

STATE OF NEW YORK  
APPELLATE DIVISION

SUPREME COURT  
THIRD DEPARTMENT

**AFFIRMATION IN  
OPPOSITION TO  
MOTION**

TOWN OF ESSEX

and

JAMES Z. MORGAN, Jr., as Superintendent  
of Highways of the Town of Essex,

Appellants/Plaintiffs,

Essex County

INDEX # 000047-07

:

-Against-

LEWIS FAMILY FARM, INC.,

Respondent/Defendant.

STATE OF NEW YORK )

) ss.:

COUNTY OF SARATOGA )

**DARRELL W. HARP, ESQ.**, an attorney being duly licensed to practice before the Courts of the State of New York, pursuant to CPLR §2106, hereby affirms under penalty of perjury that the following is true.

1. I am the Special Counsel for Appellants/Plaintiffs in the subject matter.
2. I am familiar with the matter involving Cross Road in the Town of Essex, and Appellants'/Plaintiffs' and Respondent's/Defendant's actions relative to Cross Road in the Town of Essex.
3. I make this Affirmation in opposition to Respondent's/Defendant's motion to dismiss the Appeal.
4. On February 1, 2008, a Decision and Judgment was made by the Hon. Mark L. Powers, A.S.C.J., of the Supreme Court of Essex County. This Decision and Judgment was entered in the Essex County Clerk's Office on February 11, 2008.

The Decision and Judgment after a non-jury trial, erroneously determined that Respondent/Defendant did not obstruct a public highway in the Town of Lewis known as Cross Road and did not interfere with the drainage or plowing of the public highway. (A copy of this Decision and Judgment is found as Exhibit "A" to Respondent's/Defendant's Affidavit in support of the motion).

5. On or about February 26, 2008, I as the attorney of record for Appellants/Plaintiffs served a Notice of Appeal to the Appellate Division, Third Department, of the Decision and Judgment on Respondent/Defendant and filed same in the Essex County Clerk's Office. (A copy of this Notice of Appeal is found as Exhibit "B" to Respondent's/Defendant's Affidavit in support of the motion).
6. On or about June 16, 2008 Respondent/Defendant made a motion to dismiss the Appeal.
7. While more than 60 days have expired since the Notice of Appeal was filed, there is good cause why Appellants/Plaintiffs have not yet filed the Record and their Brief in the matter. These include:
  - A. There was a Settlement Conference scheduled by the Appellant Court for May 22, 2008 and such was held on that date. Prior thereto Appellants/Plaintiffs requested me to do no work on the Appeal until after the Conference.

- B. After the Settlement Conference Appellants/Plaintiffs have indicated to me that they intend to move forward with the Appeal and I am now in the process of obtaining the trial transcript.
- C. I am a one-person office and can effectively handle only one major matter at a time. I have informed Appellants/Plaintiffs of this and that I now have pending:
  - a. A hearing in Delaware County on a matter the first part of July.
  - b. An Appeal in the Third Department known as *Hargett v. Town of Ticonderoga*, Case #504804 for which the Reply Brief will be due in the latter part of July.
  - c. I am involved in a matter in the Federal Court in New York City most of August.
- D. Therefore, I have scheduled to work on the Appellants'/Plaintiffs' Appeal in September and would be filing the Record and Brief by October 15, 2008.
- E. This is well within the nine months of the Notice of Appeal.
- 8. Pursuant to the Rules of Practice, Section 800.12, if Appellants'/Plaintiffs' have to serve and file the Record and Appellants'/Plaintiffs' Brief in the subject matter by November 26, 2008, the Appeal will be deemed abandoned.
- 9. The schedule which Appellants/Plaintiffs have set forth above meets this deadline.


10. Respondent/Defendant has shown no prejudice to Respondent/Defendant that would require strict compliance with the 60 day rule.
11. Further, the Appeal has merit based on the following positions of Appellants/Plaintiffs:
  - a. The lower Court determined that Respondent/Defendant, Lewis Family Farm. Inc., had placed rock material in the drainage area for the highway culvert. Thus, based on applicable law the lower Court failed to recognize Appellants'/Plaintiffs' right to have this drainage area opened up and free of any obstructions.
  - b. The lower Court determined that there was materials, including rocks placed in the drainage ditches by Respondent/Defendant on the south side of the road there by Respondent/Appellant. Based on applicable law, the lower Court erroneously determined that Appellants/Plaintiffs did not have the right to have the materials placed in the drainage ditches by Respondent/Defendant moved.
  - c.. Based on applicable law, the lower Court erroneously determined that the Respondent/Defendant had the right to build farm roads so close to the Town's Highway that the snow plows would strike the same.
  - d. Based on applicable law, the lower Court erroneously determined that the Respondent/Defendant could build high farm roads next to the Town's

Highway that would cause snow and snow removable problems in the wintertime.

- e. As well as several other erroneous determinations of the lower Court.

**THEREFORE**, the Appellants/Plaintiffs request the Court to deny Respondent's/Defendant's Motion since Appellants/Plaintiffs are pursuing the Appeal in a timely manner, as resources permit, and are not guilty of "lack of prosecution."

Dated: June 20, 2008  
Clifton Park, New York

  
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