

Columbus 69th LLC v De Dominguez

2024 NY Slip Op 33016(U)

August 26, 2024

Supreme Court, New York County

Docket Number: Index No. 654577/2023

Judge: Suzanne Adams

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SUZANNE ADAMS PART 39M

Justice

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COLUMBUS 69TH LLC,

Plaintiff,

- v -

CARMEN MAGARIN DE DOMINGUEZ, AIRBNB, INC.

Defendant.

-----X

INDEX NO. 654577/2023

MOTION DATE N/A

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 51 were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that defendant Airbnb, Inc.'s ("Airbnb") motion is denied. Plaintiff, the owner and landlord of the building located at 207 Columbus Avenue, New York, New York, alleges in this action that co-defendant Carmen Magarin de Dominguez ("Tenant") used the apartment she leased from plaintiff for short-term rentals through Airbnb and other platforms, in violation of her lease. Plaintiff claims, *inter alia*, that Airbnb failed to verify that Tenant had a valid short-term rental registration number for the subject apartment in violation of Local Law 18, and that because the apartment's short-term rentals were not registered with the city, plaintiff was fined for violating the New York City Fire Code. The complaint herein seeks a permanent injunction against Airbnb from permitting short-term rentals at the subject premises to be listed on its platform, and alleges a cause of action for common-law indemnification of the fines incurred for this violation. By decision and order of this court dated March 19, 2024, plaintiff was granted a preliminary injunction that, *inter alia*, enjoins and restrains Airbnb from violating New York City Local Law § 18 during the pendency of this action. Airbnb now moves

pursuant to CPLR 3211(a)(7) to dismiss the complaint as to Airbnb in its entirety, with prejudice. Plaintiff opposes the motion.

It is well established that “[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The criterion under CPLR 3211(a)(7), is whether the proponent of the pleading has a cause of action, not whether he has stated one. *Leon*, 84 N.Y.2d at 88 (citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977)).

The gravamen of Airbnb’s motion is that this action cannot be maintained against it because Local Law § 18 does not provide for a private right of action. Local Law § 18 provides in pertinent part that

“[i]t shall be unlawful for a booking service to charge, collect or receive a fee from a person in connection with a short-term rental of a dwelling unit . . . unless such booking service has used the electronic verification system maintained by the administering agency either to (i) verify that such short-term rental is for a dwelling unit . . . within a class B multiple dwelling on the list of class B multiple dwellings published pursuant to section 26-2103, as added by local law number 146 for the year 2018; or (ii) to verify that the dwelling unit . . . that is the subject of such short-term rental is associated with the short-term rental registration number submitted by such person to the booking service and such registration is currently valid, that the uniform resource locator or listing identifier being used to offer the short-term rental is associated with the short-term rental registration number, and that the host and physical address information provided by such person to the booking service match the information contained in the electronic verification system”

N.Y.C. Administrative Code § 26-3202. Both plaintiff and Airbnb agree that Local Law § 18 does not expressly provide for a private right of action, so the viability of the instant action as to Airbnb

essentially turns on whether a private action may be fairly implied. To make such a determination, New York courts have applied a three-prong test: “(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme [citations omitted].” *Sheehy v. Big Flats Community Day*, 73 N.Y.2d 629, 633 (1989). The record before the court provides ample basis for concluding that plaintiff herein is an entity for whose benefit Local Law § 18 was created, and that its action promotes the law’s legislative purpose, *i.e.*, addressing the continued prevalence of illegal short-term rentals in New York City. *Airbnb, Inc. v. New York City Mayor’s Office of Special Enforcement*, 2023 WL 5044059 **7 (Sup. Ct., N.Y. County 2023). However, the “court must, ‘most importantly, [determine] the consistency of doing so with the purposes underlying the legislative *scheme*’ [citation omitted] [emphasis supplied]). For, the Legislature has both the right and the authority to select the methods to be used in effectuating its goals, as well as to choose the goals themselves. Thus, regardless of its consistency with the basic legislative goal, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme [citation omitted].” *Sheehy*, 73 N.Y.2d at 634-35.

