STATE OF NEW YORK
SUPREME COURT COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

-against-

ADIRONDACK PARK AGENCY,

Respondent.

NOTICE OF ENTRY

Index No. 315-08
Index No. 332-08
RJI No. 15-1-2008-0109
Hon. Richard B. Meyer

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order by the Hon. Richard B. Meyer, Acting Supreme Court Justice, Essex County Supreme Court, dated and entered by the Essex County Clerk on February 3, 2010.

Dated: Albany, New York
February 3, 2010

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

By: _____
Jacob F. Lamme, Esq.
Attorneys for Lewis Family Farm, Inc.
677 Broadway
Albany, New York 12207
(518) 447-3200

TO: Loretta Simon, Esq.
Assistant Attorney General
State of New York
Office of the Attorney General
The Capitol
Albany, New York 12224

Cynthia Feathers, Esq.
48 Union Avenue, Suite 2
Saratoga Springs, New York 12866

STATE OF NEW YORK
COUNTY OF ESSEX
COUNTY, FAMILY & SURROGATE'S COURTS

RICHARD B. MEYER
JUDGE

AMY N. QUINN
COURT ATTORNEY
JILL H. DRUMMOND
SECRETARY

February 3, 2010

Terry Stoddard, Chief Clerk
Essex County Supreme Court
7559 Court Street, P.O. Box 217
Elizabethtown, New York 12932

Re: Lewis Family Farm, Inc. v. Adirondack Park Agency
Index Nos.: 315-08 and 332-08

Dear Terry:

Enclosed for filing is the original decision and order in the above matter relative to plaintiff's application pursuant to CPLR Article 86. Kindly file the same as soon as possible. Also returned to you are copies of the motion papers and briefs.

By way of a copy of this letter to counsel via fax and mail, I am providing them with a copy of the decision and order. Service hereof does not constitute notice of entry.

Very truly yours,

Richard B. Meyer

RBM:jhd
cc: McNamee, Lochner, Titus & Williams, P.C.
New York State Attorney General
Cynthia Feathers, Esq.,

Supreme Court of the State of New York
For the County of Essex

Submitted November 2, 2009 Decided February 3, 2010

Index No.: 315-08 – IAS No.: 15-1-2008-0109
Index No.: 332-08 – IAS No.: 15-1-2008-0109

LEWIS FAMILY FARM, INC.
Petitioner,

v.

ADIRONDACK PARK AGENCY,
Respondent.

ADIRONDACK PARK AGENCY,
Plaintiff,

v.

LEWIS FAMILY FARM, INC.,
Defendant.

Decision and Order

McNamee, Lochner, Titus & Williams, P.C. (*John J. Privitera, Esq.*, and *Jacob F. Lamme, Esq.* of counsel), Albany, New York, for Lewis Family Farm, Inc.

Andrew M. Cuomo, Esq., New York State Attorney General (*Loretta Simon, Esq., Assistant Attorney General*), Albany, New York, for the Adirondack Park Agency.

Arroyo Copland & Associates, PLLC (*Cynthia Feathers, Esq.*, of counsel) and *Elizabeth Corron Dribusch, Esq.*, General Counsel, Albany, New York, for the New York Farm Bureau, Inc., as *amicus curiae*, supporting Lewis Family Farm, Inc.

Application[1] pursuant to CPLR Article 86 by Lewis Family Farm, Inc. (LFF) for fees and expenses incurred in its combined declaratory judgment action and article 78 proceeding against the Adirondack Park Agency (APA) and its enforcement committee challenging the March 25, 2008 determination asserting APA jurisdiction over LFF's farmworker housing project, directing LFF to comply with certain requirements, and imposing sanctions against LFF including a $50,000 civil penalty, as well as incurred in defending the APA's action to enforce the disputed determination. The APA has cross-moved to strike certain documents not submitted by LFF in its initial motion as being outside the record[2].

---

1 Notice of motion dated August 13, 2009; Affirmation of Privitera dated August 12, 2009 with exhibits A and B; Affidavit of S.B. Lewis sworn to August 13, 2009; Memorandum of Law dated August 13, 2009.

APA answering papers: Affirmation of Simon dated August 28, 2009 with exhibits A through H; Affidavit of Cecil Wray sworn to August 24, 2009 with exhibits A through B; Memorandum of Law dated August 28, 2009.

