

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: HOUSING PART

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42nd and 10th ASSOCIATES LLC,

Petitioner/Landlord,

Index No 85736/2014

- against -

DECISION/ORDER

HENRY P. IKEZI,

Respondents/Tenants.

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Present: Hon. Jack Stoller
Judge, Housing Court

42nd and 10th Associates LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Henry P. Ikezi, the respondent in this proceeding ("Respondent"), seeking possession of 450 West 42nd Street, Apt. 46B, New York, New York ("the subject premises"), on the ground that Respondent was using the subject premises, which is subject to the Rent Stabilization Law, for hotel purposes and profiteering. Respondent answered, denying the allegations and raising as a defense, *inter alia*, that Petitioner did not serve a notice to cure. The Court held a trial of this matter on January 16, 2015 and January 21, 2015.

At trial, Petitioner proved that it is the proper party to commence this proceeding pursuant to RPAPL §721; that Petitioner has complied with the registration requirements of M.D.L §325; and that there is a landlord/tenant relationship between the parties pursuant to a lease that commenced October 10, 2014 with a monthly rent of \$6,670.00. Prior to the commencement of this proceeding, Petitioner served a notice upon Respondent purporting to terminate his tenancy pursuant to 9 N.Y.C.R.R. §§2524.2(c) and 2524.2(d).

Petitioner called its senior residential service specialist as a witness ("Petitioner's

employee"). Petitioner's employee testified that she is at the building in which the subject premises is located. (rth- Building") every day. Petitioner's witness testified that on October 16, 2014, shortly after Respondent's tenancy commenced, she spoke with a person who claimed to have rented the subject premises on Airbnb.¹

Petitioner's employee testified that she found an advertisement (the ad") Respondent placed with Airbnb for the subject premises on that day; that she then spoke with Respondent about the ad: and that Respondent said that he can do whatever he wants and that he was not going to remove the ad. Petitioner introduced the ad into evidence? In addition to touting appealing features of the subject premises, the ad. states that the charge for the room is \$649.00 a month; that there is a check-in time of 4:00 p.m. and a check-out time of 11:00 a.m.; that there is

Airbnb is a company that provides an internet platform connecting individuals who offer accommodations to individuals who wish to book accommodations and, if the parties agree on the price and terms, they can complete the transaction, including payment, via such platform. Airbnb, Inc. v. Schneiderman, 2014 N.Y. Misc. LEXIS 2270 (S. Albany Co. 2014)..

² Respondent contested the admissibility of the ad. Petitioner's employee laid the foundation for the ad by testifying that she has been in the subject premises recently, before Respondent took possession in October of 2014, to check that it was clean before Respondent moved in, that she had personal knowledge of what the subject premises looked like and what the views from the windows of the subject premises looked like, that photographs of the ad. were photographs of the subject premises, and that the ad references an apartment on the 46th floor of a building, where the subject premises is. Petitioner's employee testified that a floor plan in the ad comes from the website for Petitioner. Petitioner's employee offered additional testimony about specific features of the subject premises that appeared in the ad. The Court finds that Petitioner proved by a preponderance of the evidence that the photographs in the ad are photographs of the subject premises. Given that Airbnb is an internet platform permitting individuals to advertise to rent accommodations as if they were hotel rooms, the Court finds that placement of an ad of the subject premises compels the conclusion that Respondent is the individual who placed the ad. Such a consideration of all the facts and circumstances may be used to prove admissibility of evidence. See, e.g., People v. Campney, 94 N.Y.2d 307, 31.2 (1.999). As the Court finds that the ad is a statement of Respondent, it is admissible against him as an admission by a party-opponent. Satra, Ltd. v. Coca-Cola Co., 252 A.D.2d 389, 390 (1st Dept. 1998).

a charge 01195.00 per extra guest; and that there is a \$150.00 cleaning fee.

Petitioner's employee testified on cross-examination that there are 816 units in the Building, and that floors 7 through 63 on the "B" line have the same view as the subject premises up to the 47th floor, that there are other units in the Building with the same floor plan as the subject premises and the same appliances, and that she has not been in the subject premises after Respondent moved in. Petitioner's employee testified that the legal regulated rent for the subject premises exceeds \$9,000.00 a month., and that Respondent is charged a preferential rent pursuant to 9 N.Y.C.R.R. §2521.2(a)-.

Petitioner's employee testified. on cross-examination that the. Building has a guest policy, according to which guests whom tenants register may enter the Building without the tenant. Petitioner's employee testified on cross-examination that after she was notified about a guest that Respondent had in the Building, Respondent told her that this person was his guest, which Petitioner's employee testified was her last verbal communication with Respondent. Petitioner's employee testified on cross-examination. that she sent Respondent a warning letter and an email regarding the ad, and that Respondent sent her an email telling Petitioner's witness to contact her attorney. Petitioner's employee testified on cross-examination that she did not have personal knowledge as to whether Respondent charged money for his guests to be there.

