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Airbnb, Inc. v New York City Mayor's Off. of Special Enforcement

2023 NY Slip Op 32740(U)

August 8, 2023

Supreme Court, New York County

Docket Number: Index No. 154865/2023

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

AIRBNB, INC.,

Petitioner,

- v -

NEW YORK CITY MAYOR'S OFFICE OF SPECIAL
ENFORCEMENT, CHRISTIAN J. KLOSSNER, in his official
capacity as the Executive Director of the Mayor's Office of
Special Enforcement; THE CITY OF NEW YORK,

Respondents.

-----X

INDEX NO. 154865/2023

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 37, 45, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79

were read on this motion to/for ARTICLE 78.

The petition to annul certain rules relating to short-term rentals and for injunctive relief is denied and the cross-motion by respondents to dismiss is granted.

Background

The instant proceeding asks this Court to set aside restrictions implemented by respondents regarding the use of short-term rentals in New York City. Airbnb is widely known throughout the world for providing a forum whereby customers can rent housing accommodations. In response to years of public debate, the City Council passed Local Law 18 and tasked respondent, the New York City Mayor's Office of Special Enforcement ("OSE"), with promulgating the rules related to this statutory scheme.

The Court begins with the challenged rules. The new rules require that the dwellings to be rented out must be registered with OSE. The rules state that:

“Short-term rentals of dwelling units (rental for less than 30 days) are prohibited by the Multiple Dwelling Law, the Housing Maintenance Code, and the Construction Codes unless the permanent resident of the dwelling unit is present during the rental. Chapter 31 of Title 26 of the Administrative Code of the City of New York provides for the regulation of such hosted short-term rentals by requiring permanent residents of dwelling units who engage in such rentals to register themselves, the dwelling units they occupy, and their listings with OSE and obtain a short-term rental registration number signifying such registration. Registered hosts will be required to include their short-term rental registration number on all advertisements and offers for short-term rental, and to conspicuously post and maintain, within the dwelling unit, a diagram of normal and emergency exit routes and their short-term rental registration certificate. A registrant will further be required to retain records of their short-term rental transactions and provide such records to OSE upon request. Registration will not be permitted if there are uncorrected violations of law that might imperil occupants of such units, or if the units are in buildings on a prohibited building list (NYSCEF Doc. No. 9 at 1).

Airbnb has numerous complaints about these rules. Initially, it maintains that the rules would enforce a *de facto* ban on short-term rentals. It adds that the rules require an applicant to disclose too much personal information to OSE. It also questions why a “lay New Yorker” should be required to certify that he or she understands various regulations relating to residential spaces. Airbnb takes issue with other parts of the regulations, including those that ban locks on bedroom doors or that individuals may not rent out their spaces while they are on vacation. It insists that the process is designed to approve as few applicants as possible.

With respect to the rules (as opposed to the Local Law 18), Airbnb insists that it would be required to verify four distinct data points before collecting any fees for all short-term rentals except for a class B multiple dwelling. It argues that respondents are not permitted to burden Airbnb to ensure that registrations are valid. Airbnb details what it considers to be onerous tasks to fulfill this verification process including that it has to receive confirmation numbers, track

registration expiration dates, reverification deadlines and changes to host information. It asserts that it will have to devote money and employee time to do this and complains that that there has to be an exact match on each of the four data points in order to put up a listing.

Airbnb also points out that it will have to retain these confirmation numbers and must use these numbers to determine what type of dwelling the listing provides and when the registration is set to expire. It contends this is yet another code Airbnb has to now track. Airbnb argues that the rules impose verification fees in connection with these listings that could only potentially be used during a calendar year but which may never actually be booked – in other words, Airbnb would have to do all that work and may never actually make any money off the listing.

Airbnb takes issue with the monthly reporting requirements and insists that there is no purpose for these rules. It also insists that there are steep penalties for not properly complying with these booking rules as Airbnb will face a fine of up to \$1,500 or three times the fee collected for each improper transaction.

