

STATE OF NEW YORK
APPELLATE DIVISION

SUPREME COURT
THIRD DEPARTMENT

TOWN OF ESSEX and JAMES Z. MORGAN, JR.,
as Superintendent of Highways of the Town
of Essex,

Plaintiffs,

against

LEWIS FAMILY FARM, INC.,

Defendant.

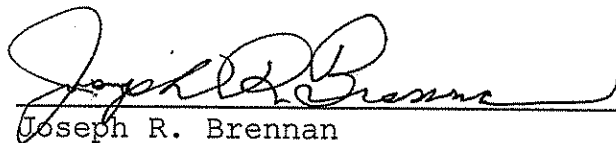
**NOTICE OF MOTION
FOR DISMISSAL OF APPEAL**

(Essex County
Index No: 000047-07)

PLEASE TAKE NOTICE that, upon the affidavit of Joseph R. Brennan, sworn to on the 16th day of June, 2008, and upon the Notice of Appeal of the plaintiffs-appellants, Town of Essex and James Z. Morgan, Jr., as Superintendent of Highways of the Town of Essex, dated the 26th day of February, 2008, the defendant-respondent, Lewis Family Farm, Inc., will move this Court at a motion term thereof to be held at the Appellate Division Courthouse located at the Justice Building, State Street, Albany, New York 12224 at 1:00 p.m. on June 30, 2008, for an order, pursuant to §§ 800.2 and 800.9(a) and (d) of the Rules of Practice of this Court, dismissing the appeal to this Court of the plaintiffs-appellants, Town of Essex and James Z. Morgan, Jr., as Superintendent of Highways of the Town of Essex, said Notice of Appeal being from the Decision and Judgment of the Supreme Court of Essex County (Hon. Mark L. Powers, Acting Supreme Court Justice), dated February 1, 2008, and entered in the Office of the Essex County Clerk on February 11, 2008, which granted Judgment after a non-jury trial in favor of the defendant,

Lewis Family Farm, Inc., upon the Decision that the farm roads of the defendant, Lewis Family Farm, Inc., do not obstruct the public highway, Cross Road, and do not interfere with the drainage or plowing of the public highway, Cross Road, since more than sixty (60) days have elapsed from the date of and service of the Notice of Appeal and the plaintiffs-appellants, Town of Essex and James Z. Morgan, Jr., as Superintendent of Highways of the Town of Essex Daniel J. Stranahan, have failed to file with the Clerk of this Court the Record on Appeal and Appellants' Brief and Appendix as required by §800.9 of the Rules of Practice of this Court and granting such other and further relief as to the Court may seem just and proper.

Dated: Queensbury, NY
June 16, 2008



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STATE OF NEW YORK
APPELLATE DIVISION

SUPREME COURT
THIRD DEPARTMENT

TOWN OF ESSEX and JAMES Z. MORGAN, JR.,
as Superintendent of Highways of the Town
of Essex,

Plaintiffs,

against

LEWIS FAMILY FARM, INC.,

Defendant

**AFFIDAVIT IN SUPPORT
OF MOTION FOR DISMISSAL
OF APPEAL**

(Essex County
Index No: 000047-07)

STATE OF NEW YORK)
COUNTY OF WARREN) SS:

JOSEPH R. BRENNAN, being duly sworn, deposes and says:


1. I am an attorney duly admitted to practice in the courts of the State of New York, am a member of the law firm of Brennan & White, LLP, attorneys for the defendant-respondent, Lewis Family Farm, Inc., and I am fully familiar with all facts, circumstances and proceedings heretofore had herein.

2. On February 11, 2008, a Decision and Judgment of the Supreme Court of Essex County (Hon. Mark L. Powers, Acting Supreme Court Justice), dated February 1, 2008, was entered in the Essex County Clerk's Office, which determined after a non-jury trial that the farm roads of the defendant, Lewis Family Farm, Inc., did not obstruct the public highway, Cross Road, and did not interfere with the drainage or plowing of Cross Road, a copy of which Decision and Judgment is annexed hereto as Exhibit "A".


