

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF THE BRONX, PART 25

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

Plaintiff,

-against-

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

Index No.: 33784/2019E
DECISION AND ORDER
Hon. Llinét M. Rosado

BACKGROUND

This shareholder derivative action against the defendants arises out of alleged malfeasances and misconducts of Zvi Sebrow (defendant) to Worbes Corporation (Worbes). The plaintiff's causes of action sound in failure to provide an accounting of Worbes to its shareholders; a shareholder derivative action against the defendant under New York Business Corporation Law (BCL) §626; unjust enrichment and imposition of constructive trust from the plaintiff to the defendant; entitlement to the dissolution of Worbes; and entitlement to the partition of the premises located at 815 East 135th Street, Bronx, New York.

Abraham Sebrow (Abraham)¹, Joseph Sebrow (Joseph)², the defendant, and David Sebrow (David)³ signed the Stockholders' Agreement of Worbes Corporation and the other family businesses⁴, dated January 2, 1997 (Stockholders' Agreement). It is alleged that Worbes and the other family businesses were consolidated between Abraham, Joseph, the defendant, and David pursuant to the Stockholders' Agreement.

The Stockholders' Agreement sets forth that Abraham, Joseph, the defendant, and David are each the owners of twenty-five (25) shares of Worbes. It is alleged that, prior to their deaths, Abraham and Joseph transferred their shares to their children, the defendant and David respectively, through their testamentary dispositions. Through the testamentary dispositions, the defendant and David became the owner of fifty (50) shares of Worbes.

In approximately 1991, David married the plaintiff, Betty Sebrow. Sadly, David passed away in May 2017. Although he had executed a Will and Testament, he never made a testamentary disposition of his shares in Worbes to his issue, or to any other person with the defendant's consent. Following the death of David, the defendant became the sole shareholder of Worbes and has never consented to any third party to be a shareholder of Worbes.

¹ Zvi Sebrow's Father.

² David Sebrow's Father.

³ Zvi Sebrow's first cousin and deceased husband of the plaintiff.

⁴ Worbes Leasing Corporation (WLC) and S&S Soap Co., Inc.

The defendant moves for an order pursuant to CPLR 3211(a) dismissing the plaintiff's complaint for lack of legal capacity to bring this suit as a "shareholder" and for failure to state a claim. In the alternative, the defendant seeks an order compelling arbitration pursuant to Section 9 of the Stockholders' Agreement and CPLR 7501. In support of its motion, the defendant submitted a memorandum of law; an affidavit by Zvi Sebrow; and the Stockholders' Agreement.

The plaintiff submitted an attorney's affirmation in opposition, dated January 28, 2020, and submissions that include an affidavit by Betty Sebrow; a copy of the Last Will and Testament of David Samuel Sebrow (Will and Testament), and the letters testamentary and certificate of appointment of Executor, dated July 10, 2017, issued by Surrogate's Court of the State of New York, County of Nassau.

In response to the opposition by the plaintiff, the defendant filed a memorandum of law in reply, dated February 6, 2020.

DISCUSSION

Affidavit of Zvi Sebrow

The plaintiff argues that the affidavit by the defendant is not an affidavit because it is not acknowledged by either a notary, commissioner of deeds, or other like officer specified in Real Property Law §298, but acknowledged by Ms. Lianne J. Forman, "Attorney At Law - State of New Jersey." In addition, the plaintiff argues that Ms. Forman is licensed to practice in New Jersey, however, she is listed as an "out of state" practitioner, and she is not licensed as a notary public in either New York or New Jersey.

The plaintiff further argues that, under CPLR 2309(c), "Oaths and affirmations" can be taken without the state with same force and effect as if taken within the state if accompanied by a certificate of conformity. The plaintiff contends that Zvi Sebrow's affidavit is not accompanied by such certificate, and therefore it is ineffectual.

Furthermore, the plaintiff cited *Seidman v. Industrial Recycling Properties Inc.*, in support of her assertions that the affidavit was not properly notarized in New Jersey and should not be considered by this Court. *Seidman v. Industrial Recycling Properties Inc.*, 52 A.D.3d 678 (2d Dept. 2008).

