

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,

-against-

JAMES J. BREHENY, in his official capacity as the 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

**MEMORANDUM OF
LAW IN SUPPORT
OF PETITIONER'S
MOTION FOR STAY**

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I. PRELIMINARY STATEMENT

In a concurrently filed motion for leave to appeal, dated January 24, 2019 and made pursuant to CPLR 5701(c) (“Motion to Appeal”), Petitioner, the Nonhuman Rights Project, Inc. (“NhRP”), seeks permission from this Court to appeal its order, dated January 18, 2019 (“Transfer Order”), granting the motion by Respondents, James J. Breheny and Wildlife Conservation Society (“Bronx Zoo”), to transfer the venue of this habeas corpus proceeding from Orleans County to Bronx County to the New York State Supreme Court Appellate Division, Fourth Judicial Department (“Fourth Department”).

Pending before this Court is the NhRP’s previously filed motion for leave to reargue the Transfer Order, which is scheduled to be heard at oral argument on February 1, 2019.

In this present motion for a stay (“Motion to Stay”), the NhRP moves to stay the Transfer Order pursuant to CPLR 2201 and CPLR 5519(c) until final resolution of any appeal taken from the Transfer Order, should this Court deny the NhRP’s Motion to Reargue or adhere to its prior decision. The NhRP submits this memorandum of law in support of its motion for a stay.

II. BRIEF PROCEDURAL HISTORY

On October 2, 2018, the NhRP filed a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause (“Petition”) pursuant to CPLR Article 70 on behalf of Happy, a 47-year old Asian elephant alleged to be illegally imprisoned by Respondents at the Bronx Zoo.

On November 16, 2018, the Court granted the requested Order to Show Cause and made it¹ returnable in Orleans County on December 14, 2018. On November 21, 2018, the Bronx Zoo

¹ The NhRP uses the terms “Order to Show Cause” and “writ” interchangeably when describing where the writ is made returnable under CPLR 7004(c). *See The Nonhuman Rights Project, Inc. v. Stanley*, 16 N.Y.S.3d 898, 906, 907 (Sup. Ct. 2015) (after signing petitioner’s Order to Show Cause in New York County, respondents maintained that “the writ should have been made returnable in Suffolk County,” but the court held “the writ here is to be made returnable in the county of issuance, namely, New York County.”).

filed a Demand for Change of Venue stating that venue was “improperly placed” in Orleans County and must be changed to Bronx County “where venue would be proper, as provided by CPLR 503, 510(1), and 7004(c).” On December 3, 2018, the Bronx Zoo made a motion pursuant to CPLR 511 and CPLR 7004(c) to transfer venue of this habeas corpus proceeding from Orleans County to Bronx County. On December 14, 2018, this Court held a hearing on the Order to Show Cause. At its conclusion, the Court stated that it would grant the motion to transfer venue.

On January 8, 2019, the NhRP moved this Court by an order to show cause for a stay of the Court’s then-forthcoming transfer order until final resolution of the NhRP’s then-forthcoming motion for leave to reargue pursuant to CPLR Rule 2221(d) (“Motion to Reargue”).² On January 14, 2019, this Court issued the order to show cause and set oral argument for February 1, 2019.

On January 18, 2019, this Court entered the Transfer Order, about which the NhRP was notified on January 22, 2019. On January 23, 2019, the NhRP filed its Motion to Reargue, which is scheduled to be heard at oral argument on February 1, 2019.

The NhRP files this Motion to Stay concurrently with its Motion to Appeal.³

III. ARGUMENT

a. Governing standards

CPLR 2201 authorizes this Court to “grant a stay of proceedings in a proper case, upon such terms as may be just.” *See Rhodes v. Mosher*, 115 A.D.2d 351 (4th Dept. 1985). “The issuance of a stay pursuant to CPLR 2201 is discretionary in the trial court.” *Research Corp v. Singer-*

² In that motion, the NhRP attached a draft memorandum of law in support of its then-forthcoming motion for leave to reargue.

³ In the event that this Court, at the upcoming hearing on February 1, 2019, denies the Motion to Reargue, adheres to its prior decision, denies the Motion to Appeal, and denies this Motion to Stay, the NhRP intends to immediately seek permission with the Fourth Department to appeal the Transfer Order.

General Precision Inc, 36 A.D.2d 987, 988 (3d Dept. 1971); *Pierre Assoc v. Citizens Cas Co of NY*, 32 A.D.2d 495, 496 (1st Dept. 1969) (per curiam).

