

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

AFFIRMATION

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

**AFFIRMATION IN SUPPORT OF MOTION FOR THE CONSOLIDATION OF
TWO ESSEX COUNTY SUPREME COURT ACTIONS**

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 (collectively "Petitioner/Defendants"). 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 support of the Petitioner/Defendants' motion to consolidate these actions pursuant to CPLR § 602(a) because the proceeding and action involve identical questions of law and fact.

3. In November 2006, Petitioner/Defendants began construction on three farm worker housing structures on its land within the Adirondack Park and within Essex County Agricultural District No. 4. In September 2007, nearly a year later, the Adirondack Park Agency (hereafter "Respondent/Plaintiff") commenced an enforcement proceeding against Petitioner/Defendants which resulted in a March 25, 2008 Determination ("March 25 Determination"), whereby the Agency's Enforcement Committee determined that the Petitioner/Defendants had violated the Adirondack Park Agency Act by failing to obtain a permit for the construction of the dwellings and subdivision of land.

4. The Agency's March 25 Determination against Petitioner/Defendants directs the following:

- (1) Lewis Farm will apply for a permit for the three new dwellings and the 4-lot subdivision into sites (including retained "lot") by April 14, 2008, by submitting the appropriate major project application.
- (2) By April 28, 2008, Lewis Farm will also submit the following to the Agency:
 - (a) a detailed description of the use of each dwelling and connection to the Lewis Farm agricultural operations;
 - (b) an as-built plan for the septic system and an evaluation by a NYS licensed professional engineer as to whether the installed septic system for the three dwellings complies with the NYS Department of Health and Agency standards and guidelines;
- (3) Lewis Farm will reply to any addition information request within 30 days of receipt.

- (4) Lewis Farm will retain all rights of appeal in the project review process, but forgoes the right to challenge Agency jurisdiction and the review clocks otherwise applicable.
- (5) Lewis Farm or its employees shall not occupy the three new dwellings located on the corner of Whallons Bay Road and Christian Road unless and until an Agency permit is issued and the civil penalty paid.
- (6) By April 28, 2008, Lewis Farm will pay a civil penalty of \$50,000 to the Agency.
- (7) Agency staff is directed to review the application for the three dwellings and the subdivisions promptly, towards the goal of issuing the after-the-fact permit in time for farm worker occupancy of the dwellings for the 2008 growing season. However, that can only happen if the Respondent responds immediately and favorably to this determination and submits the required information and penalty. The Agency will not proceed with review of the application unless and until the civil penalty is paid, the information requested above is submitted, and the dwellings remain vacant until approval is issued.

(See Amended Verified Petition, Ex. A).

5. By way of the March 25 Determination, Respondent/Plaintiff has, among other things, wrongfully asserted jurisdiction over Petitioner/Defendants' agricultural use structures.

6. On April 8, 2008, Petitioner Lewis Family Farm commenced an Article 78 proceeding against Respondent Adirondack Park Agency seeking to vacate and annul the March 25 Determination (Essex County Index No. 315-08). A copy of the Amended Verified Petition, which was served on April 14, 2008, is attached hereto as **Exhibit "A"**.

7. On April 9, 2008, Petitioner moved by an Amended Order to Show Cause for a stay of Petitioner's obligation to comply with the March 25 Determination during the pendency of the Article 78 proceeding.

8. On April 11, 2008, at 9:15 a.m., Respondent/Plaintiff filed a Summons and Complaint against Petitioner/Defendant (Essex County 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. A copy of the Summons and Complaint (minus exhibits) is attached hereto as **Exhibit "B"**.

9. Mere hours later, on April 11, 2008 at approximately 1:30 p.m., the parties appeared at a hearing before Hon. Richard B. Meyer, Acting Supreme Court Justice, on Petitioner's motion for a stay of its obligation to comply with the March 25 Determination pending the outcome of Action No. 1.

10. Counsel for Respondent/Plaintiff failed to disclose to the Court that it had, in fact, commenced Action No. 2 mere hours earlier, despite a direct and specific inquiry from Judge Meyer on this issue.

11. I was provided with a copy of the Summons and Complaint for Action No. 2 in the afternoon on April 14, 2008. Respondent/Plaintiff has yet to complete personal service on the named defendants in Action No. 2.

12. Both actions involve the same facts, issues of law, and parties. Allowing the two actions to proceed independently would be duplicative and a waste of judicial resources. Accordingly, to save the time of the court, the parties and witnesses, for the convenience of all concerned and because the relief requested can result in no prejudice, the Court should enter an order consolidating the actions. See Mattia v. Food Emporium, Inc., 259 A.D.2d 527 (2d Dep't 1999) (holding that consolidation of actions is proper when there exists common questions of law and fact); Cushing v. Cushing, 85 A.D.2d 809 (3d Dep't 1981) (holding that consolidation is proper based on common issues of fact and law, even where an answer has not been served); see also Big Apple Supermarkets, Inc. v. Corkdale Realty, Inc., 61 Misc.2d 483 (Suffolk County Sup. Ct., 1969) (consolidation should not be denied merely because it involved the joinder of a

special proceeding with an action); Nelson v. Nelson, 74 Misc.2d 946 (Nassau County Sup. Ct., 1973) (holding that an action may be consolidated with a special proceeding).

13. The actions should be consolidated under the caption of Action No. 1 because: (i) Action No. 1 was commenced prior to Action No. 2; (ii) a final determination in Action No. 1 could render Action No. 2 as moot; and (iii) Action No. 2, which essentially seeks to enforce the March 25 Determination, is not yet ripe.

14. Based on the foregoing, the Petitioner/Defendants respectfully ask this Court to enter an order consolidating Action No. 1 and Action No. 2 pursuant to CPLR 602(a), 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 14th day of April, 2008.

/s/ John J. Privitera
John J. Privitera