

L.W!

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 12

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Hugh W. Campbell X

Index No.

7384-2007

-against-

Hon. JOHN A. BARONE

McCalls Bronxwood Funeral Home X

Justice.

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

The following papers numbered 1 to _____ Read on this motion,
Noticed on _____ and duly submitted as No. _____ on the Motion Calendar of _____

	PAGES NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Answered		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Findings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

FILED
CLERK'S OFFICE

BRONX

SEP - 2 2010

Upon the foregoing papers this memorandum decision.

motion is decided in accordance with the annexed

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 7, 30, 10

Hon. [Signature]
J.S.C.
JOHN A. BARONE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-12

-----X
Application of Hugh. W. Campbell as the Preliminary
Executor of the Estate of Emma C. Brisbane,

Petitioner(s),

INDEX. NO.: 17384/07

for the Judicial Dissolution of McCall's Bronxwood
Funeral Home, Inc.,

-----X
Hugh. W. Campbell as the Executor of the
Estate of Emma C. Brisbane,

Plaintiff(s),

- against -

INDEX. NO.: 300513/10

Jeffrey D. Buss, Esq. And James H. Alston, Jr.,

Defendant(s).

-----X
James H. Alston, Jr., and McCall's Bronxwood
Funeral Home, Inc.,

Third-Party Plaintiff(s),

- against -

INDEX. NO.: 83796/10

Hugh W. Campbell, Individually,

Third-Party Defendant(s).

-----X
HON. JOHN A. BARONE:

This matter originated in 2007 when the initial petitioner moved under NY Bus Corp.
Law §1104(a)(1)(2) for a judicial dissolution of McCall's Bronxwood Funeral Home, Inc., (Index
No. 17384/07). The petition was brought on behalf the Estate of Emma Brisbane by Hugh W.

Campbell the executor of the estate. Mrs. Brisbane's estate was the owner of 50% of the corporation. The corporation, by James H. Alston, Jr., its manager and the holder of the remaining 50% opposed dissolution and cross-moved under BCL §1118 for a hearing to determine the value of the Brisbane stock preliminary to a tender offer by the corporation to redeem those shares pursuant to the terms of the shareholders agreement which it was alleged which provided an alternative to dissolution. A preliminary tender offer of \$393,048.00 had been made to and rejected by the Brisbane estate.

Another action was filed by Mr. Campbell for the estate against Mr. Alston and Jeffrey D. Buss, the attorney for the corporation. (Index No. 300513/10). This action was before Justice Green of this court. In brief, the complaint was made pursuant to the Judiciary Law §487 and alleges mismanagement and deception on the part of the individual defendants both in managing the corporation and in the proceedings before the court. Partial summary judgment was sought therein Mr. Alston and McCalls then cross-moved for summary judgment and to add Mr. Campbell as an individual third-party defendant in this second suit. Original plaintiffs than moved to dismiss the third-party action and to consolidate Index No. 300513/10 with Index No. 17384/07. Defendants opposed the motion to consolidate. They did however suggest a consolidation of the hearings proposed by plaintiffs pursuant to BCL 1104(a)(1)(2) and by defendants pursuant to BCL §1118.

In addition to their actions there is an estate proceeding pending in Surrogates Court, Westchester County in re the Estate of Emma C. Brisbane.

This court has issued a number of orders in this case. On June 18, 2008 the court ordered a full evidentiary with respect to the need for dissolution of the corporation and to determine the value of the corporate stock. In furtherance of the hearing a referee of the court, Mr. John D'Alessandro was appointed to supervise discovery in the case on September 22, 2008. Mr. D'Alessandro made his report to the court on April 28, 2009. On July 16, 2009 the

court issued an order confirming the report and awarding \$7,500.00 in attorneys fees to petitioner. For reasons that remain unclear to the court no Judicial Hearing Officer was ever appointed to conduct the evidentiary hearings.

As to plaintiff's motion to consolidate that motion is granted. The allegations made and issues involved in the various motions and cross-motions claim and counterclaims had herein are so inter-related that it is certainly in the interest of judicial economy to bring all matters into one consolidated action. Defendants have suggested the possibility of a joint trial rather than consolidation. Consolidation fuses separate actions into one action. In a joint action, although joined together for trial maintain their separate identity and captions. Siegel, New York Practice (4th Ed.) §127. Both types of actions are governed by CPLR 602. Joint trials rather than consolidation is sometimes preferred where cases while related are in markedly different procedural stages and it would be preferable to proceed separately with both matters up to the point of trial. Continental Building Co., v. Town of Salem, 150 AD 2d 518. In this case, however, the identity of the parties, the same adversarial position in both actions and the pendency of both actions in Supreme Court, Bronx County disposes the court to order consolidation.

It has been the opinion of this court since its earliest involvement in this case that prior to dealing with the many thorny issues arising out of this litigation that an initial hearing should be held to determine the fair value of the stock of the corporation. Since the initial court order of June 18, 2008 directing such hearing presided over by a Judicial Hearing Officer was never carried out, the court itself will conduct this hearing. It will be a full evidentiary hearing on the record. All parties have suggested that this would be extremely helpful in refining their respective positions.

It is the decision and order of this court:

- 1) that all matters herein be consolidated under Index No. 17384/07.

2) that a full evidentiary hearing be held by this court to determine the fair value of the shares and underlying business of McCalls Bronxwood Funeral Home, Inc.:

a) That this matter will be scheduled for August 23, 2010 in Trial Part 12, Bronx County Supreme Court, Room 710 at 9:30 a.m. or as soon thereafter as counsel may be heard;

b) on that date a conference will be held to resolve any outstanding discovery issues and a schedule will be set for the evidentiary hearing. Court referee John D'Alessandro will be present at that conference to aid in the resolution of any discovery issues.

This constitutes the decision and order of this Court.

Date: 7/30/10



John A. Barone, JSC