolous one. Nonetheless, this decision’s message makes clear that a more thorough fact investigation should be undertaken before starting this nuisance-type eviction proceeding, especially when the law allows free, short term “house-sitting” stays (see MDL § 4[8][a](1)[B]) when a record tenant is away for legitimate personal reasons (e.g., vacation, business trip, medical treatment, etc.).

## **2. Summary Proceedings – What is the Nature of the Cause of Action?**

What is the exact nature of the cause of action that leads directly to termination? Asked another way, when you draft the Termination Notice, what section of the leases (and Rent Stabilization Code if the apartment is Rent Stabilized) do you cite?

I have been citing to the sections of leases that prohibit tenants from using apartments for illegal purposes, and then I refer back to Multiple Dwelling Law § 4(8)(a), which prohibits the use

of a multiple dwelling for transient purposes. I have yet, however, to have a tenant or a court challenge me on this characterization.

I notice that other law firms are couching the cause of action as illegal subletting. I do not favor that approach because an illegal subletting cause of action requires a notice to cure<sup>13</sup> and raises issues of fact regarding whether or not the arrangement was a roommate or sublet situation. See 335-7 LLC v. Steele, 993 N.Y.S.2d 646 (N.Y. Supp. App. Term 1st Dept. 2014), discussed above.

Still other firms call illegal short-term subletting “nuisance”. I was hired by a young couple who did Airbnb just once, but was hit by their landlord with a nuisance termination notice. I wrote a letter to landlord’s counsel explaining that nuisance legally requires a *pattern* of bad behavior, not a single instance. Landlord backed down and agreed to let the tenants stay, in exchange for a promise that they would do no more Airbnb.

Finally, in a Rent Stabilization case you should also allege (and be prepared to prove) “profiteering”. See the section above, however, on the difficulties of proving profiteering.

### **3. Make a Discovery Motion and, Maybe, a Summary Judgment Motion**

There is no discovery allowed in a summary proceeding for the recovery of real property pursuant to Article 7 of the Real Property Actions and Proceedings Law (a Housing Court case) unless leave of court is granted for such discovery, and such leave will only be allowed when the movant shows “ample need”. NYU v. Farkas, 468 N.Y.S.2d 808 (Civ. Ct. N.Y. County 1983) (defines “ample need” test for discovery to be allowed in a summary proceeding).

In a recent Manhattan Housing Court case, 859 Ninth Avenue LLC v. Mor<sup>14</sup>, an “Airbnb case”, discovery was allowed and included a deposition of the tenant. Landlord demonstrated that tenant reported on his 2013 taxes that he used 50% of his home for business purposes and deducted

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<sup>13</sup> 9 NYCRR § 2524.2(c)(2); 2215-75 Cruger Apartments, Inc. v. Stovel, 769 N.Y.S.2d 347 (App. Term 1st Dept. 2003) (“Landlord’s failure to serve the notice to cure at least ten days prior to the date listed for a cure is fatal to the summary proceeding.”); Hudson Associates v. Benoit, 640 N.Y.S.2d 540 (App. Div. 1st Dept. 1996) (“In a summary holdover proceeding to recover possession upon the ground of an illegal sublet, the landlord is required to prove as part of its *prima facie* case that a notice to cure was served and that the tenant has failed to cure.” Only then can the landlord seek to terminate a tenancy).

<sup>14</sup> Index No. LT 87976/2015, Judge H. Cohen, 4/5/2017.

half of his rent as a business expense. In 2014 tenant declared \$19,328 in rental fees from Airbnb and deducted a management fee of \$21,120. Respondent, per his deposition and his instructions on the Airbnb website, directed the guests to never mention Airbnb and to state that they were tenant's friends if they were ever asked. Based upon this and other evidence, summary judgment was awarded to landlord.

#### 4. Subpoenas

You can also subpoena Airbnb for its records on a particular apartment, once a litigation is initiated. You can ask for the information on the stays (dates, prices, duration) and conversations between guest and hosts on the site.

#### B. Injunctions

Injunctive relief is also available to a landlord when a tenant violates the short term leasing laws. *Brookford v. Penraat*<sup>15</sup> involved an action commenced by plaintiff-landlord against defendant-tenant, the resident of a four-bedroom, rent-controlled duplex apartment on Central Park West, arising out of tenant's rental of three of the bedrooms to tourists and other transient visitors for profit on a short-term basis using a commercial website. Landlord was granted a preliminary injunction enjoining tenant from so renting the apartment where plaintiff demonstrated a likelihood of success on the merits of its claim that defendant's activities were in violation of Multiple Dwelling Law § 4 (8) (a), and where the circumstances of such renting posed a danger to all occupants of the building. The court stated:

As to whether plaintiff suffered from irreparable injury, case law has already set forth that placing tourists in accommodations that are not designed or equipped with sufficient fire and safety protections, in and of itself, constitutes irreparable injury, and the equities lie in favor of enjoining such conduct, "rather than in allowing said business to continue to operate (to defendants' presumed financial advantage)".

See also, IP Mortg. Borrower, LLC v. Sharif, No. 159434/15 WL 6566605 (Sup. Ct. N.Y. County 2015).

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<sup>15</sup> N.Y.S.3d 859 (Sup. Ct. N.Y. County 2014).

Interestingly, in CLAC America II, Inc. v. Sky Worldwide LLC, 41 N.Y.S.3d 448 (Civ. Ct. N.Y. County 2015), the Civil Court enjoined the tenant from engaging in future short-term rentals.

## **IX. TENANT'S PERSPECTIVE**

Throughout these materials, the Tenant's advocate will find MANY possible defenses to be employed when defending a tenant in one of these cases. In this section, I extract and consolidate those possible defenses. The following defenses should be considered when defending a tenant from an allegation of illegal short-term subleasing.

If there was no camera, it is hard to prove the tenant was not living in the unit with the guests or that the stay was less than 30 days. It becomes landlord's word against tenant's and landlord has no personal knowledge. I recently represented a landlord in an Airbnb case where there was no camera (bad move). My client was very confident because we had many Airbnb listings for the apartment where the tenant was offering to rent the "whole apartment". But this tenant was represented by a clever young tenant's attorney who I have mountains of respect for. This attorney called me and said, "*Michelle, the tenant works nights, so she slept in the bed during the day and her guest slept there at night. Thus, she rented the "whole apartment", while being present in the unit.*" That's clever! Yeah, I could have done discovery and depositions and vetted this creative excuse, if the client wanted to drop bags of money on my legal fees and spend a year on the case. We settled.

In addition, if there is no camera and landlord is only prosecuting the case with Airbnb records from a third-party provider (as opposed to a subpoena of Airbnb records) there may be a hearsay challenge.

What constitutes profiteering is now arguably well settled by Goldstein v. Lipetz 53 N.Y.S.3d 296 (App. Div. 1st Dept. 2017) see above. Nevertheless, that case also suggests that if the profiteering overcharges were refunded to the guests that a cure may be permitted. Keep that in mind for a tenant-client that only did Airbnb a few times.

In *Goldstein v. Lipetz* the tenant also unsuccessfully used a waiver defense, because there was no evidence that the landlord was aware of the short-term subletting. This defense should be kept in mind, because it might work in a different fact pattern.

The predicate notice may be constructed wrong. See the above comments on a cause of action for nuisance (which requires a pattern). Moreover, I saw another firm default tenant for not paying hotel tax! Hello?! That's not a *per se* cause of action by a landlord against a tenant.

**X. WHEN A GUEST MAKES A CLAIM THAT THEY ARE ENTITLED TO STAY!**

I represent a *GUEST* who stayed in a New York City furnished apartment for more than 30 days. Her original booking was as a short-term guest, but she kept “renewing” and extending, and she remained in the apartment for more than thirty consecutive days. She has been in the apartment for almost a year now. I wrote a letter to the landlord, cc-ing the alleged tenant, accusing the alleged tenant of being an illusory prime tenant, and demanding a lease for my client, as the legitimate Rent Stabilized tenant of the apartment. The landlord denied my request, terminated the tenancy for illegal short-term subletting, and sued both tenant and my client (the guest) in a holdover. The “tenant” defaulted. So now the case is between the landlord and my guest-client.

My argument is that my client, the “guest”, is not a subtenant, but is a prime tenant. The alleged tenant is an *illusory*-prime-tenant because he has been long absent, landlord knows of that absence, and tenant perpetually rents the furnished, Rent Stabilized unit on short-term leasing platforms, transforming rent regulated housing into an illegal hotel unit, which landlord fully benefits from because it is getting a market rent for what it admits in its petition is a Rent Stabilized apartment. My client has paid rent for the apartment, both via tenant and directly to landlord.

The term “illusory tenant” has been used to describe a party who, while assuming the guise of a “prime tenant” enters into a sublease arrangement which has the effect, directly or indirectly, of evading the requirements of the Rent Stabilization Law. In such case, the subtenant will be accorded the full protection of the rent stabilization laws. Matter of Avon Furniture Leasing, Inc. v. Popolizio, 500 N.Y.S.2d 1019 (App. Div. 1st Dept. 1986).

The landlord is acting as if it is totally clueless that this unit has been operated as a hotel room since 2013. You will remember from above that ignorance of the violations is not a defense. NYC v. JJNK Corp., ECB Appeal No. 1500708 (Sept. 25, 2015). I think landlord knew and was complicit, that the tenant is illusory, that my guest-client is the real tenant, and that my client should be recognized as the Rent Stabilized tenant.

The case goes to trial in the fall! Because the fun never ends when you're me...

**XI. LANDLORD AND TENANT LAW IS EVOLVING IN THE SHORT-TERM RENTING AREA**

So there you have thirty-one substantive pages on short-term renting in the sharing economy in New York State. But this is NOT the end of the discussion or of our education. This is only a place to begin. This area is obviously evolving right before our eyes. When an area is in flux, it creates both peril and opportunity, for all of us. Stay alert for new developments!

## ABOUT THE AUTHOR

Michelle Maratto Itkowitz is the owner and founder of Itkowitz PLLC and has been practicing commercial and complex-residential landlord and tenant law in the City of New York for over twenty years. Michelle represents BOTH landlords and tenants and her core competencies include: Rent Stabilization, the Loft Law, Short-Term Leasing litigations, Yellowstone injunctions, residential tenant representation, Good-Guy Guaranties, clearing buildings so that construction projects can go forward, and Rent Stabilization Due Diligence.

Michelle publishes and speaks frequently on landlord and tenant law. The groups that Michelle has written for and/or presented to include: Lawline.com; The Columbia Society of Real Estate Appraisers; LandlordsNY; Lorman Education Services; Rossdale CLE, The Association of the Bar of the City of New York; The New York State Bar Association, Real Property Section, Commercial Leasing Committee; Thompson Reuters; The Cooperator; The New York State Bar Association CLE Publications; The TerraCRG Brooklyn Real Estate Summits; The Association of the Bar of the City of New York; BisNow; and SubletSpy.

Michelle regularly creates and shares original and useful content on landlord and tenant law, including via booklets, videos, and live presentations. As the “Legal Expert” for LandlordsNY.com, the first social platform exclusively for landlords and property managers, Michelle answers member's questions, guest blogs, and teaches. Michelle developed and regularly updates a seven-part, eight-hour continuing legal education curriculum for Lawline.com entitled "New York Landlord and Tenant Litigation". Over 20,000 lawyers have purchased Michelle's CLE classes on Lawline.com (a labor of love for which Michelle gets not a dime) and the programs have met with the highest reviews. Michelle is currently co-authoring a chapter on lease remedy clauses and guaranties for the New York State Bar Association, Real Property Section, Commercial Leasing Committee.

Michelle is also an adjunct professor of Legal Project Management, a topic she is passionate about, at NYU's School of Professional Studies.

Michelle is immensely proud that Itkowitz PLLC was awarded its NYS Women Business Enterprise Certification by the Empire State Development Corp. Michelle's eponymous law firm is one of the largest women-owned law firms, by revenue, in the State.

Michelle is admitted to practice in New York State and the United States District Court for the Southern District of New York. She received a Bachelor of Arts in Political Science in 1989 from Union College and a Juris Doctor in 1992 from Brooklyn Law School. She began her legal career at Cullen & Dykman.

There are many ways to keep up with Michelle. When Michelle tweets, which is not an obnoxious amount, she does so in an easy to understand manner about useful stuff regarding real estate, business, the legal industry, and organic herb gardening. Feel free to contact Michelle; she would be happy to speak to you.



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