

**Case No. 505179**

SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION    THIRD DEPARTMENT

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LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

Essex County  
Index No. 315-08

ADIRONDACK PARK AGENCY,

Respondent.

STATE OF NEW YORK  
SUPREME COURT    COUNTY OF ESSEX

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ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

Essex County  
Index No.: 332-08

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

Defendants.

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**AFFIDAVIT IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL**

STATE OF NEW YORK            )  
  ) ss.:  
COUNTY OF ALBANY            )

**JACOB F. LAMME**, being duly sworn, deposes and states as follows:

1.     I am duly licensed and admitted to practice law in the State of New York, and I am an associate with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for the Lewis Family Farm, Inc. (hereafter "Lewis Family Farm"), Salim B. "Sandy" Lewis, and

Barbara Lewis in several actions involving the New York State Adirondack Park Agency (hereafter "Agency").

2. I respectfully submit this affidavit in opposition to the Agency's motion for permission to appeal the July 2, 2008 Decision and Order of Hon. Richard B. Meyer, Acting Supreme Court Justice in the above-captioned consolidated actions, which are described more fully below.

3. The underlying dispute between the Lewis Family Farm and Agency centers around the Agency's attempt to regulate farming by illegally claiming jurisdiction over the Lewis Family Farm's farm worker housing structures, which are exempt from Agency jurisdiction under the Adirondack Park Agency Act (N.Y. Exec. Law § 801, et seq.) and the Wild, Scenic, and Recreational Rivers System Act (N.Y. Env'tl. Conserv. Law § 15-2701, et seq.). See also Town of Lysander v. Hafner, 96 N.Y.2d 558, 563 (2001).

4. The Lewis Family Farm is the plaintiff-appellant in a declaratory judgment action that was converted to an Article 78 proceeding and dismissed as premature on August 16, 2007 (Essex County Index No. 0498-07) (hereafter "*Action No. 1*"). The Lewis Family Farm appealed that decision because the lower court unnecessarily and incorrectly commented upon some of the merits of the case on the Agency's motion to dismiss. This Court recently extended the time in which the Lewis Family Farm has to perfect this appeal until September 22, 2008. (A.D. Case No. 504696).

5. Following the dismissal of *Action No. 1*, the Agency commenced its administrative enforcement proceeding, which culminated in a final enforcement determination of the Agency on March 25, 2008 ("*March 25 Determination*").

6. On April 8, 2008, the Lewis Family Farm commenced an Article 78 proceeding against the Agency seeking to vacate and annul the March 25 Determination (Essex County Index No. 315-08) (hereafter *Action No. 2*).

7. Three days later, on April 11, 2008, the Agency commenced a duplicative and unnecessary action seeking to enforce the March 25 Determination (Essex County Index No. 332-08) (hereafter *Action No. 3*). However, instead of simply naming the Lewis Family Farm as the defendant, the Agency improperly named Salim B. "Sandy" Lewis and Barbara Lewis as individual defendants in *Action No. 3*.

8. *Action No. 2* and *Action No. 3* were consolidated by order of the lower court on April 25, 2008 and are currently pending before Hon. Richard B. Meyer, Acting J.S.C., Essex County Supreme Court.

9. In June 2008, the Agency filed a motion to dismiss portions of the Article 78 petition in *Action No. 2*, and the Lewis Family Farm filed a motion to dismiss the complaint in *Action No. 3*. On July 2, 2008, the lower court issued a joint Decision and Order on these motions which, among other things, (i) denied the Agency's motion to dismiss seven causes of action in *Action No. 2* on grounds of collateral estoppel; and (ii) granted the motion to dismiss defendants Sandy Lewis and Barbara Lewis from *Action No. 3*. A copy of Justice Meyer's July 2, 2008 Decision and Order is attached as Exhibit "A" to the Affirmation of Loretta Simon, dated August 1, 2008.

