

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST JUDICIAL 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,

Petitioner-Appellant,

-against-

TROY K. WEBBER, in her official capacity as
an Associate Justice of the New York State
Supreme Court Appellate Division, First Judicial
Department,

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-Respondents.

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I. Preliminary Statement

This memorandum is submitted in support of The Nonhuman Rights Project, Inc.'s ("NhRP") Article 78 Verified Petition for Writ of Mandamus ("Petition") in which NhRP respectfully requests this Court to order Respondent, Honorable Associate Justice Troy K. Webber ("Justice Webber") of the New York State Supreme Court Appellate Division, First Judicial Department ("First Department"), to grant NhRP's motion to appeal as of right, as required by New York Civil Practice Law and Rules ("CPLR") 7011.¹

II. Statement of Facts and Procedural History

On January 29, 2016, the Supreme Court, New York County denied a verified petition for a common law writ of habeas corpus and order to show cause ("Habeas Petition") filed pursuant to CPLR Article 70 by NhRP on behalf of a chimpanzee named Kiko (Exhibit 6 attached to Stein Aff.).

On February 9, 2016, NhRP filed with the Clerk of this Court the following papers: Notice of Appeal (Exhibit 2 attached to Stein Aff.), completed Request for Appellate Intervention, Order of the Supreme Court New York County, and affidavit of service. NhRP then sought to perfect its appeal. On May 18, 2016, it filed the Record on Appeal, which included the order of the lower court and Opening Brief. NhRP's counsel was then contacted by the First Department

¹ Submitted herewith in support of its Article 78 Petition is the Affirmation of Elizabeth Stein, Esq. ("Stein Aff.")

Clerk's Office, informed that NhRP did not have a proper order from which an appeal could be taken, and that NhRP did not have an appeal as of right from the lower court's refusal to issue an order to show cause or writ of habeas corpus. NhRP also filed the following documents with this Court: Appendix, Motion to File an Oversize Brief (which was denied); a second Motion to File an Oversize Brief (which was granted), Motion for Steven M. Wise to appear and argue *Pro Hac Vice* (which was granted), and Motion to Appeal as of Right (Exhibit 4 attached to Stein Aff.).

In response to the Clerk's statement regarding the sufficiency of the order and appropriateness of the appeal, on May 20, 2016, NhRP submitted a letter to the lower court requesting that it enter an appropriate order with the New York County Clerk from which an appeal may be taken, which the court issued on the same date (Exhibit 3 attached to Stein Aff.) and which NhRP sought to file as a supplemental record on appeal. Because this judgment post-dated all filings in this appeal, on July 6, 2016, the lower court granted NhRP's motion for an order that the judgment of May 20, 2016 be issued *nunc pro tunc* to the date of the lower court's original final order of January 29, 2016 (Exhibit 5 attached to Stein Aff.).

On July 28, 2016, Justice Webber entered an order denying NhRP's Motion to Appeal as of Right pursuant to CPLR 7011 by *sua sponte* converting it into a

Motion for Leave to Appeal pursuant to CPLR 5701(c), then denying this Motion, which NhRP neither filed nor intended to file, asserting:

Petitioner-Appellant moved to appeal the matter as of right pursuant to CPLR 7011.

I, Troy K. Webber, a Justice of the Appellate Division, deem this a motion brought pursuant to CPLR 5701(c), for leave to appeal to the Appellate Division, First Department, from the order of Supreme Court Justice Barbara Jaffe of the Supreme Court, New York County, entered on or about January 29, 2016,

Now, upon reading the papers with respect to the motion, and due deliberation having been had thereon, it is Ordered that the application for leave to appeal is denied.

(Exhibit 1 attached to Stein Aff.).

On August 19, 2016, NhRP filed with this Court a Motion to Reargue or, in the alternative, for Leave to Appeal to the Court of Appeals from the order of July 28, 2016 (Exhibit 7 attached to Stein Aff.). On October 25, 2016, the Court entered an order denying NhRP's motion (Exhibit 8 attached to Stein Aff.).

