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## SHARING ECONOMY



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### AIRBNB: FACILITATOR OF PROFITEERING IN NEW YORK CITY

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Does Airbnb facilitate some of its hosts to ignore housing statutes and regulations and engage in profiteering? Certainly, New York State's Attorney General may have concluded as much when after a four year investigation he found in 2014 that 72 percent of Airbnb host units were illegal with commercial operators constituting 6 percent of the hosts and supplying 36 percent of the rentals . And certainly Governor Cuomo may have concluded as much when he signed into law New York Multiple Dwelling Law Section 121 and New York City Administrative Code Section 27-287.1 [the 'Act'] which imposed substantial penalties for "advertising that promotes the use of dwelling units in a class A multiple dwelling for other than permanent residence purposes" seeking, inter alia, to make Airbnb vicariously liable for the illegal acts of its hosts and similar to legislation in other cities in the United States . Now the courts have weighed in and may have reached the same conclusion in a decision sustaining an eviction of a tenant for "profiteering" and "[t]urning her rent-stabilized apartment into a single-unit tourist hotel (enabling tenant) to earn substantial profits (of) 72%.from her subletting".

#### **Profiteering**

In *Goldstein v. Lipetz*, 2017 N.Y. App. Div. LEXIS 4006 (1<sup>st</sup> Dept. May 23, 2017) the Appellate Division, First Department in a 3-2 decision found that defendant tenant sublet her rent-stabilized apartment through Airbnb's website for 338 days during an 18 month period to 93 different customers charging nightly rates of \$95 (single) to \$120 (double) "far in excess of her stabilized rent...equivalent to \$57.50 per day". Although the Rent Stabilization Code (RSC)(9 NYCRR) 2525.6(b) allows the tenant to charge a 10% premium "for an otherwise lawful sublet" the Court found that defendant charged her "roommates" from one and half times to twice the "lawful rent".

There have been a handful of other cases involving Airbnb hosts that have reached similar conclusions regarding profiteering.

#### **Single-Unit Tourist Hotel**

Defendant "turned her rent-stabilized apartment into a single-unit tourist hotel" with the help of Airbnb [advertised on Airbnb as "5<sup>th</sup> Avenue Perfection"..."large well appointed private bedroom in great downtown location (Greenwich Village West)...Perfect for single or couple. Private Entrance...Elegant [sic] Comfy.. Defendant's listing on Airbnb website also provides (1) links for making reservations, (2) 'check-in' and 'check-out' times, (3) the financial penalty for untimely cancellation and (4) reviews from numerous past guests"] and "realized a 72% profit from her subletting-about seven times the 10% premium permitted for otherwise lawful sublets of furnished rent-stabilized apartments". The majority rejected defendant's arguments including

that (1) her customers were “roommates” per Real Property Law 235-f and RSC 2525.7 instead of subtenants per RSC 2525.6, (2) her subletting was de minimus, short terms and insubstantial and (3) her landlord had knowledge and gave consent to her subletting. The majority concluded that defendant “exploited the governmentally-conferred privilege of her rent-stabilized tenancy to take financial profits unavailable to her landlord”.

### **Anti-Airbnb Host Legal Strategies**

What can landlords and co-op boards do to stop tenants and co-op owners in New York City from illegally renting to Airbnb guests in addition to terminating a lease based on profiteering. As for cooperatives with restrictions on subletting “The board’s attorney, presented with a listing on Airbnb, can issue a default notice against the shareholder. As additional leverage, if the shareholder has a loan against the apartment the lender will be entitled to notice and opportunity to cure (and he or she doesn’t) the Board may seek an injunction (and) the cooperative’s attorney’s fees” . As for rentals “Of particular importance is whether the violation of an applicable statute is curable by the tenant, simply, by stopping the rental of the apartment to a Airbnb guest”[Higgins, Addressing Short Term Rentals by Cooperative Shareholders”, New York Law Journal (May 8, 2015)]. In Goldstein, the majority found that defendant “is not entitled to an opportunity to cure her breach nor was she entitled to a notice to cure”.

### **Integrity Of Rent Stabilization**

“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...The tenant was commercializing with the apartment in a manner which defrauded his landlord as well as the subtenant. This practice, which the Rent Stabilization Law was designed to prevent, is not to be condoned by permitting the tenant to remain after the fraud has been found out”[Continental Towers Ltd. Partnership v. Frueman, 128 Misc. 2d 680 (App. Term., 1<sup>st</sup> Dept. 1985)].