

CA 504696

On submission

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

LEWIS FAMILY FARM, INC.,

Plaintiff-Appellant,

v.

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Defendant-Respondent.

RESPONDENT'S MEMORANDUM OF LAW
IN OPPOSITION TO EXTENSION OF
TIME TO PERFECT APPEAL AND IN
SUPPORT OF CONDITIONAL ORDER OF DISMISSAL

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PRELIMINARY STATEMENT

The New York State Adirondack Park Agency ("APA" or "the Agency") submits this memorandum in opposition to plaintiff-appellant Lewis Family Farm, Inc.'s ("Lewis Farm") motion for an extension of time to perfect its appeal of the August 16, 2007 order of Acting Supreme Court Justice Kevin K. Ryan, Supreme Court Essex County; and in support of its own cross motion for a conditional order of dismissal unless Lewis Farm perfects its appeal by June 26, 2008, nine months from the date of its notice of appeal.

In the August 16, 2007 order, the supreme court held that the APA had jurisdiction over three single-family dwellings that Lewis Farm built without APA permits in an area protected by the Adirondack Park Agency Act ("APA Act"), Executive Law § 801, et. seq., and the Wild, Scenic, and Recreational River System Act ("Rivers Act"), Environmental Conservation Law ("ECL") § 15-2701 et. seq. The court converted the declaratory judgment action to a C.P.L.R. article 78 proceeding and dismissed it as premature in view of the ongoing administrative proceedings before the APA. After notice of entry on August 31, 2007, Lewis Farm filed a notice of appeal dated September 26, 2007. That appeal will be deemed abandoned on June 26, 2008, unless Lewis Farm obtains an extension of time or files its brief and record by that date. See 22 NYCRR § 800.12.

The administrative enforcement proceedings before the APA have now ended in a final determination. Lewis Farm has initiated an article 78 proceeding to challenge the APA's final determination, which remains pending in supreme court. Lewis Farm seeks to delay its appeal so that it can have a second chance before a different supreme court justice to challenge APA's jurisdiction to conduct enforcement proceedings over the exact same violation. But having lost its challenge to APA's jurisdiction in the prior declaratory judgment action, Lewis Farm is collaterally estopped from re-litigating the jurisdictional issues in the new article 78 proceeding. Thus, Lewis Farm's motion for an extension should be denied and the APA's cross motion for a conditional order of dismissal should be granted.

STATEMENT OF FACTS

In the fall of 2006, Lewis Farm obtained a building permit from the Town of Essex to construct three modular single-family dwellings on its property. See Affirmation of Loretta Simon dated May 16, 2008 ("Simon Aff"), Exhibit D (August 2007 Order, p. 3). The area in which the three single-family dwellings are located is subject to the APA Act and the Rivers Act (id. at 4-5). In March of 2007, Lewis Farm submitted a permit application to the APA for the three dwellings. Because Lewis Farm had already commenced construction, however, the matter was referred to APA's enforcement division (id. at 3). Staff at the

enforcement division attempted to negotiate a civil penalty of \$10,000 that was to be paid before the APA would consider the after-the-fact permit application (id. at 3-4). When the parties could not agree on settlement, Lewis Farm resumed construction of the dwellings in late June 2007, and the APA served Lewis Farm with a cease and desist order (id. at 4).

Lewis Farm's 2007 Declaratory Judgment Action Against the APA (Index No. 498-07) ("Lewis Farm I")

Lewis Farm immediately commenced a declaratory judgment action in Supreme Court, Essex County, seeking to restrain APA's enforcement proceedings and a declaration that the Agency jurisdiction over construction of three single-family dwellings - - which it termed "farm worker housing" -- is precluded by Agricultural and Markets Law § 305-a. See Simon Aff. Exhibit A (June 26, 2007 Complaint, ¶¶ 1, 28). Thereafter, Lewis Farm amended its complaint claiming that the APA Act does not confer jurisdiction, and even if it did, Agricultural and Markets Law precludes APA interference in its housing project. See Simon Aff., Exhibit B (July 2007 OSC and Amended Complaint, ¶¶ 1, 31, 34). The APA moved to convert the action to a C.P.L.R. article 78 proceeding and to dismiss it.

On August 16, 2007, Supreme Court (Ryan, Acting J.S.C.) issued a Decision and Order denying Lewis Farm's application for a restraining order and rejecting Lewis Farm's argument that the

three dwellings are exempt "agricultural use structures." The supreme court held that neither the APA Act, nor the regulations implementing the Rivers Act, exempt the dwellings from the APA's jurisdiction. See Simon Aff., Exhibit D (August 2007 Order, p. 4-5). Addressing Lewis Farm's alternative argument, the court also held that Agriculture and Markets Law Section 305-a did not preempt APA's jurisdiction. See Simon Aff., Exhibit D (August 2007 Order, p. 4-5). The court then dismissed the converted article 78 proceeding as premature. See Simon Aff., Exhibit D (August 2007 Order, p. 5-6).

The August 16, 2007 Order was filed and entered August 29, 2007, and served on Lewis Farm's counsel by regular mail on August 31, 2007. See Simon Aff., Exhibits D (August 2007 Order) and E (August 31, 2007 Affidavit of Service). Lewis Farm filed a notice of appeal dated September 26, 2007, on or about October 1, 2007. See Simon Aff., Exhibit F (September 26, 2007 notice of appeal).

APA's Administrative Enforcement Proceedings

The APA continued with its administrative enforcement proceedings. See Simon Aff., Exhibit M (March 25, 2008 determination, p. 1, paragraphs 1-3; p. 5, paragraph 15). On March 25, 2008, the APA Enforcement Committee issued a determination that Lewis Farm violated the APA Act and the Rivers Act, directed Lewis Farm to submit a permit application to the

APA accompanied by detailed information on the dwellings and the septic system, directed that the dwellings not be occupied until the permit is issued, and imposed a civil penalty of \$50,000. See Simon Aff., Exhibit M (March 25, 2008 determination). On or about April 18, 2008, the APA modified its March 25, 2008 determination, deleting a provision that purported to preclude Lewis Farm from challenging the Agency's jurisdiction. See Simon Aff., Exhibit M.

**Lewis Farm's 2008 Article 78 Proceeding
(Index No. 315-08) ("Lewis Farm II")**

On April 8, 2008, Lewis Farm commenced a C.P.L.R. Article 78 proceeding challenging the APA Enforcement Committee's determination on various grounds and sought a stay of enforcement.¹ See Simon Aff., ¶ 17, Exhibit G (April 8, 2008 Petition, Matter of Lewis Family Farm, Inc v. Adirondack Park Agency, Supreme Court, Essex County, Index No. 315-08). The petition, like the earlier declaratory judgment complaint, continues to allege that APA lacks jurisdiction over the three dwelling units under the APA Act and the Rivers Act; and that the Agriculture and Markets Law preempts the APA's jurisdiction. Petition, id. at ¶¶ 67, 69, 71, 73.

On April 11, 2008, the supreme court (Richard B. Meyer,

¹Lewis Farm filed a Request for Judicial Intervention ("RJI") form dated April 7, 2008 (Index No. 315-08), but did not disclose its previously-filed, related case Lewis Family Farm v. APA (Index No. 498-07). See Exhibit O.

Acting S.J.C.) granted Lewis Farm's application for a stay of the Enforcement Committee's order to the extent that it directed Lewis Farm to submit a permit application and septic information to the APA. See Simon Aff., Exhibit J, (April 11, 2008 Order p. 5). The court also stayed a provision regarding Lewis Farm's right to challenge the APA determination.² See id. at 5. The court, however, denied Lewis Farm's request to stay the APA's prohibition against occupancy of the dwellings and the requirement that Lewis Farm pay the \$50,000 civil penalty. See Simon Aff., Exhibit J (April 11, 2008 Order, p. 5).

On or about April 14, 2008, Lewis Farm filed an amended petition again claiming that the APA lacks jurisdiction over the housing project and that the APA enforcement was precluded by Agricultural and Markets Law § 305-a, but adding several other causes of action. See Simon Aff., Exhibit H (April 14, 2008 Amended Petition at ¶¶ 73, 77, 79, 81, 83, 85, 87, 96).

Also on April 14, 2008, Lewis Farm moved for leave to reargue and renew Supreme Court's April 11, 2008 order to the extent that it denied a stay of APA's occupancy prohibition and the requirement that Lewis Farm pay a civil penalty of \$50,000. On April 25, 2008, the court issued a letter Decision and Order granting reargument and renewal, but adhering to its April 11,

²The APA subsequently amended its March 25, 2008 determination to remove that provision. See Simon Aff., Exhibit M.

