

**Olsen v Stellar W. 110 LLC**

2012 NY Slip Op 30178(U)

January 23, 2012

Sup Ct, NY County

Docket Number: 107800/10

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

MARY OLSEN and ADAM HARIDOPOLOS,  
Plaintiffs,

Index No.: 107800/10

Motion Date: 08/30/11

- v -

Motion Seq. No.: 02

STELLAR WEST 110 LLC,  
Defendant.

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED

1, 2

3

4

**FILED**

Cross-Motion:  Yes  No

JAN 25 2012

Upon the foregoing papers,

NEW YORK  
COUNTY CLERK'S OFFICE

The court shall grant defendant's motion to dismiss the amended complaint in this action.

By Order dated December 3, 2010, this court denied defendant's pre-answer motion to dismiss plaintiff's original complaint. On November 24, 2010, plaintiffs served an amended complaint and defendant now moves to dismiss the amended pleading.

Plaintiffs argue that defendant's current motion is precluded by the "single motion rule" of CPLR 3211 (e). "The

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

purpose of CPLR 3211 (e) is to prevent the delay before answer that could result from a series of motions." Held v Kaufman, 91 NY2d 425, 430 (1998) (citations and internal quotations omitted). The defendant argues that plaintiffs' amendment of the complaint allows them to bring a subsequent motion against the amended pleading. See Shelley v Shelley, 180 Misc 2d 275, 282 (Sup Ct, West. County, 1999) ("because the original complaint was superseded . . . as a matter of law defendants were entitled to move for dismissal of the amended complaint after they were served with that pleading"). Plaintiffs counter that though the complaint was amended and added new causes of action the defendant now moves for dismissal on jurisdictional grounds on the same grounds as the earlier motion and therefore the single motion rule should bar the current application. See B.S.L. One Owners Corp. v Key Intern. Mfg., Inc., 225 AD2d 643, 644 (2d Dept 1996) (where defendants previous challenge to causes of action in prior complaint was denied the defendants were barred by the "single motion rule" from challenging the same causes of action in an amended complaint in a second motion pursuant to CPLR 3211 [a])).

However, an exception to CPLR 3211 (e) applies here because the defendant is asserting that this court lacks subject matter jurisdiction to hear plaintiffs' claims of rent overcharge. As stated by the Court, "a court's lack of subject matter

jurisdiction is not waivable, but may be raised at any stage of the action, and the court may, ex mero motu [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action." Fry v Village of Tarrytown, 89 NY2d 714, 718 (1997); see also Financial Industry Regulatory Authority, Inc. [FINRA] v Fiero, 10 NY3d 12, 17 (2008) (although the lack of subject matter jurisdiction pursuant to statute was not raised in the lower courts action dismissed by court because issue not waivable). On the prior motion to dismiss the parties did not raise the issue of subject matter jurisdiction but instead brought before the court the issue of forum selection. That is defendant sought dismissal on the grounds that plaintiffs' claim was for rent overcharge and therefore the choice of forum was permissive; that is the court should defer to DHCR in the first instance. See Wolfisch v Mailman, 182 AD2d 533 (1<sup>st</sup> Dept 1992) ("Supreme Court has statutory jurisdiction to entertain an action to recover a rent overcharge").

However, now the defendant raises the issue of subject matter jurisdiction and there is no prejudice to plaintiffs in the court's consideration of defendant's application because subject matter jurisdiction is a threshold limitation on the court's power to grant relief. See 767 Third Ave. LLC v Greble & Finger, LLP, 8 AD3d 75 (1<sup>st</sup> Dept 2004) ("single motion rule

[CPLR 3211 (e)] has no application where . . . [t]here was no prejudice to plaintiff, and the matter was ripe for disposition. Neither the letter nor the spirit of the single motion rule was violated").

As in FINRA, the court here finds that a statute divests this court of subject matter jurisdiction over plaintiffs' claims of rent overcharge. It is conceded here based upon the facts alleged in the complaint that the plaintiffs are the first rent stabilized tenants in the subject apartment. Binding authority interpreting Rent Stabilization Code (9 NYCRR) § 2521.1 (a) (1) states that "there is no question that plaintiff was the apartment's first rent stabilized tenant. Accordingly, plaintiff cannot assert a claim for rent overcharge, but instead must file a fair market rent appeal with the Division of Housing and Community Renewal." Ramlie v Soufer Family LLC, 287 AD2d 388 (1<sup>st</sup> Dept 2001). Plaintiffs' attempt to characterize their claims as seeking a declaration of the proper rent cannot escape the binding impact of precedent based upon the allegations in the complaint. See Commercial Hotel, Inc. v White, 194 Misc 2d 26, 28 (App Term, 2d Dept 2002) (statutory provision may not be evaded by the simple expediency of labeling what is essentially a rent action).

Contrary to plaintiffs' arguments, neither Thornton v Baron, (5 NY3d 175 [2005]), Levinson v 390 West End Associates, L.L.C.,

(22 AD3d 397, 400 [1<sup>st</sup> Dept 2005]) nor Grimm v State Div. of Housing and Community Renewal Office of Rent Admin. (15 NY3d 358, 364 [2010]) supports their opposition to defendant's motion. In those cases the Courts found that because the landlords engaged in fraudulent schemes to circumvent the rent laws the court's had jurisdiction to direct DHCR to review the entire record to set the appropriate rent. None of the cases relied upon by plaintiff determined that this court has original jurisdiction over a fair market rent appeal such as that presented here.

Accordingly, it is

ORDERED that defendant's motion to dismiss for lack of subject matter jurisdiction is GRANTED and the Clerk is directed to enter judgment DISMISSING the complaint.

This is the decision and order of the court.

**FILED**

Dated: January 23, 2012

ENTER:

**JAN 25 2012**

Debra A. James  
**DEBRA A. JAMES**  
 NEW YORK COUNTY CLERK'S OFFICE  
 J.S.C.