10. On August 1, 2008, the Agency filed a notice of appeal, as of right, on the portion of the July 2, 2008 Decision and Order pertaining to the dismissal of the duplicative enforcement action as against defendants Sandy Lewis and Barbara Lewis in *Action No. 3*.<sup>1</sup>

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<sup>1</sup> Although the Agency filed this notice of appeal in *Action No. 3* as of right, its appeal is completely and utterly without merit. The lower court chastised the Agency on this issue at oral argument on June 19,

11. The Agency now seeks permission from this Court, pursuant to CPLR §§ 5513 (a)-(b) and 5701(c), to appeal the portion of the July 2, 2008 Decision and Order pertaining to the denial of the Agency's motion to dismiss on grounds of collateral estoppel in *Action No. 2* (Article 78 proceeding).

12. The Agency's motion should be denied in its entirety because this permissive appeal is completely without merit. Moreover, this permissive appeal would only clutter this Court's docket since the ultimate issues for which the Agency seeks appellate review are already before this Court and will necessarily be decided in the appeal for *Action No. 1*.

13. The Agency's permissive appeal lacks merit, as demonstrated in the July 2, 2008 Decision and Order, because the doctrine of collateral estoppel does not prohibit the Lewis Family Farm from challenging the Agency's jurisdiction in *Action No. 2* and *Action No. 3*. Specifically, the July 2, 2008 Decision and Order states as follows:

To the extent that the motion court [in *Action No. 1*] addressed whether the project involved "agricultural use structures", a "single family dwelling" and "subdivision (*Executive Law §802[8], [63]*), such was only to indicate that Lewis Farm had not established a "clear legal wrong" (*City of Newburgh v. Public Employment Relations Bd., supra; see also Town of Huntington v. New York State Div. of Human Rights, 82 NY2d 783, 604 NYS2d 541, 624 NE2d 678*) or that the Agency was acting in excess of its jurisdiction (*see Cortland Glass Co., Inc. v. Angello, 300 AD2d 891, 752 NYS2d 741*). None of the court's determinations on those issues were essential to its ultimate decision to dismiss the proceeding as "not ripe for judicial intervention". Significantly, the court [in *Action No. 1*] indicated that its decision did not preclude Lewis Farm from subsequent judicial review after the Agency performed its administrative functions:

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2008 and again in the July 2, 2008 Decision and Order, which states as follows: "The notice of apparent violation which initiated the administrative enforcement proceeding before the Agency's enforcement committee (9 NYCRR §581-2.6) named only Lewis Farm as a respondent, and its March 25, 2008 determination refers only to Lewis Farm. To the extent that the determination is an 'order' (*see 9 NYCRR §581-1.2*), enforcement proceedings through the Attorney General are limited by Executive Law §813(2) solely to Lewis Farm." (*See July 2, 2008 Decision and Order, Ex. A, pp. 10*). As such, it is abundantly clear that the Attorney General's pursuit of Sandy and Barbara Lewis on behalf of the Agency is a vendetta. The Agency's complaint in the duplicative enforcement action was only filed in response to the Lewis Family Farm's Article 78 petition, seeking redress in the courts.

"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." [citing the motion court from *Action No. 1*].

(See July 2, 2008 Decision and Order, Ex. A, pp. 8-9).

14. This is precisely the outcome on the issue of collateral estoppel that the Lewis Family Farm seeks from this Court in its appeal of *Action No. 1*. The motion court's determination of factual issues on the motion to dismiss in *Action No. 1* were not necessary to that court's decision to dismiss the action as premature.

15. The absurdity of the Agency's position on this issue—which merits a denial of this motion—is set forth as follows: "[In *Action No. 1*], Justice Ryan unambiguously decided the merits of Lewis Farm's jurisdictional argument and fixed the legal rights of the parties before concluding that the court had no authority to intervene in the administrative proceedings." (See Affirmation of Loretta Simon, dated August 1, 2008, ¶ 18) (emphasis supplied). Significantly, the motion court in *Action No. 1* only issued one decision. We are unable to locate any jurisprudence that establishes the significance of paragraph placement within a decision as a material issue in determining its collateral estoppel effect.

