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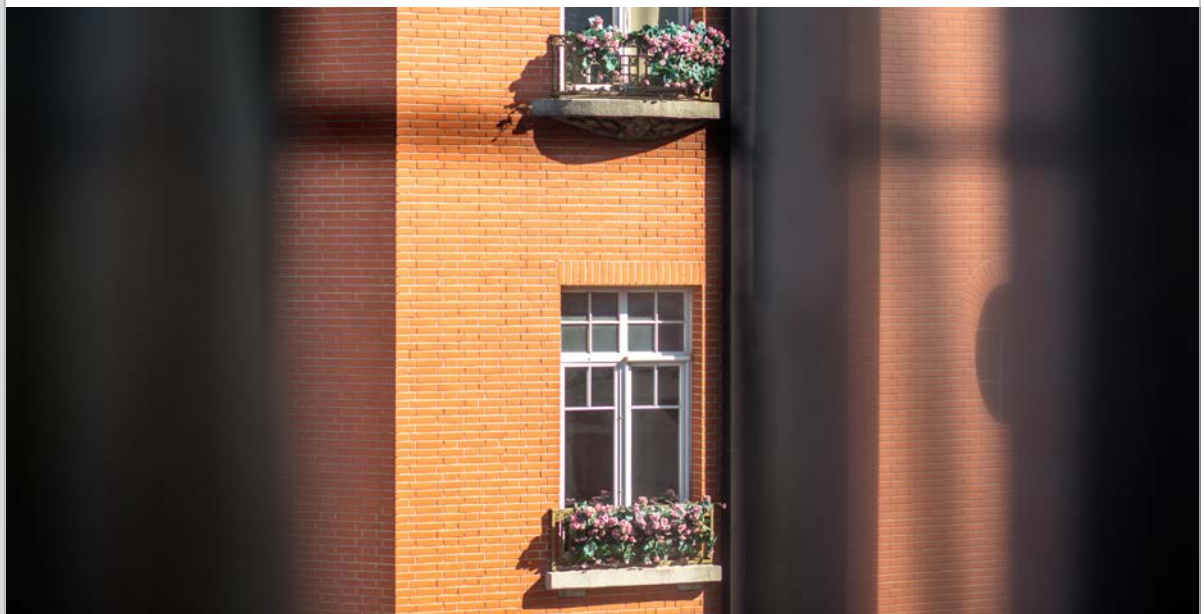
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*(and Other Short-Term Rentals)

WHAT TO DO ABOUT SHORT TERM RENTALS



By Sherwin Belkin

Starting in 2010-2011, New York began addressing the burgeoning short term rental business via amendments to a host of laws: the Multiple Dwelling Law (Section 4. a. 8(a)), the Housing Maintenance Code (Section 27-2004. a. 8(a)), the Administrative Code (Section 27-265) and New York City Building Code (Section 310.1.2) which all prohibit short term rentals in Class A multiple dwellings. The aim was to ensure

that such dwellings were used “for permanent residence purposes” – generally meaning that it became illegal to rent such a unit for less than thirty days.

The policy goals behind the bar to short term rentals were to prevent the circumvention of the strict fire safety standards applicable to hotels; prevent unfair competition to legitimate hotels; protect the rights of permanent tenants from having to endure having their buildings transformed into a form of hotel occupancy; and to preserve the supply of affordable permanent housing. *continued on page 2*

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Just check the internet to see how well this has worked in New York City. Whether it is the largest entity, AirBNB, or smaller but similar businesses, or individual tenants, the number of listings on a daily basis whereby tenants seek to rent out their apartments is now estimated in the tens of thousands.

Aside from the substantial safety and security concerns that having an endless stream of inadequately vetted short term renters entering into and occupying Class A multiple dwellings obviously creates, the City's enforcement of such illegal activity has, in a number of instances, shifted the blame from the tenant that is posting the listing and making the profit onto the owner of the building, who neither participated in nor consented to the illegal rental. The result has been substantial fines levied against owners who were completely blameless for the illegal activity and, in at least one instance, actually alerted the City to the illegal activity in the hope that the City would put a stop to it!

Owners have begun taking tenants (that they become aware of) who are in violation of the short term rental laws to court on eviction proceedings –with some recent success. But, certainly, the more economically prudent goal would be to try to stop the illegality before it occurs.

When the short term rental business began, my initial reaction was that the standard apartment lease already contained sufficient protection for owners (and I believe that it still does). The standard lease requires tenants to abide by all laws, restricts occupancy and requires compliance with statutes pertaining to sublets and roommates. Moreover, when a rent regulated tenant is involved, there are restrictions on what a tenant may charge a roommate or a subtenant.

