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.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

JONATHAN A. STEIN, P.C.
Attorney for Plaintiffs-Appellants
132 Spruce Street
Cedarhurst, New York 11516
(516) 295-0956
jonsteinlaw@gmail.com

Supreme Court, Bronx County, Index No. 33784/2019E

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Plaintiff-Appellant Betty Sebrow in reply to the brief submitted on behalf of Defendant-Respondent Zvi Sebrow. Respondent argues in his brief: (a) that it is "picayune and frivolous" for Mrs. Sebrow to have insisted that Defendant comply with the provisions of CPLR § 2309(c) [Oaths and affirmations taken without the state; (b) alternatively, that it is "picayune and frivolous" for Mrs. Sebrow to have insisted that Defendant comply with the

provisions of CPLR § 2309(a) [Oaths and affirmations – Persons authorized to administer]; (c) Mrs. Sebrow waived her right to invoke the Dead Man's Statute; and (d) any claim to her spousal right of election was time barred. Respondent has not addressed the issue as to whether Mrs. Sebrow already had a vested interest in shares Worbes, as a marital asset by the time the purported shareholders' agreement[1] was made, over eight years after her March 19, 1989 marriage to her late husband, David Sebrow. Respondent has also not addressed Mrs. Sebrow's argument that her late husband's testamentary intent – that the shares go to his children in the event his wife was not in a position to receive them – should also be honored.

POINT I

IT WAS NOT "PICAYUNE AND FRIVOLOUS" TO INSIST RESPONDENT COMPLY WITH CPLR §2309

There are two provisions of CPLR § 2309 which are applicable to this case. It is not "picayune and frivolous"[2] to have insisted that Defendant-Respondent

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[1] The term "purported" is utilized because, although Appellant concedes there likely was a shareholder agreement, it does not automatically stand to reason that the agreement proffered by Respondent is legitimate. Appellant restricted its argument to admissibility in the context of Respondent's motion to dismiss. Appellant believes at trial it can demonstrate that a different shareholder agreement exists, which does not contain the same restrictions as that proffered by Respondent.

[2] The term "frivolous" is even more offensive than the term "picayune." As this Court is well aware, frivolous conduct can be the basis for the imposition of financial sanctions and attorneys fees under 22 NYCRR § 130-1.1 *et. seq*. Since when did insisting the law be followed become "frivolous"?

comply with this provision. On its face the purported affidavit of Zvi Sebrow (R. 22 - 25) was executed in New York County. Specifically, the jurat on the front page of the affidavit states that it was executed in the "State of New York" and "County of New York." (R. 22) Yet, it purports to have been notarized by "Lianne J. Forman" not as a New York State Notary, but as an "attorney at law" of the "State of New Jersey." (R. 25). Thus, if the affidavit was made in New York County, as it indicates it is, it is not notarized and fails to comply with CPLR § 2309(a)[Oaths and affirmations - Persons authorized to administer]. Such authorization is limited to "any person authorized to take acknowledgements of deeds by the real property law." This authority does not extend to attorneys admitted to practice in the State of New Jersey. It does not even extend to attorneys admitted to practice in the State of New York.[3]

If the affidavit was in fact made in New Jersey, it would still require a certification under CPLR § 2309(c)[Oaths and affirmations taken without the state], which 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

[3] Real Property Law § 298 lists those officials authorized to take acknowledgment. It provides in part: "(1) At any place within the state, before (a) a justice of the supreme court; (b) an official examiner of title; (c) an official referee; or (d) a notary public." While New York attorneys qualify, without examination, to become notaries public, they are not qualified to administer oaths unless they take that extra step.

> 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.

Notwithstanding the fact that these deficiencies were pointed out to Respondent in opposition to the motion to dismiss (R. 34 - 40), there was no attempt to correct the affidavit. In fact, while the Courts permit such a deficiency to be corrected, Respondent made no effort to do so. *See, Moccia v. Carrier Car Rental, Inc.*, 40 A.D.3d 504, 837 N.Y.S.2d 67 (1st Dep't 2007).[4]

Respondent did not even seek to correct his failure to comply with CPLR § 2309 when Appellant filed a motion to renew and reargue. Such cavalier disregard for provisions of law should not be sanctioned by the Court.

In this regard, the procedural context here is similar to that confronted by the Appellate Division, Second Department in *Seidman v. Industrial Recycling Properties, Inc.*, 52 A.D.3d 678, 861 N.Y.S.2d 692 (2nd Dep't 2008). As noted in Appellant's main brief, in *Seidman* the Appellate Division, Second Department reversed a post-sale foreclosure judgment because the plaintiff's affidavit in support

[4] Many decisions, published and unpublished permit the failure to provide a certificate of conformity to be corrected. No decision and order, other than the one appealed from here, dispense with the requirement to submit a certificate of non-conformity.

of the motion for summary judgment was not properly notarized[5], 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.

This is not an issue of placing form above substance. It is the adherence to statutes and rules, such as CPLR § 2309(a) and (c), that levels the playing field between litigants. *See, e.g., Graham Ct. Owner's Corp. v Taylor*, 115 A.D.3d 50, 978 N.Y.S.2d 213 (1st Dep't 2014).

