To Be Argued By:
Leroy Wilson, Jr.

Bronx County Clerk's Index Nos. 17384/07, 300513/10 and 83796/10

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Index No. 17384/07

In the Matter of the Application of

HUGH W. CAMPBELL, as the Preliminary Executor of the Estate of EMMA C. BRISBANE,

Petitioner-Appellant,

against

For the Judicial Dissolution of

MCCALL'S BRONXWOOD FUNERAL HOME, INC.,

Respondent-Respondent.

(Additional Caption on the Reverse)

REPLY BRIEF FOR PETITIONER/PLAINTIFF-APPELLANT

RODMAN AND CAMPBELL, P.C.
1428 East Gun Hill Road
Bronx, New York 10469
718-882-2681
hwc@rodmancampbelllaw.com

and

WILSON JACOBSON, P.C.
55 Dusk Drive
New Rochelle, New York 10804
917-664-4222
leroywilsonjr@gmail.com

Attorneys for Petitioner/ Plaintiff-Appellant

Of Counsel:
Jessica Nelson

Index No. 300513/10

HUGH W. CAMPBELL as the Executor of the Estate of EMMA C. BRISBANE,

Plaintiff-Appellant,

against

JEFFREY D. BUSS, ESQ. and JAMES H. ALSTON, JR.,

Defendants-Respondents.

Index No. 83796/10

JAMES H. ALSTON, JR., and MCCALL'S BRONXWOOD FUNERAL HOME, INC.,

Third-Party Plaintiffs,

against

HUGH W. CAMPBELL, Individually,

Third-Party Defendant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES

Appellant-Petitioner, Hugh W. Campbell, as the Executor of the Estate of Emma C. Brisbane ("Appellant") respectfully submits this Reply brief in further support of their appeal seeking to reverse the decision and order of the court below granting Respondent-Defendants' ("Respondents") summary judgment and dismissing Appellant's petition for judicial dissolution of McCall's Bronxwood Funeral Home, Inc. ("MBFH") under Business Corporation Law §1104-a.

PRELIMINARY STATEMENT

Respondents' opposition attempts to distort the facts and distract the Court from the following undisputed facts of the case:

- It is undisputed that the 1998 Stockholder Agreement does not contain an automatic option to repurchase the shares of a deceased shareholder;
- Neither Appellant nor Ms. Brisbane's heirs gave a written notice of intent to sell the Brisbane Shares to MBFH – a requirement under the 1998 Stockholder Agreement – and indeed never intended to sell the Brisbane Shares;
- The Westchester County Surrogate Court "So Ordered" Appellant to commence the underlying dissolution action under BCL §1104-a, and therefore it could not have rendered a contradictory Order stating that

Ms. Brisbane intended the sale of the Brisbane Shares back to MBFH;

- Respondents admit and acknowledge that Appellants have demonstrated an entitlement to dissolution through evidence of Respondents' years of fraud, oppression, waste and looting of MBFH's assets against corporate interest, in violation of their fiduciary duties, and to Ms. Brisbane's detriment; and
- Respondents failed to submit any evidence to show how they arrived at the arbitrary value of $393,048.00 for the Brisbane Shares, which amount is nearly $900,000.00 less than the value provided by a neutral third-party forensic accountant Citrin Cooperman, and is less than $450,000.00 which was the value of the Brisbane Shares in November 1987, nearly 20 years ago; and
- Respondents fail to allege any law or reason why the Court should disregard two separate Orders rendered by Justice Barone directing a valuation hearing conducted by a court-appointed referee, and why such a hearing would not be the most equitable resolution to determine the value of the Brisbane Shares.

Respondents decry Appellant's efforts to dissolve MBFH claiming that it is a thriving business that has existed for over 50 years, all the while

acknowledging their bad acts as officers and fiduciaries of the corporation. Yes, MBFH has indeed been a very lucrative business for Respondents since they admittedly spent years looting and wasting the corporate assets for personal gains all at the detriment of one of its last remaining founding members, Emma Brisbane and consequently her heirs. The assertion that MBFH is a thriving business clearly contradicts their claims that Brisbane's shares are only worth $393,048.00.

Respondents acknowledge and admit that Appellants have demonstrated entitlement to dissolution but claim that such demonstration of Respondents' fraudulent, oppressive, wasteful and looting behavior is irrelevant and immaterial because Ms. Brisbane's heir can obtain a "fair return" on her investments. Of course, what Respondents claim as "fair" is a valuation conducted using a inapplicable formula under an unenforceable provision of the 1998 Stockholder Agreement and unsupported by any credible evidence whatsoever.

