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JOSEPH P. FOLEY
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Court of Appeals
State of New York

JON H. HAMMER,

Plaintiff-Appellant,

-against-

THE AMERICAN KENNEL CLUB and BRITTANY CLUB OF AMERICA, a/k/a THE AMERICAN BRITTANY CLUB, INC.,

Defendants-Respondents.

BRIEF OF PLAINTIFF-APPELLANT JON H. HAMMER

JON H. HAMMER, ESQ.
Plaintiff-Appellant, Pro Se
420 Lexington Avenue, Suite 3005
New York, NY 10170
Tel. #(212) 697-8181

JOSEPH P. FOLEY, ESQ.
7 Mohican Lane
Irvington, NY 10533
Tel. #(914) 591-6776

On the Brief:
Leslie K. Anker

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Statutes and Rules

Treatises

Law Reviews

COURT OF APPEALS
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BRIEF OF PLAINTIFF-APPELLANT

Preliminary Statement

Plaintiff-Appellant, Jon H. Hammer (hereinafter "plaintiff" or "appellant"), appeals from the decision and order entered February 27, 2003 in the Supreme Court, Appellate Division, First Department, which affirmed the judgment of the Supreme Court, New York County (Kapnick, J.) entered February 26, 2002, which had granted the defendants'-respondents' motions to dismiss the amended complaint. This appeal is taken as of right pursuant to CPLR Sec. 5601(a) of the CPLR, since it is an appeal from an action originating in the Supreme Court from an order of the Appellate Division, which finally determined the action, with a dissent by two judges on a question of law in favor of the party taking the appeal.

Questions Presented

1. Did the Appellate Division err in concluding that plaintiff could not maintain a private cause of action based upon Section 353 of the New York Agriculture and Markets Law?

2. Did the Appellate Decision err in concluding that plaintiff was not entitled to declaratory judgment and injunctive relief against these defendants?

3. Does amputation of a canine tail for cosmetic purposes come within the prohibition of the criminal sanctions of Section 353 of the New York Agriculture and Markets Law[1], interdicting unjustifiable maiming or mutilation of any animal or the causing or furthering of any act of cruelty to an animal?

4. May the judicial branch intervene in the national rule making functions of a private enterprise exercising monopoly control of the dog breeding and showing industry, at least where such functions cause or promote actions in overt derogation of New York criminal law?

STATUTE INVOLVED

Agriculture and Markets Law Section 353

"A person who . . . unjustifiably maims, mutilates or kills any animal . . . or causes, procures or permits any animal to be... unjustifiably injured, maimed, mutilated or killed or ...in any way furthers any act of cruelty to any animal... is guilty of a misdemeanor." (emphasis supplied) [2]

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[1] Hereinafter Sec. 353.

[2] See People v. Bunt, 118 Misc.2d 904 (Just. Ct. Dutch 1983) and 74 St. John's L.Rev. 287, 289 (2000) for an analysis of the statute.

NATURE OF THE CASE AND FACTS

The amended complaint (Record p.12)* sets forth facts which have not been materially disputed by respondents or controverted by the *nisi prius* Court below in either of its opinions (R-7,31). AKC, a so-called not-for-profit entity, operates as a *de facto* national monopoly in the dog breeding and showing industry. (R-17, 161, 162) AKC and respondents, American Brittany Club, Inc. (hereinafter "ABC", collectively "defendants" or "respondents"), have in concert imposed a national standard which, in essence, mandates that appellant unlawfully mutilate his Brittany canine dog by amputating the tail of his dog (euphemistically called "docking" by respondents) in order to compete on an equal footing in the sport of dog showing. (see amended complaint, R-12, *et seq.*) The nature of the case and the essential facts are as set forth in Justice Saxe's majority opinion for the Appellate Division, First Department. They are set forth below in *haec verba (R-196, 197).*

"Through the years, the American Kennel Club and its member breed clubs have set breed standards for dogs entering various competitions sponsored by that organization. For each of the 146 separate breeds recognized by the AKC, distinct breed standards are established, initially by the national parent breed club, and then submitted to the AKC for approval. For some breeds, the standard involves the cropping, or clipping, of the dogs' ears to a certain size or shape. For certain other breeds, the standard involves docking, or amputation, of all or part of the dog's tail. The

*hereinafter "(R-)"

standard promulgated by defendants for judging the breed of dog known as the Brittany, or the Brittany Spaniel, in sponsored competitions, includes the provision that 'any tail substantially more than four inches shall be severely penalized.'

Plaintiff, Jon H. Hammer, is the owner of a purebred Brittany Spaniel which has a natural, undocked tail approximately ten (10) inches long. He contends that tail docking is a form of animal cruelty, and that the practical effect of defendants' tail standards for Brittany Spaniels is to effectively exclude his dog from meaningfully competing in AKC shows unless he complies with what he perceives as an unfair and discriminatory practice.

Specifically, his amended complaint seeks a declaratory judgment that the complained-of standard (1) unlawfully discriminates against plaintiff by effectively precluding him from entering his dog in breed competitions, (2) is arbitrary and capricious, (3) violates Agriculture and Markets Law §353, and (4) is null and void as in derogation of law; he further seeks an injunction prohibiting defendants from applying, enforcing or utilizing the standard.

