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

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The City of New York,

Plaintiff,

-against- Index No. 451031/2018

Big Apple Management, LLC, *et al*, **Decision and Order**

Defendants.

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Hon. James E. d'Auguste, J.S.C.

In the instant action, plaintiff The City of New York ("City") moves, by order to show cause, for an order, pursuant to New York Multiple Dwelling Law ("MDL") Section 306, CPLR 6301 and 6311, and Sections 7-707, 20-703(d), 27-2122, and 28-205.1 of the Administrative Code of the City of New York ("Administrative Code" or "Admin. Code"), for an order enjoining the defendants and each of them, their agents, employees, representatives, and all persons acting individually or in concert with them during the pendency of this action from: (1) using or occupying, or permitting the use or occupancy of, any of the dwelling units in the buildings located at 321 West 47th Street, 323 West 47th Street, 328 West 47th Street, 332 West 47th Street, 334 West 47th Street, 348 West 47th Street, and 350 West 47th Street in Manhattan (collectively, the "Subject Buildings") for less than thirty (30) consecutive days; (2) booking, offering, or advertising any dwelling units in the Subject Buildings for occupancy of less than thirty (30) consecutive days; and (3) disposing of, modifying, or in any other manner interfering with the digital or paper documents, photographs, and records maintained in connection with the management, operation, use and occupancy of the Subject Buildings.[1]

[1] On June 6, 2018, this Court granted a temporary restraining order, pursuant to MDL Section 306, CPLR 6313, and Sections 7-710, 7-711, 20-703(d), 27-2122, 28-103.13, and 28-205.1 of the Administrative Code, enjoining the defendants herein and each of them, their agents, employees, representatives, and all persons

Defendants Big Apple Management, LLC ("Big Apple"), 321-3 West 47th Street Associates, L.P., 328-30 West 47th Street Associates, L.P., 332-4 West 47th Street Associates, L.P., 348-58 West 47th Street Associates, L.P. (collectively, the "limited partnership defendants"), and the *in rem* properties located at 321 West 47th Street, 323 West 47th Street, 328 West 47th Street, 332 West 47th Street, 334 West 47th Street, 348 West 47th Street, and 350 West 47th Street (along with the limited partnership defendants, the "moving defendants") cross-move for an order dismissing the complaint pursuant to CPLR 3211(a) and 3024(b) on a myriad of grounds including, *inter alia*, (1) violations of moving defendants' rights under the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of New York; (2) moving defendants have no obligation to police the conduct of their tenants; (3) the instant action is unfairly prejudicial against the moving defendants as they have no relation to the alleged misconduct at issue; (4) this action's sole purpose is to make a political statement; (5) this action is brought at

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acting individually or in concern with them from (1) interfering with the City's right to have immediate and unhindered access for its Fire Department of New York ("FDNY") Fire Protection Inspectors and Department of Buildings ("DOB") Inspectors, including but not limited to those personnel assigned to the Mayor's Office of Special Enforcement ("OSE"), to lawfully enter the Subject Buildings, in their normal course of duty, for the purpose of inspecting the Subject Buildings and any parts thereof, and any signs or service equipment contained therein or attached thereto, at all reasonable times, pursuant to relevant and applicable regulations and unobstructed by defendants, to determine the Subject Buildings' compliance with the provisions of the New York City Building Code ("Building Code"), the New York City Fire Code ("Fire Code"), as well as all other relevant provisions of the Administrative Code, the MDL, and other applicable laws and rules; (2) using or occupying, or permitting the use or occupancy of any residential units in the Subject Buildings for less than thirty (30) consecutive days, except those units currently so occupied, which must be vacated within twenty-four (24) hours of issuance of this Court's order, and from further permitting the use or occupancy of such currently occupied units for less than thirty (30) consecutive days immediately after the current occupants leave "(This injunction is not meant to prevent Flavio Rausei [from] residing in his apartment)"; (3) permitting the use or occupancy of any additional residential units at the Subject Buildings for less than thirty (30) consecutive days; (4) registering any new persons at the Subject Buildings for use or occupancy for less than thirty (30) consecutive days; (5) booking or advertising any units at the Subject Buildings for use or occupancy for less than thirty (30) consecutive days, either on their own internet sites or on other travel-related internet sites not directly operated by defendants; and (6) disposing of, modifying, or in any other manner interfering with the digital or paper documents, photographs, and records maintained in connection with the management, operation, use and occupancy of the Subject Buildings. NYSCEF Doc. No. 125.

the behest of a private industry seeking to protect its profits; (6) moving defendants have already wholly cured the nuisance alleged or, in the alternative, that moving defendants are acting aggressively to put any purported nuisance to an end so as to require under the principles of equity that this action be dismissed; (7) moving defendants have already been subjected to full penalties from the City for the conduct alleged in the complaint; and (8) the residuum of bad conduct taking place in the Subject Buildings is *de minimus* in nature.

