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Unreported Disposition
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Supreme Court, Bronx County, New York.

Worbes Corporation and ZVI SEBROW, Plaintiff(s),
v.
Betty Sebrow AND BETTY SEBROW AS ADMINISTRATOR OF THE ESTATE OF DAVID SEBROW, Defendant(s).

Index No. 800583/22E
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Decided on April 8, 2022

Attorneys and Law Firms

Counsel for plaintiffs: Law Offices of Jan Meyer & Associates

Counsel for defendants: Jonathan A. Stein, PC

Opinion

Fidel E. **Gomez**, J.

In this action for, *inter alia*, declaratory judgment, plaintiffs move seeking an order pursuant to CPLR § 6301, granting them a preliminary injunction allowing the sale of the real property at issue and enjoining [1] defendants from taking any adverse action with regard to the sale of the foregoing property. Plaintiffs aver that (1) in this action, they are likely to succeed on the merits because the shares in the corporation which owns the property could not and were not conveyed to defendant BETTY SEBROW (BS); (2) absent a preliminary injunction allowing the sale of the property, it is likely to be sold at a tax foreclosure, thereby irreparably harming plaintiffs; and (3) that the equity tips in favor of allowing the property to be sold because absent the sale, the diminution in value of the property would be prejudicial to plaintiffs. Defendants oppose the instant motion, asserting that in light of the pending appeal in an already disposed action, any decision rendered by this Court is impermissibly advisory. Defendants also assert - presumably on the issue of likelihood of success on the merits - that CPLR § 4519 - the Dead Man's Statute - precludes the use of the agreement upon which plaintiffs' claims are premised.

1 Given the relief sought by plaintiffs, which is leave to sell the property at issue and which is, in part, the ultimate relief sought by plaintiffs, it appears that plaintiffs seek a mandatory preliminary injunction.

For the reasons that follow hereinafter, plaintiffs' motion is granted.

The instant action is for declaratory judgment, tortious interference with prospective business relations, abuse of process, malicious prosecution, and breach of fiduciary duty. The complaint alleges that plaintiff ZVI SEBROW (ZS) owns 50 percent of the shares in plaintiff WORBES CORPORATION (Worbes), a corporation, whose sole asset is real property located at 815 East 135 Street, Bronx, NY (815), and whose exclusive business is to own, hold, and operate 815. Worbes is governed by a Stockholder's Agreement (the agreement), dated January 2, 1997. When the agreement was executed, the shares in Worbes were equally owned by Abraham Sebrow (AS), Joseph Sebrow (JS), ZS, and David Sebrow (DS), who each held 25 percent of the shares. Pursuant to the agreement, absent a testamentary disposition, the transfer of any of the shares in Worbes is prohibited unless agreed upon by all other stockholders. Upon AS' death in 2000, per AS's previous testamentary disposition, ZS became owner of 50 percent of the shares in Worbes. Similarly, upon JS' death, per JS' previous testamentary disposition, DS became 50 percent owner of the shares in Worbes. In 2017, DS, who was by then married to BS, died and his shares in Worbes reverted back to Worbes. Moreover, in 2018, ZS determined that Worbes could no longer operate profitably and seeking to wind up its affairs, arranged for the sale of 815. Because Worbes lacked the funds to pay taxes for 815, ZS personally paid at least $437,138.78 to prevent a tax lien foreclosure. In 2019, BS filed an action seeking a declaration that upon DS's death she and DS' estate became owners of 50 percent of the shares in Worbes. The foregoing action was dismissed, BS filed an appeal, moved to reargue the court's decision, and both the appeal and the motion are still pending. Because defendants' actions have clouded 815's title, attempts to procure defendants' consent to sell 815 have proved fruitless and defendants continue to interference with plaintiffs' efforts to sell 815. In 2021, a tax lien foreclosure action was initiated against Worbes and BS and is currently pending. ZS currently lacks the funds to pay the taxes due at

815, which continue to accrue interest. On January 5, 2022, ZS entered into a contract on behalf of Worbes to sell 815 to Maujer, LLC (Maujer) for $5,500,000. The foregoing contract discloses the existence of this action and the prior action, which, if decided against plaintiffs, would impact plaintiffs' ability to consummate the transaction.

Based on the foregoing, plaintiffs seek a declaratory judgment declaring that defendants do not own any of shares in Worbes. Plaintiffs also interposes a cause of action for tortious interference with prospective business relations premised on defendants' conduct - namely the initiation of the prior action - which conduct has prevented plaintiffs from selling 815. Based on the foregoing, plaintiffs also interpose claims for abuse of process and malicious prosecution, adding that the prior action was baseless and lacked probable cause. Lastly, plaintiffs interpose a claim for breach of fiduciary duty, asserting that if it is found that defendants own any shares in Worbes, the refusal to consent to the sale of 815 unless their demands are met constitutes a breach of the duty of loyalty to Worbes, solely for financial gain.

