SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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WORBES CORPORATION and ZVI SEBROW,

Plaintiffs,

-against-

BETTY SEBROW and BETTY SEBROW as Administrator of the Estate of DAVID SEBROW,

Defendants.

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Index No. 800583/2022E

Assigned to
Hon. Fidel E. Gomez, A.J.S.C.

AFFIRMATION IN OPPOSITION

JONATHAN A. STEIN, an attorney duly admitted to practice before all the Courts of the State of New York, hereby 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 Defendants Betty Sebrow, sued individually and as the "Administrator" of the Estate of David Sebrow. In fact, Plaintiff should know from a prior action, which is still active, that Mrs. Sebrow is the Executor of the Estate of her late husband, David Sebrow.

2. I am fully familiar with the underlying facts of this matter. Unfortunately, due to the abbreviated time to respond to Plaintiffs' voluminous motion I will be brief.

3. First, my involvement in this matter commenced with Mrs. Sebrow's initiation of an action against Plaintiff herein captioned *Betty Sebrow, Individually and as a Shareholder of Worbes Corp. v. Zvi Sebrow, et.ano.*, Sup. Ct., Bronx Co., Index No. 33784/2019E. In that action we presented proof to the Court that Mrs. Sebrow is the Executor of her late husband's Estate – not the Administrator. (A copy of Letters Testamentary were efiled in the prior action as efile document 20). Thus, she has been sued in the wrong capacity.

4. Zvi Sebrow was represented by an attorney named Ari Weisbrot in that action. For the record, although the Hon. Linet Rosado, J.S.C. dismissed that action, we timely moved to reargue. All papers were fully submitted by early April 2021, the case was reassigned to the Honorable Mary Ann Brigantti, J.S.C. The motion to reargue and renew has been *sub judice* since August 5, 2021.

5. Additionally, Mrs. Sebrow timely filed a notice of appeal from the order dismissing the complaint. The appeal was fully perfected on August 9, 2021 in the Appellate Division, First Department (Docket No. 2021-01311). As of this date Zvi Sebrow has not filed a Respondent's Brief in the appeal. In fact, we have granted multiple extensions to Mr. Sebrow's appellate counsel.

6. At the time that action was commenced I conveyed two offers to Zvi Sebrow's prior attorney Ari Weisbrot. One, was from an entity known as Altmark for the sum of $8 Million. The other, which I had to get permission to extend was from an individual named Nissim Holland, and was for $8.4 Million. (Copies of the two offers are collectively annexed hereto as Exhibit "A").

7. I told Mr. Weisbrot that Mrs. Sebrow was prepared to go forward with either deal, provided all money other than taxes due and brokers' fees would be escrowed pending an accounting as to what Zvi Sebrow legitimately laid out for the property. Mr. Weisbrot categorically rejected the offer.

8. Mr. Weisbrot apparently passed away in the Spring of 2021. When his new counsel came aboard they immediately requested an extension to time in the matter before the Appellate Division, First Department. I readily agreed. I also agreed to three additional request for extensions to file the Respondent's Brief in the appeal. Had Mr. Sebrow actually filed his Brief a decision on the appeal might already have been issued.

PLAINTIFFS ARE REQUESTING AN
IMPROPER ADVISORY OPINION

9. It is clear that what Mr. Sebrow is requesting here is an advisory opinion from the Court that he can go forward with the sale of the Premises in the manner he sees fit. He could have brought the motion in the prior case, where the motion to reargue is pending and where the notice of pendency which was placed on the property still remains.

10. Neither Mr. Weisbrot nor Mr. Sebrow's current counsel have taken any steps to discharge the notice of pendency.

11. Further, it would be palpably improper to issue the kind of advisory decision this Court is being asked to issue. In essence Plaintiff is requesting an order from this Court impinging on Mrs. Sebrow's appellate rights and rights with respect to her motion to reargue and renew.

