

**SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION - THIRD DEPARTMENT**

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In the Matter of a Proceeding under Article 70 of  
the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC.,  
on behalf of TOMMY,

Petitioners-Appellants,

v.

PATRICK C. LAVERY, individually and as an  
officer of Circle L Trailer Sales, Inc., DIANE  
LAVERY, and CIRCLE L TRAILER SALES,  
INC.,

Respondents-Respondents.

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**ATTORNEY AFFIDAVIT  
IN SUPPORT OF MOTION FOR  
PRELIMINARY INJUNCTION  
PURSUANT TO CPLR 6301**

STATE OF FLORIDA }

ss.: }

COUNTY OF BROWARD

**AFFIDAVIT OF STEVEN M. WISE IN SUPPORT OF PETITIONERS-APPELLANTS'  
MOTION FOR A PRELIMINARY INJUNCTION**

Steven M. Wise, being duly sworn, deposes and says under penalties of perjury:

1. I am an attorney duly admitted to practice before the courts of the Commonwealth of Massachusetts and admitted *pro hac vice* in the State of New York for the purpose of

representing the Nonhuman Rights Project, Inc. (“NhRP”) and Tommy, the Petitioners-Appellants herein. I make this Affidavit in support of Petitioners-Appellants’ Motion for a Preliminary Injunction to enjoin Respondents from removing Tommy from the State of New York during the pendency of this appeal or further order of this Court.

2. I am the president of the NhRP and am fully familiar with the facts and circumstances set forth below.

3. This action was commenced on December 2, 2013 by filing a Verified Petition and Order to Show Cause for a common law writ of habeas corpus (“Petition”), pursuant to Article 70 of the CPLR, to which numerous and extensive expert affidavits were attached (“Expert Affidavits”) attesting to material facts contained therein (R.34), as well as a supporting Memorandum of Law (R. 468).

4. On March 24, 2014, a Brief for Petitioners-Appellants and Record on Appeal were filed with this Court.

5. Tommy is a 26 year-old chimpanzee, who is being imprisoned in solitary confinement by Respondents in a cage located within a small enclosed area on a trailer lot in Gloversville, New York.

6. As set forth more fully in the Petition that has been made a part of the Record, Respondents have detained, and continue to detain, Tommy in the State of New York.

7. Respondents Patrick and Diane Lavery have indicated their desire and ability to remove Tommy from the State of New York and are likely to do so. Such action could raise a colorable claim of mootness of the pending appeal, which could render ineffectual any judgment ultimately obtained by Petitioners-Appellants. It will therefore cause Petitioners-Appellants immediate and irreparable injury.

8. Respondents Patrick and Diane Lavery have a home in Florida where they reside for several months each year.

9. Upon information and belief, Respondent Patrick Lavery has a close friend who once owned chimpanzees in the State of New York, but has moved them to a home-built facility in Florida that is not a member of the North American Primate Sanctuary Alliance (“NAPSA”).

10. Respondents Patrick and Diane Lavery own a trailer business and have several trailers they could use to transport Tommy. Upon information and belief, Respondents Patrick and Diane Lavery once owned between eight and ten chimpanzees.

11. Respondent Patrick Lavery has made numerous public statements of his intent to remove Tommy from the State of New York. Many of these statements were made after Petitioners-Appellants filed their Petition.

12. A *USA Today* article, dated December 2, 2013, a true and accurate copy of which is attached herein as Exhibit 1, reports: “Patrick Lavery says Tommy is one of 11 chimps he has rescued from abusive or neglectful homes and cared for until they could be relocated to sanctuaries. Tommy, the last of the 11, has lived with them for more than a decade while they search for an appropriate place for him near enough to the couples' Ocala, Fla., farm so they can visit him, he said.”

13. An article in *the Huffington Post*, dated December 2, 2013, a true and accurate copy of which is attached herein as Exhibit 2, states: “Lavery was on his way to Florida for the winter, where he'd been exhibiting some reindeer and preparing the paperwork to bring Tommy down south in about a year as well. ‘We've got a place for him in Florida,’ said Lavery. ‘That's going to be his retirement home ... We tried placing him different times in sanctuaries and like that, but all the sanctuaries were full.’” The article attached herein as Exhibit 2 was obtained from the following

URL:

<http://www.huffingtonpost.com/2013/12/02/chimpanzee-lawsuit->

personhood\_n\_4369377.html.

