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NO.: 22370-10

SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 7-8-10  
SUBMITTED: 10-21-10  
MOTION NO.: 003-MD

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CARL WERNER,

Plaintiff,

-against-

POLLACK COOPERMAN & FISHER, P.C.  
Attorneys for Plaintiff  
5372 Merrick Road, Suite 200  
Massapequa, New York 11758

M.H. MANDELBAUM ORTHOTIC & PROSTHETIC  
SERVICES, INC., AND MARTIN H. MANDELBAUM,

Defendants.

GARFUNKEL WILD, P.C.  
Attorneys for Defendants  
111 Great Neck Road  
Great Neck, New York 11021

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Upon the following papers numbered 1-46 read on this motion for a declaratory judgment and for damages ; Notice of Motion and supporting papers 1-13 ; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 14-28 ; Replying Affidavits and supporting papers 29-31 ; it is,

**ORDERED** that the motion (003) by plaintiff for a judgment declaring that the plaintiff is the true owner of the shares, directing the defendants to immediately issue to the plaintiff shares of the Common Stock of M.H. Mandelbaum Orthotic and Prosthetic Services, Inc representing five percent of the issued and outstanding Common Stock of the company, directing the defendants to provide an accounting of the operations and profits, directing the defendants to pay the plaintiff a distribution of the profits, awarding the plaintiff damages for breach of contract is denied.

In this breach of contract action, the plaintiff Carl Werner alleges that defendants M.H. Mandelbaum Prosthetic & Orthotics Services, Inc.(hereinafter "the Corporation") and Martin H. Mandelbaum (hereinafter "Mandelbaum") breached the Shareholders Agreement and refused to issue stock certificates for 5% of the Corporation stock which he purchased from Marc Werner on June 23, 2009. Werner alleges that he is also entitled to dividends from that date.

Before the Court are three related actions: an action captioned *M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. and Martin H. Mandelbaum v Marc Werner*, Index Number 25256/09

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(Action #1), the instant action (Action #2), and an action captioned *M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. and Martin H. Mandelbaum v Carl Werner and Marc Werner*, Index Number 22222/10 (Action #3).

After the parties had several opportunities to conference the matters with the Court, the parties agreed to participate in a framed issue hearing in order to determine whether Carl Werner is a 5% shareholder pursuant to the Shareholder Agreement, which was conducted on October 26, 2011. The parties submitted post-hearing briefs on March 2, 2012. Upon consideration of the pleadings, the testimony of Mandelbaum and Carl Werner, and the post hearing briefs, the Court determined that the transfer of shares between Marc Werner and Carl Werner was invalid, inasmuch as Carl Werner was not able to fulfill the condition precedent in Section 5 (f) of the Shareholders Agreement, which provided that the purchaser of the shares “agrees to be bound by the same terms of this Agreement as [Marc] Werner” (**Preferred Mortg. Brokers, Inc. v Byfield**, 282 AD2d 589; **Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.**, 86 NY2d 685).

This Court declares that Carl Werner is not entitled to the issuance of stock, dividends in the corporation, an accounting, or damages. Accordingly, the motion is denied.

**HON. ELIZABETH HAZLITT EMERSON**

DATED: May 30, 2012

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J. S.C.