SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL 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 HERCULES and LEO,

Petitioners-Appellants,

-against-

SAMUEL L. STANLEY JR., M.D. as President of State University of New York at Stony Brook a/k/a Stony Brook University and STATE UNIVERSITY OF NEW YORK AT STONY BROOK a/k/a STONY BROOK UNIVERSITY,

Index No. 2014-01825

Respondents-Respondents.

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PETITIONERS-APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REARGUMENT

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Dated: April 16, 2014

I. PRELIMINARY STATEMENT AND STATEMENT OF FACTS

This memorandum of law is submitted in support of Petitioners-Appellants' motion for leave to reargue pursuant to CPLR 2221(d). In dismissing Petitioners-Appellants' appeal from the lower court's denial of their petition for a common law writ of habeas corpus, this Court misapprehended the relevant law by improperly relying upon CPLR 5701, which does not permit an appeal from the denial of an ex parte application and which Petitioners-Appellants did not invoke, instead of CPLR 7011, which does permit an appeal from the denial of an ex parte application and which Petitioners-Appellants did invoke. This latter section is part of CPLR Article 70, which exclusively governs the procedure for common law habeas corpus proceedings. *See People ex rel. Seppanen v. Munsey*, 2012-09913, 2014 WL 1043805, *3-4 (2d Dept. 2014). Petitioners-Appellants' motion should therefore be granted.[1]

Petitioners-Appellants' motion to reargue is taken from an order of the Supreme Court Suffolk County, dated December 5, 2013, denying Petitioners-Appellants' Order to Show Cause and Verified Petition for a common law writ of habeas corpus ("Petition") filed pursuant to CPLR Article 70. (Stein Aff. ¶5 and Exh. B attached thereto). On January 9, 2014, Petitioners-Appellants filed with the

[1] The pertinent facts are set forth in the Affirmation of Elizabeth Stein, Esq. (Stein "Aff."). Such facts are incorporated by reference herein.

Clerk of this Court the following papers: Notice of Appeal, completed Request for Appellate Intervention, Order of the Supreme Court Suffolk County, and affidavit of service of these papers to Respondents and the Office of the New York State Attorney General. (Stein Aff. ¶6). On March 3, 2014, Petitioners-Appellants filed with the Clerk of this Court a Notice of Motion for Admission *Pro Hac Vice* of Steven M. Wise, Esq. to brief and argue the appeal along with his affidavit and certificate of good standing. (*Id.* at ¶7). On April 3, 2014, the Court entered an order dismissing the appeal *sua sponte* "on the ground that no appeal lies as of right from an order that is not the result of a motion made on notice (see CPLR 5701)" and denying, as academic, the motion for *pro hac vice* admission. (*Id.* at ¶8). The order further stated that no papers had been filed in opposition or in relation to the motion. (*Id.*).

This motion is made within thirty days of the date of service of a Notice of Entry of the Decision plus five days for service by regular mail and is therefore timely. CPLR 2103(b) and 2221(d)(3).

II. PETITIONERS-APPELLANTS ARE ENTITLED TO RELIEF UNDER CPLR 2221(D).

CPLR 2221(d) provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in

determining the prior motion." *See also* 22 N.Y.C.R.R. 670.6; *Groonstad v. Robins Dry Dock & Repair Co*., 196 N.Y.S. 413, 414 (2d Dept. 1922). A motion to reargue is "designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." *Foley v. Roche*, 418 N.Y.S.2d 588, 593 (1st Dept. 1979). *See C. Sav. Bank in City of New York v. City of New York*, 19 N.E.2d 659 (N.Y. 1939). Its purpose "is to offer the unsuccessful party an opportunity to persuade the court to change its decision." *People v. Alamo*, 961 N.Y.S.2d 359 (Sup. Ct. 2012). It is not "designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided." *McGill v. Goldman*, 691 N.Y.S.2d 75, 76 (2d Dept. 1999). In this case, Petitioners-Appellants' appeal was not yet perfected but was dismissed *sue sponte* in response to a motion for admission *pro hac vice*. Petitioners-Appellants have never been afforded an opportunity to present the merits of their underlying Petition.

