

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

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

Plaintiff,

- against -

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

Defendants.

**AFFIDAVIT IN SUPPORT
OF MOTION FOR
SUMMARY JUDGMENT**

Index No. 2184-12

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

JOHN PRIVITERA, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice law in the State of New York and a shareholder of plaintiff, McNamee, Lochner, Titus & Williams, P.C. ("McNamee Lochner").
2. I make this affidavit in support of McNamee Lochner's motion for summary judgment on its first cause of action for account stated for legal fees and disbursements in the amount of Two Hundred Ninety-Eight Thousand One Hundred Forty-One and 56/100 (\$298,141.56) Dollars, with interest at the rate of nine percent (9%) per annum from June 30, 2011. No previous application for the relief requested has been made.
3. After successfully defending defendants, Lewis Family Farm, Inc. ("Lewis Farm"), Barbara Lewis and Salim ("Sandy") Lewis against the oppressive and overreaching actions of the Adirondack Park Agency ("APA"), McNamee Lochner was forced to commence this action by the filing of a summons and verified complaint, copy of which is attached as Exhibit A, on April 18, 2012, to recover its unpaid legal fees from its former clients. Defendants, Lewis Farm, Barbara Lewis and Sandy Lewis answered on May 3, 2012, copy of which is attached as Exhibit B.

4. Defendant, Lewis Farm owns and operates a twelve hundred acre organic farm in the Town of Essex, one of the largest USDA Certified organic farms in New York State. Defendant, Lewis Farm is owned by husband and wife, defendant, Sandy Lewis and defendant, Barbara Lewis.

5. It is undisputed that on or about September 7, 2007, defendant, Lewis Farm orally retained McNamee Lochner to battle the Adirondack Park Agency (“APA”) in two separate, but related proceedings, an administrative enforcement proceeding entitled, In the Matter of the apparent violations of Section 809 of the Executive Law and 9 NYCRR Part 157 by: Lewis Family Farm, Inc., Agency File No. E2007-041, (“Enforcement Proceeding”), (Ex. A, Complaint, ¶5; Ex. B, Answer), and an appeal from an August 29, 2007, Decision and Order of the Supreme Court, Essex County, arising from a declaratory judgment action entitled, Lewis Family Farm, Inc. v. New York State Adirondack Park Agency, Index No. 0498-07, (Ex. A, Complaint, ¶11; Ex. B, Answer) (“Appellate Proceeding”), which the Court dismissed as premature, (Ex. A, Complaint, ¶12; Ex. B, Answer).

6. It is further undisputed that McNamee Lochner was thereafter orally retained to represent individual defendants, Barbara Lewis and Sandy Lewis and defendant, Lewis Farm in two additional actions that arose from, and following the Enforcement Proceeding, an Article 78 proceeding entitled, Lewis Family Farm, Inc. v. Adirondack Park Agency, Index No. 315-08, commenced by defendant, Lewis Farm seeking judicial review of the APA determination in the Enforcement Proceeding (“Action No. 3”) and an Article 78 proceeding entitled, Adirondack Park Agency v. Lewis Family Farm, Inc., Salim B. Lewis and Barbara Lewis, Index No. 332-08, commenced by the APA seeking to enforce the APA’s determination in the Enforcement Proceeding (“Action No. 4”). (Ex. A, Complaint, ¶¶13-15; Ex. B, Answer).

7. In each of the four related proceedings, I was the attorney at McNamee Lochner that represented Lewis Farm, and later individual defendants, Barbara and Sandy Lewis. I was assisted by Jacob F. Lamme, an associate at plaintiff law firm.

8. McNamee Lochner, beginning on or about December 31, 2007, and continuing through to on or about June 30, 2011, in the regular course of representation, prepared and sent to defendant, Lewis Farm and defendants, Barbara and Sandy Lewis periodic invoices for services rendered, calculated upon the applicable hourly rate of the shareholders and associates of plaintiff law firm, and disbursements advanced. Neither Barbara nor Sandy Lewis, during the course of my representation of them and Lewis Farm, ever brought to my attention or to the attention of my associate or assistant, any questions, complaints or problems with any invoice or any specific charge in any invoice.

