AIRBNB AND YOUR BUILDING

SHORT-TERM ILLEGAL SUBLETS IN NYC APARTMENTS

Prevention, Detection, and Remedies for Landlords

(and Some Strategies for Tenants to Protect Their Leases when doing Short-Term Leasing Too!)

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[6] 51 Misc 3d 126(A) (AT 1st 2016).

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[6] 51 Misc 3d 126(A) (AT 1st 2016).

I. INTRODUCTION

This booklet explains the law regarding short-term subletting, much of which is illegal, in New York City and it explains how a landlord can prevent, detect, and remedy these situations. The booklet is also an excellent resource for tenants and/or people who want to be "guests" in New York City via a short-term leasing platform because it educates people about what is and is not legal. I kept my personal opinions on the prohibitions against short-term leasing and the politics surrounding it out it out of the booklet. (Really!) There is a whole lot of law here, so let's get down to business.

II. 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 sub-leasing. 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 v. Hennen, 2017 WL 87171 (Sup. Ct. NY Cty. 2017).

[6] 51 Misc 3d 126(A) (AT 1st 2016).

MDL § 4(8)(a) is the relevant section of the statute and we need to read it closely, it 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.]

[6] 51 Misc 3d 126(A) (AT 1st 2016).

Multiple Dwelling Law § 4(7) & (8)(a) prohibits 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 make sure that we 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.

[6] 51 Misc 3d 126(A) (AT 1st 2016).

2. The Housing Maintenance Code

The HMC applies to all dwellings.[1] 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 exceptions work.

In NYC v. Carrey[2], the 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.

[1] N.Y. ADC. LAW § 27-2003.

[2] ECB Appeal Nos. 1300602 & 1300736, 9/26/2013.

[6] 51 Misc 3d 126(A) (AT 1st 2016).

But see NYC v. 488 West 57th Associates[3], 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

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. For example, this could encompass the classic bed and breakfast gig, where a guest lives with the permanent occupant for a few days.

(2) Or if the permanent occupant is temporarily away and the guest does NOT pay. For example, if the tenant is on vacation for a week and lets her cousin stay in the apartment and does not take any money for the favor, then there is no violation of the short-term leasing law.

[3] ECB Appeal No. 140043, 2/27/2014, LVT No. 25476.

C. 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. That is according to appellate case law. In 42nd & 10th Assoc. v. Izeki[4], 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[5], 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."

So a difficulty arises over what is profiteering?

[4] 50 Misc. 3d 130(A) (AT 1st 2015).

[5] 100145/2014 (NY Civ. Ct. 2015), 2015 NY Slip Op 52875, at pp. 8 - 9 (Civ., Kl, Decided April 1, 2015).

51 Misc. 3d 126(A) (AT 1st 2016).

In 13775 v. Foglino[6], the Appellate Term again held, that is 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 prediscovery record now before us are the number of times tenant sublet the premises through Airbnb or otherwise and the amount of any overcharges.

I got a call from a tenant who proudly stated, "Michelle, I want you to help me defend my home, I am doing Airbnb!"

> I said, "I am not sure I CAN help you. Are you HOME when these gigs happen?"
> "Absolutely," he said. "And I can prove it, I know the landlord has a camera on my apartment door and he can see that I am home the whole time my guests are here."
> "Ok," I said, "But does your lease prohibit short-term leasing?"
> "Nope!"
> "Are you Rent Stabilized?"
> "Yes," he answered.
> "Well, then," I said, "you are profiteering."
> "Am I?" he asked. "Why? I NEVER made a dime more than HALF my rent."

That gave me something to THINK about! Is he profiteering? I feel like he isn't. But again, there just isn't enough case law to be sure about hat that answer will be.

[6] 51 Misc 3d 126(A) (AT 1st 2016).

In 3357 LLC v. Steele[7], the Appellate Term also 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.

And a decision just came down on the Steele case!

Landlord sued to evict rent-stabilized tenant for unlawful subletting of her apartment and profiteering. 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 properly found that tenant's conduct constituted subletting, profiteering, and commercialization of the premises. This was an incurable violation of the Rent Stabilization Law. 335-7 LLC v. Steele 53 Misc.3d 150(A), 2016 NY Slip Op 51689(U) (App. T. 1 Dept.; 11/29/16) LVT Number: #27371.

Here is a brand new profiteering case. PWV Acquisition v. Poole, 2017 WL 550196 (Sup. Ct. NY Cty. 2017). Here, the special referee found that, in 2014, the tenant made

[7] 43 Misc 3d 144(A) (AT 1st 2014).

$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 Pooole 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.