On redirect examination, Petitioner's employee testified that she has never seen Respondent at the Building.

On January 21, 2015, a concierge who works for Petitioner ("the concierge") testified for Petitioner that since October of 2014 he has been stationed at the front desk in the middle of the

lobby of the Building from Sundays through Thursdays, from 7 a.m. to 3:30 p.m., where he accepts packages for residents, assists residents if they lock themselves out, and takes work orders. The concierge testified that he knows Respondent, although he had only seen Respondent about five times since October of 2014. The concierge testified that, in October of 2014, a European guest of Respondent once needed his assistance with a key. The concierge testified on cross-examination that someone staffs the Building lobby twenty-four hours a day; that anyone who wants to enter the Building through the front desk has to be announced; and that a guest may be sent up to an apartment in the Building if the guest shows a key to an apartment in the Building. The concierge testified that there is another entrance accessible by a key by which a person may enter the Building without passing by the concierge desk.

Petitioner called Respondent as Petitioner's witness. Respondent testified that he is employed in the field of real estate construction and that he fixes up houses and sells them. Respondent testified that he is an officer, part owner, and president of a five-year-old organization called the Circle Group, where he works with other partners, seven or eight of whom that he knows of, who are also owners. Respondent testified that he was a manager and a vice president of the Circle Group before becoming president, which he has been for a year. Respondent testified that while there is no other "Henry" at the Circle Group, there are at least sixty people working at the Circle Group, that he is unaware as to whether there are real estate brokers working for his company, that he does not have an email address with the Circle Group, and that he was unaware as to whether his biography appears on the website for the Circle Group. Respondent authenticated a printout from the website for the Circle Group by testifying that it was what he knows the website to be, that he knows that people portrayed on the website work

for the Circle Group, and that a phone number on the website is its main office number for the Circle Group. Respondent testified that he did not know if an entry on the page of the website entitled "About Us" with the name "Henry Ike" refers to him or not? Respondent's biography, as it appears on the website of the Circle Group, does not mention anything about construction, Respondent testified that he worried that the website is inaccurate.

Respondent testified that he is familiar with Airbnb, that he has used it because he travels a lot, that it is a way to meet people, and that he regards it as a social network and a community. Respondent first testified that he does not list rentals on Airbnb, but that someone at a division in his office lists rentals for him, then he testified that he does not know the extent of websites that people in his office use, although Airbnb could be one of those websites. Petitioner introduced into evidence Respondent's profile on Airbnb, which states that Respondent has been a member of Airbnb since June of 2014 and features a picture that Respondent testified was of him, his

Even though Respondent testified that he is not involved with information technology at the Circle Group, to the extent that Respondent acknowledged that the exhibit in evidence comes from the website for the Circle Group, the company he is president and part owner of, there is no other conclusion for this Court to reach but that an authorized employee of the Circle Group in some capacity or another generated the content that appears on the website. Statements of an agent of a principal in the agent's capacity that the agent is authorized to make are admissible in evidence as admissions by a party-opponent. Loschiavo v. Port Auth. of N.Y. & N.J., 58 N.Y.2d 1040, 1041 (1983), Candela v. City of New York, 8 A.D.3d 45, 47 (1st Dept. 2004) (a hearsay statement of an agent is admissible against his or her employer if the making of the statement is an activity within the scope of his or her authority)

If an employee of a company at which Respondent is employed makes posts on Airbnb for Respondent, the ad still constitutes an admission by a party-opponent. Loschiavo, supra, 58 N.Y.2d at 1041, Candela, supra, 8 A.D.3d at 47.

wife, and his son.'

Respondent testified that he knew of an address that appears on the website for the Circle Group in Jamaica, Queens, the same address listed as Respondent's address ("the Queens address") on the lease he signed for the subject premises in evidence. Respondent testified that the Queens address is his mother's house, that he has lived there, that he does not currently live there, and that he lives in the subject premises. When asked how many nights he spends at the subject premises, Respondent testified that he spends approximately 10-12 nights a month at the subject premises.

Respondent testified that he was not familiar with the content of the ad and that it did not look like something he wrote. Respondent testified that he did not know if the photographs in the ad were photographs of the subject premises, that he did not know if the photographs of the apartment in the ad was his because he has a friend on the 4.5th floor of the Building who has similar furniture, if the hallway portrayed in the ad was his, and that he did not know if a comforter on a bed in a picture on the ad was his comforter because the photograph was in black and white and he has multiple comforters.

