STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

MEMORANDUM OF LAW

ACTION NO. 1

Index No. 315-08

Hon. Richard B. Meyer

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

LEWIS FAMILY FARM, INC., SALIM B. LEWIS and BARBARA LEWIS,

Defendants.

ACTION NO. 2

Index No.: 332-08

PRELIMINARY STATEMENT

Petitioner Lewis Family Farm, Inc. ("Lewis Family Farm") submits this memorandum of law in opposition to cross-motion of Respondent Adirondack Park Agency ("Agency") to transfer the above-captioned actions to Hon. Kevin K. Ryan.

The Agency does not oppose consolidation of these actions. Thus, the sole remaining issue is whether the consolidated actions should be transferred to Justice Ryan or remain here under the Individual Assignment System ("IAS"). For the reasons stated below, the Agency's attempt to pivot and engage in judge-shopping should be denied.

STATEMENT OF FACTS

In November 2006, the Lewis Family Farm commenced construction of a farm employee housing project involving four new houses on the Farm. (Amended Verified Petition, ¶ 13). Thereafter, the Agency alleged that the Lewis Family Farm needed an Agency permit in order to build the farm structures.

On or about June 27, 2007, the Lewis Family Farm commenced an action in the Essex County Supreme Court (Index No. 498-07) seeking a declaration that, among other things, the Agency lacked jurisdiction over the Lewis Family Farm's employee housing structures. (See Affirmation of John J. Privitera, dated April 22, 2008, ¶ 4). The case was assigned to Hon. James P. Dawson under the IAS. However, the case was re-assigned to Hon. Kevin K. Ryan, Acting Supreme Court Justice, after Justice Dawson recused himself because of a conflict. (See Privitera Aff., ¶ 4).

On or about August 16, 2007, Justice Ryan issued a Decision and Order whereby the action was converted to an Article 78 proceeding and was summarily dismissed as premature. Justice Ryan's Decision and Order states as follows:

> [T]his situation is not ripe for judicial intervention. While the plaintiff may not wish to proceed to a hearing before the APA commissionersé that is clearly the next step in the process. This Court has only the jurisdiction that the Legislature gave it over disputes involving the APA. It does not have concurrent jurisdiction over this situation. (*Sohn v Calderon,* 78 NY2d 755, 766-767 (1991)). This Court's jurisdiction is limited to a review of the APA's actions under CPLR Article 78 (*Ibid.*). Otherwise, as the Court of Appeals pointed out in *Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 (1987), the Court condones a breach of the separation of powers between the branches of government.
>
> The Commissioners of the APA have the authority to review this situation under Executive Law §809. If, after receiving a determination from the Commissioners, the plaintiff is still dissatisfied, they are free to file an Article 78 proceeding at which time this Court may review the actions of the APA. Until that time, this matter constitutes an internal matter in which the Court will not interfere.

(August 16, 2007 Decision and Order, pp. 6-7, Ex. E to Simon Aff.).

Inexplicably, Justice Ryan's August 16, 2007 Decision and Order also contained several pages of dicta that contradict the principles of law that the Court cited above. Essentially, the Court stated that the Agency had jurisdiction over the Lewis Family Farm's farm worker housing project. (See August 16, 2007 Decision and Order, pp. 4-6, Ex. E to Simon Aff.). Therefore, the Lewis Family Farm filed a notice of appeal of the August 16, 2007 Decision and Order in order to preserve all of its rights in the event that the yet-to-occur Agency enforcement determination find that the Lewis Family Farm's farm buildings were under Agency jurisdiction. (See Privitera Aff., ¶ 8).

On September 5, 2007, several weeks following Justice Ryan's dismissal of the action (and nearly one year since the construction project began), the Agency finally commenced its internal enforcement proceeding by serving a Notice of Apparent Violation ("NAV"), alleging that the Lewis Family Farm's employee housing structures were illegal unless it received a permit from the Agency. (Amended Verified Petition, ¶ 29). The Agency's enforcement proceeding culminated in a final determination of the Agency on March 25, 2008 ("March 25 Determination), whereby the Agencyôs Enforcement Committee determined that the Lewis Family Farm had violated the Adirondack Park Agency Act by failing to obtain a permit for the construction of the dwellings and subdivision of land. (See Privitera Aff., ¶ 10).

On April 8, 2008, the Lewis Family Farm commenced the instant Article 78 proceeding against the Agency seeking to vacate and annul the March 25 Determination.[1] On April 9, 2008, pursuant to CPLR § 7805, the Lewis Family Farm moved by an Amended Order to Show Cause for a stay of its obligation to comply with the March 25 Determination during the pendency of

[1] Petitioner served an Amended Verified Petition on April 14, 2008.

the Article 78 proceeding. On April 11, 2008, this Court issued a partial stay of the Lewis Family Farm's obligation to comply with the March 25 Determination.