However, this Court does not agree. First, under New Jersey law, an attorney admitted to practice in the State of New Jersey may administer all oaths, affirmations, and affidavits, and such officers need not certify such documents under seal for same to be effective. New Jersey Statutes Annotated §§41:1-7, 41:2-1. Here, Ms. Forman is admitted to practice in the State of New Jersey. Zvi Sebrow was duly sworn and his affidavit was executed before Ms. Forman. The plaintiff failed to offer evidence for this Court to find otherwise.

Second, the Appellate Division First Department held that the absence of a certificate of conformity as required by CPLR 2309(c) is a mere irregularity, and not a fatal defect. *Wager v. Rao*, 178 A.D.3d 434 (1st Dept. 2019); *Matapos Tech. Ltd. v. Compania Andina de Comercio Ltda*, 68 A.D.3d 672, 673 (1st Dept. 2009); *see also U.S. Bank Natl. Assn. v. Dellarmo*, 94 A.D.3d

746 (2d Dept. 2012). The Appellate Division First Department further held that the courts are not rigid about this requirement. *Matapos Tech. Ltd.*, 68 A.D.3d at 673. This view is shared by the Second and Third Departments of the Appellate Division as well. *See Todd v. Green*, 122 A.D.3d 831 (2d Dept. 2014); *Mack Cali Realty v. Everfoam Insulation Sys., Inc.*, 110 A.D.3d 680 (2d Dept. 2013); *Fredette v. Town of Southampton*, 95 A.D.3d 940 (2d Dept. 2012); *Sparaco v. Sparaco*, 309 A.D.2d 1029 (3d Dept. 2003); *Nandy v. Albany Med. Ctr. Hosp.*, 155 A.D.2d 833 (3d Dept. 1989).

Finally, although the plaintiff cited the *Seidman* case in support of her argument that the affidavit was not properly notarized and should not be considered by this Court, the *Seidman* case is distinguishable from this case. In contrast to the *Seidman* case, the affidavit of Zvi Sebrow was taken under oath and notarized by Ms. Forman who is authorized to administer such oath and notarization.

Therefore, this Court can consider the affidavit of Zvi Sebrow for the purpose of CPLR 3211.

CPLR 3211 Standard of Review

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be liberally construed. CPLR 3026; *Leon v Martinez*, 84 N.Y.2d 83, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994). The court must accept the facts alleged in the complaint as true, accord a plaintiff the benefit of every possible favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory. *Chanko v American Broad. Co. Inc.*, 27 N.Y.3d 46, 49 N.E.3d 1171, 29 N.Y.S.3d 879 (2016); *Leon*, 84 N.Y.2d at 87-88; *Amaro ex rel. Almazan v Gani Realty Corp.*, 60 A.D.3d 491, 492 (1st Dept. 2009). A motion to dismiss under CPLR 3211 should be granted only where “the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted.” *Biondi v. Beekman Hill House Apartment Corp.*, 257 A.D.2d 76 (1st Dept. 1999).

Under CPLR 3211(a)(1), a motion to dismiss will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim. *Leno*, 84 N.Y.2d at 88; *Array BioPharma, Inc. v. Astrazeneca AB*, 184 A.D.3d 463, 464 (1st Dept. 2020); *Foster v. Kovner*, 44 A.D.3d 23, 28 (1st Dept. 2007). Dismissal is appropriate only where the documentary evidence submitted “utterly refutes plaintiff’s factual allegations,” and conclusively establishes a defense to the asserted claims as a matter of law. *Carlson v. American Intl. Grp., Inc.*, 30 N.Y.3d 288, 298 (2017); *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002); *Amsterdam Hosp. Grp., LLC v Marshall-Alan Associates, Inc.*, 120 A.D.3d 431, 433 (1st Dept. 2014).

Under CPLR 3211(a)(3), a defendant moving to dismiss based upon a plaintiff’s alleged lack of standing, has the burden to establish, prima facie, the plaintiff’s lack of standing as a matter of law. *Berger v. Friedman*, 151 A.D.3d 678, 679 (2d Dept. 2017). “To defeat the motion, a plaintiff must submit evidence which raises a question of fact as to its standing.” *Id.* at 679.

