

Matter of Campbell v McCall's Bronxwood Funeral Home, Inc.

2012 NY Slip Op 33861(U)

September 24, 2012

Supreme Court, Bronx County

Docket Number: 17384/2007

Judge: Fernando Tapia

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part DCM**

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

Petitioner,

-against-

Index No. 17384/2007

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

Respondent.

**Hugh W. Campbell as the Executor of the Estate of
Emma Brisbane,**

Plaintiff,

-against-

Index No. 300513/2010

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

Defendants.

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

Third-Party Plaintiffs,

-against-

Index No. 83796/2010

Hugh W. Campbell, Individually,

Third-Party Defendant.

DECISION

In this action for corporate dissolution, Petitioner seeks an Order pursuant to CPLR 3126(1) finding Respondent in willful noncompliance with Petitioner's various discovery demands. Petitioner additionally seeks an Order pursuant to CPLR 3126(2) precluding Respondents from producing any evidence not previously disclosed in response to its discovery requests. Respondents oppose and cross-move for an Order pursuant to CPLR 2304, quashing four Non Party Subpoena Duces Tecum

for Respondent James H. Alston, Jr.'s bank records. Respondents also move for a protective order precluding Petitioner's discovery demands relating to Mr. Alston's personal and financial information. Lastly, Respondents seek additional time to respond to Petitioner's lengthy interrogatories and document requests dated May 4th, 2012.

Following a discovery conference on July 2, 2012,¹ and a review of the motion papers, this Court hereby decides the following:

- Petitioner's motion to preclude is **GRANTED TO THE EXTENT** that any information not disclosed in response to Petitioner's discovery demands dated May 4, 2012 within [60] days from the date of this Order is precluded from producing in evidence.
- Respondents' cross motion is **GRANTED TO THE EXTENT** that the four Non party Subpoena Duces Tecum are hereby quashed and Respondents are granted (60) days from the date of this Order to comply with Petitioner's discovery demands dated May 4, 2012.

The essence of this discovery dispute concerns Petitioner's discovery requests regarding Mr. Alston's personal and financial information. In addition to the first set of discovery demands dated May 4, 2012, requesting financial information relating to McCall's Bronxwood Funeral Home ("McCall's"), Petitioner served four Non-party Subpoena Duces Tecum about one week later, requesting Mr. Alston's personal and attorney trust account bank records at four different banks for a twelve year period.² Petitioner also served Mr. Alston with interrogatories and document requests dated May 3, 2012, May 4, 2012, and May 5, 2012, requesting, among other things, personal information regarding his marriage, whether he fathered children out of wedlock, and joint personal

¹ At the discovery conference, the parties agreed that Respondents would submit their response to Petitioner's Second Notice of Discovery and Inspection by June 25, 2012. The parties further agreed that Petitioner would be allowed to inspect documents at McCall's Bronxwood Funeral Home on July 6, 2012 and July 9, 2012.

² See Alston Aff. at Exs. A-D.

tax returns of his wife.³

In support of its motion, Petitioner argues that the information sought after is necessary and crucial to the action and ties in directly with its theory that Mr. Alston was engaged in diversion and looting of McCall's corporate assets.⁴ Petitioner further contends that Mr. Alston's personal tax return and bank account information "would disclose some evidence" of wrongdoing.⁵ This Court finds Petitioner's contentions unpersuasive. The possibility of obtaining information that might demonstrate some illegal conduct and possibly strengthen Petitioner's allegations against Mr. Alston does not warrant leave to embark upon a fishing expedition through Mr. Alston's personal financial accounts and family history. Therefore, the aforementioned subpoenas are quashed.

Turning to Petitioner's claims that Respondents have willfully failed to respond to its discovery requests, Respondents argue that they have attempted to comply with Petitioner's demands. Petitioner was given access to McCall's electronic and paper based records. Furthermore, at the last discovery conference dated July 2, 2012, Respondents had located the corporate stock and minute books for Petitioner to review. Respondents also contend that certain documents that Petitioner requested do not exist as they were never created.

It is well settled that a party making disclosure is not required to create or prepare a report or document that does not already exist. Only pre-existing items can be inspected and produced during discovery. See Rosado v. Mercedes-Benz of North America Inc., 103 AD2d 395 (App Div,

³ Id. at Exs. E-G.

⁴ See Reply at p. 2-4.

⁵ Id. at p.4.

2nd Dept 1984). However, if a document does not exist, the party requesting the document is entitled to a sworn denial of its existence by a party with knowledge as to its absence. Thus, in this case, Mr. Alston, as the party with specific knowledge, must submit an affidavit affirming the non-existence of Petitioner's requested documents. In addition, Respondents' counsel, Mr. Buss, must submit an affirmation stating that the documents in question do not exist.

Accordingly, it is

ORDERED that Respondents are directed to respond to Petitioner's discovery demands dated May 4, 2012 within (60) days from the date of this Order. Any information or documentation that Respondents fail to disclose within this period shall be precluded from producing in evidence;

ORDERED that the four Non party Subpoena Duces Tecum for records of James H. Alston to Wells Fargo Bank, Citibank, N.A., Bank of America, and JP Morgan Chase are quashed;

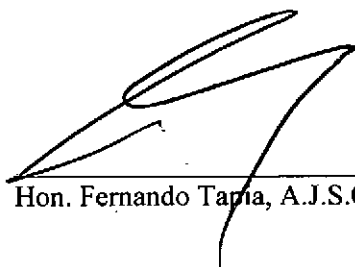
ORDERED that Petitioner is precluded from demanding James H. Alston, Jr.'s personal and business information;

ORDERED that James H. Alston Jr. submit an affidavit denying the existence of any document requested by Petitioner in its previous discovery demands that is alleged not to exist within (60) days from the date of this Order; and it is further

ORDERED that Respondent's counsel, Mr. Jeffrey D. Buss submit an affirmation stating that the documents requested by Petitioner do not exist within (60) days from the date of this Order.

This Constitutes the Decision of the Court.

Dated: September 24, 2012
Bronx, NY



Hon. Fernando Tapia, A.J.S.C.