On April 11, 2008, the Agency filed a duplicative action against the Lewis Family Farm and its shareholders/officers individually (Index No. 332-08), alleging the exact same violations that it had advanced in its administrative proceeding, the culmination of which resulted in the March 25 Determination. Counsel for the Lewis Family Farm was provided a copy of the Summons and Complaint in the afternoon on April 14, 2008. The Agency has not yet completed service on the named defendants in this new action.

On April 15, 2008, the Lewis Family Farm moved pursuant to CPLR 2221 for leave to reargue and renew its motion for a stay in order to obtain a full stay of its obligation to comply with the March 25 Determination during the pendency of this Article 78 proceeding. That motion, which is returnable on April 24, 2008, is currently pending before Justice Meyer.

On April 15, 2008, the Lewis Family Farm also moved to consolidate its Article 78 proceeding (Index No. 315-08) with the Agency's duplicative enforcement action (Index No. 332-08) pursuant to CPLR § 602(a). The Agency consents to consolidation, but has made the instant cross-motion to transfer the consolidated actions to Justice Ryan.

For the reasons set forth below, the Agency's cross-motion should be denied.

ARGUMENT

THE AGENCY IS ABUSING JUDICIAL PROCESS

A. The Agency is Abusing Judicial Process by Engaging in Judge Shopping

The Agency seeks to transfer the consolidated actions to Justice Ryan in a blatant attempt to select a judge in violation of the spirit of the IAS. In its motion papers, the Agency neglects to point out that the Uniform Rules for the New York State Trial Courts mandate that assignments

of actions and proceedings "shall be made by the clerk of the court pursuant to a method of random selection authorized by the Chief Administrator." 22 NYCRR § 202.3(b). Indeed, a party is entitled to apply for random selection of a judge under the IAS. See United Cmty. Ins. Co. v. State Farm Fire & Cas. Co., 143 Misc.2d 954, 956 (New York County Sup. Ct. 1989). The filing of a request for judicial intervention ("RJI") causes an action or proceeding to be randomly assigned to a judge. See 22 NYCRR § 202.6. Once a case or proceeding is assigned to a judge, that judge provides for the continuous supervision of that action only. See 22 NYCRR § 202.3(a).

The Agency cites Morfesis v. Wilk, 138 A.D.2d 244 (1st Dep't 1988), for the proposition that a judge in a previous case should be allowed to determine if subsequent cases are related. (See Agency's Memorandum of Law, pg. 4). However, the Agency's reliance is misplaced. The practice of assigning an arguably-related case to a judge of an earlier case only applies when the earlier case is still active and pending. See Morfesis, 138 A.D.2d at 246 (stating that the Uniform Rules "permit[] the person most familiar with the ***already pending case*** to make the determination of whether the new case is related.") (emphasis supplied). Moreover, when completing an RJI, the party seeking judicial intervention need only refer to a "related case" if one is currently active in a state trial court. See United Cmty. Ins. Co., 143 Misc.2d at 956 (stating that "the only rational purpose of requiring identification of related action[s] is to ensure that related proceedings are resolved most expeditiously").

Here, when the Lewis Family Farm commenced the instant Article 78 proceeding and filed an RJI on April 8, 2008, there were no active cases pending before a state trial court that could be deemed a "related case" that should have been disclosed on the RJI. The Lewis Family Farm's declaratory judgment action (Index No. 498-07) had long been dismissed by Justice

Ryan. Accordingly, the Lewis Family Farm properly exercised its right to apply for random selection of a judge under the IAS when it filed its Article 78 proceeding (Index No. 315-08) and RJI without referencing any related cases. (See Privitera Aff., Ex. A). Moreover, the Lewis Family Farm properly referred to the Article 78 proceeding as a related case when it filed an RJI in the Agency's enforcement action (Index No. 332-08) because that action is more than a "related case" ï it is an entirely duplicative and unnecessary action. (See Privitera Aff., Ex. B).

One can only surmise that the Agency is abusing judicial process by attempting to shop for a new judge in this action. It is well-settled that "judge-shopping" is an improper litigation device. See Albany Specialties, Inc. v. County of Orange, 255 A.D.2d 439 (2d Dep't 1998) (denying government's motion for recusal because it was merely judge-shopping); Eber-NDC LLC v. Star Indus., 2005 N.Y. Misc. LEXIS 3501 (Nassau County Sup. Ct. 2005) (denying motion to consolidate an action with one in a different venue because the movant was merely judge-shopping).

