

JAMES M. VISSER

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June 15, 2007

Attorney General of the
State of New York
Charities Bureau
120 Broadway, 3rd Floor
New York, New York 10271
Attn.: Carolyn Ellis, Esq.
Director

Re.: Shelter Reform v. ACC
Index No.: 107636/06

Dear Ms. Ellis:

I represented Shelter Reform Action Committee (Hereinafter "SRAC") in their suits against the City, civil and Article 78, and attended the meeting at your office on June 1, 2007 at 11:00 am related to a concomitant complaint that, Mr. Kaskel, a member of SRAC filed with the Charities Bureau.

Initially after filing a complaint against Animal Care and Control (hereinafter "AC&C"), Mr. Kaskel was told to contact the Charities Bureau once it came to pass that he either prevailed or exhausted his remedies in the courts. Now that both suits are dismissed, Mr. Kaskel has returned. The crux of the litigation was that SRAC objected to the City running a "private not-for-profit" charity to wit AC&C while at the same time, negotiating a contract with them. The suits raised this objection and the Hon Karen Smith's eight-page opinion, dated April 16, 2007, addressed this issue stating that SRAC as well as the two individuals named as plaintiffs, Mr. Kaskel and Ms. Mar, lacked standing to proceed. (Exhibit 1) Judge Smith stated that the ACC owes no fiduciary duty to SRAC and therefore SRAC cannot assert a breach of fiduciary duty against AC&C. (Exhibit 1-page 5) In so ruling, Judge Smith failed to address whether breaches of fiduciary duty had occurred, squarely placing this matter in your hands.

Judge Smith's decision rests on what I believe is a misinterpretation of AC&C's by-Laws together with the City's statutory mandate to have animal control services. (Exhibit 1- page 5) SRAC does not dispute that the City's purpose in hiring ACC was to protect the general public from loose or stray animals and satisfy a statutory obligation. Although that is the City's sole purpose for contracting with AC&C, it is not AC&C's sole purpose. AC&C's Certificate of incorporation states, "The Corporation is formed for the public and charitable purpose of providing animal care and control services in the City of New York ("the City") thereby lessening the burdens of government on behalf of the City." AC&C's first purpose is animal care, and then control. Otherwise, AC&C would

just be a City agency or division and not a charity. Additionally, AC&C was formed to lessen the burden on the City with regard to animal care and control not merely to fulfill the City's statutory obligation to have an animal control provider. (Exhibit 2-page 2, AC&C's Certificate of Incorporation)

Although AC&C's work may satisfy the City's statutory requirements, it is not AC&C's sole purpose as Judge Smith or the Corporation Counsel suggests, and although AC&C's obligations are similar at times, they are not conjoined. Since AC&C's stated purpose is different from that of the City, the fiduciary obligations of its board members are different as well. No clearer indication of this is seen as when AC&C is negotiating a contract with the City for providing services. Even a first year contract law student would concur that an attorney cannot represent both parties in a contract negotiation. Yet, the board of directors at AC&C, the City, and Corporation Counsel have no problem with this conflict. We assert that because AC&C's board members have divided loyalty between the City, their employer, and the AC&C board they sit on, at the very least, AC&C board members who are City employees should not be allowed to vote on contracts with their employer the City. The current situation is like allowing attorneys for the Corporation Counsel to maintain private third party suits against the City. It is respectfully requested that the Charities Bureau rectify the situation as the courts have abdicated their responsibility based on standing. The Charities Bureau has a right, an arguably an obligation, to assure and insure that charities within the State operate in a manner that squares with the Not for Profit Law. Given the animals at stake and the vast amount of public and private monies at stake, in-excess of ten million per annum, it would seem that AC&C's current situation is a priority that needs addressing.

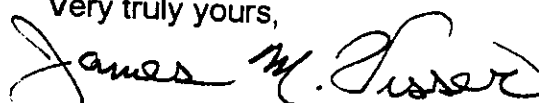
Additionally, the court rejected a similar Article 78 claim in a companion decision. (Exhibit 3) Both decisions left Mr. Kaskel with no recourse, but to proceed with the charities bureau. Since the courts have found the Charity is a private entity whose board is not subject to outside scrutiny, they have de-facto conceded that, the Charities Bureau has the authority to investigate the underlying conflict of interest with the City of New York running a "private" charity. Granted, as we discussed at our meeting, the City can create a charity, but they cannot control and run a "private" charity once it is established. Since the court has found the Charity is private, there is no iteration the City can conjure that would otherwise allow it to maintain control of a private not-for-profit that is a charity. Also, it cannot be now said, that it is a City agency or affiliate and City control of same is fine as the Court has found it is not affiliated or a part of City government.

