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To be argued by
JOSEPH P. FOLEY

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

JON H. HAMMER,

Plaintiff-Appellant,

Docket No.

-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

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New York County Clerk's Index No. 600029/2000

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PRELIMINARY STATEMENT

Plaintiff-Appellant, Jon H. Hammer (hereinafter "Plaintiff" or "Appellant") appeals from an order dated February 20, 2002 (entered in the New York County Clerk's Office on February 26, 2002) which dismissed Plaintiff's amended complaint with prejudice. (R-7)* The Court below had previously dismissed Plaintiff's initial complaint by an Order dated January 4, 2001, with leave to replead (R-31). Plaintiff thereafter timely served the amended complaint (R-12), which is the subject of the order from which the present appeal is taken.

QUESTIONS PRESENTED

1. Does amputation of canine tail bones for cosmetic purposes come within the purview of the criminal sanctions of Section Sec. 353 of the New York Agriculture and Markets Law?

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* (parentheses refer to record on appeal: pages R-)

2. 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?

3. Does Plaintiff-Appellant have standing under Sec. 3001 of the CPLR to obtain declaratory relief, to the effect that Defendants-Respondents have mandated that Plaintiff-Appellant act in contravention of a remedial criminal statute in order to engage, on an equal footing, in a sporting competition nationally regulated by the American Kennel Club (hereinafter "AKC", "Defendant" or "Respondent")?

STATUTE INVOLVED

Agriculture and Markets Law Sec. 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...is guilty of a misdemeanor." (emphasis supplied)

NATURE OF THE CASE AND FACTS

The amended complaint (R-12) sets forth facts which have not been materially disputed by Respondents or controverted by the 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 Respondent, 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.*)

Medical experts, the Humane Society of New York, and the national American Veterinary Medical Association (hereinafter "AVMA") have clearly found cosmetic tail docking/amputation to cause extreme pain and serious medical complications to the canine. (R-148, 153-156, 165-186) It follows that any such action that "causes" or "procures" same would be in derogation of the criminal statute above cited. There is no credible *indicia* that tail docking serves the slightest utilitarian or practical purpose. Indeed, the converse is the case (R-138, 144); the tail is an essential anatomical component of the canine. (R-144)

The AKC's bible of operations ("The Complete Dog Book") mandates that "a dog changed in appearance by artificial means" is disqualified in breed showing; but disingenuously cosmetic amputation of the tail is not deemed to have been effectuated by such disqualifying artificial means. (R-95, 143) The AKC further disqualifies any dog with ears cropped in derogation of law (R-96), but it fails to act similarly with respect to tail amputation in contravention of the New York Agriculture and Markets Law, Sec. 353.

The Court below did not consider the applicability of the subject statute to the undisputed facts. The Court further misapplied the concept of discrimination and failed to perform the essential judicial function of statutory construction.

The catalyst for the instant litigation is the Respondents' adherence to a breed standard for the brittany dog, which states in pertinent part:

"Any tail substantially more than four inches shall be severely penalized." (R-25, 99, 119) The clear practical effect of the foregoing standard is to compel or promote canine tail docking or amputation in derogation of New York criminal law. (R-15, 16, 20; see amended complaint) Indeed, AKC executive secretary Crowley recognized that a brittany standard

imposing such "severe penalties" acts to "effectively eliminate them from competition". (R-61)

ARGUMENT

POINT I

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

The Court below erroneously relied on the premise that Sec. 353 "does not explicitly address the practice of tail docking" (R-9). However, it would be antithetical to the judicial process if such a statute could not be reasonably construed to effectuate its obvious legislative intent, namely to prohibit animal cruelty. The statute specifically 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 (college ed.1966). Can it be seriously argued that the reasonable construction of this statute was not intended to encompass what the facts clearly demonstrate is animal (canine) cruelty?

Contrary to the rule at common law, penal statutes are no longer to be strictly construed. Such provisions must be read to promote justice and secure the objects of the law. 97 NY Jur 2d *Statutes*, Sec. 203, p. 161. See People v. Keyes, 75 N.Y. 2nd 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 clearly state 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)

The Court below found that the animal cruelty in the case at bar is not within the gravamen of the law because "tail docking" is not "explicitly" within the four corners of the statute. (R-9) It is now well settled that the:

"Fact that the statute can be applied in situations not expressly anticipated [by the legislature] does not demonstrate ambiguity; it demonstrates breadth." PGA Tour Inc. v. Martin, __ U.S. __, 121 S. Ct. 1879 (2001); see also, Pennsylvania Department of Corrections v. Yeskev, 524 U.S. 206, 212 (1998).

Oliver Wendell Holmes, Jr., in his 1881 treatise, has directed the judiciary to a path, in which it enables society to grow and evolve. Professor Holmes stated, in pertinent part, as follows:

"The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious,...have had a good deal more to do than the syllogism in determining the rules by which men should be governed. Holmes, The Common Law, Little Brown & Co. (1938 ed.) at p 1.

