



**THE CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD**

HEARING LOCATION:
Environmental Control Board
66 John Street
10th Floor
New York, NY 10038
(212) 361-1400



1200623613E902888C1

Method of Appearance
Live Hearing

DECISION AND ORDER

Violation #: 035006622J et al. (5 NOVs)
Hearing Date: May 9, 2013

To: ABE CARREY
604 ELVIRA AVENUE
FAR ROCKAWAY, NY 11691

City of New York v. ABE CARREY

Total Civil Penalty: \$2,400.00

5 Notice(s) of Violation (NOV(s)) was/were issued to the Respondent. On the record before me, and upon the Further Findings of Fact/Conclusions of Law stated below, I find as follows and, where applicable, order payment and compliance.

NOV: 035006622J

PLACE OF OCCURRENCE: 182 EAST 2 STREET MANHATTAN

DATE OF OCCURRENCE: 09/12/2012

ISSUING OFFICER/AGENCY: 2218 DOB

ECB CODE: B103

CHARGE: AC 28-118.3.2

DISPOSITION: IN VIOLATION

CIVIL PENALTY IMPOSED:

\$2,400.00

NOV: 035006623L

PLACE OF OCCURRENCE: 182 EAST 2 STREET MANHATTAN

DATE OF OCCURRENCE: 09/12/2012

ISSUING OFFICER/AGENCY: 2218 DOB

ECB CODE: B155

CHARGE: AC 28-301.1

DISPOSITION: DISMISSED

CIVIL PENALTY IMPOSED:

\$0.00

NOV: 035006624N

PLACE OF OCCURRENCE: 182 EAST 2 STREET MANHATTAN

DATE OF OCCURRENCE: 09/12/2012

ISSUING OFFICER/AGENCY: 2218 DOB

ECB CODE: B189

CHARGE: 28- 301.1

DISPOSITION: DISMISSED

CIVIL PENALTY IMPOSED:

\$0.00

NOV: 035006625P

PLACE OF OCCURRENCE: 182 EAST 2 STREET MANHATTAN

DATE OF OCCURRENCE: 09/12/2012

ISSUING OFFICER/AGENCY: 2218 DOB

ECB CODE: B106

CHARGE: AC 27MISCAC28MISCBCMI

DISPOSITION: DISMISSED

CIVIL PENALTY IMPOSED:

\$0.00

NOV: 035006626R

New York City Environmental Control Board

1200623613E902888C1

PLACE OF OCCURRENCE: 182 EAST 2 STREET MANHATTAN

DATE OF OCCURRENCE: 09/12/2012

ISSUING OFFICER/AGENCY: 2218 DOB

ECB CODE: B205

CHARGE: ZR 22-00

DISPOSITION: DISMISSED

CIVIL PENALTY IMPOSED:

\$0.00

FURTHER FINDINGS OF FACT/CONCLUSIONS OF LAW:

NOV: 035006622J AC 28-118.3.2 NOV: 035006623L AC 28-301.1 NOV: 035006624N 28- 301.1
NOV: 035006625P AC 27MISCAC28MISCBMI NOV: 035006626R ZR 22-00

Master Decision and Order

Notices of Violation (NOV) 35006622J and four others listed

City of New York, petitioner v. Abe Carrey, respondent

Hearing date: 5/9/2013

Appearances:

Michael Burns, Esq. for petitioner. witness: issuing inspector Pugach.

Nick Warren appeared as authorized representative for respondent.

Christopher Muller, Esq. for discretionary intervenor, Airbnb, Inc.

Observers: Nick Pappas, David Hantman, Airbnb, Inc.; Ron Liebman, Ilya Maritz, Adrienne Jeffries, members of the press.

These NOV's alleged:

Occupancy contrary to Certificate of Occupancy in that apartment 5G was used transiently;

No sprinkler system (failure to maintain);

Inadequate exits;

No fire alarm; and

Illegal use in a residential Zoning District.

Introduction:

It is undisputed that as of the date of the NOV, respondent owned a unit in a condominium building and that his representative, Mr. Warren, was a tenant of that unit. As will be seen, Mr. Warren used an internet service called Airbnb, Inc, to find a guest to stay in the unit during his absence.

Airbnb, Inc. filed a timely motion with this tribunal to be granted discretionary intervenor status. I grant that motion and treat its accompanying memorandum of law as an amicus brief. The intervenor wrote that it wished to address only the scope and application of §27-2004(a)(8)(a) of the Administrative Code of the City of New York, which defines a class A multiple dwelling.

Petitioner's case:

Petitioner's evidence augmenting the NOV's related entirely to the charge of occupancy contrary to the Certificate of Occupancy. The cited section of law provides:

§28-118.3.2 Changes inconsistent with existing certificate of Occupancy. No change shall be made to a building or open lot or portion thereof inconsistent with the last issued certificate of occupancy or, where applicable, inconsistent with the last issued certificate have completion for such building or open lot or which would bring it under some special provision of this code or other applicable laws or rules, unless and until the commissioner has issued a new certificate of occupancy.