Defendant Flavio Rausei ("Rausei") seperately opposes the City's motion for a preliminary injunction as against him claiming the City has not met its burden of proof. Rausei asserts that the City cannot demonstrate irreparable harm because, as of June 30, 2018, he vacated the apartment located at 334 West 47th Street, Apartment 1C, and the tenant of the apartment located at 332 West 47th Street, Apartment 1C has also vacated that unit. He also asserts that a balancing of equities tilts in his favor.

Factual and Procedural History

The instant action involves seven residential multiple dwellings located in Manhattan. The seven Subject Buildings are all located on West 47th Street between Eighth and Ninth Avenues. Each of the Subject Buildings is a five-story, Class "A" multiple dwelling with approximately twelve apartments in each building. According to the City, all of the Subject Buildings are owned by the limited partnership defendants and managed by Big Apple.[2] The City further alleges that the Subject Buildings, which can only be legally occupied as permanent residences, have been and are continuing to be deceptively advertised and illegally operated, conducted, maintained, and occupied for short-term transient stays of less than thirty (30) days by defendants and, potentially,

[2] According to the New York City Department of Housing Preservation and Development ("HPD"), Big Apple currently has 394 open violations for specific repairs and maintenance in the Subject Buildings. NYSCEF Doc. No. 10.

by other advertisers and/or operators not yet known, for the purpose of providing highly profitable, but illegal and hazardous, short-term transient occupancies.

The complaint sets forth nine causes of action for the abatement of statutory and common law public nuisances premised upon violations of building codes related to alleged illegal conversion of the Subject Buildings from residential to transient use (Admin. Code § 28-210.3); illegal occupancy (Admin. Code § 28-118.3.2); work without a permit (Admin. Code § 28-105.1); failure to maintain the Subject Buildings in safe condition in compliance with building codes (Admin. Code § 28-301.1); criminal nuisance (New York State Penal Law § 240.45(1)); violations of MDL Section 4.8(a) (prohibiting the use of a Class "A" multiple dwelling for any purpose other than that of a permanent residence); unlawful change of use or occupancy (§§ 28-118.3.1, -118.3.2, -101.5); deceptive trade practices under the New York City Consumer Protection Law ("CPL") (Admin. Code §§ 20-700 *et seq.*); and common law nuisance.

The City avers that it engaged in extensive pre-litigation enforcement efforts to try to bring defendants into compliance with state and local laws and regulations, including repeated administrative code inspections and issuing numerous DOB Notices of Violation ("NOVs") returnable before the Office of Administrative Trials and Hearings ("OATH"), FDNY Violation Orders, FDNY Criminal Court Summonses, advertising summonses, DOB and FDNY Commissioners orders directing defendants to remediate violations of various provisions of the Administrative Code, and multiple decisions and orders from OATH with "in violation" findings that resulted in civil penalties of an amount exceeding $120,000. Further, the City claims that Big Apple is aware of the violations issued by the City because it has a history of "regularly submitting certificates of correction to DOB after each violation and before first hearing dates in order to mitigate penalties imposed, with Big Apple's Head Officer and Managing Agent Eric Gaugler (or

his predecessors) swearing conclusorily each time that transient use has been 'discontinued' in a given apartment and 'throughout the building.'" NYSCEF Doc. Nos. 4, ¶ 10; 12.

The City also asserts that it identified at least five listings on the website www.Airbnb.com ("Airbnb") advertising nightly short-term rentals of units within the Subject Buildings. These unlawful advertisements for transient stays in the buildings located at 332 West 47th Street and 334 West 47th Street have been posted on Airbnb by one host using various names, which the City contends are all traceable to Rausei, an Airbnb "superhost."[3] Rausei is allegedly using at least two different identities and two distinct Airbnb "Host" accounts in contravention of Airbnb's own restrictions on the number of host accounts per listing addresses.[4]

The City commenced the instant action, seeking declaratory and injunctive relief, and statutorily authorized penalties under Administrative Code Sections 7-701 *et seq.*, to halt defendants' unlawful advertising and use and operation of units in the Subject Buildings for short-term tenancies of less than thirty (30) days.