9. It is undisputed that defendant, Lewis Farm and defendants, Barbara and Sandy Lewis, pursuant to the oral agreement between McNamee Lochner and the defendants, made partial payments, during the course of my representation, against the invoices issued by the firm. (Ex. A, Complaint, ¶24; Ex. B, Answer). The first payment, received on or about February 11, 2008, in the amount of \$11,693.20 was by check number 2540 written against defendant, Lewis Farm's business account, copy of which, redacted to remove defendant, Lewis Farm's banking account information, is attached as Exhibit C. The second payment, received on or about September 15, 2008, in the amount of \$25,000 was made by credit card held in the name of defendant, Barbara Lewis. A third payment of \$25,000 was thereafter received on or about December 29, 2008 also by credit card. The last payment received by McNamee Lochner was on or about January 2, 2009 in the amount of \$25,000 by credit card held in the name of defendant, Barbara Lewis.

10. By affidavit, sworn to August 13, 2009, and submitted to the Supreme Court, Essex County in the consolidated Action No. 3 and Action No. 4 proceeding, copy of which is attached as Exhibit D, Lewis Farm, seeking its fees and expenses under the New York State Equal Access to Justice Act, admitted that, “as of August 10, 2009, the Lewis Family Farm ha[d] incurred fees and is obliged to pay \$287,292.69 to McNamee, Lochner, Titus & Williams, P.C. for its services”.

11. Additionally, by affidavit, sworn to March 3, 2010, submitted to the Supreme Court, Essex County in consolidated Action No. 3 and Action No. 4, copy of which is attached as Exhibit E, defendant, Sandy Lewis declared, “I have not experienced dishonesty, incompetence or misconduct in John J. Privitera, Esq., or Jacob F. Lamme, Esq., counsel to Lewis Family Farm”, (Ex. C, Lewis Aff., ¶6), and “my assessment of counsel’s performance here is good,” (Ex. C, Lewis Aff., ¶7). Additionally, in his March 3, 2010 Affidavit, defendant, Sandy Lewis explained McNamee Lochner had previously represented defendant, Lewis Farm in 1999 when I represented the farm in an environmental enforcement matter in State Court involving the NYS DEC, (Ex. A, Complaint, ¶8; Ex. B, Answer; Ex. C, Lewis Aff., ¶8), for which defendant, Lewis Farm “paid counsel’s bill for John Privitera’s services,” and that he “reviewed performance,” that “[t]he invoice amount was not our concern then, and is not now,” (Ex. C, Lewis Aff., ¶9), and that, “Lewis Family Farm resists retainer agreements with counsel,” (Ex. C, Lewis Aff., ¶14).

12. In 2009, I sent five emails to defendant, Sandy Lewis regarding the firm’s unpaid invoices. The first email was sent on May 2, 2009, stating, in pertinent part, “The Farm’s debt to my firm is now the largest, longest account receivable my firm has carried in more than a decade” and I asked, “When are you going to pay me for my work?” In response defendant, Sandy Lewis wrote same day, “As and when we are able... happy to review this any time ...” and thereafter on

the same day, by email, further explained, "we are net worth solid, quite well off, but we are illiquid and focused on reversing this - and I have made this clear for some time. It should straighten out... slow lawyers are driving me nuts - and a key buyer is 1 month overdue - which is not surprising, given his program. Death and taxes, happy to take you through the drill - I responded in December but even that was imprudent in the circumstance." Copy of my May 2, 2009 email and defendant, Sandy Lewis's email responses are attached as Exhibit F.

13. Next, on July 29, 2009, I emailed defendant, Sandy Lewis, copy of which is attached as Exhibit G, stating, in pertinent part, "When will you pay your bill? I will be asked this question Monday morning by all of my partners. I hope to say it was paid." I received no response.

14. On September 2, 2009, I wrote defendant, Sandy Lewis another email, copy of which is attached as Exhibit H, stating unequivocally and, in pertinent part:

I am midway through prosecution of a motion for your attorney fees. If we win, the Farm will benefit, not me. The relative success or (sic) the motion is inconsequential to my painfully long overdue invoice, much less my income. You have repeatedly agreed to pay it.

...

I trust you will pay my full invoice by year end, no matter what happens to the motion.

15. Thereafter, I emailed defendant, Sandy Lewis on October 15, 2009, writing, in pertinent part:

The question is not when or if the state is going to pay you. The question that I am embarrassed to face at every partner meeting for nearly 2 years is: When are you going to respect me enough to pay me?

...

I am not going to ask you again. I should never have had to ask once in the first place. Answer, please.

