

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SCHENECTADY

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In the Matter of the Application of
SCHENECTADY COUNTY SOCIETY FOR
THE PREVENTION OF CRUELTY TO
ANIMALS, INC.,

Index No.: 2011-2234

EMERGENCY
AFFIRMATION

Petitioner,

For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules

-against-

DOMINIC A. DAGOSTINO, *in his official*
capacity as Sheriff of the County of Schenectady,

Respondent.

----- X
ANDREW L. MCNAMARA, ESQ., an attorney duly licensed to practice law in the State
of New York, under penalties of perjury, affirms pursuant to CPLR § 2106 that the following
statements are true:

1. I am a member of the law firm of Tully Rinckey P.L.L.C., attorneys for the
petitioner SCHENECTADY COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY
TO ANIMALS, ("Petitioner") in this action. As such, I am fully familiar with this proceeding
with the source of my information being the file maintained in the office of the above-mentioned
law firm.

2. I submit this affirmation pursuant to section 202.7 (f) of the Uniform Rules for the
Supreme and County Courts.

3. I am about to submit an Order to Show Cause containing a restraining Order.

4. Should a temporary restraining order, pending a hearing and determination of the within application not be issued, the SPCA will be unable to carry out its public mission with regard to safeguarding the welfare of the forty-five animals seized on October 6, 2011 following the arrest of Michelle Regels. Additionally, SPCA will be unable to continue to seize abused and neglected animals in need of appropriate treatment upon arrest of individuals in violation of Chapter 26 of the Agriculture and Markets Law. If the Respondent fails to comply with N.Y. Agric. & Mkts. Law § 373(4) and continues to do so, the SPCA will be unable to carry out its regular duties in seizing animals that are in need of protection and therefore will be unable to attend to the needs of the community. Money could not possibly compensate Petitioner for such a loss. Even if it could, this is the governmental agency (Sheriff's Department) which would be the party at fault. Since they are probably immune from paying out damages, there would simply be no recourse here.

5. I have notified the Respondents' Counsel of Petitioner's intention to appear in the Supreme Court of New York, County of Schenectady, located at 612 State Street, Schenectady, New York, 12305 to present and submit the annexed application. The notice was contained in correspondence forwarded *via facsimile* to the aforementioned parties' counsel together with correspondence advising of them of the date and time of the submission of this application and inviting them to attend in opposition. (See exhibit annexed hereto to the Emergency Affirm.)

6. No prior application for the relief sought herein has been made.

Dated: Albany, New York
October 7, 2011



ANDREW L. MCNAMARA, ESQ.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SCHENECTADY

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In the Matter of the Application of
SCHENECTADY COUNTY SOCIETY FOR
THE PREVENTION OF CRUELTY TO
ANIMALS, INC.,

Index No.: 2011-2234

VERIFIED PETITION

Petitioner,

For a Judgment Pursuant to Article 78 of
the Civil Practice Law and Rules

-against-

DOMINIC A. DAGOSTINO, *in his official
capacity as Sheriff of the County of Schenectady,*

Respondent.
----- X

Petitioner, Schenectady County Society for the Prevention of Cruelty to Animals, Inc., by and through its attorneys Tully Rinckey, P.L.L.C. as and for its Verified Article 78 Petition, alleges the following:

PRELIMINARY STATEMENT

1. This proceeding is commenced pursuant to Article 78 of the New York Civil Practice Law and Rules for a judgment enjoining the Schenectady County Sheriff to perform a duty mandated by New York State Agricultural and Markets Law § 373(4) and for such other relief as this Court may deem proper. N.Y. Agric. & Mkts. Law § 373(4) requires the Schenectady County Sheriff to take custody of any animal in possession of an individual arrested by an officer of the Schenectady County Society for the Prevention of Cruelty to Animals (hereinafter "SPCA"). However, as hereinafter set forth on October 6, 2011, the Sheriff refused to comply with § 373(4).

PARTIES

2. Petitioner SPCA is an all-volunteer non-profit organization incorporated under the laws of the State of New York State.