3. On or about February 26, 2008, Darryl W. Harp, Esq., attorney for the plaintiffs-appellants, Town of Essex and James Z. Morgan, Jr., as Superintendent of Highways of the Town of Essex, served a Notice of Appeal to the Appellate Division, Third Department, from the Decision and Judgment of the Supreme Court of Essex County referred to above, a copy of which Notice of Appeal is annexed hereto as Exhibit "B".

4. More than sixty (60) days have elapsed from the date of service of the aforementioned Notice of Appeal and the plaintiffs-appellants, Town of Essex and James Z. Morgan, Jr., as Superintendent of Highways of the Town of Essex, have not filed with the Clerk of this Court or served the Record on Appeal and/or Appellants' Brief and Appendix as required by §800.9(a) of the Rules of Practice of this Court.

WHEREFORE, your deponent respectfully prays for an Order dismissing the appeal of the plaintiffs-appellants, Town of Essex and James Z. Morgan, Jr., as Superintendent of Highways of the Town of Essex, for lack of prosecution, together with such other and further relief as to the Court may seem just and proper.


Joseph R. Brennan

Sworn to before me this 16th
day of June, 2008


Notary Public

DEBRA WILLIAMS
Notary Public, State of New York
Warren Co. #4972116
Commission Expires Sept. 17, 2010

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX
TOWN OF ESSEX and JAMES Z. MORGAN, JR., as
Superintendent of Highways of the Town of Essex,

Plaintiffs,

-against-

LEWIS FAMILY FARM, INC.,

Defendant.

DECISION/JUDGMENT

Index No. 47-2007

RJI No. 15-1-2007-0014

Hon. Mark L. Powers

APPEARANCES:

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In this action, plaintiffs seek a judgment declaring that defendant lacks any right to build private roadways within the highway right of use area and/or immediately adjacent to Cross Road in a way that interferes with the proper maintenance and repair of the public highway, directing defendant to remove all obstructions to the drainage culvert on Cross Road, permanently enjoining defendant from building or maintaining private roadways within the highway right of use area, including, but not limited to, the snow removal and snow storage right of way use area, and permanently enjoining defendant from building or maintaining private roadways adjacent to the highway right of way use area that are at a higher elevation than Cross Road. This matter was tried before the Court without a jury.

and the Court makes the following findings as required by CPLR §4213(b).

This action concerns approximately 400 feet of a 1.46 mile road known as Cross Road, an unpaved public highway by use in the Town of Essex ("Essex"). Cross Road is certified on the annual certification of highway mileage submitted to the New York State Department of Transportation as being 20 feet wide with 5 feet of shoulders on each side. Within this 400 feet length of road there is a 24 inch diameter culvert lying under Cross Road. Alongside Cross Road are drainage ditches which were constructed and maintained by Essex. These ditches are approximately 3 feet wide and 2 feet deep. In 2006 defendant constructed farm roads parallel to Cross Road on the north and south sides.

Plaintiffs contend that the construction of these farm roads have encroached upon the drainage ditches by having stones therein, blocked the drainage culvert at its outlet on the south side of Cross Road, blocked the drainage area where water flowed for many years through the field until it reached the Webb Royce Swamp, and has interfered with the snow storage and removal on Cross Road.

The parties stipulated that the examination before trial of James Z. Morgan, Jr., would be submitted since he would not be available at the time of trial. Also submitted was the testimony from the hearing on the request for a preliminary injunction in this matter. Those testifying at the hearing on the preliminary injunction were Ronald Jackson, Supervisor of Essex, on behalf of the plaintiff and Todd Deyo, a self-employed contractor who built the farms roads, for the defendant.¹

At the trial plaintiff called as witnesses, Chad Cooke, a Professional Engineer,

¹The preliminary injunction was denied and the Court scheduled an early trial on this matter.

Ronald Jackson, Supervisor of Essex, and Eugene Benway, an employee of the Essex Highway Department. Defendant called Barbara Lewis, an owner of the defendant business.

