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

EASTWOOD INVESTORS V, LLC,

Plaintiff,

-against-

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

Defendants.

Index No. 652864/2012

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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Defendants Morrisania Associates ("Morrisania" or the "Partnership"), Two Trees, Inc. ("Two Trees") and Two Trees Management Co., LLC ("Two Trees Management") (collectively, the "Defendants") submit this memorandum of law in support of their motion to dismiss the complaint of plaintiff Eastwood Investors V, LLC ("Eastwood" or "Plaintiff"), with prejudice, pursuant to N.Y. C.P.L.R. 3211(a)(1), (a)(2), (a)(3) and (a)(7) (McKinney 2012).

Preliminary Statement

This is an action by Eastwood for declaratory relief, injunctive relief and money damages arising out of Eastwood's purchases, in the spring and summer of 2009, of assignments of interests of eight limited partners in Morrisania. The gravamen of Eastwood's complaint is that Two Trees/Two Trees Management, as general partner of Morrisania, has refused to recognize Eastwood as a substituted limited partner in Morrisania or, at a minimum, as the owner of the economic interests formerly belonging to the limited partners from whom it acquired assignments of limited partnership rights.

As a result, Eastwood seeks declaratory and injunctive relief demanding that it be recognized as a substituted limited partner, that the assignment agreements be honored as valid and binding on the Partnership, and that Plaintiff be afforded the full gamut of limited rights and interests in Morrisania, including, by way of example: (i) the right to receive all economic benefits flowing from the Partnership; (ii) the right to immediately remove the general partner and nominate itself as a replacement; and (iii) the right to instantaneously dissolve the 40-year-old Partnership.

The problem for Eastwood, however, is that the assignments it acquired are "void and ineffectual" under the clear and unambiguous terms of the very partnership agreement it now seeks to enforce against Defendants.

Both the express terms of the Morrisania Associates Limited Partnership Agreement[1] and controlling New York authority flatly contradict Eastwood's allegations that it was the recipient of valid assignments of partnership interests in Morrisania. Under long-standing New York case law, courts have enforced so-called "non-assignability" provisions and have held that assignments made in contravention of them are void where – as here – the non-assignability provision uses clear and definite language to establish a prohibition against assignment. Applying that well-established authority to the facts presented here requires an identical outcome.

Under the Morrisania Limited Partnership Agreement, any assignment of a limited partnership interest without the prior written consent of the general partner is simply "void and ineffectual." Section 7.05 of the Limited Partnership Agreement expressly provides:

> 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.

See Walentas Aff., Exh. A (emphasis added). And Section 7.09 of the Limited Partnership Agreement clearly states the consequences of an attempted transfer or assignment of a limited partner's interest in contravention of the terms of the agreement:

> 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***.

Id. (emphasis added).

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[1] A true and complete copy of the Morrisania Associates Limited Partnership Agreement (the "Limited Partnership Agreement") is annexed as Exhibit A to the accompanying affidavit of David C. Walentas, President of Two Trees, the general partner of Morrisania, sworn to October 9, 2012 ("Walentas Aff."). On a motion to dismiss, a court may consider documents incorporated by reference and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference. *See Lore v. New York Racing Ass'n. Inc.*, 12 Misc. 3d 1159(A), 819 N.Y.S.2d 210 (N.Y. Sup. Ct. 2006). The Limited Partnership Agreement is expressly referenced in numerous paragraphs of Eastwood's complaint (*see, e.g.*, ¶¶ 9, 10, 14 and 15), and Eastwood seeks in this action to vindicate and enforce its rights under the Limited Partnership Agreement (*see, e.g.*, Fourth through Eleventh Causes of Action).

Nowhere in its complaint does Eastwood allege that it either solicited or received prior written consent to the purported assignments from the general partner of Morrisania. As demonstrated below, under the Limited Partnership Agreement's valid and enforceable non-assignment provision, the assignments Eastwood acquired from the eight Morrisania limited partners are void and have no legal binding effect on the Partnership. Therefore, the First and Third Causes of Action of the complaint should be dismissed with prejudice. Having no partnership rights (economic or otherwise) in Morrisania by virtue of the invalid assignments it acquired, Eastwood lacks standing to bring this lawsuit to enforce the terms of the Limited Partnership Agreement. Consequently, the Fifth through Eleventh Causes of Action of the complaint must be dismissed with prejudice. Further, both common sense and the express terms of the Limited Partnership Agreement itself dictate that Eastwood has not acquired any economic rights in Morrisania because it is not an assignee of valid assignments of partnership interests. Therefore, its Second Cause of Action – which seeks declaratory and injunctive relief to enforce its entitlement to the economic benefits of the interests it acquired – should also be dismissed with prejudice. Finally, the Plaintiff's Fourth Cause of Action – which seeks declaratory relief that Two Trees/Two Trees Management waived the right to consent to the Assignments – is undone by the express "no waiver" provision in the Limited Partnership Agreement and, accordingly, should be dismissed with prejudice.

