

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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C/

_____AD3d_____

Argued - November 17, 2025

MARK C. DILLON, J.P.
LARA J. GENOVESI
DONNA-MARIE E. GOLIA
PHILLIP HOM, JJ.

2023-09179

DECISION & ORDER

Karin Perkins, respondent, v
Dayton Robert Small, et al., appellants.

(Index No. 718536/19)

Law Office of Henry Graham, P.C., Greenvale, NY, for appellants.

Daniel Friedman, Brooklyn, NY, for respondent.

In an action, inter alia, for a judgment declaring the plaintiff's ownership interest in the defendant Dayton Small Realty Co., Inc., and certain real property, the defendants appeal from an order and judgment (one paper) of the Supreme Court, Queens County (Ulysses B. Leverett, J.), entered July 6, 2023. The order and judgment, insofar as appealed from, granted that branch of the plaintiff's motion which was for summary judgment declaring that she has a 25% ownership interest in the defendant Dayton Small Realty Co., Inc., denied the defendants' motion for summary judgment dismissing the complaint and on their counterclaims, and declared that the plaintiff has a 25% ownership interest in the defendant Dayton Small Realty Co., Inc., and that shares of the defendant Dayton Small Realty Co., Inc., should be distributed in accordance with a trust agreement.

ORDERED that the order and judgment is modified, on the law, (1) by deleting the provision thereof granting that branch of the plaintiff's motion which was for summary judgment declaring that she has a 25% ownership interest in the defendant Dayton Small Realty Co., Inc., and substituting therefor a provision denying that branch of the motion, and (2) by deleting the provision thereof declaring that the plaintiff has a 25% ownership interest in the defendant Dayton Small Realty Co., Inc., and that shares of the defendant Dayton Small Realty Co., Inc., should be distributed in accordance with the trust agreement; as so modified, the order and judgment is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff's father, Dayton V. Small (hereinafter the father), owned certain real property located in Queens (hereinafter the property). In 1993, the father executed a certificate of incorporation forming the defendant Dayton Small Realty Co., Inc. (hereinafter the Corporation). In December 1995, the father prepared a deed conveying the property to the Corporation. Thereafter, the defendant Dayton Robert Small (hereinafter Dayton) took over operations of the Corporation and management of the property.

In May 2000, the father executed a self-declaration of living trust (hereinafter the trust) designating himself and Dayton, his son and the plaintiff's brother, as co-trustees. Upon the father's death, the trust directed Dayton to distribute the father's residuary estate equally between the plaintiff, Dayton, and the father's two other children. The trust did not expressly direct any distributions of the property or interests in the Corporation. The same day, the father executed a will devising his residuary estate into the trust, to be distributed by Dayton in accordance with the terms of the trust. Days later, the father died.

The plaintiff commenced this action in 2019 against Dayton and the Corporation seeking, among other things, a judgment declaring that she was entitled to an interest in the property by way of her interest in the father's residuary trust estate. The defendants interposed an answer and asserted counterclaims alleging the father made an inter vivos gift of his shares in the Corporation to Dayton such that Dayton was entitled to a judgment declaring that he was the sole owner of the Corporation.

The plaintiff moved, inter alia, for summary judgment declaring that she has a 25% ownership interest in the Corporation. The defendants moved for summary judgment dismissing the complaint and on their counterclaims. In an order and judgment entered July 6, 2023, the Supreme Court granted that branch of the plaintiff's motion, denied the defendants' motion, and declared that the plaintiff has a 25% ownership interest in the Corporation and that the shares of the Corporation should be distributed in accordance with the trust. The defendants appeal.

Here, the plaintiff failed to establish her entitlement to judgment as a matter of law. While the plaintiff's submissions established that the father owned all of the Corporation's stock at some point after its formation, she failed to eliminate triable issues of fact as to whether the Corporation remained a part of the father's residuary estate at the time of his death. Therefore, the Supreme Court should have denied that branch of the plaintiff's motion which was for summary judgment declaring that she has a 25% ownership interest in the Corporation, as she failed to establish, as a matter of law, that she was entitled to receive any ownership interest in the Corporation through the father's residuary trust estate.

However, the Supreme Court properly denied the defendants' motion for summary judgment dismissing the complaint and on their counterclaims. "On a motion for summary judgment, a moving defendant does not establish its prima facie entitlement to judgment as a matter of law by merely pointing to gaps in the plaintiff's case. The moving defendant must affirmatively demonstrate the merit of its claim or defense" (*Correra v 60 Millwood Partners, LLC*, 224 AD3d 728, 729, quoting *UB Distribs., LLC v S.K.I. Wholesale Beer Corp.*, 161 AD3d 1027, 1028). Here, the defendants failed to demonstrate, prima facie, that the father transferred ownership of the

Corporation to Dayton before the father's death. The defendants' submissions, purportedly demonstrating the father's donative intent and delivery of the corporate kit, were insufficient to establish transfer of ownership in the absence of a written record as required by the Corporation's stock certificate (*see Celauro v 4C Foods Corp.*, 88 AD3d 846, 846-847; *see also Hong Qin Jiang v Li Wan Wu*, 179 AD3d 1035, 1038). Further, the defendants failed to demonstrate, *prima facie*, that the action was barred by the doctrine of laches or the statute of limitations (*see Simmons v Bell*, 220 AD3d 647, 648; *cf. Matter of Greens at Half Hollow, LLC v Suffolk County Dept. of Pub. Works*, 147 AD3d 942, 944).

Accordingly, neither party was entitled to judgment as a matter of law, as triable issues of fact existed regarding ownership of the Corporation, and the Supreme Court should have denied that branch of the plaintiff's motion which was for summary judgment declaring that she has a 25% ownership interest in the Corporation, and properly denied the defendants' motion for summary judgment dismissing the complaint and on their counterclaims.

In light of our determination, we need not reach the parties' remaining contentions.

DILLON, J.P., GENOVESI, GOLIA and HOM, JJ., concur.

2023-09179

DECISION & ORDER ON MOTION

Karin Perkins, respondent, v
Dayton Robert Small, et al., appellants.

(Index No. 718536/19)

Appeal from an order and judgment (one paper) of the Supreme Court, Queens County, entered July 6, 2023. Motion by the appellants to strike stated portions of the respondent's brief on the ground that they improperly raise issues for the first time on appeal. By decision and order on motion of this Court dated November 15, 2024, the motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof.

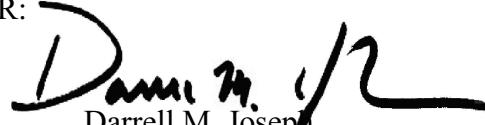
Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the argument of the appeal, it is

ORDERED that the motion is granted to the extent that (1) page 18 and the first two paragraphs on page 19, which end with the words "cannot now be heard to complain of the result," (2) the material beginning with the first full paragraph of page 20 through the quoted material on page 22, which ends with the words "repudiation was lacking," (3) page 24, the remainder of the paragraph starting on page 24 that ends on page 25, and the first full paragraph on page 25, which ends with the words "was ever filed," and (4) the last paragraph on page 26 of the respondent's brief

are stricken and have not been considered on the determination of the appeal, and the motion is otherwise denied.

DILLON, J.P., GENOVESI, GOLIA and HOM, JJ., concur.

ENTER:


Darrell M. Joseph
Clerk of the Court