While the "determination to grant leave to reargue a motion lies within the sound discretion of the court," *Am. Alt. Ins. Corp. v. Pelszynski*, 926 N.Y.S.2d 640, 642 (2d Dept. 2011), it would be an abuse of discretion to deny a motion to reargue where the movant clearly demonstrates, as in the case at bar, that the court misapplied the law. *See, e.g.*, *Highgate Pictures, Inc. v. De Paul*, 549 N.Y.S.2d 386, 388-89 (1st Dept. 1990); *Denihan v. Denihan*, 468 N.Y.S.2d 614, 618 (1st

Dept. 1983). *See also Scarito v. St. Joseph Hill Acad.*, 878 N.Y.S.2d 460, 462 (2d Dept. 2009) ("The Supreme Court providently exercised its discretion in granting that branch of the plaintiff's motion which was for leave to reargue since it admittedly did not consider the plaintiff's argument that the defendants allegedly failed to provide Anthony with adequate safety equipment.").[2] A motion to reargue should especially be granted in situations, such as this, as there is a "'strong public policy in favor of resolving cases on the merits'" *Id.*

Where, as here, a party demonstrates that a court misapplied the law, the court should vacate its prior decision. *E.g., K2 Inv. Group, LLC v. American Guarantee & Liability Ins. Co*., 22 N.Y.3d 578 (2014); *Auqui v. Seven Thirty One Ltd. Partn*., 22 N.Y. 3d 226 (2013); *People v. Boyland*, 17 N.Y. 3d 852 (2011); *Weissblum v. Mostafzafan Found. of New York*, 60 N.Y. 2d 637, 639 (1983); *Porcelli v. N. Westchester Hosp. Ctr*., 977 N.Y.S.2d 32, 33 (2d Dept. 2013); *People v. Springer*, 970 N.Y.S.2d 462 (2d Dept. 2013); *People v. Morales*, 930 N.Y.S.2d 884 (2d Dept. 2011); *Kennedy v. Bennett*, 818 N.Y.S.2d 776 (2d Dept. 2006).

[2] "[E]ven in situations where the criteria for granting a reconsideration motion are not technically met, courts retain flexibility to grant such a motion when it is deemed appropriate." *Loris v. S & W Realty Corp*., 790 N.Y.S.2d 579, 580-81 (3d Dept. 2005).

As discussed in detail, *infra,* as this Court misapprehended the nature of Petitioners-Appellants' appeal and consequently misapplied the law governing it, it should grant Petitioners-Appellants' motion to reargue.

III. THE COURT ERRED AS A MATTER OF LAW IN RELYING UPON CPLR 5701 TO DISMISS PETITIONERS-APPELLANTS' APPEAL AS PETITIONERS-APPELLANTS' ORDER TO SHOW CAUSE AND VERIFIED PETITION FOR A COMMON LAW WRIT OF HABEAS CORPUS WERE FILED PURSUANT TO CPLR ARTICLE 70, THE *EX PARTE* DENIAL OF WHICH IS APPEALABLE.

The Court's reliance on CPLR 5701 in dismissing the appeal was based upon a misapprehension of the applicable law. Petitioners-Appellants filed their Petition pursuant to CPLR Article 70, which exclusively governs the procedure applicable to common law writs of habeas corpus. CPLR 7001 ("the provisions of this article are applicable to common law or statutory writs of habeas corpus and common law writs of certiorari to inquire into detention."). Petitioners-Appellants tracked the language of Article 70 in styling their Petition as a "show cause" order and petition for habeas corpus. Petitioners-Appellants **did not** intend to seek an order to show cause that was independent of Article 70, as that would have been superfluous and contrary to Article 70.

This Court misapprehended Petitioners-Appellants' Petition as seeking a traditional "order to show cause" and apparently took the words "Order to Show

Cause" as referring to CPLR 403, the appeal of which is not permissible, rather than CPLR 7003, the appeal of which is specifically granted by statute. Since the dismissal was *sua sponte*, the Petitioners-Appellants were never given the opportunity to address the misapprehension, and now point out the correct law.