The Relevant Facts

The following facts are alleged by Eastwood in its complaint and are assumed to be true only for purposes of this motion to dismiss.

Morrisania is a limited partnership that was formed in 1972 under New York law. Complaint ¶ 8. It was originally composed of one general partner, Two Trees, and 14 limited partners

who owned the balance of the interests in the Partnership. *Id.* The Partnership was formed to own and manage an affordable housing project located in the South Bronx. *Id.*

On July 10, 1972, Two Trees, as general partner, and the limited partners executed the Limited Partnership Agreement. Complaint ¶ 9.[2] Pursuant to Section 9.01 of the agreement, the Partnership will end on January 1, 2015, unless dissolved earlier. Complaint ¶ 10.

Eastwood Investors V, LLC is a limited liability company formed under the laws of the State of Delaware. Complaint ¶ 2. From April through July 2009, Eastwood acquired assignments of the limited partner interests from eight limited partners in Morrisania. Eastwood's acquisitions were accomplished pursuant to certain Purchase and Sale Agreements and Assignment Agreements[3] (the "Assignments"). Complaint ¶¶ 17, 19-26. As a result of the Assignments, Eastwood claims to have acquired an aggregate 74.28% limited partnership interest in Morrisania. Complaint ¶ 28. During this time, Eastwood apprised Two Trees of the Assignments. Complaint ¶ 18.

Each of the limited partners that purportedly assigned a limited partnership interest to Eastwood also signed a letter of instruction to Morrisania directing it to forward all correspondence concerning Morrisania to Eastwood, and directing that all distributions of partnership profits be made directly payable to Eastwood. Complaint ¶ 27. Subsequently, by letter dated August 20, 2009, Eastwood notified Two Trees of its purported assignee status and demanded to be rec-

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2 The complaint alleges that in or around 2002, Two Trees purported to transfer its entire general partnership interest to defendant Two Trees Management in derogation of the terms of the Limited Partnership Agreement, and it seeks a declaratory judgment that any such purported transfer was void as well as an injunction prohibiting Two Trees Management from holding itself out as the general partner of Morrisania. (*See* Complaint, Fifth Cause of Action.) As demonstrated below, even if these allegations were true – and defendants believe that they are not – since Eastwood is not a partner in Morrisania and it cannot have otherwise suffered any injury as a result of any such action by Two Trees or Two Trees Management, Eastwood lacks standing to obtain the relief it seeks in its Fifth Cause of Action.

3 Capitalized terms not defined herein have the meanings ascribed to them in the Plaintiff's complaint.

ognized as a substituted limited partner of Morrisania. Complaint ¶ 29. By letter from its counsel dated September 28, 2009, Two Trees Management responded by declining to recognize Eastwood as a substitute limited partner of Morrisania upon the ground that the Assignments are invalid. Complaint ¶ 30.

Eastwood sent a second demand letter to Two Trees on October 5, 2011, again insisting that Two Trees recognize the validity of the Assignments. Complaint ¶ 32. Two Trees did not reply to Eastwood's second demand letter (Complaint ¶ 33), and Eastwood filed this action on August 16, 2012.

ARGUMENT

I. The Legal Standard to Be Applied

On a motion to dismiss, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v. Morone,* 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154 (1980); *Rovello v. Orofino Realty Co.,* 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976). Pleadings shall be liberally construed. N.Y. C.P.L.R. § 3026 (McKinney 2012). When the moving party submits affidavits or other documentary evidence in support of its motion, dismissal is warranted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Mandarin Trading Ltd. v. Wildenstein*, 65 A.D.3d 448, 458, 884 N.Y.S.2d 47, 57 (1st Dep't 2009). Here, both the applicable law and the documentary evidence – namely, the Limited Partnership Agreement and Morrisania's Certificate of Formation of Limited Partnership – conclusively establish the meritless nature of Eastwood's claims.

