

<b>Matter of Brown v New York State Racing &amp; Wagering Board (NYSR&amp;WB)</b>
2007 NY Slip Op 34400(U)
July 11, 2007
Supreme Court, New York County
Docket Number: 12103/06
Judge: Roy S. Mahon
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

In the Matter of CHRIS BROWN

TRIAL/IAS PART 11

Petitioner,

INDEX NO. 12103/06

For an Judgment pursuant to Article 78 of the CPLR

- against -

THE NEW YORK STATE RACING AND WAGERING BOARD (NYSR&WB),

Respondents.

The Petition by Petitioner for an Order (1) directing a prompt judicial hearing to review the action of the respondents, The New York State Racing and Wagering Board, in refusing to allow the Petitioner, Chris Brown, to continue to practice route equine dental care and maintenance upon thoroughbred race horses stabled at all New York Racing Association race tracks; in refusing to allow the Petitioner, Chris Brown, to be licensed as a veterinary assistant or dental technician under the supervision of a duly licensed New York State veterinarian; in threatening the Petitioner, Chris Brown, with words that state that if, Chris Brown, continues to render routine equine dental care and maintenance to thoroughbred race horses stabled at New York Racing Association race tracks that he will be escorted off the grounds, have criminal charges and arrest proceedings brought against him; and (2) pending the hearing and judicial determination of this proceeding, enjoining the aforesaid Respondents from enforcing and/or attempting to enforce its unilateral determination that Petitioner, Chris Brown, not be allowed to perform routine equine dental care and maintenance upon thoroughbred race horses stabled at New York Racing association race tracks; not be allowed to be employed as a veterinary assistant or dental technician by a duly licenses New York State veterinarian; in harassing and threatening the Petitioner, Chris Brown, with words stating that if he continues to render routine equine dental care and maintenance to thoroughbred race horses stabled at New York Racing Association race tracks that he will be ejected from the New York Racing Association grounds and that criminal charges and arrest proceedings will be brought against him; and/or (3) granting petitioner, Chris Brown, a preliminary injunction or temporary restraining order, preventing the herein named respondents from interfering with and/or attempting to enforce its unilateral determination that the petitioner, Chris Brown, not be allowed to earn a living by performing routine equine dental care and maintenance upon thoroughbred race horses stabled at New York Racing Association race tracks; and (4) Upon the conclusion of the judicial hearing herein before requested: (a) reviewing and annulling as unlawful, irrational, unreasonable, arbitrary and capricious and an abuse of discretion in failing, refusing and neglecting to allow the Petitioner, Chris

Brown, to continue to earn a living by practicing routine equine dental care and maintenance upon thoroughbred race horses stabled at New York Racing Association race tracks; and (b) reviewing and annulling as unlawful, irrational, unreasonable, arbitrary and capricious and abuse of discretion in failing, refusing and neglecting to allow the Petitioner, Chris Brown, to be employed by a duly licensed New York State veterinarian as a veterinary assistant or dental technician; and © reviewing as, irrational, unreasonable arbitrary and capricious, an abuse of discretion and a direct violation of the law in harassing and threatening the petitioner, Chris Brown, with ejection from the New York Racing Association grounds and in threatening the Petitioner, Chris Brown, with criminal actions and arrest proceedings to be brought against him unless the Petitioner, Chris Brown, ceases and refrains, from practicing routine dental care and maintenance upon thoroughbred race horses stabled at New York Racing Association race tracks; the Petition by Petitioner brought by Order to Show Cause for an Order granting petitioner, Chris Brown, a preliminary injunction and/or temporary restraining order, restraining and preventing the herein named respondent, the New York State Racing and Wagering Board, from interfering with and/or attempting to enforce its unilateral determination that the petitioner, Chris Brown, not be allowed to earn a living by performing routine equine dental care and maintenance upon thoroughbred race horses stabled at New York Racing Association race tracks; that the petitioner, Chris Brown not be allowed to be employed by and/or placed upon the badge list of a duly licensed New York State veterinarian; and be restrained and prohibited from ordering and/or allowing NYSR&WB investigators to threaten and harass the petitioner, Chris Brown, by stating to him that unless the petitioner, Chris Brown, refrains from practicing routine equine dental care and maintenance upon thoroughbred horses stabled at New York Racing Association race tracks that he will be ejected from the grounds and that criminal charges and arrest proceedings shall be brought and filed against him; the motion by the Respondent for an Order to dismiss this proceeding pursuant to CPLR 3211(a)(5) on the ground that it is untimely and pursuant to CPLR 3211(a)(7) on the ground that it fails to state a cause of action and the Petition by Petitioner for an Order granting petitioner Chris Brown, a preliminary injunction and/or temporary restraining order, restraining and preventing the herein named respondent, the New York State Racing and Wagering Board, from the improper and wrongful revocation and taking away of the petitioner's NYRA badge and New York State "stable agent" occupational license that had previously been issued to the petitioner so as to enable the petitioner to act as a "stable agent" for thoroughbred owner, Penny Loeb, in order that the petitioner buy and sell race horses on behalf of and for owner Penny Loeb,, which by wrongful revocation, shall in effect ensure that the petitioner, Chris Brown, is now not allowed to earn a living in any way and will ensure that the petitioner, Chris Brown, no longer have any livelihood for which to support himself and his family; from wrongfully and improperly ordering NYRA security to eject the petitioner, Chris Brown, from NYRA grounds and from wrongfully and unlawfully ordering NYRA security to charge the petitioner with "Criminal Trespass" if found upon the back stretch area of NYRA race tracks, are all determined as hereinafter provided:

This Article 78 proceeding arises out of a determination by the Respondent New York State Racing and Wagering Board that the care and maintenance rendered by the Petitioner to thoroughbred horses' teeth in various New York Racing Association race tracks constitutes the practice of veterinary medicine. As a result of said determination the Petitioner has not been allowed to perform services previously rendered to horses on New York State horse racing tracks related to a horses mouth and teeth.

In pertinent part, the Court in its prior Order dated April 19, 2007 stated:

"A review of the respective submissions establishes an issue of fact as to whether the procedures employed by the Petitioner related to a horse's teeth constitute treatment pursuant to the Education law. The Court observes that neither party has submitted evidence in admissible form from a health care professional that treats horses related to the Petitioner's procedure in issue. Based upon this issue of fact and pursuant to the provisions of CPLR

**§7804(b), a hearing is required and shall be held on May 23, 2007 at 9:30 a.m. in Part 11, Nassau County Supreme Court."**

On May 23, 2007, the parties appeared to conduct the aforesaid hearing. Post-hearing memoranda were submitted to this Court on June 14, 2007.

After hearing, the Court now makes the following findings of fact and conclusions of law.

Petitioner's first witness was Mr. Carlos Francisco Martin. He testified that he has been a thoroughbred horse trainer since 1988, but is not a veterinarian or veterinary technician. He stated that part of his duties as a thoroughbred horse trainer are to identify common injuries or ailments of the thoroughbred horses consigned to his supervision and to provide simple treatment for those injuries or ailments. Such treatments include the application of poultices, use of heat or ice and the administration of over-the-counter medications, often in the form of food additives (see, Petitioner's #1 in Evidence). If the horse's condition did not improve, or if it was not susceptible to the simple remedies, then the services of a veterinarian qualified to prescribe and inject medications would be required.

While the witness conceded that he has never "floated" teeth, as the petitioner does, he stated he was familiar with the process which involves filing the teeth of the horse which facilitates eating and the placement of the bit in the horse's mouth. According to the witness, the floating of teeth does not entail the injection or use of medications and is similar to the type of elementary treatment provided by thoroughbred horse trainers.

The petitioner testified as his second witness. He testified that he works as a equine dentist. From 1959 through 1965, he worked for the U.S. Olympic Team and was taught equine dentistry. Additionally, he took classes from the Board of Cooperative Educational Services (BOCES) and Cornell University and received his certification from 1978-1979. He has never been licensed in equine dentistry.

According to the petitioner, he conducts an oral inspection of the horse's mouth, checks its teeth and sinuses and looks for cuts on its tongue and mouth. If he discovers cuts or abrasions in the horse's mouth, he treats them with an application of salt, tincture of myrrh or baking soda.

When "floating teeth," the petitioner employs the use of a speculum to hold the horse's mouth open and blades which round off the horse's teeth. A veterinarian sometimes accompanies him to assist in identifying a problem or to administer a tranquilizer to the horse.

Petitioner's third witness was Dr. Albert Cowser Saer. Dr. Saer testified that he has been a licensed veterinarian in the State of New York for the past 20 years. According to the witness, the "floating" of a horse's teeth is a labor-intensive process which entails the filing down of sharp teeth and the removal of deciduous teeth. According to the witness, this process is undertaken when a bit placed in the horse's mouth does not fit properly and causes the horse pain.

According to the witness, the practice of "floating" teeth did not constitute the practice of veterinary medicine because it does not require the administration of medication, particularly by injection, in order to achieve its objective. Rather, the witness likened it to procedures routinely employed by horse owners, trainers, grooms, and blacksmiths who regularly apply poultices, liniments, and over-the counter products available for the health and physical well-being of thoroughbred horses.

