

ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

NOTICE OF MOTION

ACTION NO. 1

Index No. 315-08

Hon. Richard B. Meyer

STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

LEWIS FAMILY FARM, INC.,
SALIM B. LEWIS and BARBARA LEWIS,

Defendants.

ACTION NO. 2 /
COUNTERCLAIM

Index No.: 332-08

Hon. Richard B. Meyer

PLEASE TAKE NOTICE that upon the annexed Affirmation of John J. Privitera, Esq., dated December 16, 2010, and upon all prior papers and proceedings had in these consolidated actions, the undersigned will move the Hon. Richard B. Meyer, Acting Supreme Court Justice, at an Individual Assignment Term to be held in the County of Essex, at the Essex County Courthouse, 7559 Court Street, Elizabethtown, New York, on *January 14, 2011, at 9:30 a.m.* of that day, or as soon thereafter as counsel can be heard, for an order granting leave pursuant to CPLR 2221(d) for Petitioner Lewis Family Farm, Inc. to reargue its prior motion for attorneys fees and other expenses pursuant to Article 86 of the CPLR, and granting such other or further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214(b), answering affidavits and cross-motions, if any, shall be served at least seven (7) days before the return date.

Dated: December 16, 2010
Albany, New York

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

By: 

John J. Privitera, Esq.

Jacob F. Lamme, Esq.

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

AFFIRMATION

Index No. 315-08

Hon. Richard B. Meyer

ADIRONDACK PARK AGENCY,

Plaintiff,

-against-

LEWIS FAMILY FARM, INC., SALIM B. LEWIS
and BARBARA LEWIS,

Defendants.

COUNTERCLAIM

Index No.: 332-08

Hon. Richard B. Meyer

AFFIRMATION OF JOHN J. PRIVITERA IN SUPPORT OF MOTION TO REARGUE

JOHN J. PRIVITERA, under penalty of perjury, hereby affirms as follows:

1. I am counsel to Petitioner, Lewis Family Farm, Inc., as well as Sandy Lewis and Barbara Lewis, defendants in the counterclaim that was filed against them individually by Respondent.

2. I make this Affirmation in support of a motion for leave to reargue Petitioner's motion for attorneys' fees pursuant to Article 86 of the CPLR, which resulted in this Court's Supplement Decision and Order on Application for Counsel Fees, filed and entered in the County Clerk's Office on November 17, 2010, a copy of which was served with notice of entry on November 19, 2010. Petitioner respectfully asks this Court to reconsider the amount of the fee award.

3. A motion for reargument must be based upon "matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include matters of fact not offered on the prior motion." CPLR 2221(d)(2).

4. Specifically, Petitioner seeks an Order striking the sentence "Thereafter, the parties waived their respective rights to such hearing and instead agreed to have the Court render a decision based upon the submission of papers [footnote omitted]." (See Supplemental Decision and Order on Application for Counsel Fees, p. 3, attached hereto as **Exhibit "A"**). There is absolutely nothing in the record to support his finding of fact.

5. Petitioner, Sandy Lewis, Barbara Lewis and my law firm, all unanimously and wholeheartedly welcomed this Court's Order of February 3, 2010 directing an evidentiary hearing concerning the reasonable hourly rate and, number of hours reasonably expended by undersigned counsel in the prosecution of this action against the APA. Indeed, both Sandy Lewis and I were and remain willing to testify at an evidentiary hearing in open court.

6. Petitioner promptly requested adjournment of the evidentiary hearing because of a conflict (see February 5, 2010 Letter of my associate Jacob Lamme, attached hereto as **Exhibit "B"**), but never "waived" its right to a hearing. Indeed, "waiver" is a strong legal term. "Waiver" in the context of procedural rights such as those under the Equal Access to Justice Act, is a knowing and intelligent relinquishment of a known right. The Lewis Family Farm never waived its right to an open evidentiary hearing.

7. Rather, hot on the heels of this Court's Order, the State waived its right to a hearing and asked that the matter be resolved on the papers. (See February 10, 2010 Letter of Loretta Simon, attached as **Exhibit "C"**).

8. Petitioner objected to the State's waiver letter in which it suggested also that the Order for a hearing be reversed. (See my Letter of February 12, 2010 attached as **Exhibit "D"**). Petitioner insisted that the Order for a hearing stand.

9. Upon the Court's request, a conference call was scheduled to discuss "procedures for the hearing." (See my Letter of February 18, 2010, attached as **Exhibit "E"**).

10. Fully expecting the hearing, we drafted a pre-hearing Memorandum of Law, which can still be submitted.

11. Upon submission of all written materials requested by the Court, Petitioner maintained that we had established a prima facie case in support of a full award, as requested, but did not waive the ordered hearing. (See my Letter of March 4, 2010 attached as **Exhibit "F"**).

12. Since the Court never superseded its Order for a Hearing, which still stands, we understood that the Court had not yet decided whether or not it was necessary, although we stood ready to participate and welcomed the opportunity to do so in open Court. On March 25, 2010, as Petitioner made its last written submissions to the Court on this matter, we indicated that "we stand ready to appear at an evidentiary hearing to hear all of the Court's concerns and answer all of the Court's questions." (See my Letter of March 25, 2010, attached as **Exhibit "G"**).