Supervisor Jackson testified at the hearing on the preliminary injunction that the north side of the culvert is open but the south end is no longer visible, because it is covered. He further testified that in 2006 and prior years water flowed through the culvert out onto fields that now belong to the Lewis Family Farm. With respect to drifting snow in the area, Mr. Jackson said that up to the late 1960's to early 1970's, snow fences were placed in the area in question about thirty to forty feet from the road. On cross-examination, Mr. Jackson stated that wollastonite was covering the stone from the farm road and that there was a build up of wollastonite in the culvert. He stated there was no flooding in the area of the culvert but there was a build up of water at the end of the culvert. At no time during the winter of 2006-2007 was Cross Road closed for travel.

Mr. Deyo testified that he was hired to improve the drainage for the farm to rectify the erosion problem and the problem of wollastonite, which retards growth of plants, getting into the lower lying areas of the area in question. With respect to the culvert, Mr. Deyo stated that the construction of the farm roads did not in any way impact the drainage of the culvert and that the culvert was two-thirds full of wollastonite. As to the construction of the roads, he testified they were made of limestone rock, that the standards of construction exceeded those required by the state, and he was aware of the location of the town's highway easement. He stated that crushed rock was used because it passes water fairly quickly, but will release the water at a slower rate to cause less volatility in storm runoffs. He also stated that the farm roads are set back approximately 34, 35 feet from Cross Road

and that the farm roads are at a higher elevation than Cross Road so that when the Town added more wollastonite to the road, the wollastonite would not run off into the fields. Mr. Deyo also testified that New York State Electric & Gas lines were about three and a half feet higher than Cross Road and that 30 inches of cover over the lines was required. He also testified that there is an "18 inch tile perforated" and it goes through a manhole. The 18 inch pipe then goes to Redway Swamp. When asked his opinion what effect a three inch rainfall would have on the road, he indicated that due to the manner in which Cross Road is constructed, the road would fail.

At trial, Chad Cooke, P. E., testified with respect to his observations of the area in dispute. He found two adjacent and graveled farm roads parallel to Cross Road and "constructed in higher elevation than the existing Cross Road surface elevation." He also located a culvert on the north side but could not find the outlet location on the south side. He determined that the distance from the top of the existing gravel road banks to the existing edge of Cross Road varied from six to twenty-two feet in width and that in terms of height above Cross Road the range was approximately two feet to six feet above Cross Road. He also found that on the south side the gravel farm road has infringed on the existing drainage ditch that was there, and that where the culvert would be on the south side the distance from the edge of the road to the bottom of the gravel bank was less than the distance from the edge of the road to the gravel bank east and west of that location. He concluded that since the south end of the culvert was buried under gravel and that since surface drainage has no where to go, ponding would take place in this area. His opinion was that because of a bathtub type effect the road could become impassable and the structural integrity of the road could be compromised.

When asked about the impact that severe snow storms could have, Mr. Cooke stated that in the area where there is only a six foot distance from the edge of Cross Road to the gravel road bank that there is approximately twenty-eight feet of snow storage so that "plowing that half of that lane into that area a four-inch snow fall would fill that area." He also stated that where the adjacent areas are elevated relative to Cross Road, the piling of high snow in a smaller area is going to create snowdrifts across Cross Road.

Upon cross-examination, Mr. Cooke admitted that he did not examine the farm roads closely enough to determine the type of rock used in the construction of the roads, did not know how far below ground level the base of the farm road is, did not know the exact length of the culvert, and did not see any pooling or evidence of pooling of water on either the north or south sides of the road. He also was not aware of the fact that in the process of plowing Cross Road the surface is removed, although he acknowledged there was wollastonite down the embankment in the area of the ditch on both sides. He also did not make any inspection of the farm road to determine whether the voids between the drainage rock are filled with sediment. Since Mr. Cooke did not inspect the southernmost point of the south farm road, he had no knowledge that the construction of that farm road in any way prevented water from flowing through that culvert and through the drainage rock. As to the storage of snow, Mr. Cooke made no calculation with regard to the volume of snow between the edge of the road and the edge of the farm road. He further admitted that on the day he was there in 2007 he did not observe any compromise to the structural integrity of Cross Road and could not determine where the ditch was actually located. He also stated that if the south end of the culvert became filled with sediment it could be cleaned out by removing the roadway.