Petitioner's fourth witness was Dr. Russell Cohen, also a licensed veterinarian in the State of New

York. He testified that he has been a licensed veterinarian for over 20 years. According to Dr. Cohen, it is the responsibility of trainers, assistant trainers, grooms, foremen and blacksmiths to check the horse's feet, apply medications and clean bandages, check feeding habits, take temperatures and generally see that the horses are maintained in good physical condition. According to the witness, none of these personnel are licensed veterinarians, but regularly participate in medicinal care of common horse ailments.

Petitioner's fifth witness was William Turner. He testified he has trained thoroughbred racehorses since 1967. He testified he was familiar with the petitioner and his work and further stated that in the field of thoroughbred racing, it is often the trainer who makes an initial determination of a horse's condition. After such a determination, regarding a horse's illness or ailment, the trainer or groom will employ various devices, such as food supplements, to correct the problem with the horse. Blacksmiths, in addition to shoeing horses, also address common hoof maladies such as cracks, abscesses, simple bacterial and fungal infections in the course of their daily responsibilities.

According to the witness, the petitioner "floats" horse's teeth, which involves the filing of the horse's teeth and care for common cuts and sores in the horse's mouths. This practice constitutes common care and maintenance of the horse and does not require a licensed veterinarian, according to Mr. Turner.

Petitioner's sixth witness was Patrick Kelly. He testified he is a thoroughbred trainer of horses. In his experience, the shoeing, dental care and grooming of horses constitutes maintaining good health for the horses.

Petitioner's seventh witness was Oliver P. Hosang also a licensed thoroughbred trainer. He also testified that it is the responsibility of the trainer to engage in good care of the horses and that he also applies liniments, poultices, heat, ice and water for treatment of common horse ailments. In the event a horse's foot needs attention, Mr. Hosang indicated he would employ the services of a blacksmith. If a horse's teeth needed attention, Mr. Hosang stated he would call in equine dentist since it is a specialized area of expertise requiring specialized tools and specialized knowledge and ability.

Petitioner's eighth witness was Cleveland Johnson, a licensed trainer and former assistant trainer of thoroughbred horses. He too, confirmed that in his experience, blacksmiths and other non-veterinary personnel perform care for horses as needed without being licensed veterinarian and that the petitioner's expertise lay in performing difficult, but standard and common dental procedures upon horses to maintain their good health and fitness.

Petitioner's ninth witness was Dr. Donald Baker. He testified he has been a licensed veterinarian for 27 years. He diagnoses and treats horse's teeth. He testified that the employment of the term "dentistry" in the context of the petitioner's work is, in his opinion, a misnomer. According to Dr. Baker, the petitioner is involved in prophylactic trimming of a horse's teeth, commonly termed "floating" teeth. This practice involves no diagnosis or treatment, but consists of filing teeth and removing exfoliated teeth from the horse's mouth. Veterinary treatment, according to the witness, involves diagnosis and treatment of medical conditions such as infections and fractures and employing radiography, diagnose and treat conditions of the horse's teeth, mandible and maxilla.

Petitioner's tenth witness, Bruce Johnstone, testified that he is the manager of racing operations for the New York Racing Authority at the Belmont race track in Elmont, NY. Previously, he had been a public trainer of thoroughbred horses. According to the witness licensed veterinarians are reluctant to perform the type of work performed by the petitioner. Trainers and grooms are responsible for managing the horse's health and keeping the horse free of pain and inflammation. Blacksmiths perform routine maintenance of a horse's foot. Licensed veterinarians are consulted for more complex medical issues requiring diagnosis

and prescription medications.

The petitioner then rested his case. The respondent's sole witness was Dr. Lance Karcher.

Dr. Karcher testified that he has been a licensed veterinarian for 22 years and is board certified as an internal medicine specialist. Moreover, he is employed as an instructor at Cornell University in large animal veterinary medicine and is a member of the American Veterinary Medical Association, the American Association of Equine Practitioners.

According to the witness, equine dentistry falls within the definition and practice of veterinary medicine. This opinion is shared, according to the witness, with at least one of the professional associations to which the witness belongs. According to the witness, equine dentistry is a growing component of veterinary care which the witness has observed in his own treatment of horses on Long Island, NY and which should be relegated only to licensed veterinarians to avoid injury to horses by lay practitioners unfamiliar with implications of equine dentistry for a horse's health.

After hearing, the Court now makes the following findings of fact and conclusions of law. The Court finds the witnesses advanced by both the petitioner and respondent credible. At issue is what constitutes "treatment" pursuant to Education Law §6701.

It is apparent to the Court from the testimony and evidence adduced at the hearing that long standing custom and practice in the field of thoroughbred horse racing has drawn a distinction between common care and maintenance of a horse's health and physical well-being and treatment afforded by licensed veterinarians and veterinary technicians. A wide variety of maladies common to horses, including simple lacerations, bruises, infections and eating disorders, are readily identifiable by personnel experienced in the care, training and management of horses. These maladies are similarly susceptible to correction by the application of simple remedies not mandating the intervention of a licensed professional.