Discussion

The City is essentially requesting two preliminary injunctions: (1) to enjoin defendants from the illegal use or occupancy of the Subject Buildings and (2) to enjoin defendants from advertising what would be an illegal use or occupancy of the Subject Buildings. Typically, "[a] party seeking a preliminary injunction must demonstrate, by clear and convincing evidence (1) a

[3] According to Airbnb's website, a "superhost" is a host with "a 4.8 or higher average overall rating," who "respond[s]to 90% of new messages within 24 hours," and "host[s] at least 10 stays [per] year" with zero cancellations absent extenuating circumstances. Airbnb, Inc., *Superhost: Recognizing the best in hospitality*, https://www.airbnb.com/superhost (last visited Mar. 27, 2019). The aliases used by Rausei are confirmed by Consolidated Edison, Inc. records for the aforementioned buildings. *See* NYSCEF Doc. No. 15.

[4] Airbnb's "Terms of Service" state that an individual "may not register more than one (1) Airbnb Account unless Airbnb authorizes [otherwise]." Airbnb, Inc., *Terms of Service*, "4. Account Registration," § 4.4, https://www.airbnb.com/terms (last visited Mar. 27, 2019).

likelihood of success on the merits, (2) irreparable injury absent the granting of the preliminary injunction and (3) a balancing of the equities in the movant's favor." *Gilliland v. Acquafredda Enters., LLC*, 92 A.D.3d 19, 24 (1st Dep't 2011). However, recognizing the public's compelling interest in ensuring that building and fire safety codes are followed, where a municipality seeks injunctive relief in nuisance abatement proceedings, such as in this action, "[t]he three-pronged test for injunctive relief does not apply; no special damage or injury to the public need be alleged; and commission of the prohibited act is sufficient to sustain the injunction." *City of New York v. Bilynn Realty Corp.*, 118 A.D.2d 511, 512 (1st Dep't 1986). Here, under either the three-prong test discussed in *Acquafredda Enterprises, LLC*, 92 A.D.3d at 24, or the single prong test set forth in *Bilynn*, 118 A.D.2d at 512, the City has met its prima facie entitlement to a preliminary injunction against all defendants.

Pursuant to MDL Section 4.8(a), the apartments within the Subject Buildings, each being a Class "A" multiple dwelling, "shall only be used for permanent residence purposes," which is defined as "occupancy of a dwelling unit by the same natural person or family for thirty consecutive days or more." Pursuant to MDL Section 306, the City may seek to enjoin any violation of the MDL, including the improper use of a Class "A" multiple dwelling. Further, MDL Section 304 establishes that both the violator and "every person who shall . . . assist in the violation of any provision of [the MDL]" are punishable under the statute.

MDL Section 4.8(a) is incorporated into both the Administrative Code and the Building Code.[5] Pursuant to Section 7-703(d) of the Administrative Code, which contains the "Nuisance

[5] Section 27-265 of the Administrative Code references and incorporates Housing Maintenance Code ("HMC") Section 27-2004(8)(a), which is identical to MDL Section 4.8(a). Similarly, Building Code Section 310.1.2 also references and incorporates HMC Section 27-2004(8)(a) and MDL Section 4.8(a). Each provision governs "buildings with three or more dwelling units that are occupied for permanent residence purposes," such as the Subject Buildings at issue herein.

Abatement Law," a building such as the Subject Buildings, shall be a public nuisance if it is in violation of, *inter alia*, Administrative Code Sections 28-210.3, 28-118.3.1, including 28-101.5, 28-118.3.2, and 28-118.3.1 through 28-118.3.4. Section 28-210.3 of the Administrative Code governs illegal conversion of buildings from residential use to transient use. It sets forth, in pertinent part, the following:

> It shall be unlawful for any person or entity who owns or occupies a multiple dwelling or dwelling unit classified for permanent residence purposes to offer or permit the use or occupancy or to convert for use or occupancy such [dwelling or unit] for purposes other than permanent residence purposes. For the purposes of this section a conversion in use . . . may occur irrespective of whether any physical changes have been made to such dwelling unit.