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.[8] 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, 47 Misc.3d 723 (Sup. Ct. NY Cty. 2014).

[8] 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 on 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

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

A. Violations and Fines

The City has a task force cracking down on illegal hotels.[9] 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[10], 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[11], 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. It didn't matter that the city applied stricter fire safety standards for transient dwellings than on permanent residential units.

In NYC v. JJNK Corp.[12], 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,

[9] http://www.nydailynews.com/new-york/nyc-spend-10m-crack-illegal-hotels-article-1.2436047.

[10] ECB Appeal No. 1400626, 8/28/ 2014.

[11] Index No. 451997/2014, NYLJ No. 1202739515002 (Sup. Ct. NY; 10/6/15; d'Auguste, J) LVT Number: #26632.

[12] ECB Appeal Number 1500708, 9/25/15, LVT Number 26579.

> April 30, 20 15) (premises owner liable despite lack of knowledge that 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[13], 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 September 2016, 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[14], a multi-family building's residents brought a premises security action against building's 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

[13] ECB App. No. 1600535 (7/28/16) LVT Number: #27161.

[14] 99 A.D.3d 638 (1st Dept. 2012).

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.[15], when a fourteen-year-old tenant brought negligence action against landlord for breaching his duty to take precautions against foreseeable criminal assaults on tenants 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 was harmed by a short-term leasing guest.

In NYC v. Lorimer LLC[16], 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

Many insurance policies will not cover a loss which occurs while the policy holder is violating the law. Therefore, if your short-term guest burns your building down, you may not be covered.

[15] 259 A.D.2d 386 (1st dept., 1999).

[16] ECB Appeal No. 1400672, September 18, 2014 (affirmed 11/20/2014 under Appeal No. 1401013).

D. Inability to Refinance

A recent article suggests that Airbnb activity makes refinancing harder.[17]

IV. "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 illegally short-term sublets continuously.

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.[18] An analysis of global Airbnb listings [in 2014] showed that hosts offering multiple listings made up over 40% of the company's business.[19] A 2016 report from Penn State researchers for the American Hotel and Lodging Association[20] determined that $378M of Airbnb's total revenue—nearly 30%—was generated from "full-time operators" listing rentals year-round.[21]

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

[17] http://therealdeal.com/2016/08/29/residential-lenders-think-twice-about-refinancing-an-airbnb-home.

[18] http://www.nytimes.com/2014/11/30/magazine/the-business-tycoons-of-airbnb.html?mwrsm=Email&_r=0.

[19] https://www.fastcompany.com/3043468/the-secrets-of-airbnb-superhosts.

[20] http://www.ahla.com/uploadedFiles/_Common/pdf/PennState_AirBnbReport_.pdf.

[21] https://www.bisnow.com/national/news/hotel/report-professional-operators-make-a-killing-off-airbnb-59859.

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.[22]

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

V. PREVENTING TENANTS FROM ENGAGING IN ILLEGAL SHORT-TERM LEASING

It is better to prevent tenants from engaging in short-term leasing 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.

[22] *See* Real Property Actions and Proceedings Law ("RPAPL") § 853; *Romanello v. Hirschfeld*, 63 N.Y.2d 613, 615 (1984).

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. I created a form lease for LandlordsNY. Below is a sample of the language contained in the BODY of the lease, in the Use Clause.

USE OF THE APARTMENT

> …Tenants shall not violate Multiple Dwelling Law § 4(8)(a) of 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 can be immediately terminated without the benefit of a cure period.

VI. 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 innuendo.

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

The author of these materials likes the SubletSpy product[23]. It apparently uses building façade recognition software to find a particular building and then produces reports that contain printouts of all the Airbnb pages associated with the listings in such building. For a particular unit the report contains:

- 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

I find these reports, which are quite lengthy, to be extremely helpful in cases against tenants for illegal short-term sublets. I have also heard my clients say that they feel they never could have found the data by cruising around the Airbnb site by themselves.

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."[24]

[23] I have not been paid to endorse SubletSpy. https://subletspy.com.

[24] *W 47 Realty LLC*, ECB App. No. 1600535 (7/28/16) LVT Number: #27161.

B. 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.

C. Cameras

Properly installed and maintained hidden security cameras trained on the door of an apartment can also be an excellent tool in proving a tenant's violation of the short-term leasing laws.

We recommend letting a professional install and maintain such equipment. 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. It is, therefore, often helpful if someone actively monitors the recording, rather than allowing months of footage to build up before reviewing it.[25] However, it is not absolutely necessary to monitor the video feed. Testimony from someone who has knowledge of the circumstances and who actually reviewed the footage is usually sufficient.[26]

D. Other Tenants and Building Personnel

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

In 42nd & 10th Assoc. LLC v Ikezi[27], 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.