3. Respondent, Dominic A. Dagostino is Sheriff of the County of Schenectady in the State of New York (hereinafter "Sheriff"). At all times relevant to this action, he maintains and continues to maintain his principal office at 320 Veeder Avenue, Schenectady, New York 12307.

JURISDICTION AND VENUE

4. This is a special proceeding pursuant to CPLR § 7804, which statute expressly provides for jurisdiction of such actions in Supreme Court.

5. Venue in this Court is proper under CPLR § 506(b) in that the principal office of the Defendant is located in Schenectady County.

FACTUAL BACKGROUND

6. On October 6, 2011, Michelle Regels (hereinafter "Regels") of 1751 Suffolk Avenue, Rotterdam, New York was arrested for animal neglect in violation of New York State Agricultural and Markets Law § 353.

7. Regels was arrested by duly appointed Humane Law Enforcement Officers of the Schenectady County Society for the Prevention of Cruelty to Animals pursuant to N.Y. Agric. & Mkts. Law § 371.

8. At the time of her arrest, Regels was in possession of at least forty-five animals, some of whom were neglected and in need of veterinary assistance.

9. Prior to the arrest, SPCA sent a written request by facsimile transmission asking the Schenectady County Sheriff (hereinafter "Sheriff") to assume the care, custody and control of

all animals seized in accordance with N.Y. Agric. & Mkts. Law § 373(4), a copy of which is attached hereto as *Exhibit "A"*.

10. On October 6, 2011, the Sheriff's Office contacted Mathew Tully, Chairman of the Board of Directors and Chief Humane Law Enforcement Officer of the SPCA and left a voicemail stating that the Sheriff would not assume custody of the animals.

AS AND FOR A FIRST CAUSE OF ACTION
(Mandamus pursuant to CPLR § 7801)

11. SPCA repeats and realleges each and every allegation set forth in the paragraphs above as though fully set forth herein.

12. N.Y. Agric. & Mkts. Law § 373(4) requires the Sheriff to assume the care, custody and control of all animals seized as the result of a valid arrest made pursuant to N.Y. Agric. & Mkts. Law § 371.

13. The Sheriff's failure to assume the custody of animals seized following the arrest of Regels constitutes the failure of an officer to perform a duty enjoined upon him by law as set forth in CPLR § 7803(1).

14. SPCA is entitled to judgment mandating the Sheriff to comply with N.Y. Agric. & Mkts. Law § 373(4).

AS AND FOR A SECOND CAUSE OF ACTION
(Violation of N.Y. NPCL § 1403(b)(4))

15. SPCA repeats and realleges each and every allegation set forth in the paragraphs above as though fully set forth herein.

16. N.Y. Not-For-Profit Corp. Law § 1403(b)(4) provides in pertinent part that:

All magistrates, peace officers, acting pursuant to their special duties and *police officers shall aid such a corporation*, its officers, agents and members in the enforcement of laws enacted to prevent (i) the abuse, maltreatment or neglect of a child, as those terms are defined in

section four hundred twelve of the social services law and section one thousand twelve of the family court act, or (ii) the exploitation of or harm to a child at the hands of an adult that would constitute a violation of article one hundred twenty, one hundred thirty, one hundred thirty-five, two hundred sixty or two hundred sixty-three of the penal law, *and for the prevention of cruelty to animals (emphasis added)*.

17. The refusal of the Sheriff to assume the care, custody and control of all animals seized as the result of a valid arrest made pursuant to N.Y. Agric. & Mkts. Law § 373(4) constitutes a violation of N.Y. Not-For-Profit Corp. Law § 1403(b)(4) in failing to aid the SPCA.

18. SPCA is entitled to judgment mandating the Sheriff to comply with N.Y. Not-For-Profit Corp. Law § 1403(b)(4).

WHEREFORE, Petitioner respectfully requests that the Court grant it a permanent injunction as previously described together with reasonable costs and disbursements and reasonable attorneys' fees and such other and further relief as this Court may deem just and proper.

Dated: Albany, New York
October 7, 2011

Respectfully submitted

TULLY PINCKEY, PLLC

By:  _____

Andrew L. McNamara, Esq.