Admin. Code § 28-210.3. Administrative Code Section 28-118.3.1, entitled "Change of Occupancy or Use," prohibits a change in the use or occupancy of a building "unless and until the [DOB] has issued a certificate of occupancy certifying that the alteration work for which the permit was issued has been completed in accordance with the approved construction documents and the provisions of this code and other applicable laws and rules for the new occupancy or use," including the Building Code. Administrative Code Section 28-101.5 defines the term "alteration" as "[a]ny construction, addition, change of use or occupancy, or renovation to a building or structure in existence."

Further, Section 28-118.3.2 of the Administrative Code, entitled "Changes inconsistent with existing certificate of occupancy," provides, in part, that "[n]o change shall be made to a building . . . inconsistent with the last issued certificate of occupancy." Section 28-119.3 of the Administrative Code, entitled "Completed buildings or open lots," states, in relevant part, that "[t]he provisions of sections 28-118.3.1 through 28-118.3.4 shall apply to completed buildings." Combined, these provisions render unlawful a change from permanent use or occupancy to

transient use or occupancy of a building without having first obtained a certificate of occupancy for that change in use or occupancy.

Section 28-105.1 of the Administrative Code provides that "[i]t shall be unlawful to . . . change the use or occupancy of any building . . . unless and until a written permit therefore shall have been issued by the commissioner in accordance with the requirements of this code." Administrative Code Section 28-301.1 provides, in pertinent part, that a building's owner "shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code in a safe and code-complaint manner." Pursuant to Administrative Code Section 7-704, the City may seek an injunction to enjoin acts, such as the foregoing acts, that constitute a public nuisance.

The City alleges that defendants violated and continue to violate MDL Section 4.8(a) and the aforementioned Administrative Code provisions by permitting the use or occupancy of the Subject Buildings, or by converting the same for the purpose of use or occupancy, as short-term transient tenancies of less than thirty (30) days. The City argues that these violations create an unsafe condition in the Subject Buildings because Class "A" multiple dwellings are not equipped with fire safety devices and other protections that are statutorily required of buildings registered for the purpose of transient occupancy, such as hotels, which, in turn, leads to an increased potential for injury to transient tenants who are unfamiliar with the layout of the building. NYSCEF Doc. Nos. 7, ¶ 4 (DOB Fire Safety Affidavit); 6, ¶ 8 (FDNY Chief Affidavit). The City also notes that the existence of transient tenants in a residential neighborhood are often an annoyance to permanent residents due to resulting increases in noise, drunken behavior and instances of drug use. Further, advertising and offering short-term accommodations that are prohibited by law violate the CPL and constitute deceptive trade practices.

The City has provided ample evidence that several units within the Subject Buildings have been used for transient occupancy in violation of MDL Section 4.8 and Administrative Code Sections 28-118.3.2, 28-105.1, and 28-210.3, in that defendants have, on a continuing and regular basis, advertised and rented units within the Subject Buildings, or permitted the same to be rented, to individuals for stays of less than thirty (30) days. *See, e.g.*, NYSCEF Doc. Nos. 14, 24, 26, 53, 60, 64, 77, 86, 88, 90, 91, 93 (Airbnb profiles and advertisements); 22, 25, 28, 30, 37, 48, 51, 55, 58, 66 (photographs of guest reservation receipts for short-term stays); 21, 23, 27, 29, 31, 34, 36, 38, 39, 42, 44, 45, 47, 49, 52, 56, 59, 62, 69, 71, 72, 74, 76, 80, 82, 84 (NOVs and DOB complaints referencing the illegal occupancy of the Subject Buildings); 28, 41, 63, 75, 79 (photos of allegedly violating conditions taken by DOB inspectors); 85, 87, 89, 92 (ad summonses issued by DOB inspectors). The City has also made a proper evidentiary showing that the Subject Buildings were not maintained in a safe or code-compliant manner in violation of Administrative Code Section 28-301.1. *See generally* NYSCEF Doc. Nos. 16, 94-98, 105, 108, 111 (affidavits of DOB inspectors, FDNY Fire Protection Inspectors, and NYPD Sergeant Kenneth Caesar detailing the violations they personally observed when inspecting the Subject Buildings); 99-102, 104, 106, 109-110 (FDNY Violations). In doing so, the City has sufficiently proven that defendants are advertising and/or operating, or permitting the operation of, the Subject Buildings for a purpose other than permanent residency in violation of MDL Section 4.8(a) and Administrative Code Sections 28-210.3, 28-118.3.2, 28-105.1, and 28-301.1. The commission of these violations, in and of themselves, is sufficient to sustain the City's request for a preliminary injunction. *Bilynn*, 118 A.D.2d at 512.

