

Case No. 504696

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Plaintiff-Appellant,

NOTICE OF MOTION

-against-

Case No. 504696

NEW YORK STATE ADIRONDACK PARK AGENCY,

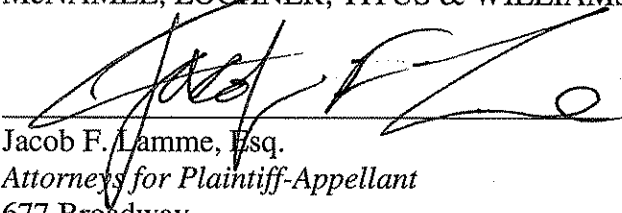
Defendant-Respondent.

PLEASE TAKE NOTICE that upon the Affidavit of Jacob F. Lamme, Esq., sworn to November 3, 2008, and upon all of the papers and proceedings had herein, appellant Lewis Family Farm, Inc., will move at a motion term of this Court to be held at the Justice Building, South Mall, Albany, New York, on the 17th day of November 2008 for an order pursuant to 22 NYCRR § 800.12 granting an extension of the time in which the Appellant has to perfect its appeal, and granting such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to 22 NYCRR § 800.2, papers in opposition to this motion, if any, must be filed by 11:00 a.m. on Friday, November 14, 2008. This motion will be submitted on the papers and personal appearances by the parties or their counsel in opposition to the motion is neither required nor permitted.

Dated: November 3, 2008
Albany, New York

McNAMEE, LOCHNER, TITUS & WILLIAMS, P.C.



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Albany, New York 12224-0341

Case No. 504696

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Plaintiff-Appellant,

AFFIDAVIT

-against-

Case No. 504696

NEW YORK STATE ADIRONDACK PARK AGENCY,

Defendant-Respondent.

**AFFIDAVIT IN SUPPORT OF MOTION TO
EXTEND TIME TO PERFECT APPEAL**

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

JACOB F. LAMME, 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 an associate 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-appellant 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 and 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 support of a motion to extend the time in which the Appellant has to perfect its appeal in *Action No. 1* in the interest of judicial economy.

3. On September 25, 2008, this Court granted the Appellant's previous motion to extend the time in which the Appellant has to perfect its appeal. The deadline is now November 24, 2008.

4. On September 12, 2008, the Adirondack Park Agency's (hereafter "Agency" or "Respondent") counsel submitted a letter to this Court stating that, although the Agency disagreed with the characterization of the facts set forth in my September 3, 2008 affidavit, it did not object to a further extension of time in this appeal.

5. Despite the several extensions granted by this Court, the prosecution of the instant appeal has not been dormant. Since this Court granted the previous motion on September 25, 2008, I have worked with the Agency's counsel to compile the record in *Action No. 1*.

6. As of August 18, 2008, the Article 78 proceeding and motions for summary judgment have been fully argued and submitted to the lower court in *Action No. 2* and *Action No. 3*. Moreover, the court transcript from the June 19, 2008 oral argument was finally made available to the lower court and parties at the end of September 2008. Since the lower court has a track record of issuing expeditious decisions in these combined cases, a final decision on the merits can likely be expected to be forthcoming very soon.

7. The relevant historic facts pertaining to these actions are set forth in the Affidavit of John J. Privitera, sworn to May 8, 2008, the Affidavit of John J. Privitera, sworn to May 16, 2008, the Affidavit of Jacob F. Lamme, sworn to July 3, 2008, and the Affidavit of Jacob F.

Lamme, sworn to September 3, 2008, all of which were submitted to this Court in support of the previous motions to extend the time to perfect this appeal, and are hereby incorporated herein.

8. To briefly summarize, these actions involve the Agency's attempt to regulate farming by claiming jurisdiction over the Lewis Family Farm's farm worker housing structures. In June 2007, the Lewis Family Farm commenced *Action No. 1* in Essex County Supreme Court seeking a declaratory judgment that the Agency lacked authority to regulate farms. In August 2007, the Honorable Kevin K. Ryan, Acting J.S.C. converted *Action No. 1* to an Article 78 proceeding and summarily dismissed it as premature. However, in doing so, the lower court improperly reached some of the merits of the dispute and advised that the Agency had jurisdiction over the Lewis Family Farm's farm worker housing project.

9. After *Action No. 1* was dismissed, the Agency commenced its internal enforcement proceeding, which culminated in a final enforcement determination of the Agency on March 25, 2008 ("March 25 Determination"). On April 8, 2008, the Lewis Family Farm commenced an Article 78 proceeding against the Agency seeking to vacate and annul the March 25 Determination (*Action No. 2*, Essex County Index No. 315-08). On April 11, 2008, the Agency commenced a duplicative action seeking to enforce the March 25 Determination (*Action No. 3*, Essex County Index No. 332-08). Those actions were consolidated by order of the lower court on April 25, 2008 and are currently pending before Hon. Richard B. Meyer, Acting J.S.C.

10. On July 2, 2008, the Essex County Supreme Court (Hon. Richard B. Meyer) issued a Decision and Order in *Action No. 2* and *Action No. 3*, which disposed of several preliminary issues in those actions. Specifically, the July 2, 2008 Decision and Order ruled that the doctrine of collateral estoppel does not prohibit the Lewis Family Farm from challenging the Agency's jurisdiction in *Action No. 2* and *Action No. 3*. In essence, the decision from *Action No.*

I that is the subject of the instant appeal has no preclusive effect on the Lewis Family Farm's ability to challenge the Agency's jurisdiction.