Article 70, like its predecessors, "contains elaborate provisions regulating the exercise of the common-law power to issue and adjudge it . . . including those relating to rights of appealing." *People ex rel. Curtis v. Kidney,* 225 N.Y. 299, 303 (1919). "The writ existed at common law, but the proceedings of the court with respect to it are regulated by statute, and the courts must be governed by *that statute*." *People ex rel. Billotti v. New York Juvenile Asylum*, 57 A.D. 383, 384, 68 N.Y.S. 279 (1st Dept. 1901) (emphasis added).

The practice commentaries to CPLR 401 note that a "particular authorizing statute may contain some unique rules that would, of course, ***take precedence over those of Article 4***." Vincent C. Alexander, *Practice Commentaries: C401:1 Special Proceedings, In General,* N.Y. C.P.L.R. 401 (McKinney) (emphasis added). Only if Article 70 "is silent on the particular problem, [must] Article 4 [] be consulted." *Id.* As Article 70 expressly provides the manner of appeal, it takes precedence over all other provisions of the CPLR.

Petitioners/Appellants' decision to file their Petition *ex parte* was directed by CPLR 7002(a), which provides that "a person illegally imprisoned or otherwise

restrained in his liberty within the state, or one acting on his behalf . . . may petition ***without notice*** for a writ of habeas corpus to inquire into the cause of such detention and for deliverance." (emphasis added). *See* Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013) ("the proceeding is initiated by the filing of a petition requesting the court, ***ex parte***, to issue a writ of habeas corpus") (emphasis added). It was therefore entirely proper. *See People ex rel. Planter v. McCoy*, 767 N.Y.S.2d 357 (4th Dept. 2003) ("We agree with petitioner that he properly commenced this special proceeding . . . and thus the court erred in determining that the proceeding was not properly commenced because petitioner failed to serve respondents and the Attorney General with the order to show cause issued thereafter by the court."). *See also Brevorka ex rel. Wittle v. Schuse*, 643 N.Y.S.2d 861, 862 (4th Dept. 1996) (recognizing that a person "'may petition without notice for a writ of habeas corpus'") (quoting CPLR 7002(a)); *People ex rel. Fernandez-Morales v. Barron*, 824 N.Y.S.2d 756 (Sup. Ct. 2006) (same); *People ex rel. Wilder v. Reilly*, 847 N.Y.S.2d 903 (Sup. Ct. 2007) (same); *Application of Siveke*, 441 N.Y.S.2d 631, 633 (Sup. Ct. 1981) (same); *In re John Children*, 306 N.Y.S.2d 797, 823 (Fam. Ct. 1969) (same); *People ex rel. Zangrillo v. Doherty*, 243 N.Y.S.2d 702, 707 (Sup. Ct. 1963) (same).

It was also entirely appropriate, under CPLR 7003(a), for Petitioners-Appellants to style their Petition as an Order to Show Cause with the Verified

Petition for a Writ of Habeas Corpus requesting that the court order Respondents to explain the legality of the detention. CPLR 7003(a) provides that "[t]he court to whom the petition is made shall issue the writ without delay on any day, *or where the petitioner does not demand production of the person detained*. . . order the respondent to ***show cause*** why the person detained should not be released" (emphasis added). Petitioner-Appellant Nonhuman Rights Project did not demand the production of Petitioners-Appellants, Hercules and Leo. *See, e.g.*, *Callan v. Callan*, 494 N.Y.S.2d 32, 33 (2d Dept. 1985) ("Plaintiff obtained a writ of habeas corpus by order to **show cause** when defendant failed to return her infant daughter after her visitation . . . "); *State ex rel. Soss v. Vincent*, 369 N.Y.S.2d 766, 767 (2d Dept. 1975) ("In a habeas corpus proceeding upon an order to **show cause (CPLR 7003, subd. (a)),** the appeal is from a judgment of the Supreme Court … which granted the petition and ordered petitioner released"); *People ex rel. Bell v. Santor*, 801 N.Y.S.2d 101 (3d Dept. 2005) ("Petitioner commenced this CPLR article 70 proceeding seeking habeas corpus relief . . . Supreme Court dismissed the petition without issuing an **order to show** cause or writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell*, 421 N.Y.S.2d 443, 444 (4th Dept. 1979) ("This matter originated when petitioner . . . sought, by an order and petition, a *writ of habeas corpus* (Respondents) to **show cause** why Ricky Brandon, an infant . . . should not be released and placed in petitioner's custody."); *People ex rel. Smith v.*