Petitioner is engaged in the practice of what is termed "floating" horses' teeth. This practice involves the filing and grinding of teeth to permit easier mastication of horse feed and to facilitate the entry of a device known as a bit into its mouth for superior control by its rider. Additionally, deciduous teeth are sometimes extracted and common over-the-counter substances are sometimes applied to lacerations and abrasions found within the horse's mouth. No invasive surgery, prescription medications or injections are employed.

The services provided by the petitioner do not involve matters of judgment reserved exclusively for licensed veterinarians, but rather address themselves to ordinary and standard care necessary for the good health and well-being of the horse. While this does not suggest that a licensed veterinarian should not or could not undertake the practice of equine dentistry, evidence adduced at the hearing suggests that licensed veterinarians have been reluctant to perform equine dentistry because of difficulties inherent in its practice.

In the Court's view, "treatment", as defined by the Education Law, connotes a therapeutic regimen designed to correct an illness, disease, ailment or condition either diagnosed or susceptible to diagnosis exclusively by a licensed veterinarian. To find otherwise would blur the distinction between licensed veterinary care and responsible equine health care and maintenance, in the litigation regarding the multi-faceted aspects of ordinary equine health care, and impermissibly strain the meaning of the statutory term.

Based upon the hearing and the foregoing findings of fact, those portions of the Petitioner's application which seeks an Order (4) Upon the conclusion of the judicial hearing herein before requested: (a) reviewing and annulling as unlawful, irrational, unreasonable, arbitrary and capricious and an abuse of

discretion in failing, refusing and neglecting to allow the Petitioner, Chris Brown, to continue to earn a living by practicing routine equine dental care and maintenance upon thoroughbred race horses stabled at New York Racing Association race tracks; and (b) reviewing and annulling as unlawful, irrational, unreasonable, arbitrary and capricious and abuse of discretion in failing, refusing and neglecting to allow the Petitioner, Chris Brown, to be employed by a duly licensed New York State veterinarian as a veterinary assistant or dental technician; and (c) reviewing as, irrational, unreasonable arbitrary and capricious, an abuse of discretion and a direct violation of the law in harassing and threatening the petitioner, Chris Brown, with ejection from the New York Racing Association grounds and in threatening the Petitioner, Chris Brown, with criminal actions and arrest proceedings to be brought against him unless the Petitioner, Chris Brown, ceases and refrains, from practicing routine dental care and maintenance upon thoroughbred race horses stabled at New York Racing Association race tracks; an Order granting petitioner, Chris Brown, a preliminary injunction, restraining and preventing the herein named respondent, the New York State Racing and Wagering Board, from interfering with and/or attempting to enforce its unilateral determination that the petitioner, Chris Brown, not be allowed to earn a living by performing routine equine dental care and maintenance upon thoroughbred race horses stabled at New York Racing Association race tracks; that the petitioner, Chris Brown not be allowed to be employed by and/or placed upon the badge list of a duly licensed New York State veterinarian; and be restrained and prohibited from ordering and/or allowing NYSR&WB investigators to threaten and harass the petitioner, Chris Brown, by stating to him that unless the petitioner, Chris Brown, refrains from practicing routine equine dental care and maintenance upon thoroughbred horses stabled at New York Racing Association race tracks that he will be ejected from the grounds and that criminal charges and arrest proceedings shall be brought and filed against him and an Order granting petitioner Chris Brown, a preliminary injunction, restraining and preventing the herein named respondent, the New York State Racing and Wagering Board, from the improper and wrongful revocation and taking away of the petitioner's NYRA badge and New York State "stable agent" occupational license that had previously been issued to the petitioner so as to enable the petitioner to act as a "stable agent" for thoroughbred owner, Penny Loeb, in order that the petitioner buy and sell race horses on behalf of and for owner Penny Loeb,, which by wrongful revocation, shall in effect ensure that the petitioner, Chris Brown, is now not allowed to earn a living in any way and will ensure that the petitioner, Chris Brown, no longer have any livelihood for which to support himself and his family; from wrongfully and improperly ordering NYRA security to eject the petitioner, Chris Brown, from NYRA grounds and from wrongfully and unlawfully ordering NYRA security to charge the petitioner with "Criminal Trespass" if found upon the back stretch area of NYRA race tracks, are all respectively granted.

In light of the foregoing, the Respondents' application for an Order to dismiss this proceeding pursuant to CPLR 3211(a)(5) on the ground that it is untimely and pursuant to CPLR 3211(a)(7) on the ground that it fails to state a cause of action, is denied.

SO ORDERED.

DATED: 7/11/2007

.....*Roy S. Malton*.....  
J.S.C.

**ENTERED**  
JUL 12 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE