SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus and Order to Show Cause,

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

Petitioner,

v.

JAMES J. BREHENY, in his official capacity as Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY,

Respondents.

Index No. 18-45164

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO MOTIONS FOR STAY AND LEAVE TO APPEAL

Respectfully submitted,
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PRELIMINARY STATEMENT

In a last-ditch attempt to keep the current proceeding in Orleans County, Petitioner the Nonhuman Rights Project, Inc. ("NRP") seeks permission to appeal to the Appellate Division, Fourth Department, the Court's Order transferring the proceeding to the Bronx County, and a stay pending the appeal. NRP's instant motion ignores controlling and well-established precedent barring the appeal of intermediate orders in habeas corpus proceedings. NRP's motions for permission to appeal and a stay therefore should be summarily denied, and venue should be transferred to Bronx County.

PROCEDURAL BACKGROUND

In the interest of brevity, Respondents Wildlife Conservation Society and James Breheny incorporate and refer the Court to their memorandum of law dated January 25, 2019, and the affidavit of Joanna J. Chen, sworn to January 25, 2019, submitted in opposition to NRP's motions for stay and reargument, which also are currently pending before the Court.

ARGUMENT

POINT I

NRP IS BARRED FROM APPEALING THE COURT'S ORDER TRANSFERRING VENUE

CPLR 7011 states "[a]n appeal may 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, or from a judgment made upon the return of such writ or order to show cause."

As a corollary of CPLR 7011, it is well-established that "[n]o appeal should be taken from incidental orders made in the course of the [habeas] proceeding." *People ex rel.*

Robertson v. New York State Div. of Parole, 67 N.Y.2d 197, 201 (1986); *State ex rel. Satti v. Satti*, 55 A.D.2d 149, 153 (1st Dep't 1976), *affirmed* 43 N.Y.2d 671 (1977); *People ex rel. Duryee v. Duryee*, 188 N.Y. 440, 444 (1907).

In habeas proceedings, orders concerning transfers of venue are considered to be intermediate orders, from which no appeal lies. *People ex rel. Ardito v. Trujillo*, 88 A.D.2d 1002, 1002 (2d Dep't 1982) (citing CPLR 7011, dismissing appeal from an order denying motion to transfer the venue of the action); *Sassower v. Finnerty*, 68 A.D.2d 936, 936 (2d Dep't 1979) (citing CPLR 7011, dismissing appeal from an order transferring venue). NRP therefore is barred from appealing the Court's Order transferring this proceeding to Bronx County.

Although NRP cites CPLR 7011 and *Robertson*, 67 N.Y.2d at 201, in its memorandum of law in support of permission to appeal (at pp. 3, 18-19), and therefore should be aware that intermediate habeas orders are non-appealable, NRP fails to address why this controlling authority should not result in an immediate denial of its motions. NRP also fails to address the substantial authority from all Departments holding that intermediate orders in habeas proceedings are not appealable. *See e.g., In re Rzepecka*, 284 A.D. 867, 867 (4th Dep't 1954); *see also Wilkes v. Wilkes*, 212 A.D.2d 719, 720 (2d Dep't 1995) (collecting cases); *People ex rel. Falaq v. Dalsheim*, 122 A.D.2d 93, 93 (2d Dep't 1986); *State ex rel. Williams v. Windham Child Care*, 55 A.D.2d 146, 148 (1st Dep't 1976); *People ex rel. Wysocki v. Webster*, 268 A.D. 811, 811 (3d Dep't 1944).

Instead, NRP relies upon *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dep't 1996), to argue that an appeal from an intermediate order in a habeas proceeding may be available by permission under CPLR 5701. However, the *Brevorka* court, in exercising its

discretion to convert the habeas petitioner's notice of appeal into an application for permission to appeal, failed to consider the controlling authority from the Court of Appeals set forth in *Robertson*, 67 N.Y.2d at 201; *Satti*, 43 N.Y.2d at 671; and *Duryee*, 188 N.Y. at 444, as well as its own prior precedent. *In re Rzepecka*, 284 A.D. at 867. The *Brevorka* court's consideration of an intermediate habeas proceeding therefore was improvidently undertaken.

The balance of the cases NRP relies upon concern appeals from Article 78 proceedings, as opposed to habeas proceedings, and as such are distinguishable. CPLR 5701(b)(1) expressly provides that orders "made in a proceeding against a body or officer pursuant to article 78" are "not appealable to the appellate division as of right." CPLR 5701(c) then provides the procedure by which permission may be sought to appeal an order not appealable as of right. No such process to seek permission to appeal intermediate orders from habeas proceedings is provided in Articles 57 or 70 of the CPLR. Moreover, cases such as *Sassower*, 68 A.D.2d at 936, make clear that an appeal by permission is available in an Article 78 proceeding, whereas "no appeal lies from an intermediate order in a habeas corpus proceeding." *Id.* NRP's allusions to the "interest of justice" therefore are misplaced because no appeal, even by permission, is available for intermediate orders in habeas proceedings.

Because NRP fails to identify any persuasive authority that would permit a deviation from the foregoing controlling and well-established precedent, NRP's motion for permission to appeal should be summarily denied.

POINT II

THE COURT SHOULD DENY PETITIONER'S MOTION FOR A STAY AND ALLOW THIS CASE TO PROCEED IN BRONX COUNTY

NRP also moves to stay the transfer of this proceeding pursuant to CPLR 5519(c) "until final resolution of any appeal taken from the Transfer Order." Such a stay is improper when, as here, the "underlying issues lack merit." *Petkovsek v. Snyder*, 251 A.D.2d 1088, 1088 (4th Dep't 1998). As explained above, no appeal lies from an interlocutory order in a habeas corpus proceeding, thus no stay is warranted.

Even if such an appeal could be taken, NRP cannot identify any error warranting reversal, thus a stay would serve only to delay resolution of this proceeding. Indeed, NRP's instant motions recite *verbatim* its earlier arguments in support of re-argument and a discretionary stay under CPLR 2201. Mem. Supp. Permission to Appeal, at 5; Mem. Supp. Stay, at 2-7. The motions should be denied for the same reasons stated in Respondents' Opposition to the earlier motions—the Court correctly ordered the transfer of this proceeding and no further delay is warranted.

Notwithstanding its multiple requests to *stay* this proceeding, NRP also argues that transferring venue "would delay resolution of this proceeding far beyond necessity." Mem. Supp. Permission to Appeal, at 19. NRP does not explain, however, how permitting an interlocutory appeal could possibly expedite resolution of this proceeding on the merits. Indeed, doing so would ensure precisely the opposite.

Finally, CPLR 5519(c) would not apply here even if NRP had an appeal to pursue. "Neither an automatic nor a discretionary stay under CPLR 5519 stays all proceedings in the action; it stays only proceedings to enforce the judgment or order appealed from." *Baker v. Bd. of Educ.*, 152 A.D.2d 1014, 1014 (4th Dep't 1989). This Court

granted Respondents' motion to change venue and duly entered that Order. The order is self-effectuating and there is no proceeding to "enforce" that order requiring a stay (*id.*); there is only a duly entered order changing venue "forthwith" to Bronx County. NRP's motion for a stay should be denied accordingly.

CONCLUSION

Based upon the foregoing reasons, Petitioner's motions for a stay and permission to appeal should be denied, and this proceeding should be transferred to Bronx County forthwith as previously directed by the Court.

Dated: Buffalo, New York
January 30, 2019

PHILLIPS LYTLE LLP

By: /s/ Kenneth A. Manning

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