

**State of New York
Supreme Court : County of Monroe**

**The Humane Society of Rochester and
Monroe County, Inc.,**

Plaintiff,

-against-

Index No. 2001/3258

Harold E. Passmore,

Defendant.

APPEARANCES:

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Leone and Salvatore Cipolla, of counsel),
attorneys for plaintiff
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MEMORANDUM DECISION

ANDREW V. SIRACUSE, J.

Last October, in an undertaking that attracted the attention of television, newspapers, and advocates for animals throughout western New York, some 235 animals were taken from the farm of Harold Passmore, a retiree who lives on the border with Pennsylvania at the end of a dirt road in Caton, New York. Because no local facilities could house

such a large number of animals or provide the care they needed, the animals were taken to Lollypop Farm, the plaintiff's facility in Egypt, New York. Mr. Passmore was charged with violations of Agriculture and Markets Law § 353.

Pursuant to a plea bargain in Caton Town Court that was much criticized in the Rochester media, Mr. Passmore entered an Alford plea to a single count of neglect, a plea which does not concede liability. Town Justice Matusick issued a complex probation order, permitting the return of approximately half of the animals at Lollypop Farm and directing that Mr. Passmore's farm be visited periodically by veterinarians to ensure that he was treating his animals properly.

Before Mr. Passmore could travel to Rochester to bring his animals back the Humane Society commenced this action, seeking to retain all of the animals under authority of sections 373 and 374 of the Agriculture and Markets Law. By Order to Show Cause, to be served by March 23, 2001, and returnable on April 20, 2001, Mr. Passmore was ordered to show why the animals should not be kept by the plaintiff.

The effect of such an order, of course, is to bring the matter before the court; the burden remains on the plaintiff. Mr. Passmore's counsel accepted service of the Order to Show Cause, was in touch with the court when it rescheduled what all parties referred to as the hearing date, but did not serve answering papers until a few days before the hearing. In

those papers he raised objections to the procedure and to the jurisdiction of the court, contending that an identical proceeding had been brought by the plaintiff in Steuben County and then withdrawn with prejudice. This was denied by the plaintiff in a reply affidavit.

A hearing was held, as scheduled, on April 20, 2001. Counsel for the plaintiff presented four witnesses and the defense called three, including Mr. Passmore himself. Before testimony was taken, however, defense counsel moved for dismissal. The court reserved on this motion and took testimony. As a preliminary matter, therefore, it is necessary to address the defendant's motion.

This motion, as elaborated in oral argument, raised three issues: first, an alleged failure of procedural due process in the short time allowed before the hearing, without time to answer or for discovery; second, the alleged failure to give notice that the April 20 proceeding would be a full-blown hearing rather than a motion argument; and, finally, the previously-mentioned contention that the plaintiff's counsel had consented to the plea bargain, had withdrawn the Steuben County action and explicitly waived any right to bring this present action. Counsel maintained that the speed with which this matter was handled gave him no time to bring proof on this last point. He requested either dismissal or an adjournment.

The first two of these points may be dealt with together. The defendant had almost a month in which to respond and during which he could have asked for discovery; in that period he could easily have contacted the court had his preparation been hindered in any way. He did not do so. Defense counsel repeatedly argued that he had received an amended complaint less than 20 days before the return date, giving him no time to respond; but he had ample time to respond to the original complaint, which raises the same issues, and also did not do so. In extenuation he argues that he was taken by surprise only a few days before the hearing to discover that evidence would be presented there.

Yet there were no preliminary legal issues raised by the plaintiff's papers; they raise only the factual question of whether the animals taken to Lollypop Farm had been neglected. Such legal questions as now have to be resolved were raised by defense counsel. There would have been no point to having an appearance on the return date of the Order to Show Cause if fact questions were excluded. The court could have done nothing more than set a date for a hearing.

It was the clear expectation of both the plaintiff and the court that witnesses would be called on the return date, and the court has in its possession a letter from defense counsel's firm confirming the date for the "Order to Show Cause Hearing." While any misapprehension on the defendant's part is unfortunate, the court cannot see that defense counsel

was led astray by anything other than his own assumptions. The claim that the defendant has not had time to prepare a response is unfounded.

The defendant also failed to establish that this action is barred by the existence of a prior action in Steuben County. Once again, counsel claimed that the unexpected nature of the hearing put him at a disadvantage, in that he could produce no documentation of the events he claimed happened. Yet if the April 20 proceeding had *not* been a hearing but a motion argument, as counsel claims he believed, he would have been expected to bring support for his contentions in his motion papers or a supplement of some sort, as he was in effect moving to dismiss. Since counsel was in control of the time and manner in which this specific issue was raised, he cannot complain that he has not been given time to establish it.