2008 Order. See Simon Aff., Exhibit K (April 25, 2008 Order of Justice Meyer, pp. 2-3).

On April 28, 2008, Lewis Farm moved in this Court by order to show cause for permission to appeal Justice Meyer's April 11, 2008 order and to enjoin enforcement of the APA's determination in its entirety. On April 28, 2008, Justice Leslie Stein ordered a limited conditional stay of enforcement pending determination of the motion by the full Court. See Simon Aff., Exhibit L (April 28, 2008). Specifically, the interim order: (1) granted a conditional stay of the APA's assessment of a \$50,000 civil penalty to be paid by April 28, 2008, provided that Lewis Farm pay that amount to the Essex County Treasurer's office or post an undertaking on or before May 5, 2008, pursuant to CPLR § 5519(a)(2); and (2) enjoined enforcement of the APA's prohibition regarding occupancy of one single-family dwelling - the "dormitory" - on the condition that petitioner-appellant submit as-built septic plans and an evaluation by a NYS licensed engineer as to whether the septic system complies with NYS Department of Health and Agency standards by May 5, 2008. See Simon Aff., Exhibit L (April 28, 2008 Order of Justice Stein).

The State's Enforcement Action
(Index No. 332-08) (Lewis Farm III)

On April 11, 2008, the Office of the Attorney General, on behalf of the APA, filed a summons and complaint against Lewis Farm, Salim B. Lewis and Barbara Lewis to enforce Executive Law

§§ 809 and 810, ECL § 15-2701, and 9 NYCRR Part 577. See Simon Aff., Exhibit N (APA v. Lewis Family Farm, Inc., Salim B. Lewis, and Barbara Lewis, Supreme Court, Essex County, Index No. 332-08, Summons and Complaint dated April 10, 2008). On April 25, 2008, the lower court consolidated the State's enforcement action with Lewis Farm's article 78 proceeding. See Simon Aff., ¶ 19-20, Exhibit K (April 25, 2008 Order of Justice Meyer, pg. 2).

ARGUMENT

**AN EXTENSION OF TIME TO ALLOW LEWIS FARM TO
SEEK A SECOND, DIFFERENT ORDER IN ITS ARTICLE
78 PROCEEDING SHOULD BE DENIED BECAUSE THE
DOCTRINE OF COLLATERAL ESTOPPEL BARS
RELITIGATION OF THE ISSUES DECIDED BY THE
SUPREME COURT IN THIS CASE**

Lewis Farm seeks to delay perfecting its appeal of Justice Ryan's August 16, 2007 order in Lewis Farm I so that it can relitigate those very same jurisdictional issues before a second supreme court justice of coordinate jurisdiction in Lewis Farm II. Lewis Farm raised two jurisdictional claims in its declaratory judgment action underlying this appeal, each of which was flatly rejected by Justice Ryan. Specifically, Lewis Farm alleged that: (1) the APA does not have jurisdiction over the single-family dwellings constructed on the farm; and (2) Agricultural and Markets Law § 305-a supercedes or preempts APA jurisdiction. See Simon Aff., Exhibit A (Complaint dated June 26, 2007, ¶¶ 28, 29) and Exhibit B (Amended Complaint dated July

2007, ¶¶ 31, 32, 34, 35). Lewis Farm is collaterally estopped from relitigating these same jurisdictional issues in its pending article 78 proceeding before Justice Meyer. It should not be granted an extension of time to perfect its appeal of the underlying order in Lewis Farm I to allow it another "bite at the apple" in Lewis Farm II.

"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.

Before addressing whether these requirements are met here, it is worth noting that the pendency of an appeal from an order or judgment does not prevent the use of that order or judgment to collaterally estop a party from relitigating an issue in a subsequent proceeding. See Parkhurst v. Berdell, 110 N.Y. 386, 392-93 (1888); Matter of Capoccia, 272 A.D.2d 838, 846 (3d

Dep't), app. dismissed, 95 N.Y.2d 887 (2000); Samhammer v. Home Mut. Ins. Co. of Binghamton, 120 A.D.2d 59, 64 (1986). Thus, the fact that an appeal is pending in Lewis Farm I does not give Lewis Farm license to relitigate in Lewis Farm II issues decided below in Lewis Farm I that otherwise meet these two requirements.

There is no question that Justice Ryan in Lewis Farm I decided precisely the same jurisdictional issues currently before Justice Meyer in Lewis Farm II: whether APA has jurisdiction to require permits for the construction of three-single family dwellings on the Lewis Farm property near the Boquet River, and whether that jurisdiction has been preempted by the Agriculture and Markets Law. While Lewis Farm raises several additional issues in the latter proceeding, Lewis Farm's jurisdictional and preemption arguments are identical.

