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October 2021 Eviction Moratorium, VRBO, Air Rights

Stephen Lasser · Friday, July 22nd, 2022

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Fall Newsletter

October 2021
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Eviction Moratorium Extended to January 15, 2022

BY: HEATHER S. STIELL, ESQ.

Eviction Moratorium Extended to January 15, 2022 Despite Recent Supreme Court Decisions in Favor of Landlords; New Constitutional Challenges by Landlords in Progress.

On September 2, 2021, Governor Kathy Hochul signed new legislation affecting the COVID-19 Emergency Eviction and Foreclosure Prevention Act ("CEEFPA") and the COVID-19 Emergency Protect Our Small Businesses Act, extending New York's moratorium on residential and commercial evictions, which expired on August 31, 2021, to January 15, 2022.

The legislation was passed to extend the expired moratorium and to also address two Supreme Court decisions that found parts of the prior moratorium unconstitutional. In Chrysafis v. Marks, the Court held that denying residential landlords a hearing based solely on their tenants' submission of a hardship declaration violates Due Process. In Alabama Association of Realtors v. DHHS, the Court held that the nationwide CDC moratorium exceeded the agency's federal authority and therefore, it is up to federal or state legislatures to enact further moratoriums.

The new law, which applies to both commercial and residential evictions, attempts to address the Chrysafis decision by making the presumption of COVID hardship based on a tenant declaration rebuttable rather than an absolute defense, but places the burden on landlords to oppose their tenants' claims of hardship. The rebuttable presumption, and the burden of landlords to overcome it in order to proceed with eviction matters, applies to both residential and commercial evictions.

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In response to the new law, on September 9, 2021, the Rent Stabilization Association (RSA), the largest landlord group in New York, filed suit in the Second Circuit Court of Appeals challenging the moratorium extension as contravening the Chrysafis decision in that it does not require tenants to submit actual proof of hardship in order to gain protection under the statute.

While the constitutional challenges to the eviction moratorium make their way through the courts, landlords should continue to try to pursue their eviction cases in court even if an eviction may not be possible until 2022, and should also consider other legal remedies like pursuing money judgments for unpaid rent against tenants and guarantors.

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New Attorneys Join Lasser Law Group

We are pleased to announce that Erwin F. Lontok, Esq. and Heather S. Stiell, Esq. joined the firm over the summer. They add many years of transactional and litigation real estate experience to our team.

Heather S. Stiell, Esq.

Is Senior Counsel at Lasser Law Group. Her practice focuses on litigation and transactional matters in the representation of condominiums, cooperatives, commercial and residential landlords, developers and other businesses. Ms. Stiell is responsible for litigation matters ranging from collections and holdover proceedings to foreclosures and land disputes. Additionally, she handles a variety of transactional matters relating to commercial and residential real estate including contract negotiations, zoning and land use issues, regulatory and compliance, corporate governance and insurance coverage issues.

Ms. Stiell is an experienced civil litigator. Prior to entering practice, she served as a judicial clerk in New York State Supreme Court in Kings County, where she was responsible for conferencing commercial and residential foreclosure cases, researching civil motions and drafting decisions. She is trained in civil and commercial mediation.

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Erwin F. Lontok, Esq.

Focuses his practice primarily on residential and commercial real estate transactional work. As a part of his practice, Erwin represents and assists numerous clients with the sale and purchase of their homes as well as their financing needs. In addition, Erwin represents a number of cooperative corporations and condominium boards, to which he provides guidance on internal governance matters and assistance with mortgage refinances. Erwin has extensive experience in drafting and negotiating real estate contracts, agreements and loan documents.

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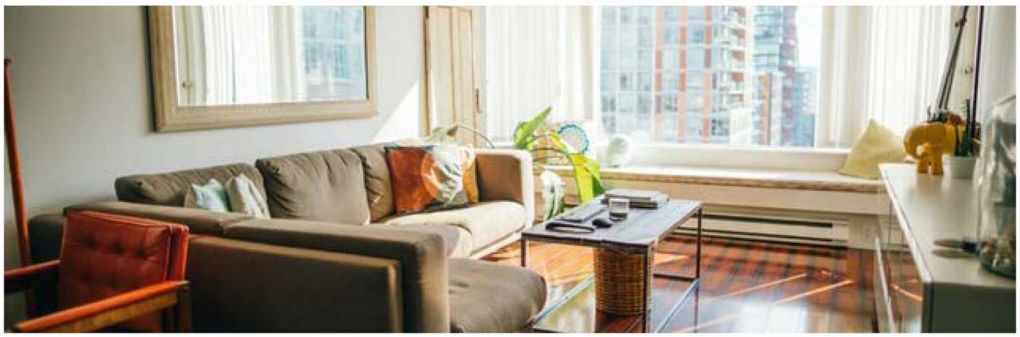

Court Awards $25,000.00 Due to Illegal Short-term Rental

BY: STEPHEN M. LASSER, ESQ.

Court Awards $25,000.00 Due to Illegal Short-term Rental Based on Restrictions in Governing Documents.

As you may have read in our prior Airbnb blog articles, short-term rentals of less than 30 days, in multiple dwelling buildings, have been illegal in New York since 2010. Furthermore, in response to continued short-term rentals, despite their illegality as of 2010, the law was further amended in 2016 to prohibit the advertising of short-term rental services on services such as Airbnb, HomeAway, and Vrbo. Unfortunately, the government agencies responsible for enforcing these laws have not done so except under extreme circumstances where entire buildings or floors of buildings are being carved up and rented out like hotel rooms. This has left condominiums and HOAs to fend for themselves and having to rely on their governing documents to police such illegal conduct, often without being able to obtain adequate relief through the court system.

