SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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

Plaintiff,

-v-

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

Defendant.

Index No. 33784/2019E

MEMORANDUM OF LAW OF DEFENDANT ZVI SEBROW IN SUPPORT OF HIS MOTION, PURSUANT TO C.P.L.R. 3211(a)(1) (3) AND (7), TO DISMISS THE COMPLAINT, OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION

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PRELIMINARY STATEMENT

Defendant Zvi Sebrow ("Zvi" or "Defendant") respectfully submits this Memorandum of Law in support of its motion for an order, pursuant to CPLR 3211(a)(1) (3) and (7), dismissing the complaint of Plaintiff Betty Sebrow ("Plaintiff" or "Betty") for failure lack of legal capacity to bring this suit and for failure to state a claim upon which relief may be granted or, in the alternative, compelling arbitration compelling Arbitration, pursuant to the Stockholders' Agreement of the Plaintiff Corporation, and for such other and further relief as the Court may deem just and proper.

Betty acknowledges the validity, effect, and control of the Stockholders' Agreement for the Plaintiff corporation - -Worbes. She includes its terms and provisions in her Complaint (See, Complaint, ¶ 10, 11, 12). Pursuant to the clear and unambiguous terms of the Stockholder Agreement, Betty is not a shareholder, owner, officer, or director of the Plaintiff Corporation. It is not a matter of ambiguity or interpretation. The Stockholders' Agreement provides that the transfer or ANY shares of the corporation may ONLY be through a testamentary disposition to an ISSUE of an existing shareholder. Any other attempts to transfer shares is a "nullity and is unenforceable." Under NO circumstances can shares transfer to a widow or an estate. Under NO circumstances can shares transfer to anyone without a testamentary disposition. Thus, Betty is not a shareholder and her self-appointed transfer of shares to herself is a "nullity and unenforceable." Sher, therefore, cannot maintain this suit.

Moreover, if Betty is deemed a stockholder in stark contravention of the Stockholders' Agreement and the unambiguous intent of Worbes' founding and remaining stockholders, any dispute between the stockholders must be resolved in Arbitration. *(See, Stockholders' Agreement, Section 9).*

For those reasons, it is respectfully submitted that the Complaint should be dismissed with prejudice or, in the alternative, stayed and compelled to arbitration.

STATEMENT OF FACTS

Plaintiff Worbes Corporation was founded in or around 1960 by my father, Abraham Sebrow and my uncles Joseph Sebrow, Sol Sebrow and Norman Sebrow. Thereafter, the corporation and other family businesses were consolidated between Abraham, Joseph, myself, and my first-cousin, David Sebrow. *(See the Affidavit of Zvi Sebrow ("Zvi Aff.") at ¶ 2).*

Worbes was formed along with three "family" business: Worbes Corporation, Worbes Leasing Corporation, and S&S Soap Co., Inc. *(Zvi Aff. at ¶ 3).*

All of the family businesses were governed by a single Stockholders' Agreement, entered into on January 2, 1997. *(A true copy of the Stockholders' Agreement is attached to the Zvi Aff. as Exhibit A). (Zvi Aff. at ¶ 4).*

Pursuant to the Stockholder' Agreement, Abraham, Joseph, Zvi, and David were each the owners of 25 shares of stock and 25% of each corporate entity. *(Zvi Aff. at ¶ 5).*

Initially, Abraham was named president, David - Vice President, Zvi – Treasurer, and Joe – Secretary. *(Zvi Aff. at ¶ 6).*

The exclusive business of Worbes was to hold, own, operate, and maintain certain improved real property located at 815 East 135th Street, Bronx, New York 10454 (the "Building"). The Building had been acquired by Abraham and Joseph in or around 1950. *(Zvi Aff. at ¶ 7).*

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 stock holder 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.

(See, Stockholders' Agreement, Exhibit A to the Zvi Aff. at Section 6).

Each of Abraham and Joseph complied with this provision by making a testamentary disposition of their shares to their children - - Zvi and David - - who, upon the deaths of Abraham and Joseph, each became 50% owners of Worbes. *(Zvi Aff. at ¶ 9).*

In or about 1991, David married Plaintiff Betty Sebrow. Sadly, in May 2017, David passed away. *(Zvi Aff. at ¶ 10).*

At his death, David had NOT made a testamentary disposition of his shares in Worbes to his issue (or, to anyone). Thus, pursuant to the Shareholders' Agreement, "any other attempted transfer or disposition of such shares shall be a nullity and unenforceable." Moreover, no "third party" may become a stockholder of Worbes without the unanimous consent of all other stockholders - - which, after David's death, was only Zvi Sebrow. Thus, after David's death, Zvi remains as the sole shareholder of Worbes. Zvi has not consented to any third party becoming a stockholder of Worbes. *(Zvi Aff. at ¶ 11).*

Sadly, since David's death, Plaintiff Betty has attempted to take control of the family businesses - - included Worbes. She has made untenable demands, resisted any reasonable operation of the affairs of the businesses, retained numerous counsel to fight any act by Zvi and, for the most part, tried to control the Building and its disposition. *(Zvi Aff. at ¶ 12).*