The defendant's motion is therefore denied in its entirety. This remains, however, an unusual proceeding, and one without explicit support in statute. The court, instead, has followed a decision from the Third Department, *Montgomery County Society for the Prevention of Cruelty to Animals v Juliana Bennett-blue* (255 AD2d 705), which is extraordinarily close to the present one in its fact pattern and which, as the sole Appellate Division authority on this point, binds trial courts in all Departments.

In that case

Plaintiff and the Sheriff's Department raided defendant's farm, located in the Town of Perth, Fulton County, and found

148 live animals and numerous decomposing animal bodies; many of the animals found alive were severely malnourished and approximately 34 animals had to be immediately destroyed. The Sheriff's Department seized the remaining animals and placed them in plaintiff's custody and defendant was charged, in violation of Agriculture and Markets Law §§ 353 and 356, with several misdemeanor counts of cruelty to animals.

Thereafter, in accordance with a plea agreement, defendant entered an Alford plea to a violation of Agriculture and Markets Law § 369, interference with officers, and was sentenced to a period of probation. The terms of probation included, *inter alia*, monthly monitoring of defendant by licensed veterinarians for one year and, further, that the animals seized, except those adopted out to other families, would be returned to her. The plea and sentence agreement was reduced to writing and executed by defendant, her attorney, an Assistant District Attorney and the Town Justice; significantly, a representative of plaintiff's organization did not sign the agreement. Subsequently, plaintiff commenced this action pursuant to Agriculture and Markets Law § 373 seeking, *inter alia*, permanent custody of the seized animals (*id.*, at 705–706).

In construing sections 373 and 374 of the Agriculture and Markets Law together, the Appellate Division held that the Society "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" (*loc. cit.*). The defendant's arguments based on *res judicata* and double jeopardy grounds were rejected, and the trial court's verdict was affirmed.

There is only one distinction that the court can see between that case and the present one, and that is the party named as plaintiff. In the cited case the plaintiff, though located in a different county, was

apparently the society chartered to look after animal welfare in the county where the animals were found. Here, on the other hand, the animals were in a different county, and the Monroe County society took possession at the request of the local organization because that group's facilities were inadequate to house so many animals.

In his closing argument defense counsel laid stress on this fact, arguing that Steuben County had not authorized the present plaintiff to pursue a remedy which belonged only to the home county of the animals. But this is a distinction without a difference. Both relevant sections of the Agriculture and Markets Law speak of "the American Society for the Prevention of Cruelty to Animals, or *** any society duly incorporated for that purpose" (§374[1]; the wording in § 373 [1] is similar but not identical). No system of county-by-county jurisdiction is intended, and therefore the Monroe County Society may maintain this action.

The court is thus free to address the merits of the case. This proves to be the least difficult aspect of the case, because the defendant did not directly confront the testimony of plaintiff's witnesses. These testified that thick layers of manure covered the bottom of most cages, requiring animals to stand and sleep in filth; dead animals were found in cages and pens with live ones; horses' hooves were unkept, some growing out to resemble a Turkish slipper and others severely deteriorated due to the lack of a farrier's care; cages with open bottoms were stacked so

droppings fell from one animal onto another. Many of the animals seized were found to be severely malnourished, and veterinarians determined that a quarter of them should be euthanized. The record contains other, similarly distressing accounts.

In response to this Mr. Passmore attempted to show, both by direct evidence and in the thrust of his counsel's cross-examinations, that he was now able to look after the returned animals properly. He had photographs of new and sanitary cages, and by testimony of other poultry fanciers established that he had an excellent local reputation for the quality and health of the rare birds he liked to show at county fairs.

In addition, defense counsel suggested that the plaintiff was attempting to hold Mr. Passmore to a "gold standard" of animal care, one practiced by similar societies but unattainable in the "hardscrabble" world of the working farmer.

The court does not agree with this last point, in particular. The condition of these animals went far beyond a degree of unkemptness or dirt. One does not need a degree in agricultural science to know that animals' cages need to be cleaned regularly. Most significantly, Mr. Passmore's own testimony contradicted his lawyer's arguments, because it was clear that the appalling conditions discovered last fall were not necessarily representative of his farm.

Mr. Passmore is clearly a man who values his independence, and he was ill at ease when called upon to defend his conduct. Just as clearly, he struck the court as someone who genuinely wanted to do best by his animals, though lacking the sentimental regard for them that urbanites often confuse with care. The court rejects any insinuation that he acted with conscious or intentional cruelty.

At the same time, however, the standard for cruelty and animal neglect is, like negligence, an objective one, and Mr. Passmore fell short of the minimum required by law. The plaintiff's testimony amply brought home the results of what appears to have been inattention; and Mr. Passmore's own testimony furnished an explanation for it. He had experienced a number of time-consuming problems, including the loss of a barn roof and an inoperable manure spreader, and these difficulties led his attention away from the animals.