Therefore, I respectfully suggest that it is the Charity Bureau's obligation and duty to ensure that a private charity is not run by the City as it is impermissible with regard to the Not-For-Profit Law. The conflict of interest with regard to the board of directors owing a fiduciary duty to the City as employees and their fiduciary duty to the Board of ACC is inappropriate. Since AC&C and the City have different interest, we suggest: a change in the number of the board of directors; how they are nominated, and

by whom; and not allowing any ex-officio or mayoral appointees to vote for or against a City contract.

Thank you for your time and consideration.

Very truly yours,



JAMES M. VISSER

Exhibits:

- 1-Judge Smith's 4/16/07 decision dismissing the Civil Suit
- 2-AC&C's Certificate of Incorporation
- 3-Judge Smith's 4/30/07 decision dismissing the Article 78
- 4-The Verified Complaint from the Civil Action Out line violations of the NFP Law
- 5-AC&C's Amended By-laws
- 6-Stipulation signed by Corp Counsel Claiming they would not guarantee AC&C's funding.

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- x
THE SHELTER REFORM ACTION COMMITTEE,
GARY KASKEL and MARIE AN MAR, in their
capacities as co-chairpersons of THE SHELTER REFORM
ACTION COMMITTEE,

Plaintiffs

NOTICE OF ENTRY

Index No. 107636/2006
IAS Part 62
Justice Karen S. Smith

-against-

ANIMAL CARE AND CONTROL OF NEW YORK
CITY, INC. (f/k/a THE CENTER FOR ANIMAL CARE
AND CONTROL, INC.), THE CITY OF NEW YORK,
THE DEPARTMENT OF HEALTH AND MENTAL
HYGIENE OF THE CITY OF NEW YORK, MICHAEL
R. BLOOMBERG, as the Mayor of the City of New York,
THOMAS FREIDEN, ADRIAN BENEPE, JOHN M.B.
O'CONNOR, JAU KUHLMAN, JOYCE YANG, BRUCE
DONIGER and JOHN DOE,

Defendants.

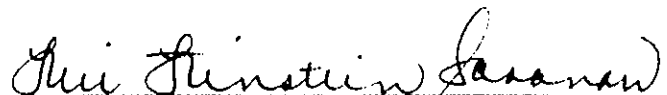
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PLEASE TAKE NOTICE that an Order, of which the within is a true copy, was

duly entered and filed in the Office of the Clerk of the County of New York on April 27, 2007.

Dated: New York, New York
April 30, 2007

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street, Room 3-115
New York, New York 10007
(212) 788-1282

By:



Terri Feinstein Sasanow
Assistant Corporation Counsel

TO: JAMES M. VISSER, Esq.
Attorney for Plaintiffs
3400 Paul Avenue
Bronx, New York 10468.
(646) 260 6326

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DESCENT. **HON. KAREN SMITH**

Index Number : 107636/2006

PART 62

SHELTER REFORM ACTION

vs

ANIMAL CARE AND CONTROL

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2/1/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion ~~to~~ for summary judgment dismissing the complaint.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits: Memorandum

PAPERS NUMBERED

1-2

3

4-5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted and cross-motion is denied in accordance with the attached memorandum decision and order.

RECEIVED

APR 25 2007

IAS MOTION SUPPORT OFFICE

FILED

APR 27 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/16/07

K S S
HON. KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):
Not for filing
negotiated

4/21/07

mlj/1/10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
THE SHELTER REFORM ACTION COMMITTEE,
GARY KASKEL and MARIE ANN MAR, in their
capacities as co-chairpersons of THE SHELTER
REFORM ACTION COMMITTEE

Plaintiff,

-against-

Index No.: 107636/2006
Motion Seq.: 002
Motion Date: 02/01/2007

DECISION AND ORDER

ANIMAL CARE AND CONTROL OF NEW YORK
CITY, INC. (f/k/a THE CENTER FOR ANIMAL CARE
AND CONTROL, INC.), THE CITY OF NEW YORK,
THE DEPARTMENT OF HEALTH AND MENTAL
HYGIENE OF THE CITY OF NEW YORK, MICHAEL
R. BLOOMBERG, as the Mayor of the City of New York,
THOMAS FREIDEN, ADRIAN BENEPE, JOHN M. B.
O'CONNOR, JAU KUHLMAN, JOYCE YANG, BRUCE
DONIGER and JOHN DOE,

Defendants.