12. As stated the by Court in *Cuomo v. Long Island Lighting Co.,* 71 N.Y.2d 349, 354, 520 N.E.2d 546, 549, 525 N.Y.S.2d 828, 830 (1988):

> The courts of New York do not issue advisory opinions for the fundamental reason that in this State "[the] giving of such opinions is not the exercise of the judicial function" (*Matter of State Indus. Commn.,* 224 NY 13, 16 [Cardozo, J.]). HN3[ ] The role of the judiciary is to "'give the rule or sentence'" (*Matter of Richardson*, 247 NY 401, 410), and thus the courts may not issue judicial decisions that "can have no immediate effect and may never resolve anything" (*New York Pub. Interest Research Group [NYPIRG] v Carey*, 42 NY2d 527, 531).

13. Yet, it is exactly an "advisory opinion" that the Court is being requested to render here.

14. Similarly, in *New York Public Interest Group, Inc. v. Carey*, 42 N.Y.2d 527, 529-530, 369 N.E.2d 1155, 1157, 399 N.Y.S.2d 621, 623 (1977), the Court stated:

> It is fundamental that the "function of the courts is to determine controversies between litigants * * * They do not give advisory opinions. The giving of such opinions is not the exercise of the judicial function" (*Matter of State Ind. Comm.*, 224 NY 13, 16 [Cardozo, J.]). This is not merely a question of judicial prudence or restraint; it is a constitutional command defining the proper role of the courts under a common-law system (*Matter of State Ind.Comm., supra*).

15. Plaintiff here is not entitled to short-circuit the legal system, simply because, having rejected much higher offers, he now feels a financial pinch.

PLAINTIFF IS VIOLATING THE DEADMAN'S STATUTE

16. Defendants object, on evidentiary ground's to the Court's consideration of the purported affidavit of Zvi Sebrow. Defendant, in addition to her other roles, is also the Executor of the Estate of David Sebrow (*See,* Letters Testamentary, efile document 20 in prior action). No one other than Zvi Sebrow seeks to authenticate the purported shareholder agreement. In fact, no one else could have sought to authenticate it as every purported signatory to the purported agreement, including the attorney who is claimed to have prepared it is deceased. There is no question that Zvi Sebrow has an interest in the admissibility of the purported shareholder agreement. Consequently, the Court also should have refused to consider his affidavit and the purported shareholder agreement under CPLR § 4519 [Personal transaction or communication between witness and decedent or mentally ill person] – New York's Deadman's Statute.

17. CPLR § 4519 provides in pertinent part:

> Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person, or a person deriving his title or interest from, through or under a deceased person or mentally ill person, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or mentally ill person, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication.

18. Notably, Plaintiff Zvi Sebrow is a textbook interested party.

19. As applied to documentary evidence, such as the purported shareholder agreement, the Appellate Division, First Department held in *Acevedo v. Audubon Mgmt. Inc.*, 280 A.D.2d 91, 95, 721 N.Y.S.2d 332, 335 (1st Dep't 2001):

> The Dead Man's Statute does not, by its terms, prohibit the introduction of documentary evidence against a deceased's estate. On the contrary, an adverse party's introduction of a document authored by a deceased does not violate the Dead Man's Statute, as long as the document is authenticated by a source other than an interested witness's testimony concerning a transaction or communication with the deceased (*see, Kiser v Bailey,* 92 Misc 2d 435; *Yager Pontiac v Danker & Sons,* 41 AD2d 366, *affd* 34 NY2d 707).

20. However, the purported shareholder agreement was not authenticated in this case by someone "other than an interested witness's testimony", but only by the interested witness's testimony. Thus, Defendant is correct to object to its consideration.

21. Similarly, the Appellate Division, Third Department, citing to the First Department's holding in *Acevedo, supra,* held in *Miller v. Lu-Whitney*, 61 A.D.3d 1043, 1045, 876 N.Y.S.2d 211, 213 (3rd Dep't 2009):

