

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

Petitioner-Appellant, The Nonhuman Rights Project, Inc. (“NhRP”), on
behalf of a chimpanzee named Kiko, by their attorneys, Elizabeth Stein, Esq. and

Steven M. Wise, Esq., *pro hac vice*, as and for a Verified Petition (“Petition”) pursuant to Article 78 of the CPLR respectfully show to this Court as follows:

1. This is special proceeding brought pursuant to New York Civil Practice Law and Rules (“CPLR”) Article 78 for relief in the nature of mandamus to compel the 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 CPLR 7011.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this proceeding under CPLR 506(b)(1), which 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); *Gold v. Shapiro*, 62 A.D.2d 62 (2d Dept. 1978), *aff’d*, 45 N.Y.2d 849 (N.Y. 1978);

Nichols v. Gamso, 42 A.D.2d 630 (3d Dept. 1973), *modified*, 35 N.Y.2d 35 (N.Y. 1974).

3. Although a Justice of this Court is a named Respondent, this Court need not recuse itself if it can adjudicate the merits impartially. *New York State Ass'n of Criminal Def. Lawyers v. Kaye*, 95 N.Y.2d 556, 558 (2000); *Gold*, 62 A.d.2d 62.

4. If the Court cannot be impartial, it must transfer the Petition to a different Appellate Division. *E.g.*, *Dinsio*, 125 A.D.3d 1313, *Nichols*, 42 A.D. 630. The New York State Supreme Court Appellate Division, Third Judicial Department (“Third Department”) has already carefully considered the issue.

PARTIES

5. NhRP is a tax exempt Sec. 501(c)(3) not-for-profit corporation organized under the laws of the State of Massachusetts, with its primary place of business located at 5195 NW 112th Terrace, Coral Springs, Florida 33076.

6. At all relevant times, upon information and belief, Respondents Carmen Presti and Christie E. Presti have resided at 2764 Livingston Avenue, Niagara Falls, New York 14303.

7. At all relevant times, upon information and belief, Respondent The Primate Sanctuary, Inc.’s primary place of business has been located at 2764 Livingston Avenue, Niagara Falls, New York 14303.

8. At all relevant times, Respondent Justice Webber has been an Associate Justice of the First Department.

FACTS

9. On January 7, 2016, NhRP filed a verified petition for a common law writ of habeas corpus and order to show cause (“Habeas Petition”) on behalf of Kiko with the Supreme Court, New York County pursuant to CPLR Article 70.

10. On January 29, 2016, the court entered an order denying the Habeas Petition, which stated “declined to sign.” (Exhibit 6 attached to Stein Aff.).

11. 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.

12. On May 18, 2016, NhRP filed the Record on Appeal, which included the order of the lower court and Opening Brief.

13. NhRP’s counsel was subsequently contacted by the First Department 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 the order to show cause or writ of habeas corpus.

14. NhRP subsequently filed with this Court the following documents: Appendix, Motion to File an Oversize Brief (which was denied), a second Motion

to file an Oversize Brief (which was granted), and Motion for Steven M. Wise to appear and argue *Pro Hac Vice* (which was granted).

15. On May 20, 2016, NhRP requested that the lower court enter an appropriate order from which an appeal may be taken, which the court issued on the same date (Exhibit 3 attached to Stein Aff.). NhRP then sought to file this order as a supplemental record on appeal.

16. On May 26, 2016, NhRP filed with this Court a Motion to Appeal as of Right (Exhibit 4 attached to Stein Aff.)

17. On July 6, 2016, NhRP filed a motion with the lower court for an order stating that the final order of May 20, 2016 be issued *nunc pro tunc* to the original order of January 29, 2016, which was granted the following day (Exhibit 5 attached to Stein Aff.).

18. On July 28, 2016, Justice Webber entered an order in which she *sua sponte* converted NhRP's Motion to Appeal as of Right into a Motion for Leave to Appeal pursuant to CPLR 5701(c), then denied this motion, which NhRP neither filed, nor intended to file as it has an absolute right to appeal, nor was given an opportunity to oppose (Exhibit 1 attached to Stein Aff.).

19. 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.).

20. On October 25, 2016, the Court entered an order denying NhRP's Motion to Reargue or, in the alternative, for Leave to appeal to the Court of Appeals (Exhibit 8 attached to Stein Aff.).

LEGAL ANALYSIS

21. 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.

22. “An 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 therefore had a non-discretionary duty to grant NhRP’s motion and accept NhRP’s appeal as of right under CPLR 7011.

23. 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).”

24. NhRP was *not* requesting an order to show cause under CPLR Article 22. Rather, 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).

25. The lower court’s refusal to sign the order to show cause pursuant to 7003(a) is appealable as of right by NhRP pursuant to CPLR 7011.

26. Justice Webber erred in not recognizing the absolute right of NhRP to appeal under CPLR 7011, in not ruling on the motion, and in *sua sponte* converting NhRP's motion to appeal as of right under CPLR 7011 into a motion seeking leave to appeal under CPLR 5701(c), thereby depriving NhRP of its absolute right to appeal.

27. NhRP filed its Habeas Petition pursuant to CPLR 70, which exclusively governs the procedure for common law writs of habeas corpus including those relating to rights of appealing, (*See* 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.”), including those relating to rights of appealing. *People ex rel. Curtis v. Kidney*, 225 N.Y. 299, 303 (1919).

28. 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).

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

WHEREFORE, NhRP respectfully requests an order compelling Justice Webber to grant its motion to appeal as of right.

Dated: November 1, 2016

By:

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By permission of the Court

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