To this email, defendant, Sandy Lewis responded on October 16, 2009 stating, among other things:

We are trying to survive.

Will speak with Barbara - and see what we can do.

We are not flat broke, but it's not pretty. An interesting feeling for a family with substantial net worth.

You said we had to pay first. I said that made no sense. The law was written for those who cannot pay. That is clear.

It also was not possible.

Copy of my October 15, 2009 email and defendant, Sandy Lewis's October 16, 2009 email response are attached as Exhibit I and Exhibit J, respectively.

16. In 2010, I sent defendant, Sandy Lewis four more communications seeking payment of the firm's outstanding bill. On March 8, 2010, my assistant, Kathleen Hill, emailed defendant, Sandy Lewis a statement of the defendants' account history reflecting a total outstanding amount due of \$262,075.32, on which I hand wrote the question, "Have you discussed this with Barbara?", to which I received no response. Seven months later, I wrote by email once again, as follows:

I hope that you and the Farm have found some liquidity. As you know, I have been holding a large account receivable of 281K for a very long time, some of which goes back nearly three years. Even if the Judge awards the full amount we have requested, which is unlikely, the Farm will still owe about 75K. When can I anticipate payment?

Copy of my assistant's March 8, 2010 email and my October 8, 2010 email are attached as Exhibit K and Exhibit L, respectively.

17. I next emailed defendant, Sandy Lewis on November 1, 2010, copy of which is attached as Exhibit M, to remind him that, regarding the firm's bill, the last check my firm had

received was nearly two years ago and that the firm's bill was now at \$281,000, without interest. Then, on December 8, 2010, I emailed defendant, Sandy Lewis, copy of which is attached as Exhibit N, again forwarding a statement of the Defendants' account history and stated, "The Farm has received a bill every month. The last payment was nearly 3 years ago. I look forward to your courteous response." I received no response.

18. Ultimately, defendant, Lewis Farm and defendants, Barbara and Sandy Lewis prevailed in their litigation against the APA, see Lewis Family Farm, Inc. v. New York State Adirondack Park Agency, 64 A.D.3d 1009, 882 N.Y.S.2d 762 (3rd Dep't 2009), and defendant, Lewis Farm moved for an award of counsel fees against the APA, under Article 86 of the CPLR, the Equal Access to Justice Act ("EAJA"). The Court, by Decision and Order dated February 3, 2010, determined that the farm was entitled to an award of its fees and expenses, but explained:

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." (citation omitted). 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 (citation omitted), but not LFF's appeal from the dismissal of the 2007 case.

To the extent defendant, Lewis Farm had sought to recover from the APA its attorneys' fees and expenses for the Appellate Proceeding, the Enforcement Action, and Action No. 4, those fees and expenses could not be awarded by the Court under the EAJA. Nor could defendants, Barbara and Sandy Lewis (or defendant, Lewis Farm, on their behalf) recover for those attorneys' fees and expenses incurred defending them in Action No. 4. Copy of the February 3, 2010 Decision and Order is attached as Exhibit O. Moreover, *it was never intended nor agreed* that the amount of plaintiff law firm's fee would be limited to, or that the defendants would only be responsible for paying, those legal fees that *might* be awarded to the defendants under the EAJA.

19. Thereafter, by written decision dated November 17, 2010, the Court awarded defendant, Lewis Farm attorneys' fees and expenses in the sum of \$71,690.28. Copy of the November 17, 2010 Supplemental Decision and Order on Application for Counsel Fees is attached at Exhibit P. Having been awarded less than the total attorneys' fees and expenses it had incurred, defendant, Lewis Farm moved to reargue its fee application, which the Court denied, and filed notice of its intent to appeal the Court's Supplemental Decision and Order, to which the APA filed notice of intent to cross-appeal.

20. Six months later, on or about June 9, 2011, the lengthy battle between the APA and defendant, Lewis Farm ended when defendant, Sandy Lewis signed a settlement agreement, on behalf of defendant, Lewis Farm, and accepted a \$71,690.28 check from the State. This amount was paid directly to defendant, Lewis Farm, no amount of which was paid over to McNamee Lochner by the farm.

