

510986

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

LEWIS FAMILY FARM, INC.,

Petitioner-Respondent-Appellant,

- against -

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent-Appellant-Respondent.

ADIRONDACK PARK AGENCY,

Plaintiff-Appellant-Respondent,

- against -

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

Defendants-Respondents-Appellants.

NOTICE OF MOTION
FOR CONSOLIDATION
OF APPEALS AND
EXTENSION OF
TIME

Essex Co. Index
No. 315-08

Essex Co. Index
No. 332-08


PLEASE TAKE NOTICE that upon the annexed affirmation of Julie M. Sheridan, Esq., dated February 17, 2011, and the exhibits attached to it, the undersigned will move this Court at a Term thereof to be held at the Robert Abrams Building for Law and Justice, Empire State Plaza, Albany, New York, on Monday, March 7, 2011, for an order consolidating the Adirondack Park Agency's appeal from

the order of Supreme Court, Essex County, entered February 3, 2010, with its cross appeal from a final judgment entered in the Office of the Essex County Clerk on November 30, 2010, and deferring perfection of the Adirondack Park Agency's appeal from the February 3, 2010 order until such time as the Adirondack Park Agency is required by Court rule or order to perfect its cross appeal from the November 30, 2010 judgment. The motion will be submitted on papers and your personal appearance in opposition to the motion is neither required nor permitted.

Dated: Albany, New York
February 17, 2011

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for APA
The Capitol
Albany, New York 12224
Telephone: (518) 486-5355
OAG Nos. 08-077232, 08-074861

By:


JULIE M. SHERIDAN
Assistant Solicitor General

TO: HON. ROBERT D. MAYBERGER
Clerk
Appellate Division, Third Department
P.O. Box 7288
Capitol Station
Albany, New York 12224

JOHN J. PRIVITERA, ESQ.
McNamee, Lochner, Titus & Williams, P.C.
677 Broadway
Albany, New York 12207

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

LEWIS FAMILY FARM, INC.,

Petitioner-Respondent-Appellant,

- against -

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent-Appellant-Respondent.

AFFIRMATION IN
SUPPORT OF MOTION
FOR CONSOLIDATION
OF APPEALS AND
EXTENSION OF
TIME

Essex Co. Index
No. 315-08

ADIRONDACK PARK AGENCY,

Plaintiff-Appellant-Respondent,

- against -

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

Defendants-Respondents-Appellants.

Essex Co. Index
No. 332-08

I, JULIE M. SHERIDAN, an attorney duly admitted to practice in the courts of this State, affirm under penalty of perjury that the following is true and correct:

1. I am an Assistant Solicitor General in the office of Eric T. Schneiderman, Attorney General of the State of New York, and I have been assigned by the office to represent the Adirondack Park Agency ("APA") in the above-referenced matters.

2. I make this affirmation in support of a motion for an order (1) consolidating the APA's appeal from the order of Supreme Court, Essex County, entered February 3, 2010, holding the APA liable to Lewis Family Farm, Inc. ("Lewis Farm") for attorneys fees under the New York State Equal Access to Justice Act ("EAJA") (C.P.L.R. Article 86), with the APA's cross appeal from a final judgment entered in the Office of the Essex County Clerk on November 30, 2010, granting Lewis Farm a specific amount of attorneys fees; and (2) deferring perfection of the APA's appeal from the February 3, 2010 order until such time as the APA is required by Court rule or order to perfect its cross appeal from the November 30, 2010 judgment.

3. These matters arose out of a dispute between the parties concerning whether new single family dwellings Lewis Farm constructed on its farm land in the Adirondack Park are subject to the APA's jurisdiction and permit requirements 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.* In *Lewis Family Farm v. APA* (Essex Co. Index No. 315-08), Lewis Farm challenged the APA's March 2008 determination that Lewis Farm had violated the APA Act and Rivers Act. The APA subsequently commenced an action against Lewis Farm and its principals to enforce the determination (*APA v. Lewis Family Farm*, Essex Co. Index No. 332-08).

4. Supreme Court, Essex County (Meyer, J.), among other things, granted Lewis Farm's article 78 petition to annul the APA's March 2008 determination, and

also granted summary judgment to Lewis Farm dismissing the APA's enforcement action.

5. The cases were consolidated for purposes of appeal. In a memorandum and order entered July 16, 2009, this Court affirmed. The Court held that the dwelling units on Lewis Farm's land are "agricultural use structures" within the meaning of the APA Act and are therefore exempt from APA jurisdiction and permit requirements.

6. Lewis Farm subsequently applied under the EAJA for fees and expenses incurred in the article 78 proceeding and the APA's enforcement action.

