SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Return Date: February 7, 2020

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BETTY SEBROW, Individually and as a Shareholder of WORBES CORPORATION,

Plaintiff,

Index No. 33784/2019E

Assigned to
Hon. Llinet M. Rosado, J.S.C.

-against-

ZVI SEBROW, NYCTL 2017-A TRUST and THE BANK OF NEW YORK MELLON as Collateral Agent and Custodian,

Defendants.

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AFFIRMATION IN OPPOSITION

JONATHAN A. STEIN, an attorney duly admitted to practice before all the Courts of the State of New York, affirms the following to be true, under the penalties of perjury, pursuant to CPLR Rule 2106:

1. I am a member of the firm of Jonathan A. Stein, P.C., attorney for Plaintiff, Betty Sebrow ("Mrs. Sebrow"). I am fully familiar with the facts and circumstances set forth in this affirmation. The basis of my knowledge is my review of documents provided to me by Mrs. Sebrow, my conversations with her and my independent fact research.

2. This affirmation is submitted in opposition to Defendant Zvi Sebrow's motion dismissing this action with prejudice, or alternatively, compelling the parties to proceed to arbitration.

3. The motion is supported by the purported affidavit of Defendant Zvi Sebrow, who basis the argument on an unsubstantiated shareholder agreement.

THE "AFFIDAVIT" OF ZVI SEBROW IS FACIALLY DEFECTIVE

4. However, Mr. Sebrow's "affidavit" is not in fact an affidavit. It is not acknowledged by either a notary, commissioner of deeds, or other like officer specified in Real Property Law § 298, which officers are empowered to acknowledge proofs within New York State.

5. Specifically, CPLR § 2309 [Oaths and affirmations] provides in pertinent part:

> (a) Persons authorized to administer. Unless otherwise provided, an oath or affirmation may be administered by any person authorized to take acknowledgments of deeds by the real property law. Any person authorized by the laws of this state to receive evidence may administer an oath or affirmation for that purpose.

6. However, none of the officers specified in RPL § 298 "notarized" Mr. Sebrow's affidavit. Rather, Mr. Sebrow's signature is acknowledged by "Lianne J. Forman, Attorney At Law, State of New Jersey."

7. I have independently verified that Ms. Forman resides in Teaneck, New Jersey, just 1 mile from Defendant Zvi Sebrow's home. Ms. Forman is an attorney with the New York law firm of Moskowitz & Book, LLP. She is licensed to practice in both New York and New Jersey, though in New Jersey she is listed as an "out of state" practitioner, i.e., she is registered, but likely not practicing. I also independently researched whether Ms. Forman is licensed as a notary public in either New York or New Jersey. I have found no listing indicating she is so licensed.

8. Moreover, notwithstanding the fact that the "affidavit" indicates that it was executed in the State of New York, County of New York" it was more likely executed in New Jersey, which is why she likely utilized her "Attorney At Law, State of New Jersey" stamp.

IF THE AFFIDAVIT WAS EXECUTED IN NEW JERSEY IT IS FURTHER DEFECTIVE AS THERE IS NO CERTIFICATE OF CONFORMITY

9. CPLR § 2309(c) [Oaths and affirmations – Oaths and affirmations taken without the state] provides:

> An oath or affirmation taken without the state shall be treated as if taken within the state if it is accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation.

10. The actual form of the certificate is set forth in Real Property Law § 390-b. Even had the affidavit been notarized, the absence of such certificate is renders the affidavit ineffectual.

11. In *Seidman v. Industrial Recycling Properties, Inc.*, 52 A.D.3d 678, 861 N.Y.S.2d 692 (2nd Dep't 2008), the Appellate Division, Second Department reversed a post-sale foreclosure judgment because the plaintiff's affidavit in support of the motion for summary judgment was not properly notarized, and such affidavit and the exhibits admitted through it were entitled to no consideration "regardless of the sufficiency of the opposing papers." 52 A.D.3d at 680, 861 N.Y.S.2d at 693.

12. Consequently, the affidavit in support of the motion to dismiss is a nullity. As such, there is no foundation for the consideration of the purported shareholder agreement[1] and the motion to dismiss must be denied.

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[1] The purported shareholder agreement covers three corporations: Worbes, S&S Soap Co., Inc. and Worbes Leasing Corp. An examination of the New York Department of State website shows that the latter two corporations were both dissolved by proclamation on January 25, 2012.

DEFENDANT MAY NOT CORRECT
THE DEFECTS IN A REPLY SUBMISSION

13. Defendant Zvi Sebrow may not simply correct this defect by submitting corrective papers in a reply affidavit. Specifically, a party may not correct in reply papers that which should have been in the moving papers. *See, e.g.*, *Pampalone v. Giant Bldg. Maint., Inc.*, 17 A.D.3d 556, 793 N.Y.S.2d 462 (2nd Dep't 2005), *Scherrer v. Time Equities, Inc.*, 218 A.D.2d 116, 634 N.Y.S.2d 680 (1st Dep't 1995), *Ritt v. Lenox Hill Hospital*, 182 A.D.2d 560, 582 N.Y.S.2d 712 (1st Dep't 1992) *Wosyluk v. L.T.L. Developers, Inc.*, 147 A.D.2d 475, 538 N.Y.S.2d 478 (2nd Dep't 1989).

