

ANDERSON KILL CO-OP, CONDO & REAL ESTATE ADVISOR

Occupancy Rights and Restrictions in Co-ops, Condos and Rentals: Roommates, Subletting and Airbnb

By Andrew J. Wagner



Andrew J.
Wagner

The need to control who resides in your building is a legitimate one for several reasons, such as safety, security, enhancing the value of housing units, and avoiding liability and litigation, to name a few.

Screening people as “primary occupants” before they are permitted to lease or own an apartment is a fairly routine affair, whereby applicants must submit financial and employment information and letters of reference from friends and employers, consent to criminal and credit background checks, and subject themselves to personal interviews, before they are accepted.

But what about “secondary occupants,” such as roommates and subtenants? Or even worse, what if the primary occupant uses their apartment as a source of income by engaging in short-term rental activity through Airbnb or similar services? How does a landlord or co-op/condo board prevent or restrict occupancy once the primary occupant takes possession of the apartment? The answer depends largely on the type of ownership of the building and apartment. This article will focus on co-ops, condos and rental buildings in New York City, and the laws applicable to each one.

Roommates

Cohabitation distinguishes a roommate from a subtenant, and a primary occupant’s right to have a roommate is governed by Real Property Law (“RPL”) Section 235-f, often referred to as the “Roommate Law.” Basically, the Roommate Law states that a residential lease shall be construed to permit occupancy of not only the tenant on the lease, but also members of their immediate family plus one unrelated occupant. This law obviously applies to rental buildings and co-ops, since occupancy by the primary occupant is governed by a lease and a proprietary lease, respectively. Since condo unit owners have no lease, however, they could arguably claim that the Roommate Law does not apply to them. Although this proposition is untested, it is very likely that any attempt to circumvent the law on this technical ground would fail, given the public policy against unreasonably restricting occupancy rights of families and close-knit individuals. (The courts in Brooklyn, Queens and Staten Island apply the Pet Law — which technically also only applies to tenants — to condo unit owners, so there is strong analogous evidence to support this view.)

Provided the primary and secondary occupants lawfully reside in their apartment, do not violate any other building rules (such as

Andrew J. Wagner is a shareholder in Anderson Kill’s New York office concentrating his practice in litigation and cooperative and condominium law. With over 20 years of experience, Andrew handles all areas of real-estate litigation. He has also successfully argued numerous appeals before the Appellate Term and Appellate Division, in both the First and Second Departments.
(212) 278-1085 | awagner@andersonkill.com

causing excessive noise or offensive odors to emanate from their apartment), maintain the apartment as their primary residence, and do not violate other laws (such as overcrowding restrictions), a landlord or board cannot lawfully restrict roommates from occupying the unit. However, the identity of these individuals must be provided to the landlord or board upon request.

Subtenants

There is a statutory right to sublet an apartment (RPL §226-b), which generally states that consent to a request to sublet cannot be unreasonably withheld, provided certain procedural and substantive requirements are followed. However, co-ops and condos are excluded from the statute's ambit. Therefore, subletting restrictions are governed exclusively by the relevant governing documents. For co-ops, the bylaws and proprietary lease typically give the board the authority to implement a sublet policy, set objective criteria, or prohibit the practice entirely. Of course, the policy must be applied equally to all shareholders, and denials of applications cannot be discriminatory or made in bad faith. Condo bylaws frequently authorize unlimited subletting to the unit owner, limited only by a right of first refusal by the board.¹

Airbnb and Other Short-Term Rental Services

Short-term rentals through the use of Airbnb and its ilk are regulated by some of the laws and rules described above, since it is a specific form of subletting, but it implicates several other laws as well. For example, recent amendments to the Multiple Dwelling Law expressly prohibit making or even *advertising* short-term rentals of less than 30 days. In order to enforce these violations directly against the actual perpetrators (violations are generally issued against the building owner), New York City created the Mayor's Office of Special Enforcement to field and investigate complaints, and if verified issue civil penalties against the "host" ranging from \$1,000 for first offenses to \$7,500 for third and subsequent occurrences. The effectiveness of this enforcement mech-

anism remains to be seen, although its very existence demonstrates the seriousness of the problem and the intention to curtail this activity in New York City.

Enforcement

Restricting unwanted occupants in your building can be a daunting task, considering the diverse forms of property ownership and the distinct legal status of the different forms of occupancy. The situation is not helped by the fact that governing documents sometimes conflict with the law. Given these obstacles, the following recommendations are made to boards and landlords:

- Have your attorney review your leases, bylaws and board policies to ensure they contain the enforcement mechanisms necessary to enhance safety and security in your buildings, and are drafted in a manner to withstand judicial scrutiny. Amend if necessary.
- Obtain and use tools for effective evidence gathering (e.g., investigations, hallway cameras, internet ad monitoring, or doorman visitor logs).
- Confer with your attorney to ascertain the best method for removing illegal or unauthorized occupants in your building, based on the type of occupancy involved and the form of building ownership.

Dealing with unauthorized occupants, like many age-old problems, constantly presents new challenges to building owners, co-op boards and condo boards who need to stay abreast of new laws, evolving norms, available technology, and their own governing documents to manage this challenge effectively. ▲

ENDNOTES

¹ *Technically, a condominium unit owner's tenant is not a "subtenant," since there is no primary lease between the unit owner and the condominium. However, this is a distinction without a difference.*

About Anderson Kill

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Estates, Trusts and Tax Services, Corporate and Securities, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Real Estate and Construction, Foreign Investment Recovery, Public Law, Government Affairs, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes — with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. Based in New York City, the firm also has offices in Philadelphia, PA, Stamford, CT, Washington, DC, Newark, NJ, and Los Angeles, CA.

This was prepared by Anderson Kill PC to provide information of interest to readers. Distribution of this publication does not establish an attorney-client relationship or provide legal advice. Prior results do not guarantee a similar outcome. Future developments may supersede this information. We invite you to contact the editor, Bruce A. Cholst at (212) 278-1086 or bcholst@andersonkill.com, with any questions.

© 2018 Anderson Kill P.C.

New York, NY • Philadelphia, PA • Stamford, CT • Washington, DC • Newark, NJ • Los Angeles, CA