SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ESSEX

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

NEW YORK STATE ADIRONDACK PARK AGENCY,

Respondent.

Essex County
Index No. 315-08

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

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

Defendants.

Essex County
Index No. 332-08

THE NEW YORK STATE ADIRONDACK PARK AGENCY'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION TO REARGUE AWARD OF ATTORNEY FEES

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PRELIMINARY STATEMENT

The New York State Adirondack Park Agency ("APA" or "the Agency") submits this memorandum of law in opposition to petitioner Lewis Family Farm Inc.'s ("Lewis Farm's") motion to reargue its previous application for attorney fees and costs pursuant to CPLR Article 86, the Equal Access to Justice Act ("EAJA"). By Decision and Order dated November 17, 2010, this Court awarded petitioner $71,690.28 in attorney fees. Petitioner seeks reargument to obtain a higher fee award. See 12/16/10 Affirmation of John J. Privitera dated December 16, 2010 ("12/16/10 Privitera Aff."), ¶ 2.

The Court should deny the motion because it fails to meet the standard for reargument pursuant to CPLR § 2221(d), which requires a showing that this Court overlooked or misapprehended the facts or law. In addition, petitioner had more than a full and fair opportunity to be heard on its application, having participated in oral argument on the motion, and having been given the opportunity by this Court to submit supporting papers on five separate occasions.

STATEMENT OF FACTS

In a Memorandum and Order dated July 16, 2009, the Appellate Division, Third Department upheld Supreme Court's decision that three single family dwelling units constructed for farmworker housing on Lewis Farm's land are "agricultural use structure[s]" within the meaning of Executive Law § 802(8) and are therefore exempt from APA jurisdiction. By Notice of Motion dated August 13, 2009, petitioner applied to this Court for an award of $208,770.06 in attorney fees and costs pursuant to EAJA. See Affirmation of John J. Privitera dated August 12, 2009 ("8/12/09 First Privitera Aff."), Exhibit B; see also Affidavit of Salim B. Lewis dated August 13, 2009 ("8/13/09 First Lewis Aff."). In response, the State argued that the APA was substantially justified in its position, that special circumstances made an award unjust, that the

fee was excessive and that numerous expenses were inappropriate. See Affirmation of Loretta Simon, dated August 28, 2009 ("8/28/09 Simon Aff.").

Thereafter, counsel for petitioner submitted three new sworn statements, a memorandum of law and a second affirmation of Mr. Privitera with several hundred pages of exhibits. See Affirmation of John J. Privitera dated September 23, 2009 ("9/23/09 Second Privitera Aff.") Exhibits A-G; see also Affidavit of Ronald Briggs undated; Affidavit of Howard Aubin dated September 21, 2009; Affidavit of Jorge Valero dated September 17, 2009. The State cross-moved to strike the new sworn statements, new documents and matters raised for the first time in the reply. See Notice of Cross-Motion and Affirmation of Loretta Simon, both dated October 9, 2009 ("10/9/09 Simon Aff."). Petitioner responded with a second affidavit of Salim B. Lewis. See Affidavit of Salim B. Lewis, dated October 21, 2009 ("10/21/09 Second Lewis Aff."), and a second memorandum of law dated October 22, 2009.

Oral argument was held on petitioner's motion for attorney fees on October 29, 2009, in Essex County, Supreme Court. See Affirmation of Jacob F. Lamme dated March 4, 2010, Exhibit A (Transcript). In a Decision and Order dated February 3, 2010, ("2/3/10 Order") this Court found that the APA was not "substantially justified" in its position, within the meaning of EAJA, in its determination requiring a permit for the construction of the three single-family dwellings for farmworker housing in the Adirondack Park. The 2/3/10 Order also set a hearing date to determine the amount of attorney fees to be awarded. On February 5, 2010, petitioner requested that the hearing be adjourned. See 12/16/10 Privitera Aff., Exhibit B (2/5/10 letter of Lamme). Shortly thereafter, the State requested that the amount of the award be determined on submission, to save all parties and the Court the additional time and expense of a hearing. See Affirmation of Loretta Simon dated January 20, 2011 ("1/20/11 Simon Aff."), Exhibit B (2/10/10

letter of Simon). On February 22, 2010, the Court held a conference call with counsel for the parties to determine whether to hold a hearing or make a determination on submissions. At the end of the conference call, it was agreed that all additional arguments would be on submission, which the Court confirmed by letter to the parties the same day. See 1/20/11 Simon Aff., Exhibit C (2/22/10 letter of Hon. Meyer).

In a submission by letter dated February 12, 2010 petitioner revised its fee request upward to $206, 953.78. See Affirmation of John J. Privitera dated March 4, 2010 ("3/4/10 Third Privitera Aff."), Exhibit C. Thereafter, in another submission, petitioner increased its fee to $226,087.53, accompanied by eight new sworn statements to further justify its fee request. See 3/4/10 Third Privitera Aff., Exhibit D; see also Petitioner's "Record On Motion to Reargue" Exhibits Q-X (Third Affidavit of Salim Lewis dated March 3, 2010, Affirmation of Jerry Hoffman dated February 23, 2010, Affirmation of Benjamin Pratt dated February 25, 2009, Affirmation of Michael J. Cunningham dated February 26, 2010, Second Affidavit of Jorge Valero dated March 1, 2010, Affirmation of Jacob F. Lamme dated March 4, 2010, Affirmation of Cynthia Feathers dated March 1, 2010).

In a Decision and Order, dated November 17, 2010 ("11/16/10 Decision"), this Court awarded fees and costs of $71,690.28 to petitioner, which was entered as a judgment on or about November 30, 2010. Notice of Entry of the Judgment dated December 6, 2010, was served by mail on the State Office of the Attorney General. Petitioner's Notice of Motion dated December 16, 2010, requests leave to reargue, in order to increase its award of attorney fees.

ARGUMENT

THE COURT SHOULD DENY PETITIONER'S MOTION FOR LEAVE TO REARGUE BECAUSE IT FAILS TO MEET THE REQUIREMENTS OF CPLR § 2221

Petitioner's motion to reargue should be denied for its failure to meet the standard for reargument pursuant to CPLR § 2221(d) which requires that the motion:

> shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion

CPLR § 2221(d)(2). A motion for leave to reargue must show that the Court overlooked or somehow misconstrued the facts or misapplied the law. See DeSoignies v. Cornasesk House Tenants' Corp., 21 A.D.3d 715 (1st Dep't 2005) (reargument not available where a movant sought only to urge a new theory of liability not previously advanced, and failed to show how the court misconstrued facts or law); see also Andrea v. E.I. du Pont de Nemours & Co., 289 A.D.2d 1039 (4th Dep't 2001), appeal denied, 97 N.Y.2d 749 (2002) (motion to reargue may be granted only upon a showing that the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision).

A. The Court Did Not Misapprehend Facts

Petitioner has failed to show that this Court misapprehended facts warranting reargument. In support of its motion for leave to reargue, petitioner alleges that the Court overlooked or misapprehended petitioner's desire for a hearing to determine the amount of attorney fees to be awarded. Petitioner's counsel, Mr. Privitera, argues he did not consent to a determination of the motion on submission and that there is nothing in the record to support that fact. See 12/16/10 Privitera Aff., ¶ 4. This statement is belied by the record. This Court issued a letter which clearly and unequivocally confirmed agreement after a conference call held February 22, 2010,

wherein counsel to the parties consented to a determination of the motion on submission. See 1/20/11 Simon Aff., ¶¶ 8-9, Exhibit C (letter of Court dated February 22, 2010).

In any event, whether petitioner's counsel acknowledges this Court's letter or not, EAJA does not require a hearing for a determination on attorney fees, nor does petitioner cite any law supporting its right to such a hearing. See Walz v. Town of Smithtown, 46 F.3d 162, 170 (2d Cir. 1995) (in civil rights action against a town, Circuit Court upheld fee award and upheld lower court's determination not to hold an evidentiary hearing on fees, finding that attorney fees awards are routinely made without an evidentiary hearing) see also Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation."). It is within the Court's discretion to make a determination on the amount of attorney fees on submission. How the Court determined a motion, whether on submission or with a hearing, cannot serve as grounds for reargument here especially given the more than ample due process provided to petitioner and its counsel. The standard for leave to reargue is whether the Court misapprehended a fact related to the merits of the motion, not whether counsel may have misunderstood how the Court was going to determine the motion.

B. Petitioner Failed To Submit An Adequate Application To The Court In The First Instance And Is Not Entitled To Another Opportunity

Counsel for petitioner was given no less than six opportunities to justify its request for attorney fees, once in oral argument and again in five separate submissions to the court, including two memoranda of law and fifteen affidavits. See "Record on Motion to Reargue," Exhibit W (Transcript of oral argument held October 29, 2010 as Exhibit A to 3/4/10 Lamme Aff.); see also submissions of August 2009; September 2009; October 2009; February and March, 2010. Nevertheless, petitioner seeks reargument "so that the record may be more fully developed and 'justification' for my time may be provided" and to "expound upon the issues

already explained in our affidavits." See 12/16/10 Privitera Aff., ¶¶ 20, 24. Counsel may not use reargument to correct deficiencies in its application. See Franklin Nat. Bk. of L.I. v. Briskman, 202 N.Y.S 2d 584 (Sup. Ct. Nassau Co. 1960) (deficiencies in proof on a former motion may not be supplied on reargument in a motion for leave to reargue). Petitioner is not entitled to another "bite at the apple," either to further justify its original position or to add new arguments. See Amato v. Lord & Taylor, Inc.,10 A.D.3d 374 (2d Dep't 2004) (motion for leave to reargue denied, not designed to give successive opportunities to present arguments different from those originally presented); see also Matter of Mayer v. National Arts Club,192 A.D.2d 863 (3d Dep't 1993) (motion for reargument is not designed to afford successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted).

