Arora v New York City Mayor's Off. of Special Enforcement
2023 NY Slip Op 32741(U)
August 8, 2023
Supreme Court, New York County
Docket Number: Index No. 154868/2023
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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RUPI ARORA, SARAH BREZAVAR, GIA BRISCOE

Petitioners,

- v -

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

Respondents.

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INDEX NO. 154868/2023

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, 4, 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, 34, 35, 36, 37, 38 were read on this motion to/for ARTICLE 78.

The petition to annul rules regulating short-term rentals is denied and respondents' cross-motion to dismiss is granted.

Background

Petitioners are three New York City residents (they live in Manhattan, Queens, and Brooklyn respectively) who claim that they want to rent portions of their homes as short-term rentals (that is, rentals shorter than 30 days). They claim they have utilized short-term rentals in the past to help pay bills and supplement their income; they insist that this additional income helps them remain in their homes. Petitioners complain that the promulgation of rules affecting short term rentals by respondent the New York City's Mayor's Office of Special Enforcement ("OSE") pursuant to Local Law 18 are irrational and should be struck down.

They claim that these rules require them to apply to register their homes with OSE and the application process would involve divulging intimate and personal information. Petitioners insist that the government cannot demand that they provide such information. They also complain that the rules require them to certify that they understand various building codes and other requirements and that no layperson could ever legitimately certify compliance with this obligation. Petitioners also argue that respondents' rules rely upon misguided interpretations of the Multiple Dwelling Law, the Building Code and Housing Maintenance Code.

Respondents, on the other hand, assert that Local Law 18 and the rules promulgated by OSE are part of an attempt to root out unlawful short-term rentals, which are widespread throughout New York City. They insist that these illegal short-term rentals disrupt the quality of life for many residents and have led to many, many complaints. Respondents emphasize that the rules do not amend any existing laws about residential dwelling units and simply create a registration regime for short-term rentals.

They maintain that these rules are necessary to prevent housing units from being lost to illegal short-term rentals and the heightened healthy and safety risks that accompany these listings. Respondents argue that there are now over 10,000 active illegal short-term rentals on Airbnb. They observe that Local Law 18 directed registration requirements for legal short-term rentals and specified that the registration process was to be handled by OSE. Respondents conclude that Local Law 18 and the subject rules provide a necessary framework to ensure that only legal short-term rentals exist in New York City.

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]).

In support of their cross-motion to dismiss, respondents insist that petitioners lack standing as they have not shown they will be harmed by the rules. They point out that petitioners could continue to host guests in their homes as long as they register with OSE and none of the petitioners have even submitted an application. Respondents argue that petitioners have not cited a plausible reason for why they have not applied or why, if they did, their applications would be denied.

Petitioners claim they have standing because they will lose their income from their short-term rentals if the rules go into effect. They insist that they need not show that the loss of this income will bankrupt them in order to establish standing. Petitioners emphasize that they cannot submit applications without making a false certification to OSE that they understand certain laws, rules, and regulations and without including sensitive personal information.

The Court finds that petitioners lack standing to bring this case as they cannot establish that they have suffered any injury. The purported injury—the loss of income from short-term rentals—derives from their decision not to apply to register their homes with OSE. In other words, the Court views the alleged injury as self-induced. As respondents point out, petitioners did not identify any reason why their applications would be denied (if they actually applied) or cite legitimate reasons for why there were unable to submit an application.

Certification

Standing directly overlaps with two substantive issues raised by petitioners—the certification about understanding certain laws and the disclosure of information about a person's household. Therefore, the Court will discuss the merits of those issues as well.

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. 26 at 1).

Among other requirements, an individual seeking to register a premises with OSE must submit an application (*id*. at 7). That application includes information about the "Full physical address where short-term rental will take place, including street number, street name, zip code, borough, and unit number where there is more than one dwelling unit in the building" and "[t]he number of individuals not related by blood, adoption, legal guardianship, marriage or domestic partnership that reside with the registrant in the unit" (*id*. at 8).

The applicant also has to "certify that they understand and agree to comply with applicable provisions of the zoning resolution, multiple dwelling law, housing maintenance code, New York city construction codes and other laws and rules relating to the short-term rental of dwelling units in private dwellings and class A multiple dwellings, or in class A dwelling units

within mixed use buildings including but not limited to: a. New York City Administrative Code, Title 28, Articles 118, 210, 301, 701 (BC § 310); b. New York City Administrative Code, Title 27, Chapter 1, Subchapter 3, Article 18; c. New York City Building Code § 310; d. New York City Housing Maintenance Code §§ 27-2004, 2057-2088; and e. Multiple Dwelling Law §§ 4(8), 121, 248" (*id*. at 9).