The result is no different under the traditional three-prong test. The evidence provided by the City meets the clear and convincing standard of proof to demonstrate the City's likelihood of

success in establishing that defendants have violated the above-mentioned statutes by operating, or permitting the Subject Buildings to be operated, for transient use, thereby committing a public nuisance. As to irreparable injury, where a municipality seeks to enjoin a public nuisance, "irreparable injury is presumed from the continuing existence of an unremedied public nuisance." *City of New York v. 330 Cont. LLC*, 60 A.D.3d 226, 230 (1st Dep't 2009). Here, as discussed above, the City has established the existence of a public nuisance and therefore has sufficiently established irreparable injury. *See Inc. Vill. of Plandome Manor v. Ioannou*, 54 A.D.3d 364, 364-65 (2d Dep't 2008) (holding that a municipality "need not demonstrate irreparable harm" when seeking injunctive relief to enforce ordinances). Finally, the equities—enforcing regulations and ordinances designed to protect the health, safety, and welfare of the public versus allowing the continued flaunting of said regulations—unquestionably lie in favor of the City. *See, e.g.*, *Fischer v. Deitsch*, 168 A.D.2d 599, 601 (2d Dep't 1990) (holding that the equities will lie in favor of the movant where the harm to it is greater than harm to the opponent).

The City also argues that defendants should be enjoined from advertising the Subject Buildings for transient use. Pursuant to MDL Section 121 and Section 27-287.1 of the Administrative Code, advertising short-term transient occupancies in a Class "A" multiple dwelling, such as the Subject Buildings, is prohibited. These statutes, which are largely identical, make it "unlawful to advertise occupancy or use of dwelling units in a class A multiple dwelling for occupancy that would violate [MDL Section 4.8]."

In addition, the CPL prohibits deceptive trade practices, defined as "false . . . or misleading . . . representation[s] of any kind made in connection with the sale, lease, rental or loan or in connection with the offering for sale, lease, rental, or loan of consumer goods or services." Admin. Code § 20-701. The rental of an apartment is considered a consumer good or service. *23 Realty*

Assoc. v. Tiegman, 213 A.D.2d 306, 308 (1st Dep't 1995) (stating that a residential lease is "a purchase of services from the landlord (and, by extension, his agent)" and "[a]n apartment dweller is today viewed, functionally, as a consumer of housing services"). Similarly, New York courts have held that it is a violation of the CPL to market residential properties for short-term transient rentals, which includes the advertising and booking of such properties for illegal transient use. *See* Admin. Code §§ 20-700 *et seq.*; *City of New York v. Smart Apts. LLC*, 39 Misc. 3d 221, 225, 227-28 (Sup. Ct. N.Y. County 2013) (Engoron, J.) (citing *Realty Assocs. v. Teigman*, 213 A.D.2d 306, 308 (1st Dep't 1995)); *City of New York v. City Oases, LLC*, 49 Misc. 3d 1205(A) (Sup. Ct. N.Y. County 2015) (d'Auguste, J.).

The City has submitted evidence that Rausei, as recently as April 2018, was issued advertising summonses for his illegal advertisement of units within two of the Subject Buildings for transient stays of less than thirty (30) days via Airbnb in violation of MDL Section 121 and Administrative Code Section 27-287.1. NYSCEF Doc. Nos. 16, ¶¶ 153-55; 87-91. Such conduct constitutes deceptive trade practices under the CPL. Rausei's commission of these advertising violations, in and of themselves, is enough to sustain the City's request for a preliminary injunction in this regard. *Bilynn*, 118 A.D.2d at 512. Rausei argues that the City can no longer satisfy the irreparable injury prong as against him because he vacated the apartments in the Subject Buildings that he was purportedly illegally advertising and using as short-term rentals. This argument, however, is not a basis for denying the requested relief as there is a strong possibility that the public nuisance will not remain abated in the absence of a court order, as discussed *infra*. The Court has reviewed Rausei's arguments and find them to be unavailing.

