

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Petitioner-Respondent-Cross-Appellant,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY,

Respondent-Appellant-Cross--Respondent.

**NOTICE OF
CROSS-MOTION**

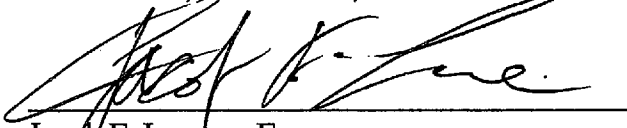
Essex Co. Index Nos.
315-08 and 332-08

PLEASE TAKE NOTICE that upon the Affirmation of Jacob F. Lamme, Esq., sworn to November 24, 2010, and upon all of the papers and proceedings had herein, Petitioner-Respondent-Cross-Appellant Lewis Family Farm, Inc., will cross-move at a motion term of this Court to be held at the Justice Building, South Mall, Albany, New York, on the 29th day of November for an order (1) denying the Adirondack Park Agency's motion, which failed to provide adequate notice under CPLR §§ 2103(b)(2) and 2214(b); (2) granting an extension of the time in which Lewis Family Farm, Inc. has to perfect its cross-appeal pursuant to 22 NYCRR § 800.12; (3) designating the Adirondack Park Agency as the "appellant" pursuant to 22 NYCRR § 800.9(e); and (4) granting such other and further relief as the Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to 22 NYCRR § 800.2, papers in opposition to this cross-motion, if any, must be filed by 11:00 a.m. on Friday, November 26, 2010, and this cross-motion will be submitted on the papers and personal appearances by the parties or their counsel in opposition to the cross-motion is neither required nor permitted.

Dated: November 24, 2010
Albany, New York

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



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TO: Julie M. Sheridan, Esq.
Assistant Solicitor General
State of New York
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LEWIS FAMILY FARM, INC.,

Petitioner-Respondent-Cross-Appellant,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY,

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AFFIRMATION

Essex Co. Index Nos.
315-08 and 332-08

JACOB F. LAMME, ESQ., an attorney at law duly admitted to practice in the courts of the State of New York, swears and affirms under penalty of perjury as follows:

1. I am duly licensed and admitted to practice law in the State of New York and I am a member of the bar of this Court. I am an associate with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for Petitioner-Respondent-Cross-Appellant Lewis Family Farm, Inc. ("Lewis Family Farm") in this action. As such, I am fully familiar with the pleadings and proceedings in this action and with the matters set forth herein.

2. I submit this affirmation in partial opposition to the motion submitted by Respondent-Appellant-Cross-Respondent New York State Adirondack Park Agency ("APA"), and in support of the Lewis Family Farm's cross-motion for an order (1) denying the APA's motion, which failed to provide adequate notice under CPLR §§ 2103(b)(2) and 2214(b); (2) granting an extension of the time in which Lewis Family Farm has to perfect its cross-appeal pursuant to 22 NYCRR § 800.12; (3) designating the APA as the "appellant" pursuant to 22 NYCRR § 800.9(e); and (4) granting such other and further relief as the Court may deem just and proper.

3. On February 3, 2010, the Essex County Supreme Court (Meyer, J.) issued a decision and order holding that the Lewis Family Farm is entitled to an award of fees and expenses under Article 86 of the CPLR because the position of the APA throughout this litigation was not "substantially justified". See Lewis Family Farm, Inc. v. Adirondack Park Agency, 26 Misc. 3d 1219A; 907 N.Y.S.2d 438 (Essex County Sup. Ct., Feb. 3, 2010) (See Ex. B to the Affirmation of Julie M. Sheridan, dated November 18, 2010).

4. The APA filed a Notice of Appeal, dated February 25, 2010. (See Sheridan Aff., Ex. C). Thus, the APA's 9-month time limit to perfect its appeal expires on Friday, November 26, 2010.

5. On March 4, 2010, the Lewis Family Farm timely filed a Notice of Cross-Appeal, protecting its right to appeal the lower court's denial of attorney's fees incurred to defend against the APA's baseless and punitive counterclaim. (See Sheridan Aff., Ex. D). Thus, the Lewis Family Farm's 9-month time limit to perfect its cross-appeal expires on December 6, 2010 (since December 4, 2010 is a Saturday).

6. On November 18, 2010, the APA sought to move this Court for a 60-day extension of the time in which it must perfect its appeal. The APA served its motion via regular first class mail.

APA Failed to Provide Adequate Notice for Its Motion

7. Pursuant to CPLR §§ 2103(b)(2) and 2214(b), and upon this Court's rule concerning motion practice (22 NYCRR § 800.2), the earliest proper return date available to the APA based on its Notice of Motion dated November 18, 2010 was December 6, 2010.