Here, the Agency commenced the new action (Index No. 332-08) mere days after it was served with the petition and order to show cause regarding the stay in the Article 78 proceeding (Index 315-08). Additionally, the Agency made the instant cross-motion to transfer the cases to Justice Ryan only after Justice Meyer granted a stay to the Lewis Family Farm, a temporary remedy that the Agency vehemently opposed. The new action (Index No. 332-08), filed on April 11, 2008, was commenced in contemplation of this cross-motion to transfer. These actions must be viewed seriatim. The only possible reason that the Agency could have for fighting so vehemently to transfer these procedurally infant actions to Justice Ryan is that it is displeased with the fact that the Lewis Family Farm was sent to Justice Meyer with its order to show cause after Justice Dawson recused himself, and it is further displeased with the stay issued by this

Court on April 11, 2008 (Hon. Richard B. Meyer). Accordingly, this cross-motion to transfer is unmistakably a judge-shopping effort that must be thwarted.

Moreover, the Agency's rambling "motion to transfer" is not even grounded in a CPLR provision.

Based on the foregoing, the Agency's cross-motion to transfer the consolidated actions to Justice Ryan should be denied in its entirety.

B. The Agency's Purported "Corrected Final Determination" is an Abuse of Process

The Agency is clearly engaging in improper judge shopping because it is attempting to do everything it can to undercut this Court's April 11, 2008 Decision and Order that granted the Lewis Family Farm a partial stay of its obligation to comply with the Agency's March 25 Determination pending the outcome of this Article 78 proceeding. This Court's Decision and Order granted the stay in part because the Agency's March 25 Determination required the Lewis Family Farm "to forego its right to challenge the Respondent's jurisdiction here if it proceeds to apply for the after-the-fact permit(s)." (See April 11, 2008 Decision and Order, pg. 5, Ex. H to Simon Aff.).

On April 18, 2008, in an unprecedented maneuver, the Agency sent a purported "Corrected" Determination of the Agency's Enforcement Committee, whereby the Agency sought to delete the paragraph of its March 25 Determination that required the Respondent to forego its right to challenge the Agency's jurisdiction. (See Privitera Aff., Exhibits C and D). This abuse of process should not be condoned.

The Agency is slapping the face of justice and abusing process by attempting to alter a final determination that was stayed by order of this Court and remains under review in this Article 78 proceeding. This purported Agency action must be deemed null and void. Further,

the act of serving a "Corrected" final determination is completely unsupported by any law. An agency determination becomes "final and binding" when the party seeking review has been aggrieved by it. Yarbough v. Franco, 95 N.Y.2d 342, 346 (2000). At this point, the aggrieved party can seek judicial review in an Article 78 proceeding. It should go without saying that once an agency issues a final determination ï and certainly after the aggrieved party files its Article 78 petition ï the agency has no further power to change or alter its "final determination". See e.g., Mott v. Div. of Housing & Cmty. Renewal of the State of New York, 140 A.D.2d 7, 8 (2d Dep't 1988) (citing 9 NYCRR § 2510.13 for the proposition that a statute or regulation *could* allow for the modification of an agency's order if it is done *prior* to the date of the commencement of an Article 78 proceeding to review the order).

Here, the Agency is obligated to follow the Adirondack Park Agency Act ("APAA"), the Agency regulations, and the State Administrative Procedure Act ("SAPA") when issuing a final enforcement determination. See N.Y. Exec. Law § 813; 9 NYCRR § 581-4.16; and N.Y. S.A.P.A. Law § 307. The APAA, Agency regulations, and SAPA provide no administrative power to alter a final determination. Thus, the Agency, as creature of statute, is without power to modify a final determination since its enabling statute and regulations are silent on the issue. See Flynn v. State Ethics Comm'n, 208 A.D.2d 91, 93 (3d Dep't 1995); see also Foy v. Schechter, 1 N.Y.2d 604 (1956) (stating that an agency must have jurisdiction in order for its determinations to be valid, and absent such jurisdiction, agency acts are void).

Accordingly, the Agency's "Corrected Final Determination" dated April 18, 2008 is an abuse of process that seeks to undercut this Court's April 11, 2008 Decision and Order that granted a stay to the Lewis Family Farm. As such, the Agency's cross-motion to transfer the consolidated actions to Justice Ryan can only be seen as an attempt to judge shop. The

attempted alteration must be deemed null and void to prevent further abuse in this and other proceedings.

CONCLUSION

Based on the foregoing, Petitioner prays that this Court exercise its discretion to deny the Agency's cross-motion to transfer the consolidated actions (Index Nos. 315-08 and 332-08) to Hon. Kevin K. Ryan, Acting Supreme Court Justice, and grant such other and further relief as to the Court seems just and proper.

Dated: April 23, 2008
Albany, New York

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.

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