

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

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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-

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.

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**MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION FOR A WRIT OF  
MANDAMUS**

**Dated: April 23, 2014**

**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 112<sup>th</sup> Terrace  
Coral Springs, Florida 33076  
(954) 648-9864**

## **I. PRELIMINARY STATEMENT**

This memorandum of law is submitted in support of Petitioners' original Article 78 Petition, which is a proceeding in the nature of mandamus. Its purpose is for this Court either to order Respondent Justice of the Supreme Court Niagara County to rule on Petitioners' Motion to Settle the Record for appeal, as he is required by statute to do, or to order the record settled, so that Petitioners may proceed with their appeal of his December 10, 2013 order refusing to issue a writ of habeas corpus. The pertinent facts are set forth in the Verified Petition and are incorporated by reference herein.

The action is properly filed in this Court. CPLR 506(b)(1) 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). *See People ex rel. Washington v. Burge*, 816 N.Y.S.2d 650, 651 (4th Dept. 2006).

## **II. STATEMENT OF FACTS**

On December 3, 2013, Petitioner Nonhuman Rights Project, Inc. (“NhRP”) filed a Verified Petition and Order to Show Cause for a common law writ of habeas corpus pursuant to Article 70 of the CPLR on behalf of Petitioner Kiko, a chimpanzee, in the Niagara County Supreme Court (Verified Petition at ¶8). Petitioners petitioned the court to issue a writ of habeas corpus and thereafter order the immediate release of Kiko, who was being imprisoned in Niagara County by Respondents Carmen Presti, Christie E. Presti, and the Primate Sanctuary, Inc. (*Id.* at ¶¶4-6, ¶8). On December 9, 2013, Respondent Justice of the Supreme Court Niagara County held an *ex parte* telephone hearing with Petitioners’ counsel, the undersigned herein, on the record. (*Id.* at ¶9).

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 (*Id.* at ¶10). 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) (*Id.* at ¶11).

On January 30, 2014, Petitioners timely filed a motion with Respondent Justice of the Supreme Court Niagara County seeking an order of the court settling the contents of their record. (*Id.* at ¶12 and Exh. C attached thereto). Respondent Justice of the Supreme Court Niagara County has failed to rule on this motion and

communicated through John Fiorella, Esq. and Lawrence X. Dalton, Esq. that he intends to refuse to address the motion, which is causing undue delay and prejudice to Petitioners on their ability to prosecute their appeal (*Id.* at ¶13).

### **III. PETITIONERS HAVE THE RIGHT TO A RULING ON THEIR MOTION TO SETTLE THE RECORD**

#### A. Respondent Justice of the Supreme Court Niagara County's refusal to rule on Petitioners' Motion to Settle the Record is appropriate for Article 78 relief in the nature of mandamus.

In general, an Article 78 proceeding in the nature of mandamus is an appropriate remedy where, as here, an “officer failed to perform a duty enjoined upon it by law.” CPLR 7801 and 7803. *See Wyoming County v. Div. of Crim. J. Services*, 443 N.Y.S.2d 898, 901 (4th Dept. 1981). Specifically, “[m]andamus will lie to compel the determination of a motion.” *Weinstein v. Haft*, 60 N.Y.2d 625, 627 (1983); *accord Howland v. Eldredge*, 43 N.Y. 457, 461 (1871); *Miller v. Lanzisera*, 709 N.Y.S.2d 286, 288 (4th Dept. 2000) (“the appropriate procedural vehicle ... would have been a CPLR article 78 proceeding to compel the court to render a decision on the motions.”). *See, e.g., Pitt v. Walsh*, 893 N.Y.S.2d 246, 247 (2d Dept. 2010) (granting mandamus remitting matter to Supreme Court “to determine the petitioner's motion, and a written order determining the motion shall be made.”); *L. Offices of Russell I. Marnell, P.C. v. Blydenburgh*, 809 N.Y.S.2d 470 (2d Dept. 2006) (granting Article 78 mandamus petition compelling judge “to

determine the petitioner's motion”); *DeCintio v. Cohalan*, 795 N.Y.S.2d 459 (2d Dept. 2005) (same); *Giampa v. Leahy*, 540 N.Y.S.2d 680 (2d Dept. 1989) (granting Article 78 mandamus petition compelling judge to “issue an order”); *Silk & Bunks, P.C. v. Greenfield*, 476 N.Y.S.2d 484 (1st Dept. 1984) (granting Article 78 mandamus petition compelling judge “to render a decision in motions now pending before him”); *Briggs v. Lauman*, 250 N.Y.S.2d 126, 127 (3d Dept. 1964). *See also Jacobs v. Parga*, 950 N.Y.S.2d 204, 205 (2d Dept. 2012).

