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

April 4, 2011

Joseph A. Provoncha
Essex County Clerk
7559 Court Street, P.O. Box 217
Elizabethtown, NY 12932

Re: Lewis Family Farm, Inc. v. Adirondack Park Agency
Index No.: 315-08
RJI No.: 15-1-2008-0109

Adirondack Park Agency -v- Lewis Family Farm, Inc., Salim B. Lewis and Barbara Lewis
Index No.: 332-08
RJI No.: 15-1-2008-0117

Dear Mr. Provoncha:

I enclose herein for filing the original decision and order on the motion to reargue in the above matter. By way of a copy of this letter to counsel for petitioner and respondent, I am providing them with a copy of this order.

Very truly yours,

Richard B. Meyer

RBM:jhd
Enclosure
cc: John J. Privitera, Esq.
Loretta Simon, Esq., Assistant Attorney General

ESSEX COUNTY COURTHOUSE
7559 COURT STREET, P.O. BOX 217 • ELIZABETHTOWN, NEW YORK 12932
(518) 873-3326 • FAX (518) 873-3732

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

Submitted January 28, 2011 Decided April 4, 2011

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

Action No. 1

LEWIS FAMILY FARM, INC.
Petitioner,

v.

ADIRONDACK PARK AGENCY,
Respondent.

Action No. 2

ADIRONDACK PARK AGENCY,
Plaintiff,

v.

LEWIS FAMILY FARM, INC.,
Defendant.

Decision and Order on Motion to Reargue
Application for Counsel Fees Under CPLR Article 86

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

Eric T. Schneiderman, Esq., New York State Attorney General (*Loretta Simon, Esq. and Lisa M. Burianek, Esq., Assistant Attorneys General,* of counsel), Albany, New York, for Adirondack Park Agency.

Motion by Lewis Family Farm, Inc. (LFF) to reargue its application for attorney's fees under the "New York State Equal Access to Justice Act" (*CPLR art. 86*) (EAJA).

After successfully challenging the March 25, 2008 administrative determination of the Adirondack Park Agency (APA) (*see* *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), resulting in annulment of that determination and dismissal of the APA's enforcement action (Action No. 2), LFF applied for an award of counsel fees under the EAJA. In a decision and order dated February 3, 2010 (2010 NY Slip Op 50180[U], 26 Misc3d 1219 [A]), this Court found that LFF was a prevailing party entitled to an award of counsel fees under the EAJA, but reserved decision on the remaining issues so that an evidentiary hearing could be held relative to a reasonable hourly rate for the services rendered by LFF's counsel and the number of hours reasonably expended by such counsel in the prosecution of LFF's civil action against the APA. In preparation for the evidentiary hearing, LFF's counsel was directed to furnish 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 fee application.

LFF's counsel requested an adjournment of the evidentiary hearing in a letter dated February 5, 2010 based upon the unavailability of one of its' expert witnesses. By letter dated February 10, 2010 counsel for the APA suggested "that the matter could be resolved on submission, saving

all parties and the Court the additional time and expense of a hearing." Counsel for LFF objected to that suggestion in a letter dated February 12, 2010. On February 18, 2010 LFF withdrew its request to reschedule the hearing and confirmed that there would be a telephone "conference call between the parties" and the Court on "February 22, 2010 at 9:30 A.M. to discuss scheduling and the procedures of the hearing." The conference call with counsel for both parties took place as scheduled on February 22, 2010. In that telephone conference, counsel for LFF agreed that the information he would present at a hearing could be furnished by written submissions. The attorneys for both sides agreed to cancel the evidentiary hearing and proceed solely on written submissions, and a timetable for such submissions was established. This Court confirmed the parties' agreement by letter dated February 22, 2010 delivered to counsel that same day by facsimile transmission. Counsel for LFF did not thereafter dispute the contents of that letter, except upon the present motion to reargue. Significantly, in the March 4, 2010 letter from LFF's counsel filing additional submissions for consideration by the Court in rendering a final decision on the fee application, no mention was made of any objection to the cancellation of the hearing and there was no request that the Court hold such a hearing. Following the submissions by the APA, counsel for LFF objected to those submissions[1]. Although LFF's counsel stated he was "ready to appear at an evidentiary hearing to air all of the Court's concerns and answer all of the Court's questions", he did not object to the lack of an evidentiary hearing or request such a hearing.

