

Dealing with Illegal Hotel Rooms and Short-Term Rentals November 5, 2015

When you consider the amount of money that people stand to make by renting out a room in their apartments, you can understand why so many co-op and condo boards have to handle shareholders and unit-owners who want to get in on some Airbnb action. Many of them may ask, "Hey - if my building allows sublets, I can sublet for short stays, can't I? And since the law allows roommates, why can't I rent out my spare bedroom by the day, week, or year?"

Take one commentator from our online forum, Board Talk. She writes: "If a prop[rietary] lease permits 'sublets,' can the board decide that sublets must be for a minimum of one-year?" By way of example, "Lessee submits an application for a 3-day sublet over the Memorial Day weekend. And an application for a 7-day sublet over July 4th holiday. Another application for a 3-day sublet in August. Must the Board treat these as sublet applications? Or do these short-term rentals not count as sublets?"

"A wrinkle on this is the Roommate Law," writes another. "You are allowed one person in your apartment (you must be residing there concurrently) and the landlord [including a co-op board] may not ask anything except for the person's name. There are no time limits with roommates. There are no limits on the [money] you can charge a roommate in a co-op."

Do they have a point? Is there a loophole in the law?

Sub Stance

Let's start with some definitions. In a co-op, "A subtenant is someone who's going to occupy the premises without a shareholder," says attorney Marc Schneider, a principal of Schneider Mitola. "In a condo, because it's real property," as opposed to shares in a housing corporation, "the person renting from the unit-owner is a lessee" - a tenant, in other words, not a subtenant.

But in neither case does it matter, whatever the governing documents say, if you're talking about sublets of less than 30 days - because New York State passed an amendment to the Multiple Dwelling Law in 2010 banning such short-terms arrangements in rental buildings, cooperatives and condominiums.

Ah, but what about "roommates"? Real Property Law Section 235f, colloquially called the Roommate Law, guarantees that in a rental situation, including under a co-op proprietary lease, a tenant may live with immediate family plus "one additional occupant, and dependent children of the occupant." The only requirement is that the tenant must give the landlord the roommate's name within 30 days.

While this doesn't allow co-op boards to vet roommates, the law still helps boards, Schneider says, since, "Legislators crafted the law to prevent tenants from getting around subletting restrictions by claiming their subtenants were roommates." In other words, if you claim someone is a roommate, you have to be living in the apartment yourself.

The Roommate Law doesn't apply to condo boards, Schneider notes. "There is no landlord-tenant relationship between the condominium and the unit-owners," so a condo board actually can prevent you from having a roommate. However, "In most condos you can freely rent out a room" unless the governing documents say otherwise.

To Airbnb Is Human?

So you can have roommates for any length of time? "My attorney says you can have a roommate for 1 day or 30 days," writes one commentator - who, it turns out, may want to find another attorney.

"This argument has been tried and has failed," another commentator writes, noting the New York County Supreme Court decision in *Peck v. Lodge*, in which the court allowed an eviction where a tenant had advertised for "roommates" for stays of a day or more. As the court succinctly noted, the tenant "is not protected under 'the Roommate Law' because her guests were not 'roommates,'" explaining that a roommate is "a long-term co-occupant of an apartment" - besides which, the court said, the tenant was charging, in aggregate, more than the monthly rent and was "commercializing the apartment."

"The court said the apartment has to be used for private residential purposes," and not as a hotel or bed-and-breakfast, Schneider says, adding, "You're not a roommate unless you're a longtime occupant. Someone who's just there for a day is not really a roommate."

The "my attorney says" commentator isn't buying it, asking "How old is that case?" Answer: It's from 2003, cited in another decision as recently as 2014, and doesn't appear to have been overturned by an appellate court. In any event, the 2010 law banning short-term rentals specified apartments are for "permanent" - and not transient - "residence purposes."