-----X
PRESENT: KAREN S. SMITH, J.S.C.:

FILED

APR 27 2007

NEW YORK
COUNTY CLERK'S OFFICE

Defendants' Motion for Summary Judgment Dismissing this action is granted and Plaintiff's Cross-Motion for Summary Judgment on its complaint is denied as moot.

Plaintiff (hereafter referred to as "Shelter") brought this action by a summons and complaint containing four causes of action. The first two causes of action allege that those individual defendants who are members of the Board of Directors (hereafter referred to as the "Directors") of Animal Care and Control of New York City, Inc (hereafter referred to as "ACC") breached their fiduciary duties to ACC (first cause of action) and also breached their duty to

ACC to exercise diligence, care and skill in carrying out their functions as directors of ACC (second cause of action). The third cause of action alleges that the Directors and Mayor Michael R. Bloomberg (hereafter referred to as "Bloomberg") were negligent in the allocation and failure to use public funds to construct animal shelters. The fourth cause of action alleges that the City of New York (hereafter referred to as the "City") failed to follow proper procurement procedures when it renewed ACC's contract to provide animal control services at its expiration on December 31, 2000. Based upon all four causes of action, Shelter's complaint demands; 1) an injunction permanently restraining the City and the Directors from entering into any contract between the City and ACC until an alleged conflict of the Directors' interest is resolved, 2) a preliminary injunction during the pendency of the action restraining; "...the acts complained of and threatened", 3) an injunction restraining ACC from entering into any further contracts with the City other than six month extensions of the current contract until ACC adopts new by-laws containing provisions establishing an "expanded board", 4) a temporary injunction restraining the City and Bloomberg from entering into any contracts with ACC except six month extensions of the current contract until such time as the Directors of ACC are free from; "...City control and able to negotiate contracts with the City at arms-length", 5) a permanent injunction preventing any of the Directors who are City employees or officials from voting concerning any funding related to the City, 6) a decree directing that Directors, officers and members of ACC be appointed pursuant to a "...proposal the plaintiff shall submit", 7) a decree directing the adoption of "...prophylactic measures in accordance with a proposal plaintiff shall submit..." to prevent future conflicts of interest, 8) a decree directing the plaintiffs to "...account for their use of corporate assets...", 9) a decree directing that the Directors be "...surcharged for any losses to

ACC...”, 10) a judgment in favor of Shelter for costs, disbursements and attorneys fees in this action and, 11) such other and further relief as the court deems just and proper.

The defendants have answered the complaint, denying the essential allegations of the complaint and asserting, *inter alia*, affirmative defenses of failure to state a cause of action, lack of standing, the expiration of the statute of limitations for this action and the immunity and privilege attached to discretionary administrative duties of governmental and quasi-governmental entities.

The defendants now move to dismiss the action pursuant to CPLR §3211 and for summary judgment dismissing the action pursuant to CPLR §3212 based upon; 1) the applicable statute of limitations, 2) Shelter’s lack of standing to commence the instant action and, 3) with respect to the City, to the extent that Shelter’s claims sound in negligence, Shelter has failed to file a timely Notice of Claim pursuant to New York City Administrative Code §50-i.

Shelter opposes the motion and cross-moves for Summary Judgment on its complaint and numerous items of additional relief.

“Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which must be considered at the outset of any litigation.” (*Matter of Dairylea Coop. v Walkley*, 38 NY 2d 6, 9 [1975]). Thus the first issue the court must consider is whether or not Shelter has standing to assert the causes of action set forth in its complaint.

“[T]he contemporary rule is that a party has standing to enforce a statutory right if its abuse will cause him injury and it may fall within the zone of interest protected by the legislation...Simply stated, a party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the zone of interests, or concerns, sought

to be promoted by the statutory provision under which the agency has acted" (*Matter of Schwartz v Morgenthau et. al.*, 7 NY3d 427 [2006], internal quotations and citations omitted). Beyond the injury-in-fact test; "...the courts have added rules of self restraint, or prudential limitations: a general prohibition on one litigant raising the rights of another; a ban on adjudication of generalized grievances more appropriately addressed by the representative branches ..." (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773 [1991]). Additionally, when an organization or entity is a plaintiff/petitioner in an action/special proceeding, the Court of Appeals has established a three part test to determine if the entity has standing to maintain the action. These requirements are; "...(1) that one or more of its members must have standing to sue; (2) that the interests advanced here are sufficiently germane to petitioner's purposes to satisfy the court that the petitioner is the appropriate representative of those interests; and (3) that the participation of the individual members is not required to assert this claim or to afford petitioner complete relief" (*Matter of Aeneas McDonald Police Benevolent Association, Inc. v City of Geneva*, 92 NY2d 326, 331 [1998], internal citations omitted).