Airbnb maintains that all of these requirements are arbitrary and capricious and that the rules should be stricken. It argues that these rules will serve as a chilling effect on hosts who want to lawfully engage in the short-term rental business and that Airbnb's business will be substantially affected. It claims it will lose up to 95% of its net revenue from short-term rental listings in New York City if it has to remove listings subject to the rules (it claims will have to remove these listings if they do not have the proper verification information).

Airbnb moves in support of its petition and for a preliminary injunction to stop the implementation of the subject rules. It characterizes the rules as “an extreme regulatory scheme” and that OSE failed to consider reasonable alternatives that would not have the effect of ending

short-term rentals. It points out that respondents have breached two prior settlements agreements with Airbnb.

Airbnb also brings plenary causes of action in addition to and apart from its Article 78 petition. It points to 2016 and 2020 settlement agreements which it claims were breached by the implementation of these rules. Airbnb directs the Court to a 2016 case (filed in federal court) concerning advertising about short-term rentals and a settlement in which respondents agreed not to enforce a ban on advertising. The 2020 case (also filed in federal court) dealt with reporting requirements and respondent agreed to limit the types of rentals that were subject to these requirements and made the reports be due quarterly.

Respondents cross-move to dismiss the petition/complaint and emphasizes that many owners and tenants have illegally set aside their homes for short-term rentals instead of permanent occupancy. They point out they have received many, many complaints about these illegal short-term rentals and that the passage of Local Law 18 and the subject rules address these issues. Respondents explain that Local Law 18 requires that individuals obtain a registration to host a short-term rental and that Airbnb simply cannot accept fees until it has verified that the property to be rented is either exempt from registration or is properly registered.

Respondents observe that the goal of the registration process is to ensure that places where short-term rentals are not permitted, such as rent regulated units or public housing, are not listed with booking sites like Airbnb. They detail how OSE issued proposed rules in November 2022, held two public hearings, and then published final rules in February 2023. Respondents emphasize that Local Law 18 and the rules do not amend existing law and simply create a licensing scheme for this commercial activity. They argue that Airbnb is attempting an improper collateral attack on many laws under which short-term rentals are based. That is, the challenged

rules do not create the various obligations – the laws (such as the multiple dwelling law, the housing maintenance code, the building code, local law 18) create the obligations; the rules just cite these laws when necessary.

Standing

“The two-part test for determining standing is a familiar one. First, a plaintiff must show ‘injury in fact,’ meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted” (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211, 778 NYS2d 123 [2004]).

Respondents insist that Airbnb lacks standing to challenge these rules. They argue that Airbnb’s allegations are based on how it assumes these rules will affect their business in New York City. Respondents argue that these predictions are speculative and focus on Airbnb’s claim that it will somehow lose 95% of its net revenue. They also stress that Airbnb did not differentiate between its legal income derived from the New York City market and the revenue generated from unlawful rentals. They point to respondent Klossner’s affirmation (NYSCEF Doc. No. 71) in which he estimates that 55% of Airbnb’s revenue comes from illegal short-term rentals. Respondents also argue that Airbnb cannot challenge rules on behalf of third parties (the hosts or guests).

Airbnb claims it has standing to challenge a rule before it has caused any harm. It points out that OSE has only approved a small number of applications and that the rules will harm Airbnb’s reputation as it will be forced to eliminate many short-term rental options.

The Court finds that Airbnb has standing to bring the instant proceeding but only to the extent that it challenges the rules that apply to it (Chapter 22 of the rules, which apply to booking services). Clearly, the rules that require Airbnb take certain steps and threaten penalties for noncompliance affords Airbnb standing; this implicates a potential (as opposed to merely hypothetical) injury as Airbnb insists it wants to stay in the short-term rental market.

To the extent that Airbnb seeks to challenge other portions of the rules that do not affect it, such as the registration requirements for hosts, the Court finds that Airbnb has no standing. That means the instant decision will not explore in depth the portions of the rules that apply to the hosts (such as the issues with locked doors and the application process). Airbnb cannot bring a challenge on behalf of hosts (third parties who are not employees of Airbnb). It does not claim that it is acting as an agent for hosts or as some type of broker for these individuals. It is merely a forum for hosts to put up their listings. (The merits of the hosts' challenge are addressed in a companion case).