11. The July 2, 2008 Decision and Order states as follows:

To the extent that the motion court [in *Action No. 1*] addressed whether the project involved "agricultural use structures", a "single family dwelling" and "subdivision (*Executive Law §802[8], [63]*), such was only to indicate that Lewis Farm had not established a "clear legal wrong" (*City of Newburgh v. Public Employment Relations Bd.*, *supra*; see also *Town of Huntington v. New York State Div. of Human Rights*, 82 NY2d 783, 604 NYS2d 541, 624 NE2d 678) or that the Agency was acting in excess of its jurisdiction (see *Cortland Glass Co., Inc. v. Angello*, 300 AD2d 891, 752 NYS2d 741). None of the court's determinations on those issues were essential to its ultimate decision to dismiss the proceeding as "not ripe for judicial intervention".

(See July 2, 2008 Decision and Order, Ex. D to the July 3, 2008 Lamme Aff., pp. 8-9).

12. This is precisely the outcome on the issue of collateral estoppel that the Lewis Family Farm seeks from this Court in the instant appeal of *Action No. 1*.

13. On August 1, 2008, the Agency filed a notice of appeal, as of right, on the portion of the July 2, 2008 Decision and Order pertaining to the dismissal of the duplicative enforcement action as against defendants Sandy Lewis and Barbara Lewis in *Action No. 3*.

14. The Agency also moved for permission from this Court, pursuant to CPLR §§ 5513 (a)-(b) and 5701(c), to appeal the portion of the July 2, 2008 Decision and Order pertaining to the denial of the Agency's motion to dismiss on grounds of collateral estoppel in *Action No. 2*. (Appellate Division Case No. 505179). This Court has not yet ruled on the Agency's motion.

15. Accordingly, it is entirely conceivable that the lower court will issue a final decision and order on the merits in *Action No. 2* and *Action No. 3* sometime within the next 30-60 days.

16. In the interests of judicial economy, this Court should not require that these matters be heard in piecemeal fashion. The issues of the instant appeal in *Action No. 1* are

inextricably intertwined with the issues in *Action No. 2* and *Action No. 3*. Thus, they should be heard together. It is respectfully submitted that it would be a waste of judicial resources and the expenses of the parties to require that this appeal be prosecuted during the pendency of the consolidated actions before Justice Meyer.

17. The time in which to perfect this appeal in *Action No. 1* has not yet expired, but will expire on November 24, 2008.

18. 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. The Lewis Family Farm has demonstrated a justifiable and reasonable excuse for their anticipated delay in perfecting the appeal within the nine-month time frame imposed by 22 NYCRR § 800.12, namely that the pendency of the consolidated actions in the lower court will likely dispose of and render moot any issues to be raised on this appeal. In any event, the issues pending in *Action No. 2* and *Action No. 3* overlap, in part, with the erroneous opinion by Acting Supreme Court Justice Ryan in *Action No. 1*. Accordingly, this Court should review the matters together.

19. No party will be prejudiced if this Court extends the Appellant's time in which to perfect the appeal.

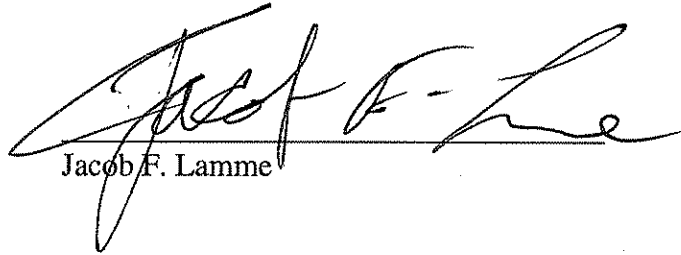
20. Moreover, this Court should grant the extension because the Lewis Family Farm has demonstrated that this appeal has merit, and the extensions would further the interests of justice and judicial economy.

21. The Lewis Family Farm respectfully requests that it receive a 60-day extension, until January 25, 2008, to file and serve the record and brief in this appeal. This timeframe will

allow the lower court to decide *Action No. 2* and *Action No. 3* on the merits and allow for the inevitable appeal of the lower court's forthcoming final decision.

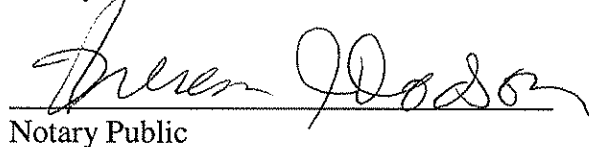
22. Once the lower court issues the final decision in *Action No. 2* and *Action No. 3*, and once the notice of appeal is filed, a motion will be promptly made to this Court to have the multiple pending appeals in these actions consolidated and heard on a joint record and brief.

23. Based on the foregoing, the Lewis Family Farm respectfully requests an order from this Court granting: (i) 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); and (ii) such other relief as to this Court seems just and proper.



Jacob F. Lamme

Sworn to before me this
3rd day of November, 2008.



Notary Public

THERESA J. DODSON
Notary Public, State of New York
No. 01DO4300422
Qualified in Albany County
Commission Expires July 31, 2009