

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

INDEX No. 315-08
RJI No. 15-1-2008-0109
Hon. Richard B. Meyer

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

INDEX No. 332-08
RJI No. 15-1-2008-0117

MEMORANDUM IN OPPOSITION TO LEWIS FARM'S
MOTION TO DISMISS APA COMPLAINT

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June 10, 2008

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PRELIMINARY STATEMENT

The Adirondack Park Agency ("APA" or "Agency") submits this memorandum of law in opposition to the motion of Barbara Lewis, Salim B. Lewis and Lewis Family Farm Inc., (collectively hereafter "Lewis Farm") to dismiss the APA's civil enforcement action (Index No. 332-08), (Lewis Farm III) consolidated by Order of this Court with Lewis Family Farm, Inc. v. NYS Adirondack Park Agency, (Index No. 315-08) (Lewis Farm II). Lewis Farm's memorandum in support of its motion, also framed in support of its Article 78 petition, argues the merits, and asks the Court to annul and vacate the APA's March 25, 2008 determination of violation. See June 3, 2008 Lewis Farm Memorandum of Law ("Memo of Law") pp. 1-41 (Points I through IV). This memorandum addresses Lewis Farm's motion to dismiss; the APA will address the merits of the petition separately within the time frame allowed pursuant to CPLR § 7804(c) and General Construction Law § 25-a.

Lewis Farm seeks dismissal of the APA's enforcement action on several grounds: 1) failure to state a cause of action against the Lewis Farm or the defendants individually; 2) res judicata and 3) collateral estoppel; and pursuant to CPLR § 3211(a)(4), claiming that the two cases are actually the same actions pending between the same parties concerning the issues.

Lewis Farm's Motion to Dismiss the APA's civil enforcement action is without merit and should be denied.

STATEMENT OF FACTS

These consolidated cases arise from the same facts: the construction of three single-family dwellings and subdivision of land pursuant to the APA Act, on land located in the Town of Essex, Essex County without an APA permit and in violation of the Adirondack Park Agency Act ("APA Act") and the Wild, Scenic, and Recreational River System Act (the "Rivers Act"). See Executive Law § 809 and Executive Law § 810; Environmental Conservation Law ("ECL") § 15-2701. A detailed statement of facts and litigation history can be found in the documents previously filed with this Court.

ARGUMENT

POINT I

THE APA'S ENFORCEMENT ACTION IS STATUTORILY AUTHORIZED AND SHOULD NOT BE DISMISSED PURSUANT TO CPLR § 3211(a)(4) OR ON RES JUDICATA OR COLLATERAL ESTOPPEL GROUNDS

1. CPLR § 3211(a)(4)

Lewis Farm asserts that the APA's action should be dismissed pursuant to CPLR § 3211(a)(4), arguing it is duplicative of petitioner's CPLR Article 78 proceeding herein. See June 3, 2008 Lewis Farm Memo of Law pp. 44-45. It is not. While these two

consolidated cases stem from the same facts, they do not constitute the same cause of action. The APA's statutorily authorized enforcement action is brought to enforce the two state statutes and an administrative determination. See Executive Law § 813. In contrast, petitioner's CPLR Article 78 proceeding consisting of sixteen causes of action, seeks to annul the administrative determination, challenges Agency jurisdiction, argues violations of Agriculture and Markets Law, and argues violation of the New York State Constitution, and due process. See Amended Petition dated April 14, 2008.

CPLR § 3211(a)(4) provides that a party may move to dismiss where "there is another action pending between the same parties for the same cause of action in a court of any state" CPLR § 3211(a)(4). While Lewis Farm II and III are factually and legally related, they are not "the same cause of action" for purposes of CPLR § 3211(a)(4). Furthermore, this Court has already consolidated these actions. See Simon Aff., Exhibit A (letter Decision and Order of Justice Richard B. Meyer dated April 25, 2008). In addition, in a letter to the parties regarding consolidation of the cases, Justice Meyer noted and determined that the State's civil action will be deemed a counterclaim. See Simon Aff., Exhibit A (letter of Justice Richard B. Meyer dated May 30, 2008). Accordingly, the APA's enforcement claims - whether considered as counterclaim or

consolidated civil action - should not be dismissed pursuant to CPLR § 3211(a)(4).

2. Res Judicata and Collateral Estoppel

Remarkably, defendants also argue that the APA's action should be dismissed pursuant to the doctrines of res judicata and collateral estoppel. However, it is Lewis Farm that is collaterally estopped from raising the jurisdictional issues that were already decided against it by Justice Ryan in Lewis Farm I. See Decision and Order of Honorable Kevin K. Ryan dated August 16, 2007 (Index No. 498-07). Under no reading of that decision could the APA be estopped from enforcing its March 25, 2008 administrative determination against Lewis Farm.

"The doctrine of collateral estoppel is based on the notion that it is not fair to permit a party to relitigate an issue which has previously been decided against him in a proceeding in which he had fair opportunity to fully litigate the point." Gilberg v. Barbieri, 53 N.Y.2d 285, 291 (1981); Buechel v. Bain, 97 N.Y.2d 295, 303-304 (2001), cert. denied, 535 U.S. 1096 (2002). There are two requirements for invoking collateral estoppel: (1) the party seeking to invoke the doctrine must demonstrate that the same issue was raised and necessarily decided in the prior action; and (2) the party against whom the doctrine is to be invoked must have had a full and fair opportunity to litigate the issue. Id. at 306. Defendants

misunderstand the nature of the proceedings herein. The APA does not seek to relitigate an issue in Lewis Farm I that was decided against it, nor does it seek to re-litigate the APA administrative determination. Rather, the APA seeks to enforce its subsequent March 25, 2008 determination which found violations of the APA Act. It is defendants who are in fact subject to collateral estoppel here regarding their jurisdictional claims, not the APA. Accordingly the APA's complaint should not be dismissed for res judicata or collateral estoppel.

POINT II

LEWIS FARM'S CLAIM THAT THE APA COMPLAINT FAILS TO STATE A CAUSE OF ACTION IS WITHOUT MERIT

Lewis Farm's claim that the APA's complaint should be dismissed because it fails to state a cause of action is without merit. See June 3, 2008 Lewis Farm Memo of Law, p. 42. As established by documents previously submitted to this Court, there is no doubt that Lewis Farm is geographically located in the Adirondack Park, in an area regulated as "Resource Management" pursuant to the APA Act, and that the dwellings at issue here are located within 1/4 mile of the Boquet River, a river designated as protected pursuant to the Rivers Act. See Affidavit of Douglas Miller dated March 4, 2008 ("March 4, 2008 Miller Aff.") ¶ 3, Exhibit A. Further, there is no dispute that

three single-family dwellings were constructed on the property of Lewis Farm. See January 17, 2008 Barbara Lewis Aff. ¶¶ 12-14, 16, 19, 26, Exhibit H. Essex County Supreme Court has already determined that the APA has jurisdiction over the three dwellings at issue here. See Decision and Order of Honorable Kevin K. Ryan dated August 16, 2007, Index No 498-07 (Lewis Farm I). Clearly, the APA complaint states a cause of action, and Lewis Farm's motion to dismiss should be denied.

POINT III

DEFENDANTS BARBARA LEWIS AND SALIM B. LEWIS SHOULD BE HELD INDIVIDUALLY LIABLE

Defendants Barbara and Salim B. Lewis argue they should not be held individually liable for the violations set forth in the State APA's complaint. See June 3, 2008 Lewis Farm Memo of Law pp. 43-44. However, the Lewis defendants can and should be held individually liable because of their direct involvement and decision making underlying the APA enforcement actions.

Under New York law, an officer of a corporation who participates in the commission of a wrong by the corporation may be held personally liable without having to pierce the corporate veil. See New York v. Shore Realty Corp., 759 F.2d 1032, 1052-53 (2d Cir. 1985). Individual liability may be predicated upon the actions of the individual, irrespective of compliance with corporate formality. See e.g. State of New York v. McGrane, 298

A.D.2d 577 (2d Dep't 2002) (president and sole shareholder of corporation individually liable, as he himself participated in violations of the Environmental Conservation Law); American Express Travel Related Serv. Co. v. North Atl. Resources, Inc., 261 A.D.2d 310 (1st Dep't 1999); Jackson's Marina v. Jorling, 193 A.D.2d 863, 866 (3d Dep't 1993) (president of a Marina, who made application for permits and was listed as Marina's agent could be held liable individually on the basis of his actions, without piercing the corporate veil). This analysis has been applied in actions involving violations of federal or state environmental statutory or common law. See Malin v. Bill Wolf Petroleum Corp., Index No. 21438/96 (Sup Ct. Nassau Cty. April 6, 1999), aff'd., 272 A.D.2d 527 (2d Dep't 2000) (summary judgment against individual defendant for contamination originating from underground storage tanks owned by defendants' companies).

In State v. Williamson, 8 A.D.3d 925 (3d Dep't 2004), a case involving several waste tire storage and recycling operations, Supreme Court granted summary judgment for the State, finding several individual defendants personally liable. On appeal, the Appellate Division concluded that while the issue was not preserved for appeal, the lower court was justified in holding individual shareholders, owners and/or officers of several closely held defendant corporations liable, where those individuals were aware of at least some of the violations at

their waste tire storage and recycling operations. Id. at 929.

As in Williamson, Barbara Lewis and Salim Lewis had individual and personal knowledge of and involvement in actions which violated the APA Act and the Rivers Act. Barbara and Salim Lewis planned and carried out the construction of the three single-family dwellings on the Lewis Farm property. As individuals, they submitted an application for a permit to the APA requesting permission to build the dwellings. See Affirmation of Loretta Simon dated June 10, 2008 ("Simon Aff."), Exhibit B. In a sworn statement, Barbara Lewis stated that the three dwellings were under consideration for years, she sought local town permits for the construction of the dwellings, and knowing that the APA had asserted jurisdiction, authorized delivery and installation of the modular dwellings. See Affidavit of Barbara Lewis dated January 17, 2008 ("January 17, 2008 Barbara Lewis Aff.") ¶¶ 12-14, 16, 19, 26. Moreover, Barbara and Salim Lewis acted not only individually as applicants for a permit, but as officers of Lewis Family Farms, Inc. Salim Lewis signed the Certificate of Incorporation, identified himself as a shareholder of the corporation in a sworn statement, and documents on file with the Department of State list Barbara Lewis as President. See Simon Aff., Exhibit C, see also December 12, 2007 Miller Aff. ¶ 7, Exhibit D (Affidavit of Salim Lewis dated August 7, 2007, ¶ 1). Barbara and Salim Lewis have a residence

at the farm, had personal knowledge of and involvement in the construction of the dwellings at issue here and are the officers of the corporation that owns the property. Thus they should be held individually liable for the construction of the dwellings on their farm, and for the violations found by the APA and remain a defendants.

CONCLUSION

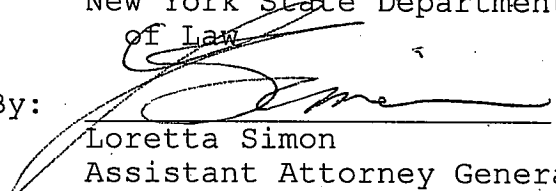
For all of the foregoing reasons, Lewis Farm's motion to dismiss the APA's civil enforcement action should be denied.

Dated: June 10, 2008

Respectfully submitted,

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