Defendants moved to dismiss the complaint on the grounds that plaintiff did not have the legal capacity to sue and that he had failed to state a cause of action (CPLR 3211(a)(3), (7)). The motion court granted the motion, and for the reasons that follow, we affirm."

THE APPELLATE DIVISION DECISION

The Appellate Division majority acknowledged that "there are numerous reasons why canine tail docking might be termed cruel (R-199), such as the fact that the procedure is generally performed without anesthesia and assertedly causes great pain

to the young puppy (R-199); and that tail docking interferes with a dog's natural form of communication (R-199). The majority correctly noted that the subject statute does not preclude causing pain, but only interdicts pain brought about unjustifiably (R-200). The court further stated that a "determination on the merits as to whether the requisite justification is established would be proper in the context of trial or . . . summary judgment" (R-200), but it could not resolve the question on an appeal from the decision below granting a CPLR Rule 3211 motion to dismiss. The Appellate Division assumed for purposes of its decision that the practice of canine tail amputation was indeed cruel and unjustifiable (R-200).

The Appellate Division clearly rejected the argument of defendants and *amici* that the court was precluded from addressing the merits because courts should not interfere with the internal affairs of private voluntary organizations, holding that the concept of such non-interference is of no effect when the organization's rules, as here, violate state law and public policy (R-197, 198).

The Appellate Court also repudiated the argument that Sec. 353 may not be construed to encompass canine tail docking (R-200, 201). The defendants had argued that the legislature had specifically prohibited equine tail docking and the clipping of canine ears by non-veterinary non-anesthesia procedures; and that accordingly the failure to specifically bar canine tail docking should be read as an implicit acceptance of the procedure. In rejecting this narrow construction of the statute, the majority stated that equine tail docking and canine ear clipping constituted statutory violations which apply regardless of "justification", whereas the general prohibition of canine cruelty here under review only applies if the procedure is unjustified (R-201).

The Appellate decision, however, affirmed the trial court's dismissal on the grounds that plaintiff "lacked standing to obtain any . . . civil remedies." (R-201,202).

ARGUMENT

POINT I

I. THE APPELLATE DIVISION ERRED IN HOLDING THAT PLAINTIFF COULD NOT MAINTAIN A PRIVATE CAUSE OF ACTION BASED UPON SECTION 353 OF THE AGRICULTURE AND MARKETS LAW

A. The Appellate Division erroneously held that a private party could not maintain a civil action for an injury sustained by reason of defendants' violation of a criminal statute

The facts here are undisputed. The defendants American Kennel Club ("AKC") and the American Brittany Club ("ABC") establish mandatory breed standards for entering dog show competitions. The Brittany standard provides that "any tail more than four inches shall be severely penalized." (R-15, 119) In order to compete in AKC and ABC sponsored shows, the only readily available arena of competition, Brittany owners are thus required to amputate their dog's tail, since the Brittany, as with most canines, "come from the factory" (R-138) with tails, not with four inch stubs artificially created for cosmetic purposes.

Plaintiff owns a Brittany, which he seeks to enter in AKC/ABC breed shows, but to do so, he must amputate his dog's tail. The Appellate Division concurs that it is cruel to amputate a dog's tail for cosmetic purposes; and that doing so constitutes a violation of Sec. 353 (R-199, 200). Notwithstanding, the Court below ruled that plaintiff is entitled to no relief, thus there is a clear statutory wrong with no apparent remedy. The courts

below refuse to order the AKC/ABC consortium to modify their illegal rules. What reasons does the appellate court below advance for such an incongruous result?

First, the Court opines that Sec. 353 is a criminal statute, and, as such, its enforcement must be entrusted only to public agencies; and that civil remedies of injunctive or declaratory relief are not generally available to private individuals to prevent violations of penal statutes (R-202). The Court further concludes that a private cause of action based upon a violation of a criminal law may be engrafted on the statutory plan, only where three criteria are met: (1) plaintiff must be within the class for whose benefit the statute was enacted; (2) recognition of a private right of action must promote the legislative purpose; and (3) creation of such a right must be consistent with the legislative scheme (R-202, 203). The Court held only that the third factor was not satisfied because the legislature had established a criminal enforcement procedure for Sec. 353 violations (R-202).

The reasoning in the majority decision below is erroneous; it has misread this Court's line of decisions pertaining to the availability of private causes of action grounded upon state criminal law. Moreover, contrary to the rule at common law, penal statues should not be strictly construed, but should be read broadly to promote justice and secure the humanitarian and remedial objectives of the law, in this case to preclude animal cruelty. 97 NY Jur. 2d, *Statutes*, at p. 161 (Lawyer's Coop 1992); see also 1 McKinney's *Statutes*, Sec. 321. The presumption is not, as the court below held, against the viability of a private right of action based on penal statutes. On the contrary, the presumption is in favor of private civil remedies, absent a showing that private actions would be at clear variance with the legislative scheme.