Since David's incapacitation in September 2014, and continuing after David's death, Zvi - - the sole stockholder and officer of the businesses - - has exclusively devoted significant time, effort, resources, and his personal funds to the family businesses and the Building. He has paid taxes, expenses, and salaries. He ran and managed the companies. Other than covering for the secretary by answering the phones on the few occasions when the secretary was out and Zvi needed

to be off premises, Betty has contributed nothing to the businesses or the Building - - which is not surprising - - she is neither an owner, officer, nor stockholder of any of the corporate entities. *(Zvi Aff. at ¶ 13).*

Yet, she now brings this action in her own name and as a "shareholder" of Worbes Corporation seeking, once again, to force its actual sole shareholder - - Zvi - - to take certain actions in the manner that she demands. *(Zvi Aff. at ¶ 14).*

Section 9 of the Stockholders' Agreement provides as follows:

> Any controversy arising out of or relating to this Agreement shall be resolved by Arbitration before a panel of three (3) arbitrators who shall consist of an orthodox rabbi, a lawyer and a layman. If the parties cannot agree on a panel, the panel shall be selected by the American Arbitration Association who shall choose the three individuals described herein. The findings of the arbitration panel shall be confirmed by the Supreme Court of the State of New York by the prevailing party. The costs of the arbitration panel shall be assessed by said panel and paid according to the panel's decision which shall be final and binding on all parties. A majority vote of the panel shall be sufficient, binding and enforceable.

(See, Stockholders' Agreement, Exhibit A to the Zvi Aff. at Section 9).

LEGAL ARGUMENT

BETTY HAS NO STANDING TO BRING THIS ACTION

The Stockholders' Agreement is binding and controlling in this case. The Complaint itself acknowledges the validly and effect of the Stockholders' Agreement in paragraphs 10, 11, and 12.

Moreover, because the Stockholders' Agreement is referenced in, quoted, cited, and relied upon by the Complaint, it is, by law, incorporated by reference.

The Stockholders' Agreement is clear and unambiguous with respect to the transfer or disposition of shares of Worbes. Even upon the death of a shareholder - - David - - the shares can ONLY pass or be transferred through a testamentary disposition to the shareholder's issue - - his children. Never to a widow, and not to anyone without a testamentary disposition. Any

attempts to otherwise transfer shares or appoint new shareholders is "a nullity and unenforceable" including to a widow and even included to issue without a testamentary disposition.

Thus, it is unclear how and why Betty believes she is a shareholder of Worbes or has ANY legal rights therein. It is unclear how she brings this action as a Plaintiff or as a shareholder. What is perfectly clear and undeniable, based on the very agreement upon which this Action is based, is that she is NOT a shareholder, officer, or owner of Worbes and that her "self-appointment" is a nullity and enforceable.

For that reason Plaintiff Betty Sebrow does not have legal capacity to sue, pursuant to CPLR 3211(a)(3) and the Complaint must be dismissed.

ANY DISPUTE HEREUNDER MUST BE BROUGHT IN BINDING ARBITRATION

Moreover, if Betty is deemed a stockholder in stark contravention of the Stockholders' Agreement and the unambiguous intent of Worbes' founding and remaining stockholders, any dispute between the stockholders must be resolved in Arbitration. *(See, Stockholders' Agreement, Section 9).*

"A written agreement to arbitrate is enforceable under New York law." (CPLR 7501.) A court may issue an order compelling arbitration upon application by a party aggrieved by another party's failure to arbitrate. Such an order "shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration." CPLR 7503 [a].) Arbitration is a favored means of resolving disputes. (*Matter of Nationwide Gen. Ins. Co. v. Investors Ins. Co.* of Am., 37 NY2d 91, 95, 332 NE2d 333, 371 NYS2d 463 [1975].) "`Where there is no substantial question whether a valid agreement was made or complied with . . . the court shall direct the parties to [*407] arbitrate.'" (*Liberty Mgt. & Constr. v. Fifth Ave. & Sixty-Sixth St. Corp.*, 208 AD2d 73, 77, 620 NYS2d 827 [1st Dept. 1995], quoting CPLR 7503 [a].) "Thus, it is for the courts to

determine, in the first instance, whether the parties have entered into a binding agreement to arbitrate." (*Id.*) The "judicial inquiry ends once it is determined that a valid agreement to arbitrate exists and that the matter in controversy falls within the scope of the agreement." (*Id.* at 80.) *Tong v. S.A.C. Capital Mgt., LLC*, 16 Misc. 3d 401, 406-407, 835 N.Y.S.2d 881, 886, (1st Dept. 2007).

CONCLUSION

Accordingly, based on the very agreement upon which this action is based, it is clear, and beyond any dispute, that Plaintiff Betty Sebrow is not a stockholder of Worbes and, therefore, does not have the legal capacity to bring this Action as a "shareholder" of Worbes or as an "individual" with any legal interest therein. Moreover, if she is deemed a shareholder of Worbes, it is equally clear that this matter must be brought in Arbitration pursuant to the express terms of the Stockholders' Agreement and the intent of the founding and current shareholders of Worbes.

DATED: New York New York
January 1, 2020

N. ARI WEISBROT, ESQ.