Plaintiffs' motion seeking a preliminary injunction and a mandatory preliminary injunction is granted. Significantly, on this record, plaintiffs establish all the requisite elements warranting the issuance of a preliminary injunction, including a high likelihood of success on the merits of their cause of action for declaratory judgment. Moreover, because absent the sale of 815 to Maujer, it is likely that it will be sold upon the conclusion of the tax foreclosure action for less than the sum Maujer is willing to pay, it is clear that the circumstances here are extraordinary so as to warrant the issuance of a mandatory preliminary injunction allowing the sale of 815.

CPLR § 6301 describes the grounds upon which the court can grant a preliminary injunction and reads, in pertinent part, as follows:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

Thus, a preliminary injunction "provide[s] a provisional remedy by maintaining the status quo pending a full hearing on the merits, rather than to determine the ultimate rights of the parties and mandate corrective action" (*Jamie B. v Hernandez*, 274 AD2d 335, 336 [1st Dept 2000]). Accordingly, the court should not, on a motion for a preliminary injunction, grant the ultimate relief sought in the underlying action (*id*. at 336).

Because a preliminary injunction substantially limits a defendant's rights and is, therefore, an extraordinary provisional remedy, it requires a special showing (*Margolies v Encounter, Inc.*, 42 NY2d 475, 479 [1977]. Hence, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tips them in favor of the moving party (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *61 West 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 334 [2010], *mod* 16 NY3d 822 [2011]; *Second on Second Cafe, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 264 [1st Dept 2009]; *Stockley v Gorelik*, 24 AD3d 535, 536 [2005]).

With respect to likelihood of success on the merits, the threshold inquiry is whether the proponent has tendered sufficient evidence demonstrating ultimate success in the underlying action (*Doe* at 750-751). While the proponent of a preliminary injunction need not tender conclusive proof beyond any factual dispute establishing ultimate success in the underlying action (*Sau Thi Ma v Xuan T. Lien*, 198 AD2d 186, 187 [1993], *lv dismissed* 83 NY2d 847 [1994]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 605 [2004]), "[a] party seeking the drastic remedy of a preliminary injunction must [nevertheless] establish a clear right to that relief under the law and the undisputed facts upon the moving papers" (*Gagnon Bus Co., Inc. v Vallo Transp., Ltd.* 13 AD3d 334, 335 [2004]). This, of course, does not mean that plaintiff must conclusively establish guaranteed success on the merits and, thus, issues of fact raised by the defendant cannot serve as a basis for denial of any motion seeking a preliminary injunction (*Ma* at 187; *Moy* at 605; *Stockely* at 536; *Demartini v Chatham Green, Inc.*, 169 AD2d 689, 689 [1st Dept 1991]). In *Doe*, plaintiffs, a coalition of various members of the medical and pharmaceutical communities, sued seeking a declaration that 100 NYCRR 80.67 - which

imposed strict control on certain tranquilizing medications - be declared unconstitutional (*id*. at 749). Plaintiffs also sought a preliminary injunction enjoining defendant, the State, from enforcing the challenged regulation (*id*.). The court denied plaintiffs' request for a preliminary injunction, holding that because plaintiffs failed to establish that defendant "acted outside of the authority constitutionally delegated to him under the Public Health Law or that the regulation was so lacking in reason for its promulgation that it [was] essentially arbitrary" (*id.* at 750 [internal citations and quotation marks omitted]), they failed to establish a likelihood of success on the merits (*id*.). Conversely, in *Stockley*, the court granted plaintiffs' - owners of a condominium - application for a preliminary injunction, thereby enjoining defendants - also owners of the condominium - from building a structure, which plaintiffs established would "encroach upon portions of the common elements of the condominium, which may require an easement the defendants did not seek, and would deprive the plaintiffs of the use and enjoyment of certain common elements, as well as portions of their own units" (*id*. at 536). The court held that plaintiffs' evidence established a likelihood of success on the merits insofar as they demonstrated that they had initially authorized defendants' proposed construction without being fully apprised of its extent, which did not become known until plans were drawn (*id*.).