In Lewis Farm I, Lewis Farm argued both in its pleadings and in oral argument that the APA is without jurisdiction under its own statute and regulations to require a permit for the construction of the three single-family dwellings because they are "agricultural use structures." See Simon Aff., Exhibit B (July 2007 Amended Complaint, pg. 13, 31) and Exhibit C (August 8, 2007 transcript, pg. 10, lines 9-15; pg. 25, line 6). This is precisely the claim presented again to Justice Meyer in Lewis Farm II. See Simon Aff., Exhibit G (April 7, 2008 Petition ¶¶ 38, 39, 42, 65, 67, 69, 73); and Exhibit H (April 14, 2008

Amended Petition, ¶¶ 40, 77, 79, 83, 85). Lewis Farm also argued that the housing project did not constitute a subdivision of land within the meaning of the APA Act. See Executive Law § 802(63); 9 N.Y.C.R.R. § 570.3(ah)(3); see also Simon Aff., Exhibit C (August 8, 2007 transcript, pg. 22, lines 2-15) and Exhibit H (April 14, 2008 Amended Petition, paragraph 17).

Moreover, Justice Ryan in Lewis Farm I squarely decided the issues whether the APA has jurisdiction over these dwellings, and whether there is an illegal subdivision of land under the APA Act. Rejecting Lewis Farm's arguments that the APA was acting ultra vires, Justice Ryan recognized APA's broad regulatory authority in his August 16, 2007 decision:

The Court does not agree with the plaintiff's assertion that the APA has no authority over this building project. The area in which three of the houses, the particular houses which have been built, is located, is defined as part of the Wild, Scenic and Recreational River System Act (Environmental Conservation Law § 15-2701(1)). Under the Environmental Conservation Law, the APA has authority to make and enforce regulations necessary to enforce the act (Environmental Conservation Law § 15-2709(1)).... Under the APA regulations, this building project constitutes a "subdivision" even though it is not a typical suburban subdivision.

See Simon Aff., Exhibit D (August 2007 Order at 4-5). Hoping for a more favorable result in Lewis Farm II, Lewis Farm seeks to extend the time to perfect its appeal Lewis Farm I.

Moreover, Lewis Farm seeks to relitigate in Lewis Farm II

the issue of whether Agricultural and Markets Law § 305-a supercedes the jurisdictional grant of the APA Act. See Simon Aff., Exhibit A (June 2007 Complaint, ¶ 28), and Exhibit H (April 14, 2008 Amended Petition, ¶ 73). In both actions, Lewis Farm asserted that Town of Lysander v. Hafner, 96 N.Y.2d 558 (2001), supports its claim that Agricultural and Markets Law restricts APA's jurisdiction. See Simon Aff., Exhibit C (August 8, 2007 transcript p. 18, lines 18-20); Exhibit I (April 11, 2008 transcript p. 5, line 2-11; p. 8, line 19-24; p. 23, line 1-6); see also Exhibit H (April 14, 2008 Amended petition ¶ 73). In Lewis Farm I, Justice Ryan also squarely rejected this claim, noting that "[f]rom plain reading of [Agriculture and Markets § 305-a], it applies only to local laws." See Simon Aff., Exhibit D (August 2007 Order, at p. 6). Thus, the court held section 305-a "has no application to the Executive Law or the regulations promulgated by the APA pursuant to that law." Id.

The second criteria for invoking the collateral estoppel doctrine -- a full and fair opportunity to litigate -- is also met. Lewis Farm chose to litigate these issues in this declaratory judgment action in an attempt to cut off enforcement proceedings. Lewis Farm was represented by counsel and had ample opportunity to be heard before Justice Ryan. See Simon Aff., Exhibit C (August 8, 2007 transcript, pg. 1).

Petitioner seeks to avoid the collateral estoppel

implications of Lewis Farm I by arguing that Justice Ryan's conclusions regarding APA's jurisdiction and its preemption claim were merely "advisory" and unnecessary to its decision. See Affidavit of John J. Privitera ("Privitera Aff.") May 8, 2008, ¶ 13. But Lewis Farm expressly asked the court below for a determination of whether the APA had jurisdiction over its housing project and whether that jurisdiction was preempted. See Simon Aff. Exhibit A (June 2007 Complaint ¶ 1, 28, 29[b]) and Exhibit B (July 2007 Amended Complaint ¶ 1, 31, 34 and p. 8, paragraphs (b) and (c)). Justice Ryan necessarily decided these jurisdictional issues before concluding that the APA should be allowed to continue with its administrative proceedings. See Simon Aff., Exhibit D (August 2007 Order at p. 7).

