

**Matter of Animal Fair Media, Inc. v State of New  
York, Exec. Dept., Div. of Human Rights**

2007 NY Slip Op 32810(U)

September 6, 2007

Supreme Court, New York County

Docket Number: 0106514/2007

Judge: Lewis Bart Stone

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

PRESENT: Stone

PART 505

STONE  
Justice

Index Number : 106514/2007

**ANIMAL FAIR MEDIA**

VS.

**STATE OF NEW YORK**

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 106514-07

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

e read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with attached Decision & Order.*

**FILED**

SEP 11 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6 Sept 2007

*Lewis Bart Stone*

**HON. LEWIS BART STONE J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50S

-----X  
 In the Matter of :  
 ANIMAL FAIR MEDIA, INC. :  
 :  
 Petitioner, : DECISION AND  
 : ORDER  
 THE STATE OF NEW YORK, :  
 EXECUTIVE DEPARTMENT, DIVISION : INDEX NUMBER  
 OF HUMAN RIGHTS, : 106514/07  
 :  
 Respondent. :  
 -----X

**FILED**  
 SEP 11 2007  
 NEW YORK  
 COUNTY CLERK'S OFFICE

Hon. Lewis Bart Stone, J

This proceeding was commenced by petitioner, Animal Fair Media, Inc. (“Animal Fair”), by Notice of Motion, dated June 19, 2007, pursuant to Civil Practice Law and Rules, Article 78 (“Article 78”) to prohibit the New York State Division of Human Rights (“SDHR”) from proceeding to hear a complaint, dated July 24, 2006, made against Animal Fair by Patrick Cashin (“Cashin”).

On June 13, 2006, Cashin filed a complaint with SDHR accusing Animal Fair of discrimination. About a month later, Animal Fair was requested to give a reference for Cashin to an employment agency. Animal Fair refused to give a reference while the complaint was pending. Cashin subsequently added a charge of retaliation to his complaint.

SDHR was created by statute to hear and determine allegations of unlawful discriminatory practices. Its jurisdiction is not a general jurisdiction to consider all claims of discrimination but is limited to the unlawful discriminatory practices defined in New York State Executive Law (“Exec. L.”) §296-a. Exec. L. §292(4). While discrimination by an employer by reason of certain listed attributes does constitute an unlawful discriminatory practice, (Exec. L. §296(1)(a)), an employer for this purpose of Exec. L. §296 excludes “any employer with fewer than four persons in his employ.” Exec. L. §292(5). However, like any court or body, whether of limited or unlimited jurisdiction, SDHR has the initial jurisdiction to make a determination whether a request for relief made to it falls within its jurisdictional ambit.

Under Exec. L. §297(2), where a complaint is made to SDHR, SDHR must make an initial inquiry to “determine whether it has jurisdiction and, if so, whether there is probable cause to believe that the person named in the complaint...has engaged or in engaging in an unlawfully discriminatory practice.”

Animal Fair contends in its Petition that by reason of the number of its employees, it is not subject to SDHR’s jurisdiction, and that accordingly, this Court should prohibit SDHR from proceeding. Animal Fair further contends, citing Scott v. Massachusetts Mut. Life. Ins. Co., 86 NY2d 429 (1995) that Cashin was in any

event an independent contractor and therefore not covered by the Human Rights law. SDHR responds that whether Animal Fair is subject to SDHR's is a matter of fact to be determined by SDHR, and that such issues may be raised in the hearing by Animal Fair, and the SDHR's decision on such issue (as well as any other issue) would be eventually subject to an Article 78 review after the hearing.

SDHR procedures allows SDHR to review a finding of probable cause, if request therefor has been made in a timely manner, prior to the full hearing on the complaint. 9 NYCRR §465.20(b). SDHR contends that Animal Fair made no proper and timely application under this section and accordingly, did not pursue its administrative remedies, and therefore cannot invoke this Court's prohibition jurisdiction under Article 78. The record submitted by SDHR shows no such request was made. Animal Fair asserts that, on March 5, 2007, it did apply for a re-hearing and that SDHR took no action on such application.

While Animal Fair submitted a copy of its Counsel's letter dated March 5, 2007, addressed to the SDHR Acting Regional Director requesting a rehearing, such letter was not addressed to the SDHR general counsel who is the proper person for service of such an application. Further, NYCRR §465.20(b)((2) requires an application for reconsideration to be served on "all parties." Animal Fair makes no showing that any copy of the letter was sent to Cashin. Accordingly, Animal Fair's

counsel failed to make a proper and timely request for a reconsideration under published SDHR procedures for a reconsideration. As the letter was not properly addressed, the absence of the letter in the record is understandable.

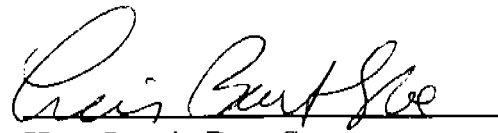
Accordingly, Animal Fair has failed to establish any right to a reconsideration of the SDHR finding of probable cause.

Although this Court must dismiss Animal Fair's petition, it notes that the SDHR finding of probable cause merely moves the matter to the next level, a full hearing before SDHR, and does not establish any fact for the hearing, including whether Cashin was an employee or an independent contractor, whether Animal Fair had fewer than four employees or whether Animal Fair was a person subject to Exec. L. §296(7) (proscribing certain retaliation) or whether Animal Fair had discriminated against Cashin. A probable cause finding does not resolve competing factual allegations. While Animal Fair has correctly noted that the jurisdiction of SDHR does not apply to small employers or to independent contractors, SDHR is the proper forum to determine whether in fact Animal Fair has fewer than four employees or whether Cashin is an independent contractor. This Court may not presume that SDHR will not properly determine such facts. In any event, any such determination would be reviewable in a subsequent Article 78 procedure, limited to the proper grounds of a CPLR Article 78 review.

The amended petition is dismissed.

This constitutes the Decision and Order of the Court.

DATED:     SEPTEMBER 6, 2007  
           NEW YORK, NEW YORK

  
\_\_\_\_\_  
Hon. Lewis Bart Stone  
Justice of the Supreme Court

**FILED**  
SEP 11 2007  
NEW YORK  
COUNTY CLERK'S OFFICE