The moving defendants do not actually challenge the facts as alleged in the complaint. Instead, they raise several arguments that broadly challenge the City's authority to inspect

buildings and enforce punishments for violations of the provisions at issue, as well as challenge the City's responsibility to police and monitor the Subject Buildings under said provisions.

The moving defendants' arguments can be summarized in four broad categories: (1) constitutional violations of moving defendants' rights due to the City's actions as permitted by the MDL and Administrative Code provisions and challenges to the validity of the searches of the Subject Buildings; (2) moving defendants were not personally at fault; (3) the instant action is brought out of impure motives; and (4) moving defendants have either cured any alleged nuisance or already been penalized for the allegedly illegal activity, which is *de minimis* in nature.

Moving defendants argue, *inter alia*, that the City is unconstitutionally penalizing moving defendants and prosecuting them in violation of their state and federal constitutional rights by imposing fines under the MDL and Administrative Code sections discussed herein. To the contrary, the City is only civilly prosecuting the moving defendants as authorized by statute for their failure to maintain the Subject Buildings in a safe and code-compliant manner. Section 28-301.1 of the Administrative Code, entitled "Owner's responsibilities," explicitly sets forth that an owner is "responsible at all times to maintain the building . . . in a safe and code-compliant manner." This obligation is a nondelegable duty and any violation of such an obligation exposes an owner to vicarious liability. *Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559, 566 (1986) (finding the owner vicariously liable where the owner failed to remedy a condition that violated the Administrative Code). Any purported ignorance that moving defendants claim to have regarding the alleged nuisances does not defeat this nondelegable duty set forth in the Administrative Code. "Moreover, the defendants' protestations that [they] had no knowledge of the illegality are irrelevant. '[T]he court's jurisdiction on the application for preliminary injunctive relief is invoked by the *existence of the nuisance at the premises*.'" *City of New York v. P'ship 91,*

L.P., 277 A.D.2d 164, 164-65 (1st Dep't 2000) (second alteration and emphasis in original) (quoting *City of New York v. Castro*, 160 A.D.2d 651, 652 (1st Dep't 1990)). Additionally, the complaint sufficiently alleges, and the City provides support for the claim, that moving defendants failed to maintain the building in a safe and code-compliant manner in violation of Section 28-301.1 of the Administrative Code.

Additionally, moving defendants argue that they are not personally responsible for the conduct of their tenants, nor do they have to police the conduct of their tenants. Aside from the fact that the limited partnership defendants have a nondelegable duty to maintain the Subject Buildings in a code-compliant manner, the Administrative Code is structured so as to impose liability upon building owners for permitting the use and occupancy of units in a Class "A" multiple dwelling as illegal short-term tenancies. *See Pamela Equities Corp. v. Envtl. Control Bd. of City of N.Y.*, 59 Misc. 3d 1007, 1014 (Sup. Ct. N.Y. County 2017) (Billings, J.) (stating that "Administrative Code § 28-204.6.3 . . . authorizes respondent New York City Department of Buildings to issue NOVs only to building owners. . . . [T]his statute does not impermissibly discriminate against building owners in favor of the buildings' tenants or occupants simply because the statute may be underinclusive or fail to address all causes of transient use." (citing *New York State Ass'n for Affordable Hous. v. Council of City of N.Y.*, 141 A.D.3d 208, 217 (1st Dep't 2016))). Moreover, the state and local legislatures have time and again stated that owners of multiple dwellings located within the City of New York are responsible for the safe operation and maintenance of their buildings, even if other individuals may also be responsible for maintaining safe building conditions as well. *See, e.g.*, Admin. Code § 27-2006(c) ("The fact that a tenant is or may be liable for a violation of [the Housing Maintenance Code] or any other law or is found liable for civil or criminal penalties does not relieve the owner of his or her obligation to keep the

premises, and every part thereof, in good repair."); MDL § 78 (requiring that "[e]very multiple dwelling, . . . and every part thereof . . . , shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section provisions of this section; but the tenant also shall be liable if a violation is caused by his own willful act, assistance or negligence or that of any member of his family or household or his guest."); *Barkley v. Plaza Realty Inv'rs Inc.*, 149 A.D.3d 74, 76, 79 (1st Dep't 2017) (stating that an owner of a building has a nondelegable duty under MDL Section 78 "to maintain the premises in safe condition"); *see also* Admin. Code §§ 27-2005 (detailing duties of owners of multiple dwellings), 28-301.1.