However, as the problem as morphed from a drip to a flood, I have suggested that owners begin to take a more proactive approach, including the following:

- Reminding tenants—via a regular mailing—that short term rental may violate:
 - The terms of the lease (which restricts occupancy);
 - The Administrative Code of the City of New York and other statutes (which limit short term rentals);
 - Real Property Law 226-b (which governs sublets);
 - Real Property Law 235-f (which governs roommates)
 - The Penal Code (which prohibits rent gouging).

–The Rent Stabilization Law (as applicable)

- Adding a rider to the lease that is a stand-alone regarding short term rentals. The rider that BBWG suggests not only addresses the restrictions on short term rentals, but has the tenant agree to indemnify the owner for any fines, penalties or costs incurred by reason of the tenant's violation of these restrictions.
- Have a staff member routinely examine the listings for short term rentals to determine if your apartments are “in play”;
- Train door people and other building staff how to question persons seeking entry to the building to determine the nature of the occupancy –even if with the consent of the tenant;
- Maintain a log of “guests” coming to each apartment, not merely by date, but by apartment; by compiling such a log, you can create a more comprehensive picture as to the frequency and duration of “guest” stays in a particular unit;
- Consider registering with <http://www.airbnbalert.com/> (or similar sites) to obtain alerts on listings for potential illegal activity.

Short term rental operators justify their business model as part of the new “sharing economy.” However, that justification—even if worthy of consideration—certainly requires legal compliance by all concerned. Tenants who moved into an apartment building expecting to have permanent neighbors, should not be forced to live adjacent to an ever changing unknown cast of characters. Similarly, Owners should not be placed at risk for fine by actions they neither take nor condone.

Sherwin Belkin (sbelkin@bbwg.com) is a founding partner of the firm and works in the firm's Administrative and Appeals Departments.

IGNORANCE MAY BE BLISS BUT IT IS NO DEFENSE TO TRANSIENT OCCUPANCY FINES



By Robert Jacobs

The proliferation of tenants' use of apartments as transient accommodations has not gone unnoticed by the City Department of Buildings ("DOB"). The DOB has been issuing violations to the property owners of buildings where such practice is detected. The violations are steep, running as much as \$1,000 per day! Worse yet, the Environmental Control Board ("ECB") has been sustaining such violations even where the building owner had no knowledge of such use.

The reason for the stringent enforcement stems from the fact that, under recent statutory amendments, transient use of apartments that are intended for permanent occupancy is a violation of the Building Code, the City Housing Maintenance Code ("HMC"), and the State Multiple Dwelling Law ("MDL"). In addition, transient use triggers more stringent, hotel-like, fire protection requirements under the City Fire Code, which requirements generally do not apply in apartment buildings.

Under the Building Code and MDL, a permanently occupied apartment is known as a "Class A" apartment. Such apartments are designed for the housing of tenants on a permanent basis. Fire Code requirements in a building containing Class A apartments are less stringent since such permanent tenants are presumed to know the location of fire exits in the building where they live, in contrast with transient occupants, who normally do not.

The difference between transient and

permanent occupancy was previously a gray area since the premises had to be "primarily" occupied for transient use before running afoul of the transient occupancy laws. However, the word "primarily" was deleted from the law when the City Council enacted Local Law 45 of 2012 to amend Section 28-201.3 of the Building Code to provide that Class A apartments "shall only be used for permanent residence purposes." Moreover, the MDL has been amended to provide that Class A apartments can only be used for "*permanent residence purposes*", which is defined as occupancy for "thirty consecutive days or more" and a person so occupying a dwelling unit is known as a "permanent occupant". (MDL Section 4[8][a]). In addition, the HMC was amended to expand the word "occupied" to be construed as if followed by words "intended, arranged or designed to be used or occupied". (HMC Section 27-2004. A[8][a]) These statutory changes have made it easier for the DOB to issue violations for transient use.

With the growth of AirBnB and other similar internet-based transient occupancy placement services, transient use of Class A apartments has escalated greatly. The DOB (and the Mayor's Office of Special Enforcement) have, in turn, ramped up their enforcement efforts by sending inspectors into the field to ferret out transient use, and to file violations based thereon. Notably, with the aforementioned changes in the law, there has been a substantial increase in the ECB sustaining such violations for transient use.

Since reporting such transient use to the DOB will not relieve an owner of financial liability for such infractions even where the

owner had no knowledge of the violation, owners must be vigilant in policing their own buildings to make sure such transient use is not ongoing. Therefore, doormen, superintendents and other building employees should be instructed to advise management immediately where transient use appears to be ongoing. Turning a blind eye to the use because the tenant is otherwise paying rent on a timely basis can lead to substantial fines being imposed on ownership--ignorance is not bliss when it comes to transient occupancy.

An added potential practical issue is that, often, building employees stand to reap personal financial gain from tenants who allow their apartments to be used for transient purposes—many such tenants reward many such employees for "looking the other way" as transient occupants arrive for their short-term stays.