The Court finds that the certification requirement is inherently reasonable. The fact is that petitioners are engaged in commercial activity and respondents have the right to regulate such activity. Petitioners are inviting strangers into their homes to stay overnight. Those guests expect that the places they will stay are safe and comply with applicable laws and rules regarding dwelling units in New York City. The challenged rules merely require that applicants certify that they understand and agree to comply with these rules; they do not have to certify that they are experts. Respondents are not requiring anyone to pass a test on these rules and petitioners, therefore, are not claiming that they, as laypeople, they couldn't possibly pass such a test.

Petitioners contend that there is no purpose to the certification.[1] Petitioners appear to want it both ways. They want the right to rent out their spaces for money, but not comply with a basic requirement that they familiarize themselves with obligations that accompany providing a safe space for a customer.

To be sure, the maze of various state and local laws and related codes and regulations is frustrating and can be onerous for anyone reviewing them. Certainly, some streamlining of these regulations and laws would make things clearer although the Court observes that, in the

[1] Petitioners also call these rules "arcane." But it bears pointing out that these rules did not appear out of thin air. Their origins date back to the 19th century out of concerns about the dangerous conditions in tenements. "At the time, there were hardly any laws regulating building construction in New York, and tenement buildings had few if any windows, no running water, and little chance of escape in case of a fire. Disease and overcrowding were rampant. Ultimately, the shockingly substandard conditions that were uncovered led to the passage of the Tenement House Act in 1867" (Kyle Giller, The Fight for NYCHA: RAD and the Erosion of Public Housing in New York, 23 CUNY L Rev 283, 289 [2020]).

regulations challenged, respondents did highlight specific laws appropriate for applicants to review. But the Court cannot waive away these laws and rules just because petitioners don't want to make any effort to learn about their chosen business. There is no doubt that many landlords, who are also bound by these and many other rules, would like the right to avoid their obligations by saying that they just did not, or could not, understand them.[2]

And, of course, respondents have a clear interest in ensuring some baseline level of understanding by potential short-term rental hosts. Commercial activity is highly regulated in New York City. After all, one needs a license to operate a car wash, drive a pedicab or be a sightseeing guide (NYSCEF Doc. No. 30, n 6). It is against the law to take your personal car and pick up riders off the street or at the airport and charge a fee without a license (*see* 35 RCNY § 51-03). If you want to go into a public-facing business, then it makes sense that you have to familiarize yourself with the rules applicable to that business. The certification requirement is clearly not intended to ensure total compliance. Rather, it is a recognition that people contemplating renting out their units must make some effort to learn about their chosen field and make a certification about those efforts. That is not an illogical or senseless request.

Personal Information

The Court finds that petitioners' claim that they are wholly unable to fill out applications because they would have to reveal personal information is without merit. The rules require that an applicant has to provide "the number of individuals not related by blood, adoption, legal guardianship, marriage or domestic partnership that reside with the registrant in the unit" (NYSCEF Doc. No. 26, § 21-03[3][f]). The Court fails to see how providing only a number (not

[2] For instance, owners of certain buildings are required to install window guards where a child ten years of age and under resides (NY City Health Code (24 RCNY) § 131.15[a]). An owner of a building where this regulation applies cannot avoid this duty by asserting that he or she did not understand or know about this rule.

a name or even a generalized description of that person's relationship) is so personal that it prevented petitioners from filling out the application or to strike down these rules altogether. If that information was too personal, then the Court questions why providing the applicant's full name, phone number, email address and physical address would not also be too personal.

As respondents point out, this requirement is not new; it derives from the Housing Maintenance Code (section 27-2004[a][4][c] and [d]), which prohibits more than three unrelated persons from occupying a dwelling unit and maintaining a common household. They explain that if there are already three unrelated individuals in the unit, then the space would not be eligible for a short-term rental registration. In other words, respondents simply want the number so that they can ensure that an applicable law is followed. That is a reasonable request.