Documentary Evidence and Lack of Legal Capacity to Sue

The defendant submitted the Stockholders' Agreement. Pursuant to Section 6 of the Stockholders' Agreement:

No stockholder of S&S, Worbes and WLC shall sell, transfer, assign, mortgage, hypothecate his shares in any of said corporations or enter into any agreement as the result of which some third party shall become a stockholder in any of said corporations without the unanimous consent of all the other stockholders with the sole exception that any stockholder may make a testamentary disposition of his shares to his issue in which event his issue shall own the shares of his deceased father but subject nevertheless to the terms and conditions contained in this agreement. Any other attempted transfer or disposition of such shares shall be a nullity and unenforceable.

On the other hand, the plaintiff submitted David's Will and Testament. The Will and Testament declares that all the rest, remainder and residue of David's real or personal property, wherever situated and whether acquired before or after the execution of the Will and Testament, David gives, devises and bequeaths to the plaintiff.

The defendant attests that David had not made a testamentary disposition of his shares in Worbes to his issue, and the defendant has not consented to any third party becoming a shareholder of Worbes.

According to the Stockholders' Agreement, unless David made a testamentary disposition of his shares to his issue, or the defendant consented to David's transfer of his shares in Worbes to his wife, such transfer or disposition of the shares in Worbes shall be a nullity and unenforceable.

Even if this Court accepts David's Will and Testament as true, there is no evidence that David made a testamentary disposition of his shares to his issue or obtained a consent from the defendant. Furthermore, the plaintiff failed to offer any statute or case law that defeats the language of the Stockholders' Agreement.

Therefore, after David's death, as of the date of this motion, the defendant remains as the sole shareholder of Worbes, and the plaintiff is not a shareholder of Worbes.

Finally, the plaintiff attests that David's signature on the Stockholders' Agreement was forged, and the defendant routinely forged David's signature when he needed it. The plaintiff further argues that unlike the Stockholders' Agreement, the Will and Testament was signed and executed before Mr. Bernard Koenigsberg who is a notary public in the State of New York. However, even if this Court accepts the alleged facts as true and draws every possible favorable inference for the plaintiff, the plaintiff's argument is not availing. The plaintiff did not raise an issue that the Stockholders' Agreement is unenforceable in her complaint, and the factual allegations and causes of action in her complaint are based on the Stockholders' Agreement. If the Stockholders' Agreement was actually forged, then the plaintiff should not rely on such Stockholders' Agreement to allege her causes of action. The plaintiff first has to allege that the

Stockholders' Agreement was forged and not enforceable, and show that David was a shareholder of Worbes, but not based on the allegedly forged Stockholders' Agreement. However, the plaintiff failed to do so and offers inconsistent arguments here.

This Court finds that the Stockholders' Agreement submitted as a documentary evidence resolved all factual issues as a matter of law, and the defendant made a prima facie showing that the plaintiff does not have standing to sue as a matter of law.

Accordingly, the defendant's motion to dismiss pursuant to CPLR 3211(a) is granted.

Arbitration Clause

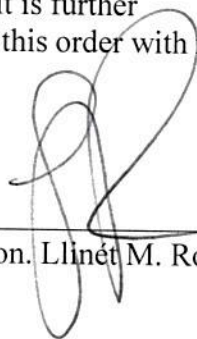
Finally, Section 9 of the Stockholders' Agreement sets forth that any controversy arising out of or relating to the Stockholders' Agreement shall be resolved by an arbitration, and such written agreement to arbitrate is enforceable in the State of New York. CPLR 7501. However, since this Court concluded that the plaintiff is not a shareholder, this Court declines to consider the defendant's arguments regarding the arbitration clause.

Accordingly, it is hereby

ORDERED, that the defendant's motion to dismiss is granted; and it is further
ORDERED, that the plaintiff's complaint is dismissed; and it is further
ORDERED, that the defendant is directed to serve a copy of this order with notice of entry on the plaintiff within thirty (30) days from the date of entry.

This constitutes the decision and order of the court.

Dated: October 9, 2020



Hon. Llinét M. Rosado, J.S.C.

HON. LLINÉT M. ROSADO, J.S.C.