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

REPLY MEMORANDUM OF LAW OF DEFENDANT ZVI SEBROW IN FURTHER 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 Reply Memorandum of Law in further support of his 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.

As set forth in Defendant's moving papers, this case could not be simpler. There is a Stockholders' Agreement that all parties concede governs this case and the subject corporation. The Complaint admits that Plaintiff's husband was a "signatory" of that Agreement. *(Compl. ¶ 10).* That document clearly and unambiguously prohibits the transfer of any shares of the corporation to any third party, with ONE exception - - to the ISSUE of the shareholder, in a testamentary disposition. Any other attempt to transfer, pass, inherit, or devise the shares of the company are a "nullity" and "enforceable." Plaintiff is the widow of a deceased shareholder. She brings this derivative action as a "shareholder," which she clearly cannot be, pursuant to the Agreement. It is really that simple. Moreover, the underlying Stockholders' Agreement requires this and any dispute to be determined in arbitration.

Plaintiff cannot deny, dispute, or refute these truths. So, her opposition tries to avoid dealing with the dispositive Agreements.

First, she claims that the affidavit of Zvi Sebrow is defective because it is not notarized by a notary. But, she (or her attorney) deceptively (and, perhaps sanctionably) omits the provision of the CPLR (and the case-law) that specifically permits an out-of-state oath, provided the oath is taken under the laws of the state in which it is sworn. In New Jersey, any attorney-at-law is

authorized to take oaths for all purposes, including the recording of Deeds. Courts in New York routinely accept the taking of oaths by NJ Lawyers precisely because the CPLR requires it. (Though, there is not a huge number of reported cases on this topic because, seriously, who would raise this objection to a properly sworn, attorney-recorded affidavit taken under the laws of New Jersey? Someone who does not have any better arguments). Plaintiff's counsel simply omits these facts from his Affirmation. More concerning is the fact that Plaintiff's counsel, bases the entirety of his opposition to his speculation about where the attorney who signed the Affidavit lives, practices, and where it was signed. Even if counsel's speculation was accurate (and permitted), it makes no difference, as New Jersey law makes no distinction about the validity of the affirmation based on those factors and New York law requires the acceptance of the oath - - regardless of the issues on which counsel speculates.

Second, Plaintiff submits her own Affidavit in which she claims, for the first time, that her husband's signature on the Stockholder's Agreement is a forgery. It is bizarre because the parties, and counsel, have been addressing this very issue for the last 3 years and she has never made that claim before. To the contrary, she brought this lawsuit based on the Stockholders' Agreement, and her Complaint specifically concedes that her husband is a "signatory." *(Complaint, ¶10).* The Complaint confirms the validity of the Agreement by seeking relief thereunder. Moreover, it is Plaintiff's burden to demonstrate any viability to this defense. She could and should (having been given two adjournments of this motion), retained a handwriting expert. Or an affirmation from the lawyer who drafted it. It would have taken one day, and, perhaps, would have raised an issue sufficient to defeat this motion. But, likely it would make no difference because the Complaint alleges that her husband did sign the agreement. She cannot defeat a motion to dismiss by arguing with her own allegations. The four corners of the complaint do NOT mention, establish, or even assert that the Stockholders' Agreement is invalid based on forgery. Indeed, Plaintiffs' counsel

states that the Will and the Stockholders' Agreement were both prepared by the same attorney!! Is the argument that one is forged and the other is not, when prepared by the same lawyer? It would appear that Plaintiff simply cannot get her story straight and instead of being candid with the Court, she concocts these wild theories (improper notarization, forgery, etc.). Nevertheless, the terms of the Stockholders' Agreement, upon which Plaintiff sues, could not be clearer and less ambiguous. Plaintiff has no interests, rights, shares, or role in the corporations. Her complaint must be dismissed.

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.