II. Plaintiff's Claims Should Be Dismissed Because the Assignments Were Prohibited by Statutory Law and the Express Terms of the Limited Partnership Agreement

A. Eastwood Acquired No Rights in the Partnership

Eastwood alleges that it acquired limited partnership interests in Morrisania by assignment from eight limited partners of Morrisania. As established, the Limited Partnership Agreement expressly precluded those assignments without the prior written consent of Two Trees, as general partner. The Limited Partnership Agreement in no uncertain terms specified that any assignment without prior written consent was void and ineffectual. Since Eastwood does not allege that it obtained the general partner's prior written consent to the Assignments – and, in fact, alleges that the general partner "refused" to recognize the Assignments (*e.g.*, Complaint, ¶¶ 31, 39) – the Assignments to the Plaintiff were void and had no effect.

1. New York Law Precludes Assignment of Limited Partnership Interests to Eastwood

New York Partnership Law Section 108(4) (McKinney 2012) – applicable to New York limited partnerships such as Morrisania – provides that "[a]n assignee shall have the right to become a substituted limited partner if ***all the members***, except the assignor, consent thereto or if the assignor, being thereunto empowered by the certificate [of limited partnership], gives the assignee that right" (emphasis added). Eastwood's complaint specifically alleges that Two Trees, a member of the Morrisania Associates limited partnership, ***refused*** to consent to Eastwood's becoming a substituted limited partner (Complaint, ¶ 39), and fails to allege that its assignors were empowered by the Morrisania Certificate of Formation of Limited Partnership to assign their

limited partnership interests in the Partnership.[4] Thus, the complaint fails the requirements of Partnership Law Section 108(4).

To the extent that New York's Revised Limited Partnership Act (N.Y. P'ship Law, §§ 121-101, *et seq.* [McKinney 2012]) is applicable to the claims asserted in this case, Eastwood fares no better. That statute provides:

> (a) ***Except as provided in the partnership agreement***,
>
> (1) A partnership interest is assignable in whole or in part;
>
> * * *
>
> (3) The only effect of an assignment is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled....

N.Y. P'ship Law § 121-702(a) (emphasis added).[5] Since, as established, the Morrisania Limited Partnership Agreement clearly provides otherwise, the exception set forth in the Revised Limited Partnership Act defeats any claim by Eastwood that it acquired any limited partnership interests

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[4] In fact, Article XI of the Certificate of Formation of Limited Partnership of Morrisania Associates, dated October 20, 1972, a true and correct copy of which is annexed to the Walentas Affidavit as Exhibit B, tracks the language of Partnership Law § 108(4) by providing: "Additional Limited Partners may be admitted only upon the prior written consent of ***all*** Partners" (emphasis added). Since Eastwood has not alleged (and cannot allege) that ***all*** Morrisania partners gave their prior written consent to Eastwood's admission to the Partnership, its complaint is deficient and must be dismissed. (Morrisania's Certificate of Formation of Limited Partnership is specifically referenced in Paragraph 67 of Eastwood's complaint and is integral to the claim set forth therein; thus, the certificate may be considered by this Court in determining Defendant's motion to dismiss the complaint. *See* note 1, *supra.*)

[5] *See also* N.Y. P'ship Law § 121-704(a) (McKinney 2012) ("An assignee of a partnership interest . . . may become a limited partner if (i) the assignor gives the assignee that right in accordance with authority granted in the partnership agreement, or (ii) all the partners consent in writing, or (iii) to the extent that the partnership agreement so provides."). Eastwood has not alleged that any of these three conditions has been satisfied in this case.

in Morrisania by virtue of assignments from the assignors.[6]

2. The Assignments Are "Void and Ineffectual"

It is well established in New York that "assignments made in contravention of a prohibition clause in a contract are void if the contract contains clear, definite and appropriate language declaring the invalidity of such assignments." *Macklowe v. 42nd Street Dev. Corp.*, 170 A.D.2d 388, 389, 566 N.Y.S.2d 606, 606-07 (1st Dep't 1991) (citing cases).

