

LEWIS FAMILY FARM, INC.,

Plaintiff,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY,

Defendant.

AFFIDAVIT

Index No.: 0498-07
RJI No.: 15-1-2007-0153

**PLAINTIFF-APPELLANT'S AFFIDAVIT IN OPPOSITION TO
CROSS-MOTION FOR "CONDITIONAL ORDER OF DISMISSAL"**

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

JOHN J. PRIVITERA, being duly sworn, deposes and states 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 the Lewis Family Farm, Inc. (hereafter "Lewis Family Farm" or "Appellant"), plaintiff in this action (Essex County Index No. 0498-07) (hereafter "*Action No. 1*"). I am also counsel to the Lewis Family Farm in an Article 78 proceeding (Essex County Index No. 315-08) (hereafter "*Action No. 2*") and an action (Essex County Index No. 332-08) (hereafter "*Action No. 3*"), both of which involve the same parties herein. *Action No. 2* and *Action No. 3* were consolidated because of common issues of fact and law. They are currently pending before Hon. Richard B. Meyer, Acting J.S.C., Essex County Supreme Court. As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

2. This affidavit is submitted in opposition to the defendant-respondent's "cross-motion for a conditional order of dismissal", served on May 15, 2008, which also served as papers in opposition to plaintiff-appellant's motion to extend the time in which to perfect its appeal in *Action No. 1*.

3. Appellant's motion to extend the time for this appeal is based primarily upon and was prepared in the interest of judicial economy. This action involves the Adirondack Park Agency's (hereafter "Agency" or "Respondent") attempt to regulate farming by claiming jurisdiction over the Lewis Family Farm's farm worker housing structures. The parties are in substantial disagreement. In *Action No. 2*, the trial court has already determined that the Lewis Family Farm is likely to prevail on the merits in maintaining that the Agency lacks jurisdiction to regulate farming. We have no doubt that, one way or another, one of the parties will appeal the decisions in *Action No. 2* and *Action No. 3*. Since *Action No. 1* is a related action that was dismissed because the jurisdictional dispute was not ripe for judicial review, it only makes sense, in the interest of this Court's time and resources, to extend the time to perfect the appeal in *Action No. 1* as requested by the Appellant.

4. Conspicuously, the Respondent does not respond at all to Appellant's simple contention that an extension of time in *Action No. 1* conserves this Court's time. The Respondent does not argue that the three actions are not essentially the same case, nor does it argue that this Court's valuable time would be conserved by denial of Appellant's motion. For this reason alone, Appellant's motion should be granted and the Respondent's cross-motion should be denied.

5. There can be no doubt that the trial court in *Action No. 1* dismissed the proceeding as premature because the Respondent had not yet made a determination on the merits of the jurisdictional claims at issue in all three actions. Moreover, and most importantly, there is no

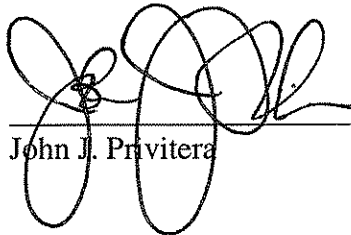
administrative record for this Court to review if Appellant is forced to perfect the appeal in *Action No. 1* now. The record in *Action No. 1* does not even include the administrative decision in this dispute. Thus, the Respondent not only wishes to force this Court to decide *Action No. 1* in the absence of an administrative record and decision, but it also wishes to consume this Court's time and resources in deciding this important jurisdictional dispute in a vacuum while the very administrative decision that the trial court in *Action No. 1* found necessary for judicial review is currently resting below with the trial court in *Action No. 2* and *Action No. 3*, and thus, is presently unreviewable. Not only is this unfair to this Court; it risks the very uninformed result that the trial court in *Action No. 1* sought to avoid in dismissing the matter. This Court should have the benefit of the administrative record, not to mention the very administrative decision itself, in considering the legality of the farm worker houses in these actions.

6. Rather than addressing, much less considering, matters of judicial economy, the Respondent endeavors to argue that the Appellant will be barred from certain arguments in *Action No. 2* and *Action No. 3*, which are not before this Court. Indeed, issue has not even been joined below in *Action No. 2* or *Action No. 3*. Therefore, Respondent's entire argument contained in its Memorandum of Law at pp. 8-16 is non-responsive and immaterial to Appellant's motion. This Court need not decide Respondent's claim of jurisdiction or the scope of any preclusive effect of Judge Ryan's decision in *Action No. 1* to decide the Appellant's motion.

7. Rule 800.12 of the Rules of this Court permits this Court to extend the time to perfect an appeal upon a showing of a reasonable excuse for the delay and merit to the appeal. Appellant has made this showing in the Affidavit of John Privitera, Esq., sworn to May 8, 2008.

8. Finally, Respondent fails to establish that it will be prejudiced if this Court extends the Appellant's time in which to perfect the appeal in *Action No. 1*. Indeed, the Appellant will be prejudiced if it must perfect this appeal by June 26, 2008 because this Court will then have to "pre-judge" the very issues pending below before they are properly decided by the trial court in *Action No. 2* and *Action No. 3* upon review of the administrative record and decision.

9. Based on the foregoing, the Lewis Family Farm respectfully requests an order from this Court: (i) granting an extension of the time in which to perfect its appeal of Justice Ryan's August 16, 2007 Decision and Order (which has not yet expired); (ii) denying the Respondent's "cross-motion for a conditional order of dismissal"; and (iii) granting such other relief as to this Court seems just and proper.



John J. Privitera

Sworn to before me this
16th day of May, 2008.



Notary Public

JACOB F. LAMME
Notary Public, State of New York
Qualified in Albany County
No. 02LA6150759
Commission Expires Aug. 7, 2010