STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK PARK AGENCY,

Respondent.

Hon. Richard B. Meyer

INDEX No. 315-08
RJI No. 15-1-2008-0109

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 OF LAW IN OPPOSITION TO THE FARM BUREAU'S AMICUS BRIEF

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for Respondent
Adirondack Park Agency
New York State Department
of Law
State Capitol
Albany, New York 12224

Dated: October 21, 2009

LORETTA SIMON
LISA M. BURIANEK
Assistant Attorneys General

Of Counsel

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Preliminary Statement

The Adirondack Park Agency ("APA" or "Agency" or the "State") submits this Memorandum of Law in opposition to the amicus brief filed by the New York Farm Bureau for an award of attorney's fees to the petitioner under CPLR article 86, the Equal Access to Justice Act ("EAJA"). See CPLR § 8601 et seq. Like petitioners, the Farm Bureau argues that the APA's position was not "substantially justified," within the meaning of CPLR § 8601(a), and there are no special circumstances that preclude an award.

Facts

A summary of the factual and procedural background is provided in the Memorandum and Order of the Appellate Division, Third Department, dated July 16, 2009 ("Order"). The Order annulled the APA's March 25, 2008 determination ("Determination") finding that the Agency's interpretation of the statutory definition of "agricultural use structure," under the Adirondack Park Agency Act ("APA Act") Executive Law § 801, et seq., and the Wild, Scenic and Recreational Rivers System Act (the "Rivers Act"), Environmental Conservation Law ("ECL") § 15-2701, et seq. was affected by error of law, and that farmworker residences are "agriculture use structures" within the meaning of Executive Law 802(8) and, therefore, are exempt from APA jurisdiction.

Relevant Statute

The New York State Equal Access to Justice Act ("EAJA"), codified in CPLR article 86, provides that attorney fees should be awarded to a prevailing party in a civil action against the State, unless the Court finds that the government's position was substantially justified or where special circumstances make an award unjust. See CPLR § 8601(a).

ARGUMENT

POINT I

BECAUSE THE APA WAS SUBSTANTIALLY JUSTIFIED IN ITS POSITION THE COURT SHOULD DENY AN AWARD OF ATTORNEY FEES UNDER ARTICLE 86

An application for attorney fees cannot be granted where the government's position was "substantially justified," meaning that the government had a reasonable basis for its position. See CPLR § 8601 (a); see also Sutherland v. Glennon, 256 A.D.2d 984, 985 (3d Dep't 1998)(APA's position on wetlands was based on evidence that would lead a reasonable person to conclude its position had a sound basis, no fees awarded); Appollon v. Giulliani, 246 A.D.2d 130, 136 (1st Dep't 1998) lv. dismissed, 92 N.Y.2d 1046 (1999); Bio-Tech Mills v. Jorling, 152 Misc 2d 619 (Sup Ct, Albany Co, 1991). Because payment of counsel fees is "in derogation of the common law rule and thus is to be strictly

construed," Article 86 awards are the exception rather than the rule. See Matter of Scibilia v. Regan, 199 A.D.2d 736, 737 (3d Dept 1993); see also Matter of Rivers v. Corron, 222 A.D.2d 863 (3d Dep't 1995); Matter of Peck v. New York State Div. of Housing & Community Renewal, 188 A.D.2d 327, 328 (2d Dep't 1992).

The Farm Bureau argues that the APA cannot rely on the Justice Kevin K. Ryan's Lewis Farm I decision to support its position that the Agency was "substantially justified" because the court's declaration of APA jurisdiction was "dictum," "superficial and poorly reasoned." See October 5, 2009, Farm Bureau Memorandum of Law ("10/5/09 Farm Bureau Memo"), p. 7, 9-10; see also Decision and Order, August 16, 2007, Hon. Kevin K. Ryan, Lewis Family Farm, Inc. v. APA, Sup. Ct. Essex Co., Index No. 498-07 (hereafter "Lewis Farm I"). In fact, Lewis Farm specifically sought a declaration of jurisdiction in Lewis Farm I arguing that declaratory relief would end the controversy over whether or not the APA could continue its administrative enforcement proceeding. See Lewis Farm I, July 2007 Amended Complaint ¶¶ 32, 35. Justice Ryan's jurisdictional determination was a reasonable interpretation under both the APA Act and Rivers Act, and was expressly relied on by the Agency in its determination. See Record, APA Determination p. 5 (R00855-870)

and Lewis Farm 1 Decision (R001061)[1]; see also Affidavit of Cecil Wray ("Wray Aff.") dated August 24, 2009, ¶ 8, Exhibit B (Decision and Order, Lewis Farm 1). Contrary to the Farm Bureau's assertion, a court's finding of jurisdiction does, in fact, demonstrate the reasonableness of, and substantial justification for, the government's position. See Herman v. Schwent, 177 F.3d 1063, 1065 (8th Cir. 1999) ("This Court previously has stated that the Government's ability to convince federal judges of the reasonableness of its position, even if the judges' and Government's position is ultimately rejected in a final decision on the merits, *is "the most powerful indicator of the reasonableness of an ultimately rejected position"*)(emphasis added).