With regard to irreparable harm, generally, the inquiry is whether in the absence of a preliminary injunction, usually to preserve the status quo, any judgment on the underlying action would be rendered ineffectual (*Ma* at 186; *Moy* at 604). When this is the case, the proponent of a preliminary injunction has demonstrated irreparable harm. In *Ma*, plaintiff sued to recover payments from a winning lottery ticket, such winnings held by the defendant (*id*. at 186). Finding that a preliminary injunction was warranted, the court held that since it was clear that defendant intended to spend the proceeds at issue - intending to share the funds with his family - it was clear that absent a preliminary injunction, plaintiff would be irreparably harmed inasmuch as any judgment would be rendered ineffectual (*id*. at 186). The court in *Moy* similarly held that plaintiff had demonstrated irreparable harm but for the grant of preliminary injunction. In that case, plaintiff sued to void the transfer of her ownership interest in real property on grounds that such transfer was obtained by fraud (*id*. at 604). In holding that plaintiff established entitlement to a preliminary injunction, the court noted that "[t]he purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" (*id*. 604), and thus, that absent the preliminary injunction, defendant could transfer the property, thereby irreparably harming plaintiff (*id*.).

With regard to the balancing of equities, the same requires that the court look at the prejudice which may accrue to the parties in the event the application for an injunction is granted or denied (*Ma* at 186-187), and usually the equities tip in favor of the party who would be irreparably harmed absent the grant of a preliminary injunction (*id*. at 187). Thus, should the court determine that plaintiff would be irreparably harmed by denial of the preliminary injunction while defendant would suffer little or no harm if said injunction is granted, then a preliminary injunction should be granted (*id*.).

Notably, while CPLR § 6301 authorizes a preliminary injunction "restraining the defendant from the commission or continuance of an act," "it is doubtless within the power of a court of equity, in proper cases, to issue mandatory injunctions, and the provisions of the Code should not be so strictly construed as to deny that power in any case." (*Bachman v Harrington*, 184 NY 458, 463 [1906]). Thus, where appropriate, a court has the power to issue a mandatory injunction, which disrupts rather than preserves the status quo, and whereby a party is affirmatively ordered to perform an act (*id*. at 464 ["Therefore, where the complainant presents a case showing or tending to show that affirmative action by the defendant, of a temporary character, is necessary to preserve the status of the parties, then a mandatory injunction may be granted."]; *Second on Second Cafe, Inc.* at 265 ["Moreover, a mandatory preliminary injunction (one mandating specific conduct), by which the movant would receive some form of the ultimate relief sought as a final judgment, is granted only in unusual situations, where the granting of the relief is essential to maintain the status quo pending trial of the action" [internal quotation marks omitted].); *Rosa Hair Stylists, Inc. v Jaber Food Corp.*, 218 AD2d 793, 794 [2d Dept 1995]). Mandatory injunctions, however, should not be granted, absent extraordinary circumstances and only when the right to such relief is clearly established (*Second on Second Cafe, Inc.* at 360-361; *Rosa Hair Stylists, Inc.* at 794). In *Second on Second Cafe, Inc.*, the court granted plaintiff's application for a mandatory preliminary injunction, ordering

a mandatory preliminary injunction directing the landlord to permit the tenant to install, at its own expense, a new exterior exhaust vent on the roof of the building, along with the necessary ducts between the kitchen and the roof, and further directing the landlord to execute the permit applications required for such work.

(*id.* at 256-257). In that case, plaintiff, a tenant in a building owned by the defendant, sought a mandatory preliminary injunction after the defendant allowed the owner of the adjacent building to remove the exhaust vent servicing plaintiff's business, a bar with a kitchen, which served food (*id*. at 257-259). Because removal of the vent substantially impaired plaintiff's ability to profitably operate its business, plaintiff sought to reinstall the vent on the roof of defendant's property (*id*. at 259). In granting plaintiff's application for a mandatory injunction, the court found that the absence of prejudice to defendant tipped the equities in favor of granting an injunction, that plaintiff established a likelihood of success on the merits, and irreparable harm but for the issuance of the injunction (*id*. at 273-274). With regard to the last two factors, whose establishment also warranted the grant of a mandatory injunction, the court noted that

[g]iven the strong case Café made for its likelihood of success on the merits, we are satisfied that Café's showing of irreparable harm warranted relief. Moreover, we find that Café demonstrated that it met the heightened standard for the grant of a mandatory preliminary injunction, namely, that the situation was an "unusual" one in which a preliminary injunction mandating specific conduct by the movant's adversary was "essential to maintain the status quo pending trial of the action

(*id*. at 273).
Pursuant to CPLR § 6312(b),

prior to the granting of a preliminary injunction, the plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction

Thus, an undertaking is a condition precedent to the grant of a preliminary injunction and such requirement cannot be waived by the court (*Rourke Developers Inc. v Cottrell-Hajeck Inc.*, 285 AD2d 805, 805 [3d Dept 2001]; *Smith v Boxer*, 45 AD2d 1054, 1054 [2d Dept 1974]). The amount of such undertaking is solely within the court's discretion and should be as much as rationally necessary to compensate defendant for any potential damages should it later be determined that a preliminary injunction was unwarranted (*Clover St. Assoc. v Nilsson*, 244 AD2d 312, 313 [2d Dept 1997]; *Kazdin v Putter*, 177 AD2d 456, 457 [1st Dept 1991]). The undertaking represents the amount and indeed the limit of damages to which defendant will be entitled if it is determined that no preliminary injunction ought to have been granted (*Bonded Concrete, Inc. v Town of Saugerties*, 42 AD3d 852, 855 [3d Dept 2007]).
Pursuant to CPLR § 2501(1) and (2), an undertaking is

[a]ny obligation, whether or not the principal is a party thereto, which contains a covenant by a surety to pay the required amount, as specified therein, if any required condition, as specified therein or as provided in subdivision (c) section 2502, is not fulfilled; and . . . any deposit, made subject to the required condition, of the required amount in legal tender of the United States or in face value of unregistered bonds of the United States or of the state.

CPLR § 2502(a)(1) and (2) defines a surety as an insurance company or a natural person, except an attorney.
In support of the instant motion, plaintiffs submit an affidavit by ZS. ZS states that Worbes was founded 70 years ago by his father AS, his uncles JS, Sol Sebrow, and Norman Sebrow. Thereafter, Worbes and other family business were consolidated between AS, JS, ZS and DS. All the businesses were governed by the agreement, which states that AS, JS, ZS, and DS each owned 25 percent of the shares in each corporate entity, including Worbes. Initially, AS was the president, DS the vice president, ZS the treasurer and JS the secretary. Worbes' exclusive business was to hold, own, and operate 815. With the exception of a testamentary disposition, section 6 of the agreement prevents the transfer of shares in Worbes without the unanimous consent of all other stockholders. Further, because section 5 of the agreement provides that the spouse of any shareholder shall be paid a six month pension upon the shareholder spouses' death, it is clear that section 6 of the agreement was not excepted for spouses, even upon the death of a shareholder spouse. Because both AS and JS made testamentary dispositions of their shares in Worbes, upon their deaths, ZS and DS each held 50 percent of the shares in Worbes. In 1991, DS married BS. On May 29, 2017, DS passed away. ZS has never consented to any third-party becoming a shareholder in Worbes. Since DS' death, BS has attempted to take control of Worbes and the other businesses, has made numerous untenable demands, resisted

reasonable operation of the businesses and has tried to control 815 and its disposition. Since DS' incapacitation in 2014, ZS, as the sole stockholder in Worbes, has devoted time, effort, resources, and personal funds to all the family businesses. ZS has paid taxes due, expenses, and salaries and has managed the businesses. On February 25, 2020, ZS, using personal funds, paid $292,876.51 towards taxes owed by Worbes and on April 1, 2020, he did the same in the sum of $144,193.28. Conversely, besides answering the telephone at times when the secretary was away, BS has contributed nothing to the businesses or 815. In 2018, ZS determined that the businesses could no longer operate profitably and sought to wind up their affairs, which included selling 815. As a courtesy, ZS conveyed the foregoing to BS, who incorrectly asserted that her consent was required, and would not consent to the sale of 815 unless none of her share of the proceeds from the sale would be used to pay the expenses of the businesses. BS took this position despite an agreement between ZS and DS that upon the sale of 815, the proceeds would be used to pay the expenses of the other family businesses. On November 20, 2019, BS initiated an action in Supreme Court, wherein she sought to force ZS and Worbes to take certain actions, sought to dissolve Worbes, and sought to sell 815 by partition. In support of her action, BS referenced the agreement and asserted that upon DS' death, his shares were passed to her. Upon plaintiffs' motion, the court dismissed the prior action, holding that ZS was the sole shareholder, since there had been no testamentary disposition of DS' shares in Worbes. BS moved to reargue the court's decision and also appealed. Both the appeal and the motion are pending. On October 12, 2021, a tax lien foreclosure action was commenced in Supreme Court. Should that sale proceed, it would not be in the best interests of Worbes or its shareholder insofar as at a foreclosure sale, the property would sell for less than it would if sold on the open market. Since April 2021, ZS has been attempting to procure a seller for 815. However, because of BS' actions - the claim that she has to consent to a sale, the prior action and the pending appeal therein - procuring a buyer has been difficult. Nevertheless, on April 5, 2022, ZS, on behalf of Worbes, entered into a contract to sell 815 to Maujer, for $5,500,000. The foregoing contract discloses the existence of the pending litigation between the parties, providing that if Worbes is unable to convey title, the contract may be canceled. Because BS refuses to consent to the foregoing sale, it is likely that the foregoing contract will be canceled. However, ZS has been assured that if a court authorizes the sale of 815, a title company will insure title in any ensuing sale.

Plaintiffs also submit the agreement. The agreement is dated January 2, 1997 and is between AS, JS, ZS, and DS. The agreement's purpose is "to set forth [the] respective rights, interests and obligations [of the parties] in and to" S & S Soap Co., Inc., Worbes, and Worbes Leasing Corp. With respect to Worbes, the agreement states that AS, JS, ZS, and DS "are each the owners of twenty five shares of the common stock of Worbes, same being all of the issued and outstanding shares." Paragraph 1 confirms that the ownership of the shares in the respective corporations is correct and accurate. Paragraph 5 states that

[i]n the event of the death of a stockholder, his widow shall continue to receive his salary for a period of six (6) months following his death and shall be based on the deceased's average salary for the six (6) months prior to his death.

Paragraph 6 states that

[n]o stockholder of S & S, Worbes and WLC shall sell, transfer, assign, mortgage, hypothecate his shares in any of said corporations or enter into any agreement as the result of which some third party shall become a stockholder in any of said corporations without the unanimous consent of all the other stockholders with the sole exception that any stockholder may make a testamentary disposition of his shares to his issue in which event his issue shall own the shares of his deceased father but subject nevertheless to the terms and conditions contained in this agreement. Any other attempted transfer or disposition of such shares shall be a nullity and unenforceable.

Plaintiffs submit documents, which evince that on February 6, 2020, there was a tax lien placed on 815 totaling $292.876.51, which was paid by Sebrow Family Gelt MGT LLC on February 25, 2020. The same documents evince that on April 1, 2021, there was another tax lien placed on 815 totaling $144,262.27, which was paid from the same account [2].

2 The court presumes that this is ZS' account.

Plaintiffs also submit the complaint, filed on November 20, 2019, in a prior action brought by BS against ZS. Per the complaint, BS alleged that DS' shares in Worbes, acquired by him pursuant to the agreement, passed to BS upon his death. BS further alleged that ZS precluded BS from making decisions in Worbes, and sought, *inter alia*, an accounting and Worbes' dissolution.

Plaintiffs submit an order of the Court (Rosado, J.), dismissing the action brought by BS. The decision states that dismissal of the action was warranted pursuant to CPLR 3211(a)(1) since except for testamentary disposition, the agreement precluded conveyance of Worbes' shares absent consent of all other shareholders. The Court noted that DS' last will and testament, while bequeathing all of DS' personal property to BS, had no indication that his shares in Worbes were similarly conveyed to her. Notably, the Court found BS' claim that the agreement was forged unavailing, since she relied on the agreement to establish that DS owned 50 percent of the share in Worbes.

Plaintiffs submit a complaint, filed on January 14, 2022 in a tax lien foreclosure action brought by NYCTL 2019-A Trust, agent and trustee of the City of New York, seeking to foreclose on the lien and sell 815. The complaint alleges that the tax lien levied against 815 totals $99,406.

Lastly, plaintiffs submit an Agreement of Purchase and Sale (heretofore and hereinafter "the contract"), wherein Maujer has agreed to purchase 815 from Worbes for $5,500,000, with a down payment of $5,100,000. Within paragraph 7.1.11, the parties acknowledge that "[t]here are legal actions pending or, to Seller's knowledge, threatened in writing, which may impair or otherwise adversely affect (i) Seller's ability to consummate the transactions contemplated by this Agreement," and should plaintiffs be unable to clear title with 180 days [3], then Maujer is entitled to cancel the contract.

3 The date from which the 180 days is measured is ambiguous. However, the Court presumes that it is measured from the date of the contract's execution.

Based on the foregoing, plaintiffs' application seeking a mandatory preliminary injunction allowing them to sell 815 to Maujer pursuant to the contract is granted.

As noted above, the proponent of a preliminary injunction must establish a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tips them in favor of the moving party (*Nobu Next Door, LLC* at 840; *Doe* at 750; *61 West 62 Owners Corp.* at 334; *Second on Second Cafe, Inc.* at 264; *Stockley* at 536). While CPLR § 6301 authorizes a preliminary injunction "restraining the defendant from the commission or continuance of an act," it is well settled that, where appropriate, a court has the power to issue a mandatory injunction, which disrupts rather than preserves the status quo, and whereby a party is affirmatively ordered to perform an act (*Bachman v* at 463; *Second on Second Cafe, Inc.* at 265; *Rosa Hair Stylists, Inc.* at 794). Mandatory injunctions, however, should not be granted, absent extraordinary circumstances and only when the right to such relief is clearly established (*Second on Second Cafe, Inc.* at 360-361; *Rosa Hair Stylists, Inc.* at 794).