21. Following the successful conclusion of my representation of defendant, Lewis Farm and defendants, Barbara and Sandy Lewis, which resulted in a landmark right to farm decision, the

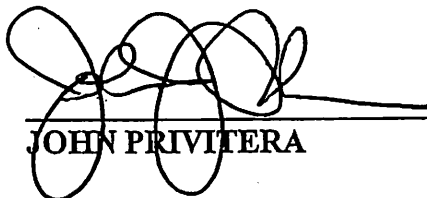
first ever award of counsel fees against the APA, and which defendant, Sandy Lewis himself describes on his website, Lewis Family Farm, Inc. vs. APA at www.sblewis.com, as having "established a standard and changed the rules in The North Country", I emailed Martina Baillie, Esq., family friend of defendants, Barbara and Sandy Lewis and a lawyer for defendant, Lewis Farm, on or about June 30, 2011, hoping to finally receive payment in full for McNamee Lochner's services, as follows:

Sandy has indicated that he is looking to you to approve the invoices that we have sent on a monthly basis for years.

In my view, this is a stated account.

Please provide me with the Farm's written position at your earliest convenience so that I can inform my firm as to the status of this matter.

Copy of my June 30, 2011 email to Martina Baillie, Esq. is attached as **Exhibit Q**. On July 1, 2011, Ms. Baillie responded that she did not have the authority to communicate with me about the firm's outstanding invoices, and, to this date, I have received no further payment or any complaint or objection to a specific invoice or any charge set forth in any invoice.



JOHN PRIVITERA

Sworn to before me this 11th day of July, 2012.

Kathleen L. Hill

Notary Public, State of New York
Qualified in _____ County
Commission Expires:

KATHLEEN L. HILL
Notary Public, State of New York
No. 01HI6029213
Qualified in Albany NY
Commission Expires Aug 8, 2016

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

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

Plaintiff,

- against -

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

Defendants.

**AFFIDAVIT IN SUPPORT
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Index No. 2184-12

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:

KATHLEEN L. HILL, being duly sworn, deposes and says:

1. I am Administrative Assistant to John Privitera, Esq., employed by plaintiff, McNamee, Lochner, Titus & Williams, P.C. in the firm's Environmental Department, a position I have held since 1999. As such, I am familiar with the billing practices and procedures of the law firm and am responsible for mailing Mr. Privitera's legal billing to his clients, which included mailing defendant, Lewis Family Farm, Inc. ("Lewis Farm") and defendants, Barbara and Sandy Lewis their billing statements for the firm's most recent representation, as well as for the firm's previous representation of Lewis Farm involving the NYS DEC.

2. Beginning on or about December 31, 2007, I began mailing defendant, Lewis Farm and defendants, Barbara and Sandy Lewis invoices detailing (i) the professional services rendered to them, by whom, the time charged and at what hourly rate, (ii) the disbursements advanced on their behalf, (iii) any unpaid balance being carried forward from prior invoices, (iv) the total new charges incurred, and (v) the total balance now due.

3. The invoices were mailed, pursuant to McNamee Lochner's standard operating procedure, and sent by regular, first-class mail addressed to Barbara and Sandy Lewis, Lewis Family


Farm at Whallons Bay Road, Essex, New York 12936.

4. An invoice was ordinarily sent to defendants monthly. For each billing statement, the billing statement at or about month's end was first printed in draft by the firm's Bookkeeping Department. The draft was then forwarded in hard copy to John Privitera, the managing attorney assigned to the client matter, for review and approval. Once approved by John Privitera, the draft billing statement was printed in final by Bookkeeping and forwarded to me in hard copy for mailing. In response, I prepared cover letters for John Privitera's signature. Once signed, each cover letter and accompanying billing statement was then photocopied and each time, I put one set in an envelope on which I computer printed the clients' names and address from the prepared cover letter. Each envelope was then stamped and I placed each addressed, stamped envelope in the firm's mail room in the outgoing mailbox, which is emptied and taken to the post office at the end of each day by the firm's mail clerk.

5. Lastly, I filed a hard copy of each mailed invoice and cover letter in my physical billing files, which I maintain for two years at my desk before forwarding to archives for long-term storage, and I gave two hard copies of each invoice without cover letter to Bookkeeping. A copy of each invoice with cover letter that I mailed to defendants from December 31, 2007 through to on or about June 30, 2011 is attached as Exhibit R.


KATHLEEN L. HILL

Sworn to before me this 17th day
of July, 2012.


Notary Public - State of New York
Qualified in _____ County
Commission Expires:

CINDY R. HARRINGTON
Notary Public, State of New York
No. 01HA4819628
Qualified in Rensselaer County
Commission Expires March 30, 2014