As Professor Dan B. Dobbs points out, "in the development of English law, tort law arose out of criminal law... a single act might constitute both a crime and a tort. For example, if a defendant beats a person, he is almost certainly committing a crime. .. He is also committing a tort." Dobbs, The Law of Torts, Sec. 21, p. 4 (West 2001). In fact, rather than constituting a bar to a private cause of action, "courts will take notice of the fact that defendant's conduct amounted to a crime and will give weight to the fact in determining whether the conduct also amounted to a tort." *Id.* This is in accord with the law of the State of New York.

In Abounader v. Strohmeyer & Arpe Co., 243 N.Y. 458 (1926), the plaintiff purchased containers of olive oil, which were falsely labeled as to weight. State inspectors discovered that plaintiff was offering the mislabeled containers for sale and threatened prosecution. Plaintiff was compelled to employ counsel to defend himself and subsequently sued to recover his legal expenses from the person who sold to plaintiff's vendor. The question before the Court was whether the statute conferred a right of action against a remote seller. This Court held that it did, stating as follows:

> "We ought not to assume that the Legislature intended to limit the duties of those violating such provisions as these by any technical rules of privity but that it was intended to impose a broad and far-reaching duty . . . The fact that penalties are ordained for violations of course furnishes no argument against this conclusion. Civil responsibility and public punishment by common usage have long since been established as appropriate and complementary associates.
>
> [i]t is . . . well settled that such an one who has suffered from a disregard and violation of the duty has a cause of action for his damages against the one who has disregarded his duty. From the duty and its violation there is implied a cause of action in favor of the one for whose benefit the duty was imposed . . . Violation becomes actionable default.

This rule is so general and well established that it is not subject to debate." *Id.* at 465, 466. (emphasis supplied)

The cases relied upon by the majority in the Appellate Division, Carrier v. Salvation Army, 88 N.Y.2d 298 (1996), Stroganovic v. Dinolfo, 92 A.D.2d 729 (4th Dept. 1983), and Larson v. Albany Med. Centr., *173 Misc. 2d 508 (Sup Ct. Albany 1997)*, mod. other grounds. 252 A.D. 2d 936 (3d Dept. 1998) do not in any way repudiate this "general and well established" (*id*) principle of jurisprudence. The legislative intent to craft a private a private right of action is "implied", as this Court held in Abounader, *supra*, from the violation of a criminal statute. The foregoing cases cited by the Court below merely confirm that this implication may be overcome by a clear showing that (a) permitting a private remedy would contravene the legislative scheme underlying the penal statute, (b) it would be in conflict with other statues or (c) it would be contrary to strong public policy. The fundamental implications of a private right of action remain. The burden is imposed on those opposing the private remedy to demonstrate that there exist sound public policy reasons for abrogating the judicially crafted implication. In the case at bar, it is submitted that no such showing has been or can be made.

The plaintiff in Stroganovic, players of a defunct soccer team, sued the president of the corporate owner for unpaid wages under Sec. 198-a of the Labor Law, which declared it a misdemeanor for a corporate officer to fail to pay employee wages. The Appellate Division and this Court agreed upon the absence of a private remedy against the corporate officer because of a statutory scheme which imposed civil liability upon the top ten shareholders of a non-publicly traded corporation, and criminal liability on corporate officers. The statutory pattern there clearly opted against civil liability

imposed on corporate officers for unpaid wages, and thus the presumption that the criminal statute authorized a private right of action was rebutted. The pattern of the law before this Court does not warrant such a rebuttal.

In Carrier, *supra.*, the plaintiff, resident of an adult care facility, subjected to state supervision, brought an action against the operator (Salvation Army) of the facility for the appointment of a receiver. The defendant's plan to surrender its operating certificate and close the facility had previously been approved by the Department of Social Welfare. Plaintiff complained that defendant failed in its obligations pursuant to the approved surrender plan. This Court, citing Hoxie's Painting Co. v. Cato-Meridian Cent. School District, 76 N.Y.2d 207, 211 (1990), citing Sheehy v. Big Flats Community, 73 N.Y.2d 629, 633 (1989) stated that private parties may seek relief "only if a legislative intent to create such a right is 'fairly implied' in the statutory provisions and its legislative history. This inquiry involves three factors:

(1) whether plaintiff is within the class for whose particular benefit the statute was enacted;

(2) whether recognition of a private right of action would promote the legislative purpose; and

(3) whether creation of such a right would be consistent with the legislative scheme. [citations omitted]

The third factor . . . is generally the most critical." Carrier v. Salvation Army, *supra*, at 88 N.Y.2d at 302.

This Court in Carrier denied a private right of action because adult care facilities were heavily regulated and enforcement authority was "expressly vested only in the Department of Social Service" *id* at p. 303.

Hoxie's Painting Co., *supra.*, was an action against a school district for damages by a contractor to recover for wages below the prevailing rate mandated by the labor law. This Court dismissed the claim to maintain a private cause of action, reasoning that "an implied private cause of action", subjecting the public entity to financial liability, was at variance with the unmistakable aim of the statutory scheme to impose liability upon the contractor. Hoxie's *supra* at 76 N.Y.2d at 213.