In a seminal case on the issue of non-assignability provisions, the New York Court of Appeals held that an assignee could not recover money due to the assignor, a subcontractor, because the assignor was prohibited from assigning his interest in a subcontracting agreement and the prohibition on assignment expressly stated that any assignment without written consent of the general contractor would be void. *Allhusen v. Caristo Constr. Corp.*, 303 N.Y. 446, 103 N.E.2d 891 (1952). In that case, the plaintiff assignee sought to recover money due and owing from the general contractor for work performed by the assignor (subcontractor). The court rejected the assignee's claim, holding: "where appropriate language is used, assignments of money due under contracts may be prohibited. When 'clear language' is used, and the 'plainest words have been chosen,' parties may 'limit the freedom of alienation of rights and prohibit the assignment.'" *Id.* at 452 (internal citations omitted). The court explained:

> We have now before us a clause embodying clear, definite and appropriate language, which may be construed in no other way but that any attempted assignment of either the contract or any rights created thereunder shall be 'void' as against the obligor. One would have to do violence to the language here employed to hold

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6 And, of course, even if the assignments could somehow be found to have been valid, they would be strictly limited under the statute to assignments of economic benefits and Eastwood would in no respect be entitled to receive any financial or other information intended to be delivered solely to partners, would not be entitled to vote on partnership matters and would not be entitled to any role in the management or operations of the partnership, including but not limited to the removal of the general partner.

> that it is merely an agreement by the subcontractor not to assign. The objectivity of the language precludes such a construction. We are therefore compelled to conclude that this prohibitory clause is a valid and effective restriction of the right to assign. Such a holding is not violative of public policy.

Id. See also C.U. Annuity Serv. Corp. v. Young, 281 A.D.2d 292, 722 N.Y.S.2d 236 (1st Dep't 2001) (holding that "[e]nforcement of this non-assignment clause by declaring the purported assignment as void comports with the expressed intent of the contracting parties" and noting that "there was no basis upon which [assignor] or any assignee could assert that a purported [assignment] could have any legal effect" given the non-assignment clause).

In sum, non-assignability provisions of contracts such as the Limited Partnership Agreement are enforceable by their terms and have been consistently upheld by courts where, as here, they contain clear and definitive language regarding the invalidity of any assignment.

In this case, the Limited Partnership Agreement's prohibition against transfer and assignment of a limited partner's partnership interests could not be clearer or more definitive and appropriate. As noted above, Section 7.06 of the Limited Partnership Agreement provides that 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***" (emphasis added). Here, there is no allegation in the complaint that either the assigning limited partners or Eastwood, as assignee, sought or received prior written consent to the Assignments from Two Trees,[7] as general partner. Moreover, the Limited Partnership Agreement also contains clear, definite and appropriate language regarding the invalidity of any purported assignment of partnership interests in violation of the non-assignment provision: "Any attempted assignment or transfer in violation

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[7] Neither is there any allegation in the complaint that Eastwood or the assigning limited partners sought prior consent from Two Trees Management, to the extent that Eastwood is correct in its contention that Two Trees Management held itself out as the general partner of Morrisania.

of the provisions of this Article VII shall be ***void and ineffectual*** and shall not bind the Partnership" (emphasis added).

The limited partners who attempted to assign their limited partnership interests to Morrisania had no legal ability to do so without the prior written consent of the general partner. Their purported assignment of their limited partnership interests to Eastwood without the general partner's prior written consent is simply "void and ineffectual," as a matter of law. Consequently, Eastwood is not an assignee of valid assignments and, thus, its complaint must be dismissed.

B. Plaintiff Has No Partnership Rights as an Assignee

Even if the Assignments were somehow valid – and they are not – New York law prohibits an assignee of a partnership interest from interfering in the affairs of a partnership. Specifically, New York Partnership Law Section 53 provides:

> A conveyance by a partner of his interest in the partnership ***does not . . . entitle the assignee . . . to interfere in the management or administration of the partnership business or affairs***, or to require any information or account of partnership transactions, or to inspect the partnership books; but ***it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.***

N.Y. P'ship Law § 53 (McKinney 2012) (emphasis added); *accord* N.Y. P'ship Law § 108(3).

Plaintiff concurs. *See* Complaint ¶ 44 ("[an] assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books") (citing N.Y. Partnership Law § 108(3)).

Therefore, assuming *arguendo* that the Assignments were valid, Eastwood, as an assignee, is at best entitled only to the economic benefits due to its assignors; it has **no** right "to interfere in the management or administration of the partnership business or affairs." N.Y. P'ship

Law § 53 (McKinney 2012). For the foregoing reasons, Eastwood's First and Third through Eleventh Causes of Action should be dismissed with prejudice.