This Court should reasonably construe the provisions of Sec. 353 of the Agriculture and Markets Law. In addition to the foregoing analysis and guidance from cited federal cases, the New York Legislature has provided assistance in this judicial task. It is manifest that Sec.353 is a remedial statute designed to promote humanitarian ends consistent with the present state of societal values.

1 McKinney's Statutes, Sec. 321, directs, in pertinent part, as follows: "...Remedial statutes meet with judicial approval and are liberally construed to spread their beneficial results as widely as possible... and to promote justice." See also, Machinski v. Ford Motor Company, 277 App. Div. 634, 102 N.Y.S. 2d 208, 213 (3d Dept. 1951). The narrow interpretation of Sec. 353 adopted by the Court below is at variance with the basic rules of statutory construction.

It is in substance admitted by Respondents that the AKC/ABC national rules and standards mandate amputation of the brittany tail; absent compliance therewith Appellant is "effectively eliminate[d]...from competition". (R-61) It would seem self evident that such conduct is the *raison d'etre* for canine mutilation, as proscribed by statute; and that no further proof or *indicia* thereof should be deemed necessary. Nevertheless, the record is replete with clear and convincing evidence that the actions of the Respondents result in animal cruelty by reason of the cosmetic amputation of an essential appendage, designed by nature to benefit an animal. (R-138)

The Court below dismissed the amended complaint because Plaintiff ostensibly failed to "plead unlawful discrimination since any alleged discrimination on the basis of Plaintiff's dog's tail length is not proscribed by any local, state or federal law". (R-8) This rationale misapprehends the gravamen of Plaintiff's claim, which is grounded upon Sec. 353 of the Agriculture and Markets Law. (pars. 18, 20, amended complaint R-16,17) The trial Court erred because it failed to consider that Respondents' rules are proscribed by New York law. There is overt discrimination practiced by the AKC/ABC. Their rules state that "any tail more than four inches shall be severely penalized. (R25,29) (emphasis supplied) This mandates that owners of brittany dogs are to be "severely penalized" if the tails of their canines are longer than four inches. Conversely, the owners of dogs with docked tails four inches or less are not penalized. This is just what is meant by discrimination. The essential question is whether such discrimination is lawful. Clearly, it is unlawful, since the only way for a brittany dog owner to be placed in this AKC/ABC rule-favored category is to amputate the tail. To engage in such acts of cosmetic mutilation is in violation of New York State law, in that it constitutes maiming and mutilation under law. It is precisely such conduct which is interdicted by the governing statute.

POINT II

PLAINTIFF HAS STANDING TO MAINTAIN THE INSTANT ACTION

The Court below found that Plaintiff had no legally protected interest in the present matter or that Plaintiff's claim "falls within a zone of interest that is protected by any law". (R-8) AKC is a national monopoly and Plaintiff has a right to compete in its events. However, Plaintiff cannot feasibly engage in such competitive canine events with other brittany owners, unless he or she violates New York State law by cosmetic tail amputation.

The recent decision by the U.S. Supreme Court in Martin v. PGA Tour, Inc., __U.S. __, 121 S. Ct. 1879 2001, makes it evident that a private sports organization is subject to direction of the Court to revise its standards of competition or even the rules of its game (i.e. all players must walk the course) if such rules or standards are in derogation of law. Appellant seeks no more, namely, an order to compel compliance with a remedial New York animal protection penal statute. As with Casey Martin, the Plaintiff is denied the essential ability to compete on an equal footing with the other contestants because of Respondents' discriminatory standards. Respondents would have the Courts deny the practical reality and clear intendment of its subject breed standard. See Indiurn Corp. of America v. Semi-Alloys, Inc., 591 F. Supp. 608, 612 (N.D.N.Y. 1984), where the Court noted that there is no hard and fast rule as to whether a case and controversy exists, there always being a question of degree in light of the "realities". 591 F. Supp. at 612. Respondents would have this Court plainly ignore the "realities" and compel Plaintiff to perform vain, futile, cruel and illegal acts of cosmetic mutilation in order to have a basis for legal redress. See also, Matter of Storar, 52 N.Y. 2d 363 (1981).

In Animal Legal Defense Fund v. Glickman, 154 F. 3d 426 (D.C. Cir. 1998), cert. denied., 526 U.S. 1064, the District of Columbia Circuit, *en banc*, in reliance on United States Supreme Court precedent, held that the plaintiffs challenging animal treatment under the Federal Animal Welfare Act, 7 U.S.C. Sec. 2143, had standing to assert rights thereunder:

"There need be no indication of congressional purpose to benefit the would-be plaintiff.... Instead the test...asks only whether the interest sought to be protected by the complainant is *arguably* within the zone of interests sought to be protected by the statute." 154 F.3d at 444.