In Sheehy, *supra.*, this Court denied recovery to a minor for damages sustained in an auto accident following her consumption of alcohol in violation of Penal Law Sec. 260.20(4) [presently designated as 260.20 (2)], which criminalized service of alcohol to a minor by anyone except a parent or guardian. The Court refused to entertain a private cause of action because to do so would have been inconsistent with the express provisions of the General Obligations Law Sec. 11-100, which provided for civil action only by persons injured by the intoxicated person and not by the intoxicated person for his or her own injuries.

The foregoing decisions, Stoganovic, Carrier, Hoxie's and Sheehy, *supra.*, stand for the clear proposition that a private cause is not to be implied from a penal statute, if doing so would be at variance with the obvious legislative scheme. In Stoganovic, sustaining a private right of action for unpaid wages was directly contrary to the applicable labor law. In Carrier, such an action would have done violence to the statutory scheme embodied within the four corners of the Social Service Law. Finally,

in Hoxie's and Sheehy, a private right of action would have overturned the clear legislative intent of the applicable statutes.

Larson v. Albany Med Ctr, 173 Misc.2d 508 (Sup. Ct. Albany 1997), mod. other grounds, 252 A.D.2d 936 (3d Dept. 1998), mistakenly relied upon by the Court below, is in accord with these cases. In Larson, *Id.*, the Court rejected a private right of action to nurses alleged to have been terminated in retaliation for submitting letters pursuant to the Civil Rights Law. The Court denied a private cause of action because such a private right of action would have been inconsistent with a strong public policy against private actions for abusive or wrongful discharge of an employee. No such policy is present in the case at bar with respect to Sec. 353 of the Agriculture and Markets Law.

In the instant case, the question is whether or not to permit a private cause of action based upon the defendants' patent violation of Sec. 353. The critical issue necessary to the determination is "whether creation of such a right would be consistent with the legislative scheme. Carrier v. Salvation Army, 88 N.Y.2d 298, 302 (1990). The Appellate Division found below that sanctioning a private right of action would be inconsistent with the legislative scheme (R-203), because the legislature "explicitly determined the means by which [Article 26 of the Agriculture and Markets Law] is to be enforced (R-203). However, the only "explicit means" of enforcement identified by the Court below were Sections 371 and 372 of the Act. Section 371 does no more than authorize constables, agents of any authority with jurisdiction to prevent cruelty to animals, and police officers to make arrests or issue a summons, whereas Section 372 merely authorizes magistrates to issue arrest and search warrants. The provisions of Sections 371 and 372 do little more than is authorized for the enforcement of any penal

statute. At most, such provisions reflect a possible concern that ordinary police officers might have neither the time nor the inclination to enforce the sanctions under Article 26, and that the legislature intended to assure the availability of officers with greater animal protection motivation to enforce the article. By no stretch of the imagination can these two provisions be read as encompassing a comprehensive program for the enforcement of Article 26 that would be impeded or even inhibited by sanctioning a private right of action to enforce Sec. 353 of Article 26.

Private actions have contributed a great deal to the enforcement of governmental policy, as established by either criminal or civil statutes. Government enforcement, for example, of our anti-trust and securities laws, have been materially augmented by private causes of action. Government resources are obviously finite; such resources must be allocated, a procedure which often leave some laws unenforced or, at best, marginally enforced. Private action, such as that initiated by plaintiff, steps in to fill the vacuum in the enforcement mechanism of Sec. 353.

The decisions of this Court teach that, absent an express provision authorizing a private civil action to enforce a criminal statute, the question is one construing the legislative intent. See Abounader v. Strohmeyer & Arpe Co., 243 N.Y. 458, 463-464 (1926); Carrier v. Salvation Army, 88 N.Y.2d 298, 302 (1996); Stroganovic v. Dinolfo, 92 A.D.2d 729, 730 (4th Dept. 1983), aff'd., 61 N.Y.2d 812 (1984). Legislative intent to allow a private right of action is implied, Abounader, *supra.* at 415-416, unless the creation of such private action would clearly contravene or subvert the legislature scheme, as in Carrier, *supra.* and Hoxie, *supra.*, is in conflict with other statutes, as in

Sheehy, *supra*, or contrary to a strong public policy as in Larson, *supra*. Such are not the factual and legal parameters in the case at bar.

Recognition of a private right of action in the case at bar creates no conflict with any legislative scheme, other statutes or pre-existing clearly articulated public policy; a private right of action as sought by plaintiff under Sec. 353 is implied. Plaintiff accordingly has standing to pursue the cause of action complained of; and the majority decision of the Appellate Division should be reversed.

B. The Appellate Division Rationale Dismissing Plaintiff's Claims For Discrimination And Arbitrary And Capricious Practice Is Erroneous

Had the Court below been correct in determining that no private action is sustainable under Sec. 353, it would necessarily follow that no cause of action for discrimination and/or arbitrary and capricious conduct could be maintained. We agree with the Court below that the discrimination here is not per se illegal; and if plaintiff's sole assertion or complaint pertained to defendants' discriminatory cosmetic preferences, the plaintiff's cause of action would not be sustainable. However, such is not the gravamen of plaintiff's claim. Plaintiff's complaint is that defendants promote a mandatory standard that discriminates, in its competitive dog shows, against canine owners and competitors who have not maimed their dog, and in favor of those who act in derogation of New York law and a clear remedial public policy.

