

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

<p>Application of HUGH W. CAMPBELL, as the Preliminary Executor of</p> <p>THE ESTATE OF EMMA C. BRISBANE Petitioner,</p> <p>for the Judicial Dissolution of MCCALL'S BRONXWOOD FUNERAL HOME, INC.</p>	<p>Index No. 17384-2007</p> <p>ASSIGNED JUSTICE Hon. Edgar G. Walker</p>
<p>HUGH W. CAMPBELL, as the Executor of THE ESTATE OF EMMA C. BRISBANE, Plaintiff,</p> <p>-against-</p> <p>JEFFREY D. BUSS, ESQ. and JAMES H. ALSTON, JR.,</p> <p>Defendants.</p>	<p>Index No.: 300513/2010</p> <p>ASSIGNED JUSTICE Hon. Edgar G. Walker</p>
<p>JAMES H. ALSTON, JR. and MCCALL'S BRONXWOOD FUNERAL HOME, INC.</p> <p>Third Party Plaintiffs,</p> <p>-against-</p> <p>HUGH W. CAMPBELL, individually</p> <p>Third Party Defendant.-</p>	<p>Index No.: 83796/2010</p> <p>ASSIGNED JUSTICE Hon. Edgar G. Walker</p>

**PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENT'S
AND BUSS'S MOTION FOR SUMMARY JUDGMENT**

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COUNTER PRELIMINARY STATEMENT

On Respondent and Defendants Alston and Buss's motion for summary judgment pursuant to CPLR § 3212, Alston and Buss have presented no undisputed material facts to show that they are entitled to the relief they seek.

On the other hand, Petitioner has presented exhaustive evidence by affidavit, with supporting exhibits, depositions and written admissions which recite material facts to show that He and Buss have any defense to the causes of action.

Petitioner has furnished this Court with the undisputed material factual basis for finding, as a matter of law, that pursuant to the parol evidence rule and the merger provisions under paragraphs 19 and 25 of the 1998 Stockholder's Agreement (the "Agreement"), that Alston and Buss may not introduce extrinsic evidence to vary the unambiguous language of the text of paragraph 8(b) of the Agreement. (Wilson Opposition to Alston Aff. at 6, 47 and corresponding exhibits; Wilson Opposition to Buss Aff. at 3-4.

As a matter of law Petitioner has shown that he is entitled to summary judgment under CPLR 3212(b) holding that Alston:

- a. is a person in control of the Funeral Home within the meaning of BCL §1104-a(1)
- b. is guilty of illegal, fraudulent or oppressive actions against Emma Brisbane;
- c. looted, wasted, or diverted the property or assets of the funeral Home for non-corporate purposes; and that

We have also shown that pursuant to CPLR 3212 (c), the only triable issues of fact relate to the amount or extent of damages and equitable adjustment under BCL 1104 -a. Alston and Buss contend that the Estate is entitled to only **\$393,048.00**.

We have shown that Alston and the Funeral Home have no option or other rights under paragraph 8(b) the 1998 Stockholder's Agreement (the "Agreement") to compel Petitioner to sell the Estate's shares to Alston or the Funeral Home for **\$393,048.00**.

We have also shown that the Estate is entitled to recover at least **\$\$2,733,611.77**, which is the relief that Petitioner is entitled to under BCL § 1104-a. Moreover, based upon developments in the Westchester County Surrogate's Court in 2007, that Court ordered Petitioner to bring an appropriate dissolution action in this Court. See transcript and Surrogate Scarpino's Order annexed to the Wilson Opposition to Alston Aff., Exhibit 20.

Petitioner has requested an immediate trial on issues of fact relate to the amount or extent of damages and equitable adjustment under BCL 1104 -a.

The Agreement gives Alston no right under paragraph 8 (b), or any other provision, to compel Campbell to sell the Estate's shares to him or to the Funeral Home.

BACKGROUND FACTS

The parties agree that Alston and the late Ms. Emma Brisbane entered into the Agreement on May 1, 1998.