This may be a reasonable explanation, but it is not an excuse. With any animal comes a degree of responsibility, and a farm with more than 300 animals, some of them rare, demands a great deal of attention. The court concludes that adequate care of the vast number of animals in his menagerie proved to be beyond Mr. Passmore's powers, especially with the additional problems he faced last year.

This might not have led to the disastrous conditions found by the plaintiff, but Mr. Passmore was both unwilling to seek help and

apparently unaware of the consequences of his inaction. He showed a strong prejudice against veterinarians, asserting that he had lost more animals to vets than to his own care. Far worse, however, was his explanation for the condition of the cages: he told the court that his manure spreader was broken for three to four months.

It argues strongly against the defendant's concern for the animals that he seems to have left their cages uncleaned for the sole reason that he had no way to distribute their wastes over his fields. So, too, does his almost casual assurance that his animals were all well fed, when he admitted to the court that lighting conditions in the barn were so poor that he could not see if some of them were getting food or not. This may in part explain the number of dead animals found rotting in cages and pens with live ones.

The court finds, then, that the animals were indeed neglected, though it does not exclude the possibility that Mr. Passmore might in other circumstances be able to keep them in reasonable health. The question for the court is whether, in light of this neglect, Mr. Passmore ought to have the animals returned to him.

It seems most likely that Justice Matusick of Caton Town Court had similar concerns, because his probation order would have the effect of reducing the size of Mr. Passmore's collection and monitoring his care. While the court does not agree with this result, it gives Justice Matusick

full credit for a scrupulous approach to a difficult question. The highly-charged language with which the plaintiff's papers characterized Justice Matusick's deliberations is entirely uncalled for.

Indeed, this court gave serious consideration to a similar result. In the end, however, such a plan is quite possibly beyond this court's powers and the court believes that it has little hope of success.

The legal issue has not been addressed by any court. Justice Matusick was acting in the context of a criminal proceeding, with considerable flexibility in the crafting of an appropriate order of probation. This proceeding, however, would seem to be limited by the terms of Sections 373 and 374 of the Agriculture and Markets Law, and these speak of the neglecting party's forfeiture of the right to keep the animals (§ 374 [5] [a]). No intermediate remedies are specified, and the statute very clearly bars sale or return of the animals even to those living in the same household as the original owner (§ 374 [5] [d]).

Even were the court not limited to a single remedy, it is not apparent that a period of probation, supervision or training would change the way Mr. Passmore acts or prevent a recurrence of the neglect the next time his attention is distracted by the inevitable crises of rural life. His counsel protested that he was being made to suffer for a refusal to express remorse. This is simply not true; but it does point to a genuinely significant question, which is Mr. Passmore's refusal to admit that

problems existed on his farm. Similarly, this refusal undercuts his claims that he had no opportunity to remedy the conditions before his animals were taken from him. The statute does not require that he be given a warning, though the local animal control officer testified that he left his card and then a notice on Mr. Passmore's door before he visited in late September and decided, without telling Mr. Passmore, that he would ask that the animals be confiscated. In light of Mr. Passmore's consistent denials, in court and out, that the animals were in any way neglected, the court cannot withhold the plaintiff's requested remedy because he was not given time to improve conditions he maintains were satisfactory.

The plaintiff, then, is to be allowed to retain possession of the animals under authority of the Agriculture and Markets Law, to sell or put up for adoption as it sees fit. There remains the issue of money. Mr. Passmore estimated that the animals seized were worth from twenty to twenty-five thousand dollars. This figure likely assumes that the animals were in good health, an assumption that is clearly incorrect. Under the statutory scheme, however, he is entitled to any monies brought in by the sale of the animals, "less any costs, including, but not limited to, veterinary and custodial care, and any fines and penalties imposed by the court" (§ 374 [5] [d]). It is highly unlikely that the remaining value of these animals could exceed the costs of keeping and healing them. The court

therefore orders that no costs or expenses are to be charged by either party against the other.

This constitutes the decision of the court, and counsel for the plaintiff may prepare an order, with no costs or disbursements; but the court also wishes to add that the vilification of Mr. Passmore and, to a lesser extent, Justice Matusick have gone well beyond the needs of advocacy. It is the court's hope that Mr. Passmore may in the future limit his collection to a size that he may easily care for given the constraints of time, age, and funds, and that such animals as he does keep will provide him, his visitors, and fairgoers with pleasure for many years.

DATED: Rochester, New York
April 24, 2001

/S/
Andrew V. Siracuse, J.S.C.