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[25] *See, e.g., People v. Fondal*, 154 A.D.2d 476 (2d. Dep't 1989). (Holding that there was an adequate foundation for the introduction of a videotape into evidence where an employee observed, through the medium of a closed-circuit television, defendants engaged in the commission of a theft, and testified that the videotape accurately depicted the events which he had observed.)

[26] *See Zegarelli v. Hughes*, 3 N.Y.3d 64, 69 (2004).

[27] 46 Misc.3d 1219(A) (Civ. Ct. NY Cty. 2015).

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 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 guest's 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.

E. 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!

F. Public Social Media Data

The 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.

G. Private Investigators Who Book the Apartment

Another way of proving these cases is to have a private investigator book the apartment for a short-term sublet and create a detailed report of the experience.

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

A. Summary Holdover Proceedings

1. Predicate Notices – No Notice to Cure Needed

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 non-primary residence 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.[28]

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 using 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 others couch 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[29] and raises

[28] *Brookford, LLC v. Penraat*, 47 Misc3d 723 (S. Ct. NY Co. 2014).

[29] 9 NYCRR § 2524.2(c)(2); 2215-75 Cruger Apartments, Inc. v. Stovel, 196 Misc. 2d 346 (App. Term 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

issues of fact regarding whether or not the arrangement was a roommate if sublet situation. See 3357 LLC v. Steele[30] discussed above.

I saw one firm recently call illegal short-term subletting "nuisance". The author was hired by a young couple who did Airbnb just once, but was hit by their landlord with a nuisance termination notice. We wrote a letter to landlord's counsel explaining that nuisance 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 (but be prepared to prove) "profiteering". See the section above, however, on the difficulties of proving profiteering.

B. Injunctions

Moreover, injunctive relief is also available to a landlord when a tenant violates the short term leasing laws. Brookford v. Penraat[31] 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

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summary proceeding."); Hudson Associates v. Benoit, 226 A.D.2d 196 (1st Dep't 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).

[30] 43 Misc 3d 144(A) (AT 1st 2014).

[31] 47 Misc 3d 723 (S. Ct. NY Co. 2014).

conduct, "rather than in allowing said business to continue to operate (to defendants' presumed financial advantage)".

See also, IP Mortg. Borrower, LLC v. Sharif, 2015 WL 6566605 (Sup. Ct. NY Cty. 2015).

C. Strategies to Utilize Against Real-People-Violators vs. Professional Operators

We 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 Marshall comes to the door. Therefore, for Professional Operators may justify the expense of seeking an injunction.

VIII. BONUS SECTION – TENANT'S PERSPECTIVE

The following defenses should be considered when defending a tenant form an allegation of illegal short-term leasing.

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 had a tenant say that she worked nights, so she slept in the bed during the day and her guest slept there at night.

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

Profiteering is unsettled. That is a fruitful area for attack.

The operation of the law in this area is draconian. There is no other default where tenant does not get a cure.

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! That's not a per se cause of action by a Landlord against a Tenant.

IX. LANDLORD AND TENANT LAW IS EVOLVING IN THE SHORT-TERM SUBLET AREA

Landlord and tenant law in New York City is evolving in the short-term sublet area. When an area is in flux, it creates both peril and opportunity, for both landlords and tenants. Stay alert for new developments!

ABOUT THE AUTHOR

Michelle Maratto Itkowitz is the owner of Itkowitz PLLC. She practices real estate litigation. Michelle has over twenty years of experience, and is best known for her work in the area of commercial and complex-residential landlord and tenant law in the City of New York. Michelle represents BOTH landlords and tenants and her core competencies include: Rent Stabilization and Rent Control, the Loft Law, Short-Term Leasing cases, Yellowstone injunctions, tenant buyouts, clearing buildings so that construction projects can go forward, and Rent Stabilization Due Diligence. She also is very experienced in general commercial litigation. See our Accomplishments section of Itkowitz.com to get an idea of the breadth of Michelle's work.

Michelle publishes and speaks frequently on legal issues in real estate. 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 real estate and law, including booklets, videos, and articles. She is frequently quoted in the press on a variety of real estate and legal issues. 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 recently developed a seven-part, eight-hour continuing legal education curriculum for Lawline.com entitled "New York Landlord and Tenant Litigation". Over 16,000 lawyers have purchased Michelle and Jay Itkowitz's earlier CLE classes from Lawline.com, and the programs have met with the highest reviews. Jay and Michelle are 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 immensely proud that Itkowitz PLLC was recently awarded its NYS Women Business Enterprise Certification by the Empire State Development Corp.

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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