TO BE ARGUED BY:
JONATHAN A. STEIN, ESQ.
TIME REQUESTED: 15 MINUTES

Supreme Court of the State of New York
Appellate Division: First Department

Appellate Division Docket No. 2021-01311

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

Plaintiffs-Appellants,

-against-

ZVI SEBROW,

Defendant-Respondent,

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

Defendants.

BRIEF FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Plaintiff-Appellant Betty Sebrow, from a decision and order (one paper) of the Supreme Court, Bronx County (Rosado, J.), dated October 8, 2020 and entered October 9, 2020 (R. 6 – 11). The decision and order dismissed Plaintiff's complaint based upon the contents of a shareholder agreement (R. 29 – 32) proffered through the purported affidavit of Defendant Zvi Sebrow (R. 22 – 25).

Plaintiff, Betty Sebrow ("Mrs. Sebrow") is the surviving spouse of an individual named David Sebrow, who at the time of his death on May 29, 2017 was a fifty percent (50%) owner of Worbes Corporation ("Worbes"). (R. 11.4)

Mrs. Sebrow brought this action to assert her rights to her interest in Worbes, as the surviving spouse of her late husband.

Defendant Zvi Sebrow moved to dismiss the complaint (R. 12). The factual predicate for his motion was his unnotarized affidavit (R. 22 – 25) and a purported shareholder agreement. (R. 29 – 32).

While Defendant Zvi Sebrow's affidavit indicated it was signed in New York County, it was only witnessed by a New Jersey attorney, i.e., not a notary. Even if it had been executed in New Jersey, it was not accompanied by a certificate provided for in CPLR § 2309(c). Defendant Zvi Sebrow sought to proffer a purported shareholder agreement through his defective affidavit. The affidavit was never corrected, but the lower court nonetheless gave it full credence as though it was. Moreover, the purported shareholder agreement also should not have been accepted for evidentiary consideration by the lower court, but again, it was.

The lower court issued a decision and order on October 8, 2020, which was efiled on October 9, 2020. This appeal ensued.

QUESTIONS PRESENTED

1. Whether the court below erred in accepting the unnotarized affidavit of Defendant Zvi Sebrow?

2. Whether the court below erred in considering the improperly authenticated "shareholder agreement" proffered by Defendant Zvi Sebrow?

3. Whether the court below erred in failing to address the fact that the purported shareholder agreement was an improper attempt to defeat Plaintiff's right of election, as a surviving spouse?

4. Whether the court below erred in ignoring Plaintiff Betty Sebrow's right of election?

5. Whether the court below erred in failing to address the fact that Plaintiff Betty Sebrow already had an interest in Worbes, as a marital asset before any purported shareholder agreement?

STATEMENT OF FACTS

Worbes is a domestic corporation, formed on or about December 26, 1947. (R. 11.2) By deed dated July 10, 1950 Worbes acquired fee title to the premises located at 815 East 135th Street, Bronx, New York 10454, located in the County of Bronx, City and State of New York, also known by the tax map designation of the New York City Register as Block 2587, Lot 21 (the "Premises"). (R. 11.3)

Worbes was a closely held family corporation of members of the Sebrow family.[1]

There were originally four shareholders of Worbes, Abraham Sebrow, Joseph Sebrow, Defendant Zvi Sebrow, and the late David Sebrow. Ultimately, the interest of two of the shareholders, Abraham Sebrow and Joseph Sebrow, passed to their sons Zvi Sebrow and David Sebrow.

David Sebrow married Plaintiff March 19, 1989.[2]

For many years David Sebrow, acting as Vice President and Zvi Sebrow, acting as President, operated Worbes without incident. Notwithstanding their respective titles, David Sebrow managed the day to day affairs of Worbes.

In or around 2014 David Sebrow was diagnosed with cancer, and became extremely ill, making it difficult for him to continue managing the day to day operations of Worbes and the other closely held family corporations. During that period of time Zvi Sebrow took over the day to day management of Worbes and the other closely held family corporations.

On May 29, 2017, after battling cancer for over two years, David Sebrow passed away. Upon his death, David Sebrow's shares of Worbes as well as the other

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[1] "Worbes" is "Sebrow" spelled in reverse.

[2] Defendant Zvi Sebrow placed the date of marriage at 1991 (R. 23). While it does not change much, the actual date was March 19, 1989. 1991 was when their son Jeffrey was born.

closely held family corporations passed to his wife, Plaintiff Betty Sebrow, who then became and currently is the owner of fifty percent (50%) of the shares of Worbes.