As will be demonstrated in detail below, behind all of Respondents' smoke and mirrors, what is clear is that: (1) Respondents do not present any evidence to support any of their claims, including what they allege is a "fair" valuation; (2) that both the terms of the 1998 Stockholder Agreement and the June 11, 2008 Surrogate's Court decree must be read as they are written and not in the contorted way Respondents seek to present them; and (3) in light of the numerous

material issues of fact remaining in this case, the lower court's granting of summary judgment in Respondents' favor was improper and must be reversed.

ARGUMENT

POINT I

RESPONDENTS' ADMISSION OF FRAUD, OPPRESSION, WASTE AND LOOTING IS RELEVANT TO SUPPORT DISSOLUTION BECAUSE IT IS MATERIAL TO THE VALUATION OF THE BRISBANE SHARES

As set forth in detail in Point I(C) of Appellant's opening brief, Appellants have amply demonstrated through admissible evidence all of Respondents acts of, inter alia, self-dealing, fraud, deceit, and looting of corporate funds. Respondents have acknowledged and admitted all of these bad acts. (Respondents' Brief Point III). Therefore, it is undisputed that Appellants are entitled to a dissolution of MBFH under BCL §1104-a. The Court of Appeals in In re Kemp & Beatley, Inc., 64 N.Y.2d 63, 74, 473 N.E.2d 1173, 1180 (1984) affirmed the Supreme Court's decision to confirm a special referee's report granting the judicial dissolution of the a closely held corporation after the special referee found evidence of "oppressive conduct" by the company's board of directors.

What distinguishes this case from In re Kemp & Beatley, Inc. is: (1) the formula Respondents present is unenforceable because it is pursuant to an inapplicable part of the 1998 Stockholder Agreement; and (2) assuming *arguendo*,

even under the formula their suggested value of $393,048.00 is unsupported by any evidence because part of the fraudulent and deceitful conduct admitted to by Respondents is their failure to provide accurate annual tax filings and verifiable income statements of MBFH to support a legitimate valuation.

Respondents have failed to submit any credible evidence to show how they arrived at the value of $393,048.00 for the Brisbane Shares. Assuming *arguendo* that the application of the formula set forth in the 1998 Stockholders Agreement was the proper mechanism to value the Brisbane Shares, such a valuation would be flawed without establishing the correct and verified income of the corporation for all of the applicable years. Any formula utilized by Respondents to arrive at a value cannot yield a correct and fair value if the underlying annual income as reported by Respondents are fraudulent, incomplete and inaccurate.

Both MBFH's former accountant Ian Nelson, CPA and Appellant's third- party forensic accountant Citrin Cooperman have independently reported that there were numerous irregularities in income and revenue reporting, including:

- enormous discrepancies between earnings Alston Jr. reported on the tax returns and what Mr. Nelson found during his investigation; (R.1205-1206)

- questionable tax filings for years 2000 through 2007, including nonexistent tax filings Alston Jr. claimed were filed but which Citrin Cooperman could not obtain directly from the IRS; (R. 993)
- MBFH revenues which were not properly recorded in the corporate books; (R. 993-996)
- Approximately $1,569,000.00 of cash from MBFH that have never been accounted for to date; (R.1206) and
- Payment advances and transactions that were not recorded in the corporate books or any balance sheets. (R. 996).

Respondent's reliance on Matter of Harris, 118 A.D. 2d 646 (2d Dept. 1986) and DiPace v. Figueroa, 233 A.D. 2d 949 (3d Dept. 1996) is misplaced. In these cases the Court found the shareholders could obtain a fair return on their investment without a dissolution. In the instant case, a fair return on Brisbane's investments is impossible given the acknowledged evidence of misappropriation of MBFH's assets, improper recording of revenues and looting of corporate assets.

Moreover, Respondents never submitted a certified valuation to the lower court, nor any verified financial records in support of their valuation. During his examination before trial, Alston, Jr. testified that Lionel Lewis, MBFH's Certified Public Accountant gave him the numbers to make the calculations. (R. 592-593 [Pages 154-158]). However, Lionel Lewis contradicted Alston Jr.'s

testimony and testified that he had no discussions with Alston, Jr. regarding Alston, Jr's preparation or calculation of the valuation figures. (R. 688-689 [Pages 112-113]).