LFF reply papers: Privitera affirmation dated September 23, 2009 with exhibits A through G; Affirmation of Ronald Briggs dated September 23, 2009; Affidavit of Jorge Valero dated September 17, 2009; Affidavit of Howard Aubin dated September 21, 2009; Memorandum of Law dated September 22, 2009.

Amicus curiae brief of New York Farm Bureau dated 10/05/09. APA memorandum of law in opposition to Farm Bureau's *amicus* brief.

2 Notice of cross motion dated October 9, 2009, with copy of record on appeal - Volume III; Simon affirmation dated October 9, 2009 with exhibits A through G.

Preliminarily, the APA's cross-motion is granted to the extent that its papers shall be considered as a sur-reply to LFF's additional submissions dated September 22 and 23, 2009; and the cross-motion is otherwise denied.

The facts underlying the present application are set forth in *Lewis Family Farm, Inc. v. New York State Adirondack Park Agency*, 64 AD3d 1009, 882 NYS2d 762, *affirming* 20 Misc3d 1114, 867 NYS2d 375 [Table], 2008 WL 2653236). For the purposes here, LFF prevailed on its article 78 claims, resulting in the APA's March 25, 2008 administrative determination being annulled and dismissal of the APA's enforcement action. LFF now seeks fees and expenses under the New York State Equal Access to Justice Act (*CPLR Article 86*).

The New York State Equal Access to Justice Act was enacted "to create a mechanism authorizing the recovery of counsel fees and other reasonable expenses in certain actions against the state of New York" (*CPLR §8600*). Its provisions are to be interpreted and applied consistent with the provisions of federal law, upon which it was modeled (*see CPLR §8600; Governor's Mem. approving L.1989, ch. 770, 1989 McKinney's Session Laws of NY*, at 2436[3]; *see also Greer v. Wing*, 95 NY2d 676, 723 NYS2d 123, 746 NE2d 178). However, because article 86 is in derogation of the common law rule that "all parties to a controversy, the victors and the vanquished, pay their own counsel fees" (*In re Estate of Urbach*, 252 AD2d 318, 321-322, 683 NYS2d 631, 633, *citing Matter of Loomis*, 273 NY 76, 6 NE2d 103; *see also Chapel v. Mitchell*, 84 NY2d 345, 618 NYS2d 626, 642 NE2d 1082; *Hooper Associates, Ltd. v. AGS Computers, Inc*, 74 NY2d 487, 549 NYS2d 365, 548 NE2d 903), it must be strictly construed (*see, Lee v. Higgins*, 213 AD2d 553, 624 NYS2d 49, *leave to appeal dismissed* 85 NY2d 1032, 631 NYS2d 291, 655 NE2d 404, *reargument denied* 86 NY2d

---

LFF reply papers: Affidavit of SB Lewis sworn to October 21, 2009; LFF memorandum of law in opposition to cross motion to strike dated October 22, 2009.

[3] "[T]he legislative intent to follow federal case law, including the Pierce [*Pierce v. Underwood*, 108 SCt 2541, 56 USLW 4806 (1988)] decision, in interpreting this statute, is clear."

839, 634 NYS2d 447, 658 NE2d 225; *Rivers v. Carron*, 222 AD2d 863, 635 NYS2d 722; *Scibilia v. Regan*, 199 AD2d 736, 605 NYS2d 444; *Peck v. New York State Division of Housing and Community Renewal*, 188 AD2d 327, 590 NYS2d 498).

Under article 86, the award of fees and expenses to a party prevailing against the state is mandatory[4] "unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust" (*CPLR §8601[a]*). "The United States Supreme Court has interpreted the phrase 'substantially justified' as meaning 'justified to a degree that could satisfy a reasonable person', or having a 'reasonable basis both in law and fact' (*Pierce v. Underwood*, 487 US 552, 565, 108 SCt. 2541, 101 LEd2d 490; *accord, Matter of New York State Clinical Laboratory Assn. v. Kaladjian*, 85 NY2d 346, 356, 625 NYS2d 463, 468, 649 NE2d 811, 816 [Feb. 23, 1995])" (*Serio v. New York State Dept. of Correctional Services*, 215 AD2d 835, 835, 625 NYS2d 760, 761; *see also Simpkins v. Riley*, 193 AD2d 1009, 598 NYS2d 352). "Special circumstances" consist of equitable considerations by which a court may deny an award as unjust (*see* H.R.Rep. No. 1418, 96th Cong., 2d Sess. at 11, *reprinted in* 1980 U.S.Code Cong. & Ad News 4953, 4984, 4990; *see, e.g., Oguachuba v. INS*, 706 F2d 93 [2nd Cir, 1983]).