13. Deference to the Court's time and schedule and respect of the law of the case is not a "waiver."

14. The Lewis Family Farm's principals and counsel are ready to participate in an evidentiary hearing to answer all of the Court's questions and explain issues to the Court in accordance with this Court's February 3, 2010 standing Order, and we request that the Order for a hearing be followed so that the record is clear.

15. At a hearing, the Lewis Family Farm's principals and counsel, along with any other witnesses desired by the Court, will answer all of the Court's questions and explain more fully a number of issues.

16. For example, this Court denied an award of fees for all conferences between counsel and the Lewis Family Farm's principals, "there being no justification provided". (See Ex. A, pg. 8). Actually, we provided significant legal justification.

17. Specifically, the State argued that this Court should not grant the full award of attorneys fees to the Lewis Family Farm because it believed that counsel to the Lewis Family Farm spent too much time communicating with the farm's representatives. This failed to acknowledge counsel's professional obligations. The State apparently is unaware of the new Code of Professional Responsibility, which undersigned counsel worked on as a member of the New York State Bar Association's House of Delegates. The Code of Professional Responsibility 22 NYCRR Part 1200; Rule 1.4: "**Communication**," provides as follows:

(a) A lawyer shall:

(1) promptly inform the client of: (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules; (ii) any information required by court rule or other law to be communicated to a client; and (iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information;

and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

See Code of Professional Responsibility, 22 NYCRR Part 1200 (Rule 1.4).

18. As a Member of the Bar and Officer of the Court, undersigned counsel is compelled to respect, obey and honor Rule 1.4. As such, the Lewis Family Farm was provided with full and adequate legal advice throughout every step of this litigation so that it could make informed decisions. Thus, the rule that this Court's decision has fashioned fails the professionalism that is demanded by Rule 1.4 and sends a strong signal to all those lawyers who might dare to help the disadvantaged, impoverished, disenfranchised and small businesses who may wish to stand firm against the gale of erroneous and oppressive governmental action. If this Court determines that communication with a client cannot be the subject of an award of attorney's fees, it is a strong signal, if not a directive, to all lawyers who may stand with such clients against the gale. They must sacrifice their professional obligations. This Court should elevate, not diminish, the level of professional practice that is afforded the impoverished, which is already at stake. The Lewis Family Farm respectfully submits that the Court should honor the professional obligations and values embraced by Rule 1.4.

19. In the experience of the two attorneys for the Lewis Family Farm, the defense of the State's prosecution of the Farm in this matter was extremely efficient and fair. Many law firms would have had three or four, if not more, lawyers working on the case. Indeed, if this Court has any doubt about the fairness of the number of hours incurred by the Lewis Family Farm's two attorneys on this matter, a factual hearing should be held to determine how much time the State's nine or more lawyers spent on the case. By questioning the scope of legal services provided to the Lewis Family Farm, the State has invited scrutiny into the scope of the services that its attorneys provided throughout this litigation.

At least nine (9) State lawyers worked on this case against the Lewis Family Farm. (See Privitera Aff., ¶ 24). Their hours should be set forth in an affidavit or the subject of a hearing if

this Court is to entertain the unsupported assertion that Jacob Lamme and John Privitera spent too much time on this case.

20. Factually, at a hearing, I and Jacob Lamme can expound upon the issues already explained in our affidavits in support of the fee award application and the extent to which we spent reasonable time in conference with the Lewis Family Farm's principals. Specifically, a lawyer has a professional obligation to answer a client's questions and engage in conferences with a client to the extent that the client demands it. At a hearing, I can explain more fully the deep analytical processes, the demand for a full understanding of all procedural and substantive issues, and the focused cost-benefit analysis that went into each and every decision that the Lewis Family Farm's principals made. Conferences with the Lewis Family Farm's principals in this case were intense, often lengthy, and poignant. This is a client's right and a lawyer has a professional obligation to meet a client's demands in this regard, as described more fully above.

21. This Court appears to have been frustrated by my customary practice of clustering tasks in making one time entry at the end of the day. (See Ex. A, pg. 4, n.5). At a hearing, we can explain more fully that the client had no objection to this procedure, as none of my clients do. In fact, the Lewis Family Farm preferred to pay a flat fee without task descriptions.

22. I have taken assigned cases from various courts. When I know, from the outset, that the State or federal process requires separate entries for separate tasks, I am capable of this kind of time entry. (See Affirmation of Loretta Simon, dated March 19, 2010, Ex. A).

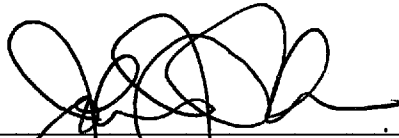
23. Further, at a hearing, I can explain the dominant tasks identified in various time entries in this case upon my memory being refreshed, but I honestly did not anticipate an Equal Access to Justice Act application when I was making time entries to bill the Lewis Family Farm.

24. Therefore, we respectfully request the opportunity for reargument so that the record may be more fully developed and "justification" for my time may be provided. (See Ex. A, pg. 8).

25. In addition to the importance of holding the evidentiary hearing in this case, counsel's presence in open court will provide this Court with a deeper understanding of the reasonableness of the Lewis Family Farm's fee demand.

I hereby swear and affirm the above under penalty of perjury this 16th day of December, 2010.

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

A handwritten signature in black ink, appearing to read 'John J. Privitera', is written over a horizontal line.

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