

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2009-0071, Syncom Industries, Inc. d/b/a Syncom Services v. Eldon Wood & a., the court on April 16, 2010, issued the following order:

Defendant William Hogan appeals a final order of the trial court following our remand of Syncom Indus. v. Wood, 155 N.H. 73 (2007) (Syncom I). He argues that the trial court, after awarding no damages to the plaintiff, Syncom Industries, Inc. (Syncom), against him, erred by then awarding the plaintiff \$100,000 in attorney's fees and ruling that he is jointly and severally liable for the attorney's fees with defendant Eldon Wood. Syncom has cross-appealed the trial court's decision not to award any damages against Hogan. We vacate and remand.

A prevailing party may be awarded attorney's fees when recovery is authorized by statute, an agreement between the parties or an established judicial exception to the general rule that precludes recovery of such fees. Tulley v. Sheldon, 159 N.H. 269, 272 (2009). We will affirm the trial court's award of attorney's fees unless it is an unsustainable exercise of discretion. *Id.*

In Syncom I, we held that the restrictive covenants contained in the contracts executed by the defendants and Syncom were unreasonably broad in scope. Syncom I, 155 N.H. at 81. We remanded the case to allow the trial court to determine whether the restrictive covenants should be reformed as to one or both defendants. *Id.* We also vacated the trial court's awards of compensatory damages and attorney's fees, noting that proper calculation of both depended upon the scope of the restrictive covenants. *Id.* at 88-89.

Upon remand, the trial court first determined that "justice requires that no monetary award for damages be levied against William Hogan." In so ruling, the trial court noted that Hogan was employed by Syncom for less than five months and that his "misdeeds without the leadership of Wood in all probability would not have cost [Syncom] any loss of business."

The trial court then reaffirmed its original award of \$100,000 in attorney's fees to Syncom, finding that the award was the joint and several liability of both defendants. The parties' employment contracts provided: "In any successful action by the Company to enforce this contract, the Company

INTERNATIONAL TRADE AND COMMERCE

CHAPTER 10

Section 10.1. The purpose of this chapter is to provide a general overview of the various aspects of international trade and commerce, including the role of the World Trade Organization (WTO) and the various trade agreements that have been entered into by member countries.

Section 10.2. This section discusses the various types of trade agreements, including bilateral, regional, and multilateral agreements, and the role of the WTO in overseeing these agreements.

Section 10.3. This section discusses the various aspects of international trade, including the role of the WTO in overseeing trade agreements, the various trade agreements that have been entered into by member countries, and the role of the WTO in resolving trade disputes.

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shall be entitled to recover its attorney's fees and expenses incurred in such action." Syncom I, 155 N.H. at 75.

In its original order which gave rise to Syncom I, the trial court cited both the parties' employment agreement and their conduct throughout the litigation as supporting an award of \$100,000 in attorney's fees. In reaffirming its award, the trial court cited Hogan's "obvious misconduct" and his lying under oath to the court. We consider first whether these findings support an award under an established judicial exception to the rule that each party is responsible for paying his own counsel fees. See, e.g., LaMontagne Builders v. Brooks, 154 N.H. 252, 259 (2006). Those exceptions apply to cases where litigation is instituted or unnecessarily prolonged due to a party's bad faith conduct or where a party must litigate against an opponent whose position is patently unreasonable. *Id.* In this case, although the trial court found that Hogan had engaged in misconduct as a result of his employment, it also found that his misconduct "in all probability would not have cost [Syncom] any loss of business." The conduct cited by the trial court in favor of an equitable award of attorney's fees did not result in unreasonable delays in litigation; rather, the trial court found Hogan's testimony not credible. Nor can Hogan's position be said to be patently unreasonable given that he prevailed at least in part in Syncom I.

Whether the terms of the parties' contract support an award of attorney's fees to Syncom against Hogan remains unresolved. As the trial court noted, the litigation in this matter was lengthy. Only the fact finder can determine whether, and to what extent, Syncom prevailed in its action against Hogan as required for an award of attorney's fees under the terms of Hogan's employment contract with Syncom. Resolution of this issue may require the trial court upon remand to reform the unenforceable restrictive covenants. See Syncom I, 155 N.H. at 81. Accordingly, we vacate and remand this portion of the trial court's order so that it can make such a determination.

In its cross-appeal, Syncom argues that the trial court erred in failing to award Syncom compensatory damages. Although Syncom cites its memorandum and motion for partial reconsideration as the portions of the record where it raised these issues before the trial court, see Sup. Ct. R. 16(3)(b), the documents have not been provided on appeal. Moreover, it is not clear from the transcript of the hearing on remand nor from the trial court's order that the arguments Syncom advances on appeal in support of an award of compensatory damages were raised before the trial court. Accordingly, we conclude that Syncom has failed to satisfy its appellate burden. See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250 (2004) (supreme court rules require moving party to provide sufficient record on appeal and to demonstrate where each question presented on appeal was raised before trial court; failure to do so may be

considered by court regardless of whether opposing party objects on those grounds).

Vacated and remanded.

DALIANIS, HICKS and CONBOY, JJ., concurred.

**Eileen Fox,
Clerk**

Distribution:

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