The burden of establishing substantial justification or special circumstances rests with the state (*see Barnett v. New York State Department of Social Services*, 212 AD2d 696, 697-698, 622 NYS2d 812, 813, *leave to appeal dismissed* 85 NY2d 1032, 631 NYS2d 290, 655 NE2d 403; *United States v. U.S. Currency*, 957 F2d 1513 [9th Cir, 1991]), and "it must make a strong showing (*Matter of Barnett v. New York State Department of Social Services, supra*, citing *Environmental Defense Fund v. Watt*, 722 F2d 1081 [2nd Cir, 1983]; *see also, National Resources Defense Counsel v. U.S. Environmental Protecton Agency*, 703 F2d 700, 712 [3rd Cir, 1983]). There is no presumption that a prevailing party is entitled to an award of counsel fees simply because the state lost on the merits in the underlying action or proceeding (*see, Edwards v. McMahon*, 834 F2d 796

---

4 "[A] court *shall* award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state . . ." (*CPLR §8601 [a]* [*emphasis added*]).

[9th Cir, 1987]; *Sutherland v. Glennon*, 256 AD2d 984, 985-986, 681 NYS2d 916, 918; *Santos v. Coughlin*, 222 AD2d 870, 635 NYS2d 317).

The APA has failed to establish either substantial justification or special circumstances here. LFF prevailed in the underlying proceeding because of the clear and unambiguous language of the APA's statutory scheme which excluded from APA jurisdiction an "agricultural use structure" (*Executive Law §802[8]*), including single family dwellings "directly and customarily associated with agricultural use" (*id.*). In arriving at its administrative determination, now annulled, the APA went beyond the statutory language of its own definitions. It interpreted the term "structure", defined in the Adirondack Park Agency Act to include single family dwellings (*see Executive Law §802[62]*), as used in the definition of "agricultural use structure"to mean "accessory structure", even though the latter term was separately defined by statute (*Executive Law §802[5]*). Both the APA's administrative determination and its defense in the underlying action were contrary to state statutes, and as such cannot be considered substantially justified (*see, Mendenhall v. National Transportation Safety Board*, 92 F3d 871, 874 [9th Cir, 1996]); *Yang v. Shalala*, 22 F3d 213, 217-218 [9th Cir, 1994]).

The APA's good-faith reliance upon "long-standing application of its statutes" and the August 2007 decision dismissing LFF's prior declaratory judgment action, later converted to an article 78 proceeding, as premature and not ripe for judicial intervention, does not render an award of counsel fees unjust since "good faith alone is not a special circumstance which prevents an award of counsel fees" (*Campain v. Marlboro Cent. School Dist. Bd. of Educ.*, 138 AD2d 914, 915, 526 NYS2d 658, 659). Thus, in *Campain*, the Appellate Division rejected the school district's claim of special circumstances because it "relied upon the plain wording of the statutory exemption" and upon a prior court decision (*id.*). Similarly, the mere fact that the underlying case presented issues of first impression is neither a special circumstance (*see, In re Blakey*, 187 Misc2d 312, 316, 722 NYS2d 333, 336) nor substantial justification (*see, Kessler v. United States*, 766 F2d 1227, 1234; *Devine v. Sutermeister*, 733 F2d 892,895). This is particularly so here since the APA not only failed to consider all applicable statutory definitions but also went beyond the clear and unambiguous statutory language in an effort to assert jurisdiction, impose

a $50,000 civil penalty, and, incredibly, require LFF to waive "the right to challenge Agency jurisdiction and the review clocks otherwise applicable".

As to the APA's claimed reliance on language contained in the August 2007 decision, in which the court expresses the view that the APA has jurisdiction over LFF's project, such reliance is belied by the specific jurisdictional findings and conclusions contained in the APA's administrative determination, a step unnecessary had there been reliance. Also, the minutes of the March 13, 2008 hearing before the APA's enforcement committee indicate only that chairman noted that LFF had brought an action related to jurisdiction which had been resolved by state Supreme Court. LFF told the committee that the language regarding jurisdiction in the August 2007 decision did not apply because that court concluded that the litigation was not ripe for judicial review or intervention and sent the case to the APA for a final jurisdictional determination, a contention that was not disputed before the committee and conceded by the APA in its findings[5].