Respondent's counsel cites *Status Gen. Dev., Inc. v. 501 Broadway Parnters, LLC*, 163 A.D.3d 740, 82 N.Y.S.3d 34 (2nd Dep't 2018) and *Falah v. Stop & Shop Cos., Inc.*, 41 A.D.3d 638, 838 N.Y.S.2d 639 (2nd Dep't 2007) to complaint that inasmuch as Mrs. Sebrow failed to "return" the affidavit she waived any defect. Quite frankly, this is an absurd and even insulting argument. The affidavit was never sent to Appellant – it was efiled. Moreover, as with the case of *Seidman, supra*, the

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[5] Ultimately, *Seidman* led to a total reversal. First, as mentioned the judgment of foreclosure and sale were reversed. Then, the Appellate Division, Second Department directed the granting of summary judgment dismissing the complaint and expunging the proceeds of the foreclosure sale. *Seidman v. Industrial Recycling Properties Properties, Inc.,* 71 A.D.3d 1117, 900 N.Y.S.2d 84 (2nd Dep't 2010). Third, the Appellate Division, Second Department permitted Defendant Industrial Recycling Properties to interpose counterclaims for breach of contract - wrongful foreclosure and malicious prosecution. *Seidman v. Industrial Recycling Properties Properties, Inc.,* 83 A.D.3d 1040, 922 N.Y.S.2d 451 (2nd Dep't 2011). Finally, the Appellate Division, Second Department granted Industrial Recycling summary judgment on its counterclaim for breach of contract - wrongful foreclosure. *Seidman v. Industrial Recycling Properties Properties, Inc.*, 106 A.D.3d 983, 967 N.Y.S.2d 77 (2nd Dep't 2013).

defective affidavit goes towards its consideration as proof. Just as the improperly notarized affidavit in that case led the Appellate Division, Second Department to reverse summary judgment, so too here, this Court should reverse the decision and order appealed from, which dismissed the case.

POINT II

MRS. SEBROW DID NOT WAIVE THE DEADMAN'S STATUTE

Respondent argues that Mrs. Sebrow waived her right to invoke the Deadman's Statute because she referenced in her complaint the very shareholder agreement proffered by Respondent and that she needed to do so in order to even assert her interest. There is nothing in the record which supports the claim that Mrs. Sebrow was referencing the same shareholder agreement proffered by Respondent. Every conclusion by both Respondent and the lower court, has, until now, been nothing more than an assumption.

Further, Mrs. Sebrow did not require any shareholder agreement to assert her rights to her husband's share of Worbes Corporation. Mrs. Sebrow separately proffered her late husband's last will and testament (R. 43 - 46) and Letters Testamentary issued by the Nassau County Surrogate's Court (R. 47 - 48).

POINT III

NO AGREEMENT COULD RESTRICT WHAT MRS. SEBROW ALREADY HAD AN INTEREST IN

As set forth in Appellant's main brief, she and her late husband David Sebrow were Married on March 19, 1989 – not in or about 1991, as set forth by Respondent (though for the purposes of this argument it likely makes no difference). The fact that Mrs. Sebrow 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.

Similarly, the fact that Mrs. Sebrow is aware of the existence of a shareholder agreement does not automatically vest the shareholder agreement proffered by Respondent with authenticity.

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 the lower 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.[6]

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 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.

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[6] 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.

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.

POINT IV

THE SPOUSAL RIGHT OF ELECTION IS STILL RELEVANT

Until the commencement of this action Mrs. Sebrow had no idea that Respondent was challenging her right to possess the shares of her late husband, David Sebrow. Respondent never took the position that Mrs. Sebrow was not entitled to be a shareholder until he moved to dismiss the complaint in January 2020, i.e., after a claimed for a spousal right of election would have been time barred. Respondent's failure to advise Mrs. Sebrow of his position, that she was not entitled to her husband's shares, was clearly meant to deprive her of the right to make a spousal election and never have been countenanced by the court below.

CONCLUSION

For all the reasons set forth in Appellant's main brief and herein the decision and order (one paper) appealed from should be reversed. The lower court should not have considered Respondent's purported affidavit, either because it was executed in New York and was therefore not notarized, or because it was defectively executed in New Jersey, without the benefit of a certificate of conformity. There was no evidentiary foundation for the lower court's consideration of the shareholder

agreement proffered and in fact its consideration violated the Deadman's Statute. The court below also ignored the fact that Mrs. Sebrow's interest in her husband's shares of Worbes vested many years prior to the purported execution of the purported shareholders' agreement. Further, the lower court should have honored the late David Sebrow's testamentary intent, i.e., that if his wife could not take the shares they would go to his children. Thereafter, this case should be remanded for further proceedings, together with such other relief as to this Court may seem just, proper and equitable.

Dated: Cedarhurst, New York
March 31, 2022

Respectfully Submitted,

JONATHAN A. STEIN, P.C.
Attorney for Plaintiff-Appellant
Betty Sebrow, Individually and as a
Shareholder of Worbes Corporation

By: _____
JONATHAN A. STEIN
132 Spruce Street
Cedarhurst, New York 11516-1915
(516) 295-0956