

Case No. 504696

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Plaintiff-Appellant,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY,

Defendant-Respondent.

NOTICE OF MOTION

Essex County
Index No. 498-07

Case No. 504626

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Petitioner-Respondent,

-against-

ADIRONDACK PARK AGENCY,

Respondent-Appellant.

Essex County
Index No. 315-08

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ADIRONDACK PARK AGENCY,

Plaintiff-Appellant,

-against-

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

Defendants-Respondents.

Essex County
Index No. 332-08

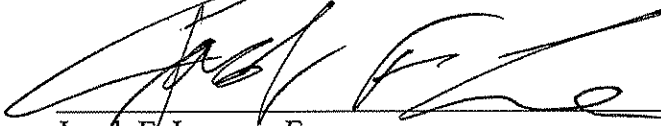
PLEASE TAKE NOTICE that upon the Affidavit of Jacob F. Lamme, Esq., sworn to December 23, 2008, and upon all of the papers and proceedings had herein, Lewis Family Farm, Inc., Salim B. Lewis and Barbara A. Lewis, will move at a motion term of this Court to be held

at the Justice Building, South Mall, Albany, New York, on the 5th day of January 2009 for: (1) an Order pursuant to 22 NYCRR § 800.2 granting a consolidation of the outstanding appeals in the above-captioned actions so that they are heard on a joint record and brief; (2) an Order pursuant to 22 NYCRR § 800.12 granting an extension of the time in which Appellant Lewis Family Farm, Inc. has to perfect its appeal in *Case Number 504696*; (3) an Order pursuant to 22 NYCRR § 800.9 deeming the Adirondack Park Agency to be the "appellant" for the purpose of the consolidated appeal, and therefore obligated to file and serve the record and brief and/or brief and appendix first; (4) an Order requiring the Agency to file its brief and record in the consolidated appeals by February 17, 2009; and (5) an Order 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 motion and cross-motion(s), if any, must be filed by 11:00 a.m. on Friday, January 2, 2008. This motion will be submitted on the papers and personal appearances by the parties or their counsel in opposition to the motion is neither required nor permitted.

Dated: December 23, 2008
Albany, New York

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



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Case No. 504696

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

LEWIS FAMILY FARM, INC.,

Plaintiff-Appellant,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY,

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AFFIDAVIT

Essex County
Index No. 498-07

Case No. 504626

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ADIRONDACK PARK AGENCY,

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-against-

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and BARBARA LEWIS,

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Essex County
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Essex County
Index No. 332-08

**AFFIDAVIT IN SUPPORT OF MOTION TO
EXTEND TIME TO PERFECT APPEAL**

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

JACOB F. LAMME, being duly sworn, deposes and states as follows:

1. I am duly licensed and admitted to practice law in the State of New York, and I am an associate with the law firm of McNamee, Lochner, Titus & Williams, P.C., attorneys for the Lewis Family Farm, Inc. (hereafter "Lewis Family Farm"), plaintiff-appellant in Case No. 504696 (Essex County Index No. 0498-07) (hereafter "*Action No. 1*"). I am also counsel to petitioner-respondent Lewis Family Farm in Case No. 504626 (Essex County Index No. 315-08) (hereafter "*Action No. 2*"). I am also counsel to defendants-respondents Lewis Family Farm, Salim B. ("Sandy") Lewis and Barbara A. Lewis in the action captioned as Essex County Index No. 332-08) (hereafter "*Action No. 3*"). As such, I am fully familiar with the pleadings and proceedings had in this action, and with the matters set forth herein.

2. I submit this Affidavit in support of the motion by Lewis Family Farm, Salim B. ("Sandy") Lewis and Barbara A. Lewis asking this Court to: 1) consolidate the outstanding appeals in the above-captioned actions so that they are heard on a joint record and brief; (2) grant an extension of the time in which Appellant Lewis Family Farm, Inc. has to perfect its appeal in *Case Number 504696*, (3) deem the Adirondack Park Agency to be the "appellant" for the purpose of the consolidated appeal, and therefore obligated to file and serve the record and brief and/or brief and appendix first, and (4) require the Agency to file its brief and record in the consolidated appeals by February 17, 2009.

