

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

LEWIS FAMILY FARM, INC.,

Petitioner-Respondent-Cross-Appellant,

- against -

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent-Appellant-Cross-Respondent..

NOTICE OF MOTION
FOR EXTENSION
OF TIME

Essex Co. Index
No. 315-08

ADIRONDACK PARK AGENCY,

Plaintiff-Appellant-Cross-Respondent,

- against -

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

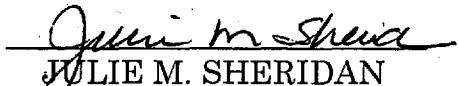
Defendants-Respondents-Cross-Appellants.

Essex Co. Index
No. 332-08

PLEASE TAKE NOTICE that upon the annexed affirmation of Julie M. Sheridan, Esq., dated November 18, 2010, 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, November 29, 2010, for an order granting an extension of 60 days, until January 25, 2011, for the Adirondack Park Agency to perfect its appeal in these matters. 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
November 18, 2010

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By: 
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TO: HON. MICHAEL J. NOVACK
Clerk
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Petitioner-Respondent-Cross-Appellant,

- against -

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent-Appellant-Cross-Respondent.

AFFIRMATION IN
SUPPORT OF MOTION
FOR EXTENSION
OF TIME

Essex Co. Index
No. 315-08

ADIRONDACK PARK AGENCY,

Plaintiff-Appellant-Cross-Respondent,

- against -

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

Defendants-Respondents-Cross-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 Andrew M. Cuomo, Attorney General of the State of New York, and I have been assigned by the office to represent appellant Adirondack Park Agency ("APA") in the above-referenced matters.

2. I make this affirmation in support of a motion for an order granting an extension of 60 days, until January 25, 2011, for the Adirondack Park Agency to perfect its appeal in these matters.

3. These matters arose out of a dispute between the parties concerning whether new single family dwellings Lewis Family Farm, Inc. ("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. A copy of the memorandum and order is attached as Exhibit A.

6. Lewis Farm subsequently applied under the New York State Equal Access to Justice Act ("EAJA") (C.P.L.R. Article 86) 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 B. 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. (The parties later waived their respective rights to a hearing and agreed to have the issue of the amount of fees and expenses decided on paper submissions.) Consequently, no final judgment on the fee application was entered.

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 C.

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 D.

10. Where, as here, there are cross-appeals to this Court, the Court's rules state that the "plaintiff shall be the appellant" and must file and serve the record and brief first. *See* 22 N.Y.C.R.R. § 800.9(e). Because Lewis Farm is the petitioner in *Lewis Farm v. APA*, the underlying proceeding, it would therefore seem that Lewis Farm must file and serve its record and brief first. However, since the APA is the "plaintiff" in the enforcement action, the applicability of the general rule is not clear in this case. Assuming the APA is required to perfect its appeal first, the APA's deadline is November 26, 2010 (November 25, 2010 is Thanksgiving, a public holiday). *See* 22 N.Y.C.R.R. § 800.12; General Construction Law §§ 24, 25-a(1).

11. In a Supplemental Decision and Order decided and 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 E. To date, however, judgment has not been entered.

12. Upon entry of a final judgment awarding fees, it appears that the parties' rights to take a direct appeal from Justice Meyer's February 3, 2010 order will be terminated but any appeal from the final judgment will bring up for review the February 3, 2010 decision and order. *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).

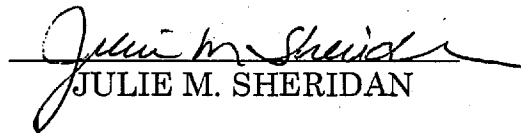
However, since judgment has not yet been entered and the November 26, 2010 deadline for perfecting the APA's appeal from the February 3, 2010 order is fast approaching, the APA is making this motion as a precaution to preserve its appellate rights.

13. Extending the APA's time to perfect its appeal by 60 days will provide time for the APA to review the November 17, 2010 decision and order and consider its appellate options.

14. The APA's appeal from the February 3, 2010 decision and order 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; the issue was one of first impression; the State was successful on two issues in the litigation; the APA had long standing statutory authority requiring permits for single family dwellings in areas such as the land on which Lewis Farm erected the dwellings at issue here.

WHEREFORE, the APA respectfully requests an order granting an extension of 60 days, until January 25, 2011, for the Adirondack Park Agency to perfect its appeal in these matters, or until such other time as the Court deems just and proper.

Dated: Albany, New York
November 18, 2010


JULIE M. SHERIDAN

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