The amended complaint alleges, and for purposes of its decision the Appellate Division agreed, that amputation of a dog's tail constituted unjustifiable injury and canine mutilation, and hence constituted an act of cruelty in contravention of Sec. 353.

If, as demonstrated in Point I (A) of this brief, there exists a private right of action for a violation of Sec. 353, the plaintiff, because of his refusal to violate the law and mutilate his dog, is injured by defendants' insistence on discriminating against him by reason of that refusal. Such a discriminatory action, founded as it is on the defendants' mandated cruel standards, is and must be actionable.

In New York, employment at will remains the law. There is an overriding public policy against a private action, even for an arbitrary discharge. *See,* Larson v. Albany Med. Ctr, 173 Misc.2d 508 (Sup. Ct. Albany 1997). Nevertheless, an employee may not be discriminated against or terminated in a manner prohibited by law, such as for reasons of race, religion or nationality. Neither may a party, whether a private association or otherwise, discriminate against contestants by favoring dog show entrants who mutilate their dogs in clear violation of New York's criminal animal protection law (Sec. 353).

The Appellate Division opines that the right to compete in dog shows is not a legally protected right (R-206). Plaintiff concedes this limited point; but, plaintiff does have a right to compete without being discriminated against due to his compliance with New York law. Surely an entity can not be permitted to discriminate with impunity against law abiding citizens and in favor of those violating penal law sanctions.

C. The Appellate Division Erred In Construing Plaintiff's Complaint As An Impermissible Request For An Advisory Opinion

The Appellate Division held that plaintiff had requested a declaration as to whether he would be subject to criminal prosecution if he were to dock his dog's tail,

and was thereby seeking an impermissible advisory judicial opinion. Such is not the case here; plaintiff seeks no injunction to restrain the county district attorney or any other enforcement agency against Sec. 353 statutory enforcement. Plaintiff rather prays for injunctive relief against AKC/ABC from enforcing, applying and promoting their illegal standards (complaint, ¶ 31, R-21).

POINT II

THE APPELLATE DIVISION ERRED IN HOLDING PLAINTIFF WAS NOT ENTITLED TO DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF AGAINST THESE DEFENDANTS

The dissent below by Judge Ellerin found "there is no dispute as to what constitutes tail docking" and that "whether tail docking for purely cosmetic reasons violates Sec. 353 is solely a question of law . . . appropriate for a declaratory judgment." (R-213)

The Court below finds, in essence, that no relief is available for an overt wrong, except for plaintiff to mutilate his dog, inflict needless pain, and risk prosecution. Even were the district attorney to decline prosecution, the maiming would have been effectuated and the damage would thus be irreparable. Our courts, however, are vested with the discretionary power under CPLR §3001 to grant declaratory relief in order to stabilize contentious relations of a legal nature and eliminate uncertainty as to present or future obligations. See Saunders v. State, 129 Misc.2d 45, 49, 492 N.Y.S.2d 510, 513 (Sup. Ct. Nass. 1985).

In the present case, appellant seeks to compete on an equal basis with other Brittany owners, but to do so he must amputate his dog's tail, a mutilation which he claims would violate New York law. Conversely, respondents assert that their

discriminatory standard does not violate that law because the statute does not explicitly encompass tail docking. The declaratory judgment statute is crafted to resolve just such disputes. See the analysis by this Court on declaratory relief in N.Y. Public Interest Group v. Carey, 42 N.Y.2d 527 (1977), where it emphasized the discretionary nature of the remedy and that such relief is appropriate where legal redress is essential. *Id.* at 530-531. Where, as in the instant case, the meaning or construction of a statute is the essential question before the Court below or this Court, declaratory relief is the proper procedural remedy. Dunn & Bradstreet, Inc. v. City of New York, 276 N.Y. 198, 206 (1937). Moreover, in Aerated Products Co. v. Godfrey, 263 App.Div. 685, 35 N.Y.S.2d 124 (3d Dept. 1942), rev'd on other grounds, 290 N.Y. 92 (1943), declaratory judgment was held to be an appropriate procedural remedy in construing, among other statutes, the New York Agriculture and Markets Law. The essential purpose of declaratory judgment in the CPLR is epitomized by the undisputed factual parameters and the question of statutory construction now before this Court.