C. Plaintiff Has No Economic Interests as an Assignee

In its Second Cause of Action, Eastwood seeks a declaratory judgment that, as a result of the Assignments, it is entitled, at a minimum, to share the economic benefits of the Partnership that would otherwise have been shared by its assignors. Eastwood's purported entitlement to share the economic benefits in the Partnership assumes, however, a valid assignment of Partnership interests. Here, because the Assignments were made in contravention of the Limited Partnership Agreement, without the consent of the general partner, they are void *ab initio* and have no binding effect on the Partnership. As a result, Eastwood is not a valid assignee and has acquired no economic rights in the Partnership.

Simply put, invalid assignments do not confer any rights, let alone a right to receive economic benefits in a partnership. *See, e.g.*, *Allhusen*, 303 N.Y. at 451 (noting that an assignee may not recover where the agreement provides that the claim is nonassignable and would be void); *C.U. Annuity Serv. Corp.*, 281 A.D.2d at 292-93 (determining an assignment in violation of a non-assignment clause void and holding that assignor "had no power to assign and [assignee] had no basis upon which to expect it could derive benefits from such a transaction"); *see also* Restatement (First) of Contracts § 151 (1932) ("a right may be the subject of effective assignment unless . . . (c) the assignment is prohibited by the contract creating the right").

The Limited Partnership Agreement is clear and definite with respect to its non-assignability provision and the lack of legal effect of ***any*** purported assignment in contravention of it, including an assignment of just the economic benefit portion of a limited partner's interest: "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" (Limited Partnership Agreement, § 7.05) (emphasis added).

Since Eastwood does not dispute that it never sought or received the general partner's prior written consent to the Assignments, Eastwood's claim to entitlement to even the economic benefit of the Assignments does not withstand scrutiny. Consequently, Eastwood's Second Cause of Action must be dismissed.

III. Eastwood's Waiver Claim (Fourth Cause of Action) Must Be Dismissed Pursuant to C.P.L.R. § 3211(a)(1)

It is well settled that dismissal is warranted pursuant to C.P.L.R. § 3211(a)(1) where, as here, the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Beal Sav. Bank v. Sommer*, 8 N.Y.3d 318, 324, 834 N.Y.S.2d 44, 47, 865 N.E.2d 1210, 1213 (2007); *Goldman v. Metropolitan Life Ins. Co.*, 5 N.Y.3d 561, 571, 841 N.E.2d 742, 746, 807 N.Y.S.2d 583, 587 (2005).

Plaintiff's Fourth Cause of Action alleges that Two Trees waived the right to consent to the Assignments based on its prior course of conduct. Once again, the express terms of the Limited Partnership Agreement provide the rule of decision and mandate dismissal of Eastwood's claim. Section 10.14 of the Limited Partnership Agreement completely undercuts Eastwood's claim:

> No failure by any party to insist upon the strict performance of any covenant, duty, agreement, or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or of such or any other covenant, agreement, term or condition . . . ***No waiver shall affect or alter this Agreement but each and every covenant, agreement, term and condition of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof.***

Limited Partnership Agreement, § 10.14 (emphasis added). Even if the general partner accepted the transfer of some limited partners' interests without providing prior written consent (and Defendants neither admit nor deny the truth of that allegation for the time being), that conduct does not constitute an actionable waiver of the general partner's right to insist upon strict adherence to the requirements of the Limited Partnership Agreement insofar as Eastwood's purported acquisitions of the Assignments is concerned.

Accordingly, Eastwood's Fourth Cause of Action should be dismissed with prejudice.

IV. Eastwood Lacks Standing Pursuant to C.P.L.R. 3211(a)(2) or C.P.L.R. 3211(a)(3)[8] to Challenge Two Trees' General Partnership Status (Fifth Cause of Action), to Remove Two Trees as General Partner (Seventh Cause of Action), to Compel an Order of Dissolution of the Partnership (Eighth Cause of Action), to Preserve the Status Quo (Ninth Cause of Action), to Compel an Inspection of Morrisania's Books and Records (Tenth Cause of Action), or to an Accounting of Morrisania's Books and Records (Eleventh Cause of Action)

Outright dismissal of a complaint is proper where, as here, the plaintiff lacks standing to obtain the relief requested in the complaint. *See Stark v. Goldberg*, 297 A.D.2d 203, 204, 746 N.Y.S.2d 280, 281 (1st Dep't 2002) ("Plaintiffs may not proceed in the absence of standing" because "[s]tanding goes to the jurisdictional basis of a court's authority to adjudicate a dispute"); *Eaton Associates, Inc. v. Egan*, 142 A.D.2d 330, 334-35, 535 N.Y.S.2d 998, 1001 (3d Dep't 1988) (same).