As discussed below, NhRP is entitled to mandamus relief because NhRP has an absolute right to appeal under CPLR 7011 which Justice Webber had no discretion to deny by construing its motion to appeal as of right under CPLR 7011 as a motion for leave to appeal under CPLR 5701(c), which NhRP intentionally neither sought nor briefed.

III. While venue is proper in this Appellate Division, this Court has the discretion to transfer NhRP's Article 78 Petition to an adjoining

Appellate Division if it cannot reasonably rule impartially.

NhRP's Article 78 Petition is properly filed in this Court. CPLR 7804(b) must be read in conjunction with CPLR 506(b). 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).

CPLR 506(b)(1)'s language "justice of the supreme court" applies to the Appellate Division and its Justices. *E.g., Dinsio v. S. Ct. App. Div., Third Jud. Dept.*, 125 A.D.3d 1313 (4th Dept. 2015), *leave to appeal denied*, 25 N.Y.3d 908, (N.Y. 2015), *reargument denied*, 26 N.Y.3d 1134 (N.Y. 2016); *Stein v. Murphy*, 439 N.Y.S.2d 221 (2d Dept. 1981) (Article 78 petition filed in Second Department to compel Presiding Justice of the First Department); *Gold v. Shapiro*, 62 A.D.2d 62 (2d Dept. 1978), *aff'd*, 45 N.Y.2d 849 (N.Y. 1978) (Article 78 petition properly filed in Appellate Division to enjoin an Appellate Division justice from effectuating a decision); *Nichols v. Gamso*, 42 A.D.2d 630 (3d Dept. 1973), *modified*, 35 N.Y.2d 35 (N.Y. 1974) (Article 78 petition filed against Appellate Division properly filed in Appellate Division).

Although a Justice of this Court is the named Respondent, this Court need not recuse itself if it can adjudicate the merits impartially. *See New York State*

Ass'n of Criminal Def. Lawyers v. Kaye, 95 N.Y.2d 556, 558 (2000); *Gold*, 62 A.D.2d 62. Such was the case in *Gold* where the petition was filed in the Second Judicial Department (“Second Department”) against an Associate Justice of the Second Department. *Id.* The court granted the petition, ordering that the respondent Justice was prohibited from signing an order effectuating his determination to grant bail. *Id.* at 68.

Significantly, in *Kaye*, an Article 78 proceeding against the Court of Appeals in its administrative capacity was filed in the Supreme Court. 95 N.Y.2d at 558. The issue on appeal was whether Chief Judge Kaye and the other judges named as parties should be disqualified from participating in the decision. *Id.* The Court concluded that recusal was not required, reasoning in part, as relevant here:

“The fact is that our promulgation of the [rule] is not a prior determination that it is valid and constitutional. That determination must await the adjudication in this or a future case” [citation omitted]. **To the extent that a decision in this article 78 proceeding may involve reevaluation by this Court of limited aspects of its own prior determination, this Court may reconsider its own decision** (*see, Matter of Rules of Ct. of Appeals for Admission of Attorneys & Counselors at Law*, . . . [Judges of this Court decided application for reconsideration of administrative order they participated in adopting]; *see also, Ex parte Farley, supra* [comparing review of administrative determination to motion for new trial or petition for rehearing]; *Board of Overseers of Bar v. Lee*, 422 A.2d 998, *appeal dismissed* . . . [comparing challenge to constitutionality of rule to reconsideration in a litigated case of issue decided in Judge's prior advisory opinion]).

Id. at 560-61 (emphasis added).

If the Court cannot be impartial, it must transfer the Petition to a different Appellate Division. *E.g.*, *Dinsio*, 125 A.D.3d 1313. In *Dinsio*, for instance, a prisoner brought an Article 78 proceeding in the Appellate Division, Third Judicial Department (“Third Department”) to compel it to determine issues raised in his motions to vacate. *Id.* The Third Department transferred the proceeding to the Appellate Division, Fourth Judicial Department. 125 A.D.3d 1314 (4th Dept. 2015). Likewise, in *Nichols v. Gamsso*, an Article 78 petition was filed in the First Department against the Chief Clerk of the First Department; the First Department transferred the petition to the Third Department. 42 A.D.2d 630. The Third Department then ruled against the Respondent First Department Clerk, directing respondent to make the file of the First Department available for public inspection.” *Id.* As in *Nichols*, NhRP requests that this Court transfer the proceeding to the Third Department if it cannot render a fair and impartial decision, as that Department has already carefully considered the issue.

