The State of New Hampshire

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

The Petitioners' Motion for a Preliminary Injunction is GRANTED, to the following extent, for the reasons stated in this Order. The Respondents shall not proceed with Banking Department Administrative Proceeding 10-013 against Petitioner Jeffrey Frost.

I. Facts

Based on the parties' offers of proof, the following facts do not appear to be in dispute. Jeffrey Frost ("Frost") is a Manchester businessperson and is 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, NH. 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

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estate.

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. The complaints are for: 1) unlicensed mortgage banking for the 2008 transaction; 2) unlawfully servicing the loan for the 2008 transaction; 3) unlicensed mortgage banking for the March 13, 2009 transaction; and 4) violating the Banking Commissioner's November 13, 2006 Order, Guidance on Nontraditional Mortgage Product Risks, by accepting a $50,000 payment and issuing a mortgage to Recio for the terms discussed previously.

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 seeks 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 the instant Petition. Frost alleges that the NHBD does not have jurisdiction over this matter, and that the NHBD's penalties and sanctions are unconstitutional because the statute, RSA 397-A:17, VIII, IX, is being applied retroactively, in violation of Part I, Article 23 of the New Hampshire Constitution. In the alternative, he argues that RSA 397-A is void for vagueness.

II. The Preliminary Injunction Standard

An injunction is an extraordinary remedy. N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007). In order to obtain an injunction, the Petitioners must establish: 1) likelihood of success on the merits; 2) immediate danger of irreparable harm; and 3) that they have no adequate remedy at law. Id. Further, an injunction must be in the best interest of the public. See UniFirst Corp. v. City of Nashua, 130 N.H. 11, 13-14 (1987). An injunction is an equitable remedy which is discretionary. Mottolo, 155 N.H. at 63.

A. Likelihood of Success on the Merits.

The version of RSA 397-A relied on by the State grants jurisdiction to the NHBD over a person who engages "*in the business* of making or brokering mortgage loans secured by real property." RSA 397-A:2, I (emphasis added). Neither Frost nor either LLC can be said to be in the business of making or brokering mortgage loans, by virtue of a single isolated transaction. The statute does not contain a definition of the phrase "in the business." However, "business" is commonly defined as "a commercial enterprise carried on for profit, a particular occupation or *employment habitually engaged in* for livelihood or gain." Black's Law Dictionary, 192 (7th ed. 1999) (emphasis added). The New Hampshire Supreme Court recently upheld a trial court's determination that "while the petitioners on occasion sell manufactured housing units, they are not in the business of selling such units, but rather are in the business of owning and managing manufactured housing parks." Green Meadows Mobile Homes, Inc. v. City of Concord, 156 N.H. 394, 397 (2007). In Currier v. Tuck, 112 N.H. 10, 12 (1972) the Court held that an occasional act of loaning money as an accommodation to a customer or friend does not constitute engaging in the business of making loans.

This analysis of the phrase "in the business" is supported by the definitional parts of the statute. RSA 397-A:1 defines the terms "mortgage banker," "mortgage broker," and "originator."

> "Mortgage banker" means a person not exempt under RSA 397-A:4 who for compensation or gain, or in the expectation of compensation or gain, either directly or indirectly: (a) Makes or originates mortgage loans as payee on the note evidencing the loan. (b) Advances, or offers to advance, or makes a commitment to advance the banker's own funds for **mortgage loans**, or closes **mortgage loans** with the banker's own funds. (c) Otherwise engages in the business of **funding mortgage loans.**

RSA 397-A:1, XII (emphasis added).

> "Mortgage broker" means a person not exempt under RSA 397-A:4 who for compensation or gain, or in the expectation of compensation or gain, either directly or indirectly: (a) Acts as an intermediary, finder, or agent of a lender or borrower for the purpose of negotiating, arranging, finding, or procuring **mortgage loans**, or commitments for **mortgage loans**. (b) Offers to serve as agent for any person in an attempt to obtain a mortgage loan. (c) Offers to serve as agent for any person who has money to lend for a mortgage loan.