Supervisor Jackson was called and testified that Cross Road is a dirt road that is topped off by wollastonite and graded at least twice a year to get rid of the ruts. He described the whole area as a basin that drains through the Lewis Family Farm property to a swamp, then down to Beaver Brook and finally to the river. He added that there is a culvert under Cross Road that conveys the water from the north side to the south side of the road. He stated that there once was a drainage swale but that about eight, ten years ago the area was plowed and smoothed out so that the water went out into the field. He can now see the inlet to the culvert on the north side but can only see a tiny bit of the south end of the culvert if no leaves are there. He could not see into the culvert because it is filled with rock. He stated that there are drainage ditches on the north side and there was a drainage ditch on the south side prior to the construction. With respect to the south side, he stated there is still some kind of ditch there but the rock from the road is against the shoulder of the town road reducing the size of the ditch area. Once again he testified about the snow fences and that to his knowledge there was no problem removing the snow from Cross Road during the substantial snow fall on Valentine's Day. He also noted that the farm roads are at a higher elevation than Cross Road in the area in question with the farm roads being higher by a foot at the ends and about six feet in the middle.

Mr. Jackson testified that he had received a complaint from a woman about the impact the farm roads could have on any response to any emergency at her home. He stated there were other routes to the woman's home and other homes in that area, but it would take ten to twelve minutes longer to get to the complaining homeowner's house, but less time to the others.

On cross-examination, Mr. Jackson calculated an ambulance would have to travel

about one mile farther if it could not use Cross Road. He also admitted that there are areas along Cross Road where banks are adjacent to the lanes of travel and areas where tree growth and foliage come almost up to the lanes of travel. There are also areas the slope of the land is a foot or a foot and a half above the surface of Cross Road.

Plaintiff then called Eugene Benway, a heavy equipment operator for the Essex Highway Department, who has operated a plow on Cross Road in the area in question. Mr. Benway described the size of the plow, how the plow directed the snow to the right, and how the wing plow pushes the snow further from the road. He stated that he plowed Cross Road during the major storm on February 14, 2007 using the plow and the wing plow. When he reached the lowest point on Cross Road in the area in question the wing plow hit stones from the farm road. He also stated a grader was not used in that section of Cross Road. With respect to the ditches, he testified that they were cleaned in 2006 but the highway superintendent did not instruct the crew to clean the ditches in this area in 2007. When he cleaned the ditches, he found stones from the road and two to three inches of wollastonite. He states that now the ditch on the south side is half filled with stone. If the culvert freezes a steam jenny is used to open the pipe. According to Mr. Benway, the steam jenny is inserted into the low end of a pipe, but because of the farm road, a steam jenny could not be used on the south end of this culvert. He also stated that ten foot sections of pipe were connected to the steam jenny.

Upon cross-examination, Mr. Benway testified that he puts about five feet of the approximately ten foot plow to the left of the center line and the wing man would separately operate the wing plow also having a length of about 10 feet. He admitted that the plowing area could be narrowed with the plow and wing man by moving the wing plow. In other

narrow areas on Cross Road, Mr. Benway testified that he would pull farther over and not bring the wing back. He estimated that in these areas the road width was maybe fifteen feet. Mr. Benway had no problem plowing the road when another storm occurred in March 2007, and never had to use a front end loader on any occasion on Cross Road during 2006-2007.

Mr. Benway never observed any flooding on Cross Road, never saw any pooling of water on the north or south end of the culvert, never saw any erosion of the banks or surface of Cross Road, and does not know if the water flowing through the culvert is going through the rock that comprises the farm road. He admitted that the hitting of stones with the wing plow did not slow him down or stop him, and also said the wing did not hit the stones when the plow was in the middle of the road. Upon further questioning it was revealed that at another location Mr. Benway totaled a truck because he slid off the right side of the road and on a prior occasion slid off Cross Road because he was too far to the right.

Barbara Lewis, a co-owner of Lewis Family Farm, Inc., testified that she took measurements from the center of Cross Road to the toe of the farm roads and found the distance from the center of Cross Road to the toe of the north farm road was 27 feet and the distance from the center of Cross Road to the toe of the south farm road was 21 feet.