Moreover, where an injunction is sought to abate a public nuisance at a building, "[t]he personal fault of the owner is not a material consideration upon such application." *City of New York v. Castro*, 160 A.D.2d 651, 652 (1st Dep't 1990). Administrative Code Section 28-210.3 explicitly establishes that "any person or entity *who owns* or occupies a multiple dwelling or dwelling unit classified for permanent residence purposes" may not "offer or *permit the use* or occupancy . . . of such [dwelling or unit] for purposes other than permanent residence purposes" (emphasis added). Here, it is alleged that the limited partnership defendants owned the Subject Buildings, that said defendants were aware of the illegal use of the Subject Buildings due to the numerous NOVs and other violations that were issued and the limited partnership defendants' belated efforts to remedy said violations, and that those defendants did nothing to stop (and, therefore, effectively permitted), prior to the commencement of this action, the illegal use of the Subject Building for short-term tenancies in violation of Section 28-210.3 of the Administrative Code.

Moving defendants do not submit any evidence to refute the City's allegations. It seems inconceivable that a substantial number of units in the Subject Buildings were used for transient

occupancy without moving defendants' knowledge, or at least willful blindness, especially in light of the thirteen holdover petitions and five notices of termination annexed as exhibits to their cross-motion. *See* NYSCEF Doc. Nos. 141-53 (holdover petitions), 157-61 (notices of termination). Moreover, even if a lack of knowledge could be reasonably asserted before the first violations occurred, the moving defendants certainly had actual or constructive knowledge at the time of the numerous subsequent inspections that gave rise to further Building and Fire code violations. This is shown by the affidavit of Eric Gaugler, the managing agent of the Subject Buildings, which was executed on behalf of the moving defendants, that specifically states "[w]e do however, occasionally catch a residential tenant who is looking to profiteer off the buildings used by AirBnB [sic] or something like it," and further explains that "[w]hen that happens, we aggressively seek to have them evicted." NYSCEF Doc. No. 139, ¶ 7. Gaugler's affidavit also states that the termination notices that were submitted in support of moving defendants' cross-motion "are termination notices that my office caused to be issued against tenants we caught engaging in such activities." *Id.* In addition, Gaugler affirms that the termination notices did not result in surrender of the apartments, indicating that the moving defendants had knowledge of the ongoing illegal short-term tenancies that were occurring in the Subject Buildings. *See id.*, ¶ 8.

Although moving defendants argue that there is currently no ongoing nuisance in the Subject Buildings due to the "rigorous and aggressive programs to rid the [S]ubject [B]uildings of the illegality in which some of their tenants are engaged" (NYSCEF Doc. No. 170, at 2) and, therefore, the City's motion for a preliminary injunction should be denied, this is simply not the case. Such self-serving assertions made by defendants, including Rausei, are insufficient to prevent the issuance of a preliminary injunction. The Appellate Division, First Department has repeatedly held that in instances of the occurrence of a public nuisance, "proof of illegal operations

at the premises over an extended period, and the City's 'ongoing right to ensure that the guilty parties do not subsequently recommence their illegal activities in the same location'" outweighs and conclusory statements made by defendants' counsel, including "that since the tenant of record had surrendered the premises, the complained-of activities were no longer taking place." *P'ship 91, L.P.*, 277 A.D.2d at 164 (quoting *City of New York v. Mor*, 261 A.D.2d 185, 187 (1st Dep't 1999)); *see also, e.g.*, *City of New York v. Mor*, 261 A.D.2d at 187 ("The reasoning that the nuisance was fully abated by the tenants' agreement to vacate and that the City's asserted need for injunctive relief was therefore moot, was flawed."); *City of New York v. 924 Columbus Assocs., L.P.*, 219 A.D.2d 19, 22 (1st Dep't 1996) ("The IAS Court erred not only in accepting defendant landlord's conclusory assertions and finding an abatement of the nuisance. It also erred in ignoring the landlord's unilateral actions in flouting the Administrative Code.").

The Court has reviewed defendants' remaining arguments and find them to be without merit. Additionally, defendants have failed to submit any facts or evidence that persuades this Court that the preliminary injunction should not be issued. With respect to the cross-motion to dismiss, not only do the arguments advanced in support of the moving defendants' application lack merit, but the City has sufficiently pled its causes of action seeking a preliminary injunction and monetary penalties, pursuant to the statutory scheme. Accordingly, the City is entitled to a preliminary injunction enjoining defendants' use of the Subject Buildings for any purpose other than permanent residency, as defined in the MDL and Administrative Code, as well as enjoining defendants from offering or advertising the use or occupancy of the Subject Buildings for any purpose other than permanent residency. As such, the cross-motion to dismiss is denied in its entirety.

