

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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. 260441/2019

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 PETITIONER'S MOTION TO STRIKE**

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PRELIMINARY STATEMENT

Petitioner the Nonhuman Rights Project, Inc. (“NRP”) commenced this unusual habeas corpus proceeding in Orleans County, New York over ten months ago, seeking a writ of habeas corpus for Happy, an Asian elephant at the Bronx Zoo. NRP’s stated rationale for commencing the matter in Orleans County, rather than Bronx County, was because NRP perceives the courts in the Appellate Division, First Department to be hostile to its arguments.

Respondents moved to transfer venue to Bronx County and to dismiss the petition, and Orleans County Supreme Court granted the motion to transfer venue and transferred all pending motions to the Bronx County Supreme Court. After this proceeding was transferred, Respondents filed their verified answer as permitted under CPLR 404(a).

NRP’s current motion to strike Respondents’ verified answer as untimely should be denied. Respondents expressly preserved their ability to serve an answer in the event their motion to dismiss is denied, but the motion to dismiss is currently pending. Respondents therefore timely filed their verified answer, and NRP has no basis to move to strike the answer. To the extent NRP had any timeliness objections to assert, NRP waived them by failing to promptly reject the verified answer. For these reasons and as further explained below, NRP’s motion to strike Respondents’ verified answer should be denied.

BACKGROUND AND PROCEDURAL HISTORY

A. Respondents’ motion to dismiss NRP’s petition is currently pending

NRP commenced this habeas corpus proceeding in Orleans County, New York on or about October 2, 2018, against Respondent Wildlife Conservation Society (“WCS”), which manages the Bronx Zoo, and Respondent James Breheny, the director of the Bronx Zoo. Attorney Affirmation of Elizabeth Stein, dated August 2, 2019 (“Stein

Aff.”) Ex. 1. On December 3, 2018, WCS and Mr. Breheny (together, “Respondents”) moved to transfer venue to Bronx County—where Happy and Respondents are located and where all material facts occurred—and moved to dismiss the petition. Stein Aff. Ex. 3. In their motion, Respondents requested five days to serve an answer in the event their motion to dismiss was denied, as permitted under CPLR 404(a). *Id.*

In an Order entered January 18, 2019 (“Transfer Order”), Orleans County Supreme Court, Hon. Tracy Bannister, J.S.C. granted Respondents’ motion to change venue, and stayed all other motions pending transfer to the Bronx County Supreme Court, including Respondents’ motion to dismiss. Affidavit of Kenneth A. Manning, sworn to August 7, 2019 (“Manning Aff.”), Ex. A.

Rather than proceed to Bronx County, however, NRP sought a stay of further proceedings to attempt an appeal to the Appellate Division, Fourth Department. *Id.* ¶ 7. According to NRP, the stay was necessary because “if this case is heard in Bronx County, the prospect of securing Happy’s freedom will drastically diminish,” given that “current precedent of the [First Department] is openly hostile to protecting the liberty interests” asserted by NRP, in apparent reference to *In re Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73, 77-78 (1st Dep’t 2017), *leave to appeal denied* 31 N.Y.3d 1054 (May 8, 2018). Manning Aff. Ex. B at 5. NRP then pursued an interlocutory appeal of the Transfer Order, despite clear precedent from the Court of Appeals holding that such appeals are barred. *People ex rel. Robertson v. New York State Div. of Parole*, 67 N.Y.2d 197, 201 (1986); Manning Aff. ¶ 9.

The Fourth Department denied permission to appeal by an Order dated April 8, 2019, following which this matter was transferred to the Bronx County Supreme Court and assigned to the Hon. Alison Y. Tuitt, J.S.C. *Id.* ¶¶ 9-10.

B. NRP failed to object to Respondents' verified answer and has delayed the progress of this proceeding

On July 8, 2019, Respondents filed and served their verified answer to NRP's petition. Manning Aff. ¶ 11. Respondents did not receive any objections from NRP regarding the verified answer prior to NRP filing the current motion. *Id.* ¶ 12.

To facilitate an orderly transfer of the matter to Bronx County, Respondents' counsel also sent NRP's counsel a proposed joint letter to the Court identifying all outstanding motions still pending. *Id.* ¶ 13, Ex. C. Despite having over three weeks to review the one-page letter, NRP has not consented to the joint submission of the letter, nor has NRP made any response to Respondents' proposal in that regard. *Id.* ¶ 14.

Respondents' counsel also requested a preliminary conference with the Court to discuss the scheduling of the pending motions, and a conference was scheduled for July 24, 2019. *Id.* ¶ 15. NRP requested an adjournment of the conference, which the Court rescheduled for August 15, 2019. *Id.* ¶ 16. On July 15, 2019, NRP contacted Respondents' counsel to request a further adjournment of the August 15, 2019 conference. *Id.* ¶ 17.