RSA 397-A:1, XIII (emphasis added).

> "Originator" . . . means an individual who for direct or indirect compensation or gain or in the expectation of direct or indirect compensation or gain, takes a mortgage application or offers, negotiates, solicits, arranges, or finds a mortgage loan or who assists a consumer in obtaining or applying to obtain a mortgage loan by, among other things, advising on loan terms (including rates, fees, and other costs), preparing loan packages, or collecting information on behalf of the consumer with regard to a mortgage loan or who offers or negotiates terms of a residential mortgage loan. No individual may act as an originator for more than one [licensee].

RSA 397-A:1, XVII(a).

A person must be engaged in the business of mortgage lending in order for the Act to apply. Based on the single and plural uses of the word "loan" in the statutes, a single transaction is not intended to be covered by the Act. There is no dispute that the LLCs were not acting as an agent, intermediary, or finder for the mortgage loans in question, but instead acted on their own behalf. Therefore, the LLCs were not mortgage brokers. Since the LLCs were not mortgage brokers, Frost could not be an originator for a mortgage broker while acting in his capacity of manager/member of the respective LLCs.

The State argues that it has jurisdiction over Frost because he became a licensed mortgage originator in April 2009. The Court agrees that the NHBD would have jurisdiction over Frost after the date he became a mortgage originator. NHBD would also have jurisdiction to penalize Frost if he had submitted a false application. Here,

however, based on the Court's interpretation of the statute and the apparently undisputed facts, there is no doubt that Frost did not violate RSA 397-A. Further, because he did not violate the statute, he had no obligation to disclose those transactions. While the NHBD may have jurisdiction over Frost because he is now a loan originator, it may take no action against him based on the September 2008 or the March 2009 transactions.[1] Therefore, the Petitioners have established that they are likely to succeed in their claim for injunctive relief.

B. Immediate Threat of Irreparable Harm

The Petitioners have each alleged that they continue to suffer reputational harm based on NHBD's allegations, which have been publicized through NHBD's press releases. The Petitioners allege that this reputational harm is continuing to threaten their ability to do business. Mr. Frost, specifically, has suffered damage to his reputation, which resulted in his resignation as Chairman of the Board of Directors for the American Red Cross. The NHBD has suspended Frost's originator license, which he claims has caused severe hardship to his ability to derive income from his business. Petitioners have filed a sealed memorandum, buttressing their claim of irreparable harm, which the Court credits, but which is not necessary to this decision.

[1] The Respondents seek to impose penalties against Frost on transactions that occurred prior to the effective date of RSA 397-A. The statutes did not become effective until July 31, 2009. There is a presumption that a statute will apply prospectively when it affects substantive rights. Estate of Sharek, 156 N.H. 28, 30 (1986). Where legislation expressly states what date it shall take effect it is assumed to apply as of that date. In re Goldman, 151 N.H. 770, 772 (2005). Considering the express language regarding the effective date of the statute and the general rules of statutory interpretation, there is little doubt that the penalties the NHBD seeks to impose on Frost cannot be applied. Indeed if any other interpretation were made, then the legislation would violate Part I, Article 23 of the New Hampshire Constitution. It is well settled that unconstitutionally retrospective legislation is that which takes away or impairs vested rights, acquired under existing laws, or creates new obligations or imposes a new duty or attaches a new disability in respect to transactions past. See, e.g., Burrage v. N.H. Police Standards and Training Council, 127 N.H. 742, 746 (1986); Woart v. Winnick, 3 N.H. 473, 475-76 (1826). However, since the NHBD may not impose any penalties on Frost, the retrospective nature of the proposed sanction is not necessary to the Court's decision.

Petitioners have met their burden of showing irreparable harm. First, "[b]ecause injuries to goodwill and reputation are not easily quantifiable, courts often find this type of harm irreparable." See, e.g., Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 217 F.3d 8, 13 (1st Cir. 2000); K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 915 (1st Cir. 1989); Camel Hair & Cashmere Inst. v. Associated Dry Goods Corp., 799 F.2d 6, 14-15 (1st Cir. 1986). The Court agrees that harm to reputation is irreparable harm.

Second, "[n]o proceeding at law can afford an adequate remedy for the destruction of one's business." Dingley v. Buckner, 11 Cal. App. 181, 183 (1909). See e.g., Engine Specialties, Inc. v. Bombardier, Ltd., 454 F.2d 527, 531 (1st Cir. 1972) ("An injunction is proper to prevent the threatened extinction of a business."); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (recognizing that the destruction of a business is an irreparable injury which can be appropriately remedied with injunctive relief). Requiring the Petitioners to exhaust administrative remedies before seeking judicial review is unreasonable. As a practical matter, since the entire issue is apparently interpretation of RSA 397-A, there is no reason for this Court to defer to an administrative agency. See Thompson v. N.H. Bd. of Medicine, 143 N.H. 107, 110-11 (1998). Failure to exercise the Court's equitable jurisdiction could lead to the destruction of the business of both LLCs and cause irreparable harm to all involved.

C. Adequate Remedy at Law

"Generally, parties must exhaust their administrative remedies before appealing to the courts." McNamara v. Hersch, 157 N.H. 72, 74 (2008). However, the exhaustion of remedies rule "is flexible, and recognizes that exhaustion is not required [in] some circumstances." Id. (citing Metzger v. Town of Brentwood, 115 N.H. 287, 290 (1975). The New Hampshire Supreme Court has established that "[a]dministrative remedies

must be exhausted when the question involves the proper exercise of administrative discretion." Konefal v. Hollis/Brookline Coop. Sch. Dist., 143 N.H. 256, 259 (1998).

> When a constitutional question is implicated in an administrative context, courts often require exhaustion based on the important prudential principle that a court should not resolve a constitutional question if a dispute could be resolved on another basis that avoids the need to resolve the constitutional question.

Id. (internal quotation omitted). Here, the parties do not dispute the facts. There is no question as to agency discretion because the only question to be resolved one of statutory interpretation.

The Superior Court may exercise its equitable powers in place of an administrative hearing if allowing the case to continue through the administrative process would result in severe repercussions for petitioners. Thompson, 143 N.H. at 111 (holding that the Superior Court had equitable jurisdiction to review a Board of Medicine decision prior to the imposition of sanctions because the petitioner would suffer severe repercussions and "most likely would be unable to recover lost income and a decreased patient base during the appeal period"). Given the grave harm to Petitioners if the NHBD proceeding continues, it is appropriate for the Superior Court to intervene.

An administrative appeal is not required where the action raises a question that is "peculiarly suited to judicial rather than administrative treatment and no other adequate remedy is available." McNamara, 157 N.H. at 74 (citing Olson v. Town of Litchfield, 112 N.H. 261, 262, (1972)). "Judicial treatment may be particularly suitable when the constitutionality or validity of an ordinance is in question. . . ." Id. (citation omitted). The issues in this case focus on the meaning of RSA 397-A, the applicability of RSA 397-A, and whether or not the RSA 397-A applies retroactively. Because these

issues are primarily legal, rather than factual, determinations, they are particularly suited for judicial review. Issues, such as those presented in this case, do not require "specialized administrative understanding". See McNamara, 157 N.H. at 74.

D. Public Interest

It is in the public interest to have disputes resolved promptly. Here, because the only question before the Court is one of law, the Superior Court is best situated to resolve the dispute. If the Court fails to act pending an administrative hearing, a resolution would be delayed significantly, with correlative harm to the petitioners, which would be inconsistent with their right to due process of law. UniFirst, 130 N.H. at 14.

III. Conclusion

Petitioners have established a reasonable likelihood of success on the merits, irreparable harm, and that there is no adequate remedy at law. The grant of injunctive relief is in the public interest. Accordingly, the Motion for a Order and Preliminary Injunction must be granted.

SO ORDERED.

6/29/10
DATE

Richard B McNamara
Richard B. McNamara,
Presiding Justice