After she acquired her late husband's interest in the shares of Worbes and the other closely held family corporations, Zvi Sebrow cut Betty Sebrow out of all decisions, including, but not limited to failing to provide financial information and an accounting of Worbes.

Mrs. Sebrow commenced this action on November 20, 2019 by the filing of a summons and complaint. (R. 11.1 – 11.11) The complaint contained five causes of action: (1) and accounting of the books and records of Worbes; (2) awarding Mrs. Sebrow reasonable attorneys' fees in accordance with BCL § 626; (3) the imposition of a constructive trust with respect to funds received by Defendant Zvi Sebrow from Worbes; (4) a judgment of dissolution of Worbes; and (5) the partition of the Premises.

Defendant Zvi Sebrow efiled a motion to dismiss the complaint on January 1, 2020. (R. 12 – 14) Defendant Sebrow filed an unnotarized affidavit in support of the motion (R. 22 – 25) together with a purported shareholder agreement. (R. 29 – 32)

In response to the motion, Mrs. Sebrow proffered an affidavit (R. 41 – 42) together with her late husband's last will and testament (R. 43 – 46) and letters testamentary issued to her by the Surrogate's Court of Nassau County. (R. 47 – 48)

Mrs. Sebrow also called into question he legitimacy of her husband's purported signature on the purported shareholder agreement, stating:

> Having been married to my husband for so long I was and am quite familiar with his signature. I have carefully examined the signature on the purported shareholder agreement. I am certain it is a forgery. This is further augmented by the fact that Defendant Zvi Sebrow has previously admitted to me that he routinely forged my deceased husband's signature when he needed it on documents and checks in connection with the running of Worbes and two related businesses, S & S Soap Co., Inc. and Worbes Leasing Corp.

(R. 41)

Notably, Zvi Sebrow did not refute this statement in a reply submission, though he certainly had the opportunity to do so.

Plaintiff also challenged the consideration of the facially defective affidavit (R. 35), the defects in its execution and the inadmissibility of the purported shareholder agreement.

The court below (Rosado, J.) summarily dismissed Mrs. Sebrow's defenses to the motion, finding that if the affidavit was in fact executed in New Jersey[3] (it says

[3] The affidavit on its face states that it was executed in the State of New York, County of New York.

otherwise) that an attorney in New Jersey may take such an oath without the requirement of a certificate of conformity under CPLR § 2309(c). (R. 8)

Despite the facial defects and evidentiary defects, the lower court found the shareholder agreement to be authentic and enforceable. This appeal ensued.

POINT I

THE "AFFIDAVIT" OF ZVI SEBROW SHOULD NOT HAVE BEEN CONSIDERED BY THE COURT BELOW

A. The purported affidavit of Zvi Sebrow was, on its face, executed in New York and cannot be deemed to have been notarized.

In its decision and order granting Plaintiff's motion to dismiss, the Court held:

> [U]nder 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.

The lower court's findings were not supportable by any reading of the facts or law. First, the purported affidavit of Zvi Sebrow does not indicate that it was executed in New Jersey. On its face it states that it was executed in the "STATE OF NEW YORK" and "COUNTY OF NEW YORK." Thus, even under the Court's reading of

the extent of Ms. Forman's powers, she clearly has no authority as a New Jersey attorney to take oaths in New York County. The idea that the purported affidavit may have been executed in New Jersey – something contradicted by the four corners of the document itself – was sheer speculation – not fact. The document should not have been accepted by the court below for the same reason the Appellate Division, Second Department rejected the purported affidavit in *Seidman v. Industrial Recycling Properties, Inc.*, 52 A.D.3d 678, 861 N.Y.S.2d 692 (2nd Dep't 2008).

B. Even if the purported affidavit was executed in New Jersey it was improper.

Second, the lower court's view of the powers conveyed upon New Jersey attorneys with respect to compliance with CPLR § 2309(c) cannot be supported. New Jersey Statutes Annotated ("NJSA"), § 41:2-1 [Officials authorized to take oaths] merely gives a litany of individuals authorized to administer oaths in New Jersey. While the list includes attorneys and counselors and law, it also includes notaries public and commissioners of deeds.

NJSA § 41:1-7 provides:

> It shall not be necessary to the validity or sufficiency of any oath, affirmation or affidavit, made or taken before any of the persons named in section 41:2-1 of this title, that the same shall be certified under the official seal of the officer before whom made.