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[8] In *Matter of Prudco Realty Corp. v. Palermo*, 60 N.Y.2d 656, 657, 455 N.E.2d 483, 485, 467 N.Y.S.2d 830, 831 (1983), the New York Court of Appeals held that if standing is not raised on a motion to dismiss pursuant to C.P.L.R. § 3211(a)(3), it is waived pursuant to C.P.L.R. § 3211(e). However, in *T & G Medical Supplies, Inc. v. National Grange Mut. Ins. Co.*, 9 Misc. 3d 767, 769-70, 800 N.Y.S.2d 835, 836 (N.Y. Civ. Ct. 2005), the court found that "[s]tanding to sue is one of the basic elements in any action. Notably, without it, you are not entitled to begin an action. As such, the issue of standing cannot be waived even if a defendant fails to object to the issue of standing beforehand" (citation omitted). In light of this apparent confusion, and in an abundance of caution, Defendants move to dismiss Eastwood's complaint pursuant to both C.P.L.R. 3211(a)(2) and C.P.L.R. 3211(a)(3).

It is well established that only partners have standing to sue other partners on behalf of a limited partnership. *See* N.Y. P'ship Law § 115-a(1) (McKinney 2012) (a derivative action against a partner may only be brought in the right of a limited partnership "by a limited partner, additional limited partner, or substituted limited partner"). Specifically, the statute requires that:

> In any such action, it shall be made to appear that at least one plaintiff is such a limited partner, additional limited partner, or substituted limited partner at the time of bringing the action . . . .

Id. at § 115-a(2).

New York courts have also routinely held that a plaintiff lacks standing to sue on behalf of a partnership if it is not a limited, additional or substituted limited partner. *See Balme v. Satterwhite*, 190 A.D.2d 633, 633-34, 594 N.Y.S.2d 158, 159 (1st Dep't 1993) (affirming dismissal of complaint because the lower court had "properly determined that the plaintiff had been removed as a general partner in the limited partnerships" and therefore "had no standing to bring the underlying action for judicial dissolution of the limited partnership"); *Levine v. Murray Hill Manor Co.*, 143 A.D.2d 298, 300, 532 N.Y.S.2d 130, 132 (1st Dep't 1988) (dismissing the complaint and holding that "plaintiff lacks standing to sue on behalf of the partnership because he is not a limited partner or an additional limited partner or a substituted limited partner"); *Stark*, 297 A.D.2d at 204, 746 N.Y.S.2d at 281 (entering judgment in favor of defendants and dismissing the complaint because "plaintiffs are without standing" to maintain "a derivative action on behalf of the limited partnership"); *Sterling v. Minskoff*, 226 A.D.2d 125, 639 N.Y.S.2d 822, 823 (1st Dep't 1996) (affirming dismissal of the complaint and holding that "Plaintiff was not a partner in the partnership on whose behalf he purports to sue, and therefore does not have standing to bring a derivative suit").

In this case, Eastwood's lawsuit against the Partnership and its general partner seeks to enforce rights that belong solely to Morrisania's partners (among others, the right to obtain

"from the ... Partnership all information which limited partners are entitled to obtain, voting on all partnership matters requiring the vote of the limited partners" [Complaint, ¶ 50]; the right to remove the general partner [Complaint, ¶¶ 85-86]; the right to require that the general partner obtain the approval of the limited partners for a transfer of the general partnership interest [Complaint, ¶ 69]; and the right to enforce the "duty of good faith and fair dealing implied in the Limited Partnership Agreement" [Complaint, ¶ 71]).

Under the aforementioned applicable statutory and decisional law, and in accordance with the clear, definite and appropriate language of Morrisania's Certificate of Formation of Limited Partnership and Limited Partnership Agreement, it is clear beyond cavil that the Assignments were "void and ineffectual" to transfer any limited partnership interests to Eastwood. Accordingly, Eastwood is not and never has been a limited partner, an additional limited partner or a substituted limited partner of Morrisania and, therefore, cannot lawfully assert rights that belong to partners alone.