A final decision and order was issued on November 17, 2010 awarding LFF $71,690.28 in attorneys fees and expenses[2]. In arriving at the award, this Court noted several deficiencies in the billing records submitted by LFF's counsel. Instead of denying LFF's application, the Court engaged in a complete re-review and analysis of the entire court record in order to arrive at a fair and reasonable determination of the

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1 LFF objected only to (a) the submission of a 25-page memorandum of law "replete with misstatements, factual inaccuracies, irrelevant statements and inapplicable case citations", and (b) the APA's use of an invoice by LFF's counsel to another client in an unrelated 2005 bankruptcy proceeding.

2 LFF had sought $226,087.53 in attorneys fees and expenses

attorneys fees and expenses to which LFF was entitled.

LFF now seeks to reargue the fee application. Specifically, LFF now contends that it did not agree to forgo or waive the evidentiary hearing. The Court has considered the following papers on the instant motion: LFF"s notice of motion dated December 16, 2010, supporting affirmation of John J. Privitera. Esq. dated December 16, 2010 with exhibits A through G, and the papers submitted on the fee application; and the affirmation of Loretta Simon, Esq. dated January 20, 2011 with exhibits A through D, and Memorandum of Law of the same date.

"A motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (*CPLR R2221[d][2]*), and "is addressed to the sound discretion of the court" (*Loris v. S & W Realty Corp.*, 16 AD3d 729, 730, 790 NYS2d 579, 581). For the reasons that follow, LFF's motion to reargue is denied.

First, the arguments advanced are factually inaccurate. During the February 22, 2010 telephone conference, LFF's counsel did indeed agree that an evidentiary hearing did not need to be conducted and that the factual information identified in the Court's February 3, 2010 decision could be presented by way of written submissions. To suggest that it was this Court which felt no evidentiary hearing was needed and that this Court in any way convinced LFF's counsel to forgo such a hearing is spurious. Had this Court believed that a hearing was not the most appropriate and best means to present the evidence supporting LFF's fee request, it would not have ordered a hearing to begin with in its February 3, 2010 decision and would instead have merely directed further written submissions.

Second, LFF's initial application contained an almost identical version of the itemized billing which the Court ultimately found to be legally deficient, the only differences being that the subsequent version contained work entries for the period following the initial filing of the application. It was because the itemized billing statements relied upon by LFF in its initial application were inadequate that this Court directed disclosure of all of its billing records to counsel for the APA in advance of

the scheduled evidentiary hearing. The failure of LFF's counsel to recognize that the Court's February 3, 2010 decision afforded LFF a second chance at submitting sufficient and proper evidence to support its fee request does not constitute grounds for reargument. It was not the Court who "overlooked or misapprehended" matters of fact and law.

Finally, this Court arrived at the fee award not by use of the problematic itemized billing alone but instead by a laborious "page-by-page examination of the voluminous records maintained by the clerk" in comparison with "LFF's billing records in order to arrive at a fair result." The Court was not bound by the statements of LFF's counsel as to the amount of time expended (*Steiger v. Dweck*, 305 AD2d 475, 476, 762 NYS2d 84, 85), and the Court made its "own assessments of the reasonableness of the amount of time spent on the case" (*F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F2d 1250, 1265). Even if reargument were to be granted, no facts are alleged in the motion papers upon which a different result would likely be obtained.

IT IS SO ORDERED.

ENTER

Richard B. Meyer, A.J.S.C.