

STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

In the Matter of the Application of
PROTECT THE ADIRONDACKS! INC.,

**AFFIDAVIT OF
JOHN W. CAFFRY**

Plaintiff-Petitioner,

INDEX NO. 2137-13

for a Judgment Pursuant to
Section 5 of Article 14 of
the New York State Constitution,
and CPLR Article 78,

RJI NO.01-13-ST-4541

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION and ADIRONDACK PARK AGENCY,

Defendants-Respondents.

STATE OF NEW YORK)
)SS.:
COUNTY OF WARREN)

John W. Caffry, being duly sworn, deposes and says that:

1. I am an attorney licensed to practice law in the State of New York, and am a member of Caffry & Flower, attorneys for the Plaintiff-Petitioner Protect the Adirondacks! Inc.

(hereinafter the "Plaintiff" or "PROTECT"). As such, I am fully familiar with the facts and circumstances of this action-proceeding.

2. I make this affidavit in support of Plaintiff's cross-motions for a default judgment on the First Cause of Action, or in the alternative, a temporary restraining order, and then a preliminary injunction, during the pendency of the First Cause of Action.

3. I also make this affidavit in opposition to the motion by the defendants-respondents New York State Department of Environmental Conservation ("DEC") and Adirondack Park Agency ("APA") (collectively "Defendants") to convert and to dismiss the Plaintiff's verified complaint-petition ("Complaint"), and their separate motion to compel the acceptance of Defendants' tardy motion papers.

4. For the reasons set forth in Plaintiff's Memorandum of Law of even date herewith, Defendants' motions should be denied, and Plaintiff's cross-motions should be granted.

5. In addition, Plaintiff requests that the case be moved from the Court's Article 78 docket¹ to its regular docket. In the First Cause of Action pursuant to Constitution Article 14, the Plaintiff is entitled to conduct discovery pursuant to CPLR Article 31. Thus, it is not amenable to summary resolution like the Second and Third Causes of Action, which are brought pursuant to CPLR Article 78, and in which discovery is not permitted without leave of the Court or the consent of the respondents.² CPLR § 408. Therefore, the case should be placed on the Court's regular docket.

¹ See www.nycourts.gov/courts/3jd/JudgesRules/3JD-Judges%20Rules.shtml#albanymotion .

² One could surmise that the motive behind Defendants' rather unique motion to convert this cause of action to an Article 78 proceeding is to avoid having to submit to discovery. See Second Rappoport Aff. ¶9.

6. The following documents are annexed hereto as exhibits and are referred to in Plaintiff's Memorandum of Law of even date herewith:

Exhibit A: Affidavits of service of the pleadings herein and proof of filing thereof.

Exhibit B: Decision and Order of Appellate Division, Third Department, dated March 28, 2013, granting Plaintiff consent to maintain suit on the First Cause of Action pursuant to Constitution Article 14, § 5.

Exhibit C: Letter from the Office of the Attorney General dated March 7, 2013 stating that the Defendants "take no position on" said motion.

Exhibit D: Notice published by DEC in the Environmental Notice Bulletin on December 26, 2012 disclosing its intention to destroy 123 trees during the construction of the Gilmantown Trail.

Exhibit E: DEC Policy ONR-3 entitled "Temporary Revocable Permit Policy".

7. Pursuant to CPLR § 3215(f), the facts establishing Defendants' default in answering the First Cause of Action are as follows. CPLR § 3012(a) requires that when a summons and complaint are served, an answer must be served by the defendant within 20 days of the completion of service.³

³ CPLR § 3012(c) allows for service of the answer 30 days after service of the summons and complaint if they are served by means other than personal service, pursuant to certain enumerated

8. In this case, personal service was made on the Attorney General pursuant to CPLR § 307(1) on April 19, 2013. Personal service was made on APA and DEC by certified mail, return receipt requested, pursuant to CPLR § 307(2)(2), and was complete on April 18, 2013. See Ex. A. Defendants do not dispute that service occurred on said dates. See Affidavit of Lawrence A. Rappoport, sworn to July 1, 2013 ¶4. When it was served, the Summons was stapled on top of the Notice of Petition and Combined Complaint-Petition, and it clearly stated on the first page that it must be answered within 20 days.

9. Therefore, pursuant to CPLR § 3012(a), Defendants' answer to the First Cause of Action was due on May 9, 2013. Rather than answer in a timely manner, counsel for the Defendants took no action until May 15 or 16, 2013, when he called counsel for the Plaintiffs to discuss a briefing schedule. By that time, Defendants had already been in default for a week. Notably, the Defendants' various motion papers do not deny that they defaulted in answering the First Cause of Action.

10. Pursuant to CPLR § 3215(f), Plaintiff submits its verified complaint-petition dated April 12, 2013 ("Complaint") as its proof of the facts on its motion for a default judgment, and for all other purposes which require proof of the facts on the pending motions. The undersigned verified the Complaint based on

sections of CPLR Article 3. In this case, the Defendants were served by personal service and none of the methods enumerated in § 3012(c) was used.

his personal knowledge, and as a director of the Plaintiff, and hereby reaffirms the statements set forth therein as if they were included verbatim in this affidavit.

WHEREFORE, it is respectfully requested that the Court grant the following relief:

A. Enter judgment by default in favor of the Plaintiff on the First Cause of Action pursuant to CPLR § 3215;

B. In the alternative, grant a temporary restraining order, and then a preliminary injunction, to enjoin the Defendants from cutting or otherwise destroying trees in the Adirondack Forest Preserve for the construction of Class II Community Connector snowmobile trails and other trails having similar characteristics, and from otherwise clearing, excavating or filling land for such trails, during the pendency of the First Cause of Action;

C. Transfer the case off the Court's Article 78 docket onto its regular docket;

D. Deny Defendants' motion to convert the First Cause of Action into an Article 78 proceeding;

E. Deny Defendants' motion to dismiss the First Cause of Action, as it relates to the Gilmantown Trail, for lack of ripeness;

F. Deny Defendants' motion to dismiss the Second and Third Causes of Action for failure to join necessary parties;

G. Deny Defendants' motion to compel Plaintiff to accept Defendants' tardy motion with regard to the First Cause of Action;

H. Award Plaintiff the costs and disbursements of these motions; and

I. Grant such other and further relief as may seem just and proper to the Court.

John W. Caffry

Sworn to before me this _____
day of July, 2013.

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