Two days later, on July 17, 2019, NRP announced a "Rally for Happy's Freedom" at the Bronx Zoo, to occur on August 10, 2019, and called on its supporters to "rally in support of freedom for our elephant client Happy," and to hear "updates on our litigation on behalf of Happy." *Id.* ¶ 18; *see also* NonHuman Rights Blog, *Rally for Freedom for Happy on August 10th in the Bronx*, July 17, 2019, <https://www.nonhumanrights.org/blog/second-happy-rally/>.

NRP then served the current motion to strike Respondents' verified answer on Friday, August 2, 2019, at 6:55 p.m. Manning Aff. ¶ 19. For the reasons stated below, the motion to strike should be denied.

ARGUMENT

POINT I

RESPONDENTS TIMELY FILED THEIR VERIFIED ANSWER

In a habeas corpus proceeding, a respondent's answering papers¹ are "to be served in the same manner as an answer in a special proceeding." CPLR 7008(a). Accordingly, in response to a petition for habeas corpus, a respondent may raise a legal objection "by setting it forth in his answer or by a motion to dismiss the petition." CPLR 404(a). "If the motion is denied, the court may permit the respondent to answer, upon such terms as may be just; and unless the order specifies otherwise, such answer shall be served and filed within five days after service of the order." *Id.*

Contrary to NRP's assertions, Respondents are still within their time to file their verified answer. In accordance with CPLR 404(a), Respondents responded to the petition by moving to dismiss. Stein Aff. Ex. 3. In the same motion, Respondents preserved their ability to file and serve an answer within five days of any order denying its motion to dismiss, as CPLR 404(a) expressly provides. *Id.* The motion to dismiss remains pending before this Court. Manning Aff. Exs. A, C. Accordingly, Respondents' time to file their verified answer has not yet expired, and NRP's motion to strike Respondent's answer is baseless.

¹ CPLR 7008 uses the term "return" to refer to Respondent's answering papers: "The return shall consist of an affidavit to be served in the same manner as an answer in a special proceeding[.]"

NRP is simply mistaken in claiming that Respondent's motion to dismiss is not currently pending. In the Transfer Order, the Trial Court identified every motion submitted to the Orleans Court—including Respondents' motion to dismiss—and held that "all pleadings, motions, and papers submitted herein, shall be and hereby [are] transferred to the New York State Supreme Court, Bronx County." *Id.* Ex. A, at 1-6. The Transfer Order further states "that all motions and issues submitted to this Court and not expressly decided herein are hereby stayed, pending transfer of this proceeding to Bronx County." *Id.* at 6. Respondents' motion to dismiss therefore is currently pending, and Respondents' time to file their verified answer has not expired. NRP's motion to strike the verified answer as untimely should be denied.

POINT II

NRP WAIVED ANY TIMELINESS OBJECTION TO RESPONDENTS' VERIFIED ANSWER

Assuming *arguendo* that NRP could assert any timeliness objection to Respondents' verified answer, NRP was required to assert such objection upon receipt. It did not, and therefore waived any timeliness objection.

"The retention of an answer without an objection will be deemed a waiver of an objection as to untimeliness." *Wittlin v. Schapiro's Wine Co.*, 178 A.D.2d 160, 161 (1st Dep't 1991); accord *Phillips v. League for Hard of Hearing*, 254 A.D.2d 181, 181 (1st Dep't 1998). Therefore, absent a clear and prompt rejection, the "[p]hysical retention of a pleading for an extended period of time will almost invariably constitute a waiver of its late service." *Minogue v. Monette*, 138 A.D.2d 851, 852 (3d Dep't 1988) (retaining answer for forty-five days waived objection based on untimeliness); see also *Phillips*, 254 A.D.2d at 181 (retaining answer for six weeks waived objection based on untimeliness).

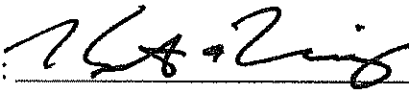
By failing to promptly assert any timeliness objection to the verified answer, NRP waived its objection. Respondents served the verified answer on July 8, 2019. Manning Aff. ¶ 11. NRP did not reject, return, or otherwise object to the verified answer at that time, or for the following month. *Id.* ¶ 12. During that time, NRP did seek two adjournments of the upcoming conference before the Court, and failed to respond to Respondents' proposed joint letter to the Court regarding the status of the proceeding. *Id.* ¶¶ 14-17. NRP apparently did devote resources to organizing a public rally at the Bronx Zoo to announce "updates" about this very proceeding. *Id.* ¶ 18. The foregoing does not constitute the "clear, unequivocal expression of current rejection" that courts require to preserve an objection as to untimeliness. *Minogue*, 138 A.D.2d at 852. NRP thus waived any timeliness objection to Respondents' verified answer, and NRP's motion should be denied.

CONCLUSION

Based upon the foregoing, Respondents respectfully submit that NRP's motion to strike Respondents' verified answer should be denied in its entirety.

Dated: Buffalo, New York,
August 7, 2019

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