

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,

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

Petitioner,

-against-

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**

**NOTICE OF MOTION  
TO STRIKE**

PLEASE TAKE NOTICE, that upon the annexed affirmation of Elizabeth Stein, Esq., an attorney of record for Petitioner the Nonhuman Rights Project, Inc. ("NhRP"), dated October 10, 2018, the Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition"), Memorandum of Law in Support thereof, and upon all other affidavits, exhibits, and attachments filed therewith, the NhRP will move this Court to strike ("Motion to Strike") Respondents' Memorandum of Law in Opposition to Proposed Order to Show

Cause (“Memorandum”) that appears to have been filed with this Court on October 9, 2018, on the following grounds:

1. The NhRP properly filed its Petition on behalf of Happy pursuant to Civil Practice Law and Rules (“CPLR”) Article 70, which governs the procedure used in habeas corpus proceedings.
2. There is no provision in Article 70 or anywhere else in the CPLR that allows the filing of any documents by Respondents prior to the issuance of the Order to Show Cause by this Court. CPLR 7002 specifies by whom the petition may be made, to whom, and its contents. CPLR 7003 instructs the Court to issue the writ of habeas corpus or order to show cause without delay. CPLR 7004 states before whom the writ of habeas corpus or order to show cause shall be returnable. CPLR 7005 sets forth how the issued writ is to be served.
3. Article 70 does not require or provide for the service of the petition upon the respondents. The NhRP served the Respondents in this case merely as a courtesy.
4. A respondent may appear if, but only if, a writ or order to show cause as set forth in CPLR 7008(a) is issued. (“The return shall consist of an affidavit to be served in the same manner as an answer in a special proceeding and filed at the time and place specified in the writ, or where the writ is

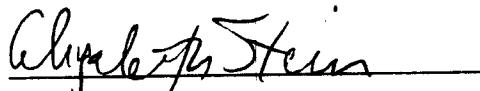
returnable forthwith, within twenty-four hours after its service”). In a special proceeding, which habeas corpus is, a respondent’s objections may only be made by answer or a motion to dismiss. CPLR 404(a).

5. But for the limitations described above, a respondent could improperly meddle in the decision of this Court as to whether and where the order to show cause may issue and be returned by filing random documents, which Respondents here have apparently attempted to do.
6. Moreover, no motion was filed asking the Court for leave to file the improper Memorandum. This deprived the NhRP even of its ability to object to its filing and necessitated this Motion to Strike.
7. In addition to the fact that Respondents have no authority to file the Memorandum at this time, they have also failed to properly serve it upon the NhRP. As of the date of this Motion, the only service to the NhRP was via email with no certificate of service verifying mailing. As Orleans County does not recognize e-filing, this service was improper.
8. The New York State Attorney General in *The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898 (Sup. Ct. 2015), properly complied with Article 70 when it waited until the court issued its order to show cause to respond. That allowed the court to set return and hearing dates as well as a briefing schedule for the parties.

9. In short, Respondents' Memorandum was filed in violation of the CPLR, without motion or leave of court, without proper service, and without giving the NhRP an opportunity to contest it or respond in a timely way, all apparently in an effort to meddle with the decision of this Court as to whether it should issue the requested order to show case and where the order should be returned. Respondents' Memorandum should therefore be promptly stricken.

PLEASE TAKE FURTHER NOTICE, that the motion is returnable at 9:30 A.M. on Monday, October 29, 2018, or as soon thereafter as it may be heard, at the Courthouse located at Courthouse Square, 1 South Main Street, Suite 3, Albion, NY 14411. The Respondents are hereby given notice that the motion will be submitted on the papers and their personal appearance in opposition is neither required nor permitted. Pursuant to CPLR § 2214(b), opposition papers, if any, are to served by no later than October 22, 2018.