Even were the plaintiff willing to amputate his dog's tail in order to compete on an equal footing in dog show competitions, he could not do so in New York without risking criminal prosecution. The right to bring the matter for judicial review by subjecting oneself to arrest is not a cognizable remedy at law. N.Y. Foreign Trade Zone Operators v. State Liquor Authority, 285 N.Y. 272, 278 (1941). In the oft-cited case of Bunis v. Conway, 17 A.D.2d 207, 234 N.Y.S.2d 435 (4th Dept. 1962), appeal denied, 17 A.D.2d 1036, appeal dismissed; 12 N.Y.2d 645, 882 (1963), the Court granted declaratory relief to a bookseller to determine if a contemplated book sale would be in violation of the penal law; he was not required to first sell the book and incur the risk of

prosecution. In Bunis, the meaning of the statute in question was at issue in terms of its construction and application to the undisputed facts; and, hence, declaratory relief was deemed to be an appropriate remedy. See DeVeau v. Braisted, 5 App.Div.2d 603, 174 N.Y.S.2d 596 (2nd Dept. 1958), aff'd. 5 N.Y.2d 236 (1959), 363 U.S. 144 (1960), where the Second Department stated in pertinent part at 5 App.Div.2d 607:

> "One of the very purposes of a declaratory judgment is to settle a serious question of law as to the validity of a statute which would be the basis for a threatened prosecution for crime, without requiring, as a prerequisite of a judicial entertainment of the question, that interested parties first commit the very acts that are involved in the dispute and thereby run the risk of prosecution."

The Court below, in concluding that its opinion in interpreting the subject statute would be "an impermissible advisory opinion." has failed to recognize this basic purpose of the declaratory judgment statute.

POINT III

CANINE TAIL DOCKING FOR COSMETIC PURPOSES IS A CLEAR VIOLATION OF NEW YORK STATE CRIMINAL LAW

The Appellate Division, as discussed above, indicated that it considered canine tail docking to be cruel and unjustified (R-199); but it did not actually find, but rather assumed for purpose of its decision, that such practice was cruel and unjustified. If this Court agrees with plaintiff that he has standing to maintain this civil action based upon the defendants' violation of Sec. 353, and that a declaratory judgment and injunctive relief are appropriate remedies, in such event the issue is ripe for adjudication on summary judgment, as only questions of law need be decided.

The subject statute (Sec. 353) penalizes maiming and mutilation or the causing or procuring thereof. Webster's Dictionary defines mutilate as follows: "To cut off or damage a limb or other important part of (a person or animal)." [emphasis added] Webster's New World Dictionary at p. 970 (college ed. 1966). Using the ordinary meaning (see 1 McKinney's *Statutes*, Sec. 234) of the word "maiming", it is clear, therefore, that the practice of cutting off a canine's tail clearly is within the prohibitions of the statute. See, People v. Keyes, 75 N.Y.2d 343, 348 (1990), citing and relying on Webster's Dictionary and Black's Law Dictionary. The affirmations from practicing veterinarians, academics and the New York Humane Society also attest that tail docking (amputation and mutilation) causes extreme pain and poses serious medical risk. (R-165-182) The national AVMA supports this conclusion. (R-148) As the Appellate Division found, tail docking is generally performed without the use of anesthesia (R-199); and "although *the* point is disputed by defendants, many dog experts assert that dogs communicate with their tails, especially to other animals." (R-199) The Court below found that tail docking necessarily interferes with this natural form of communication, which could arguably result in injury not only to the dog whose tail has been docked, but to other animals with which it attempts to communicate. (R-199) Indeed, who of us does not realize that a dog conveys its good intentions, even when barking and jumping upon us, by wagging its tail.

The American Veterinary Medical Association ("AVMA") in a formal resolution states, *inter alia*:

> "Ear cropping and tail docking in dogs for cosmetic reasons are not medically indicated nor of benefit to the patient. These procedures cause

> pain and distress, and as with all surgical procedures are accompanied by inherent risks of anesthesia . . . ." (R-148)

AVMA acknowledges in its statement about this resolution that it does not prohibit veterinarians from performing tail docking (R-148); it has no power to prohibit same. AVMA does, however, have the authority to make a medical determination that canine tail docking is "not medically indicated" and causes "pain and distress". (R-148) This is precisely the result of tail docking and the AVMA determination to that effect is evident. If this Court accepts this undisputed statement from the most authoritative body in the nation on animal treatment, then this Court must find, as a matter of law, that the practice of tail docking is unjustified and the practice is accordingly in derogation of Sec. 353. The AVMA condemnation of tail docking as a causation of pain – with or without anesthesia – is patent. (R-148) Moreover, the only New York public welfare entity expressing an opinion on this issue, the Humane Society of New York, confirms the factual bases for a violation of the New York animal cruelty law. (R-165) The New York City Animal Medical Center also condemns cosmetic tail docking. (R-162, see fn.)

Nevertheless, as the Appellate Division stated, "the statute does not prohibit causing pain to animals, but unjustifiably mutilating or causing unjustifiable pain." (R-200) Justification for an otherwise criminal act is a matter of law for determination by the court. (Penal Law Section 35.05) It is no less an issue of law because lack of justification is made an element of the crime.

In the courts below, defendants have stated their bases for justification of the arcane practice of tail docking. They have submitted two rationales for the practice.

