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,

Index No. 18-45164

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.

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

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PRELIMINARY STATEMENT

Petitioner the Nonhuman Rights Project, Inc. moves for a stay and reargument in order to seek a third opportunity to argue that this proceeding be heard and decided in Orleans County. This Court granted Respondents' motion to change venue to the Bronx, and reaffirmed that decision after Petitioner, with this Court's permission, argued it again. That decision was correct on the first and second time of asking. Petitioner should not be entitled to a third stab at this meritless argument, and the Court should not pave Petitioner's road to the Appellate Division of its choice by entertaining the same argument again. Instead, the Court should deny Petitioner's motions so this proceeding may move forward in Bronx County, where it belongs.

PROCEDURAL BACKGROUND

Petitioner the Nonhuman Rights Project, Inc. ("NRP") presented this Court with an order to show cause and a petition for a writ of habeas corpus on October 2, 2018. Affidavit of Joanna Chen, sworn to January 25, 2019 ("Chen Aff."), ¶ 3. This Court signed the order to show cause on November 16, 2018, scheduling oral argument for December 14, 2018. *Id.* ¶ 4. Five days after the order was signed, Respondents James J. Breheny and the Wildlife Conservation Society served NRP with a demand to change venue to the Bronx. *Id.* ¶ 5; Ex. 1. NRP did not consent to change venue, and opposed the demand on November 27, 2018, asserting that "[t]his Petition is . . . properly brought before this Court even though Happy is unlawfully detained in Bronx County" and that NRP accordingly "rejects the Demand."[1]

[1] Affirmation of Elizabeth Stein in Opposition to Respondents' Demand to Change Venue, dated November 27, 2018, ¶¶ 12-13.

Among their submissions to this Court, Respondents moved, on notice, to change venue to Bronx County on December 3, 2018, pursuant to CPLR 511 and 7004(c). Chen Aff., ¶ 7; Ex. 2. Respondents and NRP submitted written arguments in support of and opposing this motion, respectively, and appeared for oral argument before this Court on December 14, 2018. *Id.* ¶ 8.

After reviewing these submissions, and after hearing oral argument and rebuttal from both parties, this Court granted Respondents' motion to change venue to Bronx County and reserved decision on the remaining motions by the parties. Chen Aff. Ex. 3, at 31. The Court reasoned that NRP "could have asked any judge in the Supreme Court to sign [their] papers to start off [their] writ of habeas corpus proceeding, but it needed to be made returnable before some county that had any—some nexus to this elephant and his condition—his conditions of captivity." *Id.* at 28. The Court further reasoned that "[t]he Bronx is a convenient place. The witnesses of the conditions of Happy's confinement are there, and I would say that any experts that you would bring in or alert folks to contest that—they would also find it much easier to get to the Bronx than to Albion, New York." *Id.* at 30.

After hearing the Court's decision to transfer venue, the Petitioner requested "one attempt to change [the Court's] mind," which the Court granted. *Id.* at 31. NRP then re-argued its position, contending that this Court had rendered an "improper" decision because venue *is* proper in Orleans County, and this Court had no authority to change venue to Bronx County. *Id.* at 31-34.

Respondents identified Petitioners' position as a motion to reargue, and responded accordingly. *Id.* at 34. Respondents noted that every consideration under CPLR

Article 5—which applies to habeas corpus proceedings—required a change in venue to the Bronx. *Id.* Respondents further argued that, even if Orleans County was a permissible venue, this Court certainly had the discretion to transfer venue to the Bronx. *Id.* at 34-35. The Court maintained its original decision: "I put my reasons on the record, and I'll stand by them." *Id.* at 35.