It was petitioner's burden in the first instance to adequately explain how counsel hours were spent and to identify and justify with specificity each claim, as well as the hours that pertain to each claim. See Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); See 1/20/11 Simon Aff., Exhibit A (11/17/10 Decision, p. 5). Petitioner failed to meet its burden by lumping and clustering unrelated claims, failing to provide contemporaneous billing records, and failing to disclose its fee arrangement. The Court did not misapprehend any fact related to petitioner's billing records. Rather, counsel for petitioner failed to provide sufficient detail in its application, as the Court found: "The billing records here do "not permit intelligent review of the necessity or reasonableness of the time expenditures recorded therein . . . " See 1/20/11 Simon Aff., Exhibit A (11/17/10 Decision, p. 5).

Likewise, counsel's argument that the Court improperly rejected entries billed for communications with his client, citing for the first time the Code of Professional Responsibility

as justification for the entries, is unavailing. See 12/16/10 Privitera Aff., ¶ 17. The Court appropriately denied reimbursement for these "strategy" sessions because counsel failed to provide justification for the expenses. See 1/20/11 Simon Aff., Exhibit A (11/17/10 Decision, p. 8). Counsel's most recent justification for these entries should be rejected by the Court.

C. It is Too Late For Introduction of New Facts

A motion to reargue "shall not include any matters of fact not offered on the prior motion." See CPLR § 2221(d). Petitioner seeks to supplement its submissions with new justification after failing to adequately justify its fee request on its five prior submissions. This is nothing more than a belated attempt to add new facts, which is prohibited. See James v. Nestor, 120 A.D.2d 442 (1st Dep't 1986) (assertion that movant has new or additional facts not before the court in the original argument, is not a ground for a motion to reargue which asserts that the court misapprehended the facts or law); see also Phillips v. Village of Oriskany, 57 A.D.2d 110 (4th Dep't 1977) (motion for reargument is made on papers submitted, new facts may not be presented).

Moreover, EAJA directs that "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application . . ." See CPLR § 8601(b). Petitioner's thirty day period passed in August 2009, over one year and four months ago. Petitioner should not be allowed to revisit its application and introduce even more new evidence at this juncture. Supplementary motions are contrary to the EAJA statute. See Acevedo v. Wing, 269 A.D.2d 339 (1st Dep't 2000) (EAJA motion denied as untimely); see also 1/20/11 Simon Aff., Exhibit D (Lighthouse Pointe Property Assoc., LLC v. DEC et. al., Index No. 079701, Sup. Ct. Monroe Co. August 11, 2010) (attorney fees pursuant to EAJA denied to ineligible party, and a second motion to supplement original motion submitted after the

30 day statute of limitations denied as untimely); see also American Chophouse Enterprises, LLC v. The Town of Huntington, 2009 WL 5609559 (Sup. Ct. Suffolk Co. Dec. 29, 2009) (motion by petitioners for an order for counsel fees pursuant to CPLR § 8601 denied for failure to meet the 30 day statutory deadline). As the Court in American Chophouse noted: "[T]he Court finds that the legislature intended that the application be *submitted* for the consideration of the Court within thirty (30) days of a final judgment or Order" (emphasis added). Id. Accordingly, counsel for Lewis Farm should not be allowed to submit further additional facts in support of its application outside the 30 day period contemplated by EAJA, one year and four months after its original application.

In its fee determination, this Court found that counsel's fee application and additional submissions, "do not contain any further particularization or explanation of its counsels' services and billing." See 1/20/11 Simon Aff., Exhibit A (11/17/10 Decision, p. 5). As reflected in its Decision the Court conducted a thorough analysis of petitioner's entire fee application and supplements:

> [T]his Court expended many hours in a page-by-page examination of the voluminous records maintained by the clerk in this matter, including the papers on this application, and compared them to LFF's billing records in order to arrive at a fair result. Where the time expended per task could not be reasonably discerned from the billing records and/or the clerk's records, no award has been made." Id.

After a painstaking evaluation of the fee application, the Court arrived at a reasonable number of hours to be reimbursed, and determined a reasonable hourly rate for an attorney in the judicial district, all after petitioner had a several opportunities to present detailed billing records. Accordingly, the motion for leave to reargue should be denied.

CONCLUSION

Petitioner's motion for leave to reargue fails to satisfy the requirements of CPLR § 2221, which requires a showing that this Court overlooked facts, or misapplied the law. Accordingly, petitioner's motion for reargument should be denied.

Dated: January 20, 2011
Albany, New York

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