3. These actions involve the Adirondack Park Agency's (hereafter "Agency") attempt to improperly regulate farming by claiming jurisdiction over the Lewis Family Farm's farm worker housing structures.

4. In June 2007, the Lewis Family Farm commenced *Action No. 1* in Essex County Supreme Court seeking a declaratory judgment that the Agency lacked authority to regulate farms. On August 16, 2007, the Honorable Kevin K. Ryan, Acting J.S.C. converted *Action No. 1* to an Article 78 proceeding and summarily dismissed it as premature. However, in doing so, the lower court improperly reached some of the merits of the dispute and advised that the Agency had jurisdiction over the Lewis Family Farm's farm worker housing project. A copy of the lower court's August 16, 2007 Decision and Order is attached hereto as **Exhibit "A"**. Thus, a precautionary Notice of Appeal was filed on September 26, 2007, a copy of which is attached hereto as **Exhibit "B"**.

5. After *Action No. 1* was dismissed, the Agency commenced its administrative enforcement proceeding, which culminated in a final enforcement determination of the Agency on March 25, 2008 ("March 25 Determination"). On April 8, 2008, the Lewis Family Farm commenced an Article 78 proceeding against the Agency seeking to vacate and annul the March 25 Determination (*Action No. 2*, Essex County Index No. 315-08). On April 11, 2008, the Agency commenced a duplicative action seeking to enforce the March 25 Determination (*Action No. 3*, Essex County Index No. 332-08). Those actions were consolidated by order of the lower court on April 25, 2008.

6. On July 2, 2008, the Essex County Supreme Court (Hon. Richard B. Meyer) issued a Decision and Order in *Action No. 2* and *Action No. 3*, which disposed of several

preliminary issues in those actions. A copy of the July 2, 2008 Decision and Order is attached hereto as **Exhibit "C"**.

7. Specifically, the July 2, 2008 Decision and Order ruled that the doctrine of collateral estoppel does not prohibit the Lewis Family Farm from challenging the Agency's jurisdiction in *Action No. 2* and *Action No. 3*. The July 2, 2008 Decision and Order states as follows:

To the extent that the motion court [in *Action No. 1*] addressed whether the project involved "agricultural use structures", a "single family dwelling" and "subdivision (*Executive Law §802[8]*, [63]), such was only to indicate that Lewis Farm had not established a "clear legal wrong" (*City of Newburgh v. Public Employment Relations Bd.*, *supra*; see also *Town of Huntington v. New York State Div. of Human Rights*, 82 NY2d 783, 604 NYS2d 541, 624 NE2d 678) or that the Agency was acting in excess of its jurisdiction (see *Cortland Glass Co., Inc. v. Angello*, 300 AD2d 891, 752 NYS2d 741). None of the court's determinations on those issues were essential to its ultimate decision to dismiss the proceeding as "not ripe for judicial intervention".

(See July 2, 2008 Decision and Order, Ex. C, pp. 8-9).

8. This is precisely the outcome on the issue of collateral estoppel that the Lewis Family Farm seeks from this Court in its appeal of *Action No. 1*.

9. The July 2, 2008 Decision and Order also dismissed the Complaint in *Action No. 3*—the Agency's duplicative civil enforcement action—as against defendants-respondents Salim B. ("Sandy") Lewis and Barbara A. Lewis.

10. On August 1, 2008, the Agency filed a Notice of Appeal as to the portion of the July 2, 2008 Decision and Order pertaining to *Action No. 3*, which was appealable as of right (i.e., the dismissal of the Complaint as against Sandy Lewis and Barbara Lewis). A copy of the Agency's Notice of Appeal is attached hereto as **Exhibit "D"**.

11. On August 1, 2008, the Agency also moved this Court for permission to appeal the remaining portion of the July 2, 2008 Decision and Order pertaining to *Action No. 2* (Article 78 proceeding). This Court denied the Agency's motion on September 9, 2008.

12. On November 19, 2008, the lower court issued a Decision and Order in *Action No. 2* and *Action No. 3* that ruled completely in favor of Lewis Family Farm. Specifically, the lower court (i) granted the Lewis Family Farm's Article 78 Petition by determining that the Agency's March 25 Determination was affected by an error of law and annulled the March 25 Determination in its entirety (*Action No. 2*), and (ii) granted summary judgment to Lewis Family Farm dismissing the Agency's duplicative civil enforcement action in its entirety (*Action No. 3*). A copy of the November 19, 2008 Decision and Order is attached hereto as **Exhibit "E"**.

13. On November 21, 2008, the lower court executed a Final Judgment in the consolidated actions below.

14. On December 18, 2008, the Agency served a Notice of Appeal, a copy of which is attached hereto as **Exhibit "F"**.

The Appeals Should Be Consolidated

15. In the interests of judicial economy, this Court should consolidate the pending appeal in *Action No. 1* (Case No. 504696) with the Agency's appeal of the final judgment in *Action No. 2* and *Action No. 3*.

16. Throughout the pendency of *Action No. 2* and *Action No. 3* in the lower court, the Lewis Family Farm has moved this Court four (4) times (i.e., May 8, 2008, July 3, 2008, September 3, 2008, and November 3, 2008) for an extension of the time in which to perfect the appeal in *Action No. 1* because the issues contained therein are inextricably intertwined with the issues in *Action No. 2* and *Action No. 3*. In each instance, the Lewis Family Farm had

contemplated this instant motion for consolidation. The Agency never objected to the contemplated consolidation.

17. It is respectfully submitted that it would be a waste of judicial resources and the expenses of the parties to require that these appeals be prosecuted in piecemeal fashion.

18. No party will be prejudiced if this Court consolidates the outstanding appeals.

19. Therefore, the appeals should be consolidated and heard on a joint record and brief.

The Time to Perfect the Appeal in *Action No. 1* Should Be Extended

20. The time in which to perfect this appeal in *Action No. 1* has not yet expired.

21. On November 26, 2008, this Court issued a Decision and Order extending the time to perfect the appeal in *Action No. 1* until January 26, 2008.

22. Rule 800.12 of the Rules of this Court permits this Court to extend the time to perfect an appeal upon a showing of a reasonable excuse for the delay and merit to the appeal. The Lewis Family Farm has demonstrated a justifiable and reasonable excuse for their delay in perfecting the appeal within the nine-month time frame imposed by 22 NYCRR § 800.12, namely that the final judgment in *Action No. 2* and *Action No. 3* would unequivocally dispose of and render moot any issues to be raised on the appeal in *Action No. 1*. As anticipated, the lower court ruled completely in favor of the Lewis Family Farm.

23. However, because the Agency now seeks appellate review of the final judgment in *Action No. 2* and *Action No. 3*, the issues contained in *Action No. 1* remain alive and pertinent.

24. No party will be prejudiced if this Court extends the Appellant's time in which to perfect the appeal.

25. The Lewis Family Farm respectfully requests that its appeal in *Action No. 1*—which is now ancillary to the Agency's main appeal in *Action No. 2* and *Action No. 3*—be consolidated into the briefing schedule for these consolidated appeals.

The Agency Should Be Deemed "Appellant"

26. It is respectfully submitted that the Agency should be deemed "appellant" for purposes of 22 NYCRR § 800.9, because the Agency is the party who was truly aggrieved in *Action No. 2* and *Action No. 3*.