In exercising its discretion under CPLR 2201, the Court must weigh “the prejudice to the moving party by denying a motion balanced against the prejudice to the non-movant by granting the motion.” *Nezry v. Haven Ave Owner LLC*, 28 Misc.3d 1226(A) at *4 (Sup. Ct. N.Y. County 2010). A stay is warranted when “there exists some articulable reason, such as a showing of prejudice,” *Estate of Salerno v. Estate of Salerno*, 154 A.D.2d 430, 430 (2d Dept. 1989), and “when other remedies are inadequate and the equities invoked apparent and strong.” *Croker v. New York Trust Co*, 206 A.D. 11, 13 (1st Dept. 1923).

Similarly, CPLR 5519(c) authorizes this Court to “stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal. . .” *See Mully v. Drayn*, 37 A.D.2d 901 (4th Dept. 1971) (“Special Term, in its discretion, correctly stayed all proceedings under the judgment until the determination of the appeal therefrom”); *People ex rel Schneiderman v. College Network Inc*, 53 Misc.3d 1210(A) at *5 (Sup. Ct. Albany County 2016). “The granting of a stay pending an appeal rests in the sound discretion of the court.” *Id.*

In exercising its discretion under CPLR 5519(c), the Court must “consider the following factors when determining whether a discretionary stay is appropriate, i.e., whether (1) the appeal has merit, (2) any prejudice will result from granting or denying a stay, and (3) the stay is designed to delay proceedings.” *People ex rel Schneiderman v. College Network Inc*, 53 Misc.3d 1210(A) at *5; *Herbert v. City of N.Y.*, 510 N.Y.S.2d 112, 114 (1st Dept. 1987) (“stays pending appeal will not be granted. . . in cases where the appeal is meritless or taken primarily for the purpose of delay (See, CPLR 5519[c] “); *see also Wechsler v. Wechsler*, 8 Misc.3d 328, 331 (Sup. Ct. N.Y. County

2005) (when considering whether to vacate a stay under CPLR 5519(c), “[m]ost important to this court's decision, is that defendant will not be prejudiced one iota if the stay is vacated.”)

b. A stay is warranted in this case.

In the case at bar, all the relevant factors heavily weigh in favor of this Court granting the NhRP’s Motion to Stay. First, the Memorandum of Law submitted in support of the Motion to Appeal, which NhRP incorporates by reference herein, demonstrates that the motion for leave to appeal has a strong likelihood of success on the merits, as this Court made obvious error in issuing the Transfer Order. *See Kaur v. New York State Urban Development Corp*, 15 N.Y.3d 235, 262 (2010) (“CPLR 5519(c) application would have afforded the Court with the opportunity to assess whether petitioners could demonstrate the likelihood of success on the merits”) (citation omitted).

Second, the speed at which this Motion to Stay is filed, a mere six days after this Court entered its Transfer Order, and a mere one day after the NhRP filed its Motion to Reargue, along with the clear purpose of the NhRP’s concurrently filed Motion for Permission to Appeal, evince a clear intent *not* to “delay [this] proceeding [],” but to have it proceed in Orleans County forthwith where venue is proper. *See* Memorandum of Law in Support of Petitioner’s Motion for Permission to Appeal, at 5 - 10. Moreover, this is a habeas corpus case in which it is in the detainee’s interest to receive a speedy summary disposition.

Third, without a stay of the proceeding giving this Court time to rule on the NhRP’s Motion to Appeal, or time for the Fourth Department to consider a similar motion or any appeal from the Transfer Order, the prejudice to Happy could be severe, for the following three reasons.

First, Happy’s liberty is at stake. “The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty.” *People ex rel Sabatino v. Jennings*, 246 N.Y. 258, 269 (1927) (citation omitted); *People v. Schildhaus*, 8 N.Y.2d 33, 36 (1960) (“The right to invoke habeas corpus, ‘the historic writ of liberty’, ‘the greatest of all writs’, is so primary

and fundamental that it must take precedence over considerations of procedural orderliness and conformity.”); *People ex rel. DeLia v. Munsey*, 26 N.Y.3d 124, 130 (2015); *Article 70 of CPLR for a Writ of Habeas Corpus The Nonhuman Rights Project Inc v. Stanley*, 16 N.Y.S.3d 898, 908 (Sup. Ct. N.Y. County 2015).

If this case is heard in Bronx County, the prospect of securing Happy’s freedom will drastically diminish. Current precedent of the New York State Supreme Court Appellate Division, First Judicial Department (“First Department”) is openly hostile to protecting the liberty interests of even the most autonomous and extraordinarily cognitively complex nonhuman petitioners, just because they are not human. *See Matter of Nonhuman Rights Project Inc v. Lavery*, 152 A.D.3d 73, 28 (1st Dept. 2017) (unlike chimpanzees, human beings unable to bear legal duties and responsibilities are entitled to habeas relief because “these are still human beings, members of the human community.”).