IV. NhRP is entitled to mandamus relief because Justice Webber failed to perform a duty required by CPLR 7011.

A. Mandamus may be used to compel a judicial officer to exercise a non-discretionary duty in connection with a civil or criminal proceeding.

Article 78 mandamus is proper where, as here, an “officer failed to perform a duty enjoined upon it by law.” CPLR 7801 and 7803. *See generally 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). Despite CPLR 7801(2)'s general proscription against the use of Article 78 to challenge determinations made in connection with civil and criminal actions, if the challenged matter is the performance of an official duty in the nature of a ministerial act, no "determination" is being reviewed. *See, Nat'l Auto Weld, Inc. v. Clynes*, 454 N.Y.S.2d 33, 34-34 (3rd Dept) ("In the instant situation, petitioner's article 78 proceeding for a judgment of mandamus was proper. *Petitioner simply sought an order to compel the Judge to hear his claim.* The City Court Judge acted without authority when he dismissed petitioner's claim.") (emphasis added). *E.g., Brusco v. Braun*, 84 N.Y.2d 674 (1994); *Sackinger v. Nevins*, 451 N.Y.S.2d 1005 (Sup.Ct. 1982). Vincent C. Alexander, *Practice Commentaries*, McKinney's CPLR 7801 at C7801:3.

B. CPLR 7011 required Justice Webber to grant NhRP's motion to appeal as of right and vested it with no discretion to convert the motion to one seeking leave to appeal under CPLR 5701(c) *sua sponte* and then deny the motion.

As "[a]n appeal from a judgment dismissing a habeas corpus petition lies *as of right* rather than by permission," *People ex rel. St. Germain v. Walker*, 191 A.D.2d 1049 (4th Dept. 1993) (emphasis added), Justice Webber had a non-discretionary duty to grant NhRP's motion and accept NhRP's appeal as of right under CPLR 7011. CPLR 7011 "governs the *right* of appeal in habeas corpus proceedings," *Wilkes v. Wilkes*, 212 A.D.2d 719, 720 (2d Dept. 1995) (emphasis added), and permits an appeal either "(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*, 19 A.D.2d 845, 846 (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).”).²

Justice Webber had no discretion *sua sponte* to convert NhRP’s motion to appeal as of right under CPLR 7011 into a motion seeking leave to appeal under CPLR 5701(c). NhRP filed its Habeas Petition pursuant to CPLR 70, which exclusively governs the procedure for common law writs of habeas corpus. See

² See also *People ex rel. Silbert v. Cohen*, 29 N.Y.2d 12, 14 (1971); *Callan v. Callan*, 114 A.D.2d 348, 350 (2d Dept. 1985); *Bell v. Santor*, 21 A.D.3d 1192, 1192 (3d Dept. 2005); Application of Mitchell, 70 A.D.2d at 368 (4th Dept. 1979); *People ex rel. Peoples v. New York State Dept. of Correctional Services*, 107 A.D.3d 1648 (4th Dept. 2013) (entertaining appeal from the dismissal of a habeas corpus petition); *People ex rel. Flemming v. Rock*, 110 A.D.3d 533 (1st Dept. 2013) (same); *People ex rel. Jenkins v. Rikers Island Correctional Facility Warden*, 112 A.D.3d 135 (4th Dept. 2013) (entertaining appeal from order dismissing petition for habeas corpus); *People ex rel. Holmes v. Heath*, 107 A.D.3d 748 (2d Dept. 2013) (entertaining appeal from denial of petition for habeas corpus without hearing); *People ex rel. Gonzalez v. New York State Div. of Parole*, 255 A.D.2d 611 (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*, 179 A.D.2d 848 (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. Johnson v. New York State Bd. of Parole*, 180 A.D.2d 914, 915-16 (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. Edmonds v. Warden, Queens H. of Detention for Men*, 25 A.D.2d 860 (2d Dept. 1966) (“In a habeas corpus proceeding, relator appeals from a judgment of the Supreme Court, . . . which dismissed the writ.”).