With respect to likelihood of success on the merits, plaintiffs establish that in light of the agreement, establishing ownership of the shares in Worbes and the limitation on the transfer of the shares indicated therein, it is likely that the Court will issue a declaratory judgment declaring that defendants own no shares in Worbes. To be sure, the agreement indicates that in 1997, the shares in Worbes were equally owned by ZS, his father AS, DS, and his father JS. Paragraph 6 of the agreement prohibits, with the exception of a testamentary disposition, the transfer of any shares in Worbes absent the unanimous consent of all other shareholders. ZS states that upon AS' death, pursuant to a testamentary disposition by AS, he became owner of 50 percent of the shares in Worbes. Similarly, ZS states that DS, upon the death of JS and pursuant to a testamentary disposition, became owner of the remaining shares in Worbes. Lastly, ZS states that because there was never a testamentary disposition to BS and because he never consented to the transfer of DS' shares to BS, upon DS' death, DS' shares in Worbes reverted to Worbes. Based on the foregoing, without determining the ultimate issue in this case, it nevertheless appears that plaintiffs are likely to succeed on their cause of action for declaratory judgment [4]. Indeed, is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]). Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield* at 569). Here, in the absence of any evidence that DS expressly transferred his shares in Worbes to BS in his will or that ZS consented to such transfer, the clear language in the agreement precludes the ownership of any shares in Worbes by defendants.

4 Indeed, given Judge Rosado's decision, which essentially concluded that BS, and by extension, the estate of DS, owned no shares in Worbes, if the same ultimately stands, the doctrines of

> res judicata and collateral estoppel would almost certainly dispose of this action in favor of plaintiffs. To be sure, as to BS, the doctrine of res judicata precludes a party or his privies from re-litigating issues of fact and law decided in a prior proceeding (*Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485 [1979]). As to defendant THE ESTATE OF DAVID SEBROW, the doctrine of collateral estoppel, a narrower species of the doctrine of res judicata, prevents a party from re-litigating an issue when the issue was previously litigated and decided against the party or his/her privies (*Ryan v New York Telephone Company*, 62 NY2d 494, 500 [1984]; *see Buechel v Bain*, 97 NY2d 295, 303-304 [2001]; *David v Biondo*, 92 NY2d 318, 322 [1998]; *Gramartan Home Investors Corp.* at 485; *Lumbermens Mutual Casualty Company v 606 Restaurant, Inc.*, 31 AD3d 334, 334 [1st Dept 2006]; *Zimmerman v Tower Insurance Company of New York*, 13 AD3d 137, 139 [1st Dept 2004]; *Mulverhill v State of New York*, 257 AD2d 735, 737-738 [3d Dept 1999]; *Tamily v General Contracting Corporation*, 210 AD2d 564, 567 [3d Dept 1994]).

With respect to irreparable harm, plaintiffs establish that a tax foreclosure action has been duly commenced against Worbes, which seeks to foreclose and sell 815 in order to recover tax sums due to the City of New York. While ZS states and establishes that he previously satisfied tax liens in order to avoid foreclosure, he states that he lacks the funds to prevent the impending tax foreclosure. If the property is sold at foreclosure, given the price procured thereat and the fees associated therewith, ZS states that the net proceeds would be substantially less than if the property is sold in the open market, which is what he seeks to do by selling it to Maujer. Based on the foregoing, the Court is convinced that absent a preliminary injunction allowing the sale of 815 to Maujer for $5,500,000, not only would plaintiffs be irreparably harmed, but should the Court later conclude that defendants have any ownership interest in Worbes, that they too would be irreparably harmed. Significantly, there is no question that there is an impending action to foreclose on a tax lien, which ZS cannot forestall and which upon its disposition would lead to a forced sale of 815. Should that occur, on this record, it is clear that the proceeds of that sale would be less than if 815 were sold to Maujer.

On this record, the balancing of the equities tip in favor of a preliminary injunction. Significantly, as noted above, in the absence of an injunction not only would the ensuing harm be prejudicial to plaintiffs, but as discussed, defendants, should they ultimately prevail, would also suffer harm.

Accordingly, not only have plaintiffs met the burden warranting the issuance of a preliminary injunction, they have demonstrated that the circumstances here are extraordinary, in that if 815 is not sold, the value of the object of the instant action will be diminished. Accordingly, the issuance of a mandatory injunction, allowing the alteration of the status quo, is hereby warranted. That said, here, complete relief also requires a preliminary injunction enjoining defendants from doing anything to thwart the sale of 815.

Given the nature of the preliminary injunction - the sale of 815 to maximize Worbe's assets - and the wholesale absence of any evidence that defendants have more viable alternative, the Court shall set a minimal bond and only because the law demands it. Quite frankly, it is hard to fathom how defendants could be harmed if it later turns out that this preliminary injunction should not have been granted. As noted above, the amount of the undertaking is solely within the court's discretion and should be as much as rationally necessary to compensate defendants for any potential damages should it later be determined that a preliminary injunction was unwarranted (*Clover St. Assoc.* at 313 ; *Kazdin* at 457). The undertaking, thus, represents the amount and indeed the limit of damages to which defendants will be entitled if it is determined that no preliminary injunction ought to have been granted (*Bonded Concrete, Inc.* at 855). Thus, the amount of the undertaking is fixed at $10,000.

Nothing submitted by defendants warrants denial of the instant motion. Indeed, rather than assail the merits of the sale sought by plaintiffs, defendants merely oppose the instant motion for unavailing procedural reasons.

First, the Court finds no merit to defendants' assertion that this decision, in light of the prior action brought by them, constitutes an impermissible advisory opinion. It is true that this State's courts do not issue advisory opinions. Indeed

> [t]he 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. The role of the judiciary is to give the rule or sentence, and

thus the courts may not issue judicial decisions that can have no immediate effect and may never resolve anything. It is therefore settled law that an action may not be maintained if the issue presented for adjudication involves a future event beyond control of the parties which may never occur. This rule not only prevents dissipation of judicial resources, but more importantly, it prevents devaluation of the force of judicial decrees which decide concrete disputes

(*Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [1988] [internal citations and quotation marks omitted]; *see New York Pub. Interest Research Group, Inc. v Carey*, 42 NY2d 527, 529 [1977]). Here, however, the foregoing jurisprudence has zero applicability. Advisory opinions are those which when issued, do not resolve the dispute between the parties, such that their issuance has no effect on the controversy. This proscription is applicable where the decision sought involves a future event, beyond the control of the parties to an action (*Cuomo*at 354-355 ["In the present case, Government argues that LILCO's implementation of the Emergency Plan would usurp Government's police power. However, this potential encroachment can occur only if the NRC approves the plan, which it has not yet done and which it may never do. In addition the Emergency Plan has been revised six times during the pendency of this litigation alone—once after the case was argued before this court. Therefore, even if a plan is at some point approved, it certainly cannot be known at this point whether any final version of the plan would pose the threat that Government objects to here. Thus the potential for encroachment of which Government complains is contingent upon unfinished Federal administrative decisions, and presents a nonjusticiable dispute."]).

Here, defendants seek to proscribe this Court's instant decision because there is an appeal pending, which could revive BS' now dismissed action against plaintiffs. Even assuming that the bar on the issuance of advisory opinions was that which defendants aver, it would have no application here. To be sure, this Court is not ruling on the ultimate issues alleged in this action such that this decision would significantly impact the pending appeal in the other action. Instead, this Court is merely determining that in order to preserve the object of this action - 815 - the same must be sold. Moreover, the assertion that a pending appeal in another action somehow precludes this Court from ruling in an unrelated action is not in and of itself meritless. The assertion, however, that an appeal on an already disposed action is akin to an appeal on a live and pending action, is unavailing. Despite BS' pending motion to renew and reargue Judge Rosado's decision dismissing the prior action and the appeal of Judge Rosado's decision, the prior action is over. Until it is revived by the Appellate Division First Department or by the grant of the pending motion, that action is over and has been dismisssed. Thus, the instant decision is being issued on a very real and live controversy and it is defendants who erroneously contend that this decision is impermissibly advisory.

Defendants remaining contention, that the Dead Man's statute precludes the introduction of the agreement at trial, such that it is unlikely that plaintiffs are likely to ultimately prevail on their action for declaratory judgment, is also unavailing.

CPLR § 4519, states, in relevant part, that

[u]pon 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 person with a mental illness, or a person deriving his title or interest from, through or under a deceased person or person with a mental illness, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or person with a mental illness, 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 person with a mental illness or deceased person is given in evidence, concerning the same transaction or communication.