Alston was seriously in debt throughout the 1990's until at least 10/25/2004, before Ms. Brisbane died, and continuing after she died Wilson Opposition to Alston Aff. at 31 – 33.

He needed massive amounts of money to pay those debts and to fund other transactions which are not necessary to cover here.

Although we cannot pinpoint when he began to steal and money launder the money to perpetrate his massive fraud, we show that it continued at least until Brisbane died. Wilson

Opposition to Alston Aff. at 31 – 33; Exh 4 (Business Records Certifications and Tripp Account Chart and Supporting Bank statements)

He laundered some the money through one or more secret investment accounts he maintained with Tripp & Co., and GunnAllen Financials as shown by the records produced by Pershing, LLC, the custodian of the funds.

Alston was shameless in what he did as shown by his continued stealing and refusal to produce Funeral Home records despite numerous demands that Campbell made for him to do so. See Campbell Certification submitted separately herewith.

When she became convinced that Alston was stealing from her, Ms. Brisbane engaged Ian Nelson, CPA, Nelson analyzed cash receipts, bank statements and other records to show several things. From 1995 – 2001 Alston failed to deposit some **\$1,569,005.57** in cash from the Funeral Home's receipts representing the difference between what the recorded contracts showed and the sum of what was on one tax return and the cash deposit slips showing what Alston deposited¹. from at least 1990 through 1994, Nelson, CPA showed the difference in the total compensation that Alston paid himself (**\$1,007,000.00**) over this period and what he paid to Emma Brisbane, his 50% shareholder (**\$475,000.00**), was another **\$532,000**; from at least July 11, 1996 to June 24, 2005. Nelson Affd. at ¶¶ 6, 9 - 10.

The proof shows that although Alston had testified that he wrote the names of customers who had made cash payments next to the cash amount on the deposit slips, Wilson showed that he did not write their names next to the amounts of cash that he deposited in many instances

¹ \$18,330,097.00 less (\$2,051, 109.00 + \$14,709,982.43).

between June 29, 2005 and December 16, 2005². The financial institutions did not have some of the older records. The clear inference is that he deposited some of the cash and pocketed the rest. Wilson Opposition to Alston Aff., at 17, n.8; 22, n. 1; Exh, “8.”

Wilson showed that Alston withdrew another **\$737,131.22** through the use of a secret Tripp & Co. investment account that he had established as administrator on October 16, 1995; Wilson Opposition to Alston Aff., ¶ 10, Exh. “4” and corresponding exhibits (Business Records Certification and Tripp Account Chart and Supporting Bank statements)

Alston also had Chase Bank mail the bank statements for at least one money market account to his residence, claiming that someone had been tampering with the mail, while during the same period of time, he had the secret Tripp account statements mailed to himself as administrator at the Funeral Home address. The Chase statement for December 10, 1997 showed that the balance in that account was **\$117,086.74**. Wilson Opposition to Alston Aff., at 4; Exh. “2.”

So, in all, Alston stole at least **\$2,838,136.79** from the Funeral Home accounts.

Alston continued to cover up this fraud and deception when he refused to allow Lionel Lewis, CPA (“Lewis, CPA”) for the Funeral Home for over 30 years, to meet with Nelson to discuss what Nelson had found. Nelson Aff. ¶¶ 9 – 10, Exh. 4

Alston’s deception and fraud is further demonstrated by his keeping banking secrets from Lewis, CPA, with respect to Tripp & Company, Inc. (“Tripp”). First, Lewis, who had been the Funeral Home’s accountant for 30 years, first became aware of this Tripp in 2007. 89990

² There is exhaustive evidence that Alston continued this practice after the death of Ms. Brisbane. We were restricted in the availability of certain earlier bank records, either because the bank did not have them or at this stage, the manual labor which would be required to extract the records was too much given the discovery time periods.