Contrary to Lewis Farm's argument that Justice Ryan made an error of law in reaching the merits of the APA's jurisdictional issues, Justice Ryan's opinion was perfectly appropriate. While generally one who objects to the actions of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law, "exhaustion of administrative remedies is not required where an agency's action is challenged as beyond its grant of power" Lehigh Portland Cement Co. v. New York State Dep't of Environmental Conservation, 87 N.Y.2d 136, 140 (1995); Watergate II Apartments v. Buffalo Sewer Auth., 46 N.Y.2d 52, 57 (1978); see also Ryan v.

New York Tel. Co., 62 N.Y.2d 494, 505 (1984) (finding that an administrative determination was not an unsolicited advisory opinion and that giving it preclusive effect sought was a necessary step in fixing the legal rights of the parties). Thus, Justice Ryan acted entirely appropriately in reaching the merits of Lewis Farm's jurisdictional arguments and fixing the legal rights of the parties before concluding that the court had no authority to intervene in the administrative proceedings.

In support of its position, Lewis Farm cites Jeffreys v. Griffin, 301 A.D.2d 232 (1st Dep't 2002), a case involving the preclusive effect of a Department of Health determination revoking a doctor's license on a subsequent civil action brought by a patient against the doctor. The majority of the Court of Appeals refused to give the agency's factual determinations collateral estoppel effect because, among other reasons, a professional disciplinary hearing and the judicial forum are fundamentally different. Id. at 236. There is no mention in the majority opinion in Jeffreys of improper advisory opinions. Rather, it appears that Lewis Farm cites Jeffreys for language in its dissenting opinion that the administrative determination was not an unsolicited advisory opinion. See Jeffreys at 246-247. Lewis Farm's reliance on the Jeffreys dissent is in any event misplaced because it focused on the issue of whether to give preclusive effect to nonjudicial determinations, not on the

argument that it may have been advisory.

Lewis Farm also mistakenly relies on Nuro Transp. v. Judges of Civil Court, 95 A.D.2d 779 (2d Dep't 1983), where the appellate division affirmed the lower court's finding that a compulsory arbitration rule was constitutional and dismissed the petition. In Nuro, the court observed that the prohibition against advisory opinions "is to prevent the judicial determination of unripe claims in which a current controversy does not exist." Nuro at 780. There is no question that a live controversy existed when Lewis Farm challenged the APA's jurisdiction to enforce its regulations with respect to the dwellings at issue here. These three dwelling units were well under construction when the APA asserted jurisdiction and issued its cease and desist order.

Finally, NYPIRG v. Carey, 42 N.Y.2d 527 (1977), another case upon which Lewis Farm relies, is also inapposite. In NYPIRG v. Carey, the Court declined to rule on the constitutionality of proposed legislation and dismissed the complaint. Id. At 528. While acknowledging that it is not the role of the courts to give advisory opinions, and that an essential "function of the courts is to determine controversies between litigants," the Court observed that "a request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur." Id. at 529. Therefore, the Court declined to pass

on the constitutionality of legislation pending the outcome of a referendum by the voters which could make the issue moot.

Id. at 531. Again, Justice Ryan did not have a hypothetical dispute before him. There were in fact three actual single-family dwellings being constructed in violation of State law, and the APA had unambiguously asserted its jurisdiction over them. Clearly the jurisdictional issues were ripe for the court below to decide.

In short, Lewis Farm chose to put these jurisdictional issues before Justice Ryan in this declaratory judgment action. The court properly reached the issues, and in respondent's view, decided them correctly. Unless Lewis Farm prevails on its appeal, it is bound by Justice Ryan's rulings. There is no basis for the Court to grant Lewis Farm an extension of time to file its appellate brief and record so that it can make another attempt to get a favorable determination on these jurisdictional issues before another supreme court justice of coordinate jurisdiction.

CONCLUSION


For all of the foregoing reasons, Lewis Farm's request for an extension of time to appeal so that it may obtain a second determination from a concurrent court should be denied; and its appeal should be dismissed unless it timely files and serves its brief and record.

Dated: May 15, 2008
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Respectfully submitted,

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