



Real Estate Brokerage Law: Is AirBnB engaging in the unauthorized practice of real estate brokerage?

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There has been a lot said about AirBnB these days. It's been called a disruptive technology (a compliment in the technology world) as a result of its leveraging the international sharing culture in real estate, by Gigaom, Fastcompany, and Techcrunch, among others. Yet, it has also been labeled as an illegal hotel site, which doesn't sufficiently warn its customers that their participation may be illegal as a violation of local transient laws. The latter appears to be the sentiments of New York State, as evidenced by the recent subpoena issued by the state's attorney general, Eric Schneiderman, seeking data on AirBnB's hosts. In response, AirBnB seems to be crafting a public relations campaign defending its business model by proposing that legislation be introduced at the state level requiring its users to pay taxes incident to their rentals. However, taxes and labels are neither here nor there. The real question is if AirBnB's business model is legal in the first instance, as their practice is quite similar to that of a licensed real estate brokerage in the state of New York, but without AirBnB having such licensing, according to the eAccessNY Occupational Licensing Management System.

However, before exploring the nuts and bolts of real estate brokerage law and its applicability to AirBnB, it's submitted that AirBnB's operate first and license later attitude will be counterproductive to its business model and may cripple its growth as a dominant force in the real estate industry. In fact, this attitude is quite reminiscent of the bank's creation of the Mortgage Electronic Registration System (MERS), which, on its website, claims itself as "a national electronic registry system that tracks the changes in servicing rights and beneficial ownership interests in mortgage loans." MERS was created in 1993 in response to "the delays occasioned by local recording offices, which were at times slow in recording instruments because of complex local regulations ... that had become voluminous and increasingly difficult to search," according to the Appellate Division in the case of Bank of New York v. Silverberg. In simplest terms, the banks saw a flawed regulatory system that hurt their business model and jumped on an opportunity to fix it, but without respecting the legislative process along the way. All went well and good for the banks for years, at least until the Great Recession's foreclosure crisis when the Silverberg decision was issued in New York, which pulled the rug out from MERS. In fact, the court ruled that it "is mindful of the impact that this decision may have on the mortgage industry in New York, and perhaps the nation. Nonetheless, the law must not yield to expediency and the convenience of lending institutions." So, MERS' attempt to usurp the legislative process with innovation has resulted in the courts now preventing banks who involved MERS' in the mortgage process from foreclosing upon default under a legal theory called standing.

Similarly to MERS, AirBnB realized a gap in services and has presented the solution. People have excess housing that they don't utilize to capacity and are willing to rent it to others who demand

such housing and prefer it over hotels. This sounds conceptually great and a huge profit making venture. The problem is that vulnerable consumers are protected with respect to rentals by New York law. For starters, short term rental restrictions have a real purpose, as detailed by the White Paper prepared for the National Association of Realtors and titled "Short-Term Rental Housing Restrictions." The White Paper puts forth the following rationales for transient rental laws: Protection of neighborhood environment; protection of physical characteristics; revenue; fairer competition with licensed lodging and protection of renter safety. However, the real issue is not whether a singular property owner can rent their property under their local transient rental laws. Instead, the quintessential question is if AirBnB can help them rent their property, and if it can, does AirBnB have carte blanche or must it adhere to the State's statutes and regulations that create duties on real estate brokerages that must be satisfied when representing landlords and tenants. The answer to the licensing question is embodied in New York's Real Property Law, Article 12-A, and specifically Â§440(1), which defines a "real estate broker" to include a company "who, for another and for a fee ... lists for sale ... or otherwise, exchange, purchase or rental of an estate or interest in real estate." Secondly, one needs to look to Â§443 to learn that brokers have six duties to their clients, including confidentiality, obedience, undivided loyalty, accountability, disclosure, and the duty to utilize reasonable care. More so, did you know that Â§442-e(3) enables an aggrieved person to recover a penalty against a brokerage of up to 4Xs the monies received by the brokerage? So, is AirBnB engaging in the unauthorized practice of brokerage in this State and if so, is a class action by its clients/hosts to follow? You decide.

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