

**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-

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,

Respondents-Respondents.

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**REPLY AFFIRMATION IN
SUPPORT OF MOTION FOR
REARGUMENT**

Docket No. 2014-01825

Supreme Court
Suffolk County
Index No. 32098/13

Elizabeth Stein, Esq., an attorney duly admitted to practice law in the courts of this
state, affirms the following under penalty of perjury:

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. I am familiar with all papers
and proceedings had herein and with all facts and circumstances set forth.

2. I make this affirmation in reply to the answering papers of the
Respondents in this matter. I base this reply affirmation on my personal knowledge
and other reliable sources.

**AS THIS CASE WAS BROUGHT PURSUANT TO CPLR ARTICLE 70,
THE GENERAL CPLR PROVISIONS GOVERNING ORDERS TO SHOW
CAUSE AND APPEALS THEREFROM ARE INAPPLICABLE**

3. Respondents erroneously assert that Petitioners-Appellants made an “ex parte request for an order to show cause” (Aff. in Opp. ¶2) that is governed by CPLR 403. Petitioners-Appellants actually petitioned the court for a common law writ of habeas corpus, asking Respondents to “show cause” – but only within the meaning of CPLR Article 70 – “why the person[s] detained should not be released.” CPLR 7003(a). (Stein Aff. ¶5).¹

4. Respondents agree that Petitioners-Appellants filed a verified petition “styled as a habeas petition under article 70 of the C.P.L.R.” (Aff. in Opp. ¶3). They acknowledge that the denial of an order to show cause sought *pursuant to Article 70 is appealable*. (*Id.* at ¶12). Respondents are therefore incorrect in their assertion that the denial of Petitioners-Appellants’ petition is not appealable under the general rule that orders to show cause are not appealable.

5. As Petitioners-Appellants’ petition for a common law writ of habeas corpus was brought under and is governed by Article 70, the Supreme Court’s refusal to issue the writ is appealable as of right. The practice commentaries to CPLR 401 provide in part: “the particular authorizing statute may contain some unique rules that would, of course, *take precedence over those of Article 4*.” Vincent C. Alexander, *Practice Commentaries: C401:1 Special Proceedings, In General*, N.Y. C.P.L.R. 401 (McKinney) (emphasis added). Only if the specific statute, here Article 70, “is silent on the particular problem, [must] Article 4 [] be consulted.” *Id.* As Article 70 specifically addresses the right to appeal, it is controlling in this matter.

¹ See also *People ex rel. Bell v. Santor*, 801 N.Y.S.2d 101 (3d Dept. 2005) (“Petitioner commenced this CPLR article 70 proceeding seeking habeas corpus relief . . . Supreme Court dismissed the petition without issuing an order to show cause or writ of habeas corpus. Petitioner now appeals.”); *In re Henry*, 1865 WL 3392 (N.Y. Sup. Ct. 1865) (“the party arrested can apply for a habeas corpus, calling on the officer to *show cause* why he is detained”) (emphasis added).

6. Furthermore, it is a well-known rule of statutory construction that “where a general statute and a specific statute are in apparent conflict,” the Court should “defer to the more specific statute.” *People v. Doe*, N.Y.S.2d 399, 400 (Sup. Ct. 1982). *See also Bloom v. Town Bd. of Town of Yorktown*, 436 N.Y.S.2d 355, 357 (2d Dept. 1981). *Cf. Aguirre v. City of New York*, 625 N.Y.S.2d 597, 598 (2d Dept. 1995) (“Where there is an inconsistency between a specific provision and a general provision of a contract, the specific provision controls.”).

7. This rule is so firmly established in New York that it has been codified. *See* N.Y. Stat. Law § 397 (“A special statute which is in conflict with a general act covering the same subject matter controls the case and repeals the general statute insofar as the special act applies.”)

8. Respondents assertion that Petitioners-Appellants were required to “move to vacate the denial or take any other steps to create an appealable order” (Aff. in Opp. ¶11) pursuant to CPLR 5704 (review of ex parte orders) is incorrect. As thoroughly demonstrated in Petitioners-Appellants’ motion to reargue, the denial of their habeas petition for show cause was appealable as of right pursuant to CPLR 7011 and 7003. Notice was not required pursuant to CPLR 7002(a). *See* Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013) (“the proceeding is initiated by the filing of a petition requesting the court, *ex parte*, to issue a writ of habeas corpus”) (emphasis added). The right to appeal from the dismissal of a habeas corpus petition is firmly established. *See People ex rel. Donovan v. Conner*, 64 N.Y. 481, 482 (1876) (“The relator may . . . appeal from the order quashing the writ, . . . [and] his right to a discharge can be summarily decided.”). When “the writ is refused, an appeal is allowed, *for that is vital*.” *People ex rel. Duryee v. Duryee*, 188 N.Y. 440, 446 (1907) (emphasis added). As the Court of Appeals aptly declared: “In either alternative of the remand or discharge of the prisoner, *the right to appeal* is given, as well as when

the *proceedings are dismissed*. All these are both final and *vital*.” *Id.* (emphasis added). This right is so well settled that the Court of Appeals denied a “Motion for leave to appeal,” in such a case, “on the ground an appeal lies as of right.” *People ex rel. Harrison v. Jackson*, 297 N.Y. 597, 598 (1947).

9. In the alternative, Respondents argue that even if Petitioners-Appellants could appeal as of right under Article 70, the Court should deny the motion on the ground that Petitioners-Appellants Hercules and Leo “are not “persons” on whose behalf a habeas petition may be brought.” (Aff. in Opp. ¶12). The issue of “personhood” is, of course, the entire subject of the full appeal which has not yet been briefed. Furthermore, this Court’s order dismissing Petitioners-Appellants appeal was based solely on the erroneous conclusion that Petitioner-Appellants filed an *ex parte* order to show cause, not on a premature determination of Hercules and Leo’s status as legal persons. The issue of “personhood” is therefore irrelevant to this Motion for Reargument.

10. Because of the foregoing, this Court should grant Petitioners-Appellants’ Motion to Reargue.

WHEREAS, Petitioners-Appellants respectfully request this Court to grant Petitioners-Appellants’ prayer for relief in its motion together with such other and further relief as it deems just and proper.

Dated:

Respectfully submitted,

Elizabeth Stein, Esq.
Attorney for Petitioners-Appellants