Petitioner presented the first page of respondent's deed (P ex 1) dated 4/2/1987. The seller was the sponsor, East Second Street Development Group, Inc.

Petitioner presented the Certificate of Occupancy. P ex 2. It is dated 3/17/1987, and shows the building has six residential floors, all containing two class A apartments.

Petitioner presented an excerpt from the condominium declaration, in which 174-184 East Second Street Condominium declares that the units may only be used as private residences and may not be rented for transient, hotel, or motel purposes. P ex 3.

The issuing inspector testified that on 9/12/2012, he inspected the building and attempted to gain access to various apartments. He only obtained a response at apartment 5G (identified by the number on the door), from which two women emerged. They told him they were Russian and staying there from 9/9/2012 to 9//14/2012, and that they were not related to the owner. They also told him they found the apartment through Airbnb, Inc. One woman said her husband had booked the trip and she thought he paid between \$500 and \$600 for the apartment. He did not go inside apartment 5G or any other apartment in the building.

He further testified that one of the women said she received three keys when she arrived: one for the building entrance, one for the apartment, and one for the bedroom. They told him they saw no other person in the apartment.

Based on this conversation he wrote the NOV's. He added that other residents on the fifth floor told him they saw numerous people going in and out of apartment 5G.

Respondent's case:

Mr. Warren presented the following documents –

1. Authority to appear for respondent.
2. Rent demand for September 2012 addressed by respondent to tenants Warren and Kodysh. R ex A.
2. One year Lease from "184 East 2nd St. Condo" to Warren and Kodysh dated 9/27/2010, for apartment 5G. R ex B. (Mr. Warren testified he has since occupied the apartment on a monthly basis.)

3. Written statement of Ms. Kodysh, dated 2/14/2013, stamped by a notary public, that she was living in apartment 5G at 184 East 2nd Street on September 12, 2012. R ex C.

4. Mr. Warren's listing of the apartment 5G with Airbnb, Inc. R ex D.

5. Email from Warren to Kodysh forwarding an email from "Maxim" who had responded to the Airbnb, Inc. internet notice regarding apartment 5G. R ex E. He wrote: "This guy's wife is looking for a place for 3 days. Thoughts?" Kodysh responded: "Look, OK, they have three people saying they're not serial killers:)"

In his listing with Airbnb, Inc. Warren wrote, "This is a 2 bedroom apartment and you'll be sharing with my housemate - a low-key and truly awesome girl who works as a software engineer."

The exhibit, R ex D, includes two reviews (from previous listings to which Warren admitted). One includes the following: "We got the keys from his room mate who was very nice and helpful person."

Mr. Warren testified that he was going out of town that week and put a listing with Airbnb, Inc.. If his housemate agreed he wanted to rent out his room. She (Kodysh) remained in the apartment while he was away. She works late hours. He believed he rented the apartment to one woman who paid \$315 in total. He had rented out his portion of the apartment in this way twice before.

He denied his room had a lock. The guest was a stranger to him and his roommate.

He further testified the apartment has one living room, one kitchen, and one bathroom. He received payment from Airbnb, Inc., by direct deposit to his checking account. He testified he did not know whether the guest paid hotel taxes.

Summations: respondent asserted he did not run an illegal hotel and that the penalties in the event of the NOVs being sustained seemed very high.

Petitioner argued that respondent was responsible for the tenant's actions. Respondent violated the condominium rules by his tenant's repeated provision of transient occupancy. The exception in the definition of a class A multiple dwelling applies to boarders and lodgers who intend to stay 30 or more days. Petitioner also argued that there was no evidence that co-tenant Kodysh was present throughout the visitor's stay. She restricted her statement to September 12, 2012.

The intervenor's position is that the facts here bring the case within an exception to the requirement that a class A apartment be limited to occupancy by permanent residents.

Findings of fact and conclusions of law

For the purpose of this decision I shall assume the rental was to one visitor not two.

NOV 35006622J (contrary to Certificate of Occupancy):

Petitioner must prove respondent allowed transient occupancy in a class A apartment.

I find that at least one visitor stayed in the cited apartment for less than 30 days and was there on 9/12/2012. I also find that the co-tenant of the apartment was present during the visitor's stay.

The relevant statutory provisions under the Administrative Code of the City of New York are as follows:

§27-2004(a)(8). (a) A class A multiple dwelling is a multiple dwelling that is occupied for permanent residence purposes. This class shall include . . . apartment houses . . . and all other multiple dwellings except class B multiple dwellings. A class A multiple dwelling shall only be used for permanent residence purposes. For the purposes of this subparagraph, "permanent residence purposes" shall consist of occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more, and a natural person or family so occupying a dwelling unit shall be referred to herein as the permanent occupants of such dwelling unit.