14. In fact, in *Seidman v. Industrial Recycling Properties, Inc., supra,* Plaintiff submitted a corrected and properly notarized affidavit in his reply submission, and Defendant acknowledged this in oral argument.[2]

15. In *Wosyluk v. L.T.L. Developers, Inc., supra*, the Appellate Division, Second Department, affirming the refusal of the lower court to consider reply papers, noted:

> We note that the Supreme Court's short-form order indicates that it did not read the plaintiff's reply papers. Since the reply papers contained new matter, which should have been included as part of the papers initially submitted by the plaintiff on his motion (*see, Matter of Spofford Ave.*, 76 App Div 90; *Poillon v Poillon*, 75 App Div 536; 2 Carmody-Wait 2d, NY Prac § 8:59, at 83), we have not considered those papers on this appeal.

16. The rationale for this rule is simple. One opposing a motion only gets one opportunity to do so. He or she can only respond to what the movant places before him or her – not

[2] I know this to be true because I was the attorney who raised the issue in that appeal and made the concession during oral argument. Nonetheless, the improper notarization was the issue upon which the Appellate Division, Second Department reversed the lower court.

what the movant may choose to argue, after recognizing a deficiency in the proof or arguments submitted.

17. Notwithstanding the foregoing, the affidavit of Betty Sebrow is served contemporaneously herewith. Mrs. Sebrow separately addresses the purported shareholder agreement annexed to Defendant Zvi Sebrow's affidavit.

18. It is noteworthy that Mr. Sebrow is proffering a purported shareholder agreement claiming that Mrs. Sebrow was not entitled to inherit her husband's shares in Worbes Corporation ("Worbes"). That purported agreement states that it was prepared by an attorney named Bernard Koenigsberg. Interestingly, Mr. Koenigsberg is the attorney who prepared the Last Will and Testament for David Sebrow. (A copy of the Last Will is annexed hereto as Exhibit "A". A copy of the Letters Testamentary issued by the Nassau County Surrogate's Court is annexed hereto as Exhibit "B").[3]

19. Unlike the "shareholder agreement" the Will was executed before attesting witnesses whose signatures were acknowledged under oath. There is no such authentication with respect to the signatures on the purported "shareholder agreement."[4]

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[3] In the Last Will, David Sebrow left all of his Residuary Estate to his wife, Plaintiff Betty Sebrow. Only in the event she did not survive him would his children receive shares of Worbes. Interestingly, both the purported shareholder agreement and Last Will were prepared by the same attorney. In any event, if the shareholder agreement was taken at face value, it would even, theoretically, defeat a spousal right of election. However, the Court of Appeals has held this not to be the case. *See, In re Estate of Riefberg*, 58 N.Y.2d 134, 446 N.E.2d 424, 459 N.Y.S.2d 739 (1983). Further, the purported agreement was executed in 1997. However, Worbes was incorporated on December 26, 1947, nearly fifty years earlier. By that time, as David Sebrow's spouse, Mrs. Sebrow may already have had certain rights to her husband's shares in Worbes based upon the length of her marriage, as Mr. Sebrow's share were a marital asset. Thus, whether or not a shareholder agreement is ultimately considered by the Court, the provision which, in essence, seeks to disinherit Plaintiff, as a spouse, is unenforceable as a matter of public policy.

[4] In *TD Bank, N.A. v. Piccolo Mondo 21st Century, Inc.*, 98 A.D.3d 499, 949 N.Y.S.2d 444 (2nd Dep't 2012), the Appellate Divsion, Second Department held that there is no presumption of due execution when a signature is not notarized or attested to.

20. In *Scherrer v. Time Equities, Inc., supra*, the Appellate Division, First Department noted the widespread condemnation of raising new material in reply submissions that should have been included in the original moving papers:

> The unfortunate practice of stating a nominal position in the moving papers and reserving the substantive arguments in support of that position for the reply--so that the opponent is deprived of an opportunity to respond--was condemned by this Court in Ritt v Lenox Hill Hosp. (182 A.D.2d 560, 562, 582 N.Y.S.2d 712). It has been consistently rejected in a number of decisions thereafter, most recently in Lumbermens Mut. Cas. Co. v Morse Shoe Co. (218 A.D.2d 624, 626, 630 N.Y.S.2d 1003).

218 A.D.2d at 120, 634 N.Y.S.2d at 682.

21. In *Matter of Gonzalez v. City of New York*, 127 A.D.3d 632, 8 N.Y.S.3d 290 (1st Dep't 2015), the Appellate Division, First Department, relying upon its earlier ruling in *Ritt v. Lenox Hill Hospital, supra,* reiterated its position, to ignore attempts to utilize reply submissions to correct deficiencies in reply papers.

CONCLUSION

22. The Court should not consider the un-notarized affidavit of Defendant Zvi Sebrow. As such, there is no probative value to the statements made therein, and the purported shareholder agreement is a nullity. Moreover, it is contradicted by David Sebrow's Last Will and Testament, in which he bequeathed his entire Residuary Estate, including his shares of Worbes, to his wife, Plaintiff Betty Sebrow.

23. There is no value to the un-notarized affidavit nor can it be corrected in a reply submission for the reasons set forth above. Moreover, there is sufficient reason to believe that it may

have been executed out of New York State, i.e., in Teaneck, New Jersey, which would also have required a certificate of conformity required under CPLR § 2309(c) and § 390-b.

24. For all the reasons set forth above, the motion to dismiss should be denied in its entirety.

WHEREFORE, this Court should issue and enter an order denying the motion to dismiss in its entirety, and granting such other and further relief as to this Court may seem just, proper and equitable.

Dated: Cedarhurst, New York
January 28, 2020

JONATHAN A. STEIN