Brisbane Lionel Lewis Deposition [%LF% pg=109 ln=11 - pg=110 ln=14] annexed to Wilson Aff. See Wilson Opposition to Alston Aff., Exh. "7."

Alston knew at the time he gave the numbers to Lewis to include on the 2007 IRS Form 1120 tax return that he had closed the Tripp account in July 24, 2006, as disclosed on the GunnAllen brokerage statement for the period 7/21/2006 – 7/31/2006. See Wilson Opposition to Alston Aff., ¶¶ ___, Exh. "17."

Lewis, CPA, actively assisted Alston in this deception by continuing to produce false federal tax returns over a period of many years. See Lewis Deposition throughout, beginning on page 57; Nelson Aff. ¶8 (a), Exh. 3 (February 23, 2004 letter, first paragraph).

The deception and cover up was sealed further when Lewis, CPA began and continued to prepare Alston's personal tax returns. Lewis Dep. at 34.

Alston signed federal tax returns that he knew or had reason to know contained demonstrably false information.

Finally, Alston and Buss have offered no undisputed material facts to show that Alston or the Funeral Home had any option or other rights under paragraph 8(b) of the 1998 Stockholder's Agreement to compel Petitioner to sell the Estate's shares to them.

ARGUMENT

THE GOVERNING SUMMARY JUDGMENT STATUTE

Civil Practice Law and Rules Section 3212 provides, in relevant part, as follows.

Rule 3212:

...

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The

affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

(c) Immediate trial. If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper.

Paragraph 8 of the Agreement entitled "**Stock Purchase Upon Death**", reads:

- (a) either stockholder shall be permitted to dispose of their shares in the corporation, in their will or trust, provided the legatee/beneficiary of the said shares is a relative of decedent by blood or marriage, or trustee of said relative. In the event of the death of either stockholder, the personal representative (s) of the deceased stockholder shall immediately, upon issuance and receipt of letters Testamentary or Letters of Administration, deliver to McCall's and to the remaining stockholder, a copy of such letters.
- (b) In the event the above mentioned legatee/trustee/beneficiary wishes to sell or transfer shares of stocks [sic], then said sale or transfer shall be in accordance with Paragraph 7 above.

With respect to paragraph 8(b) above, the clear text gives only Campbell the option to sell or transfer, but only if he *wishes* to do so. *Alston cites no text of the paragraph 8(b) Agreement to support his position.*

Referring to paragraphs 9 and 21 of the Wilson Opposition to Alston Aff., the effect of clear text of the Surrogate Court's Decision and the Decree entered on the construction proceeding brought by Richard Brisbane is to "*permit*," not

“require”, Campbell, to sell or transfer her interest in the Funeral Home, i.e., “... the decedent’s intent was to *permit* her executor to distribute the proceeds from the sale of her interest in a certain funeral home...”

Neither Alston nor Buss has pointed to any ambiguity in the language of the text of paragraph 8(b) of the 1998 Stockholder’s Agreement.

As such, Alston and Buss are precluded from citing any evidence to vary the terms of Article 8(b). The parol evidence rule, which is a part of the Court of Appeals well-established contract jurisprudence, applies to option agreements.

Parol Evidence Rule

On February 14, 2013, the New York Court of Appeals, in a unanimous opinion, held that:

Parol evidence -- evidence outside the four corners of the document -- is admissible only if a court finds an ambiguity in the contract. As a general rule, extrinsic evidence is inadmissible to alter or add a provision to a written agreement. This rule gives "stability to commercial transactions by safeguarding against fraudulent claims, perjury, [*9] death of witnesses . . . infirmity of memory . . . [and] the fear that the jury will improperly evaluate the extrinsic evidence" (W.W.W. Assocs. v Giancontieri, 77 NY2d 157, 162, 566 N.E.2d 639, 565 N.Y.S.2d 440 [1990] [internal quotation marks and citation omitted]). Furthermore, where a contract contains a merger clause, a court is obliged "to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing" (Matter of Primex Intl. Corp. v Wal-Mart Stores, 89 NY2d 594, 599, 679 N.E.2d 624, 657 N.Y.S.2d 385 [1997]).