> The Dead Man's Statute "precludes a party or person interested in the underlying event from offering testimony concerning a personal transaction or communication with the decedent" (*Matter of Rosenblum*, 284 AD2d 820, 821, 727 NYS2d 193 [2001], *lv denied* 97 NY2d 604, 760 NE2d 1289, 735 NYS2d 493 [2001]; *see* CPLR 4519; *Matter of Wood*, 52 N.Y.2d 139, 144, 418 NE2d 365, 436 NYS2d 850 [1981]). The rule is 'grounded … on the concept that where death has sealed the lips of one of the parties to a personal transaction, the law, for the protection of his [or her] estate and … survivors, should and ought to seal the lips of anyone else making a claim against the estate" (*Tepper v Tannenbaum*, 65 AD2d 359, 362, 411 NYS2d 588 [1978]). While evidence excludable at trial under the Dead Man's Statute may be considered in opposition to a motion for summary judgment so long as it is not the sole evidence proffered (*see Phillips v Kantor & Co*., 31 NY2d 307, 314, 291 NE2d 129, 338 NYS2d 882 [1972]; *Marszal v Anderson*, 9 AD3d 711, 713, 780 NYS2d 432 [2004]; *Matter of Lockwood*, 234 A.D.2d 782, 782, 651 NYS2d 224 [1996]), such evidence "should not be used to support summary judgment" (*Phillips v Kantor & Co*., 31 NY2d at 313; *see Acevedo v Audubon Mgt., Inc*., 280 AD2d 91, 95, 721 NYS2d 332 [2001]).

22. In *Margolin v. Margolin Lowenstein & Co., LLP*, 14 Misc.3d 1226(A), 836 N.Y.S.2d 493 (Sup. Ct., Nassau Co., 2007) Justice Leonard Austin, now sitting in the Appellate Division, Second Department, observed:

> In essence, the Dead Man's Statute "provides that a party or person interested in the outcome of the litigation, or a predecessor in interest, is incompetent to testify to a personal transaction or communication with a deceased . . . person when the testimony is offered against the representative or successors in interest of the deceased . . .person." Prince, Richardson on Evidence § 6-121 (11th Ed. Farrell). On its face, the Dead Man's Statute should bar Defendants from testifying with regard to their business relationship and the issues presented on this trial.

23. In *Wright v. Morning Star Ambulette Servs., Inc.*, 170 A.D.3d 1249, 1251, 96 N.Y.S.2d 678, 682 (2nd Dep't 2019), the Appellate Division, Second Department, consistent with and citing to the holding in *Acevedo, supra*, and *Miller v. Lu-Whitney, supra,* observed:

> While evidence excludable at trial under CPLR 4519 may be considered in opposition to a motion for summary judgment so long as it is not the sole evidence proffered (*see Phillips v Kantor & Co.*, 31 NY2d 307, 314, 291 NE2d 129, 338 NYS2d 882 [1972]), such evidence "should not be used to support summary judgment" (*id.* at 313; *see Beyer v Melgar*, 16 AD3d 532, 533, 792 NYS2d 140 [2005]; *Friedman v Sills*, 112 AD2d 343, 491 NYS2d 794 [1985]). However, the statute does not bar "the introduction of documentary evidence against a deceased's estate. . . . [A]n adverse party's introduction of a document authored by a deceased does not violate the Dead Man's Statute, as long as the document is authenticated by a source other than an interested witness's testimony concerning a transaction or communication with the deceased" (*Acevedo v Audubon Mgt.*, 280 AD2d 91, 95, 721

NYS2d 332 [2001]; *see Miller v Lu-Whitney*, 61 AD3d 1043, 1045-1046, 876 NYS2d 211 [2009]; *Yager Pontiac v Danker & Sons*, 41 AD2d 366, 368, 343 NYS2d 209 [1973], *affd* 34 NY2d 707, 313 NE2d 340, 356 NYS2d 860 [1974]).

24. In this case Defendant objects to the consideration of Plaintiff's purported affidavit, and by extension the purported shareholder agreement. Clearly, it is erroneous to permit consideration of both Zvi Sebrow's purported affidavit and the purported shareholder agreement, as the only authentication was provided by Plaintiff, who is clearly an interested party, precluded from submitting such affidavit purusant to CPLR § 4519.

25. Based upon all of the foregoing, Plaintiffs' motion for an advisory opinion and the purported injunction must be denied. Mrs. Sebrow has an absolute right to a ruling on her pending motion to reargue and renew in the prior action, as well as a determination by the Appellate Division, First Department on her appeal.

WHEREFORE, this Court should issue and enter an order denying Plaintiffs' motion in its entirety, together with such other and further relief as to this Court may seem just, proper and equitable.

Dated: Cedarhurst, New York
February 8, 2022

JONATHAN A. STEIN