Attorneys for the Petitioner

441 New Karner Road

Albany, New York 12205

Telephone No.: (518) 218-7100

Facsimile No.: (518) 218-0496

EXHIBIT A



SCHENECTADY COUNTY SOCIETY FOR THE
PREVENTION OF CRUELTY TO ANIMALS
P.O. Box 9516
NISKAYUNA, NEW YORK 12309
(518) 755-9517
INFO@SCHENECTADYSPCA.ORG



Sent via facsimile to 518-388-4593

October 6, 2011

Schenectady County Sheriff's Office
320 Veeder Ave.
Schenectady, NY 12307

To Schenectady County Sheriff:

Let me start off by pointing out that for about three years, I have attempted to prevent the situation that we are now in. My last communication about this major problem was ignored by the County Attorney. Obviously the County has determined that the time for talk has ended and the time for action by either you or me is upon us.

We were going to arrest Michelle Regels, DOB 11/17/71, of 1751 Suffolk Avenue Rotterdam, NY 12303 at 2310hrs on October 5, 2011 for numerous crimes. At the time of her arrest, she was in possession of at least 50 animals (dogs and cats). We notified your office at about 2140hrs on October 5, 2011, that pursuant to New York State Agriculture and Markets Law section 373(4) that we were going to transfer custody of those animals to your office and we were politely told that your office will not accept these animals. We view your offices failure to take custody of animals as required by NYS AGM 373(4) to be improper. Because your office was refusing to comply with the law we allowed a criminal to remain on the street without being arrested for AT LEAST another 12 hours (so we could serve you a formal written demand before we attempt to arrest her again). I will not even begin to describe the suffering and irreparable harm that the animals are being subjected to because of the Sheriff's office refusal to comply with the law that the County Attorney has known would be required to comply with for 3 years.

This fax is to serve as an official and formal demand pursuant to NYS AGM 373(4) that you assume care, custody, and control of all animals seized because of an arrest that we plan to make at 10am on October 6, 2011 of Ms. Regels. We can deliver the animals to your office in downtown Schenectady or you may pick them up from the arrest site (1751 Suffolk Avenue Rotterdam, NY 12303) and hold them until the criminal case is adjudicated. These animals are neglected so you will need veterinarian assistance to examine the animals.

Please consider this letter a final attempt to avoid litigation to compel your office to comply with the law and take animals that we seize because of an arrest pursuant to NYS AGM 373(4). If you refuse to take custody of the animals we seized, we will without further discussions or delay seek a Court Order compelling you to perform your duties given the irreparable harm that is being doing to animals by your departments inaction.

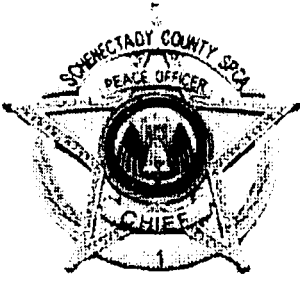
Sincerely,

Mathew B. Tully

Chairman of the Board of Directors and Chief Humane Law Enforcement Officer

CC: County Attorney Christopher Gardner via facsimile 518-388-4493

EXHIBIT 2



SCHENECTADY COUNTY SOCIETY FOR THE
PREVENTION OF CRUELTY TO ANIMALS
P.O. Box 9516
NISKAYUNA, NEW YORK 12309
(518) 755-9517
INFO@SCHENECTADYSPCA.ORG



May 29, 2009

Kathleen Rooney
Schenectady County Manager
620 State Street
Schenectady, NY 12305

VIA FACSIMILE ONLY TO 518-388-4590

Dear County Manager Rooney:

I understand from the County Sheriff's office that you will be handling the issue raised in my May 26, 2009 letter. My phone calls to you and County Attorney Gardner have gone unreturned. I am eager to learn how Schenectady County will handle the possession of animals that we turn over to the County Sheriff (pursuant to State Law) as its been at least a year since we brought this issue to the attention of Schenectady County. It seems no policies or procedures have been put in place to handle this issue. My agency is more then willing to assist the County as much as possible with this issue but we cant continue to be ignored.