Highway Superintendent James Z. Morgan, Jr., at an examination before trial testified that Cross Road has a wollastonite surface, that the difference in elevation of the surface of the farm roads in relation to Cross Road is five feet, and that the distance from the toe of the farm roads to the center of Cross Road is approximately twenty-five to twenty-seven feet. He stated that the area of concern is where the culvert is located. His

concern is that if there is a lot of snow, the town plow would not be able to push the snow over the top of the farm roads. When questioned about plowing the roads, he stated that the recommended speed for plowing was five to fifteen miles per hour depending on snow accumulation, and at that speed, the snow, using the wing plow, would be thrown approximately ten feet off the surface of the road. He also testified that there was no difficulty in removing snow from Cross Road during a three foot snowfall in February 2007, and he was not aware of any accumulation of ice on Cross Road due to the construction of the farm roads.

Mr. Morgan also stated that the south end of the culvert that ran under Cross Road is obstructed by stone from the road. However, he did admit that he has not had any difficulty with flooding or accumulation of water at the south end of the culvert, that water will flow through the culvert, and that no flooding on Cross Road has occurred since the farm roads were constructed.

With respect to the maintenance of Cross Road, Mr. Morgan testified that generally in the spring two to six inches of wollastonite is put down on the road, to fill in the low spots because during the winter a lot of material on the road is lost due to plowing. He further testified that ditches along Cross Road are approximately two feet in depth and three feet wide and have been sufficient to handle the water run-off in the area even after the construction of the farm roads. With respect to the south end of the culvert, it has stones in it, but he has not done any excavation work to open it up. He also stated that any potential problem could be corrected by taking the culvert and piping it into the catch basin owned by the defendant.

The general rule is that a highway created by use is as wide as the actual use for

purposes of public travel (see, *Schillawski v. State of New York*, 9 NY2d 235 [1961]; *Dutcher v. Town of Shandaken*, 23 AD3d 781 [3rd Dept., 2005]; *Danial v. Town of Delhi*, 185 AD2d 500 [3rd Dept., 1992]). Included are "such uses as appertain directly or indirectly to the right of passage and tend in some way to preserve or make more easy the exercise of such right" (*Thompson v. Orange & Rockland Elec. Co.*, 254 NY 366, 369[1930]; see, *Dutcher, supra*).

Highway Law §319 only prohibits obstructions "within the bounds of the highway" (*Wheeler v. Buxton Industrial Equipment Co.*, 292 AD2d 521 [2nd Dept., 2002]). This statute also lists as an obstruction "earth, stone or other material placed in any ditch or waterway along the highway."

Initially, the court notes that there was no proof of any adverse impact on Cross Road due to the construction of the farm road north of Cross Road. The testimony was unequivocal from the witnesses that the culvert on the north side was open, that there was no drainage problem or potential drainage problem on the north side, and no proof of any interference with snow plowing or snow removal. Accordingly, any claims that the farm road north of Cross Road has interfered with the drainage or plowing of Cross Road has not been proven and must be dismissed.

The ultimate issue is whether the construction of the south farm road obstructed the highway or in some way interfered with the right of passage on Cross Road. Plaintiffs do not argue that there is an obstruction of Cross Road, but contend the construction of the south farm road interfered with the drainage and snow removal from Cross Road, and thus has affected, or has the potential to affect, the right of passage over Cross Road.

Plaintiffs contend that the drainage of Cross Road over the lands of defendant for more than ten years prior to the construction of the farm road has established, in effect, a prescriptive easement over some portion of defendant's property.

There is no dispute that the culvert under Cross Road permits the drainage of water from the north to pass under Cross Road and is necessary to preserve the public's right of passage over Cross Road. Thus, the culvert constitutes a portion of the public highway and may be maintained by Essex (see, *Dutcher v. Town of Shandaken, supra*). The defendant does not contest the right of Essex to clean out the ditch area or to remove the wollastonite material that has covered the south end of the culvert.²

The next issue in this matter is whether the construction of the farm road has interfered with any rights of drainage or plowing. It has been recognized that an easement for drainage of surface water may be acquired by prescription (see, *Torre v. Meade*, 226 AD2d 447 [2nd Dept., 1996]; *Village of Schoharie v. Coons*, 34 A.D.2d 701, *affd.* 28 N.Y.2d 568 [1971]). Although the testimony was uncontroverted that Cross Road in the area in question drained onto the fields of the Lewis Family Farm for more than ten years, Essex has failed to establish exclusive possession of the drainage area. Assuming *arguendo* Essex did have a prescriptive easement, the proof failed to show that the construction of the farm roads has interfered with that easement, the drainage area off Cross Road.

