STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

CATSKILL ANIMAL SANCTUARY,

Plaintiff,

-against-

MARY DAWN SITORS, individually and doing business as PALOMINO PALACE,

Defendant.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 55-05-01743 Index No. 05-3450

Appearances: Leonard Egert, Esq.
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DECISION/ORDER

George B. Ceresia, Jr., Justice

This is an action which the plaintiff, a New York Not-for-Profit corporation which operates an animal sanctuary in Ulster County for abused, abandoned and neglected horses, has brought pursuant to sections 373 (2) and (3) of the state Agriculture and Markets Law

to, *inter alia*, obtain a judgment awarding it permanent and unconditional custody of 19 horses seized in February 2005 from the horse breeding facility known as "Palomino Palace" which the defendant owns and operates in Sloansville, New York. By order to show cause dated December 7, 2006, the plaintiff has moved for a preliminary injunction restraining the defendant or anyone on her behalf from receiving and/or accepting custody of the horses and any of their offspring and granting the plaintiff temporary custody of the horses pending the ultimate determination of this action.

The defendant opposes the motion and cross-moves for an order and judgment dismissing the complaint pursuant to CPLR 3211 (a) (4) and CPLR 3211(a) (5) on the grounds that at the time of the commencement of the action in 2005, there was another action pending between the parties in Schoharie County for the same relief, and on the grounds that the instant action is barred by res judicata and collateral estoppel. The defendant also moves for dismissal pursuant to CPLR 3211(a) (7) on the grounds that because the defendant has been acquitted of all criminal charges connected with the seizure of the horses, the complaint fails to state a cause of action.

This case had its genesis in February 2005 when the New York State Police, after conducting an investigation of defendant's facility which was apparently prompted by allegations of poor conditions there, obtained a search warrant from the Town of Carlisle Justice Court, seized 20 horses and gave possession and custody of the horses to the plaintiff (one of horses was subsequently euthanized due to its severely ill condition). The unsanitary

conditions found to exist in the defendant's facility and the emaciated and dehydrated state of the animals resulted in the aforesaid criminal charges (20 counts of misdemeanor violation of Agriculture and Markets Law § 353) being brought against the defendant on February 8, 2005 in Town of Carlisle Justice Court. Throughout the pendency of the charges, the surviving seized horses resided at the plaintiff's facility or in foster boarding.

The history of the criminal charges is lengthy and convoluted. After the transfer of custody of the horses to the plaintiff, the plaintiff sought a security posting from the defendant pursuant to Agriculture and Markets Law § 373 (6) to cover the costs of care for the horses, including veterinary expenses. In a written decision dated August 2, 2005, the Town of Carlisle Justice Court denied the security posting and later, shortly before jury selection, the Justice Court dismissed all of the misdemeanor charges against the defendant and issued an order dated September 21, 2005 directing the return of the horses to the defendant.

The Schoharie County District Attorney appealed the dismissal order to Schoharie County Court, which granted the appeal and directed the reinstatement of the charges against the defendant. The charges were subsequently tried before a jury in the Town of Carlisle Justice Court. The trial resulted in a verdict on December 1, 2006 acquitting the defendant of all of the charges against her. The defendant thereafter applied pursuant to Agriculture and Markets Law § 373 (6) (c) for the return of the nineteen horses to her, which application was granted by order dated December 11, 2006 of Carlisle Town Justice

Karen Sisson. In papers submitted in support of her cross-motion, defendant indicates that the horses have been returned to her.

This proceeding was originally assigned to Hon. Vincent G. Bradley, JSC. In her initial response to the complaint, which was accompanied by a signed order to show cause dated September 30, 2005 that sought the same relief as the instant order to show cause, the defendant cross-moved to dismiss the proceeding on the grounds that there was another action pending between the parties for the same cause of action (i.e., the criminal proceeding), and because the action was barred by res judicata and collateral estoppel. In a decision/order dated December 7, 2005, Justice Bradley, in the interest of judicial economy, decided to hold the plaintiff's order to show cause and the defendant's cross-motion in abeyance pending the "final determination" of the Schoharie County District Attorney's appeal (which at the time of the decision/order had not yet been decided).

