

# The State of New Hampshire

MERRIMACK, SS

SUPERIOR COURT

Jeffrey Frost, et al

v.

New Hampshire Banking Department, et al

NO. 217-2010-CV-288

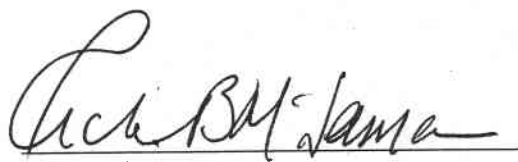
## ORDER

The Court issues the following errata notice with respect to the Court's Order of Dec 21, 2010.

Page 6, line 3-6 should read: "The complexity of the statutes regulating the industry is illustrated by the fact that Petitioners filed an expert report of Attorney W. John Funk, an expert in banking law and regulation, to aid the Court in understanding the statutes at issue in this case", replacing the sentence: " The complexity of the statutes regulating the industry is illustrated by the fact that Petitioners filed an expert report of Attorney W. John Funk, an expert in banking law and regulation, to aid the Court understand the statutes at issue in this case."

**SO ORDERED.**

1/5/11  
DATE

  
Richard B. McNamara,  
Presiding Justice

RBM/

# The State of New Hampshire

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**MERRIMACK, SS**

**SUPERIOR COURT**

**Jeffrey Frost; Chretien/Tillinghast, LLC; & Frost Family, LLC**

**v.**

**New Hampshire Banking Department & Peter Hildreth, Commissioner of the  
New Hampshire Banking Department**

**NO. 217-2010-CV-288**

## **ORDER**

A preliminary injunction in this matter was granted on June 29, 2010. Following that Order, the parties met, conferred, and agreed that the Court's June 29, 2010 Order on the preliminary injunction, which was based on offers of proof, could be treated as a final judgment so that the Respondents could appeal. Petitioners move for their costs and attorney's fees. For the reasons stated in this Order, the motion is DENIED.

### **I**

The facts established by the parties' offers of proof are set forth in detail in the June 29, 2010 Order and are briefly summarized here. Jeffrey Frost ("Frost") is a Manchester businessperson and a member and designated manager for Chretien/Tillinghast, LLC. ("Chretien"). Frost is also a member of Frost Family, LLC ("Frost Family"). Prior to this dispute, Frost served as Chairman of the Board of Directors at the American Red Cross in Manchester, New Hampshire. Chretien is a New Hampshire Limited Liability Company organized for the purpose of real estate acquisition, holding, and development. Frost Family is a New Hampshire Limited Liability Company focused on estate management and development. Frost Family performs capital improvements,

leases real estate, and on occasion, liquidates real estate.

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This dispute arose as the result of two owner-financed real estate transactions, one conducted by Chretien and one conducted by Frost Family. In September 2008, Frost Family sold a condominium to Cheryl Cayer ("Cayer"). In lieu of third-party financing, Cayer chose to proceed with owner financing. At closing, Cayer paid all but \$32,000 of the purchase price in cash, and Cayer and Frost Family executed a promissory note, secured by a mortgage, for the \$32,000 remaining balance. This transaction is the only mortgage loan that Frost Family has ever made, and it has no present intention to transact any mortgage loans in the future. Previous units sold by Frost Family were sold through a third-party lender, and current units for sale are advertised stating the buyer must have a third-party lender.

The second transaction involved a property owned by Chretien. In September 2008, Robert Recio ("Recio") approached Chretien and expressed his interest in leasing one of Chretien's properties with the option to purchase and a seller-financed second mortgage. After discussions, Recio and his housemate, William Secor ("Secor"), signed a long-term lease with Chretien, and an option to purchase the property, which if exercised, obligated Chretien to provide a first mortgage for \$425,000 at 6.25% "fully due and payable on the third anniversary date of the real estate closing and the transfer or title." In December 2008, Recio and Secor decided to purchase the property, ignoring Chretien's suggestion to look for long-term financing, stating that after closing, he would seek to refinance. Attorney John Bisson prepared a note and mortgage for Chretien based on the terms provided by Recio. Recio told Chretien that he was expecting a large insurance settlement that would pay down/off the mortgage. On March 13, 2009,

Chretien executed a promissory note secured by a mortgage for the property Recio and Secor were purchasing. Recio and Secor promised to pay \$425,000 at 6.25%, in installments of \$300 per month plus interest for the period between April 13, 2009 and March 12, 2012 at the time the balance remaining was due and payable. This transaction is the only mortgage loan that Chretien has ever made, and it does not intend to make any mortgage loans in the future.