Schron, v Troutman Saunders LLP, ...N.Y.3d..., ...N.Y.S.2d..., 2013 N.Y. LEXIS 124; 2013 NY Slip Op 952³

³ Annexed.

Schron teaches that:

Option contracts, like any other agreement, are subject to basic contract interpretation principles. Under New York law, written agreements are construed in accordance with the parties' intent and "[t]he best evidence of what parties to a written agreement intend is what they say in their writing" (Greenfield v Philles Records, 98 NY2d 562, 569, 780 N.E.2d 166, 750 N.Y.S.2d 565 [2002] [internal quotation marks and citation omitted]). As such, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*id.*).

It is clear therefore, that all references that Alston and Buss make to the earlier extrinsic Stockholder Agreements, Brisbane's Last Will and Testament, and Surrogate Scarpino's Decree may not be introduced to vary the terms of the provisions of paragraph 8 (b).

Merger Clauses

In addition, Paragraphs 19 and 25 of the 1998 Shareholder Agreement two merger clauses make all earlier agreements irrelevant. See Paragraphs 19 and 25 of Alston and Buss's Exhibit A to the movants Affidavits submitted in support of the instant motion ("1998 Shareholder Agreement").

Those paragraphs provide:

19. **ENTIRE AGREEMENT**

This instrument constitutes the entire Agreement between the parties; there are no terms, obligations, covenants or conditions other than those contained herein. This Agreement may not be extended, terminated, amended, altered, modified or changes in any way, except by a signed written consent by the parties hereto.

25. **PRIOR AGREEMENTS**

This agreement supersedes any and all prior Shareholders' Agreements and amendments made thereto heretofore made to which the parties hereto were parties alone or with others.

To allow Alston to require Campbell, as Executor /legatee/trustee/beneficiary to sell to him or to the Funeral Home would "also negate the merger clause[s]", as Schron also found.

Moreover, this case is even stronger than Schron, supra, because here we have **two** merger provisions, paragraphs 19 and 25. ...N.Y.3d..., ...N.Y.S.2d..., 2013 N.Y. LEXIS 124; 2013 NY Slip Op 952, **6.

Equitable Adjustment

Under BCL § 1104-a(d), the Court may order that stock valuations be adjusted, and may provide for a surcharge upon the directors or those in control of the corporation *upon a finding of willful or reckless dissipation or transfer of assets or corporate property without just or adequate compensation*

Petitioner has shown Alston's wilful or reckless dissipation of the Funeral Home's assets.

BCL 1118

To the extent Buss argues, that his election is valid, then he acknowledges application of statute BCL 1104-a. But his so-called election under BCL 1118 is not valid because has not provide any evidence that Alston made a timely election.

Alston and Buss have presented no evidence of churning. In any event the Surrogate's Court has exclusive jurisdiction over the propriety of legal fees. Matter of Stortecky v Mazzone, 85 NY2d 518 [1995].

CONCLUSION

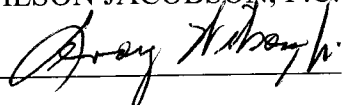
For the foregoing reasons, this Court should deny Alston's motion for summary judgment and for other relief in all respects, deny Alston and Buss the award of any monetary sanctions and attorney's fees against me on the ground that they have presented no facts to show that they are entitled to this relief, grant the Petitioner summary judgment under CPLR 8(b) and the further relief he has requested, order an immediate trial on the issue of damages and equitable

adjustment under CPLR 3212 (c), and allow the Petitioner his costs in attorney's fees and disbursements in opposing this frivolous and meritless motion for the reasons stated, to the extent the rules permit , and impose monetary sanctions on Buss and Alston to the extent that the rules permit.

Dated: New Rochelle, NY
April 29, 2013

Respectfully submitted,

WILSON JACOBSON, P.C.

by 

Leroy Wilson, Jr., President