However, this has nothing to do with the kind of certification addressed in CPLR § 2309(c). It is not addressed the certificates of conformity in New York or any other state. Rather, the "official seal" referenced in the statute is a raised seal that the officers referenced in NJSA. Such "official seal" is available to New York notaries and commissioners of deeds as well. It does not obviate the necessity to comply with CPLR § 2309(c). Had Ms. Forman sought to have a deed recorded in New York simply by utilizing her stamp "Attorney at Law, State of New Jersey" the deed would go unrecorded.

As set forth in the opposition to Defendant's motion, 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.*

Emphasis Added.

While the lower court may have been correct that noncompliance is not a fatal defect, Defendant would still have been required to correct the defect. He did not.

Further, based upon the lower court's reading of the provision of the NJSA a notary public or commissioner of deeds taking an oath for an affidavit would not have

to comply with the provisions of CPLR § 2309(c). Simply stated, such view is without foundation.

It is crystal clear that had Defendant Zvi Sebrow sought to record a deed simply with an attorney's "notary" without the appropriate certificate from an out of state officer required under Real Property Law Article 9 he would not succeed .[4]

Consequently, Plaintiff properly relied upon and cited to the holding of the Appellate Division, Second Department in *Seidman, supra*. As noted, in that case 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.

What is also noteworthy is that the Plaintiff in *Seidman* corrected the defectively notarized affidavit in its reply submission. Yet, this was unavailing to the Appellate Division, as a party may not correct in reply that which should have been in his or her initial submission. *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

[4] In the moving papers, Plaintiff's counsel improperly referenced Real Property Law § 390-b. While the proposition of law was properly stated, there is no such numbered section.

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). The Appellate Division, Second Department in *Seidman* reversed the lower court's grant of summary judgment and reinstated the Defendants' answer.[5]

C. <u>The purported affidavit violates the Deadman's Statute</u>.

Plaintiff objected, on evidentiary ground's to the Court's consideration of the purported affidavit of Zvi Sebrow. Plaintiff, in addition to her other roles, is also the Executor of the Estate of David Sebrow (*See,* Letters Testamentary, efile document 20). No one other than Zvi Sebrow sought 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

[5] In subsequent appeals in the *Seidman* matter – there were four altogether – the Appellate Division, Second Department granted the Defendant Industrial Recycling's motion for summary judgment, expunged the proceeds of the foreclosure sale, permitted the Defendant Industrial Recycling to interpose counterclaims, and granted summary judgment to Defendant Industrial Recycling on its counterclaim of breach of the mortgage contract/wrongful foreclosure.

under CPLR § 4519 [Personal transaction or communication between witness and decedent or mentally ill person] – New York's Deadman's Statute.[6]

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.

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[6] Plaintiff avered to the *Deadman's Statute* in its prior papers, it was emphatically stated in the opposition papers that "there is no foundation for the consideration of the purported shareholder agreement." (R. 36, ¶ 12).

Notably, Defendant Zvi Sebrow was not proffering testimony, through his purported affidavit, because Plaintiff, the Executor had done so. Rather, he did so in the first instance, and he is a textbook interested party.

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).

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, Plaintiff was correct to object to its consideration.

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]).

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.

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]).

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

POINT II

THE COURT FAILED TO EVEN ADDRESS PLAINTIFF'S RIGHT OF ELECTION AND INTEREST IN WORBES

A. The purported shareholder agreement violated Mrs. Sebrow's right of election.

In its decision and order entered October 9, 2020, the Court did not even address the argument raised regarding the argument that Plaintiff had a vested interest in her late husband's property, including his shares in Worbes Corporation, prior to the purported shareholder agreement.

Plaintiff and her late husband David Sebrow were Married on March 19, 1989 – not in or about 1991, as set forth by Defendant (though for the purposes of this argument it likely makes no difference). The fact that Plaintiff and her husband were married for many years prior to the purported execution of the shareholder agreement should have raised a question as to whether Mrs. Sebrow already had a vested interest in her husband's shares of Worbes prior to the purported execution.

First, it is worthwhile reiterating that the signatures on the purported shareholder agreement were neither notarized nor attested to. 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.

However, the ruling of the Appellate Division, Second Department in *TD Bank* has even greater application here. As noted in its opinion, the Second Department observed:

> Megrelishvili [defendant who is alleged to have signed a personal guaranty] acknowledged signing a promissory note, but claimed that it was not the same note as that submitted by the plaintiff.