In opposition, Plaintiff raises 2 arguments: (1) the affidavit of Defendant Zvi Sebrow is improperly notarized and, therefore cannot be considered by the Court, and (2) the signature of David Sebrow on the Stockholders' Agreement may be a forgery - - even though no evidence, no confirmation, and no direct allegation is offered. Both arguments fail as a matter of law.

The Affidavit of Zvi is Properly Admitted under NJ and NJ Law
but Even if it is Not, it Does Not Change the Outcome of This Motion

First, the validity, admissibility, and viability of the Zvi Affidavit is irrelevant. Even if the Court were to disregard it entirely, the motion to dismiss is based on the Stockholders' Agreement - - referenced and cited in the Complaint and upon which the lawsuit is based. The Plaintiff cannot sue based on a document, reference it in her complaint, seek to recover shares based on it, but then deny its admissibility. Thus, the Complaint and documents incorporated by reference, are properly before the Court. The balance of the Zvi affidavit is merely to provide background and context. Even if the Court precludes the Affidavit, the issues raised in this motion (standing and arbitration), come solely and directly from the document referenced in the Complaint and relied upon in bringing this lawsuit.

Second, Plaintiff relies on CPLR 2309 ("Oaths and Affirmations") in raising its opposition to this motion. But, sanctionably, Plaintiffs' counsel cites only section (a) of that law. He omits section (c), which provides as follows:

> (c) Oaths and affirmations taken without the state. 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.

Under New Jersey law, an Attorney can take oaths in the same manner as a notary or the Court. *N.J.S.A*. 41:2-1 provides as follows:

> 41:2-1. All oaths, affirmations and affidavits required to be made or taken by law of this State, or necessary or proper to be made, taken or used in any court of this State, or for any lawful purpose whatever, may be made and taken before any one of the following officers:
>
> **Attorneys-at-Law and Counsellors-at-Law of this State.**

Courts in New York have routinely admitted affidavits signed by New Jersey lawyers - - without any additional certification. In the *Matter of Hanson*, 151 A.D.3d 1267, 1268, 53 N.Y.S.3d 577, 578, (3d Dept 2017), the Appellate Division held as follows:

> Notwithstanding AGC's objections, we find that Hanson's affidavit was properly executed. Under New Jersey law, attorneys admitted to practice in that state may administer oaths and affidavits, and such officers need not certify such documents under seal for same to be effective (*see* NJ Stat Ann §§ 41:1-7, 41:2-1). The record before us assures us that Hanson's affidavit was executed before an attorney admitted to practice in New Jersey.

See also, *A.A. v B.B.*, 2018 N.Y. Misc. LEXIS 5549, 2018 NY Slip Op 51715(U), 61 Misc. 3d 1223(A), 111 N.Y.S.3d 803 (NY County, 2018).

Yet, Plaintiff cites cases in which the underlying affirmation was not notarized at all! See, *Seidman v. Industrial Recycling Properties, Inc.,* 52 A.D.3d 678, 861 N.Y.S.2d 692 (2nd Dep't 2008), in which the Court refused to consider an affirmation that was NOT notarized. While that may be the facts that Plaintiff wants to impose on this Court, the reality is that in this case the Affirmation WAS taken under oath by a lawyer authorized to do so under both New Jersey and New York law.

Defendant has no need to "correct" anything on reply, although, again, even if the notarization was defective, this is not the case of an unsworn document being corrected with a sworn document. It is a properly sworn document being corrected to include whatever this court may require to accept the affidavit. No case prohibits this because there is no surprise, prejudice, or impact from the correction, as there would be in the cases cited by Plaintiff.