The Farm Bureau's reliance on cited federal cases is misplaced. In United States v. 22249 Dolorosa St., (190 F.3d 977 (9th Cir. 1999), the plaintiff federal government, failed to sustain its burden to show that probable cause existed for forfeiture of real property, leading the 9th Circuit to find that defendant was entitled to attorney fees. However, an attorney fee application of this nature is not permitted under New York's EAJA, which only allows fees for actions against the State, not for actions brought by the State. See CPLR § 8601 (a)(fees

[1]"R" refers to the page number of the Record on appeal.

awarded "in any civil action brought against the state"). Moreover, the reasoning in Delorosa does not apply to the APA determination here, as there are no issues of suppressed evidence that would warrant disregarding a prior favorable court ruling. Notably, the Court in Delorosa also specifically cited dictum when referencing forfeiture law, which would indicate here that even if Justice Ryan's Lewis Farm I jurisdictional determination was dictum, it has legal significance for purposes of an attorney fee award. See 22249 Dolorosa St., 190 F.3d at 983.

The Farm Bureau further asserts that the decision of Justice Ryan in Lewis Farm I should be disregarded in the fee context, citing Howard v. Barnhart, 376 F.3d 551 (6th Cir. 2004) and Role Models Am., Inc. v. Brownlee, 353 F.3d 962 (D.C. Cir. 2004). Neither Howard or Role Models supports the amicus' argument. In Howard, the Court found that the agency decision was without substantial justification, despite the lower court's and magistrate's agreement with the agency findings, because the ALJ selectively considered the evidence in denying SSI benefits. The Howard court's finding was based on the specific facts in that case. Notably, the Howard court specifically recognized that simply because the government lost a case did not establish a presumption that the government's position was not substantially justified. See Howard, 376 F.3d at 554.

Nor is Role Models applicable here. In Role Models, the

government violated regulations requiring it to provide proper notice of a property sale, and assessed counsel fees. The court found that the government failed to offer any convincing reasons for believing that its interpretation of the regulations was substantially justified. See Role Models, 353 F.3d at 968. In contrast to Role Models, the APA determination provides a detailed explanation of its interpretation of "agricultural use structures" under the APA Act and the Rivers Act, includes fifteen findings relating to the case, provides detailed reasoning for its determination, and relies on Justice Ryan's Lewis Farm I decision. See Record, APA Determination (R00855-870). In fact, the APA (and Justice Ryan) were correct in determining that the structures were "single family dwellings" under the APA Act. However, as the Appellate Division found, they were also agricultural use structures: "although the farmworker residences constructed on the farm fall within the statutory definition of "single family dwelling(s)," they are also "agricultural use structure[s]." See Lewis Family Farm v. APA, 64 A.D.3d 1009, 1014 (3d Dep't 2009). The Affidavit of Cecil Wray, signatory to the Agency determination, confirms that the APA specifically relied on the Justice's jurisdiction decision in Lewis Farm I, and that the Agency had never before encountered Lewis Farm's claim that all farmworker housing is exempt from permitting requirements under the APA Act and the

Rivers Act. See Wray Aff. ¶ 3.

Contrary to the Farm Bureau's assertion that a case of first impression fails to establish "substantial justification," there is ample caselaw indicating that the absence of controlling precedent is legally significant and weighs strongly in determining "substantial justification." See, e.g., Abramson v. United States, 45 Fed. Cl. 149, 152 (Fed. Cl. 1999) (noting that several Circuits have adopted a presumptive rule that the Government is substantially justified within meaning of EAJA when question is being addressed for the first time); Edwards v. McMahon, 834 F.2d 796, 802 (9th Cir. 1987); Martinez v. Secretary of Health & Human Servs., 815 F.2d 1381, 1383 (10th Cir. 1987); see also State Court cases: Crabtree v. New York State Div. of Hous. and Cnty. Renewal, 294 A.D.2d 287, 290 (1st Dep't 2002), affirmed, 99 N.Y.2d 606 (2003); Huggins v. Coughlin, 209 A.D.2d 770, 771 (3d Dep't 1994). While the Farm Bureau relies on Devine v. Sutermeister, 733 F.2d 892 (Fed. Cir. 1984), where the government's arguments were found to be contradicted by its own regulations and "insupportable given the great weight of statutory, regulatory, and judicial authority to the contrary," this is plainly not the case with the APA Determination. Because this was a question of first impression, there simply was no precedential authority. There were no reported decisions interpreting the definition of "agricultural use structures"

under the APA Act, or the Rivers Act, and no decisions regarding whether such structures include single family dwellings for farmworkers. Accordingly, the lack of prior caselaw in this case weighs in favor of finding the APA's March 25, 2008 Determination "substantially justified."