Notably, the Appellate Term (which hears appeals of Manhattan housing cases) in *42nd & 10th Assoc., LLC v. Izeki* recently sustained the eviction of a rent stabilized tenant who "rented out the premises as if it was a hotel room". The appellate court upheld the housing court's ruling even though the building owner had not served a notice to cure, because, under the appellate court's reasoning, an overcharge of an undertenant (such as a transient occupant) by a rent stabilized tenant is an incurable offense. Thus, an owner's vigilance can certainly pay off.

Robert Jacobs is a partner in the Administrative Law Department at BBWG. For information on transient violation issues, please contact Mr. Jacobs at rjacobs@bbwg.com.

SHORT TERM RENTAL OF RENT STABILIZED APARTMENT ON AIRBNB HELD TO BE AN INCURABLE GROUND FOR EVICTION



By Scott Loffredo

On February 17, 2015, the New York City Housing Court (Hon. Jack Stoller J. H.C.), after trial, held that a rent stabilized tenant's nightly renting of his apartment to various third parties via AirBnB constituted illegal profiteering and awarded landlord a final judgment of possession and warrant of eviction. Notably, the Court held that tenant's infraction was incurable and thus landlord was not required to first serve tenant with a notice to cure before commencing the eviction proceeding.

During the trial, evidence was taken proving tenant's legal rent at 450 West 42nd Street Apt. 46B (the "Apartment") to be in excess of \$9,000.00 per month and preferential leasehold rent to be \$6,670.00 (or a daily rate of \$219.29 per night). Evidence was further adduced proving that either tenant himself, or tenant's employees acting on his behalf, advertised on AirBnB nightly stays at the Apartment for \$649.00 per night with a "check in" time for 4:00pm and a "check out" time at 11:00am, a \$95.00 extra person fee and a \$150.00 cleaning fee.

Landlord introduced tenant's AirBnB profile into evidence during the trial and called building personnel who had recently been in the Apartment to confirm that the photographs found in tenant's AirBnB advertisement were of the Apartment. Relying on this evidence, the Court found the placement of the ad "compels the conclusion" that tenant caused the ad to be placed on AirBnB and therefore accepted the ad as an admission made by the tenant. Additionally, landlord called tenant to testify as part of its direct case. During tenant's testimony, the Court noted that tenant "was trying to be clever" in providing evasive answers and that tenant's inability to remember if he had ever charged anyone to sleep in the premises "defied common sense".

When given the opportunity to present evidence in his defense, tenant "chose to not put on a case". Noting that it would have behooved tenant to offer evidence in support of his defense, especially where tenant was represented by highly capable counsel and was an actual party to the proceeding personally familiar with the facts in controversy, the Court's decision stated that tenant's voluntary choice not to present evidence in opposition mandated

the Court draw the strongest possible inference that landlord's unopposed evidence would permit.

While the decision is the first of its kind in New York City and sure to be cited by landlords for various propositions for years to come, it is important to fully appreciate the evidentiary hurdles a landlord will face in this type of proceeding which this particular landlord overcame in large part due to tenant's (i) evasive testimony during landlord's direct case and (ii) failure to present any evidence in his defense when given an opportunity. Since future landlords will unquestionably be faced with similar hurdles when prosecuting illegal profiteering holdover proceedings, it is critical to meet with counsel prior to any legal action to strategize how best to prepare and accumulate the necessary evidence to prevail at trial.

If you are confronted with a tenant's illegal profiteering off of their rent stabilized apartment by employment of AirBnB and similar short term rental websites, BBWG can help you.

Scott Loffredo (sloffredo@bbwg.com) is an associate in the Firm's Litigation Department.

TRANSACTION OF NOTE



Transactional Department partners **Seth Liebenstein** and **Stephen Tretola** represented the purchaser of a 1,200 unit multifamily property in Dallas. The purchase price was \$56 million and the purchase included the assumption of a CMBS loan in the amount of \$35 million.



TRANSIENT OCCUPANCY FROM A CO-OP/CONDO PERSPECTIVE



By Aaron Shmulewitz

The increasing use of apartments for transient “AirBnB”-type occupancy discussed elsewhere in this newsletter has spread to co-ops and condominiums as well. However, because of their unique ownership and operational features, co-ops and condos—and their residents (who each paid significant sums for the privilege of owning their residence, and never expected to run into transiently new faces in the corridors and elevators on a revolving door basis)—are impacted differently. While at least one case, which is referenced in other articles in this newsletter, has resulted in the eviction of a rent-regulated tenant based on illegal profiteering, that basis would likely not exist in a co-op or condo setting. Consequently, co-op and condo Boards and managing agents need to approach transient occupancy differently than do rental building owners.