Although the appeal, as stated above, was eventually decided, the parties, having apparently interpreted Justice Bradley's decision/order as meaning that the plaintiff's case would be decided after the criminal charges were adjudicated, did not request termination of the stay of the plaintiff's case after the appeal was rendered. Rather, the plaintiff decided to obtain a new order to show cause seeking the same relief as the September 30, 2005 order based on the new factual circumstances at hand (i.e., the acquittal), and the defendant decided to respond with a new cross-motion for dismissal based on these new factual circumstances. Accordingly, the Court will treat the original order to show cause and cross-

motion as having been withdrawn and will decide only the new order to show cause and cross-motion.

Justice Bradley tragically passed away prematurely on November 24, 2006, and the case has been re-assigned to this Court for disposition.

Turning to that portion of defendant's cross-motion which seeks to dismiss the complaint pursuant to CPLR 3211 (a) (7), the Court observes that Agriculture and Markets Law Article 26 imposes criminal sanctions arising out of various acts involving the improper care and treatment of animals. In conjunction with the foregoing, Agriculture and Markets Law § 373 provides a mechanism by which a society for the prevention of cruelty to animals, such as the plaintiff, can take possession of animals which are not receiving proper care. Agriculture and Markets Law § 373 (6) (c) directs that where the owner is acquitted of criminal charges arising out of the alleged improper care of his or her animals, (or the charges are dismissed) then the animals must be returned.

A significant issue has arisen with regard to the application of Montgomery County SPCA v. Bennett-Blue (255 AD2d 705 [3rd Dept. 1998]) to the case at bar. In Bennet-Blue, criminal charges in the nature of cruelty to animals were brought against an animal owner. The animal owner eventually entered an *Alford* plea to a charge of interference with officers (Agriculture and Markets Law § 369). The Montgomery County SPCA subsequently commenced a civil action pursuant to Agriculture and Markets Law § 373 seeking permanent custody of the animals (which it had previously seized). The Appellate

Division found that the plaintiff SPCA had standing to commence the action under Agriculture and Markets Law § 373, relying, in part, upon the fact that Agriculture and Markets Law § 373 did not set forth a procedure for the return of the animals. The Court stated:

> "We agree with Supreme Court that when Agriculture and Markets Law §§ 373 and 374 are read together, it is clear that plaintiff had standing to commence this type of action as well as the authority to seek permanent custody of the animals it seized from defendant, *regardless of the criminal proceedings or the plea bargain*" (Montgomery County SPCA v Bennett-Blue, supra, at 706, citation omitted, emphasis supplied) .

As pointed out by the defendant Agriculture and Markets Law § 373 was amended twice in 1997 (see L 1997, ch. 79, § 2, eff. May 27, 1997 and L 1997, ch. 256, § 2, eff. July 21, 1997). The first amendment added two new subdivisions, 6 and 7, to § 373. As relevant here, subdivision 6 sets forth a procedure by which an animal protection agency may apply to the court to require an animal owner to post security for the board and care of animals in the agency's possession. The second amendment added language to subdivision 6 (c) which directs that where an animal owner is acquitted of criminal charges of animal cruelty (or the charges are dismissed) then the owner is entitled to return of the animals. Subdivision 6 (c) recites in pertinent part as follows:

> "The person who posted the security shall be entitled to a refund of the security in whole or part for any expenses not incurred by such impounding organization upon adjudication of the charges. The person who posted the security shall be entitled to a full refund of the security, including reimbursement by the impounding organization of any amount

> allowed by the court to be expended, and the return of the animal seized and impounded upon acquittal or dismissal of the charges, except where the dismissal is based upon an adjournment in contemplation of dismissal..." (see Agriculture and Markets Law § 373 [6] [c]).

The parties have engaged in extensive debate with regard to the application of the Bennett-Blue case to the case at bar. Plaintiff maintains that the case stands for the proposition that plaintiff has standing to commence and maintain the instant action "regardless of the criminal proceedings or the plea bargain" (Bennett-Blue, supra, at 706). Defendant argues that it has been superceded by the July 21, 1997 amendment to Agriculture and Markets Law § 373 (supra).

The Court notes that the order appealed from in Bennett-Blue was entered on October 25, 1996. From a review of the Bennett-Blue decision, it is clear that the Appellate Division applied the pre-1997 version of Agriculture and Markets Law § 373 in considering the appeal, that is, the version in effect at the time the trial court rendered its determination in 1996. In the Court's view, this was the only version of § 373 upon which the Appellate Division could rely. In addition, this explains why the Appellate Division made the comment which it did, that said section did not set forth any procedure for the return of animals.

The Court cannot ignore the fact that the State Legislature, by virtue of the 1997 amendments of Agriculture and Markets Law § 373, has directed that once an animal owner is acquitted of animal cruelty charges, the owner "shall be entitled...to return of the animal

seized and impounded..." (see Agriculture and Markets Law § 373 [6] [c], supra). No provision is made in said section for any alternative, less drastic, form of relief short of return of the animals. The Court therefore finds that the holding in Bennett-Blue (supra) does not apply to the case at bar. In light of the 1997 amendments to Agriculture and Markets Law § 373, the Court is of the view that an additional civil remedy would conflict with the mandate imposed by the State Legislature that upon acquittal, the animals be returned to the owner. Moreover, as noted, Carlisle Town Justice, by order dated December 11, 2006, directed the return of the horses; and in fact, it appears that the horses are now in the possession of the defendant. Were the Court to conclude that a separate civil remedy existed for return of the horses to the plaintiff, there would arise the unseemly, even chaotic spectacle of a civil court placed in the position of being asked, in effect, to countermand an order of a criminal court.

The Court is constrained to conclude, based upon the 1997 legislative amendments to Agriculture and Markets Law § 373, the order dated December 11, 2006 which directed return of the horses to the defendant, and the fact that the horses have been returned, that the complaint fails to state a cause of action for permanent custody of the horses.

As a part of the relief requested in the complaint, plaintiff seeks reimbursement of $61,000.00 expended to board and care for the horses. Ordinarily, the Court would be of the view that the entity which provided board and care for animals should be entitled to reimbursement of the reasonable costs of same on a theory of quasi contract, inasmuch as

"but for" the seizure of the animals, the owner would have had to bear this expense. As set forth above, however, where an owner is required to post security for payment of such expenses, and where the owner is ultimately acquitted of the charges, the owner is entitled to a full refund of the security posted, including amounts allowed by the Court to be expended (see Agriculture and Markets Law § 373 [6] [c]). It appears that in the event of acquittal of the charges, the State Legislature did not intend that the temporary custodian of the horses be reimbursed by the owner for board and care of the animals. Under the circumstances, the Court finds that the claim for reimbursement fails to state a cause of action.

The Court concludes that plaintiff's complaint must be dismissed. In view of the foregoing, the Court does not reach the other grounds advanced for dismissal in defendant's cross-motion; nor does the Court need to address defendant's request for a change of venue. In addition, in view of the dismissal of the complaint, plaintiff's motion for a preliminary injunction will be denied.

Accordingly, it is

ORDERED, that plaintiff's motion for a preliminary injunction is denied; and it is further

ORDERED, that defendant's cross-motion is granted to the extent that plaintiff's complaint be and hereby is dismissed, but is otherwise denied.

This shall constitute the decision and order of the Court. All papers are returned to

the attorney for the defendant, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: August 6, 2007
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order to show cause dated October 10, 2005, Egert Supporting Affirmation dated September 29, 2005 and Annexed Exhibits A to E.
2. Notice of cross-motion dated October 14, 2005, Kindlon Supporting Affirmation dated October 14, 2005 and Annexed Record, Vols. I to III.
3. Plaintiff's Memorandum dated November 4, 2005 in Response to Defendant's Cross-Motion to Dismiss.
4. Order to show cause dated December 7, 2006, Egert Supporting Affirmation dated December 3, 2006 and Annexed Exhibits A and B.
5. Notice of cross-motion dated January 4, 2007, Kindlon Supporting Affidavit dated January 3, 2007 and Annexed Exhibits A to C.
6. Plaintiff's Memorandum of Law in Opposition dated January 30, 2007 and Annexed Exhibits A and B.