Citing United States v. Paisley, 957 F.2d 1161 (1992), the Farm Bureau asserts that a "deterrent" fee award is warranted against the APA because other New York farms of limited means would not be able to litigate such a case against the State. This assertion is legally irrelevant. The Court may only consider the administrative record in this case, not speculation involving other farms in New York. See CPLR § 8601(a) (substantial justification shall be determined solely on the basis of the record before the agency). More to the point, Lewis Farm has failed to demonstrate that it lacks ability to pay attorney fees, that a lack of financial resources prevented it from litigating this case, or that it is an impoverished farm. Instead, the record shows that Lewis Farm has substantial assets: three single family dwellings worth nearly $1 million, an owners' dwelling, a farm manager's dwelling, approximately seven farm structures, modern agricultural farm equipment, and over 1,200 acres of land. See Record (R00862, ¶ 16; R001177 ¶¶ 12-13 R001214-1220; R001252-53, ¶¶ 4, 6; R001418, ¶ 7; R001438). In fact, Paisley stands for the proposition that an EAJA fee

applicant must have actually incurred the litigation expense and, thus "it is appropriate to inquire whether that party would, as a practical matter, have been deterred from litigating." See Paisley, 957 F.2d at 1164; see also Matter of Peck v. New York State Div. of Housing & Community Renewal, 188 A.D.2d 327, 328 (2d Dep't 1992) (denial of fees affirmed where petitioner made no showing that he lacked the resources to sustain litigation). As a practical matter, Lewis Farm has not demonstrated it lacked the resources to litigate this case.

Here, the Farm Bureau seeks to turn Article 86 into a punitive damages statute, urging that awarding fees in this case "will foster accountability in the Adirondack Park Agency and deter similar unreasonable actions." This is simply inappropriate under Article 86. EAJA was "never intended to chill the government's right to litigate". New York State Clinical Lab. v. Kaladjian, 85 N.Y.2d 346, 354, 357 (1995). The evidence in this case fully supports the Agency's factual findings that the structures were located in an area designated "Resource Management" pursuant to the APA Act, and they were within 1/4 mile of a recreational river protected under the Rivers Act. See Exec. Law § 802(58); § 810(2)(b)(1) and Rivers Act, 9 NYCRR § 577.4; see also APA Determination (R00860, ¶ 6; R00865, ¶ 30). The APA was substantially justified when it made those determinations, just as it was when it found that it had

jurisdiction over the three dwellings which were the focus of the case.

The Farm Bureau's apparent reliance on Agriculture & Markets Law § 305-a and the Commissioner's February 1, 2008, Section 308 Opinion is misplaced. This Court addressed and rejected Lewis Farm's assertion of claims under those provisions in its July 2, 2008 Decision and Order. Likewise, petitioner's arguments regarding Tax Law are not relevant, as this Court made no finding on any Tax Law claims. See Lewis Farm II/III Decision and Order, dated November 19, 2008. The Farm Bureau's characterizations of the APA's communications with the Department of Agriculture and Markets are also inaccurate. The record shows the APA and the Department communicated on interpretation of their respective statutes. See Return, Item 10 Reply Affirmation of Paul Van Cott, dated 1/29/08 and exhibits (R001349-1368); see also June 13, 2008 Affidavit of John F. Rusnica, New York State Department of Agriculture and Markets.

The APA, based on the facts and law, reasonably believed that it had regulatory jurisdiction and that a permit was required for the three single-family dwellings. See APA Determination (R00865-R00867, ¶¶ 37-40). Accordingly, the APA was substantially justified and the Court should deny Article 86 fees.

CONCLUSION

For all the reasons set forth in the APA's submissions to this Court, petitioner's application for counsel fees under CPLR Article 86 should be denied. Though the Appellate Division found that the Agency erred in its interpretation of the definition "agricultural use structure" regarding the farmworker dwellings on Lewis Farm, the APA nonetheless had a reasonable basis in fact and law for its March 25, 2008 Determination, its position was substantially justified and an award to petitioner would be unjust. In the event the Court determines that the Agency was not substantially justified and awards fees, the Court should strike all belated submissions, and limit the award to reasonable fees at the prevailing rate in Essex County, New York.

Dated: Albany, New York
October 21, 2009

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York
Attorney for the Adirondack
Park Agency

By: _____
LORETTA SIMON
Assistant Attorney General
(518) 402-2724