98 A.D.3d at 500, 949 N.Y.S.2d at 446.

As set forth in greater detail in the affidavit of Betty Sebrow, Mrs. Sebrow was aware that there was a shareholder agreement. Her husband showed it to her before he signed it. It had no provision preventing him from bequeathing his ownership interest in Worbes or any other entity, to her. That, coupled with the fact that she is familiar with her late husband's signature and the copy proffered by Defendant looks like a forgery, with the additional fact that she knows from first hand experience that Defendant forged her husband's signature in the past makes this case very much like the one confronted by the Appellate Division, Second Department in *TD Bank*. Yes, Mrs. Sebrow believes there was a shareholder agreement. She even knows when it was executed, but it is not the purported shareholder agreement proffered by Defendant.

It is worth noting that the Second Department's ruling in *TD Bank* was cited as controlling authority by the Appellate Division, First Department in *HSBC Bank USA, N.A. v. Community Parking Inc.*, 104 A.D.3d 595, 961 N.Y.S.2d 440 (1st Dep't 2013).

Thus, it was wholly proper for Mrs. Sebrow to reference that a shareholder agreement existed. To borrow a quote from the decision in *TD Bank*, the shareholder agreement "that it was not the same [shareholder agreement] as that submitted by the [Defendant]."

Contrary to this Court's reading of the complaint, and perhaps the result of imperfect draftsmanship, the existence or nonexistence of a shareholder agreement was never necessary to establish Plaintiff's right to her late husband's shares in Worbes. There were years of tax returns establishing that David Sebrow was a fifty percent (50%) owner of Worbes.[7]

Further, 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

[7] David Sebrow's 50% ownership interest in Worbes and other family corporations is conceded by Defendant Zvi Sebrow. Additionally, Federal and State tax returns can be subpoenaed to verify David Sebrow's ownership interest without resort to the purported shareholder agreement.

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 mid-1997, 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 shares 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.

The ruling in *Riefberg* is extremely illuminating here. In that case the wife had abandoned her husband, and the Court was confronted with a shareholder agreement which purported to strip her of her right of election. Factually, this is already dissimilar, as Plaintiff continued to be married to her late husband for over 28 years, until his untimely death.

With respect to the shareholder agreement, the Court noted:

> [T]he agreement here was the means by which the decedent not only controlled the beneficial enjoyment of the property right at stake, but stripped the estate of assets which should have been subject to his surviving spouse's right to her elective share. Indeed, its "express provisions" enabled the decedent, in terms of an appropriate use of *ejusdem generis*, to

> retain a power to "revoke", "consume", "invade", or otherwise "dispose" of the corpus. Thus, the agreement itself, by expressly providing for the manner of its termination, fell squarely within the express statutory definition of the category of testamentary substitute which here has been our concern (EPTL 5-1.1, subd [b], par [1], cl [E]).

However, none of the provisions of the shareholder agreement which permitted the Court to view the shareholder agreement as a testamentary substitute are present in this case. There is nothing in the agreement which would have entitled it to bypass Mrs. Sebrow's right of election. This is the legal authority that defeats the purported shareholder agreement proffered by Defendant Zvi Sebrow.

B. Even if the Court were to follow the purported shareholder agreement, Defendant Zvi Sebrow would not be a 100% shareholder in Worbes, but David Sebrow's Estate would retain his 50% share of the corporation.

Even if the Court were to have invalidated the bequest, that does not mean that David Sebrow's shares magically disappeared or transferred to Defendant Zvi Sebrow. Rather, the Estate of David Sebrow would retain ownership of the shares. Thus, even were the Court correct in considering the purported shareholder agreement, it would only mean that the title to the shares held by the late David Sebrow would not pass from his Estate to Plaintiff, his wife, but would remain in his Estate.

An Estate can remain a shareholder, without time limitation, even of a Sub-Chapter S corporation. *See, e.g.*, EPTL § 11-1.1(b)(14), *Matter of Benincaso*, 2012 N.Y. Misc. LEXIS 58, 2012 NY Slip Op 30015(U) (Surr. Ct., Nassau Co., 2012), *In re Flaum*, 177 A.D.2d 170, 582 N.Y.S.2d 853 (4th Dep't 1992), *In re Brown*, 743 N.Y.S.2d 100, 295 A.D.2d 127 (1st Dep't 2002).

Further, contrary to the statement contained in Defendant's counsel's memorandum, the ownership by the Estate of David Sebrow would not be a nullity, even under the purported shareholder agreement. Specifically, an Estate is defined in EPTL § 1-2.6 as "(a) the interest which a person has in property" or "[t]he aggregate of property which a person owns."

