

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

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-Appellant,

-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-Respondents.

Index No.: 18-45164

(Supreme Court, Orleans
County)

**ATTORNEY
AFFIRMATION OF
KEVIN SCHNEIDER**

I, KEVIN SCHNEIDER, 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-Appellant, the Nonhuman Rights
Project, Inc. (“NhRP”), in the above-captioned matter and am not a party in
this action.
2. As an attorney of record, I have personal knowledge of the facts stated herein,
except where stated on information and belief.

3. 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 Notice of Motion for Permission to Appeal and Stay.

BACKGROUND

4. 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, who upon information and belief is a 47-year old Asian elephant alleged to be illegally imprisoned at the Bronx Zoo by Respondents-Respondents, the Wildlife Conservation Society and James J. Breheny (collectively “Bronx Zoo” or “Respondents”).
5. On November 16, 2018, the Supreme Court, Orleans County (“lower court”) issued the Order to Show Cause and made it returnable in Orleans County on December 14, 2018.
6. On November 21, 2018, the Bronx Zoo filed a Demand for Change of Venue (attached hereto as **Exhibit 15**, *infra*) 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).”
7. On December 3, 2018, the Bronx Zoo made a motion pursuant to CPLR 511 and CPLR 7004(c) to transfer venue from Orleans County to Bronx County.

THE UNDERLYING ORDERS

8. On December 14, 2018, the lower court held a hearing on the Order to Show Cause.
9. On January 18, 2019, the lower court issued a signed order which granted the Bronx Zoo's motion to change venue from Orleans County to Bronx County ("Transfer Order"), a true and accurate copy of which was served by the NhRP upon the Bronx Zoo via email on January 23, 2019 with written notice of entry, attached hereto as **Exhibit 1**.
10. The NhRP's notice of entry mistakenly states that the Transfer Order was entered on January 18, 2019, as it was entered by the Orleans County Clerk on January 23, 2019. A true and accurate copy of the Transfer Order with the January 23, 2019 time stamp of the Orleans County Clerk is attached hereto as **Exhibit 2**.
11. Attached hereto as **Exhibit 3** is a true and accurate copy of the corrected transcript of the lower court's decision from the December 14, 2018 hearing, referenced and incorporated in the Transfer Order.
12. On January 8, 2019, the NhRP moved the lower court by order to show cause to stay its then-forthcoming transfer order until final resolution of the NhRP's then-forthcoming motion for leave to reargue ("Motion to Reargue"). On January 14, 2019, the lower court signed the requested order to show cause

and set oral argument for February 1, 2019, which was subsequently adjourned for February 5, 2019.

13. On January 23, 2019, the NhRP filed its Motion to Reargue. On January 24, 2019, the NhRP filed concurrently with the lower court: (1) pursuant to CPLR 5701(c), a motion for permission to appeal the Transfer Order should the court deny the Motion to Reargue or adhere to its prior decision, and (2) pursuant to CPLR 2201 and 5519(c), a motion to stay the Transfer Order until final resolution of any appeal taken from the Transfer Order should the court deny the Motion to Reargue or adhere to its prior decision. All three motions were made returnable on February 1, 2019.

14. On February 5, 2019, the lower court held a telephonic hearing during which both parties litigated the merits of the NhRP's Motion to Reargue, the NhRP's motion for permission to appeal the Transfer Order, and the NhRP's motion for a stay pending any appeal taken from the Transfer Order. At its conclusion, the lower court, *inter alia*, reaffirmed the Transfer Order and denied the NhRP's motion for leave to appeal, stating:

But that being said, the Court has listened, but the Court does feel regardless of the arguments of counsel that Orleans County is not a proper county based on [CPLR] 503(a), 510(1), and 510(3). I believe that it is probably the most inconvenient place to have this case argued. . . And also one where there is simply no nexus whatsoever to Happy. So I have not changed my ruling whatsoever. And I'm not making any -- I'm not granting a motion for you to seek appeal.

Feb. 5 Transcript, at 23-24 (attached hereto as **Exhibit 5**, *infra*).

15. On February 21, 2019, the lower court issued an order (“Reargument Order”) which, *inter alia*, (a) denied the NhRP’s Motion to Reargue, (b) denied the NhRP’s motion for permission to appeal the Transfer Order, (c) denied as moot the NhRP’s motion for a stay pending reargument of the Transfer Order, and (d) denied as moot the NhRP’s motion for a stay pending any appeal from the Transfer Order. It was entered by the Orleans County Clerk on February 26, 2019, a true and accurate copy of which was served by the Bronx Zoo upon the NhRP via email on February 28, 2019 with written notice of entry, attached hereto as **Exhibit 4**.

16. Attached hereto as **Exhibit 5** is a true and accurate copy of the corrected transcript of the lower court’s decision from the February 5, 2019 hearing, referenced and incorporated in the February 21, 2019 Reargument Order.

PERMISSION TO APPEAL

17. Pursuant to CPLR 5701(c), the NhRP files its motion for permission to appeal (“Motion to Appeal”) from (a) that part of the February 21, 2019 Reargument Order reaffirming, upon reargument, the original determination in the January 18, 2019 Transfer Order; or, in the alternative, from (b) the Transfer Order.

18. As the Motion to Appeal is made within thirty days of February 28, 2019, when the Bronx Zoo served a copy of the Reargument Order with notice of

entry, the motion is timely under CPLR 5513(b).

19. As fully explained in the annexed Memorandum of Law (“Memorandum”), I believe that permission to appeal should be granted by this Court as the lower court made the following material errors in granting the Reargument Order and the underlying Transfer Order.
20. First, contrary to the lower court’s determination, venue in a habeas corpus action is governed by CPLR 506(a), 7002(b), and CPLR 7004(c), not CPLR 503(a). Memorandum, at 16-18.
21. Second, contrary to the lower court’s determination, venue is proper in Orleans County because (1) the NhRP was authorized to file its Petition with any Supreme Court Justice under CPLR 7002(b)(3), and (2) the lower court correctly made its Order to Show Cause returnable in Orleans County (county of issuance) pursuant to CPLR 7004(c). Memorandum, at 18-20.
22. Third, contrary to its determination, the lower court lacked authority to change venue after correctly making the Order to Show Cause returnable in Orleans County. As the Bronx Zoo did not establish that Orleans County is an improper venue as required by CPLR 510(1), and as it did not invoke or even mention CPLR 510(3), the lower court erred in granting Respondents’ motion to transfer venue on those grounds. Memorandum, at 22-28.
23. I believe these material errors warrant immediate review by this Court in the

interest of justice. As venue is proper in Orleans County, as the merits of the NhRP's Petition have been thoroughly briefed by both parties and heard in oral argument by the lower court, and as all that remains is for that court to render a decision, transferring venue at this late juncture is not only unlawful but will cause intolerable delay and prolong the injustice to an autonomous, imprisoned being, contrary to the summary nature of habeas corpus. Memorandum, at 35-39.

24. The following exhibits are attached hereto and discussed and cited in the annexed Memorandum of Law:

- a. **Exhibit 6** is a true and accurate copy the NhRP's Petition dated October 2, 2018.
- b. **Exhibit 7** is a true and accurate copy of the NhRP's "Memorandum of Law in support of Petition for Habeas Corpus" attached to the NhRP's Petition, dated October 2, 2018.
- c. **Exhibit 8** is a true and accurate copy of the Affidavit of Joyce Poole, Ph.D. attached to the NhRP's Petition, sworn to on December 2, 2016.
- d. **Exhibit 9** is a true and accurate copy of the Joint Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. attached to the NhRP's Petition, sworn to on January 25, 2017 and on December 5, 2016, respectively (both signatures pages attached).

- e. **Exhibit 10** is a true and accurate copy of the Affidavit of Karen McComb, Ph.D. attached to the NhRP's Petition, sworn to on December 22, 2016.
- f. **Exhibit 11** is a true and accurate copy of the Affidavit of Cynthia Moss attached to the NhRP's Petition, sworn to on May 6, 2017.
- g. **Exhibit 12** is a true and accurate copy of the Supplemental Affidavit of Joyce Poole, Ph.D. attached to the NhRP's Petition, sworn to on October 1, 2018.
- h. **Exhibit 13** is a true and accurate copy of the Affidavit of James J. Breheny, sworn to on October 9, 2018.
- i. **Exhibit 14** is a true and accurate copy of the "Order to Show Cause" issued by the lower court, dated November 16, 2018.
- j. **Exhibit 15** is a true and accurate copy of the Bronx Zoo's "Demand for Change of Venue," dated November 21, 2018.
- k. **Exhibit 16** is a true and accurate copy of the Bronx Zoo's "Notice of Motion" to transfer venue or dismiss, dated December 3, 2018.
- l. **Exhibit 17** is a true and accurate copy of the Bronx Zoo's "Memorandum of Law in Support of Motion to Dismiss or Transfer Venue and in Opposition to Petition for Habeas Corpus" accompanying its Notice of Motion, dated December 3, 2018.