Respondent testified that the subject premises is in his stable of rentals for the Circle Group. Respondent testified that the rate quoted in the ad is not always the rate that an Airbnb guest always pays because different prices are sometimes negotiated, although, he did not say that he quoted the rate of \$649 a night on the ad. Respondent testified that he could not recall if he

The Court finds that Respondent's authentication of the photograph and its appearance on Airbnb.com evinces that it is admissible, as an admission by a party-opponent. See footnotes 3, and 4.

ever charged anyone money to stay in the subject premises, and that he does not know if he ever charged anyone money to stay in the subject premises, as he is not aware of how properties are placed, although he testified that he never placed any properties on Airbnb because someone in his office deals with rentals.

Responder testified that the signature on the lease for the subject premises is not his signature.

Respondent testified that a list of "assigned properties" listing addresses, including the Queens address, prices, and information about how to rent or sell such properties, under his name on the website for the Circle Group are not actually assigned to him, that he is not a real estate broker or agent and does not hold a real estate license, although he did live there years ago.

Respondent testified that he was aware of the ad before Petitioner's employee complained to him about the ad. Respondent testified that when Petitioner's employee challenged him with regard to his Airbnb account that he deactivated his account and instructed his office to remove any ads that might have been there with his profile. Respondent testified that he did not write language in the ad that said "treat our home with respect", but that that was standard language in an Airbnb ad. Respondent testified that he was pleased with his guests, but that he deactivated the account because he did not

Respondent testified that he has been married for five years, that the lease does not list his wife as a tenant on the subject premises because of Petitioner's error, but then that he did not list her and his son as occupants when he applied for a tenancy at the subject premises, and that his wife lives with him at the subject premises, although he does not keep track of the times that

she is there and that he does not know if there are any other units in the Building; Writ a w-dol'er r rtr 112.'s'amfrtuc.

Respondent testified that he has several properties leased or owned by the Circle Group where: he can stay if he wants to; at least two or three in lower Manhattan, although he does not know the addresses, does not know how long the Circle Group has owned these properties, quite a few properties in Queens although he did not know if there were more than five, and that he did not know how many were in Brooklyn or in the Bronx. Respondent testified that he "supp.)se[s] that he has access to these units, but that his wife and his child do not stay in his company's residences. Respondent testified that he has stayed at the Queens address where his parents live.

Another concierge at the Building testified that he works a shift from Sunday to Thursday from 3:00 p.m. to 11:30 p.m. since October of 2014, that Respondent lives in the subject premises, that he sees Respondent rarely, wife and child, that he saw Respondent and his wife and child carrying duffel bags and luggage and that Respondent came downstairs to let them in, and that he wrote an incident report on November 2, 2014 about another older couple that had a key to the subject premises. On cross-examination, he testified that it was possible that Respondent could have entered the Building through a back entrance and that he would not have then seen Respondent.

Petitioner called its amenities host as a witness ("the host"). She testified that she has been working at the Building for four months, and that she manages amenities at the Building, including a gym, a screening room, a game room, a party room, a business center, and a basketball court. The host testified that Respondent attempted to have a guest of his have access

to these amenities, but that the host was not able to allow that because Respondent was the only person on the lease for the subject premises. Upon showing the host the photograph of Respondent's wife and children already in evidence, the host testified that Respondent's guest was not his wife. The host testified that when she told Respondent that he could deal with the issue at Petitioner's:

another guest of Respondent tried to access the amenities at a later date without following Petitioner's procedures.

Respondent chose to not put on a case.

Even if the Court were to afford Respondent the most favorable interpretation of his testimony on Petitioner's case, at the very least the record shows that Respondent's employees at the company that he is the president of placed the subject premises on Airbnb and rented the subject premises out as if it was a hotel room. What remains for the Court to determine is whether Respondent profited from this activity. As the monthly rent for the subject premises is \$6,670.00, the daily rate for the subject premises is \$219.29.⁶ Even assuming *arguendo* that the operative figure was the legal regulated rate of \$649.00,⁷ The ad sought a nightly rate of \$649.00 for use of the subject premises as a hotel room.

When questioned on Petitioner's case whether Respondent charged anyone money to stay in the subject premises, Respondent first testified that he could not recall if he ever charged anyone money to stay in the subject premises for a tenancy, and then testified that he does not

The Court arrives at this figure by multiplying the monthly rent by twelve and then dividing that product by 365.

