

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

Joyce Rowley,)	
Plaintiff, pro se)	
)	
v.)	Case No.
)	17-cv-11809-WGY
City of New Bedford, MA)	
Defendant)	

MEMORANDUM IN FAVOR OF CONFISCATION

Under Rule 64, Seizing a Person or Property, of the Federal Rules of Civil Procedure, Rowley may seek a provisional remedy as may be allowed equally under State law to secure satisfaction of potential judgement (FRCP 64(a)). Rowley so moves to protect her interest in the Asian elephant Ruth.

I. Background

This is a citizen's action brought under the Endangered Species Act for the removal of Asian elephants Ruth and Emily, currently residing at the Buttonwood Park Zoo, a city-owned and operated zoo located on City parkland. The complaint was filed on September 21, 2017 and amended on January 15, 2018 (Dkt. 47).

Rowley filed three motions for preliminary injunctions, all on behalf of removing Asian elephant Ruth, who has suffered the loss of an ear since the litigation started, among other injuries. The last such motion was consolidated with the trial on merits over Rowley's objections on February 12, 2019 (Dkt. 49). A bench trial was held on March 5-7, 2019, and the Court viewed the zoo on March 28, 2019. Since then, Rowley filed a Motion to Expedite the matter on June 19, 2019 (Dkt. 83), which the Court

acknowledged.

As Ruth is considered property of the City of New Bedford, and as her current confinement is a danger to her health and well-being, Rowley now asks the Court for an Order to allow Ruth's immediate removal.

II. Synopsis

Some time in May 2019, the City made a management decision to restrict Ruth to the inner yard of the exhibit, while allowing Emily access to both the inner and outer yard areas. Both elephants have chronic arthritis and joint problems, as well as foot health issues. Ruth's lameness and arthritis is visibly worse than Emily's. The City's consulting veterinarian testified that a sedentary life and confinement contributes to a captive elephant's chronic foot and joint problems (Ryer testimony, Trial Transcript Day 1).

Also acknowledged, although Rowley and the City disagree on the terms to use, is that Emily, the larger elephant, takes Ruth's food, and has injured Ruth on numerous occasions. Rowley calls this food and spatial aggression; the City refers to it as "displacement" behavior and "object play." Whatever it is called, the City's records are clear that Ruth has been injured 19 times by Emily, including an incident where 6 1/2" of Ruth's tail was bitten off by Emily (Defendants' Exhibit 8, Independent Panel Report, Appendix C, Trial Transcript Day 2).

Since May, however, Rowley witnessed changes to the management of both elephants that has caused Ruth further injury. This includes (1) a failure to change the dirt floor of the barn monthly, combined with Ruth's forced confinement to the barn and resulting in the re-opening of the wound to her right ear; (2) failure to protect Ruth from Emily resulting in a loss of nutrition and causing emotional distress seen by Ruth

stereotyping; (3) confining Ruth to the inner yard thereby reducing her mobility and increasing her lameness and arthritis; (4) preventing Ruth from accessing water during hot weather and during a heat advisory causing her heat stress and emotional distress; and (5) failing to protect Ruth from Emily's aggression resulting in physical and emotional trauma on August 16, 2019. (Exhibit 1, Rowley's Affidavit, September 4, 2019)

The City staff, by feeding Ruth and Emily in separate locations in effect admits that Ruth's nutritional needs are jeopardized by her confinement with Emily. However, separate feedings do not prevent Emily from accessing Ruth's food daily. Further, on August 25, 2019, when Emily became incensed at Ruth in front of several zookeepers and the elephant manager, the staff ordered Emily away from Ruth and then led away. This, too, is an admission that Emily poses a risk to Ruth's health and well-being.

III. State Law

Rule 64 allows for remedies under state law (Hoult v. Hoult, 373 F.3d 47, 54, 1st Cir. (2004) "...the order must comport with the law of the state in which the district court is held (here in Massachusetts), except that any federal statute governs to the extent applicable.")

Looking at Massachusetts anti-cruelty laws, Chapter 272 of Massachusetts General Laws regulate the enforcement and removal of animals. Cruelty laws apply to all animals (Knox v. MSPCA, 12 Mass App Ct, 407 (1981)). Seizure and forfeiture is allowed under MGL Chapter 272 Section 77 which states:

"Whoever ... causes or procures an animal to be ...deprived of necessary sustenance, ...whoever, having the charge or custody of an animal, either as owner or otherwise, inflicts unnecessary cruelty upon it, or unnecessarily fails to provide it with proper food, drink or shelter, sanitary environment, or protection from the weather..." shall be subject to punishment by prison and fined.

And,

"In addition to any other penalty provided by law, upon conviction for any violation of this section..., the defendant shall forfeit to the custody of any society, incorporated under the laws of the commonwealth for the prevention of cruelty to animals..., the animal whose treatment was the basis of such conviction."

Here, Rowley is asking that the Court issue an order seizing and forfeiting Asian elephant Ruth to either The Elephant Sanctuary in Tennessee or to the Elephant Refuge in North America, located in Attapulgus, Georgia. Both are bona fide non-profits whose mission is to provide care for needy, elderly and sick elephants.

Although unusual, confiscation of an elephant is not unheard of. In November 2017, an African female elephant "Nosey" was confiscated while touring in Moulton, Alabama and transferred to The Elephant Sanctuary due to its owner's failure to provide sanitary living conditions and adequate transport. After a hearing, the Lawrence County district judge awarded custody to the Sanctuary in January 2018 (Lawrence County Ex Rel v. Liebel Hugo Tomi, et al; DV-2017-000015.00; found online at Scribd (<https://www.scribd.com/document/369738694/Animal-Control-Officer-Retains-Custody-of-Nosey-the-Elephant>)).

Ironically, Asian elephant Ruth was seized from her prior owner, Brian Watson, by the U.S. Department of Agriculture in 1986 for animal cruelty. She was transferred to Buttonwood Park Zoo at that time.

For these reasons, and as allowed by law, Rowley requests a confiscation order for the immediate removal of Asian elephant Ruth from the City of New Bedford

Buttonwood Park Zoo to either sanctuary where she will receive the appropriate nutritional and medical care, sanitary housing, and a safe environment.

Respectfully submitted,

s/Joyce Rowley
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