The administering agency, the Office of Special Enforcement (“OSE”), has the power to promulgate rules to enforce Local Law § 18 and ensure compliance with relevant city codes and regulations. *See* N.Y.C. Administrative Code §§ 26-3101, 26-3102. Further, OSE is authorized to conduct investigations, issue subpoenas, receive evidence, hold public hearings, and take testimony, and violators are subject to a civil penalty. N.Y.C. Administrative Code §26-3104(a-f)). Airbnb maintains that a private right of action is inconsistent with these provisions, as the

“private enforcement mechanism . . . may disserve the goal of consistency – like having two drivers at the wheel.” *Uhr v. East Greenbush Cent. Sch. Dist.*, 94 N.Y.2d 32, 40 (1999). This court disagrees. The enforcement mechanism of Local Law § 18 is the imposition of civil penalties on the offender, a fine based on fees generated by the unlawful listing. N.Y.C. Administrative Code §26-3203(b). By OSE’s own admission, the statute’s provisions are largely reactive, inefficient, and labor-intensive, and at present have not been very effective. *Airbnb, Inc.*, 2023 WL 5044059 **8. In contrast, a private right of action such as the one at hand does not duplicate Local Law § 18 – it does not seek the recoupment of the statutory civil penalties – but rather complements it by seeking other relief that is not part of the City’s enforcement mechanisms, yet at the same time “promotes the legislative purpose” of the law and “is consistent with the legislative scheme.” The instant action is similar to the one in *Ader v. Guzman*, 135 A.D.3d 671, 673 (2d Dep’t 2016), where the Second Department noted that, without a private right of action to recoup rents collected without the required permits, “aside from the possibility of administrative enforcement, there is no incentive for a landlord to obtain a license” *See also Gerel Corp. v. Prime Eastside Holdings, LLC*, 12 A.D.3d 86, 93 (1st Dep’t 2004) (finding “the Legislature could not have intended that the Attorney General be involved in every landlord/tenant security dispute throughout the state . . . [else] the budget and staff of that office would be so burdened as to nullify the legislative scheme”). This court is aware of a recent decision involving Airbnb which reaches a different conclusion on similar facts, *S&P Assocs. v. Dewald*, Sup. Ct., New York County, June 27, 2024, Nock, J., Index No. 159779/2023. As it is also a Supreme Court decision, it is not binding on this court, which respectfully disagrees with the conclusion reached therein. This court considers the holdings of the earlier Supreme Court case, *Airbnb, Inc.*, 2023 WL 5044059, *infra*, and the Appellate Divisions in *Ader* and *Gerel Corp.*, *infra*, to be more persuasive.

Consequently, the complaint herein sufficiently states causes of action that withstand dismissal. It alleges that Tenant was “unlawfully subletting the Premises to unauthorized, short-term occupancy vis-à-vis Airbnb, similar platforms, and/or other methods,” and that Airbnb has continued “violating [Local Law 18] by allowing [Tenant] to advertise and rent the Premises on its platform.” It is reasonable to infer from these facts alleged that Airbnb is collecting fees from the subject premises in violation of Local Law 18. (See NYC Administrative Code § 26-3202.) Such a proposition is not inherently incredible and has not been flatly contradicted by documentary evidence. See *O'Donnell, Fox & Gartner, P.C. v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep’t 1993). Plaintiff further alleges that it incurred fines as a result of the alleged illegal listings, and properly states an indemnification claim for same.

Accordingly, it is hereby

ORDERED that defendant Airbnb Inc.’s motion is denied in its entirety; and it is further

ORDERED that the Clerk is directed to immediately transfer this matter to Hon. Lori Sattler, Part 2.

This constitutes the decision and order of the court.

08/26/2024

DATE

SUZANNE ADAMS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: