

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART

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

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

In the Matter of the Petition of  
Hugh W. Campbell  
-against- X

Index No. 17384/07  
Hon. **JOHN A. BARONE**

MCCALL'S BRONXWOOD FUNERAL HOME INC. X

Justice.

The following papers numbered 1 to \_\_\_ Read on this motion.

Noticed on \_\_\_\_\_ and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of \_\_\_\_\_

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

Upon the foregoing papers this \_\_\_\_\_ motion is decided in accordance with the annexed memorandum decision.

*of a JHC requesting a hearing and appointment*

Motion is Respectfully Referred to:

Justice: \_\_\_\_\_

Dated: \_\_\_\_\_

Dated: 6/18/08

Hon.   
J.S.C.  
**JOHN A. BARONE**

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

-----X  
In the Matter of the Petition of  
Hugh W. Campbell

As the Preliminary Executor of  
The Estate of Emma C. Brisbane

INDEX. NO.: 17384/07

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

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

This matter involves the above referenced petition brought on by Order to Show Cause and the cross-motion of James H. Alston, Jr., to dismiss the petition for judicial dissolution for failure to state a cause of action pursuant to CPLR 3211(a) and (7); to dismiss the petition for an accounting as time barred pursuant to CPLR 3211(a)(1)(5) and CPLR 213(4) and(7) and for an order compelling petitioner to sell the Estates' interest in the corporation pursuant to the terms of a 1998 Stockholder Agreement.

Petitioner has moved under NY Bus Corp. Law §1104-a(a)(1)(2) for a judicial dissolution of the corporation. Petitioner alleges that those in control of the corporation have been guilty of fraudulent, illegal and oppressive actions toward the complaining shareholder and further that Mr. Alston has looted, wasted or diverted corporate assets for non-corporate purposes.

During oral argument held on this petition and cross-motion, it became evident that there were factual issues that must be determined before a decision can be rendered.

Specifically the Court must determine whether: 1) liquidation of the corporation is the only feasible means whereby the petitioner may reasonably expect to obtain a fair return on their investment; and (2) whether liquidation is reasonably necessary for the protection of the

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shareholder's rights and interests. BCL §1104-a(b)(1)(2). As a corollary to this the Court must determine whether sale of the Estates' interest under the 1998 shareholders agreement will adequately compensate the Estate. Davis v. Alpha Packaging Industries, Inc., 700 NYS 2d 220 (App.Div. 2d Dept 1999).

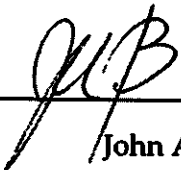
Generally a hearing is required when there is some contested issue determinative of the application BCL§ 1106, 1107 Application for Dissolution of Whitehall Art Co., 6 AD 2d 399, In re WTB Properties, Inc., 291 AD 2d 566. It has been held to be error to dismiss a petition without a hearing where an issue of fact has been framed. Singer v. Evergreen Decorators, 205 AD 2d 694. The hearing therein should be prompt and not unduly protracted or delayed. Petition of Acker, 124 NYS 2d 298.

Often in such matters a Special Referee is appointed to hear and report on the issues raised. Markman v. Exterior Delite, Inc., 14 Misc 3d 910.

Accordingly the within motion to dismiss pursuant to CPLR 3211 is converted to a motion for summary judgment pursuant to CPLR 3212 and a full evidentiary hearing is ordered to determine the issues therein.

This constitutes the decision and order of this Court.

Date: 6/18/08

  
\_\_\_\_\_  
John A. Barone, JSC

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