SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1023

CA 13-00429

PRESENT: SMITH, J.P., FAHEY, SCONIERS, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF KAMLEH S. TEHAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ROBERT J. TEHAN, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TEHAN'S CATALOG SHOWROOMS, INC., RESPONDENT-APPELLANT.

STEATES, REMMELL, STEATES & DZIEKAN, UTICA (RALPH W. FUSCO OF COUNSEL), FOR RESPONDENT-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered September 21, 2012. The order denied the motion of respondent for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner, in her capacity as the executor of the estate of her husband (decedent), commenced this proceeding pursuant to Business Corporation Law § 1104-a seeking, inter alia, a determination that she is the owner of shares in respondent corporation held by decedent at the time of his death and dissolution of respondent. As relevant on appeal, Supreme Court denied that part of respondent's motion for summary judgment dismissing the petition based on petitioner's lack of standing (*see* CPLR 3211 [a] [3]; 3212), without prejudice to renew upon completion of discovery. Based on the record before us, we conclude that the court properly denied respondent's motion to that extent. There are issues of fact whether and to what extent the parties performed their obligations under the applicable shareholders' agreement or whether the parties elected to abandon that agreement (*see Carver v Apple Rubber Prods. Corp.*, 163 AD2d 849, 850; *Staebell v Bennie*, 83 AD2d 765, 765-766; *see generally* CPLR 3212 [f]). Finally, respondent's contention that the court should have conducted an immediate trial pursuant to CPLR 3212 (c) to resolve all issues related to standing is raised for the first time on appeal and is therefore not properly before us (*see generally*

Ciesinski v Town of Aurora, 202 AD2d 984, 984).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court