In addition, the most revealing fact that debunks Respondents' claim that the $393,048.00 is allegedly a "fair return on investment" for the Brisbane Shares is that the Brisbane Shares were worth $450,000.00 as of November 2, 1987. (R. 366). If Respondents' claim is to be believed that MBFH is a "thriving" and "successful" business, then surely the Brisbane Shares would have been worth a lot more at the time of Ms. Brisbane's death in 2005, not less.

Therefore, the lower court's decision to wholesale adopt Respondents' arbitrary value of $393,048.00, which value is unsupported by any evidence, contrary to existing evidence that show the Brisbane Shares were worth $450,000.00 in 1987, nearly 20 years prior to the date of her death in 2005, was erroneous and an abuse of discretion.

POINT II

RESPONDENTS MISREPRESENT THE CLEAR LANGUAGE OF THE 1998 STOCKHOLDER AGREEMENT

A) There Was No Notice of Intent to Sell – A Prerequisite to Sell

As detailed in Appellant's opening brief Argument Point I(B), the well-established law of contracts is that where a written agreement is complete,

clear and unambiguous on its face, the contract must be construed within the four corners of the document itself and enforced according to the plain meaning of its terms. MHR Capital Partners LP v. Presstek, Inc., 12 N.Y.3d 640, 645 (2009); Greenfield v. Philes Records, 98 N.Y.2d 562, 569 (2002). Here, the 1998 Stockholder Agreement could not have been clearer in its terms. In relevant summary, the Agreement states that:

> "*If* Alston Jr. or *Brisbane desires to sell* his or *her shares of stock*… he or *she shall be obliged to give notice of such intention* to McCall's…which notice shall contain an offer to sell all of his or her shares of stock…" Paragraph 7(a) of the 1998 Stockholder Agreement (R. 52).

In the event of either shareholder's death, the 1998 Stockholder Agreement unequivocally states, in relevant summary:

> "*Either* stockholder *shall be permitted* to *dispose of their shares* in the corporation, *in their will or trust*.." Paragraph 8(a) of the Stockholder Agreement. (R. 54)
>
> …
>
> "*In the event* the above mentioned legatee/trustee/*beneficiary wishes to sell or transfer their shares of stocks*, then *said sale or transfer*

shall be in accordance with Paragraph 7 above." Paragraph 8(b) of the Stockholder Agreement. (R. 54).

Respondents do not dispute that this is the clear and unambiguous language of the Agreement. In fact, in their opposing brief Respondents acknowledge that if Ms. Brisbane's Estate "wishes to sell or transfer their shares of stock" "a written notice of intention to sell" must be provided to both MBFH and the other stockholders. What is glaringly absent in Respondents' papers is a Notice of Intent to Sell the Brisbane Shares which is a contractual prerequisite to any sale of the Brisbane shares. Respondents fail to submit any evidence of a Notice of Intent to sell from Brisbane or her Executor, the Appellant. The reason for this is clear – Ms. Brisbane's beneficiaries DID NOT intend to sell the Brisbane Shares and Respondents have not proved otherwise.

B) Respondents Misrepresent the Surrogate Court Decree in Order to Fabricate an Intent to Sell

The lower court erred when it jumped to the conclusion that the Surrogate Court's finding that Ms. Brisbane "intended to permit her executor to distribute the proceeds of the sale of her interest in the corporation" meant that Ms. Brisbane intended to sell the Brisbane Shares to MBFH. (R.10-11). Likewise, Respondents' even further conclusion that the Surrogate Court Decree "mandated" a sale of the Brisbane Shares is a misrepresentation of the express words and

meaning of Justice Scarpino's June 11, 2008 Surrogate Court Decree. (R.161). There is no place in Justice Scarpino's Decree where he state that the Executor "*MUST* sell the Estate's stock in the funeral home to comply with the decedent's will" as stated in Respondents' opposing brief [emphasis added]. Rather, Justice Scarpino's Decree specifically held that:

> "the construction and effect of Article Eighth of the decedent's Last Will is that the decedent's intent was to *permit* her executor to distribute the proceeds from sale of her interest in a certain funeral home ……." [emphasis added] (R. 161).