In the instant matter, Shelter has not shown it has sustained an injury in fact which falls within the zone of interests intended to be protected by the statute under which the City has acted. Shelter is attempting to assert claims and rights that do not belong to Shelter or its members. It has not shown that the interests it is seeking to advance by the causes of action it has asserted herein are germane to its organizational purposes.

It has been more than fifty years since the court held: "[t]he various sections of the laws of this State relating to the licensing and harboring of dogs and the disposition of same are all parts of an exercise of the police power to protect the health of the general public" (*Dog Owners*

Association of New York State, Inc. Et. Al. v Hilleboe et. al., 206 Misc 119 [Supreme, Westchester 1953], Affd. 307 NY 734 [1954]). To the extent that Shelter seeks to assert a taxpayer action, Shelter has not shown that either it or any of the individuals or entities identified as its members has suffered any injuries in fact that may fall within the statutory mandate of protecting the health of the general public from loose, stray or unclaimed animals. Instead, Shelter has argued that, since its members own dogs, they could be harmed if their animals become lost in the future and are not properly identified and returned to them. In addition they agree that some of their members, in the course of taking animals from City shelters and attempting to find homes for them, have been forced to incur expenses for medical treatment of the animals as well as expenses for the care and feeding of such animals while they were recuperating from illnesses they may have acquired while in the City shelters. None of these injuries relate to the statutory mandate, ie; protecting the general public from loose and stray animals. While Shelter's concerns are noble, they are outside the ambit of the statute. Therefore, Shelter's concerns are not appropriately addressed as a taxpayer action in the instant litigation but must be addressed through the legislature.

To the extent that Shelter's causes of action seek to address the fiduciary duties of the Directors of ACC, Shelter is attempting to assert rights that do not belong to Shelter or Shelter's members. ACC's Directors owe their fiduciary obligations to the corporation, its members and its creditors (see eg: *Brecher v Gregg*, 89 Misc. 2d 457, 461 [Supreme Court, New York County 1975], Affd. 56 AD2d 525 [1st Dept 1977], see also *Matter of Heller*, 6 NY 3d 649, 655 [2006]). Neither Shelter nor any of its members are the individuals or entities to whom the Directors owe any fiduciary duties. Therefore, Shelter is not in a position to assert any alleged breaches by the

Directors of any of their obligations to ACC.

Finally, Shelter is a loosely organized, unincorporated association. At oral argument on the instant motion, Shelter's counsel acknowledged that Shelter did not have any formal organization documents. Thus, the only evidence of Shelter's organizational purposes which is before the court is contained in the affidavits by some of Shelter's members (collectively submitted as "Exhibit 2" to Shelter's opposition to the City's motion). Each of Shelter's member's affidavits states, *inter alia*, that he or she is a: "...supporter of its mandate to advocate for improved conditions at the City's animal shelters" (see Paragraph 2 of each affidavit). The causes of action set forth in Shelter's complaint relate to the administrative and financial affairs ACC and the City. Thus, assuming *arguendo*, that the causes of action were properly pleaded by a proper party and proven, the relief granted would relate to the financial and administrative affairs of ACC and the City. Plaintiff's complaint does not allege a correlation between the correction of the alleged improprieties in the administrative and financial affairs as between ACC and the City and the treatment or conditions facing animals within ACC's facilities. Nor is the court able to conjure up a connection between the two. Even if the current administration of the City's animal shelter system (or, for that matter, the entire shelter system itself) were completely replaced, there is still no basis for the reconstituted administration or system to construe its statutory mandate (protecting the general public from loose or stray animals) to include improving conditions for animals actually within the system. Thus, it cannot be said that the interests which may be advanced by the instant litigation are germane to Shelter's organizational purposes.