However, a recent court decision demonstrates a potential shift in the judicial remedies available to prevent and stop existing short-term rentals in condominiums and HOAs, which often become a nuisance. In a HOA located on the shores of Lake George, the Mayfair Resort Homeowners Association and its residents became victims of a homeowner's continued short-term renting of his home to large groups who held loud parties, littered the surrounding community, and were responsible for the destruction of personal and community property. Despite the HOA's governing documents limiting rentals to one-year terms and unequivocally prohibiting daily, weekly, or monthly rentals, one homeowner, the eventual defendant, continued to rent his home on a short-term basis. Despite numerous attempts by the HOA to have the defendant discontinue the practice, the short-term rentals continued, and the HOA was left with no other recourse but to file a lawsuit to block this behavior.

The court in the Mayfair case granted a temporary and eventual permanent injunction preventing the defendant from engaging in short-term rentals in violation of the HOA's governing documents and, when the defendant ignored the court injunction and continued to rent his home on a short-term basis, the HOA took him back to court and the court then ruled that the defendant was in contempt and required the defendant to reimburse the HOA's attorney fees and criminally fined the defendant an amount equivalent to his rental income of $25,000.00.

In light of this new precedent penalizing a homeowner for his illegal short-term rental, boards should evaluate their governing documents to ensure they have restrictions against short-term rentals or should consider amending them if they are deficient and, if warranted, take legal action.

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How Does an Owner Buy or Sell Air Rights?

BY: CHRISTOPHER E. WRIGHT, ESQ.

The NYC Zoning Resolution (ZR), a statue that governs NYC zoning regulations, allows property owners to transfer unused air rights (a.k.a "development rights") to neighboring properties.

The transfer of air rights is a useful tool to either (i) purchase and expand a development or (ii) sell and realize a profit out of air rights you have no intention of using.

A few simple examples are a good way to explain and illustrate the concept. If you own a 20,000 s/f building on a lot that allows you to build 30,000 s/f, you can sell the 10,000 s/f of unused air rights to a neighbor. Similarly, if you are contemplating developing a 20 story building and many of your neighbors have 10-15 story buildings, there may be unused air rights to purchase from the smaller buildings that can be added to yours.

These are not simple transactions. There are certain pre-conditions to an air right transfer as follow: (i) the two properties must have a common border of at least 10 feet; (ii) the properties must be in the same zoning district; and (iii) the buyer must be able to utilize the air rights within the density parameters that govern the buyer's property. For example, if the buyer's property has a 10-floor height limit, the buyer cannot use the air rights to build an eleventh floor. However, the buyer could possibly build a wider or deeper building if permitted by the ZR. Therefore, before purchasing air rights, the buyer must confirm that the transferred air rights can fit within the zoning parameters that govern the buyer's property, known as the zoning envelope. The zoning envelope sets the maximum height, width, depth and yard requirements for a building on a particular parcel. Typically, there is room to add more air rights into the zoning envelope.

Once due diligence is completed and it is determined that the air rights transfer is viable and beneficial to both parties, the next step is preparing the transfer documents. The principal transfer document is the Zoning Lot Development Agreement, known as a ZLDA. The ZLDA recites the terms of the air rights transfer between the buyer and seller. The ZLDA establishes that once air rights are transferred, they are the property of the buyer and the seller can never utilize them, similar to a deed that transfers fee title from one party to another. The ZLDA also states that the buyer retains any air rights already attached to the buyer's parcel and that the seller retains any air rights already utilized on seller's parcel. These are known as the "retained development rights".

In addition, the ZLDA permanently mergers the buyer and seller's tax lots into a single zoning lot. The creation of a single zoning lot that contains both buyer and seller's tax lots is required because air rights can only be transferred between tax lots are that are within the same zoning lot. There is no limit as to how many tax lots can be merged into a single zoning lot. In some cases, a developer is purchasing unused air rights from several sellers, resulting in a single zoning lot containing multiple tax lots.

It is important to note that ZLDA's do not transfer ownership rights of the tax lots, known as fee title. Full ownership of the fee is retained by buyer and seller for their respective tax lots. Either party can sell or transfer its fee to a third party, take out a new mortgage or refinance an existing one without needing the other party's permission. This is important because often the seller is a small property owner and the buyer is big developer. The seller does not want the developer dictating ownership rights. Without this protection, which is recited in the ZLDA, small owners would be loath to sell air rights to big developers.

The ZLDA can also transfer a light and air easement between seller and buyer. If buyer's development looks over seller's property towards an attractive view, the buyer may want to have windows facing that direction. In that case, the seller can grant buyer a light and air easement over seller's property. This easement caps the height of seller's building at its current height. Buyer can now construct living room and bedroom windows facing over seller's property without fear of being blocked. Even if the seller redevelops their parcel, any such redevelopment cannot exceed the easement height limit.

The ZLDA does not set the financial terms of the air right's transfer. Financial terms of the transfer are set forth in a Purchase and Sale Agreement (PSA) that is similar to a property contract of sale. An air rights PSA has the same basic terms as a contract of sale: purchase price; down payment; closing date; clean title requirements, etc.

With proper due diligence and a well drafted ZLDA, an air right transfer is a win-win deal. Because the seller has no use for the air rights, they will sell them below the market rate because they still realize a profit from nothing. For the buyer, once the air rights are attached to the buyer's land, the buyer can value them at full market for the purpose of either flipping the project or constructing a building. In the end, both parties make money out of thin air.

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