27. As previously stated, the Lewis Family Farm only filed its notice of appeal in *Action No. 1* because in dismissing that converted Article 78 as premature, the lower court judge improperly (and incorrectly) reached some of the underlying merits of the case. The lower court in *Action No. 2* and *Action No. 3* has already ruled that the lower court's dicta in the Decision and Order appealed from in *Action No. 1* is not binding on the parties. Thus, the Lewis Family Farm kept the appeal in *Action No. 1* alive solely for precautionary reasons should the Agency ultimately seek appellate review in *Action No. 2* and *Action No. 3*. Of course, the Agency now seeks appellate review as the main aggrieved party.

28. As the Court can see from a review of the lower court's Decisions and Orders in *Action No. 2* and *Action No. 3* (see Exhibits C and E), the Agency is clearly the "aggrieved party". Indeed, the lower court (i) granted the Lewis Family Farm's Article 78 Petition by determining that the Agency's March 25 Determination was affected by an error of law and annulling the March 25 Determination in its entirety (*Action No. 2*), and (ii) granted summary judgment to Lewis Family Farm dismissing the Agency's duplicative civil enforcement action in its entirety (*Action No. 3*).

29. In contrast, the lower court made no findings that are truly adverse to the Lewis Family Farm, which is why the Lewis Family Farm did not appeal either the lower court's November 19, 2008 Decision and Order or the final judgment in *Action No. 2* and *Action No. 3*. The only extent to which the Lewis Family Farm is an "aggrieved party" is that the lower court in *Action No. 1* issued a Decision and Order that dismissed the action as premature, but that also improperly commented on the merits of the action. This improper commentary is the main reason for the appeal in *Action No. 1*.

30. The Agency is the party that lost on the merits in the combined actions below.

31. There is no question that as the "aggrieved party" in these consolidated appeals, the Agency should be deemed to be the "appellant" for purposes of 22 NYCRR § 800.9, and thus, required to file and serve the record and brief and/or brief and appendix, should this Court grant the motion to consolidate these pending appeals.

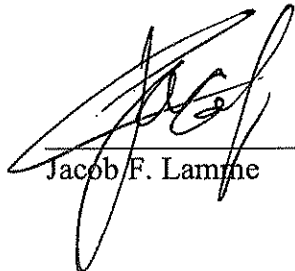
This Court Should Set an Appeal Perfection Date

32. In its opposition papers to the Lewis Family Farm's latest motion to extend the time to perfect the appeal in *Action No. 1*, the Agency recognized the need to resolve this litigation expeditiously when it stated: "The APA must oppose any extension that would extend resolution of the appeal into the next growing season." (See Affirmation of Loretta Simon in Reply to Appellant's Fourth Request for an Extension of time to Perfect Appeal, dated November 14, 2008, ¶ 14).

33. Moreover, pursuant to 22 NYCRR § 800.9, the Agency's brief and record for its appeal in *Action No. 2* and *Action No. 3* are due to be filed with the Court no later than ***February 17, 2008***.


34. Given the Agency's agreement with the Lewis Family Farm that these matters should be resolved before the 2009 farming season, it is respectfully requested that the Agency be held to the 60-day timeframe interposed by 22 NYCRR § 800.9.

35. Based on the foregoing, the Lewis Family Farm respectfully requests: (1) an Order pursuant to 22 NYCRR § 800.2 granting a consolidation of the outstanding appeals in the above-captioned actions so that they are heard on a joint record and brief; (2) an Order pursuant to 22 NYCRR § 800.12 granting an extension of the time in which Appellant Lewis Family Farm, Inc. has to perfect its appeal in *Case Number 504696*, and (3) an Order pursuant to 22 NYCRR § 800.9 deeming the Adirondack Park Agency to be the "appellant" for the purpose of the consolidated appeal, and therefore obligated to file and serve the record and brief and/or brief and appendix first; (4) an Order requiring the Agency to file its brief and record in the consolidated appeals by February 17, 2009; and (5) an Order granting such other and further relief as the Court may deem just and proper.



Jacob F. Lamme

Sworn to before me this
23rd day of December 2008.



Notary Public

KATHLEEN L. HILL
Notary Public, State of New York
No. 01HI6029218
Qualified in Alb. Co.
Commission Expires Aug. 9, 2009