

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT**

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In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HERCULES and LEO,

Petitioners-Appellants,
-against-

AFFIDAVIT IN SUPPORT
OF MOTION FOR
REARGUMENT

SAMUEL L. STANLEY JR., M.D. as President of
State University of New York at Stony Brook a/k/a
Stony Brook University and STATE UNIVERSITY
OF NEW YORK AT STONY BROOK a/k/a STONY
BROOK UNIVERSITY,

Index No. 2014-01825

Respondents-Respondents.

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State of New York }

ss.:

County of Nassau }

Elizabeth Stein, Esq., being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before the courts of the State of New York and am the attorney of record for the above-named Petitioners-Appellants with respect to both the proceedings in the Supreme Court Suffolk County and the appeal taken from these proceedings.

2. I am fully familiar with the facts set forth below and with the questions of law involved in the appeal.

3. This affidavit is submitted in support of an application by Petitioners-Appellants pursuant to CPLR 2221(d) for reargument of this Court's order

dismissing, on its own motion, Petitioners-Appellants' appeal and denying, as academic, Petitioners-Appellants' motion to have Steven M. Wise, Esq. admitted *pro hac vice*.

4. A true and correct copy of the order made by this Court and entered on April 3, 2014 is attached to this affidavit as Exhibit A.

5. The appeal was taken from an order of the Supreme Court Suffolk County, dated December 5, 2013, denying Petitioners-Appellants' Order to Show Cause and Verified Petition for a common law writ of habeas corpus ("Petition") filed pursuant to CPLR Article 70. A true and correct copy of the order is attached to this affidavit as Exhibit B. A true and correct copy of the Verified Petition is attached to this affidavit as Exhibit C.

6. On January 9, 2014, I filed with the Clerk of this Court the following papers: Notice of Appeal, completed Request for Appellate Intervention, Order of the Supreme Court Suffolk County, and Affidavit of Service of these papers to Respondents and the Office of the New York State Attorney General.

7. On March 3, 2014, I filed with the Clerk of this Court a Notice of Motion for Admission *Pro Hac Vice* of Steven M. Wise, Esq. to brief and argue the appeal, along with his affidavit and certificate of good standing.

8. On April 3, 2014, the Court entered an order dismissing the appeal *sue sponte* "on the ground that no appeal lies as of right from an order that is not the

result of a motion made on notice (*see* CPLR 5701)” and denying, as academic, the motion for *pro hac vice* admission. The order further stated that no papers had been filed in opposition or in relation to the motion.

9. CPLR 2221(d) provides that a motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion.”

10. The Court misapprehended the controlling law in dismissing the appeal in the instant case.

11. Specifically, the Court’s reliance on CPLR 5701 in dismissing the appeal was legally erroneous. CPLR Article 70 exclusively governs the procedure for common law writs of habeas corpus and therefore is controlling with respect to the Petition.

12. Pursuant to CPLR 7002(a), “a person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf . . . may petition **without notice** for a writ of habeas corpus to inquire into the cause of such detention and for deliverance.” (emphasis added). Petitioners-Appellants therefore were not required to provide notice to Respondents prior to, or contemporaneous with, the filing of the Petition.

13. Section 7003(a) further 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). In their Petition, Petitioner-Appellant Nonhuman Rights Project did not demand the production of Petitioners-Appellants Hercules and Leo and therefore asked the court to order Respondents to show cause as to the legality of the detention pursuant to the foregoing section. Petitioners-Appellants were not seeking a traditional “order to show cause” as this would have been superfluous and contrary to Article 70. In fact, Petitioners-Appellants styled the Petition to conform to the specific language of CPLR 7003(a). This Court therefore misapprehended the law by assuming the words “show cause” in Petitioners-Appellants’ Petition referred to the separate “show cause” procedure outlined in CPLR 403 (Notice of petition; service; order to show cause) rather than Section 7003(a). (See Memorandum of Law).

14. Lastly, CPLR 7011 allows an appeal to be taken “from a judgment refusing to grant a writ of habeas corpus or refusing an order to show cause issued under subdivision (a) of section 7003 . . .” The Supreme Court refused Petitioners-Appellants’ “order to show cause” sought under “subdivision (a) of section 7003” and their petition seeking a writ of habeas corpus. (Exhibit B). Petitioners-Appellants therefore have the right to appeal the order of the lower court refusing to grant the writ of habeas corpus, despite the fact that the Petition was not made

on notice. (See Memorandum of Law). By dismissing the appeal pursuant to CPLR 5701, which prohibits the appeal of an ex parte order, rather than applying CPLR 7011, which unequivocally allows for such appeals, this Court misapprehended the law governing the appeal.

15. For the reasons set forth above, I respectfully submit that the Court erred in dismissing Petitioners-Appellants appeal.

16. No previous application has been made for the relief herein sought.

WHEREFORE, I respectfully request that the Court grant reargument of the above-entitled action, vacate its April 3, 2014 order dismissing the appeal, allow the appeal to proceed and grant the motion to have Steven M. Wise, Esq. admitted *pro hac vice*.

Dated:

Respectfully submitted,

Elizabeth Stein, Esq.
Attorney for Petitioners-Appellants
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726

Sworn to before me this:

_____ day of April, 2014