Parenthetically, Plaintiff's counsel submits series of surprising and confounding admissions in his affirmation that require a quick highlight. He asserts that the same lawyer who prepared the decedent's Will, also prepared the Stockholders' Agreement. This fact surely disproves ANY claim by Plaintiff that the Stockholders' Agreement is a forgery. Counsel also

alleges that David Sebrow "left all of his residuary estate to Plaintiff. Only in the event that she did not survive him would his children receive shares of Worbes." (Stein Aff. FN 3). It is understandable that this argument is relegated to a footnote. It is frivolous on its face. The agreement between the sole shareholders of the Company, including David, prohibits any testamentary disposition of the shares except to the issue of the shareholder. David did not "cut out" Betty from his estate. He left her EVERYTHING! (But in the sole case of the shares of Worbes, he did so improperly and in violation of his agreement with third-party shareholders. It is a "nullity" and "unenforceable"). Surely, the residual estate satisfied any spousal right of election but even if it did not, the right of election would not trump or supersede a contractual agreement between the decedent and 3 other parties. Otherwise, a corporation, formed between individuals who oppose the addition or substitution of any other person (much like this case), but then be forced to accept co-shareholders with whom they do not want to partner. The law does not require the remaining shareholders to become partners with someone they do not wish to partner with. Perhaps there are other remedies (dissolution, partition, etc.). But the law would not permit an outsider to become a shareholder against the wishes of the remaining shareholders. Betty could NEVER become a shareholder.

Plaintiff's Claim of Forgery is an Obvious Sham and Should Be Sanctioned

Plaintiff's second argument - - forgery - - fares no better.

First, this allegation is omitted from the Complaint. The motion to dismiss is based on the allegations of the Complaint. Without a hint of irony, Plaintiff complains about late corrections to the motion to dismiss, while adding a COMPLETELY different allegation to her claims in this case. The Complaint does not attack the enforceability or applicability of the Stockholders' Agreement, for forgery or any other reason. Now she attempts to do so? That would, at the very

least, require an amended complaint (along with the granting of this motion). But, the latest allegation does not survive the most basic scrutiny.

Her own complaint makes the following allegations.

> 10. By shareholder agreement made as of January 2, 1997(the "Shareholder Agreement") the then four signatories acknowledged a twenty-five percent (25%) ownership in the shares of Worbes and two other closely held corporation.
>
> 11. Ultimately, the interest of two of the shareholders, Abraham Sebrow and Joseph Sebrow, passed to their sons Zvi Sebrow and David Sebrow.
>
> 12. In accordance with the provisions of the Shareholder Agreement, after Zvi Sebrow and David Sebrow became the only shareholders of Worbes, there was a requirement of unanimity with respect to all decisions of the Board of Directors (the "Board") of Worbes.

Thus, in her Complaint, she refers to her husband as a "signatory" of the Stockholders' Agreement. She defines it as an "agreement." She cites its provisions, and she claims that, based on the Agreement, her husband became a 50% shareholder in the company. She also cites the unanimity requirement of the Agreement. Now, as a desperate attempt to avoid dismissal, she completely contradicts her own complaint by suggesting that her husband is NOT a signatory? That the agreement is NOT binding and enforceable? This is the very definition of a Sham Affidavit.

Second, her attorney asserts that the same lawyer who drafted her husband's (valid) will, also drafted the (forged) Stockholders' Agreement. Surely, he had a relationship with David. Surely, he knew him and his signature. Is Plaintiff suggesting that the lawyer facilitated a fraud and that the defendant committed one? (After pleading that her husband DID sign the Agreement). Besides being impossibly speculative and perhaps defamatory,

where is the affirmation from the lawyer who prepared the agreement? Where is the handwriting expert? Where is anything except Plaintiff's "belief" that the signature "may" be a forgery? Surely when opposing a motion to dismiss, and when making such egregious accusations, the mere speculation of a party-in-interest is insufficient.

ANY DISPUTE HEREUNDER MUST BE BROUGHT IN BINDING ARBITRATION

Plaintiff does not dispute or oppose the prong of the motion relating to mandatory arbitration. For this additional reason, if the Court does not dismiss the complaint for lack of standing, it should dismiss and compel arbitration. *(See, Stockholders' Agreement, Section 9).*

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
February 6, 2020

N. ARI WEISBROT, ESQ.