

NYC Housing Court Ties Landlords' Hands In Airbnb Fight

By Natalie Rodriguez

Law360, New York (June 18, 2014, 8:30 PM ET) -- A recent Manhattan Housing Court ruling overturning the eviction of a tenant using [Airbnb Inc.](#) to sublet her apartment has made it harder for landlords to use a local zoning law to toss offenders, but falls short of doing serious damage to city and state officials' ongoing battles against the short-term lodging site, attorneys say.

The June 16 decision gives Manhattan renter Kimberly Freeman the right to keep her apartment, despite repeatedly violating her lease and the city's Multiple Dwelling Act by subletting through Airbnb, since she eventually cured the default by taking down her listing and canceling future guest reservations. However, her landlord, Gold Street Properties LP, had been arguing that she did not cure in a timely enough fashion.

The decision makes it tougher for landlords to toss Airbnb hosts, particularly in a housing court inclined to ever broader guidelines on when violations can be cured, some attorneys say. But it avoids making significant precedent that would hurt local officials' attempts to curb the lodging site's presence within Manhattan's borders.

"I don't see it really as a victory for Airbnb. The judge still found what the tenant did was illegal," said Samuel J. Himmelstein, a tenant rights litigator and name partner with Himmelstein McConnell Gribben Donoghue & Joseph.

Airbnb has been facing down New York Attorney General Eric Schneiderman, who is [seeking host information](#) to assess local zoning and hotel tax law violations [in a battle to curb](#) Airbnb's proliferation in the state. And Manhattan Borough President Gale A. Brewer has asked Mayor Bill de Blasio to fight the company's efforts to have its business model legalized within city borders.

Monday's decision hurts anti-Airbnb officials' stance the most by essentially allowing an at least onetime free pass to violate lease provisions and the MDA — which the judge specifically pointed out is aimed at property owners' conduct, not tenants'.

"It hurts them to the extent that it gives an unregulated tenant a right to cure the default. It gives [tenants] a free bite of the apple," said Stuart Berg, a real estate partner with [Kurzman Eisenberg Corbin & Lever LLP](#).

But the judge did say that the violation needs to be cured — in other words, that Airbnb use be stopped — for the tenant to stay on. And several attorneys noted that the case, which hinges on an unregulated apartment, could have gone toward the landlord had it been a rent-controlled unit, which has stricter cure periods and rules.

While narrow, the ruling could discourage some landlords from bringing similar cases, making it all the harder to clamp down on the growing number of New York apartment dwellers turning their apartments into short-term lodging.

“How much incentive will you have to really litigate these cases?” Himmelstein asked, noting that the decision makes it harder to force a tenant out.

There is a general trend in New York landlord-tenant law to expand the base of conduct that is curable, and this decision squarely helps broaden that base, he said.

“Things that would amount to a nuisance, which used to be deemed not curable, are more and more found to be curable,” Himmelstein said.

Additionally, the housing court decision poses a hypothetical problem of allowing for multiple cures on multiple lease defaults if, say, a tenant decides to use Airbnb eight months after getting the initial case closed, according to some.

“What's to stop the tenant from doing it again? My position is it would be a new default. ... I think you would have to serve a new cure notice,” Berg said.

The housing court, in this decision and others, has not said much in the way of when repeated Airbnb hosting crosses the line in being a for-profit business, according to attorneys.

“There is no bright line, as far as I know, of what would be considered excessive profiteering,” said Robert H. Leventhal, a named partner and landlord-tenant litigator with Novick Edelstein Lubell Reisman Wasserman & Leventhal PC.

At least, there isn't one for unregulated apartments. But there is some precedent in New York's code regarding curbing profiteering.

“A rent-stabilized tenant can't profit from having a roommate,” said Lorraine Nadel, a litigator and name partner of Nadel & Associates PC. She added that the issue of profiteering is likely something that will, in the long run, be a difficult matter for Airbnb to address.

Freeman, whose monthly rent came out to a daily rate of \$77.26, had been subletting her apartment through Airbnb for between \$129 and \$200 per night, according to court documents.

But the Freeman case highlights the difficulties that landlords can have in proving that a tenant is in violation or profiteering, according to Leventhal.

“I believe one of the biggest difficulties is, How does one prove what's actually going on unless the landlord is going to hire its own person to sublet?” he said.

In this case, the landlord argued that Freeman did not cure within the time period specified, but testimony from a witness fell apart at trial, and the judge essentially held that the tenant was in the clear after stopping the unlawful Airbnb activity.

“This case falls on the borderline [of] the city presumably doing all it can to discourage people essentially operating hotels without being licensed,” Leventhal said.

--Editing by Jeremy Barker and Edrienne Su.