While the Decree acknowledged that the Executor/Appellant was permitted to distribute the assets of the estate to the beneficiary parties of the Surrogate Court proceeding, no place in the Decree did it mandate the Executor/Appellant to sell the Brisbane Shares. The reason for this is clear, the Surrogate's Court was not tasked with interpreting the terms of the 1998 Stockholder Agreement (which was not even admitted in that proceeding), and the issue of whether Ms. Brisbane's beneficiaries expressed an intent to sell the Brisbane Shares to Respondents, who were not even parties in the Surrogate Court proceeding, was not before the Surrogate Court.

Rather, as can be read from the Decree itself, the relief requested in the Surrogate Court proceeding which was brought by Ms. Brisbane's grandson was, in relevant part, for:

> "(i) determining that Article Third of said Last Will, as a matter of law, is of no force and effect, or alternatively, that Article Third be construed as referring to decedent's grandson Richard Brisbane and not decedent's son Richard Brisbane who had died more that five years before the Will was executed, (ii) determining that Article Eight of said Last Will permit the distribution of the remainder of the proceeds from the Funeral Home after funding a certain charitable trust, directly to the Emma C. Brisbane Trust, an inter vivos trust created by instrument dated August 25, 1988,…" (R. 159-160).

Moreover, it is impossible that the Surrogate's Court "mandated" a sale of the Brisbane Shares. On the contrary, at the July 17, 2007 hearing, Justice Scarpino expressly "So Ordered" a Stipulation entered into between Ms. Brisbane's heirs and Appellant-Executor, and directed Ms. Brisbane's Executor, Mr. Campbell, to commence the underlying dissolution action. Therefore, since it was the Surrogate's Court that directed Appellant to commence the dissolution action under BLC §1104-a, it is both irrational and erroneous to also find that the

Surrogate's Court contradicted itself by finding that Ms. Brisbane intended to sell the Brisbane Shares back to MBFH and Alston Jr.

Therefore, Respondents' insistence that the June 11, 2008 Surrogate Court Decree mandates a sale of the Brisbane Shares is simply incorrect and unsupported by the very words of the Decree itself.

C) The Improper Introduction of the Past Stockholder Agreements Alter the Terms of the 1998 Stockholder Agreement that Ms. Brisbane Negotiated During her Lifetime

The lower court improperly considered the terms of the Past Stockholder Agreements which were inadmissible extrinsic evidence, and used them to alter the meaning of the 1998 Stockholder Agreement[1]. Ms. Brisbane negotiated the terms of the 1998 Stockholder Agreement during her lifetime and intentionally omitted the automatic buy-back provisions that were included in the Past Stockholder Agreements to prevent MBFH from exercising an automatic option to repurchase the shares of a deceased shareholder. The reason for this intentional modification to the 1998 Stockholder Agreement is obvious. The record is replete with evidence that Ms. Brisbane suspected both Alston Sr. and Alston Jr. were stealing from MBFH. (R.1183, ¶4). Ms. Brisbane even hired Ian Nelson to review MBFH's books and records because she noticed irregularities in

[1] As set forth in Appellant's opening brief Argument Point I(B)(3), Appellant maintains the lower court's review of the June 11, 2008 Surrogate Court Decree is also improper introduction of extrinsic evidence used to alter the intent of the 1998 Stockholder Agreement.

MBFH's accounting records and financials. (R. 915, 917-927, 1183). These suspicions were true and now admitted to by Respondents.

Ms. Brisbane and Alston, Jr., through their respective attorneys, drafted the 1998 Stockholder Agreement so that the automatic option for MBFH to repurchase the corporate shares no longer existed. Rather, the provision in the 1998 Stockholder Agreement allowed either shareholder's heirs and beneficiaries, including Ms. Brisbane's estate to hold on to MBFH's shares and only sell them IF the heirs/beneficiaries truly intended to sell, and demonstrated such intent through an affirmative act of providing a notice of intent to sell to MBFH.

Therefore, the lower court erred when it reviewed the Past Stockholder Agreements and inserted its own interpretation of the omission of the automatic buy-back option in the 1998 Stockholder Agreement by holding that the omission was a mistake and reinserting the option for MBFH to repurchase the Brisbane Shares in the absence of a Notice of Intent to Sell.[2] The lower court's decision completely undid Ms. Brisbane's effort to protect her beneficiaries through what Ms. Brisbane intended was a clear and unambiguous contract entered into during her lifetime. The lower court's decision is unsupported by existing authority, and otherwise alters the meaning of an otherwise clear Agreement.