First, the tail amputation provision impacting plaintiff's canine is admittedly part of the breed standard for the Brittany. (R-14, 15, 119) As alleged by respondents, the questioned "breed standards are used . . . to breed better quality dogs." (R-135, 136) Webster's New World Dictionary at p. 180 defines the concept of "breed" as follows: "to bring forth offspring from the womb." Black's Law Dictionary at p. 172 (West 5th ed. 1979) further defines breed as follows: "Produce by hatching or gestation." Thus, "to breed" has absolutely nothing to do with the post-natal act of tail docking. Docking is simply an arcane custom, now banned almost universally as a relic of animal cruelty (R-178, 179), and irrationally adhered to by respondents for reasons of economics, fashion, or non-functional habit. (R-187) The affidavits submitted by appellant's medical experts confirm the absence of any rational bases for tail docking. (R-165-186)

The foregoing rationale of defendants borders on the frivolous. Neither dogs nor any animal species produce progeny different from themselves by amputation of an appendage that a breeder finds cosmetically undesireable. If there were any credence to this argument, it would not have been necessary to continue such amputation practices for nearly a century; at this time, the so-called breeding would have genetically produced the Brittany with a naturally bobbed tail. For example, do the issue of a human couple, one of whom has an arm amputated prior to conception, arrive in this world with a missing arm? This Court should take judicial notice of this obvious fact and reject this spurious attempt at justification by defendants.

The second justification submitted by defendants to justify their cosmetic amputation is that a long tail constitutes a hazard when hunting in the brambles. (R-121) This analysis has been demonstrated to be totally specious. (R-137,138) In any

event, as the Appellate Division dissent articulated, "Assuming arguendo that the protection of hunting dogs against tail injuries justifies docking the tails of hunting dogs, it is not a justification for docking the tails of non-hunting dogs, such as plaintiff's dog, for purposes of AKC competitions." (R-213, 214) Moreover, even the rationale for docking hunting dogs is shown to be without any bona fide factual basis. (R 137, 138, 139, 170, 171)

The Sec. 353 reference to "unjustifiably" presents a question of statutory construction to be determined by this Court, as a matter of law. Webster's Third New International Dictionary, *supra*. at p. 2502 (G&G Merriam 1976) defines unjustifiable as "lacking in propriety or justice." Certainly, cosmetic tail amputation causing canine pain and cruelty does not conform to this commonly accepted criterion.

Whether an act of cruelty and infliction of pain is "unjustified" and hence interdicted by Sec. 353, is a question to be determined by this Court, as a matter of law, based upon the prevailing moral standards of the community. *People v. Voelker*, 172 Misc.2d 564, 568, 658 N.Y.S.2d 180 (Crim. Ct. Kings 1997). Moreover, the justification must be of a nature to preserve the safety of the property or overcome danger or injury. *Id.* Cosmetic tail docking certainly does not pass muster under such a standard. Just as the Court in Bunis v. Conway, 17 A.D.2d 207, 234 N.Y.S.2d 435 (4th Dept. 1962), determined the question of pornography as one of law, this appeal should construe the applicability of Sec. 353 to cosmetic tail docking as an issue of law.

Both parties have laid bare their proof in the courts below. There is no dispute as to the essence of tail docking; it is plainly, the amputation of a canine tail which is a necessary appendage composed of bone and cartilage. Such an act is an obvious

mutilation interdicted by Sec. 353, unless the practice can be otherwise justified. The defendants have offered their justifications, which are little more than a frivolous adherence to an arcane practice based solely on cosmetics (R-187) and arcane custom. Plaintiff has demonstrated by the record that the proffered justifications of the defendants are pure sophistry. The issues herein are, therefore, ripe for declaratory determination by this Court as a matter of law.

POINT IV

THE COURTS MAY INTERVENE IN THE PUBLIC PROCEDURE OF A PRIVATE NOT-FOR PROFIT MONOPOLY ENTERPRISE

Respondents argue that, as private not-for-profit corporations, they may, in essence, act without regard to the general welfare. The Appellate Division rejected this assertion of immunity, noting that this "general rule of non-interference in an organization's self-governance gives way upon a showing that its adopted rules violate state law". (R-197) Such a showing is present here. It should also be stressed that New York is not so firmly wedded, as are some other jurisdictions, to the concept of non-interference in the internal affairs of private organizations. In Simons v. Berry, 240 N.Y. 463 (1925), Judge Cardozo held that "equity will enjoin the denial to a member of the privileges of membership where the denial, if continued, will work irreparable injury." *Id.* at 465. It should further be noted that, unlike the case at bar with its overt violation of state law, the Simons case did not present any such egregious violation of state law and public legislative policy. Indeed, as Judge Cardozo infers, there is no place in New York

jurisprudence for the concept that courts are without jurisdiction to intervene in the internal affairs of private voluntary associations. That an entity is a private voluntary association, i.e., an association of two or more persons, can, as a matter of logic, have no bearing on the applicability of the civil or criminal laws to its conduct. If the behavior of an association is in compliance with law, it may do as it pleases. Conversely, if the actions, as here, are in derogation of law, the association is subject to the mandates and sanctions of the law. After all, the organized crime consortium is a private voluntary organization, but it would be frivolous to argue that its functions are, thereby, beyond the reach of the courts. This illogical and wrong-headed concept that private voluntary associations enjoy an immunity from the law not available to others should be forcefully repudiated by the judicial branch.