Time is now of the essence.

Sincerely,

COPY

Mathew B. Tully, Esq.
Chief

CC: Susan Savage, Chair of the Schenectady County Legislature (via fax only to 518-388-4591)
County Attorney (via fax only to 518-388-4493)

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DOMINIC A. DAGOSTINO, *in his official
capacity as Sheriff of the County of Schenectady,*

Respondent.

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PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF ITS
ORDER TO SHOW CAUSE AND PRELIMINARY/INJUNCTION/TEMPORARY
RESTRAINING ORDER

TULLY RINCKEY, PLLC
ANDREW L. MCNAMARA, ESQ.
Attorneys for the Petitioner
441 New Karner Road
Albany, New York 12205
Telephone No.: (518) 218-7100
Facsimile No.: (518) 218-0496

Dated: Albany, New York
October 7, 2011

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PRELIMINARY STATEMENT

Petitioner is entitled to judgment in this Article 78 proceeding mandating that Respondent comply with the provisions of N.Y. Agric. and Mkts. Law §373(4) by accepting possession and custody of animals of which Petitioner took charge in conjunction with a lawful arrest. In addition, Petitioner's request for provisional relief in its Order to Show Cause, specifically an order that Respondent immediately take custody of the aforementioned in animals compliance with N.Y. Agric. & Mkts. Law § 373(4), should be granted since, (a) the Respondent is failing to perform a duty enjoined upon it by law, (b) Petitioner has demonstrated irreparable harm, a likelihood of success on the merits and (c) a balance of the equities favors Petitioner.

FACTUAL BACKGROUND

Petitioner respectfully refers the Court to the Verified Petition and accompanying Affirmation(s)/Affidavits for a complete recitation of the facts.

ARGUMENT

POINT I

PRELIMINARY INJUNCTION SHOULD BE GRANTED

This Court should grant Petitioner's request in its Order to Show Cause for a preliminary injunction/temporary restraining order since the Petitioner has a likelihood of ultimate success on the merits, will suffer irreparable harm if the injunction is not granted, and the balance of the equities clearly leans in its favor. See CPLR §6301; see also Marietta Corp. v. Fairhurst, 301 A.D.2d 734, 736, 754 N.Y.S.2d 62, 65 (3rd Dep't 2003); (The standard for granting a preliminary injunction requires a party seeking such relief to demonstrate (1) the likelihood of success on the merits; (2) the prospect of irreparable injury if the provisional remedy is withheld, and (3) a balancing of the equities weighing in favor of the moving party); see also Jarrett v. Westchester County Dep't of Health, 166 Misc.2d 777, 778, 638 N.Y.S.2d 269, 270 (Sup. Ct. Westchester

County 1995) (providing that in an Article 78 proceeding the standard used in assessing an application for a preliminary injunction is the same standard used for assessing a stay).

A. **THERE IS STRONG LIKELIHOOD THAT PETITIONER WILL SUCCEED ON THE MERITS IN THIS CASE.**

There is a strong likelihood that the Petitioner will succeed on the merits in this case.

1. **THE SHERIFF IS FAILING TO COMPLY WITH A DUTY IMPOSED BY NEW YORK AGRICULTURAL AND MARKETS LAW § 373(4)**

It is well settled that the purpose of CPLR 78 proceedings is for persons to obtain relief from an aggrievement to them caused by some governmental action. CPLR § 7801; Matter of Ahern v. Board of Supervisors, 7 A.D.2d 538, 185 N.Y.S.2d 669 (2d Dep't 1959), affd 6 N.Y.2d 376. Three types of writ procedures, known as certiorari, mandamus and prohibition, can be used in a CPLR article 78 proceeding. See Rowe v. City of New York, 162 Misc. 2d 683, 615 N.Y.S.2d 959 (Sup. Ct. New York County, 1994). In the writ of mandamus, the aggrievement arises from the refusal of a body or officer to act or to perform a duty enjoined by law. Bernstein v. Industrial Commissioner of the State of New York, 57 A.D.2d 767, 394 N.Y.S.2d 426 (1st Dep't 1977); See CPLR § 7803(1). Through a CPLR Article 78 proceeding, petitioners can enforce by mandamus the failure to perform a duty mandated by law. Rowe v. City of New York, 162 Misc. 2d 683, 615 N.Y.S.2d 959, 962.