Dated: October 10, 2018

  
Elizabeth Stein, Esq.  
5 Dunhill Road  
New Hyde Park, New York 11040  
516-747-4726  
lizsteinlaw@gmail.com

NOTICE TO:

Kristin E. Nicholson, Chief Clerk  
Orleans Supreme and County Court  
Orleans County Courthouse  
Courthouse Square  
1 South Main Street  
Suite 3  
Albion, NY 14411

*By overnight mail and Email to [knichols@nycourts.gov](mailto:knichols@nycourts.gov)*

PHILLIPS LYTLE LLP

Kenneth A. Manning, Esq.

Joanna J. Chen, Esq.

Attorneys for Respondents *James J. Breheny* and *Wildlife Conservation Society*

One Canalside

125 Main Street

Buffalo, New York 14203-2887

Tel: (716) 847-8400

*By overnight mail and Email to: [kmanning@phillipslytle.com](mailto:kmanning@phillipslytle.com),  
[jchen@phillipslytle.com](mailto:jchen@phillipslytle.com)*

STATE OF NEW YORK  
SUPREME COURT 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,

Index No.: 18-45164

**ATTORNEY  
AFFIRMATION**

-against-

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,

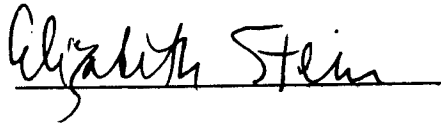
Respondents.

---

I, ELIZABETH STEIN, an attorney duly admitted to practice law in the State of  
New York, hereby affirm the following under penalty of perjury:

1. I am an attorney of record for Petitioner, the Nonhuman Rights Project, Inc. in  
the above-captioned matter and am not a party in this action.
2. I am fully familiar with the pleadings and proceedings in this matter, have read  
and know the contents thereof and submit this affirmation in support of the within  
Motion to Strike.
3. Pursuant to 22 N.Y.C.R.R. § 1301.1, this motion is not frivolous.

Dated: October 10, 2018

A handwritten signature in cursive script that reads "Elizabeth Stein". The signature is written in black ink and is positioned above a solid horizontal line.

Elizabeth Stein, Esq.  
5 Dunhill Road  
New Hyde Park, New York 11040  
Tel: (516) 747-4726  
Email: [lizsteinlaw@gmail.com](mailto:lizsteinlaw@gmail.com)  
Attorney for Petitioner

**AFFIRMATION OF SERVICE OF PAPERS (CPLR 2103)**

STATE OF NEW YORK, COUNTY OF NASSAU ss.:

**I, the undersigned, an attorney admitted to practice in New York State, with offices at the address set forth on the reverse side, affirm under penalties of perjury:**

On October 10, 2018, I personally served the within **Notice of Motion to Strike**

**Service by Mail** by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name:

**Individual Personal Service** by delivering a copy to each of the following *attorney(s)* at the last known address set forth after each name below. I knew the *attorney(s)* served to be the *attorney(s)* for the *party(ies)* stated below.

**Hand Delivery Service** by dispatching a copy by a messenger delivery service to each of the persons at the last known address set forth after each name below.

**X Service by Overnight Mail and Additional Copy by Electronic Means** by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name and by transmitting a copy to the following persons by email to the address set forth after each name below:

PHILLIPS LYTTLE LLP  
Kenneth A. Manning, Esq.  
Joanna J. Chen, Esq.  
Attorneys for Respondents *James J. Breheny* and *Wildlife Conservation Society*  
One Canalside  
125 Main Street  
Buffalo, New York 14203-2887  
Tel: (716) 847-8400  
kmanning@phillipslytle.com  
jchen@phillipslytle.com

  
Elizabeth Stein, Esq.



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,

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

**Index No.: 18-45164**

Petitioner,

-against-

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.

---

**ELIZABETH STEIN, ESQ.**  
5 Dunhill Road  
New Hyde Park, New York 11040  
516-747-4726  
lizsteinlaw@gmail.com  
*Attorneys for Petitioner*

---

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,

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

**Index No.: 18-45164**

Petitioner,

-against-

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.

---

**ELIZABETH STEIN, ESQ.**  
5 Dunhill Road  
New Hyde Park, New York 11040  
516-747-4726  
lizsteinlaw@gmail.com  
*Attorneys for Petitioner*

---