Thus, CPLR § 4519 precludes an interested party from testifying about transactions with the a decedent or one deemed incompetent to testify. As noted by the court in *Matter of Wood's Estate*, (52 NY2d 139 [1981]),

[t]he statue prevents any person "interested in the event" from testifying to a "personal transaction" with the deceased unless the representative of the deceased has waived the protection of the statute by testifying himself or introducing the testimony of the decedent into evidence at trial

(*id.* at 144). The rationale for the statute is that it

prevent[s] a party or one interested in the event giving testimony as to personal transactions or communications with

a deceased person, is that the deceased cannot confront the survivor, or give his version of the affair, or expose the omissions, mistakes, or falsehoods of the survivor

(*Burke v Higgins*, 178 AD 816, 820 [1st Dept 1917]). Notably, the protection accorded by the statute can be waived when the decedent's estate, representative, or the person seeking to avail itself of the protection of the statute testifies concerning the transaction, which would otherwise be precluded or when the party who would otherwise benefit from the statute elicits testimony regarding the otherwise precluded transaction (*Matter of Wood's Estate* at 145 ["By the terms of the statute, the representative of a decedent's estate waives the protection of the statute if he testifies in his own behalf concerning a personal transaction of his adversary with the deceased. Once having introduced testimony concerning that transaction into evidence, he cannot thereafter prevent his adversary from testifying to the details of the same transaction, for to do so would give the estate an unfair advantage not intended by the statute. Also, the executor cannot avoid a waiver by eliciting testimony from an interested party on the personal transaction in issue. It was long ago settled that when the executor questions his adversary as to all or part of a personal transaction with the decedent, he has opened the door as to that transaction and otherwise incompetent testimony is admissible to fully explain the personal transaction in issue. The purpose of this rule is to place the parties, insofar as is practical in light of the policy embodied in the statute, in relatively equivalent positions vis-a-vis the same transaction. This prevents the unfair use of the statute as a sword rather than a shield" [internal citation and quotation marks omitted]). Here, defendants contend that the only evidence precluding BS' ownership interest in shares in Worbes is the agreement. As to the agreement, defendants contend that the only person who can authenticate the same is ZS. Since ZS is an interested party and the agreement evinces a personal transaction with DS, who is dead and whose estate would otherwise be entitled to DS' shares in Worbes, defendants contend that ZS' testimony about the agreement and therefore, the agreement itself are not admissible.

On this record, the foregoing assertion is flawed at best and at worst, shortsighted. First, with regard to the flaw in the assertion, as evinced by Judge Rosado's decision in BS' action, it is clear that by alleging that the agreement was forged, she has, as the executor of DS' estate, put the authenticity of the agreement at issue, and has thus waived the right to preclude ZS from testifying about the same [5] . Second, and perhaps most puzzling, is that defendants' position, seeking to exclude the agreement and indeed ZS' testimony regarding the same from the Court's consideration fails to recognize that absent the agreement, there is nothing else establishing that DS ever owned shares in Worbes. Thus, but for the agreement, defendants cannot as urged - establish that DS owned shares in Worbes and that, therefore, the same were bequeathed to BS upon his death. This the legal and tactical equivalent of cutting off one's nose to spite one's face. Accordingly, whether in the now disposed action where BS waived the protections of CPLR § 4519, or in this action, where defendants will likely, in order to prevail, have to protections of CPLR § 4519, the Dead Man's Statute did not and will not preclude the admission of the agreement or ZS' testimony regarding the same. It is hereby

5 It bears mentioning that a review of the complaint in the action brought by BS, bearing Index No. 33784/19E, evinces that she relied on the agreement to establish DS' ownership of the shares in Worbes (Paragraphs 10-12 of the Complaint ["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 . . . Ultimately, the interest of two of the shareholders, Abraham Sebrow and Joseph Sebrow, passed to their sons Zvi Sebrow and David Sebrow. . . 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."]). This alone constituted waiver of the right to use CPLR § 4519 as a shield to preclude the use of the agreement in that case, which is the likely result in this action as well.

ORDERED upon plaintiffs posting an undertaking in the amount of $10,000, plaintiffs are authorized to sell 815 to Maujer pursuant to the contract. It is further

ORDERED that defendants be hereby enjoined from interfering with the sale of 815 in any way. It is further

ORDERED that within 30 days of the sale of 815, plaintiffs shall deposit all of the proceeds of the sale with the Court

pursuant to CPLR § 2601, pending a further order of this Court. It is further

ORDERED that plaintiffs serve a copy of this Decision and Order with Notice of Entry upon defendants within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated: April 8, 2022

Bronx, New York

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HON. FIDEL E. GOMEZ, AJSC

All Citations

Slip Copy, 2022 WL 1073713 (Table)