[2] Notably, the prior Stockholder Agreements were not between Brisbane and Alston, Jr.

D) Alston Jr. Agreed to Transfer the Vacant Lot in Consideration for Sale of Alston Sr.'s MBFH Shares.

Respondents' attempt to misrepresent the transfer of the vacant lot in 1998 to Ms. Brisbane pursuant to the 1998 Stockholder Agreement ¶23 as additional consideration for the Brisbane Shares. However, this misrepresentation is a disingenuous distortion of facts. Pursuant to the automatic buy-back provisions of the 1987 Stockholder Agreement which Ms. Brisbane exercised, Ms. Brisbane became the sole surviving shareholder and sole officer of MBFH following Alston Sr.'s death in 1995. (R. 354-355). In consideration for purchase of his father Alston Sr.'s shares from Ms. Brisbane, Alston Jr. agreed to transfer the vacant lot located at 4035 Bronxwood Avenue to Ms. Brisbane. (R. 65, Respondents' Opposing Brief, Pg. 23).

Contrary to this fact, Respondents attempt to color the transfer of the real property as some type of a windfall for Ms. Brisbane, claiming without any supporting evidence that the real property is now worth "several million dollars." In reality, the person who received a true windfall is Alston Jr. After he received 50% interest in MBFH he systematically diverted corporate funds for his personal use, misappropriated corporate assets, and otherwise deprived Ms. Brisbane a fair return on her investment. (R. 993-996, 1199-1201, 1204-1207).

POINT III

RESPONDENTS ATTEMPT TO DISTORT THE FACTS CONCERNING APPELLANT IN ORDER TO AVOID A FAIR AND EQUITABLE VALUATION FOR THE BRISBANE SHARES

Throughout these papers, Respondents have disparaged Ms. Brisbane's executor, Hugh Campbell, and have attempted to cast aspersions on his role as Ms. Brisbane's attorney during her lifetime and as her executor. None of Respondents' claims against Mr. Campbell are supported by evidence in the record, and all are yet further attempts by Respondents to muddy the facts of this case in order to avoid distributing a fair and equitable value for the Brisbane Shares.

Significantly, Respondents have repeatedly claimed that Mr. Campbell "commenced and prosecuted this action as part of a premediated scheme to churn and dissipate the estate of Emma Brisbane to his own personal benefit, and to the detriment of her heirs." (Respondents' Opposing Brief, Pg. 13). Mr. Campbell is an attorney in good standing with the bar of the State of New York, and Respondents have cited no evidence that demonstrates any conflict of interest, any self-dealing, or any iota of impropriety by Mr. Campbell. In fact, Respondents' false and unsubstantiated allegations and attempts to disparage Mr. Campbell are contradicted by evidence.

Mr. Campbell, as Executor to Ms. Brisbane's estate was "So Ordered" by Justice Scarpino of the Surrogate's Court pursuant to a stipulation entered into by Ms. Brisbane's heirs at a hearing held on July 7, 2007 before Justice Scarpino to commence the underlying dissolution action. The full and complete copy of the transcript of the July 7, 2007 is part of the record on this appeal. (R. 929-947). Therefore, Respondents' claim that Mr. Campbell has pursued this dissolution for any alleged personal gain is false and contradicted by the Record.

Likewise, Respondents claim that Appellant represented Ms. Brisbane in the transaction to sell Mr. McCall's shares following his death in 1985 is similarly untrue. As evidenced by the Record, Alfred Rodman represented Ms. Brisbane in that transaction. (R. 341-347). Similarly, Respondents allege that Appellant drafted both Ms. Brisbane's Will and the 1998 Stockholders Agreements improperly alluding to a possible conflict of interest. However, as once again evidenced by the Record, Ms. Brisbane's Will was executed under the supervision of attorney Elmira J. Jackson. Appellant neither supervised the execution of the Will nor witnessed the instrument. (R.152-158).