Before the Order regarding Respondents' motion to transfer venue had been finalized, NRP served another order to show cause on January 8, 2019, seeking to "stay[] the transfer" of this proceeding "so that the Petitioner may file a motion seeking leave to reargue this Court's order to transfer venue." *Id.* ¶ 16; Ex. 4. The Court signed NRP's order to show cause for a stay on Friday, January 11, 2019. *Id.* ¶ 17. Respondents received a copy of the signed Order from NRP's counsel five days later via email on Wednesday, January 16, 2019. *Id.*

The Court entered the Order granting Respondents' motion to change venue on January 18, 2019. *Id.*, Ex. 5. The following week on January 23, 2019, NRP filed a motion for leave to reargue the change of venue from Orleans to Bronx County. *Id.* ¶ 19.

ARGUMENT

POINT I

PETITIONER'S MOTION FOR LEAVE TO REARGUE SHOULD BE DENIED

A. This Court should not grant NRP leave to reargue the issue of venue again because the Court correctly applied the law

A motion for leave to reargue "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 28 (1st Dep't 1992). It "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented."

McGill v. Goldman, 261 A.D.2d 593, 594 (2d Dep't 1999); *Kassis*, 182 A.D.2d at 28 (same). Rather, the moving party must demonstrate that "the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its decision" to warrant re-argument. *Andrea v. E.I. Dupont de Nemours & Co.*, 289 A.D.2d 1039, 1040-41 (4th Dep't 2001). Absent a showing that the court made a material error in reaching its decision, the motion must be denied. *Andrea v. E.I. Du Pont De Nemours & Co.*, 289 A.D.2d at 1040-41; *Kassis*, 182 A.D.2d, at 28.

This Court properly granted Respondents' motion to change venue to Bronx County. NRP cannot dispute that the general venue principles of CPLR Article 5 apply to habeas corpus proceedings. *Greene v. Sup. Ct. Westchester Cty*, 31 A.D.2d 649, 649 (2d Dep't 1968); *State ex rel. Cox v. Appelton*, 309 N.Y.S.2d 290, 292 (Onondaga Cty. 1970) (habeas corpus for juvenile in need of supervision properly venued pursuant to CPLR Article 5). This Court correctly applied those principles in holding that Bronx County is the proper venue for this special proceeding, finding that Bronx County was a more convenient venue for all fact witnesses and potential experts. Chen Aff. Ex. 3 at 28-30. NRP received an opportunity for reargument immediately after the Court issued its decision, during which NRP reiterated the arguments previously heard by the Court. *Id.* at 32-33.

In an effort to create the illusion of error, NRP misreads this Court's decision by contending the Court "erroneously, and *sua sponte*" based its ruling on CPLR 510(3). NRP. Mem. at 13. NRP's characterization of the decision as *sua sponte* ignores the fact that Respondents timely moved the Court to transfer venue pursuant to CPLR 511 and 7004(c). Chen Aff. Ex. 2.

NRP similarly mischaracterizes Respondents' motion as being based solely upon CPLR 510(1). In fact, Respondents stated in their notice of motion that their motion was based upon CPLR 511 and 7004. NRP admits that CPLR 7004(c) does not impose a mandatory venue for this proceeding,[2] and that Respondents' motion "required this Court to apply the venue rules in CPLR Article 5." NRP Mem. at 12. Respondents asserted those rules in moving to change venue to Bronx County, including CPLR 503, which places venue where a party resides or where the material events occurred.[3] The Court then ruled correctly that venue should be where Happy the Elephant is allegedly "confined" for the same reasons that CPLR 503 codifies, *i.e.*, venue should be in the county with a direct nexus to the proceeding. Chen Aff. Ex. 3, at 28-31; *E.g.*, *Garrasi v. Dean*, 75 A.D.3d 1138, 1140 (4th Dep't 2010) (citing CPLR 503) (reversing denial of defendants' motion to change venue pursuant to CPLR 511, or alternatively CPLR 510, based upon CPLR 503(a) grounds). As explained in Point I.B, the Court also retained discretion to transfer venue under CPLR 7004.

NRP's motion to reargue fails to identify a material error in the Court's decision and merely presents the same arguments that this Court has rejected twice.

