| **Tallly v 885 Real Estate Associates** |
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| 2003 NY Slip Op 30125(U) |
| September 29, 2003 |
| Supreme Court, New york County |
| Docket Number: |
| Judge: Joan Madden |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

011592312002

TALLY, JOANNE
VS
885 REAL ESTATE ASSOCIATES

SEQ 1
DISMISS ACTION

INDEX NO. ______

MOTION DATE 3/27/03

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

SCANNED
OCT 15 2003

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is ~~denied~~ decided in accordance with the annexed memorandum, Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: September 29, 2003

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11
-------------------------------------- x
JOANNE TALLY,

Index No. 115923/02

Plaintiff,

- against -

885 REAL ESTATE ASSOCIATES,
AUSTIN LABER, STEVEN GANFER,
and JEROME KRETCHMER,

Defendants.
--------------------------------------x

JOAN A. MADDEN, J.:

Defendants move to dismiss the complaint (i) for failure to state a cause of action, (ii) on statute of limitations grounds, and (iii) for failure to join a necessary party. Plaintiff opposes the motion and cross moves to disqualify the law firm representing defendants in this action. As set forth below, the motion is granted and the cross motion is denied.

Background

Plaintiff is a former tenant of Apartment 6-C at 885 West End Avenue, New York, NY ("the Building"). The individual defendants are general partners of defendant 885 Real Estate Associates ("Associates"), a partnership authorized to conduct business in New York. Associates is the partner of 885 West End Avenue Associates ("WEAA"), another New York partnership. During part of plaintiff's tenancy, the Building was owned by WEAA, which was owned in part by Associates which, in turn, was owned by the individual defendants.

In this action, plaintiff seeks to recover moneys allegedly owed to her as the result of a fair market rent proceeding brought by plaintiff and her co-tenant P. Pippen ("Pippen"), against WEAA before the New York State Division of Housing and Community Renewal ("DHCR"). The first cause of action in the complaint alleges that defendants, as general partners of WEAA, are jointly and severally liable on a judgment entered against WEAA on default on January 14, 1997, in the Civil Court of the City of New York in the amount of $20,461.29, together with interest. The Civil Court action was commenced to enforce a $9,801.30 overcharge award issued by the DHCR on February 6, 1985.[1] The second cause of action seeks to enforce the DHCR order itself which directed WEAA to pay plaintiff $9,801.30. The complaint alleges that the judgment remains "wholly unsatisfied" and that WEAA failed to pay plaintiff in accordance with the DHCR order.

Defendants argue that they cannot be held liable to plaintiff as they were not named as parties or served in either the Civil Court action or the underlying DHCR proceeding. They also assert that this action is barred by the four-year statute of limitations applicable to rent overcharge proceedings (CPLR

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[1]It appears from an order and opinion issued by the Deputy Commissioner of DHCR on December 31, 1985, which partially granted a PAR filed by WEAA, that WEAA was not responsible for the entire amount of the overcharge but only that portion which was collected during its ownership of the Building between 1981 and 1984.

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213-a), as WEAA sold the building and collected no rent after September 1984. Defendants also contend that Pippen, as plaintiff's co-tenant is a necessary party and this action should be dismissed for failure to join her as a party.

Plaintiff counters that as general partners, defendants are jointly and severally liable for the unpaid debts of their general partner, WEAA, and are bound by the prior determinations against WEAA. Plaintiff alternatively argues that CPLR 1502, which authorizes a subsequent action against joint obligors to satisfy an unpaid judgment, applies here and gives rise to an independent cause of action against defendants.

With respect to the statute of limitations issue, plaintiff argues that a judgment can be enforced any time within twenty years so that the first cause of action is timely. See, CPLR 211(b). As for the second cause of action, plaintiff asserts that as the underlying proceeding involved a Fair Market Rent Appeal and not a rent overcharge proceeding, there is no statute of limitations which would limit the enforcement of the order. See Thelma Realty Co. v. Harvey, 190 Misc2d 303 (App. Term, 2d Dept). Alternatively, plaintiff argues that as defendants are co-obligors of WEAA, as defined under CPLR 1502, a six-year statute of limitations applies.

Plaintiff also argues that Pippin, who cannot be located, is not a necessary party and that in any event, as a motion to dismiss based on the non-joinder of Pippin was previously made

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and denied, in the Civil Court action, defendants are collaterally estopped from asserting this basis for dismissal here.

Plaintiff also seeks to disqualify the law firm representing defendants on the ground that defendant Steven Ganfer, who is a member of the firm, will be a necessary witness at trial.

Discussion

The preliminary issue to be resolved is whether plaintiff can base an action against defendants on a judgment and order establishing the liability of their partner, WEAA, to plaintiff. "Ordinarily, general partners are personally and individually liable for all of the obligations of the partnership, where the joint property is inadequate to pay partnership debts." Stern v. Low, 27 AD2d 756 (2d Dept 1967); Partnership Law § 26 (a)(1). At the same time, however, "[r]esort to the personal assets of individual partners is possible only as to those general partners who were named individually as defendants and personally served with process in the proceeding which resulted in the judgment." Vets North, Inc. v. Libutti, 278 AD2d 406, 407 (2d Dept 2000); see also, CPLR 5201(b)(money judgment entered upon joint liability "may be enforced against individual property of those persons summoned and joint property of such persons with any other persons against whom the judgment is entered").

Thus, it has been held that where, as here, partners are not parties to an underlying proceeding before the DHCR, any judgment

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resulting from such proceeding can not be executed against [the partners] personally." Cory Associates v. Division of Housing and Community Renewal, 254 AD2d 286 (2d Dept 1998) see also, Levin v. Total Hockey Associates, 64 AD2d 622 (2d Dept 1978)(holding that since general partners were not parties to proceeding which resulted in a judgment against the partnership, only the partnership assets, and not the assets of the general partners individually, may be applied to satisfy the judgment).

In this case, none of the defendants in this action were named or served in the DHCR proceeding, or in the subsequent Civil Court action to recover the amount purportedly representing the rent overcharge amount awarded by the DHCR. Under these circumstances, the defendants cannot be held individually liable to plaintiff based on either the judgment entered against their partner, or the order issued by DHCR.

Moreover, contrary to plaintiff's position, her complaint does not state a cause of action based on CPLR 1502, which authorizes an action against co-obligors who were named but not served in an earlier action. First, CPLR 1502 is inapplicable insofar as none of the defendants in this action were named in either the DHCR proceeding or the Civil Court action. See, Alexander, Practice Commentaries, McKinney's Consold. Laws of NY, Book 7B, CPLR 1502 ("CPLR 1502 authorizes a subsequent action against the previously named but unserved obligors as a potential means of charging their individual assets"). In fact, in Vets

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North, Inc. v. Libutti supra and Cory Associates supra, the Appellate Division, Second Department cited CPLR 1502 in determining that partners could not be held personally liable based on a judgment against another partner when they were not named or served in the prior action.

In addition, even if CPLR 1502 provided a basis for an action against defendants, the complaint does not state a cause of action under this provision as it does not allege any basis for their liability beyond the judgment entered against WEAA. Notably, the earlier judgment and order are not binding on the defendants, but, instead, 'is merely evidence of the plaintiff's demand [of payment of the judgment]." 54 NYJur2d Enforcement and Execution of Judgments, § 9 (2003), quoting Vereinigte Pinsel-Fabriken v. Rosers, 52 *AD* 529 (1900); see also, Goldsmith v. Silver, 73 AD2d 884 (1st Dept) appeal dismissed, 50 NY2d 803 (1980)(the determination as to liability between plaintiff and one partner is not binding on second partner who was not served in the action); CPLR 1502 (providing that a "defendant in a subsequent action may raise any defenses or counterclaims that he might have raised in the original action if the summons had been served on him when it was first served on the co-obligor"). The court also notes that the complaint is not verified as required under CPLR 1502.

Accordingly, as the complaint fails to state an actionable claim, and the court need not reach whether the action is time-

barred or must be dismissed for failure to join an additional party.

Finally, in light of the dismissal of the action, the cross motion to disqualify defendants' counsel based on the "advocate as witness" rule must also be denied. In any event, the cross motion is without merit as even if it were found that Mr. Ganfer's testimony were necessary, it is well established that "a law firm is permitted to continue representation of a client even though one of the firm's attorneys will be called as a witness on behalf of the client before the tribunal." Owen & Mandolfo, Inc. v Davidoff of Geneva, Inc., 197 AD2d 370 (1st Dept 1993) lv denied, 83 NY2d 751 (1994); ICS Yarn Corp v Incomex, Inc., 298 A.D.2d 232 (1st Dept 2002)(rejecting defendants' contention that plaintiff's law firm should be disqualified because one or more of its attorneys might be called as witnesses in the litigation).

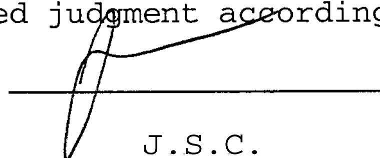
Conclusion

In view of the above, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed judgment accordingly.

DATED: September 29, 2003



J.S.C.