While the Court acknowledges that Shelter is attempting to advance laudable goals and shares its concern for appropriate and humane treatment of all animals, especially those which

have become lost by their owners or have strayed or become abandoned, these goals must be advanced in a proper forum. The instant litigation is not the proper forum. Accordingly, it is;

ORDERED that the defendants' motion for summary judgment dismissing the instant action is granted and the plaintiff's cross-motion for summary judgment on its complaint is denied as moot, and it is further;

ORDERED that, upon service of a copy of this order, together with notice of entry hereof, upon the Clerk's Office at 60 Centre Street, New York, New York, the Clerk shall enter judgment in favor of the defendants dismissing the instant action.

The foregoing constitutes the decision and order of this court.

Dated: April 16, 2007

ENTER:



Hon. Karen S. Smith, J.S.C.

FILED
APR 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

Index No. 107636/06

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE SHELTER REFORM ACTION COMMITTEE, et al.,

Plaintiffs,

-against-

ANIMAL CARE AND CONTROL OF NEW
YORK CITY, et al.,

Defendants.

ORDER WITH NOTICE OF ENTRY

MICHAEL A. CARDOZO

*Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street
New York, N.Y. 10007*

*Of Counsel: Terri Feinstein Sasanow
Tel: (212) 788-1282*

Due and timely service is hereby admitted.

New York, N.Y., 200 . . .

..... Esq.

Attorney for.....

EXHIBIT 2

CERTIFICATE OF INCORPORATION

OF

THE CENTER FOR ANIMAL CARE AND CONTROL, INC.

Under Section 402 of the Not-For-Profit Corporation Law

The undersigned, a natural person at least eighteen years of age, desiring to form a corporation pursuant to the provisions of the Not-for-Profit Corporation Law, does hereby certify:

FIRST. The name of the Corporation is THE CENTER FOR ANIMAL CARE AND CONTROL, INC.

SECOND. The Corporation is a corporation as defined in subparagraph (a)(5) of Section 102 of the Not-for-Profit Corporation Law and is a Type B corporation under Section 201 of said law.

THIRD. The Corporation is formed for the public and charitable purposes of providing animal care and control services in The City of New York ("the City"), thereby lessening the burdens of government on behalf of the City, and acting in the public interest and carrying out the essential public functions that relate to animal care and control, the prevention and control zoonotic diseases which may be transmissible to humans, and the control of vicious or dangerous animals. The Corporation shall not be vested with any special powers by virtue of Section 1403 of the Not-For-Profit Corporation Law nor shall it be deemed a corporation for the prevention of cruelty to animals.

CERTIFICATE OF INCORPORATION

of

THE CENTER FOR ANIMAL CARE AND CONTROL, INC.

Under Section 402 of the Not-for-Profit Corporation Law

Susan Forsyth, Esq.
Assistant Corporation Counsel
New York City Law Department
100 Church Street - Room 6D29
New York, New York

212 788-1091

FOURTH. The corporation is formed for the following lawful public objectives:

(1) to perform on behalf of the City or any agency of the City any functions or duties relating to animal care and control, including those for which the City or an agency of the City is authorized or permitted to contract with a not-for-profit corporation pursuant to Chapter 115 of the Laws 1894, as amended, or other applicable law, relating to animal care and control, including, but not limited to the following:

(a) to identify, seize, hold, observe and evaluate animals which are or may be a threat to public health because they present a risk of disease transmission or injury, dogs which are unlicensed, and cats the owners of which are not identified;

(b) to acquire, establish, maintain and operate facilities to shelter, hold, examine, test, treat, otherwise control and dispose of those animals which the Corporation or the City has seized or accepted for shelter;

(c) to humanely euthanize animals in its custody which have not be claimed by their owners or adopted or which are a threat to public health;

(d) to seize, hold, observe, test and otherwise control dogs, cats and other animals to prevent public health nuisances;

(e) to identify, seize, hold, evaluate and euthanize vicious animals; and

(f) to issue licenses and renewals and to collect the fees therefor.

(2) to promote or provide outreach programs, publicity campaigns and other services for the prevention and control of disease that are transmissible from animals to humans and nuisances and other conditions in which the presence of animals is or may be dangerous or detrimental to human health.

(3) to promote or provide programs and services to control the population of unlicensed dogs, cats the owners of which are unidentified and other live animals, including services for the spaying or neutering of such animals.

(4) to provide services for the adoption of dogs, cats and other animals in the custody of the Corporation.

(5) to recruit and organize volunteers to assist in the implementation of the Corporation's programs and services.