14. On December 8, 2013, I mailed a letter to Respondent Patrick Lavery that stated, in relevant part, “I have read public statements that you wish to send Tommy to a sanctuary, but have been unable to do so. If you wish to have Tommy sent to an appropriate sanctuary, please contact me immediately and we will work together to see that this happens immediately.” I received no answer from Respondent. A true and correct copy of the letter is attached herein as Exhibit 3.

15. In a letter forwarded to Elizabeth Stein, Esq., attorney of record for Petitioners-Appellants, dated May 1, 2014, Arthur Carl Spring, Esq., attorney for Respondents, advised the Court that his clients were not submitting a brief in this appeal. A true and correct copy of the letter is attached herein as Exhibit 4.

16. Concerned that the reason for Respondents’ decision not to file a brief was because they were planning to remove Tommy from the State of New York in an attempt to thwart the appeal, on May 13, 2014, I telephoned Attorney Spring to discuss whether Respondents in fact, were planning on removing Tommy from the state. Immediately after our conversation, I drafted and sent a letter of confirmation to Respondents that stated, in relevant part:

As I said, I emailed and wrote Mr. Lavery several months ago offering to settle this matter by working with him to agree on the manner in which Tommy would be immediately transferred to a North American Primate Sanctuary Alliance (NAPSA) approved sanctuary. He never replied. As I told you, we renew our offer.

As I also mentioned, we are concerned about Mr. Lavery’s public statements that he intends to transfer Tommy to a place other than a NAPSA-approved sanctuary. As that is unacceptable, we have drafted a motion for a preliminary injunction that is ready to be filed in the Third

Appellate Department. It demands that Mr. Lavery be restrained from transferring Tommy, without our assent, until all legal proceedings in this matter are complete. We ask that, after you meet with Mr. Lavery on Thursday, you confirm, no later than Tuesday, May 20, 2014, whether Mr. Lavery will agree not to transfer Tommy, without our assent, to any place outside the state of New York. If we do not hear from you by that time, we will assume that Mr. Lavery intends to transfer Tommy outside the state of New York to some place other than a NAPSA-approved sanctuary.

A true and correct copy of the letter is attached herein as Exhibit 5.

17. On May 22, 2014, I spoke by telephone with Attorney Spring, who stated that Respondents refused to agree not to remove Tommy from the State of New York pending the resolution of this appeal, that they are continuing to search for a place outside the State of New York to send Tommy, and that they will not work with Petitioner-Appellant NhRP to place Tommy in a NAPSA member sanctuary.

18. If Respondents remove Tommy from this Court's jurisdiction, Petitioners-Appellants will be irreparably harmed. The issue of Tommy's right to legal personhood protected by the common law writ of habeas corpus in New York and the remedy of transfer to an appropriate sanctuary are pending before this Court. Should Tommy be removed from the State of New York, this Court may lose its jurisdiction to determine Tommy's right to legal personhood and its authority to order Tommy transferred to a sanctuary selected by NAPSA. While this Court may determine the rights of chimpanzees generally in New York by converting the habeas corpus petition into one of a declaratory judgment under the mootness exception, that ruling would not benefit Tommy to the extent he is outside this Court's jurisdiction. Thus, Tommy and his representatives will be irreparably injured by any such removal.

19. As set forth more fully in the accompanying Memorandum of Law, Petitioners-Appellants

are entitled to a preliminary injunction enjoining Respondents from removing Tommy from the State of New York pending final disposition of this appeal or further order of the Court because Petitioners-Appellants have demonstrated: (1) a likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) that a balancing of the equities is in their favor.

20. No previous application has been made for the relief sought herein.

WHEREFORE, I respectfully request that the Court grant the Petitioners-Appellants a preliminary injunction pursuant to CPLR 6301, and enjoin Respondents from removing Tommy from the State of New York, pending the completion of this appeal or further order of the Court, and such other and further relief which the Court may seem just and proper.

Dated:

Respectfully submitted,

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Steven M. Wise, Esq.  
Attorney for Petitioners-Appellants  
Admitted *pro hac vice*  
5195 NW 112<sup>th</sup> Terrace  
Coral Springs, Florida 33076  
(954) 648-9864

Subscribed and Sworn to  
before me this  
\_\_\_\_\_ day of May, 2014

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Notary Public