The status of the case before the court in 2007 was that APA staff, not the APA Board of Commissioners, had imposed a requirement that LFF submit an application for an after-the-fact permit and pay a $10,000 civil penalty *as a prerequisite* to APA review[6]. The only issues then before the court were of law, not fact. At oral argument before that court, counsel for the APA repeatedly contended that the matter was not then ripe for judicial review and that the APA must first be afforded the opportunity to determine whether LFF's project fell within APA jurisdiction, after which

---

5 "Finally, the Court stated that the matter is not ripe for judicial intervention and referred it back to the Agency to proceed with its enforcement procedures"(*March 25, 2008 APA Determination, paragraph 14*).

6 As noted in this Court's July 2, 2008 decision dismissing the APA's motion to dismiss, the position of APA staff regarding the penalty and permit application were subject to review by the APA's enforcement committee and full Board of Commissioners under 9 NYCRR Part 581. LFF was required by law to exhaust available administrative remedies before litigating the matter in Court (*Young Men's Christian Association v. Rochester Pure Waters District*, 37 NY2d 371, 375, 372 NYS2d 633, 635, 334 NE2d 586, 588; *Watergate II Apartments v. Buffalo Sewer Authority*, 46 NY2d 52, 57, 412 NYS2d 821, 824, 385 NE2d 560, 563)

LFF could seek judicial review of any adverse ruling.

A clear reading of the *entire* 2007 decision reveals that the court found no final determination to review and dismissed the case as premature. In that decision, the court noted that "[t]he Commissioners of the APA have the authority to review the situation under Executive Law §809", a statute which merely sets forth the general procedural requirements for submission and administrative review of an application to the APA. The court stated that it did not have "concurrent jurisdiction over this situation", that it was "limited to a review of the APA's actions", and that if LFF was dissatisfied with the determination by the APA, it was "free to file an article 78 proceeding at which time this court may review the actions of the APA. Until that time, this matter constitutes an internal matter in which the Court will not interfere". Thus, the court in 2007 did not decide that the APA had full jurisdiction; only that it had primary authority to determine in the first instance whether it had jurisdiction over the project such that LFF was required to obtain a permit. This left it to the APA to decide the jurisdictional issues first, and only upon an adverse final determination could LFF then seek judicial review.

While the APA correctly contends that it was not bound by the February 2008 letter from the Department of Agriculture and Markets when interpreting its own statutory scheme, LFF's cause of action based upon that letter was dismissed by this Court's July 2, 2008 decision. Also of no avail is its contention that the financial ability of LFF's officers and shareholders to pay counsel fees renders LFF an ineligible prevailing party or constitutes a "special circumstance" because they are the real parties in interest. Unlike the federal scheme which imposes a financial ceiling upon corporate parties seeking fees and expenses[7], the financial well-being of LFF's corporate officers and shareholders is irrelevant. As long as a prevailing corporate party has "no more than one hundred employees at the time the civil action was filed" (*CPLR §8602[d][ii]*), it is entitled to seek fees and expenses under article 86. Here, there is no dispute that LFF had fewer than one hundred employees. The courts have generally rejected

---

[7] Federal law requires a prevailing corporate party to have a net worth of not more than $7,000,000 in order to be eligible for an award of counsel fees (*see 28 USC §2412[d][2][B][ii]*).

a "real party in interest" test (*see*, *Nail v. Martinez*, 391 F3d 678, 682-684 [5th Cir, 2004]; *National Association of Manufacturers v. Department of Labor*, 159 F3d 597 [DC Cir, 1998]); *Lee v. Johnson*, 799 F2d 31, 35-36 [3rd Cir, 1986]) except where one of the prevailing plaintiffs had agreed to pay the attorneys fees for all of the plaintiffs (*Unification Church v. Immigration and Naturalization Service*, 762 F2d 1077 [DC Cir, 1985]). None of LFF's officers or shareholders is a party plaintiff, and no claim has been asserted that LFF is "no more than a 'front' or a 'sham'" (*National Association of Manufacturers v. Department of Labor*, *supra* at 603). The Circuit Court of Appeals in *National Association* distinguished its prior ruling in *Unification Church* by noting that three of the four prevailing plaintiffs were eligible for an award of attorneys' fees, but the fourth plaintiff, the Unification Church, was ineligible because it employed more than 500 people. Since the Church had agreed with the other plaintiffs to pay all legal fees, the court found that the Church was the only party that would benefit from an award. The court denied all fee applications because the Church, which was ineligible for an award, was the real party in interest. (*id*, at 602-603).