This hostility is not only improper, as Judge Fahey explained in his concurrence in *Nonhuman Rights Project, Inc. on Behalf of Tommy v. Lavery*, 31 N.Y. 3d 1054, 1057 (Fahey, J., concurring), but is in deep and irreconcilable conflict with both (1) the controlling precedent of *Byrn v. New York City Health & Hosp. Corp.*, 31 N.Y.2d 194, 201 (1972), which held that “personhood is ‘not a question of biological or ‘natural’ correspondence,’” *People v Graves*, 163 A.D. 3d 16, 21 (4th Dept. 2018) (quoting *Byrn*), but “a policy determination,” *Byrn*, 31 N.Y.2d at 201, and (2) with the public policy of New York, as set forth in the Pet Trust Statute,⁴ which has long designated certain nonhuman animals as “persons” with the rights of a trust beneficiary. *See Stanley*, 16 N.Y.S.3d at 901.

⁴ The Sponsor’s Memorandum of EPTL 7-6 (now EPTL 7-8) stated that its purpose was “to allow animals to be made the beneficiary of a trust.” Sponsor’s Mem. NY Bill Jacket, 1996 S.B. 5207, Ch. 159. *See also* Mem.of Senate, NY Bill Jacket, 1996 S.B. 5207, Ch. 159 (same).

In contrast to the First Department, and in harmony with *Byrn* and the public policy of New York as set forth in the Pet Trust Statute, the New York State Supreme Court Appellate Division, Fourth Judicial Department (“Fourth Department”) has recognized that “it is common knowledge that personhood can and sometimes does attach to . . . animals.” *Id.* Retaining venue in this case merely provides the NhRP with the opportunity to place before this Court and, if necessary, the Fourth Department, the powerful public policy arguments that *Byrn* mandated establishing Happy’s entitlement to habeas corpus. *See* NhRP’s Reply Memorandum,⁵ at 20-30.

Second, since the Transfer Order is an intermediate order, a ruling on the merits of the Petition by the Bronx County Supreme Court pending resolution of any appeals taken from the Transfer Order could moot the appeal. *See Matter of Aho*, 39 N.Y.2d 241, 248 (1976) (right of direct appeal from intermediate order terminated with entry of final judgment); *Moore v. Federated Dept Stores Inc*, 94 A.D.3d 638, 639 (1st Dept. 2012) (“Any right of direct appeal from the intermediate orders terminated with entry of the final judgment. . .”).

Third, should the Fourth Department determine on appeal that the Transfer Order was made in error, and that this Court should proceed to the merits of the Petition, this could create “the risk of inconsistent adjudications” with the Bronx County Supreme Court and waste judicial resources. *In re Tenenbaum*, 81 A.D.3d 738 (2d Dept. 2011) (“a court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources”) (quoting *Zonghetti v. Jeromack*, 150 A.D.2d 561, 562 (2d Dept. 1989). Either possibility, mootness or inconsistent adjudication, will severely prejudice Happy.

On the other hand, the Bronx Zoo will not be prejudiced by a grant of the NhRP’s Motion to Stay. As indicated by Respondents’ counsel at the December 14, 2018 hearing, Happy’s

⁵ NhRP’s Reply Memorandum of Law dated December 10, 2018.

imprisonment at the Bronx Zoo will continue until at least the conclusion of this litigation. *See Transcript*, at 18 (“There’s no intention on the part of the Bronx Zoo to move Happy anywhere.”). A brief stay will therefore not prejudice the Bronx Zoo.

Accordingly, the “equities invoked” for NhRP’s Motion to Stay are “apparent and strong,” and other than granting it, no adequate remedy exists to allow this Court sufficient time to consider the NhRP’s Motion to Appeal, or for the Fourth Department to consider any similar motion or appeals taken from the Transfer Order, without the potential prejudice to Happy—either from mootness or inconsistent adjudication, or to her personal liberty.

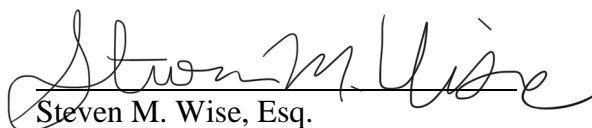
IV. CONCLUSION

For the foregoing reasons, the NhRP respectfully requests this Court to grant the Motion to Stay made pursuant to CPLR 2201 and 5519(c) until final resolution of any appeal taken from the Transfer Order, should this Court deny the NhRP’s Motion to Reargue or adhere to its prior decision, and grant such other and further relief as the Court may deem just and equitable.

Dated: January 24, 2019



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