The following uses of a dwelling unit by the permanent occupants thereof shall not be deemed to be inconsistent with occupancy of such dwelling unit for permanent residence purposes:

(1) (A) occupancy of such dwelling unit for fewer than thirty consecutive days by other natural persons living within the household of the permanent occupant such as house guests or lawful boarders, roomers or lodgers.

Respondent argues that the visitor to the cited apartment was a houseguest or lawful boarder, roomer or lodger.

In summation petitioner asserted that the intent of houseguests or lawful boarders, roomers or lodgers is at least a 30-day occupancy even though they may leave after a shorter time. Respondent disputed this interpretation. On this point I find petitioner's position untenable. The statute clearly states occupancy be fewer than 30 days. And if the houseguests or lawful boarders, roomers or lodgers were staying beyond 29 days there would be no need for the exception because they would be permanent residents.

Was the visitor in the instant case a houseguest, lawful boarder, roomer or lodger? The record established that she was not a houseguest. She was a stranger and paid to occupy the apartment. As to the other terms, it is necessary to address the rest of this subsection: "living within the household of the permanent occupant."

The record does not show that the visitor mingled with Kodysh. The word "household" is not defined but §27-2004(a)(4)(g)(4) defines "common household" as follows: "A common household is deemed to exist if every member of the family has access to all parts of the dwelling unit. Lack of access to all parts of the dwelling unit establishes a rebuttable presumption that no common household exists." The evidence is that Kodysh had her own bedroom, which the visitor did not enter.

The definition of "common household" is part of the definition of "family." "Family" includes: 4. A family is: (a) A single person occupying a dwelling unit and maintaining a common household with not more than two boarders, roomers or lodgers;

I find that the import of these definitions is that the terms houseguests, boarders, and lodgers refer to occupants who share the life of the dwelling with its permanent occupants. It does not apply to complete strangers who have no, and are not intended to have any, relationship with the permanent occupants.

The intervenor argues in its memorandum of law that allowing such transient use supports the City's desire to preserve living accommodation because it allows tenants the ability to bolster their income and pay their rent. This speculation falls before the City's stated desire to (1) maintain safe quarters for permanent and transient occupants, and (2) to prevent class A residential buildings being turned into hotels, as explained by the recent amendments to various laws governing transient use. (The City so stated in its memorandum in support of the amendments and used the word "hotel" in its general sense, not as a "transient hotel" as defined in the Zoning Resolution.)

See, also, *City of New York v Smart Apartments et al*, Index Number 402255/12, 2/13/2013, NY Supreme Court, Engoren, JSC. (Respondent enjoined from advertising for, or allowing the transient occupancy of, NYC Class A multiple dwellings. Petitioner submitted this decision and respondent commented that the respondent in that case was a different kind of entity in that it rented out some of its own apartments. That may be, but the crux of that case – the purpose behind §27 2004(a)(8)(a) – is on point.)

Finally, while breach of the condominium rules is not of itself a ground for sustaining this NOV, respondent was in breach (through Warren's acts) and the existent of the rule against rental for transient, hotel, or motel purposes is evidence that the unit owners were to restrict their use to permanent occupation.

In conclusion I find respondent has failed to establish a valid defense to this charge.

Therefore, I sustain the Notice of Violation.

NOVs 35006623L, 35006624N, and 35006626R:

These allege respectively:

A lack of a sprinkler system, citing building Code § 903.2; insufficient means of egress, citing building Code § 1018.1; and failures provide a fire alarm system, citing building Code § 907.2.8.

These requirements apply to a building not a specific unit within it. According to this record, respondent owns one unit, and the requirement to install these measures in a building with transient occupancy cannot be laid to him but is the responsibility of the condominium itself. (See, Appeal No. 1200618, NYC v Muffy J. Perl binder, 9/27/2012.)


Therefore, I dismiss these Notices of Violation.

NOV 35006626R (illegal use in R8 residential zoning district):

Zoning District R8 is a general residential district. Use groups 1 and 2 are allowed. (Zoning Resolution §22-00.) "Residences" of all types are permitted as use group 2. A transient hotel is not, but petitioner has not established that a transient hotel existed here. See Appeal No. 1200116, NYC v ABM 75 Realty, 7/26/2012.

Therefore, I dismiss the Notice of Violation.

TOTAL CIVIL PENALTY: \$2,400.00

	Control 5	05/10/2013
Clive Morricks, Administrative Law Judge		Date

**PAYMENT DUE WITHIN TEN (10) DAYS
READ BACK OF THIS ORDER – PROTECT YOUR RIGHTS**