In late 2009, Chretien began foreclosure proceedings for non-payment. Recio then filed for bankruptcy, and Chretien sought, and eventually obtained, relief from the automatic stay in Bankruptcy Court based on fraudulent misrepresentations by Recio that he never filed bankruptcy before. Around December 2009, Recio filed a complaint with the Attorney General's Consumer Protection Bureau alleging, among other things, that he was fraudulently induced to enter into the sale with Chretien for an inflated value. This complaint was forwarded to the New Hampshire Banking Department ("NHBD") for investigation.

On February 5, 2010, the NHBD received Recio's complaint and learned that Frost executed and completed the transactions for the above referenced mortgages in the name of the LLCs. NHBD began investigating Frost. Subsequently, Frost was served with four Class A misdemeanor criminal complaints on March 9, 2010. On April 1, 2009, Frost became a licensed mortgage loan originator. The NHBD instituted administrative proceedings against Frost in 2010 to determine if Frost's loan originator license should be suspended or revoked, and if any penalties should be imposed, based on the two real estate transactions that occurred before he obtained his license. On March 23, 2010, the NHBD filed a twenty-three count Staff Petition against Frost, which

included an order for him to show just cause why his loan originator licensed should not be revoked. The Order to Show Cause informed Frost that he could request a hearing under RSA 541-A and that an expedited hearing would be scheduled within ten days of that request. The Staff Petition sought penalties under statutes that became effective on July 31, 2009, which is after the date of the relevant transactions.

Frost did not file a request for a hearing with the NHBD, and instead filed Petition for a Preliminary Injunction with this Court. A hearing was held on June 10, 2010, based upon offers of proof. After taking the matter under advisement, the Court granted the motion for a preliminary injunction, finding that RSA 397-A did not give the Banking Department jurisdiction over Mr. Frost, since he was not engaged in the business of making or brokering mortgage loans secured by real property and that the Banking Department could not take action against Mr. Frost for conduct which occurred before April 2009, the date he became a licensed mortgage broker. Following denial of the Defendant's motion to reconsider, the parties agreed that the June 29, 2010 Order would be treated as a final judgment on the merits so that Petitioners could move for attorney's fees and the Defendants could appeal, without delay. On September 27, 2010, the Court approved the parties' agreement.

Petitioners' motion for attorney's fees includes a lengthy section involving investigation of the criminal charges against Frost, and includes a discussion of a motion to suppress granted by Judge Clifford Kinghorn of the Merrimack District Court. Judge Kinghorn's order is dated August 23, 2010, almost 2 months after the preliminary injunction was granted in this case. Only through this post order motion is the Court aware that the search warrant was suppressed and criminal charges brought by the State

have been dismissed.

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The prevailing rule in New Hampshire is that attorney's fees do not automatically flow in favor of a prevailing civil litigant. See, e.g., Guaraldi v. Trans-Lease Group, 136 N.H. 457, 462 (1992). New Hampshire follows the so-called American Rule; each party is generally responsible for payment of his or her own attorney's bill. Adams v. Bradshaw, 135 N.H. 7, 16 (1991). The American rule allows individuals and small businesses to litigate against larger institutions and the government without fear of financial ruin if they are unsuccessful and allows the legislature, as it has on many occasions, to enact statutes which allow recovery of attorneys' fees to vindicate important state interests. See, e.g., MacDonald, Weibusch on New Hampshire Civil Practice and Procedure, § 52.02 (3rd Ed. 2010).

Under New Hampshire, law attorney's fees may be awarded only by virtue of statutory authorization or agreement between the parties, absent an established exception to the general rule. McGuire v. Merrimack Mut. Ins. Co., 133 N.H. 51, 55 (1990). Exceptions include cases where an individual is forced to seek judicial assistance to secure a clearly defined and established right if bad faith can be established, Harkeem v. Adams, 117 N.H. 687, 691 (1977); where litigation is instituted or unnecessarily prolonged through a party's oppressive, vexatious, arbitrary, capricious or bad faith conduct; St. Germaine v. Adams, 117 N.H. 659, 662 (1977); or as "compensation for those who are forced to litigate in order to enjoy what a court has already decreed" or who are forced to litigate against an opponent who's position is patently unreasonable. Keenan v. Fearon, 130 N.H. 494, 502 (1988).

Petitioners meet none of these standards. First, the Court cannot find that the Defendants acted in bad faith. They took a legal position which involved complex statutes and their application to a highly regulated industry. The complexity of the statutes regulating the industry is illustrated by the fact that Petitioners filed an expert report of Attorney W. John Funk, an expert in banking law and regulation, to aid the Court in understanding the statutes at issue in this case.

Second, the Court cannot find that the litigation tactics of the Defendants were obstinate or unreasonable. When attorneys' fees are sought, a court must consider whether a litigant engaged in "unjustifiable belligerence or obstinacy" and whether an action is commenced, prosecuted or defended without any reasonable basis in the facts provable by evidence. Grenier v. Barclay Square Commercial Condo. Owner's Ass'n, 150 N.H. 111, 118 (2003). Here, once the Petitioners filed a petition for preliminary injunction, the parties cooperated to conduct the hearing on offers of proof so that a lengthy evidentiary hearing was not necessary. Defendants did not seek burdensome discovery or a trial once the Court ruled against them in the June 29, 2010 Order. Rather, the Defendants essentially stipulated to the factual record so that it could be treated as a judgment on the merits from which they could appeal and the Petitioners could seek attorneys' fees. Compare Allstate Ins. Co. v. Aubert, 129 N.H. 393 (1987); LaMontagne Builders v. Bowman Brook Purchase Group, 150 N.H. 270 (2003).

Third, because of the complexity of the underlying suit, the Court cannot find that the Respondents were forced to litigate a clearly defined right. Again, the fact that Petitioners produced an expert report from Attorney Funk to aid the Court in understanding the statutory scheme and the industry belies that claim.

Petitioners also argue that they are entitled to attorney's fees on the ground that they provided a "substantial benefit" to the public. Bedard v. Town Alexandria, 159 N.H. 740, 744 (2009). However, the New Hampshire Supreme Court has determined that fees should not be awarded pursuant to this exception when the primary purpose of litigating the case is for the Petitioners' own benefit. See, e.g., Simonsen v. Town of Derry, 145 N.H. 382, 387-88 (2000); Taber v. Town of Westmoreland, 140 N.H. 613, 615-16 (1996); compare Claremont Sch. Dist. v. Governor of State of N.H., 144 N.H. 590, 598 (1999). This exception is not applicable to the instant case.

## II

Petitioners also seek to recover attorneys' fees on the theory that the State's conduct in related criminal proceedings and issuing search warrants and administrative actions would authorize an award of attorney's fees.

This argument cannot be sustained. In the first place, none of the criminal charges were relied on as a basis for the Court's June 29, 2010 Order. To the extent that Mr. Frost complains that he was served with Class A misdemeanor complaints by an Assistant Attorney General on behalf of the State of New Hampshire, an action against the State for fees or damages would be barred by the doctrine of prosecutorial immunity. See, e.g., Everitt v. Gen. Electric, 156 N.H. 202, 215 (2008); Belcher v. Paine, 136 N.H. 137, 146 (1992). Moreover, the New Hampshire Supreme Court has specifically held that prosecutorial immunity also shields the entity that employs the prosecutor. State v. Dexter, 136 N.H. 669, 672 (1993). Under these circumstances, attorney's fees cannot be awarded.



III

Petitioners also seek costs pursuant to Superior Court Rule 87. In particular, they seek costs for Attorney John Funk's expert analysis which was submitted to the Court as an exhibit at the preliminary hearing. The Court agrees that Mr. Funk's analysis was not an unreasonable expense. It was valuable and helpful, and since the case was submitted on offers of proof, it was the functional equivalent of Mr. Funk's testimony at trial. Under the prevailing interpretation of Rule 87(c), expert witness fees directly related to the witness's appearance and testimony in court may be recovered. Martinez v. Nicholson, 154 N.H. 402 (2006); Flannigan v. Prudhomme, 138 N.H. 561 (1994). However, the New Hampshire Supreme Court has consistently refused to award costs against the State of New Hampshire or its agencies and employees. N.H. Motor Transport Ass'n v. State, 150 N.H. 762, 770 (2004); Claremont Sch. Dist., 144 N.H. 590, 593-94 (1999); Foote v. State Personnel Comm., 118 N.H. 640, 644-45 (1978). Under these circumstances, although an award of costs would certainly be justified if Petitioner's opponent were not the State of New Hampshire, costs cannot be awarded.

**SO ORDERED.**

DATE

12/21/10



Richard B. McNamara,  
Presiding Justice

RBM/mrs