

At an IAS Term, Part 63, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 17 day of April 2015

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS**

THE BOARD OF MANAGERS OF THE SCHAEFER LANDING NORTH CONDOMINIUM, on behalf of the Individual unit owners,

Plaintiff,

-against-

Index No. 12693/10

DECISION/ORDER

KENT NORTH ASSOCIATES LLC., BFC KENT NORTH MANAGERS LLC, L&M KENT NORTH MANAGERS LLAC, EAST RIVER HOLDINGS NORTH LLC, 460 KENT AVENUE HOUSING DEVELOPMENT FUND CO. INC., DONALD CAPOCCIA, BRANDON BARON, JOSEPH FERRARA, JOSEPH SPITZER, JOHN DOE #1-10 AND XYZ CORP. #1-10,

Defendants

Hon. Ellen M. Spodek
Justice, Supreme Court

Papers

Numbered

Notice of Motion and Affidavit.....	1
Notice of Cross Motion and Affidavit.....	
Answering Affidavits	2
Plaintiff's Memorandum of Law In Opposition to the Motion.....	3
Defendant's Memorandum of Law In Support of the Motion.....	4
Replying Affidavits	5
Exhibits	
Other	

Upon the foregoing papers defendants move for an order pursuant to CPLR 3212 and 3211(a)(1), (3) and (7) to a) dismiss the first cause of action of the complaint against the defendants Kent North Associates LLC, Donald Capoccia, Brandon Baron, Joseph Ferrara and Joseph Spitzer; b) dismiss the third cause of action against the defendant Kent North Associates LLC; and c) dismiss the fifth cause of action against defendants Kent North Associates LLC, Donald Capoccia, Brandon Baron, Joseph Ferrara, and Joseph Spitzer. Plaintiff opposes the motion.

The Court, by Justice Battaglia, previously rendered a decision on a motion to dismiss by defendants, in an order dated December 13, 2013, wherein Justice Battaglia partially granted the motion and partially denied the motion. Justice Battaglia's denial of the motion to dismiss was based upon defendants' failure to support their motion with admissible evidence. Defendants then made the within motion.

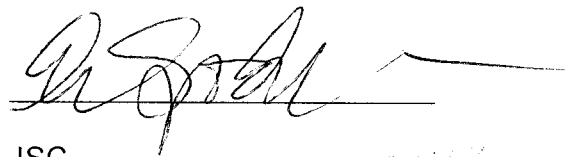
Defendants' motion to dismiss must be denied. Under CPLR 3211(e), no more than one motion to dismiss may be made pursuant to the grounds in CPLR 3211(a). The single motion rule is in place to prevent successive motions to dismiss pleadings, which is exactly what has occurred in this case. *See Ramos v. City of New York*, 51 AD 3d 753 (2d Dept. 2008). "CPLR 3211(e) permits only one preanswer motion and precludes successive motions." *Klein v Gutman*, 12 AD3d 417, 420 (2d Dept. 2004). Defendants are attempting to get another bite at the apple as their motion was previously denied by Justice Battaglia. They had the opportunity to submit evidence in admissible form on the first motion to dismiss, but failed to do so. Defendants attempted to now submit an affidavit from one of the defendants, Joseph Ferrara, which could have been submitted with the first motion, but was not. No explanation was given by defendants for their failure

to include this affidavit on their first motion to dismiss. Their failure to properly include the defendant in their original motion precludes the within motion. Defendants' motion to dismiss is denied.

Defendants also seek summary judgment pursuant to CPLR 3212. The motion for summary judgment must be denied as premature under CPLR 3212(f). No discovery has been conducted in this case, prior to the making of the motion. "[W]here the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion", the summary judgment motion can be denied as premature. *Aurora Loan Services, LLC, v. LaMattina & Associates, Inc.*, 59 AD 3d 578 (2d Dept. 2009) (citing to *Baron v. Incorporated Vil. Of Freeport*, 143 AD 2d at 793). "The motion was premature since substantial discovery remained outstanding." *Executive Aviation Services, Inc., v. Flightways of Long Island*, 15 AD3d 611, 612 (2d Dept. 2005). Therefore defendants' motion for summary judgment is denied at this time.

This constitutes the decision and order of the Court.

ENTER,

A handwritten signature in black ink, appearing to be 'JSC', written over a horizontal line.

JSC

10/16/2014 11:17:11 AM