It has not been denied by respondents that AKC is a multi-million dollar revenue producing entity, one which has a virtual monopoly over the registration of purebred dogs and dog showing. (R-13, 161, 162) Even if this Court were reluctant to jettison the dated notion against intervention in the internal affairs of such quasi-private entities, that cannot be the case, where, as here, (1) the entity is a nationwide monopoly controlling the purebred dog industry (R-12, 13, 161); (2) the entity promotes a national policy in derogation of law; (3) the monopoly permits an aggrieved party no alternative area of competition (R- 17); and (4) its policy is condemned by the national American Veterinary Medical Association (R-148).

In Martin v. PGA Tour, Inc., 994 F. Supp. 1242 (D. Ore. 1998), the federal district court intervened in the procedures of another multi-million dollar alleged not-for-profit entity in order to compel compliance with a federal statute on disability. The United

States Supreme Court, in affirming the ninth circuit in Martin, noted that the PGA did not challenge the *nisi prius* ruling that the PGA was not exempt as a private club from the rule of law. 532 U.S. 661, 672 (2001). Neither are the respondents in the present action immune.

When an otherwise private entity through the exercise of its monopoly power impacts a significant segment of society, it assumes a fiduciary duty to the general public and is thus subject to judicial scrutiny. 76 Harv. L.Rev. 983, 1037-1049 (1963), citing Falcone v. Middlesex County Medical Society, 34 N.J. 582, 170 A.2d 791 (Sup. Ct. 1961). Such is also the case on the present appeal. In Crouch v. National Ass'n for Stock Car Racing, 845 F.2d 397 (2d Cir. 1988), the Second Circuit, while not intervening in the matter of the contest of a road-car race, indicated that the principle of judicial non-interference in voluntary associations would not be applicable if, as is the case here with AKC, the not-for-profit entity "completely dominate the field"[s] of commerce at issue. *Id.* at 400. In short, the status of the defendants-respondents, as private voluntary associations, is not apposite to a determination of the present appeal.

The respondents, by virtue of their alleged not-for-profit sporting status, seek to obtain judicial sanction for arbitrary, capricious, arcane and inhumane policies. Respondents further appear to argue that "private sporting associations" should be granted a form of immunity under law for their actions promoting statutory animal cruelty. Perhaps that may have been acceptable when August Belmont caused the AKC to be formed in 1884, but the realities warrant a different conclusion in the 21st century. The courts have properly gone where none have gone before in order to grant appropriate societal relief. Private golf clubs are no longer insulated and protected islands of

discrimination. The PGA golf tour has been shown that it too must act responsibly and equitably. Sporting associations are no longer beyond the pale of the law. The AKC has an affirmative fiduciary duty to the public at large not to promote inhumane and illegal practices.

Respondents are the principal actors pursuing and promoting a policy in overt derogation of New York law. Respondent AKC argued below (R-47, 48) that because it does not itself engage in the act of tail docking, no cause of action is stated. Certainly public policy cannot permit a national monopoly to cause, procure, encourage, instigate and control a policy in violation of a state criminal remedial statute and thereby insulate its actions from judicial scrutiny and appropriate remedy. Where there is, as here, a wrong there certainly should be a remedy under law.

In order to be a responsible participant in violation of law, whether it be a tortious or criminal act, one need not be the entity which actually commits the unlawful act. As the language of Sec. 353 explicitly states ("causes, procures"), one who "advises, encourages, procures, instigates or controls" is equally responsible. 74 Am. Jur. 2d, *Torts*, Sec. 60 at p. 656 (West 2001). A beneficial organization, if indeed the AKC's alleged not-for-profit status can permit it to be so characterized, is liable for injuries brought about by its own procedures and by-laws. Thompson v. Knights of Maccabees, 189 N.Y. 294 (1907); see also Steinberg v. Goldstein, 51 Misc. 2d 825, 274 N.Y.S. 2d 46 (Sup. Ct. Kings 1966), aff'd 27 A.D. 2d 955, 279 N.Y.S. 2d 240 (2d Dept. 1967). Steinberg, although finding no liability on the facts in a civil assault case, reiterates the principle of liability on the part of one who acts "in some way [to] command, authorize, justify or approve the act". *id.*, 51 Misc. 2d at p. 826. Such is the case with respect to

the respondents. The remedial criminal statute here at issue establishes a clear public policy which the respondents may not be permitted to emasculate by an assertion of immunity. The AKC Charter and By-Laws constitute the inherent catalyst for the wrong alleged in the complaint. (R-151, 152, 160, 161)

CONCLUSION

It is respectfully submitted that the Decision and Order of the Appellate Division, First Judicial Department, should be reversed and that summary judgment should be directed by this Court in favor of plaintiff-appellant. This Court is here presented with a question of statutory construction, one clearly ripe for the issuance of declaratory judgment and injunctive relief barring the mutilation of canines.

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Respectfully submitted,

JON H. HAMMER
Plaintiff-Appellant Pro Se
420 Lexington Avenue, Suite 3005
New York, New York 10170
Tel. #(212) 697-8181

JOSEPH P. FOLEY, ESQ.
7 Mohican Lane
Irvington, NY 10533
Tel. #(914) 591-6776

On the Brief:
Leslie K. Anker