See footnote 6.

know if he ever charged anyone money to stay in the subject premises. Given that Respondent was being sued for eviction, that Respondent testified as such on January 21, 2015, and that Respondent's tenancy commenced on October 10, 2014, three months and eleven days before his tenancy, Respondent's inability to remember or know if IT had a comforter in the subject premises defies common sense. Such incredible testimony was of a piece with other testimony Respondent offered, such as his response to a question about how many nights he has slept in the subject premises with the answer that he does not keep a log of where he sleeps, Respondent's inability to determine whether a photograph of a comforter in the ad was a comforter that he owned, Respondent's lack of knowledge as to other addresses that might be his wife's address, and Respondent's testimony that he does not have an email address at the company that he is the president of. If Respondent was actually profiteering by renting out the subject premises as a hotel room, wanted to avoid testifying as such, and was trying to be clever about truthfully avoiding committing perjury, it is hard to imagine how Respondent would testify differently.

This Court passes no judgment on any individual's lifestyle. Some people would require a log to be able to truthfully answer a question as to how many nights they sleep in their homes. Married households engage in all types of arrangements that work for them. Some people are inattentive to details like the pattern on comforters they may own. However, if the particularities of Respondent's personal situation otherwise happen to be consistent with a pattern of profiteering, it would behoove Respondent to offer evidence addressing such a consistency in a civil trial where parties must prove their cases by a preponderance of the evidence. Yet,

Respondent chose not to put on a case.' A trier of fact may draw the strongest inference that the opposing evidence permits against a witness who fails to testify in a civil proceeding. Nassau County Dept. of Social Servs. ex rel. Dante M. v. Denise J. 87 N.Y.2d 73, 79 (1995). IVlatter o Tamara A. v. Anthony Wavn - 110 A.D.3d 1560, 561 (1st Dept. 2013). particularly when that witness is an actual party to the action, knowing the truth of a matter in controversy and having the evidence in his or her possession. Crowler v. Wells & Wells Equip., Inc. 11 A.D.3d 360, 361 (1st Dept. 2004).

Accordingly, the Court finds that Respondent engaged in profiteering, either by renting out the subject premises himself on Airbnb or by causing his employees to rent out the subject premises on Airbnb. that Respondent's relentlessly evasive answers on his direct testimony on Petitioner's, case constituted an attempt to withhold this information, and that Respondent did not present a case because there was no case for Respondent to present.

Using a residential apartment as a hotel room and profiteering off of it is ground for eviction and is incurable, as it undermines a purpose of the Rent Stabilization Code. West 1.48 1.1.C Yonke, 11 Misc.3d 40, 41 (App. Term 1st Dept. 2006), Brookford, LLC Penraat, 2014 N.Y. Misc. LEXIS 5476 (S. Ct. N.Y. Co. 2014). See Also Cambrithfe Dev., 1.1.C v. Staysna, 68 A.D.3d 614, 615 (1st Dept. 2009). 151-155 All. Ave., Inc. v. Pendr. 308 A.D.2d 543, 543-544 (1st Dept. 2003), 51 W. 86' St. Assoc, 1.1,(' V. Fontana, 28 Misc.3d 140A (App. Term 1st Dept. 2010), 643 Realty 1.1.0 v. Fluidal, 11 Misc.3d 131A (App. Term 2nd Dept. 2007). Central Park

Respondent was represented by highly competent counsel, which compels the conclusion that Respondent's foregoing of presentation of evidence was a voluntary and knowing choice.

W. Realty v. Stocker, 11 Misc.3d 137A (App. Term 1st Dept. 2004). 145 Ave. C LLC v. Kelk, 2006 N.Y. Misc.2d 136 (Civ. Ct., N.Y. Co. 2006). 145 Ave. C LLC v. Realty Cork, v., 136 Misc.2d 92, 94 (Ct. N.Y. Co. 1987) (proliferation of sublets undermines rent regulation and is therefore incurable). As Respondent's infraction is incurable. Petitioner was not required to serve Respondent a notice to cure. West 148 E. v. Yonke, 11 Misc.3d 40, 41 (App. Term 1st Dept. 2006), 326-330 E. St. Assoc. v. Solizade, 191 Misc.2d 329, 331 (App. Term 1st Dept. 2002).

Accordingly, the Court awards Petitioner its Final judgment of possession against Respondent. Issuance of the warrant of eviction if permitted forthwith, execution thereof stayed through February 28, 2015 for Respondent to vacate the subject premises. On default in vacatur, the warrant may execute on service of a marshal's notice,

The parties are directed to pick up their exhibits within 30 days or they will either be sent to the parties or destroyed at the Court's discretion and in compliance with. ORP-1.85.

This constitutes the decision and order of this Court.

Dated: New York, New York
February 17, 2015

HON. JACK STOLLER