B. NRP's venue argument incorrectly equates the Order to Show Cause with the issuance of a writ of habeas corpus

NRP incorrectly argues that venue in Orleans County is proper under CPLR 7004(c) by improperly equating the Order to Show Cause for a petition of writ of habeas

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[2] In so doing, NRP also claims that this Court *already issued* a writ of habeas corpus, and made the writ of habeas corpus itself returnable in Orleans County. As discussed below Point I.B, *infra*, this improperly conflates an order to show cause with an issued writ of habeas corpus.

[3] Resp.'s Mem. of Law in Supp. of Motion to Change Venue, at 6 (citing CPLR 503(a) and stating "Respondent Wildlife Conservation Society is located in Bronx County, and Respondent James Breheny works in Bronx County," and "Happy . . . is located in Bronx County, and the material events, *i.e.*, Happy's alleged 'unlawful imprisonment,' occurred in Bronx County."; *see* Chen Aff. Exs. 1-2.

corpus, granted November 16, 2018, with a writ of habeas corpus itself. Pet.'s Mem. of Law in Supp. of Mot. for a Stay, at 4 ("NRP Mem.") 1, 7-8.

Contrary to NRP's contentions, the Court did not issue a writ nor make a decision as to where this proceeding would be returnable "just by signing [Petitioner's] order to show cause" (Chen Aff. Ex. 3, at 32), which by its very nature "is merely an alternative way of bringing on a contested motion." N.Y. McKinney's Ann. C2214:24, Order to Show Cause. Given the nature of this special proceeding, the Court was required to make all motions returnable on the same day (CPLR 406), and the Court made clear that it signed the Order to Show Cause merely to avoid "depriv[ing] [NRP of] the ability to make a record that [it] asked this Court to entertain these issues. That's really the sole reason [the court] issue[d] the order to show cause." Chen Aff. Ex. 3, at 32-33. At the return date, the Court decided only Respondents' motion to change venue, and expressly reserved decision on all other pending applications, including NRP's petition for a writ of habeas corpus. Chen Aff. Ex. 3 at 31.

Because the petition for writ of habeas corpus has not been decided—and therefore no writ has issued—the Court had the discretion under CPLR 7004(c) to transfer the venue of this proceeding. *See id.* at 34.

NRP misapplies *Hogan v. Culkin*, 18 N.Y.2d 330, 335 (1966), in arguing that the Court had no such discretion. In *Hogan*, the Court of Appeals held that the trial court erred by ordering a writ of habeas corpus returnable in a county *outside* of where the detainee was confined. However, CPLR 7004(c) provides that venue must be in the county of detention in such cases, and *Hogan* expressly distinguishes the applicability of CPLR 7004(c) where, as here, the petitioner is *not* in a state institution. *Id.* Under such

circumstances, the court retains discretion to determine where the proceeding is ultimately returnable. *Id.* at 335. Thus, even if transfer was not mandatory under Article 5 of the CPLR, this Court nonetheless retained the authority to change venue on the discretionary basis provided by CPLR 7004(c). Indeed, NRP cites *Morton v. Morton* as well, yet the case likewise found that, except in state-institution cases, it "is discretionary with the issuing justice where the writ should be made returnable," and concluded a child custody proceeding would be transferred to "the county in which [the children] are residing." 361 N.Y.S.2d 617, 621-22 (Wayne Cty. Fam. Ct. 1974).

Thus, as the Court explained, CPLR 7002 allowed NRP to "start off" by presenting the petition to any justice, but NRP could not and did not usurp the Court's ultimate authority to determine the venue for determining whether a writ should issue. Chen Aff. Ex. 3, at 28. Even if this Court decided to grant NRP's petition and issue a writ of habeas corpus (though it did not), the Court nevertheless retained express authority to "make the writ returnable before any judge authorized to issue it in the county of detention." CPLR 7004(c). Happy is allegedly "detained" in Bronx County. Respondents' moved on this discretionary basis as well, and the Court had ample authority to grant the motion as such.