8. Instead of making its motion returnable then, the APA filed its motion with a return date of November 29, 2010, thus shortening the Lewis Family Farm's time to respond because of the Thanksgiving holiday.

9. As such, the APA's motion should be denied since it failed to provide adequate notice. See Williams v. Sahay, 12 A.D.3d 366, 367 (2d Dep't 2004) (holding that a motion served by mail must be made on 13 days' notice); Bush v. Hayward, 156 A.D.2d 899, 900 (3d Dep't 1989) (court lacks jurisdiction to entertain a motion where inadequate notice is given).

Extension of Time to Perfect Cross-Appeal

10. This Court is permitted to extend the time to perfect an appeal upon a showing of a reasonable excuse for the delay and merit to the appeal. See 22 NYCRR § 800.12.

11. The Lewis Family Farm seeks a 90-day extension of the time it has to perfect its cross-appeal of the lower court's February 3, 2010 decision and order. Such an extension is justifiable and reasonable because just last week, on November 17, 2010, the lower court issued the final determination on the Lewis Family Farm's motion for attorney's fees pursuant to Article 86 of the CPLR. (See Sheridan Aff., Ex. E) (awarding \$71,690.28 in fees and expenses to the Lewis Family Farm).

12. The Lewis Family Farm has not determined whether or not to appeal the November 17, 2010, decision and order, which failed to award all of the attorney's fees incurred by the Lewis Family Farm, despite finding that this litigation was protracted and made more costly by the APA's defensive strategy. (See Sheridan Aff., Ex. E, pg. 6).

13. Accordingly, in the event that the Lewis Family Farm appeals the lower court's decision and order of November 17, 2010, this Court should review that appeal and the cross-

appeal on the February 3, 2010 decision and order together. This extension would further the interests of justice and judicial economy.

14. The Lewis Family Farm's cross-appeal has merit because the New York State Equal Access to Justice Act ("EAJA") allows a prevailing party to recovery its counsel fees and expenses in certain actions against the State of New York. See CPLR § 8600; Greer v. Wing, 95 N.Y.2d 676, 679 (2001).

15. Here, the Lewis Family Farm commenced an Article 78 proceeding against the APA, which retaliated by commencing its own action against the Lewis Family Farm and, incredibly, its officers in their personal capacity. The lower court immediately consolidated the actions and deemed the APA's action as a counterclaim within the Article 78 proceeding.

16. Thus, the lower court improperly declined to award the Lewis Family Farm fees incurred in defending the counterclaim, since they were a "prevailing party" in the action against the State.

17. As such, the Lewis Family Farm has demonstrated a reasonable excuse for delay and merit to its cross-appeal such that the 90-day extension sought is warranted.

APA Should Be Deemed the "Appellant"

18. In the event that the APA's request for an extension is granted (despite being based on inadequate notice), then it should be deemed the "appellant" and required to file its brief first pursuant to 22 NYCRR § 800.9(e).

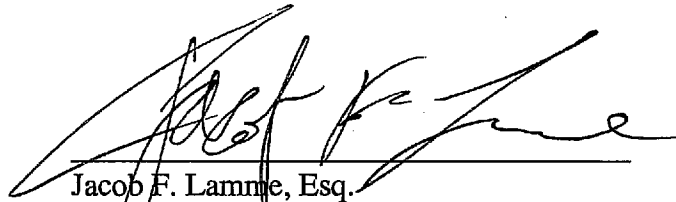
19. This is so because the APA is the main aggrieved party. The Lewis Family Farm's cross-appeal is ancillary to the main issue in the APA's appeal.

20. Indeed, the APA fully expects to be required to perfect its appeal first. (See Sheridan Aff., ¶ 10).

21. As such, this Court should issue a briefing schedule directing (i) the APA to file its initial brief; (ii) the Lewis Family Farm to file a single brief in opposition to the APA's appeal and in support of its cross-appeal; (iii) the APA to file a single brief in reply on its appeal and in opposition to the Lewis Family Farm's cross-appeal; and (iv) the Lewis Family Farm to file a reply brief on its cross-appeal.

22. Based on the foregoing, the Lewis Family Farm respectfully requests an order from this Court granting the relief sought herein, together with other relief as to this Court seems just and proper.

I, Jacob F. Lamme, hereby swear and affirm the above under penalty of perjury on this 24th day of November, 2010.

A handwritten signature in black ink, appearing to read 'Jacob F. Lamme', is written over a horizontal line.

Jacob F. Lamme, Esq.
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