Consequently, the shares would still be held by David Sebrow. The only change is the status of David Sebrow. As a decedent, his assets are marshaled by the Estate. There is no change in actual ownership, merely a change in the designation of David Sebrow.

C. Mrs. Sebrow acquired an ownership interest in the shares of Worbes prior to the purported execution of the shareholder agreement.

Plaintiff Betty Sebrowand her late husband were married on March 19, 1989, more than eight (8) years prior to the purported execution of the shareholder agreement. Her late husband already had his ownership interest in Worbes prior the execution, though he acquired his interest shortly after they were married. As such,

the actual shares in Worbes were a marital asset. *See, Weschler v. Weschler*, 58 A.D.3d 62, 866 N.Y.S.2d 120 (1st Dep't 2008), *Genger v. Genger*, 121 A.D.3d 270, 990 N.Y.S.2d 498 (1st Dep't 2014).

Mrs. Sebrow already had an ownership interest in her husband's shares of Worbes, which he acquired early in their marriage, long before the purported shareholder agreement was extant. In fact, as set forth in her affidavit, this was even before Defendant Zvi Sebrow started working in or acquired any interest in Worbes or its related businesses. In view of the above, even if the purported shareholder agreement was properly before the Court, the provision seeking to dispossess Mrs. Sebrow from shares to which she already had an ownership interest is void *ab initio.*

POINT III

THE COURT ALSO OVERLOOKED THE DECEDENT'S TESTAMENTARY INTENT

In this case the Court also overlooked the decedent's testamentary intent. Specifically, David Sebrow wanted his wife to inherit his shares in Worbes, and if she was unable to so inherit, his shares were to go to his children.

It is noteworthy that David Sebrow was not an attorney and relied upon the same attorney who purportedly prepared the shareholder agreement to prepare his last will and testament. Clearly, in relying upon that attorney he had a right to presume that his testamentary bequests were not violative of any other purported document,

e.g., the purported shareholder agreement which the same attorney – Bernard Koenigsberg – purportedly prepared.

In totally dispossessing David Sebrow's heirs the Court has placed questionable form over definitive substance.

Court's routinely follow a decedent's intent when the exact language of a last will and testament proves to be problematic – against that intent. *See, Matter of Warren,* 143 A.D.3d 1110, 39 N.Y.S.3d 282 (3rd Dep't 2016), *Matter of Goodyear*, 58 Misc. 3d 1201(A), 92 N.Y.S.3d 703 (Surr. Ct., Erie Co., 2017), *Matter of Phillips*, 101 A.D.3d 1706, 957 N.Y.S.2d 778 (4th Dep't 2012)["It is well settled that, in a will construction proceeding, the search is for the decedent's intent and not for that of the drafter. In ascertaining the decedent's intent, a sympathetic reading of the will as an entirety is required."], *Matter of Bruce*, 161 A.D.3d 712, 79 N.Y.S.3d 10 (1st Dep't 2018) [The Court may consider a decedent's intent in interpreting a will]. Here, David Sebrow's intent was clearly to give his shares to his wife, and if she was unable to inherit, to his children.

The Court's order totally abrogated David Sebrow's clear intent.

CONCLUSION

The lower court should never have considered the affidavit of Zvi Sebrow whether it was executed in New York (as stated in the jurat) or New Jersey. In the first instance an attorney from New Jersey may not notarize a signature in New York. In the second case the jurat is incorrect and the affidavit would have to be accompanied by a certification pursuant to CPLR § 2309. Neither was the case here.

The fact that Mrs. Sebrow was aware that there was a shareholder agreement does not mean that the one proffered was the correct one. There was no evidentiary foundation for the lower court's consideration of the shareholder agreement proffered, nor should the court have given such short shrift to Mrs. Sebrow's claim of forgery, which was tellingly not denied by Defendant Zvi Sebrow, though he certainly had the opportunity to do so in his reply submission.

The court below also improperly ignored both Mrs. Seborow's right of election and her vested interest in Worbes, before any purported shareholder agreement, as a marital asset, inasmuch as David Sebrow executed the purported shareholder agreement many years into his marriage to Plaintiff Betty Sebrow.

For all the reasons set forth above the decision and order (one paper) appealed from should be reversed, and upon its reversal the Court should modify the order of

the lower court to deny the motion to dismiss in its entirety, together with such other relief as to this Court may seem just, proper and equitable.

Dated: Cedarhurst, New York
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Respectfully Submitted,

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