Greiner, 674 N.Y.S.2d 588 (Sup. Ct. 1998) ("This is a habeas corpus proceeding brought by the petitioner pro se and commenced via Order to **Show Cause**"); *People ex rel. Goldstein on Behalf of Coimbre v. Giordano*, 571 N.Y.S.2d 371 (Sup. Ct. 1991) ("By order to **show cause**, in the nature of a Writ of Habeas Corpus proceeding, the petitioner seeks his release from the custody of the New York State Division for Youth. . . . [T]he Court grants the petition and directs that this petitioner be forthwith released"); *In re Henry*, 1865 WL 3392 (N.Y. Sup. Ct. 1865) ("the party arrested can apply for a habeas corpus, calling on the officer to **show cause** why he is detained, and with the return to the writ the rule is that where the arrest is upon suspicion, and without a warrant, proof must be given to show the suspicion to be well founded") (emphasis added in each).

Once petitioner's *ex parte* demand for an order to show cause why a detention is not illegal is denied, CPLR 7011 "governs the right of appeal in habeas corpus proceedings." *Wilkes v. Wilkes*, 622 N.Y.S.2d 608 (2d Dept. 1995). It "authorizes an appeal in two situations: (1) from a judgment *refusing, at the outset,* to grant a writ of habeas corpus or to issue an order to *show cause* (CPLR 7003(a)); *or* (2) from a judgment made upon the return of a writ or order to show cause (CPLR 7010)." Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), CPLR 7011* (West 2014) (emphasis added). *See People ex rel. Tatra v. McNeill*, 244 N.Y.S.2d 463, 464 (2d Dept. 1963) (an appeal "from an

order refusing to grant a writ or from a judgment made upon the return of a writ" is "authorized by statute in a habeas corpus proceeding (CPLR § 7011)."). CPLR 7011's allowance of an appeal to be taken "from a judgment refusing to grant a writ of habeas corpus *or refusing an order to show cause* issued under subdivision (a) of section 7003" is therefore an *exception* to the general rule that the denial of an *ex parte* order is not appealable (emphasis added). Because CPLR 7011 authorizes an appeal from the refusal to issue the writ *or* a CPLR 7003 show cause order, this Court erred as a matter of law in relying upon CPLR 5701 in dismissing the appeal rather than CPLR 7011, which specifically allows for the appeal.

Appellate courts routinely authorize petitioners to appeal from a court's *refusal*, at the outset, to issue the writ or a CPLR 7003 show cause order, as CPLR 7011 authorizes such appeals. *See, e.g.*, *People ex rel. Silbert v. Cohen*, 29 N.Y.2d 12, 14 (1971); *Callan*, 494 N.Y.S.2d at 33; *People ex rel. Bell*, 801 N.Y.S.2d 101 ("Supreme Court dismissed the petition without issuing an order to show cause or writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell*, 421 N.Y.S.2d at 444; *People ex rel. Peoples v. New York State Dept. of Correctional Services*, 967 N.Y.S.2d 848 (4th Dept. 2013) (entertaining appeal from the dismissal of a habeas corpus petition); *People ex rel. Flemming v. Rock*, 972 N.Y.S.2d 901 (1st Dept. 2013) (same); *People ex rel. Jenkins v. Rikers Island Correctional Facility Warden*, 976 N.Y.S.2d 915 (4th Dept. 2013)(entertaining