Petitioners also claim that this requirement somehow violates the Fourth Amendment. That claim is completely without merit. Providing a number is not tantamount to an unreasonable search as petitioners are choosing to engage in this commercial activity. The requested information sought by the government is only a number, not a detailed dossier of the unrelated individuals in the home. They also insist that the requirement to provide an update is impermissible; of course, providing an update if information changes is a sensible requirement. The Court observes that many New Yorkers have to submit annual certifications that list their family members (*see e.g., Manhattan Plaza Assoc., L.P. v Dept. of Hous. Preserv. and Dev. of City of New York,* 8 AD3d 111, 112, 778 NYS2d 164 [1st Dept 2004] [discussing a dispute about a tenant who did not include a family member on annual certifications in the context of Section 8 housing]). Here, no one is asking for names, only numbers to comply with existing law. If petitioners do not want to reveal such information, then they can simply choose not to enter this business.

Void for Vagueness

Petitioners devote substantial time arguing that various portions of the rules are void for vagueness. As an initial matter, the Court finds that petitioners cannot assert a *facial* vagueness challenge before respondents have even started to enforce the law. "Statutes that do not implicate First Amendment rights are assessed for vagueness only as applied, i.e., in light of the specific facts of the case at hand and not with respect to their facial validity" (*Eastchester Tobacco & Vape Inc. v Town of Eastchester*, 618 F Supp 3d 155, 162 [SD NY 2022] [internal quotations and citations omitted]). In other words, the fact that the rules have not yet gone into effect forecloses a vagueness challenge.

Even if the Court could consider this type of challenge, the Court would reject such a challenge. "[F]acial challenges to statutes are generally disfavored and legislative enactments carry a strong presumption of constitutionality" (*People v Stuart*, 100 NY2d 412, 422, 765 NYS2d 1 [2003]). "The void-for-vagueness doctrine employs a 'rough idea of fairness' and applies to regulations as well as to statutes. Due process of law requires that a statute or regulation be sufficiently definite such that persons of common intelligence need not guess at its meaning. The doctrine serves not only to assure that citizens can conform their conduct to the dictates of law but, equally important, to guide those who must administer the law. On the other hand, the doctrine does not require impossible standards of specificity which would unduly weaken and inhibit a regulating authority, especially in a field where flexibility and adaptation of the legislative policy to varying conditions is the essence of the program" (*Matter of Gurnsey v Sampson*, 151 AD3d 1928, 1929, 57 NYS3d 855 [4th Dept 2017] [internal quotations and citations omitted]).

Petitioners complain that the certification requirement, that an applicant understand and comply with various housing laws, is vague. As noted above, to ask people who want to be in the business of renting out their homes to first familiarize themselves with important laws and rules, including those relating to safety, is a very clear and logical requirement.

Another issue related to the vagueness challenge is the common household requirement. The rule states that "A registered host must maintain a common household with a rentee. Pursuant to Housing Maintenance Code § 27-2004, a common household is deemed to exist if every member of the household including the rentee has access to all parts of the dwelling unit, and lack of access to all parts of the dwelling unit establishes a rebuttable presumption that no common household exists" (NYSCEF Doc. No. 26, § 21-10[12]).

Petitioners insist that this rule is void because it is unclear how this will be enforced or what a host has to do to rebut the presumption that no common household exists. Respondents contend that they are simply referring to a provision of the Housing Maintenance Code that has long been the law. They point to the fact that short-term rentees are considered under the definition of family under this statutory scheme (and therefore part of the common household).

This rule clearly flows from the Housing Maintenance Code section cited above, which states in part that "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." In other words, respondents are simply enforcing a currently effective regulation in order to make short-term rentals comply with the Housing Maintenance Code; respondents are not creating new obligations with this rule.

At oral argument, there was much discussion about the fact that this provision might bar locks on bedroom doors for both guests and a host, an obviously concerning requirement

although counsel for respondents insisted that it only applied to key locks (not internal locks for bedrooms). In any event, this type of issue is precisely the reason why, ordinarily, facial challenges (as opposed to as-applied challenges) based on vagueness are not permitted outside of the First Amendment context. OSE has not yet enforced this provision and respondents point out that this type of determination will be done on a fact-specific basis.

That means that applicants will be able to challenge any determinations by OSE as it applies to their particular homes. But at this early stage, before there has been any enforcement, the Court is unable to find that this provision (which simply references an existing law) somehow renders the entire rules as void for vagueness. That argument appears to be a collateral attack on an existing Housing Maintenance Code section. And, as noted above, respondents did not need to meet some impossible standard of specificity regarding how it might enforce this type of law and the rebuttable presumption language necessarily implies that there will be a case-by-case assessment.

