

Eastwood Inv. V, LLC v Morrisania Assoc.

2013 NY Slip Op 31921(U)

August 12, 2013

Sup Ct, New York County

Docket Number: 652864/12

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA R. KAPNICK
J.S.C. Justice

PART 39

Index Number : 652864/2012
EASTWOOD INVESTORS V, LLC
vs.
MORRISANIA ASSOCIATES,
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

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

Dated: 8/12/13

Signature of BARBARA R. KAPNICK, J.S.C.
NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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EASTWOOD INVESTORS V, LLC,

DECISION/ORDER
Index No. 652864/12
Motion Seq. No. 001

Plaintiff,

-against-

MORRISANIA ASSOCIATES, a New York
Limited Partnership, TWO TREES, INC.,
and TWO TREES MANAGEMENT CO., LLC,

Defendants.

-----x

BARBARA R. KAPNICK, J.:

This motion by defendants to dismiss the Complaint pursuant to CPLR 3211(a)(1), (2), (3) and (7) is granted, in accordance with the decision dictated on the record on May 23, 2013, to the extent of dismissing the first and fourth causes of action and allowing plaintiff to replead the remainder of the Complaint, except for the second cause of action, in its capacity as attorney-in-fact.

With respect to the second cause of action, the plaintiff seeks the following declaratory relief: "a judgment declaring, in the alternative, and at a minimum, that Eastwood is entitled to all the economic rights and benefits in the Limited Partnership in accordance with its limited partnership interest," and an

order compelling Two Trees/Two Trees LLC to, among other things, (i) reflect and record Eastwood's economic interest on the books and records of the Partnership; (ii) issue Schedule K-1's to Eastwood prospectively; (iii) correct and reissue the Schedule K-1's

issued in 2010 (for tax year 2009), in 2011 (for tax year 2010), and in 2012 (for tax year 2011); and (iv) take any and all other steps necessary to recognize Eastwood's rights as assignee of the economic rights and benefits of 74.28% of the limited partnership interests in Morrisania Associates.

(Compl. ¶¶ 47-48.) Defendants argue that this cause of action must be dismissed in light of the express language of the Limited Partnership Agreement, which provides in relevant part as follows:

Section 7.05. Transfer of Partnership Interest by Limited Partner; Substituted Limited Partner. The Partnership Interest of a Limited Partner may not be transferred or assigned in whole or in part except with the prior written consent of the General Partner.
. . .

* * *

Section 7.09. Attempted Transfer in Violation of this Article Void. Any attempted assignment or transfer in violation of the provisions of this Article VII shall be void and ineffectual and shall not bind the Partnership.

Notwithstanding this language, plaintiff argues that its assignment, even if not valid for the purposes of transferring full substituted limited partnership rights, must be valid for the purpose of transferring economic benefit rights, pursuant to NY Partnership Law ("NYPL") § 108.¹ This argument, however, fails,

¹ NYPL 108(3) provides that "[a]n assignee, who does not become a substituted limited partner, . . . is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled."

because, as stated by the Court of Appeals, NYPL provisions are default provisions that only "come into play in the absence of an agreement." *Ederer v. Gursky*, 9 NY3d 514, 526 (2007); *Bailey v. Fish & Neave*, 8 NY3d 523, 529 (2007) (provisions of NYPL "cannot be implied as part of the [partnership] agreement so as to make a different contract from that which the parties intended nor override the agreement which the parties, in fact, made."); see also *Lanier v. Bowdoin*, 282 NY 32 (1939); *Raymond v. Brimberg*, 99 AD2d 988 (1st Dep't 1984). Since the Limited Partnership Agreement here specifically provides in Section 7.05 that the interest of a Limited Partner may not be transferred in "whole or in part" without consent of the General Partner, there can be no valid assignment of any part of the limited partnership interests, including a right to the economic benefits. Accordingly, the second cause of action is dismissed, without leave to replead.

Plaintiff has 30 days to replead the Complaint in accordance with this decision and the decision dictated on the record on May 23, 2012. Defendants shall have 30 days to file and serve their Answers.

Counsel for all parties shall appear for a preliminary conference in IA Part 39, 60 Centre Street, Room 208 on November 13, 2013 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: 8/12, 2013



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.