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.”); *People ex rel. Delia v. Munsey*, 26 N.Y.3d 124, 127-28 (2015) (“article 70 of the CPLR governs special proceedings for a writ of habeas corpus . . .”). 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 (1st Dept. 1901) (emphasis added).

It was necessary, under CPLR 7003(a), for NhRP to style its habeas petition relief as an order to show cause as it was not demanding Kiko’s production to the court. 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).³ Justice Webber clearly

³ See, e.g., *Callan v. Callan*, 114 A.D.2d at 350 494 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*, 48 A.D.2d 911, 911 369 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*, 21 A.D.3d at

misapprehended the nature of the order to show cause and controlling law in applying CPLR 5701(c), which requires permission for leave to appeal when there is no right to appeal, *supra*.

NhRP's right to appeal to the Appellate Division under CPLR 7011 from the Supreme Court's refusal to issue a requested CPLR 7003(a) order to show cause was specifically and correctly recognized by the Third and Fourth Department in litigation brought by NhRP on behalf of Kiko and a different chimpanzee named Tommy. *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den.*, 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015). The Third Department stated that: “[a]s Supreme Court’s judgment finally determined the matter by refusing to issue an order to show cause to commence a habeas corpus proceeding, it is appealable as of right.”

1192 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*, 70 A.D.2d at 368 421 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”) (emphasis added in each).

Id. at 149 n.1 (citing CPLR 7011; *People ex rel. Seals v New York State Dept. of Correctional Servs.*, 32 A.D.3d 1262, 1263 (4th Dept. 2006); *People ex rel. Tatra v McNeill*, 19 A.D.2d 845, 846 (2d Dept. 1963)).⁴

Because CPLR 7011 grants an appeal *as of right* from the refusal to issue the writ or a CPLR 7003 show cause order, Justice Webber was required to grant NhRP's motion to appeal. Accordingly, the Justice must be compelled under Article 78 to grant NhRP's motion.⁵

Justice Webber's failure to comply with her judicial obligation under CPLR 7011 also frustrates the right to a speedy determination guaranteed to a habeas corpus petitioner. *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*, 188 N.Y. 440, 445-46 (1907) (habeas corpus "tolerates no delay except of necessity"). As this Court held in *People ex rel. Garber v. Garber*, "procedures tending to delay (habeas corpus) are incompatible with its primary objective of prompt disposition." 18 A.D.2d 990, 990 (1st Dept. 1963).

⁴ The Appellate Division, Second Judicial Department, "dismissed petitioner's appeal '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 declined to grant leave to appeal or reargue. (Aff. in Opp., Exh. G)." *Matter of Nonhuman Rights Project Inc. v. Stanley*, 16 N.Y.S.3d 898, 903 (Sup. Ct. 2015) (emphasis added). That dismissal also violated CPLR 7011. However, in the case at bar, NhRP's request for an order to show cause was intentionally made *with* notice.

⁵ Moreover, even if CPLR 5701 applied to this habeas corpus proceeding, NhRP would still be entitled to the right to appeal under CPLR 5701(a), rather than by permission under 5701(c). In the present case, the case originated in the Supreme Court and the Supreme Court entered a final judgment disposing of all the issues in the action.

The unique procedures in Article 70 are intended not just to give habeas petitioners a speedy initial hearing to determine their liberty, but the right to appeal a refusal to issue a writ of habeas corpus or order to show cause. NhRP is absolutely entitled to, and must be afforded, this opportunity forthwith.

V. Conclusion

As CPLR 7011 confers upon NhRP an absolute right to appeal from the lower court's denial of its Habeas Petition, Justice Webber lacked discretion to deny NhRP's motion to appeal as of right. NhRP respectfully requests that this Court grant its Article 78 petition for a writ of mandamus and compel the Justice to grant NhRP's CPLR 7011 motion to appeal as of right.

Dated: November 1, 2016

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