7. In a single decision and order entered February 3, 2010, Supreme Court, Essex County (Meyer, J.), held that Lewis Farm was entitled to an award for fees and expenses incurred in the article 78 proceeding but not for fees or expenses incurred in defending against the enforcement action brought by the APA. A copy of the decision and order is attached as Exhibit A. However, the court held that the parties' submissions raised material issues of fact concerning a reasonable hourly rate and the number of hours reasonably expended by counsel for Lewis Farm that could not be resolved without further evidence. Accordingly, the court ordered the parties to submit additional evidence and scheduled the matter for a hearing.

8. Although Justice Meyer's February 3, 2010 decision and order did not constitute a final judgment on Lewis Farm's fee application, on February 26, 2010, the APA filed a precautionary notice of appeal from the February 3, 2010 decision and order pending entry of a final judgment. A copy of the notice of appeal, dated February 25, 2010, is attached as Exhibit B.

9. On or about March 4, 2010, Lewis Farm filed a notice of cross appeal from the portion of the February 3, 2010 decision and order that denied recovery for the attorneys fees and expenses Lewis Farm incurred in defending itself in the enforcement action (Essex County Index No. 332-08). A copy of the notice of cross appeal is attached as Exhibit C.

10. In a Supplemental Decision and Order entered November 17, 2010, Supreme Court, Essex County (Meyer, J.), awarded Lewis Farm attorneys fees in the amount of \$67,893.75 and expenses of \$3,796.53, for a total award of \$71,690.28. A copy of the decision and order is attached as Exhibit D.

11. On November 29, 2010, the APA moved for an extension of time to perfect its appeal from the February 3, 2010 decision and order because final judgment had not yet been entered and the November 26, 2010 deadline for perfecting that appeal was fast approaching. Lewis Farm cross-moved for an extension of time and for an order designating the APA as appellant. By order entered December 21, 2010, this Court granted the APA's motion and extended its time to perfect its appeal to February 22, 2011, and granted Lewis Farm's cross motion and extended its time to perfect its appeal to 45 days from the date of filing and service of the APA's brief. A copy of this Court's order is attached as Exhibit E.

12. Final judgment awarding attorneys fees to Lewis Farm in accordance with Justice Meyer's November 17, 2010 decision and order was entered in the Office of the Essex County Clerk on November 30, 2010. A copy of the judgment is attached as Exhibit F.

13. On January 6, 2011, Lewis Farm served a notice of appeal from the final judgment. A copy is attached as Exhibit G. On January 20, 2011, the APA filed a notice of cross appeal from the final judgment. A copy is attached as Exhibit H.

14. It appears that upon entry of the final judgment, the parties' appeals from Justice Meyer's February 3, 2010 order were extinguished. *See Matter of Orlowa*, 70 A.D.3d 1263 (3d Dep't 2010); *Pixel Intl. Network v. State of New York*, 255 A.D.2d 666 (3d Dep't 1998). However, since there is some uncertainty, and since the February 22, 2011 deadline for perfecting the APA's appeal from the February 3, 2010 order is fast approaching, the APA is making this motion as a precaution to preserve its appellate rights.

15. Accordingly, to the extent necessary to preserve its rights to challenge the February 3, 2010 order, the APA requests that the Court consolidate the appeals and allow the APA to defer perfecting its appeal from the February 3, 2010 order until such time as it is required by Court rule or order to perfect its cross appeal from the November 30, 2010 judgment.

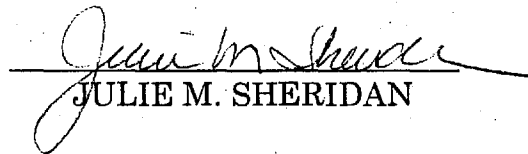
16. After entry of final judgment, Lewis Farm filed and served a motion in Supreme Court, Essex County, seeking reargument of the attorneys fees award. That motion remains pending.

17. The APA's appeal from the February 3, 2010 decision and order holding the APA liable for attorneys fees has merit. Under the EAJA, an award of fees and expenses to a party who prevails against the State is not authorized if the State's position was "substantially justified" or where "special circumstances make an award

unjust." C.P.L.R. § 8601(a). Here, the court below erred in concluding that the APA had failed to establish either substantial justification or special circumstances. The APA's administrative determination that Lewis Farm's dwellings were subject to APA jurisdiction and permit requirements was substantially justified, and an award of fees is unjust, because among other things: the APA relied on a prior Supreme Court ruling that the APA had jurisdiction to proceed with its administrative enforcement action against Lewis Farm; the issue was one of first impression; the State was successful on two issues in the litigation; and the APA had long-standing statutory authority requiring permits for single family dwellings in protected areas.

WHEREFORE, the APA respectfully requests an order consolidating its appeal from the order of Supreme Court, Essex County, entered February 3, 2010, with its cross appeal from a final judgment entered in the Office of the Essex County Clerk on November 30, 2010, and deferring perfection of the APA's appeal from the February 3, 2010 order until such time as the APA is required by Court rule or order to perfect its cross appeal from the November 30, 2010 judgment.

Dated: Albany, New York
February 17, 2011


JULIE M. SHERIDAN

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