Because the Court did not make any material error in granting Respondents' motion to change venue, NRP's request for leave to reargue should be denied, and this matter should be promptly transferred to Bronx County.

C. NRP's motion for leave to reargue should be denied to prevent NRP from further forum-shopping

An order denying a motion to reargue cannot be appealed. *AXA Equitable Life Insurance v. Kalina*, 101 A.D.3d 1655, 1656 (4th Dep't 2012); *Empire Ins. Co. v. Food City, Inc.*,

167 A.D.2d 983 (4th Dep't 1990). In contrast, if a court grants reargument and reconsiders the merits on a motion to reargue, that decision may be appealable, even if the Court ultimately renders the same decision as on the original motion. *See, e.g., Corey v. Gorick Constr. Co.*, 271 A.D.2d 911, 912 (3d Dep't 2000). This applies even where a trial court officially denies the motion to reargue but addresses the merits in its denial. *Pezhman v. Chanel, Inc.*, 126 A.D.3d 497 (1st Dep't 2015 ("Although the court's order 'denied' the motion to reargue, it addressed the merits, and in so doing, effectively granted reargument. Accordingly the order is appealable."). As such, the Appellate Division, Fourth Department has explained that "once the court [finds] that [petitioners] ha[ve] failed to set forth any grounds upon which to grant reargument, it should. . . conclude[] its analysis and den[y] the motion." *Andrea v. E.I. Du Pont De Nemours & Co.*, 289 A.D.2d at 1040-41 (4th Dep't 2001).

Unsuccessful in its attempts to keep the matter in Orleans County, NRP seeks an alternate path to the Fourth Department by filing the instant motions. NRP candidly admits that the Fourth Department has been its intended audience from the beginning, because it believes courts in the First Department (like Bronx County) are "openly hostile" to its legal arguments. This Court should preclude NRP's continued forum-shopping efforts by denying NRP's request to reargue outright.

POINT II

THE COURT SHOULD DENY PETITIONER'S MOTION FOR A STAY AND ENFORCE THE ORDER TRANSFERRING THIS CASE TO BRONX COUNTY

CPLR 2201 allows a court to stay proceedings "on such terms as may be just." A discretionary stay may be warranted to preserve judicial resources, prevent inconsistent results, or to otherwise serve the ends of justice. *E.g., Zonghetti v. Jeromack*, 150

A.D.2d 561, 562 (2d Dep't 1989). For example, the risk of "inconsistent results" arises when two separate actions "share complete identity of parties, claims, and relief sought," thus warranting a stay of one action while the other proceeds. *Simoni v. Napoli*, 101 A.D.3d 487, 487-88 (1st Dep't 2012). When such grounds are absent, however, a stay is improper. *Id.* at 488; *Am. Fleet Nat'l Bank v. Marrazzo*, 23 A.D.3d 337, 338 (2d Dep't 2005).

First, the Court should deny NRP's motion for a stay because it is unnecessary, given that NRP's motion for reargument has no merit. *See supra* Point I.

NRP's purported justifications for a discretionary stay—to preserve judicial resources and avoid inconsistent adjudications—also ring hollow. NRP, through its admitted forum shopping, commenced this case in the Fourth Department *for the express purpose of seeking a result inconsistent* from that which they may obtain in co-equal New York courts . NRP Mem., at 5. NRP's concern of an "inconsistent" outcome merely recognizes the fact that NRP's arguments directly conflict with the controlling precedent in the First Department, the jurisdiction in which this matter should have been commenced. Furthermore, NRP's strategy has expended judicial resources in a court that has no nexus to the facts in issue. A stay of transfer of venue therefore does not aid equity or the preservation of judicial resources.

CONCLUSION

Based upon the foregoing reasons, Petitioner's motions for a stay and to reargue should be denied, and this proceeding should be transferred to Bronx County forthwith.

Dated: Buffalo, New York
January 25, 2019

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