- m. **Exhibit 18** is a true and accurate copy of the Affidavit of Kenneth A. Manning, Esq., accompanying the Bronx Zoo's Notice of Motion, sworn to on December 3, 2018 (excluding the exhibits attached thereto).
- n. **Exhibit 19** is a true and accurate copy of the Supplemental Affidavit of James Breheny accompanying the Bronx Zoo's Notice of Motion, sworn to on December 3, 2018.
- o. **Exhibit 20** is a true and accurate copy of the Affidavit of Paul P. Calle accompanying the Bronx Zoo's Notice of Motion, sworn to on December 3, 2018.
- p. **Exhibit 21** is a true and accurate copy of the Affidavit of Patrick Thomas, Ph.D. accompanying the Bronx Zoo's Notice of Motion, sworn to on December 3, 2018 (excluding the exhibit attached thereto).
- q. **Exhibit 22** is a true and accurate copy of the NhRP's "Reply Memorandum of Law," dated December 10, 2018.
- r. **Exhibit 23** is a true and accurate copy of the Bronx Zoo's "Reply Memorandum of Law in Further Support of Motion to Dismiss or Transfer Venue and in Opposition to Petitioner's Motion for Preliminary Injunction," dated December 13, 2018.
- s. **Exhibit 24** is a true and accurate copy of the Bronx Zoo's

“Respondents’ Memorandum of Law in Opposition to Motions for Stay and Reargument,” dated January 25, 2019.

- t. **Exhibit 25** is a true and accurate copy of the Bronx Zoo’s “Respondents’ Memorandum of Law in Opposition to Motions for Stay and Leave to Appeal,” dated January 30, 2019.
25. As indicated in paragraph 13 above and in the Notice of Motion for Permission to Appeal and Stay filed herewith, the NhRP made a previous application with the lower court for permission to appeal from the Transfer Order pursuant to CPLR 5701(c).

STAY

26. The Reargument Order states that “enforcement of the January 18, 2019 Order is hereby stayed for a period of not more than sixty (60) days from entry of this Order to permit Petitioner to move a Justice of the Appellate Division, Fourth Department for permission to appeal the January 18, 2019 Order.” *See Exhibit 5, supra.* attached hereto. Enforcement of the Transfer Order is thus stayed until April 27, 2019, 60 days from the entry of the Reargument Order on February 26, 2019.
27. Pursuant to CPLR 5519(c), the NhRP files this motion to stay the enforcement of the Transfer Order (“Motion to Stay”) pending final resolution of any appeal taken from the Reargument Order or, in the alternative, from

the Transfer Order.

28. As set forth more fully in the annexed Memorandum, I believe that a stay is warranted for the following reasons.

29. First, an appeal from either the Reargument Order or the Transfer Order has a strong likelihood of success on the merits, as the lower court made numerous material errors of law in reaffirming, upon reargument, the Transfer Order. Memorandum, at 20-35.

30. Second, the prospect of securing Happy's freedom will drastically diminish if this case is transferred to Bronx County. Thus, without a stay, a ruling on the merits of the Petition by the Supreme Court, Bronx County could cause severe prejudice to Happy, as it would: (a) prolong the injustice of her illegal imprisonment, and either (b) moot an appeal granted by this Court from the Reargument Order or Transfer Order, or (c) create the risk of inconsistent adjudications. Memorandum, at 41-42.

31. Third, a stay will not cause any prejudice to the Bronx Zoo. Memorandum, at 42.

32. In the Reargument Order, the lower court recognized the NhRP's need for a stay by staying the enforcement of the Transfer Order for sixty days, as quoted in paragraph 26 above.

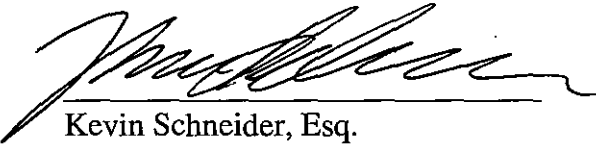
33. As indicated in paragraph 13 above, the NhRP made a previous application

with the lower court to stay the Transfer Order pursuant to CPLR 2201 and 5519(c).

34. Pursuant to 22 NYCRR 130-1.1, I affirm that this motion is not frivolous.

WHEREFORE, I respectfully request that this Court grant the NhRP's Notice of Motion for Permission to Appeal Stay, together with such other and further relief as the Court may deem just, proper, and equitable.

Dated: March 22, 2019



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