First, it is always easier to “keep the problem out”, than to try to address it once it is already in the building. Therefore, a building’s door staff and superintendent are its first (and last) line of defense. Boards and managing agents should impress upon staff—repeatedly—that their job functions include keeping unannounced visitors with suitcases from entering apartments in violation of building policy, and reporting infractions immediately, and that their job security may very well be jeopardized should they fail to do so. Unfortunately, some building employees have been known to “look the other way” when such visitors arrive, often motivated by financial considerations given by apartment owners with whom they are in cahoots. Building staff must be made to feel that violating building policies will cost them a lot more—i. e., their jobs—than the amounts they can hope to collect from the apartment owners bribing them. (Of course, smaller buildings with no staff seem to be disproportionately prone to being violated by AirBnB-type use, for obvious reasons.)

If transient occupancy does occur, the Board must take remedial action.

Virtually every co-op’s proprietary lease contains a provision that regulates occupancy in apartments, including, specifically, restricting guest occupancy longer (or shorter) than stated periods and, normally, severely restricting guest occupancy in the absence of a shareholder of record. Many co-op proprietary leases also provide that an apartment cannot be used in violation of law. Similarly, virtually every condo has bylaw provisions that explicitly bar transient occupancy in an apartment, and prohibit illegal use of an apartment. A Board that discovers that an apartment is being used for violative and illegal transient occupancy must take appropriate legal action under its governing documents—in a co-op, such legal action would normally be a holdover eviction proceeding, and in a condo it would be an injunction/ejection action. Typically, the governing documents also provide that the Board can recover its legal costs from the breaching apartment owner.

Further, a Board that discovers that an apartment is being used regularly as a transient accommodation should immediately notify the Mayor’s Office of Special Enforcement, as well as the Department of Buildings Borough Commissioner’s office. Both agencies have been very pro-active in investigating and, when warranted, taking legal action against such use. While such legal action may very well result in violations and fines being imposed against the building, the imposition of such violations and fines would normally trigger another remedy by the Board against the apartment owner—constituting prima facie evidence of illegal use, the existence of such violations and fines would buttress the Board’s proceeding against the apartment owner, in effect making the City an important and powerful confirmatory ally of the Board. Finally, the apartment owner would normally have to indemnify the Board with regard to any such fine amounts, as well as any legal costs incurred by the Board in connection with the matter.

BBWG has represented many co-op and condo Boards in such matters, and we would be happy to help others address them as well.

Aaron Shmulewitz (ashmulewitz@bbwg.com) heads the firm’s Co-op/Condo practice.

CASES OF NOTE



Partner **Jeffrey L. Goldman** and associate **David Brand** successfully represented at trial the sponsor/master commercial tenant of a co-op in a dispute with the Board over the expiration date of its lease. After much motion practice and appeals, the Court upheld our client's position that the lease still had approximately 50 more years to run, and also awarded our client significant attorneys' fees.



Partner **Orie Shapiro** successfully defended an Upper East Side co-op in an administrative proceeding brought by the DOB over the co-op's water evacuation system. The co-op's argument that the 1938 Building Code governed was upheld. The decision is of strategic import to the co-op, since the co-op is being sued separately by a shareholder for damages allegedly arising from the non-conformity.

NOTABLE ACHIEVEMENTS



Sherwin Belkin, a partner in the Firm's Appeals and Administrative Law Departments, was featured in articles in *The Real Deal* discussing cases involving 421-g real estate tax benefits on [January 12](#) and [January 14](#), and analyzing "AirBnB" type transient occupancy issues on [March 1](#). **Mr. Belkin** was also a member of a panel discussing J51 Rent Stabilization Enforcement Issues sponsored by CHIP on February 24, and a panel discussing short term renters (such as AirBnB) sponsored by RSA on March 9.



Joseph Burden, co-head of the Firm's Litigation Department, authored an article that appeared in *Real Estate Weekly's* on-line edition on January 20, titled "[Owners on notice over new heat regulations](#)"



Jeffrey Goldman, co-head of the Firm's Litigation Department, was quoted in numerous publications with regard to an Appellate Division decision in litigation against long-time Firm client Donald Trump and Trump University.



Aaron Shmulewitz, head of BBWG's co-op/condo practice, was quoted in articles in *Habitat*, *Real Estate Weekly*, *The Real Deal* and *The New York Observer* discussing new Treasury Department reporting regulations intended to regulate the purchase of Manhattan condo apartments. **Mr. Shmulewitz** was also quoted in a [March 1 article](#) in *The Real Deal* regarding changes affecting co-op Boards.



Administrative Law Department partner **Kara Rakowski** lectured at a continuing education seminar for brokers sponsored by REBNY on February 3, on the topic of how the Building Code and a building's Certificate of Occupancy affect the use and development of rent regulated properties.