

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

AFFIRMATION

Petitioner,

ACTION NO. 1

-against-

ADIRONDACK PARK AGENCY,

Index No. 315-08

Respondent.

Hon. Richard B. Meyer

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

ADIRONDACK PARK AGENCY,

Plaintiff,

ACTION NO. 2

-against-

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

Index No.: 332-08

Defendants.

**AFFIRMATION IN OPPOSITION OF AGENCY'S CROSS-MOTION
TO TRANSFER THE CONSOLIDATED ACTIONS TO JUSTICE RYAN**

JOHN J. PRIVITERA, an attorney at law duly admitted to practice in the courts of the State of New York, swears and affirms under penalty of perjury as follows:

1. I am duly licensed and admitted to practice law in the State of New York, and I am a principal with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for Petitioner Lewis Family Farm, Inc. in Action No. 1, and attorneys for the defendants in Action No. 2 (hereafter "Lewis Family Farm"). As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

2. I make this affirmation in opposition of the Respondent/Plaintiff's cross-motion to transfer the consolidated actions to Hon. Kevin K. Ryan, Acting Supreme Court Justice.

3. 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).

4. 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. 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.

5. 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. (See Ex. E to Simon Aff.).

6. 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 commissioners...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.).

7. 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.

8. 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.

9. 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).

10. The Agency's enforcement proceeding culminated in a final determination of the Agency on March 25, 2008 ("March 25 Determination), whereby the Agency's 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.

11. On April 8, 2008, the Lewis Family Farm commenced the instant Article 78 proceeding (Index No. 315-08) against the Agency seeking to vacate and annul the March 25 Determination. Pursuant to 22 NYCRR 202.6, the Lewis Family Farm filed a request for judicial intervention ("RJI"). A copy of the RJI for Index No. 315-08 is attached hereto as **Exhibit "A"**.

12. 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 the Article 78 proceeding. (See Ex. G to Simon Aff.).

13. On April 11, 2008, Hon. Richard B. Meyer, Acting Supreme Court Justice, issued a partial stay of the Lewis Family Farm's obligation to comply with the March 25 Determination. (See Ex. H to Simon Aff.).

14. 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.

15. I 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.

16. 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.

17. 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 Lewis Family Farm filed an RJI with this motion pursuant to 22 NYCRR 202.6, whereby it noted that the Article 78 proceeding (Index No. 315-08) was a "related case". A copy of the RJI for Index No. 332-08 is attached hereto as **Exhibit "B"**.

18. The Agency consents to consolidation, but has made the instant cross-motion to transfer the consolidated actions to Justice Ryan.

19. On April 18, 2008, at 4:24 p.m., I was copied on a fax from Assistant Attorney General Loretta Simon to Hon. Richard B. Meyer, whereby Ms. Simon explained that the Agency had purportedly rescinded Paragraph 4 on Page 12 of its March 25 Determination. A copy of Ms. Simon's Letter to Justice Meyer is attached hereto as **Exhibit "C"**.

20. On April 18, 2008, at 4:25 p.m., I received a fax from the Agency that purported to "correct" its final determination of March 25, 2008. A copy of the Agency's fax is attached hereto as **Exhibit "D"**.

21. Based on the foregoing, and on the reasons in the accompanying memorandum of law, the Lewis Family Farm respectfully asks this Court to deny the Agency's cross-motion to transfer the consolidated actions to Justice Ryan, and grant such other and further relief as the Court deems just and proper.

I hereby swear and affirm the above under penalty of perjury this 23rd day of April, 2008.

/s/ John J. Privitera
John J. Privitera