

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT**

-----X
In the Matter of a Proceeding under Article 78 of the CPLR
for a Writ of Mandamus,

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

Petitioners,

-against-

VERIFIED PETITION

RALPH A. BONIELLO, III, in his official capacity as
Justice of the Supreme Court County of Niagara,
Respondent,

and

CARMEN PRESTI, individually and as an officer and
director of The Primate Sanctuary, Inc., CHRISTIE E.
PRESTI, individually and as an officer and director of
The Primate Sanctuary, Inc., and THE PRIMATE
SANCTUARY, INC.,

Respondents.

-----X
TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE
DIVISION, FOURTH DEPARTMENT:

Petitioners, by their attorneys, Elizabeth Stein, Esq. and Steven M. Wise, Esq.,
admitted *pro hac vice*, as and for a Verified Petition pursuant to Article 78 of the
CPLR respectfully show to this Court as follows:

1. This is special proceeding brought pursuant to CPLR Article 78 for relief in the nature of mandamus to compel the Respondent Justice of the Supreme Court Niagara County to issue a ruling on the Petitioners' pending Notice of Motion to Settle Record and to settle the record itself.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this proceeding under CPLR 506(b)(1), which provides that an Article 78 proceeding "against a justice of the supreme court . . . shall be commenced in the appellate division in the judicial department where the action, in the course of which the matter sought to be enforced or restrained originated, is triable." CPLR 506(b)(1).

PARTIES

3. Petitioner Nonhuman Rights Project, Inc. ("NhRP") is a tax exempt Sec. 501(c)(3) not-for-profit corporation organized under the laws of the State of Massachusetts, with its primary place of business located at 5195 NW 112th Terrace, Coral Springs, Florida 33076..

4. Petitioner Kiko is a chimpanzee, who, at all times relevant, is being imprisoned by Respondents Carmen Presti, Christie E. Presti and The Primate Sanctuary, Inc. at 2764 Livingston Avenue, Niagara Falls, New York 14303.

5. At all times relevant, upon information and belief, Respondents Carmen Presti and Christie E. Presti have resided at 2764 Livingston Avenue, Niagara Falls, New York 14303.

6. At all times relevant, upon information and belief, Respondent The Primate Sanctuary, Inc.'s primary place of business has been located at 2764 Livingston Avenue, Niagara Falls, New York 14303.

7. At all times relevant, Respondent Ralph A. Boniello, III has been a Justice of the Supreme Court County of Niagara located at the Angelo A. DelSignore Civic Building, 775 Third Street, Niagara Falls, New York 14301.

FACTS AND LEGAL ANALYSIS

8. On December 3, 2013, Petitioner NhRP filed a Verified Petition and Order to Show Cause for a common law writ of habeas corpus in the Niagara County Supreme Court, pursuant to CPLR Article 70, on behalf of Petitioner Kiko.

9. On December 9, 2013, Respondent Justice of the Supreme Court Niagara County held an *ex parte* telephone hearing on the record with deponents (the hearing transcript is attached as Exhibit A hereto).

10. On December 10, 2013, Respondent Justice of the Supreme Court Niagara County entered an Order in the office of the County Clerk of Niagara County,

refusing to issue the writ of habeas corpus (the Order is attached as Exhibit B hereto).

11. On January 9, 2014, Petitioners timely filed a Notice of Appeal, pursuant to CPLR 7011, which permits an appeal to be taken from a judgment refusing to grant a writ of habeas corpus or refusing an order to show cause under CPLR 7003(a).

12. On January 30, 2014, Petitioners timely filed a motion in the Supreme Court of Niagara County seeking an order of the court settling the record (the notice of motion is attached as Exhibit C hereto).

13. Respondent Justice of the Supreme Court Niagara County has failed to rule on this motion. On information and belief, he has stated to both John Fiorella, Esq., his clerk, and Lawrence X. Dalton, Esq. of this Court's Scheduling and Calendaring of Appeals and Oral Argument Department, that he intends to continue to refuse to address the motion on the ground that Petitioners lack the right to appeal his refusal to issue the writ of habeas corpus. John Fiorella, Esq. informed Petitioners' counsel, the undersigned herein, of such statements by Respondent Justice of the Supreme Court Niagara County. This is an erroneous ground (see CPLR 7011) and one that is causing undue delay and prejudice to Petitioners with respect to their ability to prosecute their appeal.

14. It is well settled that “[m]andamus will lie to compel the determination of a motion.” *Weinstein v. Haft*, 60 N.Y.2d 625, 627 (1983). See *Howland v. Eldredge*, 43 N.Y. 457, 461 (1871); *Miller v. Lanzisera*, 709 N.Y.S.2d 286, 288 (4th Dept. 2000).

15. The Fourth Department rule, 22 NYCRR 1000.4(1) specifically demands that “a complete record on appeal shall be stipulated or settled.”

16. The Fourth Department rule, 22 NYCRR 1000.4(a)(1)(ii) provides: “When the parties or their attorneys are unable to agree and stipulate to the contents of the complete record on appeal, the contents of the record *must be settled by the court* from which the appeal is taken.” (emphasis added).

17. CPLR Rule 2219(a) provides in pertinent part: “An order determining a motion relating to a provisional remedy *shall be made* within twenty days, and an order determining any other motion *shall be made* within sixty days, after the motion is submitted for decision.” (emphasis added).

18. The Respondent Justice of the Supreme Court Niagara County failed to perform his statutory duty of ruling on Petitioners’ motion within the statutory timeframe. Petitioners timely filed a motion with the Supreme Court to settle the record on appeal on January 30, 2014. Thus, the Respondent Justice of the Supreme Court Niagara County was required to rule on the motion by March 30,

2014, which he failed to do and which he does not intend to do. Accordingly, this Court should grant the petition for mandamus.

WHEREFORE, Petitioners respectfully request the following relief:

- A. An order compelling Respondent Justice of the Supreme Court Niagara County to rule on Petitioners' pending motion to settle the record; and/or
- B. An order compelling Respondent Justice of the Supreme Court Niagara County to settle Petitioners' record for appeal; or
- C. Because the case was argued *ex parte* and the proposed record consists solely of the papers filed in the Supreme Court, the transcript of the *ex parte* hearing, and the Order refusing to grant the writ of habeas corpus, this Court should settle the record on its own motion.

Dated:

By:

Elizabeth Stein, Esq.
Attorney for Petitioners
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726

Steven M. Wise, Esq.
Pro Hac Vice
Attorney for Petitioners
5195 NW 112th Terrace
Coral Springs, FL 33076
(954) 648-9864

VERIFICATION

The undersigned, is an attorney admitted to practice in the courts of New York State, is the attorney of record for the Petitioners The Nonhuman Rights Project, Inc. and Kiko, in the within action; deponent has read the foregoing Verified Petition and is familiar with the contents thereof; the same is true to the deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent and not by the Petitioner The Nonhuman Rights Project, Inc. because the Petitioner does not reside nor maintain its office in the county where your deponent maintains her office. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are based upon a review of the facts, pleadings and proceedings in this matter, as well as conversations with the Petitioner.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Sworn to me this
_____ day of April, 2014

Elizabeth Stein, Esq.

Notary Public

