

<b>Streb v Whistlepig Assoc., Inc</b>
2020 NY Slip Op 31489(U)
May 21, 2020
Supreme Court, New York County
Docket Number: 160707/2017
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM**

*Justice*

-----X

KOURTNEY STREB,

Plaintiff,

- v -

WHISTLEPIG ASSOCIATES, INC, TOCKWOTTEN  
ASSOCIATES, INC,

Defendant.

-----X

INDEX NO. 160707/2017

MOTION DATE March 13, 2020

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for RENEWAL.

In this residential landlord tenant action where plaintiff is seeking to recover damages for alleged rent overcharges, plaintiff seeks renewal of this court’s January 23, 2020 decision/order pursuant to CPLR 2221 (e) (2) on the basis that there has been a change in the law since the submission of the parties' motion papers which directs that any tenant seeking to adjudicate a rent overcharge complaint has a statutory preference as to choice of forum.

Plaintiff maintains that this court’s decision to dismiss the claim without prejudice to refile it with the DHCR and to seek appropriate relief from that agency, violates her statutory right to choose her forum and have the claims adjudicated here in Supreme Court. The motion was filed by Order to Show Cause and has been submitted to the court without opposition.

The facts relative to this matter are fully set forth in this court’s prior decision and order, NYSCEF Doc. No. 53, and will not be repeated here.

A motion for leave to renew is left to the sound discretion of the trial court (see e.g. *Caryl S. v Child & Adolescent Treatment Servs.*, 238 AD2d 953, 661 NYS2d 168 [4th Dept 1997]). Renewal may be based upon "a change in the law that would change the prior determination" (CPLR 2221 [e] [2]; *560-568 Audubon Tenants Assn. v 560-568 Audubon Realty, LLC*, 65 Misc.3d 759 [NY Sup Ct 2019]). A motion for leave to renew based upon a change in the law must be made prior to the entry of a final judgment or before the time to appeal has expired (see *Dinallo v DAL Elec.*, 60 AD3d 620, 874 NYS2d 246 [2d Dept 2009]; *Glicksman v Board of Educ./Cent. School Bd. of Comsewogue Union Free School Dist.*, 278 AD2d 364, 717 NYS2d 373 [2d Dept 2000]).

In its prior decision, this court while mindful of the amendments to the rent overcharge statute as set forth in the Housing Stability Tenant Protection Act ("HSTPA") acknowledged that the DHCR is in the best position to perform such tasks as "interpreting the provisions of the RSC, reviewing apartments' rent registration and payment histories, . . . and calculating damages due for rent overcharges. [citation omitted]" (NYSCEF Doc. No. 53, p. 8). Relying on the doctrine of primary jurisdiction which enjoins courts sharing concurrent jurisdiction to refrain from adjudicating disputes that are within an administrative agency's authority and technical expertise, this court dismissed plaintiff's claim without prejudice to refile before the DHCR.

Recently, the Court of Appeals in *Collazo v Netherland Prop. Assets LLC*, 155 AD3d 538, 538, 64 N.Y.S.3d 537 [1st Dept 2017], modified NY3d , 2020 N.Y. Slip Op. 02128 [2020]), addressed the issue of primary jurisdiction and in its decision the Court modified well established precedent concerning the doctrine of primary jurisdiction in rent overcharge cases which this court relied upon in dismissing plaintiff's claims without prejudice to refiling the claim before the DHCR. Specifically, the Court of Appeals found that the HSTPA provides that

"[t]he courts and [DHCR] shall have concurrent jurisdiction, subject to the tenant's choice of forum (L 2019, ch 36, Part F, §§ 1, 3)" (*id.*, 2020 N.Y. Slip Op. 02128 at \*1). The Court then found that "plaintiffs' choice of forum controls and these claims should be adjudicated in Supreme Court." (*id.*) Judge Rivera, who dissented in part, concurred with the majority's decision, noting her agreement that the newly enacted HSTPA provisions, Part F, §§ 1, 3 dictate that the plaintiffs' choice of forum controls and when a plaintiff chooses to litigate claims in Supreme Court, that is the forum where the claims will be adjudicated. (*id.* at \*2).

This court finds that the *Collazo* Court's interpretation of Part F, §§ 1, 3 of the HSTPA effects "a change in the law that would change the prior determination," of this court. In its decision, the Court of Appeals has interpreted the language set forth in Part F, §§ 1, 3 of the HTSPA to hold that where the tenant 's choice of forum is Supreme Court, the court may not dismiss the action relying on the doctrine of primary jurisdiction. *Collazo v Netherland Property Assets LLC* ( NY3d , 2020 N.Y. Slip Op. 02128 [2020]).

Consequently, as this court is bound by the precedent enunciated by the *Collazo* Court, and because plaintiff initially sought to pursue her rent overcharge claims in Supreme Court, her action may not be dismissed in favor of the claims being heard by DHCR.

## CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiffs' motion sequence number 002 for renewal is granted in part; it is further

ORDERED, that plaintiff's prior cross motion filed under sequence number 001 for summary judgment is denied; it is further

ORDERED, that only the portion of this court’s January 23, 2020 decision and order, that dismissed this action without prejudice and directed plaintiff to re-file her claim with the New York State Division of Housing and Community Renewal, is vacated; it is further

ORDERED, that the case is restored to the Part 23 calendar for a Preliminary Conference; and it is further

ORDERED, that the parties are to appear for a Preliminary Conference in room 307 at 80 Centre Street, New York, New York on September 29, 2019 at 9:30, unless otherwise directed by the court due to the current health crisis.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

5/21/2020  
DATE

  
W. FRANC PERRY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					REFERENCE