Appellant's claim falls within the foregoing principle.

POINT III

DECLARATORY RELIEF IS WARRANTED IN THE CASE AT BAR

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 by the District Attorney. Even were the District Attorney to decline prosecution, the maiming would have been effectuated and the damage would thus be irreparable.

Our Courts are vested with the discretionary power under CPLR Sec. 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). As in Saunders, the facts in the instant action, although not life and death, are analogously ripe for determination by declaratory judgment.

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 the Court of Appeals on declaratory relief in N.Y. Public Interest Group v. Carey, 42 N.Y. 2d 527 (1977), where the Court noted the discretionary nature of the remedy and that such relief is appropriate where legal redress is essential. 42 N.Y.2d at pp. 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 Appellate Court, declaratory relief is the proper procedural remedy. Dun & 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 the 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 to 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. 2nd 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 "purely advisory" (R-9) has failed to recognize this basic purpose of the declaratory judgment statute.

POINT IV

THE COURTS MAY INTERVENE IN THE PUBLIC PROCEDURES 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. They submit further that mutilating a canine by sanctioning and imposing a standard that "causes, procures" or mandates amputating a dog's tail, somehow, "promote[s] the integrity of the sport of purebred dog breeding shows", is "used by breeders to guide them...to breed better quality dogs" and encourages "breeding to an ideal type". (R-56, 58, 59, 116, 117, 135,136) It defies logic and the submitted expert opinions to conceive that cosmetic amputation can possibly achieve such results. If there were the slightest credence to this spurious

argument, it would not have been necessary to continue such amputation practices for nearly a century; at this late date, the so-called breeding would have genetically produced the brittany with a naturally bobbed tail.

As alleged by Respondents, the questioned "breed standards are used...to *breed* better quality dogs". (emphasis supplied) (R-135,136) Webster's New World Dictionary defines the concept of "breed", as follows: "to bring forth offspring from the womb." Black's Law Dictionary 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 apparent reasons of economics, fashion, or non-functional habit. (R-187) The affidavits submitted by Appellant's medical experts indisputably confirm the absence of any rational, physical or other bases for tail docking. (R-165-186)

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) While, as a general rule, courts may be reluctant to intervene 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-17, 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-161, 162); and (4) its policy is condemned by the national American Veterinarian 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. __U.S. __, 121 S. Ct. at p. 1888. Such is the case with the Respondents in the present action.

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 Cit. 1988), the Second Circuit, while not intervening in the matter of the contest of one 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 dominated the field" of commerce at issue. *id.* 845 F. 2d at p. 400 The refusal of the Court below "to become involved in the internal governance of private not-for-profit sporting associations", apparently because they "are experts in the field of pure-bred dogs" (R-8, 9), is no more persuasive than was the testimony of the noted golfing professionals who testified for the PGA (Arnold Palmer, Jack Nicklaus and Ken Venturi) in the Martin case.

The Court below found in its interlocutory opinion that it was not being asked by Plaintiff "to inject itself into the management of AKC's internal affairs but merely to rule on the legality of a widespread practice which appears to be attributable, in large part, to the AKC tail standard". (R-41) Again, this is an issue which is ripe for judicial resolution by declaratory determination.

POINT V

PLAINTIFF DOES NOT SEEK JUDICIAL IMPRIMATUR FOR CANINE BREED STANDARDS, BUT ONLY FAIR AND IMPARTIAL TREATMENT

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 fairly. 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. The Court below erroneously assumed that Respondents, by virtue of their expertise in the field of pure-bred dogs (R-9), are entitled to have the Court judicially abstain with respect to enforcement of a remedial penal statute.

Respondents are patent principal actors pursuing and promoting a policy in overt derogation of New York law. Respondent AKC argued below (R-47, 48) that since 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 derogation of a state 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

available under law.

In order to be a responsible participant in a 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 Section 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. 655-656 (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 the 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. 2nd at p. 826. Such is the case with respect to the instant Respondents. The remedial criminal statute here at issue establishes a clear public policy which the Respondents may not be permitted to emasculate by reason or assertion of some type of newly minted immunity. The AKC Charter and Bylaws inevitably bring about the wrong complained of below. (R-151,152, 160, 161)

CONCLUSION

It is respectfully submitted that the order appealed from should be reversed and that summary judgment should be directed by this Court in favor of Plaintiff-Appellant. The Respondents assert that tail amputation causes no pain and poses no medical risks. Conversely, Appellant's affidavits submitted by expert veterinary clinicians, academics, the Humane Society

of New York and the American Veterinary Medical Association indisputably confirm that there is no credible material evidence controverting the fact that tail docking does cause pain, inflicts cruelty and poses serious medical risks in violation of New York law. The Court is thereby presented with a question of statutory construction, one which is ripe for the issuance of a declaratory judgment prohibiting the mutilation and maiming of canines for cosmetic purposes.

Respectfully submitted,

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