Arbitrary and Capricious

Airbnb seeks injunctive relief barring the enforcement of these rules. It argues that these rules are arbitrary and capricious as they are burdensome, inefficient, costly and fail to account for reasonable alternatives. Respondents seek to dismiss the entire proceeding. Because these two requests for relief overlap, the Court will address these issues together.

“Judicial review of an administrative agency's rule-making is extremely limited, and exercise of such authority is to be given a large degree of deference by the courts, especially where, as here, the agency has acted within the area of its expertise. A court must determine whether the challenged agency rule has a rational basis and whether the rule is unreasonable,

arbitrary, or capricious. A court cannot base its review on whether the rule is the most effective way to effectuate the goal of the agency” (*United Car & Limousine Found., Inc. v New York City Taxi and Limousine Com'n*, 178 Misc 2d 734, 737, 680 NYS2d 815 [Sup Ct, NY County 1998] [citations omitted]).

Here, there is no question that OSE acted within the scope of its authority and the authority delegated it to by Local Law 18. OSE is tasked with administering the statutory scheme governing short-term rentals and it was entitled to promulgate the rules in question. This Court’s task is to assess whether these rules have a rational basis, not whether it addresses a problem in the most effective way. The Court finds that these rules are entirely rational.

Respondent Klossner submits an affirmation in opposition to the petition and in support of respondents’ cross-motion to dismiss in which he explains that OSE was established to focus on many quality-of-life issues, including illegal short-term rentals (NYSCEF Doc. No 71, ¶ 2). He points out that Local Law 18 and the subject rules bar “any person from offering, managing, or administering short-term rentals in a dwelling unit within the City unless such dwelling unit is registered with OSE and has a currently valid short-term rental registration number” (*id.* ¶ 9).

Mr. Klossner explains that these rules are necessary to combat the thousands of illegal short-term rental listings and observes that there were 43,000 illegal short-term listings from Airbnb alone in 2018 (*id.* ¶ 39). He also claims that OSE received over 11,934 complaints (from 2017-21) regarding these rentals and that it issued about 15,665 violations arising out of inspections related to short-term rentals (*id.* ¶¶ 14, 15). Clearly, respondents have identified a major problem—the continued prevalence of illegal short-term rentals—and these rules attempt to address that issue by requiring that each listing have a registration number. That is an inherently rational strategy. Requiring that a listing have a registration number and that Airbnb

only accept fees from listings with a valid registration number makes perfect sense. It is a method designed to streamline the process of ensuring that only eligible spaces appear on Airbnb or other listing sites.

The registration requirement also addresses a related issue with illegal short-term rentals—individuals renting in buildings where it is not permitted. For instance, the rules contain a prohibited buildings list (Section 21-09), which provides that a building owner can add a building to the list and prevent a tenant from renting out his or her unit provided that the landlord “certify that leases and other occupancy agreements for dwelling units within the building prohibit short-term rentals” (NYSCEF Doc. No. 9 § 21-09[4]). If a building is on this list, then OSE (presumably) won’t issue a registration number to an applicant seeking to list a unit in this type of building. This is a critical point. The rules provide a logical way to help prevent a renter whose lease bars short-term rentals from doing it anyway. And while Airbnb complains that it is being tasked to help enforce it, the rules simply require Airbnb to verify a unit is eligible to be listed as a short-term rental before it can accept any fees. That is not an overly onerous obligation.

To be sure, these rules will likely not be perfect. But it addresses a problem raised by OSE and avoids a key obstacle—enforcing the ban on illegal short-term rentals. The record, and particularly Mr. Klossner’s affirmation, suggests that OSE has largely relied upon complaints and subsequent inspections. Undoubtedly, that is an entirely inefficient and labor-intensive way to address this problem that, according to respondents, has not been very effective. The registration system proposed under Local Law 18 and the subject rules makes it easier to identify many illegal short-term rentals *before* they are listed on Airbnb and creates a financial incentive for Airbnb and hosts to make sure they follow the law.