Due deliberation having been had, and it appearing to this Court that causes of action exist in favor of the City of New York and against defendants Big Apple Management, LLC; 321-3 West 47th Street Associates, L.P.; The Land and Building Known as 321 West 47th Street, Block 1038, Lot 21, County, City and State of New York; The Land and Building Known as 323 West 47th Street, Block 1038, Lot 20, County, City and State of New York; 328-30 West 47th Street Associates, L.P.; The Land and Building Known as 328 West 47th Street, Block 1037, Lot 49, County, City and State of New York; 332-4 West 47th Street Associates, L.P.; The Land and Building Known as 332 West 47th Street, Block 1037, Lot 41, County, City and State of New York; The Land and Building Known as 334 West 47th Street, Block 1037, Lot 52, County, City and State of New York; 348-58 West 47th Street Associates, L.P.; The Land and Building Known as 348 West 47th Street, Block 1037, Lot 59, County, City and State of New York; The Land and Building Known as 350 West 47th Street, Block 1037, Lot 59, County, City and State of New York; Flavio Rausei; and "John Doe" and "Jane Doe," numbers 1 through 10, fictitiously named parties, true names unknown, the parties intended being the managers or operators of the business being carried on by defendant Big Apple Management, LLC, and any person claiming any right, title or interest in the real property which is the subject of this action, and that the City is entitled to a preliminary injunction on the ground that the defendants threaten, or are about to do, or are doing or procuring or suffering to be done, an act in violation of the City's rights respecting the subject of the action (the Subject Buildings) and tending to render the judgment ineffectual, as set forth in the aforesaid decision and the City has demanded and would be entitled to a judgment restraining defendants from the commission or continuance of acts, which, if committed or continued during the pendency of this action, would produce injury to the City, as set forth in the aforesaid decision, it is

ORDERED that plaintiff The City of New York's motion for a preliminary injunction is granted; and it is further,

ORDERED that defendants, their agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendants, are enjoined and restrained during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee, or other person under the supervision or control of defendants or otherwise, any of the following acts:

a. Using or occupying, or permitting the use or occupancy of, any of the dwelling units in the Subject Buildings for less than thirty (30) consecutive days, and
b. Booking, offering, or advertising any dwelling units in the Subject Buildings for occupancy of less than thirty (30) consecutive days, and
c. Disposing of, modifying, or in any other manner interfering with the digital or paper documents, photographs, and records maintained in connection with the management, operation, use, and occupancy of the Subject Buildings

until the resolution of this case, or further court order; and it is further,

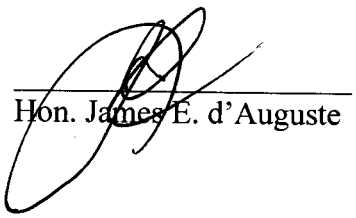
ORDERED that the cross-motion to dismiss by defendants Big Apple Management, LLC; 321-3 West 47th Street Associates, L.P.; The Land and Building Known as 321 West 47th Street, Block 1038, Lot 21, County, City and State of New York; The Land and Building Known as 323 West 47th Street, Block 1038, Lot 20, County, City and State of New York; 328-30 West 47th Street Associates, L.P.; The Land and Building Known as 328 West 47th Street, Block 1037, Lot 49, County, City and State of New York; 332-4 West 47th Street Associates, L.P.; The Land and Building Known as 332 West 47th Street, Block 1037, Lot 41, County, City and State of New York; The Land and Building Known as 334 West 47th Street, Block 1037, Lot 52, County, City and State of New York; 348-58 West 47th Street Associates, L.P.; The Land and Building Known as 348 West 47th Street, Block 1037, Lot 59, County, City and State of New York; The Land and

Building Known as 350 West 47th Street, Block 1037, Lot 59, County, City and State of New York (the Subject Buildings) is denied in its entirety; and it is further,

ORDERED that defendants are directed to serve an answer to the complaint within twenty (20) days after service of a copy of this order with notice of entry.

This constitutes the decision and order of this Court.

Dated: April 8, 2019



Hon. James E. d'Auguste