²It should be noted that Highway Law §147 provides under certain conditions for the town superintendent to enter upon the lands adjacent to any highway to open an existing ditch or drain or to dig a new ditch or drain for the drainage of the highway; change to position of a fence or other obstruction preventing the free flow of water under or through a culvert for the protection of the highway; and to remove any fence or other obstruction which causes snow to drift in and upon such highways and to erect snow fences or other devices to prevent the drifting of snow in or upon such highways.

In *Dutcher*, the proof was that the town maintained the area in question and the plaintiff blocked the culvert and drainage area with five truckloads of dirt. Similarly, in *Village of Schoharie*, defendant crushed a tile conduit and covered it with fill causing the conduit to break open on adjacent property. Here there has been no destruction of the culvert and there has been no interference with the drainage of Cross Road. The proof was consistent that there has been no ponding or pooling and that there has been no interruption of travel on Cross Road since the farm roads were built. In fact the Superintendent of Highways stated that if there was any concern the issue could be resolved by piping the culvert into the defendant's catch basin.

After the south farm road was built, the area experienced two significant snowfalls. Except for one instance when the wing plow hit some stone, there is no proof that the farm road interfered with plowing on Cross Road. In fact, testimony as to the width of the road and the width of the plows leads to the conclusion that the plow was too far to the right and not positioned to the left of the center of the road.

Mr. Cooke's testimony concerning storage area for snow is of no consequence. His testimony considered surface area and not volume. Furthermore, there was no proof as to how much compacted snow could be stored in this area. As to snow being thrown off the road, the credible testimony was that the snow would be thrown ten feet at the speeds the plows were to be operated.

A concern was raised about drifting snow blocking Cross Road in this area. There was no competent proof that the construction of the farm roads would exacerbate any drifting conditions beyond that which could be expected along any road in an open area where winter conditions occur.


Plaintiffs also raise an issue that the construction of the farm roads has interfered with the integrity of Cross Road. Although Mr. Deyo opined that Cross Road would fail with a three inch rain fall, his opinion was based on the manner in which Cross Road was constructed and not due to any adverse impact caused by the construction of the farm roads.

Accordingly, for the foregoing reasons, it is

ORDERED AND ADJUDGED that the defendant's farm roads do not obstruct Cross Road and do not interfere with the drainage or plowing of Cross Road.

**THIS DECISION SHALL CONSTITUTE THE JUDGMENT OF THE COURT.
THE ATTORNEY FOR THE DEFENDANT SHALL ENTER THIS ORIGINAL
DECISION/JUDGMENT WITHIN 20 DAYS OF ITS DATE AND PROVIDE A COPY WITH
PROOF OF ITS ENTRY ON THE OPPOSING ATTORNEY.**

Dated: February 1, 2008.



HON. MARK L. POWERS
Acting Supreme Court Justice

STATE OF NEW YORK

SUPREME COURT

COUNTY OF ESSEX

TOWN OF ESSEX

and

JAMES Z. MORGAN, Jr., as Superintendent
of Highways of the Town of Essex,
Plaintiffs,

-Against-

LEWIS FAMILY FARM, INC.,

Defendant.

**NOTICE OF
APPEAL**

**INDEX # 000047-07
R.J.I.# 15-1-07-0014**

Date Purchased:
January 17, 2007

SIR:

PLEASE TAKE NOTICE that the above named Plaintiffs, Town of Essex and James Z. Morgan, Jr., as Superintendent of Highways of the Town of Essex, hereby Appeals to the Appellate Division of the New York State Supreme Court, Third Department, from the attached Decision and Judgment of the Honorable Mark L. Powers, Acting Supreme Court Justice, Supreme Court, Essex County, New York, dated February 1, 2008 and entered in the Office of the County Clerk on February 11, 2008, in the above-entitled action .

Dated: Clifton Park, New York
February 26, 2008

BY: /s/ DARRELL W. HARP
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TO:

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