The APA's remaining contentions are without merit, and LFF is entitled to an award of fees and expenses under article 86.

The scope of any award is limited by article 86. Fees and expenses consist only of "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, consultation with experts, and like expenses, and reasonable attorneys fees, including fees for work performed by law students or paralegals under the supervision of an attorney incurred in connection with an administrative proceeding and judicial action" (*CPLR §8602[b]*). An "administrative proceeding" under the statute "does not encompass administrative proceedings that precede a civil action" (*Greer v. Wing*, *supra* at 680, 723 NYS2d at 125, 746 NE2d at 180). Moreover, no fees and expenses can be awarded for LFF's defense of the state's enforcement action since the statute explicitly refers only to a "civil action brought against the state" (*CPLR §8601[a]*) and a "prevailing party" is defined to mean "a plaintiff or petitioner in the civil action against the state" (*CPLR §8602[f]*). Similarly, LFF is not entitled to recover fees and expenses related to the 2007 proceeding or its appeal from the dismissal thereof since LFF did not prevail in that case. However, recoverable fees

and expenses include those arising from the appeal of this Court's decision (*CPLR §8602[a]*) and the instant application (*Podhorecki v. Lauer's Furniture Stores*, 184 AD2d 1066, 1067, 585 NYS2d 268, *appeal dismissed* 81 NY2d 783, 594 NYS2d 719, 610 NE2d 392), but not LFF's appeal from the dismissal of the 2007 case. Thus, to the extent that LFF seeks an award under article 86 for the 2007 action, including the appeal, the administrative proceedings before the APA, and its defense of the enforcement action, its application is denied.

Calculation of an award of counsel fees begins with determining a reasonable hourly rate in the "prevailing community", meaning "'the district in which the court sits.' *Polk v. New York State Department of Correctional Services*, 722 F2d 23, 25" (*Luciano v. Olsten Corporation*, 109 F3d 111, 115), with the court having the discretion to also consider out-of-district rates (*see Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany and Albany County Bd. of Elections*, 522 F3d 182, 191 [2nd Cir, 2008]). The district within which this Court sits is the fourth judicial district, encompassing the counties of Schenectady, Fulton, Montgomery, Saratoga, Hamilton, Warren, Washington, Essex, Clinton, Franklin and St. Lawrence. LFF submitted an itemized bill of its counsel totaling $208,770.06 for the period of March 26, 2008 through August 10, 2009, as well as affidavits from its counsel's law firm administrator[8] and from an attorney[9] practicing in Essex County to justify a requested hourly rate of $300 for the partner and $150-$175 for the associate attorney who worked on the case. No submission has been made as to the hourly rates paid to associate attorneys in or out of the district. In contrast, the APA has challenged $87,829.95 in legal fees and expenses, contested any award of counsel fees for work related to unsuccessful claims asserted by LFF,

---

8 The substance of this affidavit relates to two compensation surveys (Incisive Legal Intelligence, July 2009; National Law Journal, December 2008 Top 250 Law Firms) indicating that hourly rates for a law firm partner in the Capital Region range, respectively, from $300 to $454 and $190 to $850. It is unclear whether any county in the Fourth Judicial District is included in the "Capital Region".

9 This affidavit expresses the opinion that an hourly rate of $300 is reasonable and that a number of experienced area lawyers charge that rate or more.

and presented 2004 survey data[10] purporting to establish hourly rates of $150 to $250 for attorneys with 5 to 9 years experience and $110 to $180 for those with 1 to 4 years experience. The papers submitted raise material issues of fact which cannot be resolved without further evidence.

After review of the submissions, determination of a reasonable hourly rate and the number of hours reasonably expended by counsel in the prosecution of LFF's action against the APA must await a hearing at which each side may present evidence. Pending the hearing, scheduled for February 26, 2010 at 9:00 a.m., and within ten (10) days hereof, LFF's counsel shall furnish to counsel for the APA true and complete copies of all billing records covering services rendered and expenses incurred in LFF's action against the APA, including the appeal therefrom and the present application.

SO ORDERED.

ENTER

Richard B. Meyer
J.S.C. (Acting)

---

10 *The 2004 Desktop Reference on the Economics of Law practice in New York State*, Spectrum Associates Market Research, Farmington, Connecticut.