Respondents' attempts to disparage Appellant is disingenuous and is simply a tactic to divert the Court's attention from the undisputed facts of this case which are that: (i) Ms. Brisbane negotiated and executed the 1998 Stockholder Agreement that intentionally omitted an automatic buy-back provision in order to

avoid the Brisbane Shares being sold back to MBFH and in essence Alston Jr.; (ii) there is no evidence of a Notice of Intent to Sell the Brisbane Shares which is a prerequisite condition to sell the Brisbane Shares back to MBFH; (iii) the June 11, 2008 Surrogate's Court Decree does not mandate a sale of the Brisbane Shares, and the Surrogate Court, in fact, ordered Appellant to commence the dissolution action under BCL §1104-a; (iv) Respondents have admittedly engaged in fraudulent, oppressive, wasteful and looting conduct to Ms. Brisbane's detriment; and (v) Appellant, on behalf of Ms. Brisbane's heirs, will not get a fair return on the Brisbane Shares which Ms. Brisbane worked nearly 50 years to grow and develop because the $393,048.00 sum offered by Respondents is not only less than the $450,000.00 which the Brisbane Shares were worth back in 1987, nearly 20 years ago, but is based on self-serving, fraudulent, incomplete and unverified financial statements concocted by Respondents as part of their numerous bad acts.

POINT IV

RESPONDENTS FAIL TO DEMONSTRATE THAT JUSTICE BARONE'S TWO PREVIOUS ORDERS DIRECTING A VALUATION HEARING WAS EVER VACATED AND SHOULD BE DISREGARDED

Respondents misrepresents Justice Barone's June 18, 2008 Order and the July 30, 2010 Order. (R. 86-87). Contrary to Respondents' contentions, Justice Barone not only ordered discovery, but directed that given the disagreement

between the parties concerning the value of the Brisbane Shares ordered that a valuation hearing be held under the direction of a court-appointed referee to determine the fair market value of the Brisbane Shares. Indeed, as set forth in Appellant's opening brief Point II(A), where shareholders make conflicting allegations regarding the dissolution of a corporation, the proper course is for the Court to order an evidentiary hearing. Justice Barone's Order directing an evidentiary hearing was never vacated. Nonetheless, a hearing was never held. The lower court erred in failing to hold an evidentiary hearing, especially in light of the deep contentions between the parties concerning the value of the Brisbane Shares, and arbitrarily ruled in favor of Respondents over Appellants.

It is quite telling that Respondents are so adamant against a proper valuation hearing conducted by a court-appointed referee with evidence submitted by neutral forensic accountants. Respondents themselves have not put forth any evidence of an outside valuation report to support their claim of $393,048.00, while Appellants have been able to put forth two such valuations. (R. 986-991, 1199-1207). Rather, Respondents have frustrated every effort by Appellant to establish a fair valuation of MBFH. If Respondents are confident that the $393,048.00 is truly a fair market value of the Brisbane Shares they would not so vehemently protest a hearing.

Finally, contrary to Respondents' assertions, Appellant did not waive objections to post-discovery summary judgment by requesting summary judgment. In fact, Appellant only requested summary judgment pursuant to CPLR § 3212(b) as it concerns Alston Jr. that, as a matter of law: (a) Alston, Jr. is a person in control of the Funeral Home within the meaning of BCL § 1104-a(1); (b) Alston is guilty of illegal, fraudulent or oppressive actions against Emma Brisbane; and (c) Alston looted, wasted, or diverted the property or assets of the funeral Home for non-corporate purposes.

POINT V

APPELLANT SUFFERED DAMAGES AS A RESULT OF RESPONDENTS' UNAUTHORIZED ATTEMPT TO PURCHASE THE BRISBANE SHARES

Contrary to Respondents' assertion, the lower court erred when it dismissed Appellant's case under Index No. 30013/2010. The action for attorneys' fees and costs that Ms. Brisbane's Estate incurred to bring the claim under Jud. Law Sec. 487 directly as a result of Respondents unauthorized bad-faith attempt to sell the Brisbane Shares right under both Appellant and the Court's nose is by itself sufficient to state a cause of action for damages. See Amalfitano v. Rosenberg, 12 N.Y. 3rd 8 (2009). Therefore, Respondents' argument that Appellant's claim was meritless is disingenuous and unsupported by the facts and evidence in the Record.

CONCLUSION

For all the foregoing reasons, Appellant respectfully requests that this Court reverse the decision of the court below and remand the matter for further proceedings.

Respectfully submitted,

By: _____

Jessica F. Nelson, Esq.
RODMAN AND CAMPBELL, P.C.
Attorneys for Petitioner- Appellant
1428 East Gun Hill Road
Bronx, New York 10469
(718) 882-2681
hwc@rodmancampbelllaw.com