Other Issues

As this Court noted in the related proceeding involving Airbnb, these rules and Local Law 18 itself does not violate the City of New York's 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]). Although the petitioners here insist that they are hosting their short-term rentees and are therefore renting their spaces legally,

respondents demonstrated that there is a massive problem with illegal short-term rentals. Respondents' police powers enable them to address this issue with Local Law 18 and the subject rules in order to reduce the prevalence of this illegal activity.

Petitioners also argue that the rules' prohibition on unhosted short-term rentals is an error of law. The Court declines to embrace petitioners' novel reading of the Building Code to imply that one and two family dwellings are eligible for unhosted short-term rentals. As respondents point out, simply because a building is a one or two family dwelling does not allow for unhosted rentals (*Karol v New York City Off. of Admin. Trials and Hearings*, 190 AD3d 420 [1st Dept 2021], *lv to appeal denied*, 37 NY3d 903 [2021] [finding that petitioner was not entitled to rent the basement level of his two-floor home to three transient residents for fewer than 30 days]).

The genesis of this argument appears to be a case, *City of New York v 330 Continental LLC* (60 AD3d 226, 873 NYS2d 9 [1st Dept 2009]) in which the Appellate Division, First Department permitted SRO buildings to have a minority of its units used for short-term rentals on the grounds that a certain phrase ("as a rule") meant that the building could have a secondary use (i.e., for transient visitors). But the state legislature subsequently amended this portion of the Multiple Dwelling Law §4(8) to remove the "as a rule" phrase and the bill jacket specifically cites the need for clarification after the *330 Continental* case (New York Bill Jacket, 2010 S.B. 6873, Ch. 225).

Summary

The Court grants the cross-motion to dismiss as petitioners did not state any cognizable causes of action. The Court recognizes that petitioners claim they simply want to continue to

engage in lawful activity—to host short-term rentees (although they also ask the Court to find that unhosted rentals are permissible). Petitioners failed to state a basis upon which this Court should grant their requested relief or to sustain their causes of action.

Respondents were entitled to promulgate rules after the passage of Local Law 18 to root out illegal short-term rentals. The Court finds that the rules create a straightforward method for legal short-term hosts to enter this business and rent out their spaces—they simply have to register their homes. That petitioners have reservations about the application process is not a basis to strike it down. In fact, petitioners do not, in this Court's view, have standing to raise their concerns because they have not yet even filled out an application or explained why their application is certain to be rejected. Petitioners' apprehension at providing certain information about their household or certifying familiarity with the laws cited by respondents is understandable, but not a basis to throw out or temporarily enjoin these rules.

The fact is that nearly every commercial activity in the City of New York is accompanied by a set of rules (as noted above, even pedi-cab operators need a license). The rules here are not so burdensome that the Court finds it necessary to restrict their implementation or modify them. And they relate to a significant concern by respondents that illegal short-term rentals are causing harm across the city. It is not this Court's role to make policy assessments about respondents' concerns. It is sufficient for respondents to identify the prevalence of illegal activity and its associated harm in order to justify the rules at issue. Respondent Klossner noted that OSE received 2,201 complaints about illegal short-term rentals in 2022 (NYSCEF Doc. No. 28, ¶ 14).

Moreover, many of the concerns that petitioners raise are premature. These types of arguments generally relate to how OSE will enforce these rules. But, on its face, the rules are rational and the Court sees no reason to disturb them. It may be that OSE's subsequent

enforcement creates legitimate bases to challenge these rules. As discussed at the oral argument, OSE is slowly (very slowly) processing applications (although this does not apply to petitioners who declined to submit an application). There may be valid actions to commence if OSE does not process these applications in a timely manner, if OSE is denying applications on an arbitrary basis, or if it is imposing fines in an unreasonable manner. But those are all hypothetical situations at this stage. Currently, OSE has simply enacted rules that have yet to take effect. And those rules create a rational way for it to regulate an industry that, by virtue of the fact that it involves a person's residence, is extremely difficult to manage. No one disputes that there is rampant illegal activity taking place or that these rules are designed to address (although probably not completely eliminate) this activity. That petitioners are bound by a new registration process, and don't want to be, is not a basis for the relief requested herein.

Accordingly, it is hereby

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

ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements.

8/8/2023
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE