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

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JON H. HAMMER,

Plaintiff,

Index No. 600029/2000

-against-

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

Defendants.

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MEMORANDUM OF LAW OF
IN DEFENSE OF ANIMALS IN REPLY TO DEFENDANTS'
MEMORANDUM IN OPPOSITION TO IDA'S MOTION
FOR LEAVE TO APPEAR AS AMICUS CURIAE

In Defense of Animals ("IDA"), by its attorneys Egert and Trakinski, respectfully submits this reply memorandum of law, together with the affidavit of Leonard Egert ("Egert Affidavit"), in response to the American Kennel Club, Inc.'s Memorandum in Opposition to IDA's Motion For Leave to Appear as *Amicus Curiae* ("Defendants' Memorandum").

POINT I

IDA'S REQUEST TO APPEAR
AS *AMICUS CURIAE* IS PROPER

IDA has moved this Court for leave to appear as *amicus curiae* for the purpose of directing the Court to the proper legal authority for claims previously made by parties to this action. Specifically, IDA encourages the Court to apply the section of the Agriculture and

Markets Law which more appropriately addresses the issues at hand. (See Memorandum Of Law In Support Of IDA's Motion For Leave To Appear As Amicus Curiae ("IDA Memorandum") at 4-6.) IDA properly seeks to provide new information and relevant argument to the Court concerning issues of public interest in this case which are of particular concern to IDA's membership. Ladue v. Goodhead, 181 Misc. 807, 811, 44 N.Y.S.2d 783, 787 (Erie Co. Ct. 1943); (Egert Affidavit, ¶ 3.) As Defendants concede, in "cases involving questions of important public interest leave is generally granted to file a brief as amicus curiae." Colmes v. Fisher, 151 Misc. 222, 271 N.Y.S. 379 (Erie Co. Ct. 1934); (See Defendants' Memorandum at 2.) Since IDA is not seeking to participate further in this action (Egert Affidavit, ¶ 2), Defendants' assertion that the "appropriate procedural vehicle for [IDA's] appearance is a motion to intervene," is misguided. (Defendants' Memorandum at 2.)

Moreover, Defendants' allusion to IDA's lack of standing is merely intended to distract. (Defendants' Memorandum at 2 and 4.) It is well settled that *amicus curiae* need not assert standing in order to appear. "A person may participate *amicus curiae* where he has no right to appear in a suit, but is allowed to introduce argument, authority or evidence to protect his interests." Ladue, 181 Misc. 807, 811, 44 N.Y.S.2d 783, 787 (Erie Co. Ct. 1943).

In urging the Court to deny IDA's request to appear as *amicus curiae*, the Defendants claim that the only issues to be determined are justiciability and Plaintiff's standing. (Defendants' Memorandum at 3.) Yet this assertion ignores not only Plaintiff's claims (Plaintiff's Affidavit in Opposition to Defendants' Motions to Dismiss ("Plaintiff's Affidavit") ¶¶ 6, 9, 13, 14, 16 and 17), but the scope of the AKC's own argument in its Motion to Dismiss. As an alternative basis for its Motion to Dismiss, the AKC contends that "[e]ven if the Court determines that Plaintiff has

standing to enforce Section 353-a . . . Plaintiff has failed to state a claim for violation of Section 353-a as against the AKC because the AKC does not perform the docking procedure." (Memorandum of Law in Support of the AKC's Motion to Dismiss the Complaint at 14.) Thus, assuming the Court rejects the justiciability and lack of standing defenses, analysis of the claims being brought under the anti-cruelty statute would still be at issue in Defendant's Motion to Dismiss. Thus, the timing of IDA's motion is proper and IDA should have the opportunity to assist the Court in its evaluation of these pertinent issues.

Despite Defendants' argument to the contrary, IDA's request for leave to appear as *amicus curiae* is consistent with the authority of Kemp v. Rubin, 187 Misc. 707, 64 N.Y.S.2d 510 (Sup. Ct. Queens Co. 1946); (Defendants' Memorandum at 6.) In Kemp, the Court stated that "the function of an '*amicus curiae*' is to call the court's attention to *law* or facts or circumstances in a matter then before it that may otherwise escape its consideration." Id. at 709, 64 N.Y.S. at 512 (emphasis added). Plaintiff has alleged that Defendants have violated Article 26 of the Agriculture and Markets Law through promulgation and enforcement of the Brittany breed standard. (Plaintiff's Affidavit, ¶¶ 6, 9, 13, 14, 16 and 17.) IDA, in urging the Court to apply §353 as opposed to §353-a in evaluating Plaintiff's claim, is seeking to alert the Court to a matter of law which it may not otherwise consider. This was IDA counsel's intent in stating that "IDA's submission . . . raises issues with regard to statutory application not presented to the Court by any of the parties." (Affidavit of Leonard Egert in Support of IDA's Motion Leave to Appear as *Amicus Curiae,* ¶ 6.) Defendant simply misrepresents counsel's statement when it asserts that counsel's words are somehow an admission that IDA "is injecting new issues into the instant action" and

(Defendants' Memorandum at 6; Affidavit of Dale C. Christensen, Jr., Esq. in Support of the AKC's Memorandum in Opposition to In Defense of Animals' Motion for Leave to Appear as *Amicus Curiae* ("Christensen Affidavit"), ¶¶ 3 and 4.)

POINT II

SECTION 353 OF THE AGRICULTURE AND MARKETS LAW PROVIDES PLAINTIFF WITH A COGNIZABLE CAUSE OF ACTION

IDA maintains that §353 of the Agriculture and Markets Law is the appropriate context within which to consider Defendants' conduct. Defendants' contention that there is no "legally relevant distinction between section 353 and 353-a" (Defendants' Memorandum at 5) is without merit. Section 353 proscribes conduct which "willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty." (IDA Memorandum at 4.) This language does not appear in §353-a. Clearly, the Legislature drew a distinction between the two provisions, establishing §353-a as a felony for acts that are either "intended to cause extreme physical pain" or "carried out in an especially depraved or sadistic manner." Application of §353 presents Plaintiff with an opportunity to establish, through discovery and investigation, a *prima facie* case against Defendants.

Avoiding the merits of Plaintiff's claim, Defendants seek dismissal asserting that no private right of action exists. (Defendants' Memorandum at 6.) Defendants rely primarily on Jones v. Beame, 56 A.D. 778, 392 N.Y.S.2d 444 (1st Dept. 1977), which denied standing to resident taxpayers and organizations seeking a "declaratory judgement that New York City [was] operating certain of its zoos in violation of the Agriculture and Markets Law." Id. at 779, 392

operating certain of its zoos in violation of the Agriculture and Markets Law." Id. at 779, 392 N.Y.S.2d at 445. The Appellate Division, First Department, was concerned about extending standing "to substitute judicial oversight for the discretionary management of public business by public officials." Jones, 56 A.D.2d at 779, 392 N.Y.S.2d at 445 (emphasis added; citing Abrams v. N.Y.C. Transit Authority, 39 N.Y.2d 990, 992, 387 N.Y.S.2d 235, 236). It was the Court's hesitancy to "interpose litigants and the courts into management of public enterprises" which caused the Court to deny standing. Jones, 56 A.D.2d at 779, 392 N.Y.S.2d at 445. The Court was not, as Defendants claim, imposing a blanket prohibition on a private right of action. In fact, while denying standing, the Court directly acknowledged that Plaintiffs "may be able to seek enforcement of the criminal sanctions for violation of the Agriculture and Markets Law." 56 A.D.2d at 779, 392 N.Y.S.2d at 445. In the instant case, granting standing to Plaintiff would in no way require the Court to inject itself or Plaintiff into the management of a public enterprise.

Defendants' reliance on Walz v. Baum, 42 A.D.2d 643, 345 N.Y.S.2d 159 (3d Dept. 1973), is similarly misplaced. In Walz, the Court denied standing to a citizen seeking injunctive relief against State officials pursuant to article 78 of the CPLR with regard to allegedly cruel and inhumane slaughter methods. Id. The Court found that defendants did not have any special duty to enforce the anti-cruelty provisions so that article 78 of the CPLR provided no right to relief. Baum, 42 A.D.2d at 643, 345 N.Y.S.2d at 159. The Court also found that plaintiff had no personal or property rights at stake. Id. In the instant case, Plaintiff is not seeking to compel a State official or agency to enforce the anti-cruelty statute, but is seeking declaratory and injunctive relief against a private entity actually furthering continuing acts of cruelty. Moreover, Plaintiff has demonstrated a personal stake in the outcome of the case and should be afforded the

opportunity to develop his claims. (See Plaintiff's Affidavit, ¶¶ 9, 10, 14 and 17.)

Finally, Defendants rely on a Port Jervis City Court's decision as support for their contention that tail docking is not actionable. People v. Rogers, 703 N.Y.S.2d 891 (Port Jervis City Ct. 2000); (Defendants' Memorandum at 8.) However, the Rogers Court reaches its conclusions without any meaningful analysis of the conduct at issue, without consideration of contemporary medical opinions regarding tail docking in general and by employing a strained statutory analysis. The Court relies on the regulation of dog ear cropping and the prohibition on horse tail docking to conclude that the Legislature must therefore have meant to exclude dog tail docking from the purview of the statue. This analysis assumes that because certain acts (among a vast array of possibilities) have been regulated or specifically proscribed under the statute, all other acts not specifically addressed must therefore be lawful. The Court cites no legislative history or support for its analysis and ignores the fact that the legislature did not, and indeed could not, draft a comprehensive list of proscribed acts of animal cruelty. People v Bunt, 118 Misc.2d 904, 909 (N.Y.Just.Ct. 1983). Following the Rogers Court's reasoning to its logical conclusion, tail amputation performed on any animal (except horses), in any manner, and for any reason, would not run afoul of the anti-cruelty statute because the act was not specifically prohibited by statute. [1] This Court should reject the holding of Rogers as unpersuasive.

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[1]Indeed, the Rogers Court describes amputation of a dog's tail as "essentially innocent conduct" and "[t]he legislature may not validly make it a crime to do something which is innocent in itself merely because it is done improperly." 703 N.Y.S.2d at 896 (citing People v. Bunis, 9 N.Y.2d 1, 4, 210 N.Y.S.2d 505, 507 (1961))(prohibition on the sale of coverless magazines found unconstitutional). The Rogers Court is essentially equating amputation of a sentient creature's body part without anesthesia with the act of removing covers from magazines.

CONCLUSION

For the foregoing reasons, In Defense of Animals respectfully requests that the Court enter an order granting IDA's Motion for Leave to Appear as *Amicus Curiae*, and grant such other and further relief as it deems necessary.

New York, New York
April 25, 2000

Respectfully submitted,

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