Airbnb's insistence that it will have devote more resources to ensure it is following these rules is not a reason to strike them. It acknowledges that its revenue from New York City was \$85 million in 2022 (NYSCEF Doc. No. 6), more than \$7 million dollars. And, of course, the scope of Airbnb's alleged losses from these short-term rental rules (it claims it will lose around 95% of its revenue) is entirely speculative. But even if that were accurate, Airbnb did not sufficiently dispute respondents' point that much of Airbnb's revenue derives from illegal short-term rentals. It does not assert, for instance, that there are no illegal short-term rentals on its site or that its revenue from these illegal rentals is nominal.

The Court cannot ignore this point and embrace Airbnb's assertion that the rules should be struck down because the rules also affect lawful short-term rentals. The entire rationale behind Local Law 18 and the rules is to enforce the law that short-terms rentals are prohibited unless the permanent resident of the unit is present during the rental and the host has the authority to use the unit for a short-term rental.

Airbnb's assertion that there will be unintended consequences is also without merit and, at this point is speculative. That these rules may make hosts unlikely to keep listing their units with Airbnb does not mean that respondents have no authority to issue these rules pursuant to Local Law 18.

Other Claims

Airbnb also insists that these rules violate two settlements it previously reached with the City of New York. One in 2016 concerned a lawsuit in which the City agreed to "permanently refrain" from enforcing certain laws that banned the advertising of short-term rentals. This claim is without merit. As respondents pointed out, the 2016 settlement barred the City from not

enforcing provisions of the Multiple Dwelling Law and the Administrative Code against Airbnb (NYSCEF Doc. No. 59). But the Court fails to see how the instant rules violate that settlement as they do not purport to impose penalties against Airbnb for violating those specific laws. Instead, the only penalties Airbnb may face are for violating the rules at issue here; that is, if Airbnb collects fees on unlawful units it listed, then it may be penalized.

Similarly, respondents established that they did not breach the 2020 settlement agreement. In that dispute about reporting requirements, the settlement concerned the specific law then at issue (Local Law 146) (NYSCEF Doc. No. 16, ¶ 2.02). And it expressly stated that the parties did not release any arguments about other laws (*id.* ¶ 2.03). That is not the law at issue here. In other words, the Court is unable to find that the 2020 settlement about another law barred the passage of subsequent legislation and the promulgation of a rules pursuant to a *new* law.

In any event, the fact is that Airbnb never filed a notice of claim for either alleged breach, which bars the causes of action related to a breach of contract (*City of New York v Shellbank Rest. Corp.*, 169 AD3d 581, 582, 95 NYS3d 60 [1st Dept 2019]). Its reliance on an Appellate Term case, *Katzman v City of New York*, 183 Misc2d 501, 703 NYS2d 347 [App Term, 1st Dept 1999]), is inapplicable as that case concerned a summary proceeding for the possession of real property.

The Court also finds that the rules do not exceed respondents' police powers. "The police power is very broad and comprehensive and in its exercise the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other. But, in order for an exercise of the police power to be valid, there must be some fair, just, and reasonable connection between it and the promotion of the health,

comfort, safety and welfare of society.” (*A. E. Nettleton Co. v Diamond*, 27 NY2d 182, 193, 315 NYS2d 625 [1970] [internal quotations and citations omitted]). Here, respondents instituted regulations as part of an effort to address rampant illegal short-term rentals. It is a logical use of their police power.

Nor do these rules constitute a violation of the separation of powers based on an invalid legislative delegation. Local Law 18 provides clear requirements about the need for the registration of units as short-term-rentals (Administrative Code of City of New York § 26-3102). The relevant factors for this issue are “whether (1) the regulatory agency balanced costs and benefits according to preexisting guidelines, or instead made value judgments entailing difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance, (3) the legislature had unsuccessfully attempted to enact laws pertaining to the issue, and (4) the agency used special technical expertise in the applicable field” (*Garcia v New York City Dept. of Health and Mental Hygiene*, 31 NY3d 601, 609, 81 NYS3d 827 [2018] [internal quotations and citations omitted]).