appeal from order dismissing petition for habeas corpus); *People ex rel. Harrington v. Cully*, 958 N.Y.S.2d 633 (4th Dept. 2013) (same); *People ex rel. Aikens v. Brown*, 958 N.Y.S.2d 913 (4th Dept. 2013) (same); *People ex rel. Holmes v. Heath*, 965 N.Y.S.2d 881 (2d Dept. 2013) (entertaining appeal from denial of petition for habeas corpus without hearing); *People ex rel. Allen v. Maribel*, 966 N.Y.S.2d 685 (2d Dept. 2013) (same); *People ex rel. Bazil v. Marshall*, 910 N.Y.S.2d 494, 495 (2d Dept. 2010) (same); *People ex rel. Sailor v. Travis*, 786 N.Y.S.2d 548, 549 (2d Dept. 2004) (same); *People ex rel. Gonzalez v. New York State Div. of Parole*, 682 N.Y.S.2d 602 (2d Dept. 1998) (entertaining an appeal "[i]n a habeas corpus proceeding," where supreme court "refused an application for an order to show cause"); *People ex rel. Mabery v. Leonardo*, 578 N.Y.S.2d 427 (3d Dept. 1992) (entertaining appeal from supreme court's denial of "petitioner's application for a writ of habeas corpus, in a proceeding pursuant to CPLR article 70, without a hearing."); *People ex rel. Deuel v. Campbell*, 572 N.Y.S.2d 879 (3d Dept. 1991) (same); *People ex rel. Johnson v. New York State Bd. of Parol*e, 580 N.Y.S.2d 957, 959 (3d Dept. 1992) (entertaining appeal where petitioner "commenced this proceeding for habeas corpus relief by order to show cause and petition" and supreme court "dismissed the petition"); *People ex rel. Cook v. New York State Bd. of Parole*, 505 N.Y.S.2d 383 (2d Dept. 1986) (appeal from dismissal of writ of habeas corpus); *People ex rel. Boyd v. LeFevre*, 461

N.Y.S.2d 667 (3d Dept. 1983) (entertaining appeal from a judgment of the Supreme Court "which denied petitioner's application for a writ of habeas corpus, without a hearing."); *People ex rel. Steinberg v. Superintendent, Green Haven Correctional Facilit*y, 391 N.Y.S.2d 915, 916 (2d Dept. 1977); *People ex rel. Boutelle v. O'Mara,* 390 N.Y.S.2d 19 (3d Dept. 1976) (entertaining an appeal from the supreme court's denial of "petitioner's application for a writ of habeas corpus, without a hearing."); *People ex rel. Edmonds v. Warden, Queens H. of Detention for Men,* 269 N.Y.S.2d 787, 788 (2d Dept. 1966) ("In a habeas corpus proceeding, relator appeals from a judgment of the Supreme Court, . . . which dismissed the writ."); *People ex rel. Leonard v. Denno*, 219 N.Y.S.2d 955 (2d Dept. 1961).

Accordingly, this Court should not have dismissed Petitioners-Appellants' appeal from the Supreme Court's refusal to issue the requested writ as CPLR 7011grants them the right to such an appeal. The unique procedures in Article 70 are intended not just to give habeas petitioners a speedy initial hearing to determine their liberty, but a right to appeal even a refusal to issue a writ of habeas corpus. Petitioners-Appellants should be afforded this opportunity.

IV. CONCLUSION.

The "power of the court to dismiss an action, *sua sponte*, is to be used sparingly[,]" *Rienzi v. Rienzi*, 808 N.Y.S.2d 116, 116-17 (2d Dept. 2005), and only "when extraordinary circumstances exist to warrant dismissal." *U.S. Bank v. Emmanuel*, 921 N.Y.S.2d 320, 322 (2d Dept. 2011). Otherwise, its exercise of discretion is improper. *Rienzi*, 808 N.Y.S.2d at 117. *See Quinn v. County of Rensselaer*, 661 N.Y.S.2d 870, 871 (3d Dept. 1997).

This Court should grant Petitioners-Appellants' motion to reargue, vacate its order of dismissal, and allow the appeal to proceed. To refuse, where it is has been demonstrated that the Court misapplied the relevant law, would be an abuse of discretion.

Dated: April 16, 2014

Respectfully Submitted,

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