16. The Agency further argues, as it unsuccessfully argued below, that the motion court's determination in *Action No. 1* that the Lewis Family Farm's farm worker housing structures were not "agricultural use structures" under the Adirondack Park Agency Act was somehow "essential to the court's conclusion that the [Agency] should be allowed to proceed with its administrative enforcement action against Lewis Farm." (See Affirmation of Loretta Simon, dated August 1, 2008, ¶ 18) (emphasis supplied). This is absolute nonsense. How could

the motion court in *Action No. 1* necessarily decide the ultimate issue of fact, but then say it will not get involved and send the matter back to the agency for further administrative proceedings? The only answer to this question—which was provided by the lower court in *Action No. 2* and *Action No. 3* in the July 2, 2008 Decision and Order—is that the motion court in *Action No. 1* did not make a determination that was "essential to its ultimate decision to dismiss the proceeding as 'not ripe for judicial intervention'". (See July 2, 2008 Decision and Order, Ex. A, pp. 8-9).

17. Thus, it is clear that the Agency's permissive appeal lacks any merit whatsoever. Moreover, it is respectfully submitted that this Court should deny the Agency's motion for the permissive appeal because the appeal would not bring forth any issues that are not already before this Court. The Agency is grasping for any procedural mechanism that it can find in order to mask the reality that its odds of winning on the ultimate merits are slim. The fact of the matter is that the record in *Action No. 2* and *Action No. 3* conclusively demonstrates that the Lewis Family Farm's farm worker houses are "agricultural use structures" that are exempt from Agency jurisdiction. Thus, this desperate motion for permission to hang onto an illogical theory that the Agency somehow has jurisdiction over the "agricultural use structures" simply because a motion court unnecessarily said so when dismissing a premature Article 78 proceeding must be denied. It is time to reach the ultimate merits of this case. In any event, *Action No. 1* is already on appeal.

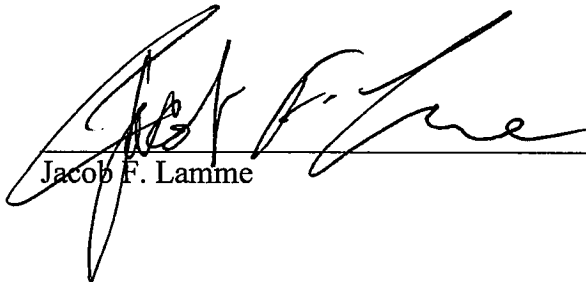
18. The Lewis Family Farm has maintained in each submission to this Court in the appeals associated with *Action No. 1* and *Action No. 2* that the appeals in this entire matter should be heard on a joint record and brief, and the appropriate motion to this Court will be made once the lower court in *Action No. 2* and *Action No. 3* issues a final determination on the merits of this matter, which appears to be imminent.

19. The lower court heard oral argument in *Action No. 2* and *Action No. 3* on June 19, 2008. Less than two weeks later, the lower court issued the July 2, 2008 Decision and Order. Moreover, the lower court directed the Lewis Family Farm to submit its motion for summary judgment in *Action No. 3*, which is returnable before the lower court on August 18, 2008.

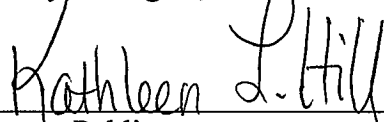
20. Accordingly, it is entirely conceivable that the lower court will issue a final judgment on the merits in *Action No. 2* and *Action No. 3* during September 2008. Thereafter, it is quite certain that the losing party will pursue an appeal of that decision in this Court.

21. In the interests of judicial economy, this Court should not grant the Agency's instant motion for permission to appeal the July 2, 2008 Decision and Order as it pertains to *Action No. 2* because the Agency's permissive appeal lacks merit. Moreover, the issues of the appeal in *Action No. 1* are inextricably intertwined with the issues in *Action No. 2* and *Action No. 3*. Thus, they should be heard together.

22. Based on the foregoing, the Lewis Family Farm respectfully requests an order from this Court: (i) denying the Agency's motion for permission to appeal the July 2, 2008 Decision and Order as it pertains to *Action No. 2*; and (ii) granting such other relief as to this Court seems just and proper.

  
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Jacob F. Lamme

Sworn to before me this  
8<sup>th</sup> day of August, 2008.

  
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Notary Public

KATHLEEN L. HILL  
Notary Public, State of New York  
No. 0116029213  
Qualified in Adh Co.  
Commission Expires Aug. 9, 2009