Thus, Eastwood has no standing to assert any claims that may only be made by an actual substituted limited partner of Morrisania, including, *inter alia*, the rights to:

- Challenge Two Trees' status as general partner of Morrisania (Fifth Cause of Action);
- Remove Two Trees as general partner of Morrisania (Seventh Cause of Action);
- Compel an order of dissolution of Morrisania (Eighth Cause of Action);[9]
- Preserve the status quo (Ninth Cause of Action);

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[9] With specific reference to Eastwood's Eighth Cause of Action, seeking dissolution of Morrisania prior to the end of the partnership's term as set forth in its certificate of partnership, *see Balme v. Satterwhite*, 190 A.D.2d 633, 633-34, 594 N.Y.S.2d 158, 159 (1st Dep't 1993) (holding that non-partner "had no standing to bring the underlying action for judicial dissolution of the limited partnership"); *Stark v. Goldberg*, 297 A.D.2d 203, 204, 746 N.Y.S.2d 280, 281 (1st Dept. 2002) (noting that because plaintiffs lacked standing to bring the action, "to the extent that the complaint seeks dissolution of the limited partnership, it is moot").

- Compel an inspection of Morrisania's books and records (Tenth Cause of Action); and

- An accounting of Morrisania's books and records (Eleventh Cause of Action).

And, again, even if the Assignments were somehow valid – and they are not – Eastwood would be entitled, at most, to the economic benefits of the Assignments and would still have no right to challenge the status of Two Trees as general partner of Morrisania. *See* N.Y. P'ship Law § 53 (McKinney 2012) (assignee has no right "to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books"); *see also* N.Y. P'ship Law § 108(3). Therefore, Eastwood's Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Causes of Action must be dismissed. [10]

V. Eastwood's Claim for Breach of the Covenant of Good Faith and Fair Dealing (Sixth Cause of Action) Must Be Dismissed Pursuant to C.P.L.R. § 3211(a)(7)

Not only does Eastwood lack standing to assert any claims in the right of a partner of Morrisania, including the supposed breach of the covenant of good faith and fair dealing between the general partner and the limited partners of Morrisania (*see* section IV, *supra*), there can be no claim for breach of any agreement between Eastwood and Defendants for the simple reason that there is no "contract" between Eastwood and Defendants that Defendants could have breached.

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10 For the reasons set forth in Section II(C), above, Eastwood's Second Cause of Action has no more substantive merit than its other ten. It is arguable, however, that Eastwood may have the requisite justiciable standing to assert its Second Cause of Action, which seeks declaratory and injunctive relief with respect to Eastwood's claim to entitlement to the economic benefits of the partnership interests it claims to have acquired. Regardless of its possible standing, however, the plain terms of the Limited Partnership Agreement prohibit – and render "void and ineffectual" – the transfer or assignment of a limited partnership interest "in whole ***or in part***" without the prior written consent of the general partner (Limited Partnership Agreement, § 7.05) (emphasis added). Since Eastwood does not allege that it obtained the prior written consent of the general partner when it purported to acquire the Assignments, it could not have permissibly and effectively purchased even the "economic benefit" portion of its assignors' limited partnership interests.

It is axiomatic that "[a] cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties." *Duration Mun. Fund, L.P. v. J.P. Morgan Sec., Inc.*, 77 A.D.3d 474, 475, 908 N.Y.S.2d 684, 685 (1st Dep't 2010) (dismissing claim for breach of covenant of good faith and fair dealing where "none of the agreements referred to were between plaintiffs and defendant"). The complaint is devoid of any allegations pertaining to a contractual obligation between Eastwood and the Defendants, and none exists. Eastwood's complaint does not even allege what contract, if any, exists between it and the Defendants by which the Defendants would owe Eastwood a duty of good faith and fair dealing. Thus, for this additional reason, Eastwood has failed to state a claim for breach of covenant of good faith and fair dealing and, consequently, its Sixth Cause of Action should be dismissed pursuant to C.P.L.R. § 3211(a)(7).

Conclusion

For all the reasons set forth above, Defendants respectfully request this Court to grant its motion to dismiss the complaint in all respects.

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