The “judicial officer may, of course, determine the motions as his judgment dictates.” *Briggs v. Lauman*, 250 N.Y.S.2d 126, 127 (3d Dept. 1964). But “duty bound he is to decide them.” *Id.* This “becomes manifest when it is realized that an inordinate deferment of the judicial obligation would frustrate the right to a speedy” determination guaranteed to a habeas corpus petitioner. *Id.* (there regarding the right of an accused). *See, e.g.*, CPLR 7003 (court must “issue the writ without delay”); CPLR 7009(c) (court required to proceed in a summary manner). *People ex rel. Duryee v. Duryee*, 81 N.E. 313, 315 (N.Y. 1907) (habeas corpus “tolerates no delay except of necessity”); *People ex rel. Garber v. Garber*, 238 N.Y.S.2d 572, 573 (1st Dept. 1963) (“procedures tending to delay (habeas corpus) are incompatible with its primary objective of prompt disposition.”).

In this case, Respondent Justice of the Supreme Court Niagara County failed to rule on Petitioners' motion to settle the record, which, as discussed *infra*, is a statutory duty that is ministerial in nature.

B. Petitioners have a right to have the record settled and to have the Respondent Justice of the Supreme Court Niagara County rule on their Motion to Settle the Record.

Mandamus is appropriate where the right to relief is clear and the action sought to be compelled is ministerial, involving no exercise of discretion. *Korn v. Gulotta*, 72 N.Y.2d 363, 370 (1988); *People ex rel. Welling v. Meakim.*, 24 Abb. N. Cas. 477, 482-83 (N.Y. 1890); *Hutchinson v. Canal Fund Comm'rs*, 25 Wend. 692 (N.Y. Sup. Ct. 1841). "Every appellant has a clear legal right to settlement of the record." *Matter of Lavar C.*, 592 N.Y.S.2d 535, 537 (4th Dept. 1992). The Rules of the Appellate Division Fourth Department require that a "complete record shall be stipulated or settled." 22 NYCRR 1000.4(a)(1). Further, "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." 22 NYCRR 1000.4(a)(1)(ii) (emphasis added). See *White v. Winter*, 801 N.Y.S.2d 680, 681 (4th Dept. 2005); *Conklin v. Rogers*, 471 N.Y.S.2d 356, 357 (3d Dept. 1983); *Wahrhaftig v. Space Design Group, Inc.*, 281

N.Y.S.2d 500, 501-02 (3d Dept. 1967) (“no basis appears for Special Term's denial of the clear legal right, possessed by every appellant, to a settlement of the record; which Special Term should, of course, have settled in one form or the other, to enable the appeal to proceed or to permit an appeal to the Appellate Division from the order of settlement.”). *See also Jefferson v. Siegel*, 813 N.Y.S.2d 318 (4th Dept. 2006) (“Petitioner commenced this original CPLR article 78 proceeding seeking, *inter alia*, judgment compelling respondent to settle the record on appeal”).

Respondent Justice of the Supreme Court Niagara County has a non-discretionary duty to rule on Petitioners’ motion to settle the record, and in a timely manner. 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). Yet he failed to rule on Petitioners’ *motion* to settle the record within the statutory timeframe, let alone *actually* settle the record, which he is obligated to do, *supra*. (Verified Petition at ¶18). Therefore, the issuance of a writ of mandamus compelling a ruling on the motion is required. At its discretion and to preserve judicial resources, this Court may also order said Justice to settle the record itself. *See White v. Winter*, 801 N.Y.S.2d 680, 681 (4th Dept. 2005) (“Defendant then moved by order to show cause for an order settling the record on appeal for the purpose of appealing the

judgment. The court denied the motion, agreeing with plaintiff that defendant waived her right to appeal. We reverse the order and remit the matter to Supreme Court to determine defendant's motion, thereby settling the record on appeal.”).

#### **IV. CONCLUSION**

Petitioners request that this Court grant their Article 78 petition for a writ of mandamus and compel Respondent Justice of the Supreme Court Niagara County (1) to render a decision on Petitioners' Motion to Settle the Record, (2) in the alternative and to preserve judicial resources, to compel him to settle the record, or (3) 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: April 23, 2014

Respectfully submitted,

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



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Steven M. Wise, Esq.  
Attorney for Petitioners  
*Pro Hac Vice*  
5195 NW 112<sup>th</sup> Terrace  
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