END OF PREPAID SEASONAL RENTALS *REVISITED*

When You Shoot the Messenger, Don't Miss

One month ago, the Legally Speaking column "The End of Prepaid Seasonal Rentals" hit, and real estate brokers have been reaching out ever since. The article explained that the Housing Stability and Tenant Protection Act of 2019 prohibits prepaid seasonal rentals and requires that tenants be billed monthly for rent. After reading the headline, brokers instantly jumped on it. They questioned the veracity of the story, the applicability of the law and everything in between. Now I respond while detailing five false assertions made in response to the article.

1. "THE LAW DOESN'T APPLY TO THE EAST END / VACATION PROPERTIES"

There is no exception whatsoever in the law for the East End, which, by the way, remains a part of New York State and subject to the state's laws. As to vacation properties, prior to the amendment, the General Obligations Law §7-108(1) had limited its application as follows: "[t]his section shall apply to all dwelling units [with written leases] in residential premises [containing six or more dwelling units and to all dwelling units subject to the city rent and rehabilitation law or the emergency housing rent control law], unless such dwelling unit is specifically referred to in section 7-107 of this [chapter]." However, the Housing Stability and Tenant Protection Act of 2019 amended the law by striking the words in the brackets. Therefore, in reading the law, pursuant to the rules of statutory construction, it was the intent of the legislature to apply the law to "all dwelling units in residential premises," including East End / vacation properties.

2. "A SEASONAL RENTAL IS LIKE A MOTEL RENTAL, SO THE LAW SHOULDN'T APPLY"

Local zoning codes define when a property is a residential premises versus a hotel, motel or inn. Being like something is irrelevant. If the Certificate of Occupancy is for a single family house, the law applies. It's that simple.

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3. "JUST TAKE THREE MONTH'S RENT FOR THE FIRST MONTH OF THE RENTAL AND MAKE THE OTHER TWO MONTHS FREE"

The applicable law states that "[n]o deposit or advance shall exceed the amount of one month's rent under such contract." Therefore, the applicable law could be read as a direction to total the rent and allocate it, on average, per month. Further, the new law states that "a person found to have willfully violated this subdivision shall be liable for punitive damages of up to twice the amount of the deposit of advance." Consequently, if a judge finds that this proposed tactic was intended to circumvent the law, it will trigger exposure to a claim for two times the amount of the advance, or four months' worth of rent under the fact pattern. It is noted that the fact pattern also may violate Real Property Law §238-a, which is another part of the Housing Stability and Tenant Protection Act of 2019, because §238-a prohibits a landlord from "demand[ing] any other payment, fee or charge before or at the beginning of the tenancy, except background checks and credit checks…" Good luck evicting a tenant on this fact pattern when such tenant doesn't leave at the end of the seasonal rental term.

4. "I AM SURE THE COURTS MAY HAVE ANOTHER INTERPRETATION OF THE LAW"

Yes, everything is subject to judicial interpretation. Know when that happens? It will be when a landlord gets sued under the penalty section of the amended statute. Guess what happens next. The real estate broker who facilitated this illegal transaction gets sued for breach of fiduciary duty. So, yes, brokers and landlords can change course and take advance rent if and when a judge holds that the section doesn't apply. Until such time, to take any contrary position to the article is to also ask to get sued.

5. "BROKERS SHOULD DO WHATEVER THEIR LANDLORD WANTS AND NOT WORRY ABOUT THE LAW—WE NEED TO DO BUSINESS"

On July 24, 2019, the New York State, Department of State, Division of Licensing Services opined that "a licensed real estate salesperson, who collects first and last month's rent with a security deposit in a rental transaction on the direction of their client, the landlord, in contravention of amended General Obligations Law 7-108(1-a)(a) [can] be subject to a charge of untrustworthiness and incompetency by the Department of State pursuant to Real Property Law 441-c(1)(a)." In plain English, a broker who collects prepaid rent, on the direction of their landlord, is exposed to a license law violation by the Department of State.

As you should now understand, fighting facts isn't the way to go. All readers who take issue with the law should write / call their local representatives in state government and demand that they introduce legislation to change the law. Only through participation in government can change happen. We hope that everyone, regardless of viewpoint, is motivated to participate in the legislative process, and if this law motivates you, all the better. Good luck, and as you can see, it's a good thing to know a little something called the law.

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