In this case, the Respondent's duties at issue are set forth under New York State Agricultural and Markets § 373(4), which provides:

“When any person arrested is, at the time of such arrest, in charge of any animal..., any agent or officer of said society or societies [for the prevention of cruelty to animals] or any police officer may take charge of such animal... and deposit the same in a safe place or custody, or deliver the same into the possession of the police or sheriff of the county or place wherein such arrest was made, who shall thereupon assume the custody thereof; and all necessary expenses incurred in taking charge of such property shall be a charge thereon”

N.Y. Agric. & Mkts. § 373(4) (*emphasis added*).

Here, the Sheriff has a duty set forth by statute to assume the care, custody and control of animals seized by Peace Officers of the SPCA following an arrest of an individual for violations of Article 26 of the New York State Agricultural and Markets Law. The statute makes clear that the SPCA may, in its sole discretion, choose to deliver seized animals in the possession of the County Sheriff. Further, if the SPCA opts to do so, the Sheriff is *mandated* to assume custody of them (“sheriff *shall* assume custody of them” [emphasis added]).

On October 6, 2011, the SPCA arrested Michelle Regels for a violation of Article 26, specifically § 353, and at that time, she was in possession of at least forty-five animals. The SPCA sent a written demand to the Schenectady County Sheriff to assume the custody of these animals. This was followed by a refusal from the Sheriff’s Office on that same day. Since the Sheriff has a clear duty set forth by law and has failed to perform this duty, the SPCA has shown a strong likelihood of success on the merits.

B. SPCA WILL SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION AND STAY IS NOT GRANTED.

Should a preliminary injunction/temporary restraining order not be issued, the Petitioner’s ability to carry out its public mission will be drastically hindered in that it will be rendered ineffective in attending to the needs of abused and neglected animals. The SPCA will be unable to seize animals upon arrest and ensure that abused and neglected animals are adequately cared for if the Sheriff continually refuses to comply with New York State Agricultural and Markets Law § 373(4) and does not assume custody of these animals. Additionally, the animals seized on October 6, 2011, whose health is already severely compromised and are at risk of death, will not be adequately treated or cared for which will prevent SPCA from performing its public mission and serving the needs of the surrounding

community. Money could not possibly compensate Petitioner for such a loss especially since Petitioner would have no monetary recourse against a public agency.

C. THE BALANCE OF EQUITIES CLEARLY WEIGHS IN PETITIONER'S FAVOR.

The balance of equities weighs in favor of granting a preliminary injunction/temporary restraining order. The Sheriff will not suffer any irreparable harm if a preliminary injunction is granted and will simply be mandated to act in a way that he is already statutorily obligated. The Sheriff's objection to custody appears to be purely financial, a circumstance which can be rectified by seeking appropriate relief against the owner of the animals. Additionally, granting the injunction will allow the SPCA to continue to seize animals upon arrest when faced with violations of Chapter 26 of the Agriculture and Markets Law and the animals seized on October 6, 2011 will be appropriately treated and placed in healthy environment. In this manner, the public and members of the SPCA will benefit in that the SPCA will be able to carry out its public mission and be in a position to continue to do so in the future. Therefore, the preliminary injunction/temporary restraining order should be granted.


CONCLUSION

For the foregoing reasons, the Petitioner requests that its request for a *preliminary injunction* and *temporary restraining order* enjoining and restraining Respondent from disregarding the provisions of New York Agriculture and Markets Law § 373(4) and compelling his compliance by accepting custody of the animals at issue be granted until further order of this Court; and (ii) that the Petitioner be granted such other and further relief as this Court may deem just and proper.

Dated: Albany, New York
October 7, 2011

Yours, etc.,

TULLY RINCKEY, PLLC

By: 

Andrew L. McNamara, Esq.

Attorneys for the Petitioner

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Facsimile No.: (518) 218-0496