These factors, although not dispositive or binding, yield a clear conclusion that these rules are not an invalid legislative delegation. OSE used its technical expertise to simply add more details to Local Law 18 to implement reasonable procedures by which a person can register their space as a short-term rental. This is not a situation where the City Council was unable to pass related legislation and OSE simply drafted rules.

Moreover, the rulemaking process did not violate the City Administrative Procedure Act. “CAPA imposes procedural requirements on New York City agencies relating to the promulgation of rules governing local agency practices” (*Matter of Council of City of New York*

v Dept. of Homeless Services of City of New York, 22 NY3d 150, 153, 980 NYS2d 62 [2013]).

As respondents point out, there was a robust notice and comment period. In fact, Airbnb submitted 59 pages of comments and 48 pages of economic analysis. And there is no dispute that OSE *modified* the rules after two public hearings as part of an attempt to address concerns (*see* NYSCEF Doc. No. 63 and 64). Simply because respondents did not adopt Airbnb's preferred changes is not a basis to find that CAPA was violated.

Airbnb also complains that the rules around bookings violate section 230 of the Communications Decency Act in that they require it to monitor and remove user information posted on its platform. The Court finds that section 230 is not implicated here as any liability that could be imposed on a booking service, such as Airbnb, does not arise from Airbnb's role as a publisher. Rather, the rules impose liability for the collection of fees from short-term rentals that violate the rules (such as those that do not have a valid registration with OSE). That Airbnb feels it will have to take down all listings that do not have registration numbers does not chill speech.

Summary

The Court observes that Airbnb stressed at oral argument that OSE has been processing applications for short-term rentals at a glacial pace. While this Court questions if OSE will be able to process the over 1,000 remaining applications prior to the effective date of the subject rules (September 5, 2023), that is not a basis for injunctive relief or to throw out the rules altogether.

There are many legal options for individual applicants (although not for Airbnb) whose application remains pending on the date of the rules go into effect, including seeking a

mandamus to compel. But that this *might* happen has no bearing on the rationality of these rules or on Airbnb's complaints.

The Court recognizes that Airbnb insists it will have to take down many of its listings. Of course, Airbnb has known about these rules for many months and has had ample opportunity to tell its hosts about these new rules and tell them to apply for a registration number. Nevertheless, it made no assertions in these papers that it has stopped or modified bookings for stays after the effective date of these rules. In other words, Airbnb cannot make little or no effort to tell its hosts to register and then complain that it might have to take down hundreds or thousands of listings because they are not registered.

As the regulations relate to Airbnb, they give Airbnb a very simple way to make sure it is no longer facilitating – and making money from – unlawful activity. All Airbnb has to do is properly verify potential listings.

The Court also observes that there was an amicus brief filed by various organizations opposed to the prevalence of Airbnb listings. This brief details allegedly harmful effects from short-term rentals, including that it reduces the availability of affordable units as more spaces are used for Airbnb listings instead of as traditional rental units. It also discusses quality-of-life concerns and claims that the vast majority of the short-term rentals are concentrated in a few neighborhoods in Manhattan and Brooklyn in contrast to Airbnb's arguments that these listings are prevalent throughout the city.

While the concerns raised in the amicus brief are valid, the Court makes no affirmative findings about the economic effects of short-term rentals. That is the province of the legislature, which must consider all manner of arguments at issue here including Airbnb's claims that allowing short-term rentals actually benefits communities (NYSCEF Doc. No. 12 [expert report

of Professor Sallinger]). The fact is that the legislature already made its own assessment and passed Local Law 8; it is not this Court's place to strike down this law based on Airbnb's disagreement with the City Council's policy preferences. This Court's only concern is whether Airbnb raised a valid basis to challenge these rules and the court finds that it has not. No basis is established as a cognizable cause of action as do the 2016 or 2020 settlement agreements or Local Law 18.

Accordingly, it is hereby

ORDERED that respondents' cross-motion to dismiss is granted and petitioner's motion is denied; and it is further

ADJUDGED that the petition/complaint is dismissed with no costs or disbursement.

8/8/2023

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: