State of New Hampshire
Supreme Court

NO. 2007-0572

2007 TERM

DECEMBER SESSION

Saraswati Mandiram, Inc. & Pandit Ramadheen Ramsamooj

v.

G&G, LLC, & G&G, Epping, LLC

RULE 7 APPEAL OF FINAL DECISION OF
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF PLAINTIFFS/APPELLANTS

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QUESTIONS PRESENTED

1. Did the court err in dismissing Saraswati Mandiram's and Pandit Ramadheen Ramsamooj's claims when the plaintiffs alleged existing causes of action, plead facts necessary to support them, and identified the relief available?
   Preserved: Plaintiffs' Motion to Reconsider

2. Did the court err in reversing the burdens of proof at the motion to dismiss stage of the litigation, wherein it regarded the defendants' factual allegations as true rather than the plaintiffs'?
   Preserved: Plaintiffs' Motion to Reconsider

3. Did the court err in holding and also in reporting to the Exeter District Court, that Saraswati Mandiram did not have a claim of title to the property?
   Preserved: Plaintiffs' Motion to Reconsider

4. Did the court err in accepting a confessed judgment from another state, arising from a cognovit note, when it was obtained without notice, and without a voluntary, intelligent, or knowing waiver of the plaintiffs' rights?
   Preserved: Plaintiffs' Motion to Reconsider

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Saraswati Mandiram is an Ashram, or Hindu Monastery, located in Epping, New Hampshire.

The land which the Ashram occupies is about 100 acres, and has been organically farmed as called for by the Hindu religion for about 50 years. It is improved by several buildings, including a temple, residential dormitories comprising 10 living units, an auditorium, a dining facility, and a barn. Living at the Ashram are four resident priests, their immediate families and children, and three students of divinity. AM.PET. ¶¶ 3-4, *appx* at 254. The land and buildings shelter its members, its religious relics, enormous marble statuary, and its animals including cows and peacocks. In the Hindu tradition, land on which religious customs are practiced takes on the nature of hallowed ground.

Although it is located near Rt. 125 and the Epping Walmart, the land is nonetheless rural in nature and zoned for residential, business, agricultural, and recreational uses. COMPLETE APPRAISAL SUMMARY RPT. (May 1, 2006), *appx.* at 123-24. It has about 2,500 feet of frontage on Ladds Lane, and 3,300 feet of frontage on the Lamprey River. *Id.*, *appx* at 113; *see Appeal of Emissaries of Divine Light*, 140 N.H. 552, 554 (1995) (concerning same parcels of real estate).

Saraswati Mandiram, Inc. is nonprofit tax-exempt religious and educational institution, AM.PET. ¶¶ 1, 7, organized under the law of Massachusetts and registered in New Hampshire. The corporation's sole executive director is Mr. Ramadheen Ramsamooj.

More important to the Hindus in our area, he is their head priest, or Pandit. Under his guidance, Saraswati Mandiram has functioned since 1997 as the center of the Hindu religious, cultural, and educational community for northern New England. AM.PET. ¶ 6. Saraswati Mandiram has about 1,500 worshipers on its roles, about 400 of them attend during the religious

year's holiday celebrations, and weekly it serves about 75. The priests at the Ashram are the only spiritual counsel available to Hindus in New Hampshire. Pandit Ramadheen Ramsamooj, and all the Ashram's residents, live an organized and disciplined religious life, and have taken religious vows including poverty, silence, chastity, and obedience, and own few material possessions.[1] *See generally* www.saraswatimandiram.org. Pandit Ramadheen Ramsamooj, and most of the Ashram's worshipers, is an immigrant, English is his second language, and he has little knowledge of business affairs in the American legal system.

Both Saraswati Mandiram and Pandit Ramadheen Ramsamooj are plaintiffs and appellants, and will be collectively referred to herein as Saraswati Mandiram.

Saraswati Mandiram Has Assets But No Cash

Saraswati Mandiram bought the land comprising the Ashram in 1997. As a regional religious and educational facility, to be successful it needed to attract parishioners to its services, students to its day-school, and patients to its religion-based ayurvedic health clinic. AM.PET. ¶ 9.

The facilities were aging, and needed maintenance and investment, but Saraswati Mandiram didn't have the cash. Moreover, when Saraswati Mandiram bought the land its previous owners provided a balloon mortgage which would expire in 2003. AM.PET. ¶ 9. The imminent ballooning of the existing loan coupled with the inability to improve the facilities and thus generate income put the continuing existence of the facility in jeopardy.

Saraswati Mandiram had significant equity in the land. It owed about $656,000 to the previous owner, but the land had been appraised at almost $3.4 by a 2002 market analysis.

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[1]Pandit Ramadheen Ramsamooj "is not required to file a federal income tax return." "He is being provided for by the Mandiram (temple) for all his living expenses." LETTER FROM MONIKA PATIENCE, CPA, TO WHOM IT MAY CONCERN (May 23, 2003), *appx.* at 24.

LETTER FROM PATRICIA LANGDON, ERA BROKER, TO PANDIT RAMADHEEN RAMSAMOOJ (Jan. 25, 2002), *appx*. at 20. Even though Saraswati Mandiram's credit rating was good, PLAINTIFF'S RESPONSE TO DEFENDANT'S OPPOSITION TO RECONSIDER, *appx*. at 373, for a year-and-a-half Saraswati Mandiram was unsuccessful in seeking conventional refinancing because its stream of income consists of religious donations. This drove it to asset-based moneychangers, who lend on a percentage of the asset's value regardless of the owner's income.

Promissory Note And Mortgage

In 2003, Saraswati Mandiram found a broker on the internet who guided it to G&G, LLC, (hereinafter referred to as G&G), a Virginia-based lender. AM.PET. ¶ 10. Confident of its own ability to assess and appraise, in May 2003 G&G walked the property with Pandit Ramadheen Ramsamooj and inspected the buildings. Without an appraisal G&G learned enough to know that the greatest value of the land was in subdividing and parceling it off into residential lots, and that it was worth more than the $2.4 million it was willing to lend. AM.PET. at ¶ 11.

Based on this, G&G agreed to loan Saraswati Mandiram money. AM.PET. at ¶ 13. On May 29, G&G sent a term sheet to Pandit Ramadheen Ramsamooj, TERM SHEET (April 22, 2003), *appx*. at 21, who understood that the terms were non-negotiable. AM.PET. at ¶ 22. Pandit Ramadheen Ramsamooj attended a closing in Exeter on June 9, AM.PET. at ¶¶ 23, 28, where for the first time he was presented with a promissory note and mortgage, PROMISSORY NOTE (June 9, 2003), *appx*. at 26 (hereinafter referred to as the note) MORTGAGE AND SECURITY AGREEMENT, ASSIGNMENT OF LEASES AND RENTS (June 9, 2003), *appx* at 34 (hereinafter referred to as the mortgage), which he executed.

The documents collectively indebted Saraswati Mandiram to G&G for $1.2 million, at

12% interest the first year and 16.36% thereafter, NOTE, *appx.* at 26, renewable annually. Up front it cost $120,000 in interest and fees, NOTE, *appx.* at 26-27, and was secured by the accompanying mortgage.

Several other terms of the arrangement are important.

First, although the initial note was for $1.2 million, the mortgage specified that "the total amount of the indebtedness so secured may increase" to $2.4 million. MORTGAGE, *appx.* at 38.

Second, the proceeds of the note were to be used for improvements to the property – its religious, educational, health and sustainable agriculture facilities. SCHEDULE OF USES OF THE LOAN PROCEEDS, *appx.* at 33.

Third, Saraswati Mandiram "unconditionally and irrevocably" appointed G&G as its "attorney in fact," thus allowing G&G to transact business on its behalf. *See e.g., Howard v. Boyce*, 146 S.E.2d 828 (N.C. 1966).

Fourth, in the event of default, the note gave the borrower 15 days in which to cure. MORTGAGE ¶ 6.1(i), *appx.* at 13-14.

Fifth, the note contains a "confessed judgment clause," also known as cognovit. In it, Saraswati Mandiram waived its right to judicial process for any action associated with the loan or with G&G's conduct. It also "agree[d] that any attorney designated by the lender … is hereby authorized to enter judgment by confession against the borrower in favor of the holder of this note of the full amount of the indebtedness" plus interest, costs, and attorney's fees. The clause named who would be Saraswati Mandiram' attorney to confess judgment in Virginia on its behalf, and waived any claims of exemption, rights to appeal, stay of execution, "and any other

rights to which the borrower may otherwise be entitled." NOTE, *appx.* at 30-31.

Finally, the note could not be modified except in writing. NOTE, *appx.* at 32.

For two years Saraswati Mandiram had an unblemished payment record. PLAINTIFF'S RESPONSE TO DEFENDANT'S OPPOSITION TO RECONSIDER, *appx.* at 372-73.

Fire And a Credit Line For Payments

Saraswati Mandiram suffered a fire six months later in January 2004. Although there was insurance, the fire "greatly affected its ability to attract and enroll new students in its school facility, and hence, its ability to produce income." DEFENDANT'S MOTION TO SET ASIDE OR REDUCE ORDER CONFESSING JUDGMENT ¶ 5, *G&G LLC v. Saraswati Mandiram & Pandit Ramadheen Ramsamooj*, Alexandria Va.Cir.Ct. No. CL06001567 (June 1, 2006). Pandit Ramadheen Ramsamooj by fax and phone requested more money from G&G, wanting G&G to take its mortgage installments from the un-disbursed amount of the loan. Pandit Ramadheen Ramsamooj traveled to Virginia in September 2004, met with Trent Gourley, G&G's principal, and thus created a "handshake" credit line.

This oral modification was reduced to writing nearly a year later in August 2005 in a memorandum from G&G's "Portfolio Manager" and counter-signed by Pandit Ramadheen Ramsamooj. It recites: "In September of 2004 Mr. Gourley indicated he may allow you to draw up to $2 million on the existing collateral. In November of 2004 you drew down an additional $300,000. Your current loan balance is $1.5 million." MEMO FROM JENNIFER CONEIN TO PANDIT RAMADHEEN RAMSAMOOJ (Aug. 3, 2005), *appx.* at 60. A letter from G&G's attorney to a Massachusetts lawyer who briefly represented Saraswati Mandiram, indicates "[t]hese advances were made under a 'handshake' agreement between Mr. Trent Gourley and your client." LETTER

FROM LISA SINCERE TO JENNIFER LAMANNA, ESQ. (Dec. 2, 2005), *appx.* at 63.

The terms of the modification are important. The memorandum memorializing it indicates Pandit Ramadheen Ramsamooj "drew down an additional $300,000." *See* CHECK FROM G&G TO SARASWATI MANDIRAM OR PANDIT RAMADHEEN RAMSAMOOJ (Nov. 9, 2004), *appx.* at 59 (in the amount of $300,000). It then says:

> In addition to the $300,000 draw you ask to have additional funds to automatically pay your monthly interest payments. The interest payments would be a draw to the principal thereby increasing the principal amount monthly. This could occur until the principal loan amount reached a total of $2,000,000.00 million [sic] dollars. This is the cap on the proposed increased loan amount.

MEMO FROM JENNIFER CONEIN (Vice President of G&G) TO PANDIT RAMADHEEN RAMSAMOOJ (Aug. 3, 2005), *appx.* at 60. The memorandum requested Pandit Ramadheen Ramsamooj's signature, in accord with the law regarding acceptance of contract modifications. *See e.g.*, *H & B Const. Co. v. James R. Irwin & Sons, Inc.*, 105 N.H. 279 (1964). The modification was ratified by G&G paying itself the installments due on August 1 and September 1, 2005. *See* PAY-OFF STATEMENT, GOURLEY LOAN NO. 553, attached to NOTICE OF ACCELERATION (Jan. 4, 2006), *appx.* at 80 (showing two "loan draw" entries dated August 5 and September 1, 2005, for $20,449.99 and $20,691.63, respectively); AM.PET. ¶ 36. G&G's own documents called the finance mechanism a "non-revolving credit line." TERM SHEET (Apr. 22, 2003), *appx.* at 22.

Several facts are thus apparent. First, there was a "handshake" deal that was later memorialized in writing. Second, the deal gave Saraswati Mandiram $300,000 which it used to hire an architect to develop a master plan for improvements to the property. Third – and most important – the handshake arrangement was structured like a credit line. The original loan was for a total of $2.4 million, half of which had been disbursed at the outset. G&G, who maintained

control over the money, would use the remaining amount of the loan to pay itself the monthly installments owed by Saraswati Mandiram to G&G, thereby steadily increasing the principal up to a maximum of $2 million. Because Saraswati Mandiram's monthly installments were roughly $20,000, and because the spread between the already-disbursed amount and the $2 million loan-cap was in the range of $500,000, Pandit Ramadheen Ramsamooj was comfortable knowing he had approximately 2 years to establish the financial viability of the religious school before the full loan became due. *See* E-MAIL FROM JENNIFER LAMANNA (for Saraswati Mandiram) TO LISA SINCERE (for G&G) (Dec. 30, 2005). Finally, in accord with the arrangement, G&G began paying itself from the credit line.

Collateralizing the Handshake Deal

A few months later, G&G without notice apparently stopped paying itself from the credit line. Rather than taking its own payments as had been arranged, it served Saraswati Mandiram with a notice of default that alleged Saraswati Mandiram had not paid the October and November installments.[2] NOTICE OF DEFAULT (Nov. 9, 2005), *appx.* at 61. The notice, dated November 9, gave just 8 days "to bring the loan current," *id.* – about half the 15-day cure period specified in the loan documents. Saraswati Mandiram nonetheless remitted payment and avoided default.

Saraswati Mandiram believes the explanation for the default notice is that G&G realized that the "handshake" deal, although it had been reduced to writing, was not secured by any asset. Alleging default gave G&G leverage to force the parties to enter amended loan documents, which they did, thus collateralizing the "handshake" deal. FIRST OMNIBUS AMENDMENT TO LOAN

[2]A second reason given was that Pandit Ramadheen Ramsamooj had a second mortgage with Sovereign Bank. A close reading of the letter, however, terms this "an event of default" rather than "a default" as the alleged failure to pay is termed. This is because a second mortgage is not cause for default in the loan or mortgage documents.

DOCUMENTS (Dec. 9, 2005) *appx.* at 64; FIRST AMENDMENT TO MORTGAGE AND SECURITY AGREEMENT (Dec. 9, 2005) *appx.* at 69. Nothing in the amended loan documents, however, suggest that they un-did the line of credit arrangement whereby loan installments were to be paid out of the un-disbursed loan amount.

G&G Defaults Saraswati Mandiram Anyway

Just *two weeks* later, G&G's lawyer sent Saraswati Mandiram a second notice of default. NOTICE OF DEFAULT (Dec. 21, 2005), *appx.* at 76. The letter said that it was because "the Borrower failed to timely remit interest on the Loan for November, 2005 (which was due on December 1, 2005)." *Id.* The letter also said that to avoid default G&G would require payment in just 7 days – again about half the 15-day cure period specified in the loan documents.

Saraswati Mandiram finds these events mystifying. It had recently arranged, first by handshake and then in writing, to have its monthly installments taken out of the un-disbursed loan proceeds, and then had agreed to have that arrangement secured by its property. And Saraswati Mandiram believed the installments G&G were claiming had been paid under that arrangement. It received no notice that G&G had stopped using the line of credit to pay the installments; the first notice it got was the default.

Confession of Judgment

In January 2005 G&G accelerated the loan, seeking immediate payment from Saraswati Mandiram of the $1.7 million which was the amount that had been disbursed so far. NOTICE OF ACCELERATION (Jan. 4, 2006), *appx.* at 80; AM.PET. at ¶ 53.

In Virginia, G&G went to the local court. In accord with the promissory note, a lawyer chosen by G&G presented the contract with the confession of judgment clause, and obtained an

order *ex parte* that Saraswati Mandiram "does hereby confess judgment" in favor of G&G in the amount of $2.5 million. ORDER CONFESSING JUDGMENT, *G&G LLC v. Saraswati Mandiram &a.* Alexandria Va.Cir.Ct. No. CL06001567 (Mar. 6, 2006), *appx.* at 82.

Pandit Ramadheen Ramsamooj received notice of the confession of judgment after it occurred. He wrote a letter to the court noting he was a priest and teacher, that he received the judgment by certified mail on March 10, that there was a great discrepancy between the $1.7 million allegedly owed and the judgment of $2.5 million, and that the judgment was causing "undue financial and social burden to my school, church, and community." He sought a two-week extension to reply on the merits. LETTER FROM PANDIT RAMADHEEN RAMSAMOOJ TO "RESPECTED COURT" (Mar. 28, 2006). He filed pleadings and appeared at a hearing to contest the judgment, but it stood. ORDER DENYING DEFENDANT'S MOTION TO SET ASIDE OR REDUCE ORDER CONFESSING JUDGMENT (June 30, 2006), *appx.* at 177; AFFIDAVIT OF MICHAEL E. TUCCI (Mar. 29, 2007), *appx.* at 220.

Foreclosure Sale

Meanwhile, back in New Hampshire, G&G scheduled a foreclosure sale. NOTICE OF MORTGAGEE'S SALE (Apr. 14, 2006), *appx.* at 89. Saraswati Mandiram filed for Chapter 11 bankruptcy, but G&G obtained a relief from the automatic bankruptcy stay, and a second foreclosure sale was noticed for November. NOTICE OF MORTGAGEE'S SALE (Oct. 24, 2006), *appx.* at 192. Among the result of these actions was that Saraswati Mandiram lost two opportunities to sell a portion of its property and to refinance it for over $3 million. LETTER OF INTENT TO PURCHASE REAL ESTATE (Apr. 29, 2006), *appx.* at 93;LETTER FROM NEW STREAM REAL ESTATE LLC TO PANDIT RAMADHEEN RAMSAMOOJ (Nov. 1, 2006), *appx.* at 196;

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS at 20 (July 9, 2007).

For the purpose of the foreclosure, G&G hired an appraiser, who valued the property at $2.4 million – coincidently the same amount as the loan which was made 3 years before. AM.PET. at ¶ 56; ROCKINGHAM APPRAISAL SERVICE, COMPLETE APPRAISAL SUMMARY REPORT (May 1, 2006), *appx.* at 95.[3]

This is in stark contrast to other indica of value:

- A January 2002 appraisal, long before this dispute, valued the property at about $3.4 million. LETTER FROM PATRICIA LANGDON, ERA BROKER, TO PANDIT RAMADHEEN RAMSAMOOJ (Jan. 25, 2002), *appx.* at 20;

- The loan G&G made to Saraswati Mandiram was for $2.4 million in 2003 and although G&G did not have an appraisal done at that time, it apparently felt confident that the value of the property was sufficient as collateral.

- For tax purposes at the time of the foreclosure the Town of Epping assessed it at $3.5 million. AM.PET. at ¶ 56.

- Two years before the sale, an unbiased appraisal made by another lender for an unrelated loan valued it at over $5.5 million. LETTER FROM PATRICIA LANGDON, ERA BROKER, TO SOVEREIGN BANK % PANDIT RAMADHEEN RAMSAMOOJ (June 26, 2004), *appx.* at 58.

- Saraswati Mandiram's own appraisal on the eve of the sale valued it at $4 million. AM.PET. at ¶ 76.

- G&G's internal documents said: "A current 'firesale' value is from 2.2 to 2.7 million Full market 3.4 - 4.5 million." G&G TERM SHEET (Apr. 22, 2003), *appx.* at 21, 22.

- Although the appraisal made by G&G for the purposes of the foreclosure valued it at $2.4 million, it also acknowledged that its most profitable use was as a 36-lots residential subdivision which it estimated might be collectively worth about $14.4 million.

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[3]Saraswati Mandiram questions the veracity of this appraisal. The appraiser said in his report he met with Pandit Ramadheen Ramsamooj, interviewed him, and toured the property with him on May 1, 2006. APPRAISAL REPORT, *appx.* at 112. Upon seeing the allegation Pandit Ramadheen Ramsamooj provided an affidavit on the matter. It says that Pandit Ramadheen Ramsamooj's never met the appraiser, never was interviewed by him, and never accompanied him on a tour. Rather, On May 1 Pandit Ramadheen Ramsamooj was meeting with an attorney in Concord. AFFIDAVIT OF PANDIT RAMADHEEN RAMSAMOOJ, *appx.* at 350.

- At the time of the foreclosure G&G's own website said the land was worth 2.4 million, touted G&G's belief that it had acquired the land for much less than its value, and estimated that "[a]ll signs seem to point to an increase in the value of our property." G&G WEBSITE (visited Feb. 2007), *appx.* at 215-16.[4]

- Saraswati Mandiram had received a recent letter of intent to buy its property just 7 months before foreclosure. In April 2006, David Safford, Manager of Sage Properties, LLC, wrote a letter to Pandit Ramadheen Ramsamooj expressing his intent to purchase about half of Saraswati Mandiram's land for $2.1 million. LETTER OF INTENT TO PURCHASE REAL ESTATE (Apr. 29, 2006), *appx.* at 93; *Lakes Region Finance Corp. v. Goodhue Boat Yard, Inc.*, 118 N.H. 103, 107-8 (1978) (price offered by outside buyer adequate to estimate fair price).

- In November 2006, on the eve of foreclosure, Saraswati Mandiram received an offer to extend it a $3 million loan on the land. NEW STREAM REAL ESTATE, LLC, OFFER OF $3 MILLION LOAN, (Nov. 1, 2006), *appx.* at 196.

On November 30, 2006 a foreclosure sale was held, with a minimum $2 million price. AFFIDAVIT OF DON BOZEMAN (July 7, 2007), *appx.* at 311; AFFIDAVIT OF SHERRY GIDDIS (July 7, 2007), *appx.* at 313; AM. PET. at ¶ 65. The highest bid at the sale was from Sherry Giddis and Donald Bozman, for $50 above the minimum. Ms. Giddis and Mr. Bozman were friends of Saraswati Mandiram, and were buying the property for its benefit. *Id.*

The purchase and sale agreement created the rules for the auction, providing that "the Seller shall sell and Purchaser shall buy … the Premises upon the terms stated herein." FORECLOSURE SALE: PURCHASE AND SALE AGREEMENT ¶ 1.1 (Nov. 30, 2006), *appx.* at 201. It

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[4]The blurb on G&G's website read:

The loan was foreclosed on and G&G successfully bid to own this location in January of 2007. It consists of 92.8 acres of residential land that was used for a holistic health and learning center. The appraised value of this property is $2.4M as is. G&G will be looking at selling the property at this price or potentially pairing up with a developer to take it through the initial stages of a lot approval process to increase its value. Initially, it appears we could get 10 frontage building lots and 26 interior lots on the property. The town i[s] pro-development for this area. Either way, G&G should sell this property for more than our loan amount.

[G&G] visited the property and met with all of the major players in the Epping, NH community. Our site is being re-zoned to commercail [sic], light industrial in the middle of march 2007. All signs seem to point to an increase in the value of our property after the re-zoning vote.

specifies such items as the amount of the deposit, purchase price, closing time and place, prorations of taxes and other charges, lack of warranties, and miscellaneous items. *Id*. at ¶ 1-5, 7.

As the highest bidders, Ms. Giddis and Mr. Bozman committed to buy "on or before January 14, 2007." PURCHASE AND SALE AGREEMENT. Because of health problems, they could not complete the sale that date. G&G denied a short extension, and they defaulted. MOTION TO INTERVENE (July 10, 2007), *appx*. at 352.

Of interest in the purchase and sale agreement is paragraph 6, which guides what G&G could do when Ms. Giddis and Mr. Bozeman defaulted. It provides the seller can do one of three things: 1) simply keep the deposit as liquidated damages; 2) keep the deposit, receive an assignment of purchaser's rights, and acquire the property for the price the purchaser bid; or 3) keep the deposit, terminate the purchase and sale agreement with the purchaser, "and convey the Premises to the ***next highest bidder at the auction*** who is willing to purchase at his bid price." PURCHASE AND SALE AGREEMENT ¶ 6, *appx.* at 203 (emphasis added).

Creation of G&G Epping, LLC

Unmentioned in this narrative so far is the other defendant, G&G Epping, LLC (hereinafter referred to G&G Epping). This is because G&G Epping was created under the laws of Virginia as an business entity on January 25, 2007, COMMONWEALTH OF VIRGINIA, STATE CORPORATION COMMISSION, Certificate of Organization (Mar. 26, 2007), *appx*. at 237, AM.PET. at ¶ 74; and did not exist until 2 months after the November 30, 2006 foreclosure sale, and shortly after the Giddis/Bozeman default.

Nonetheless, on January 26 – the day after its creation – G&G Epping recorded a foreclosure deed for the Saraswati Mandiram property. FORECLOSURE DEED (Jan. 25, 2007),

appx. at 206 (containing N.H. Dept. Rev. Admin., Real Estate Transfer Tax Stamp dated "01 26 07"); N.H. DEPT. REV. ADMIN., REAL ESTATE TRANSFER TAX DECLARATION OF CONSIDERATION (Jan. 25, 2007), ***appx.*** at 214 (on "date of transfer" line, January 26th 2007).

As noted, G&G had just three options upon the default of Ms. Giddis and Mr. Bozeman. Here, G&G purportedly chose the third – "convey the Premises to the next highest bidder at the auction." It is known this is what G&G did because its lawyer, Christopher T. Hilson of Donahue, Tucker & Ciandella, PLLC, said in pleadings in one of the Superior Court proceedings in this matter that "[t]he second highest bidder at the Foreclosure Sale was G&G Epping, LLC ('Epping'), a Virginia limited liability company." DEFENDANT'S OBJECTION TO PLAINTIFF'S PETITION FOR PRELIMINARY AND TEMPORARY INJUNCTION ¶23, ***Saraswati Mandiram, Inc. v. G&G, LLC***, Rock.Super.Ct.No. 07-E-103 (Mar. 8, 2007), ***appx.*** at 226. Likewise, accompanying the foreclosure deed was an affidavit by the Vice President of G&G, stating "on November 30, 2006, I sold or caused to have sold the mortgaged premises at public auction to G&G Epping, LLC for Two Million and 00/100 Dollars …, that being the bid made therefore at said auction." AFFIDAVIT OF SALE UNDER POWER OF SALE IN MORTGAGE (Jan. 25, 2007).

However, according to those at the auction, they "did not see G&G Epping, LLC on the list of bidders," and "never heard any bids from a company called G&G Epping, LLC, nor did anyone present claim a bid in that name at the foreclosure sale." AFFIDAVIT OF SHERRY GIDDIS ¶¶ 6, 11 (July 7, 2007), ***appx.*** at 313; AFFIDAVIT OF DON BOZEMAN ¶¶ 6, 11(July 7, 2007), ***appx.*** at 311; MOTION TO INTERVENE ¶ 11 (July 9, 2007) ***appx.*** at 352 ("The intervenors know that G&G, Epping, LLC was not the second highest bidder."). This stands to reason as the foreclosure sale took place 8 weeks before G&G Epping came into existence.

Nonetheless, G&G Epping now purports to own the property.

STATEMENT OF THE CASE

On April 30, 2007 Saraswati Mandiram and Pandit Ramadheen Ramsamooj sued both G&G and G&G Epping in the Rockingham Superior Court, alleging a variety of causes of action regarding the validity of the promissory note and mortgage, G&G's actions concerning the line of credit and its refusal to use it to pay Saraswati Mandiram's monthly installments, the conduct of the foreclosure sale, and the title being subsequently conveyed to G&G Epping.

The G&G entities filed a motion to dismiss. The Superior Court's order granting the motion (*Kenneth McHugh*, J.), ORDER, ***appx.*** at 308, also noted the Superior Court was aware of a District Court action, and said, "[w]hile this Court does not have initial jurisdiction with respect to landlord and tenant writs, this Court wishes to make it known to the Exeter District Court that said Court should not accept a plea of title claim should one be made by the plaintiff in that proceeding. It is clear that the plaintiff has no title interest in the subject property." ORDER at 2, ***appx.*** at 308, 309. A Motion for reconsideration was denied. ORDER, ***appx.*** at 380.

This appeal followed.

In addition, G&G sought and received from the Exeter District Court in the landlord-tenant action a Writ of Possession, which was then stayed. ***G&G Epping, LLC v. Saraswati Mandiram, &a.***, Exeter Dist.Ct.No. 2007-LT-73. That case was initially appealed to this Court, ***G&G Epping, LLC v. Saraswati Mandiram, &a.***, N.H.Sup.Ct.No. 2007-0571, and then summarily dismissed. ***Id.***, ORDER (Oct. 19, 2007). A motion for reconsideration of the summary dismissal is currently pending, as is a motion to consolidate that appeal with this.

SUMMARY OF ARGUMENT

Saraswati Mandiram and Pandit Ramadheen Ramsamooj first tell the long and complex story of their relationship with G&G LLC, and G&G Epping, LLC.

They then set out the proofs and standards for motions to dismiss, noting that at that early stage of the litigation, plaintiff's burdens are low.

Saraswati Mandiram and Pandit Ramadheen Ramsamooj then go through the causes of action. With reference to their well-plead allegations and documents associated with the case, they demonstrate that 1) they alleged accepted causes of action, 2) the facts plead are sufficient to support them, and 3) remedies are available. Consequently they argue that the court below should not have granted the defendants' motion to dismiss.

ARGUMENT

> And Jesus went into the temple of God, and cast out all them that sold and bought in the temple, and overthrew the tables of the moneychangers, and the seats of them that sold doves, And said unto them, It is written, My house shall be called the house of prayer; but ye have made it a den of thieves.
>
> *Matthew* 21:12, 13

Unlike Jesus Pandit Ramadheen Ramsamooj invited the moneychangers into the temple.

I. Causes of Action Are Not Dismissed When the Facts Plead Constitute a Basis for Legal Relief

The lower court granted G&G's motion to dismiss on the grounds that Saraswati Mandiram's pleadings did not state a claim upon which relief could be had.

"In reviewing the trial court's grant of a motion to dismiss, [this Court's] task is to ascertain whether the allegations pleaded in the plaintiff's writ are reasonably susceptible of a construction that would permit recovery." *In re Larue*, __ N.H. __ (decided Oct. 30, 2007). "In ruling on a motion to dismiss, all facts properly pleaded by the plaintiff are deemed true, and all reasonable inferences derived therefrom are construed most favorably to the plaintiff." *Vermont Wholesale Bldg. Products, Inc. v. J.W. Jones Lumber Co., Inc.*, 154 N.H. 625, 627 (2006); *LaChance v. U.S. Smokeless Tobacco Co.*, __ N.H. __ (decided Aug. 24, 2007). This Court "then engage[s] in a threshold inquiry that tests the facts in [the] petition against the applicable law." *Larue*, __ N.H. at __. When the facts construed most favorably to the plaintiff constitute a basis for legal relief, but the trial court erroneously dismissed the case, this Court reverses and remands for further proceedings. *Mountain Springs Water Co., Inc. v. Mountain Lakes Village Dist.*, 126 N.H. 199, 202 (1985); N.H. CONST., pt. I, art. 14.

This is a low burden of proof, which is met when the plaintiff plead a causes of action and facts to support them.

II. G&G Breached Mortgage Contract by Halving the Period in Which to Cure Default

In its pleadings Saraswati Mandiram stated two causes of action on which it could have gotten relief regarding G&G having halved the contractual period of time in which Saraswati Mandiram had to cure the alleged defaults.

A. Breach of Mortgage Contract

The loan documents indisputably evidence a contract which contain a 15-day period in which to cure. The first default letter, however, notified Saraswati Mandiram if it did not cure within 8 days, G&G would accelerate the mortgage such that the entire amount of the loan would immediately become due, charge interest of 22.36% and various fees, and commence foreclosure. Saraswati Mandiram cured by paying the demanded amount, but a few weeks later it received a second default letter with the same set of warnings, this time demanding a cure within 7 days. Failing to allow Saraswati Mandiram to cure within the time the contract specified is a material breach. *Filmline Productions, Inc. v. United Artists Corp.*, 865 F.2d 513 (2nd Cir. 1989).

The remedy for both these breaches is money in the amount of "the difference between the values of the condition promised and the actual condition," as well as "incidental consequences fairly subject to contemplation by the parties when the contract is made." *Lakeman v. La France*, 102 N.H. 300, 305 (1959). When money damages are not adequate, contract remedies include equitable rescission. *Patch v. Arsenault*, 139 N.H. 313 (1995).

Here money damages for the two truncated cure periods may be negligible. But regarding the second default Saraswati Mandiram may have been able to cure. G&G's letter is dated December 21, 2005, the Wednesday just before Christmas when it is difficult to locate people working in financing institutions. The letter required a cure by the following Wednesday, December 28 – the week between Christmas and New Years when that difficulty may rise to

impossibility. Even if Saraswati Mandiram received the letter the day it was dated, and had the full 15 days in the mortgage contract, that fell on the Thursday of the first week in January. Thus Saraswati Mandiram had at most just a few days to find money to cure the alleged default. Moreover, G&G didn't even wait the full 15 days; its notice of acceleration is on the 14th day.

The contents of the notice, its Christmas timing, and G&G's refusal to abide by the arrangement to pay itself from the loan proceeds EMAIL FROM JENNIFER LAMANNA TO LISA SINCERE (for G&G) (Dec. 30, 2005), *appx.* at 79, make it clear G&G was more interested in foreclosing the loan than servicing it.

Because Saraswati Mandiram stated a claim on which relief could be had, it's suit should have survived G&G's motion to dismiss.

B. Breach of Good Faith and Fair Dealing Regarding the Mortgage Contract

"[I]n this State every agreement contains an implied covenant that each of the parties will act in good faith and deal fairly with the other." *Bursey v. Clement*, 118 N.H. 412, 414 (1978) (quotation omitted). The covenant applies not only to contract formation, but limits the discretion parties have in their relations with each other during the operation of the contract. *Great Lakes Aircraft Co., Inc. v. City of Claremont*, 135 N.H. 270 (1992). "'Fair dealing' may include giving the opposing party fair notice and an opportunity to cure any significant objections before being held liable." *Barrows v. Boles*, 141 N.H. 382, 389 (1996).

By halving the time in which Saraswati Mandiram had to cure, G&G breached its covenant of good faith and fair dealing. The remedy for this is damages and rescission. *Bursey v. Clement*, 118 N.H. at 416.

Because Saraswati Mandiram stated a claim on which relief could be had, its suit should have survived G&G's motion to dismiss.

III. G&G Reneged On Its Non-Revolving Line of Credit

The parties entered a written modification of their contract whereby G&G would use the un-disbursed amount of the mortgage to pay itself the monthly installments Saraswati Mandiram owed it, commensurately increasing the amount of principal, an arrangement known as a non-revolving line of credit. *See e.g., In re Miami General Hosp., Inc.*, 124 B.R. 383 (Bkrtcy. S.D. Fla. 1991); AMERICAN BANKER, BANKER'S GLOSSARY (2007), http://www.americanbanker.com/glossary.html?alpha=L#line%20of%20credit.

In its pleadings Saraswati Mandiram stated five causes of action on which it could have gotten relief regarding G&G refusing to continue using the non-revolving line of credit contract.

A. Breach of Credit Line Contract

"Offer, acceptance, and consideration are essential to contract formation. A valid offer may propose the exchange of a promise for a performance. A promisee may accept such an offer by commencing performance." *Tsiatsios v. Tsiatsios*, 140 N.H. 173, 178 (1995) (quotations and citations omitted). A proposal signed by the non-drafting party constitutes a contract. *H & B Const. Co. v. James R. Irwin & Sons, Inc.*, 105 N.H. 279 (1964).

Here, the parties were in an existing contractual relationship, which was modified first orally and then in writing, to create a non-revolving credit line. Saraswati Mandiram relied on the modification, and G&G performed for two months. Any of the three – the writing, the reliance, or the performance – were enough to make the credit line modification enforceable.

Without notice, G&G stopped performing, causing Saraswati Mandiram to unknowingly default, and then to suffer bankruptcy and lose title to its property.

Contract remedies are money in the amount of "the difference between the values of the

condition promised and the actual condition," and include "incidental consequences fairly subject to contemplation by the parties when the contract is made." *Lakeman v. La France*, 102 N.H. 300, 305 (1959). When money damages are not adequate, contract remedies include equitable rescission. *Patch v. Arsenault*, 139 N.H. 313 (1995).

The benefit of Saraswati Mandiram's bargain would be G&G to recommence paying the monthly loan installments out of the un-disbursed amount of the mortgage, that is, to continue performing on its deal involving the non-revolving credit line. If putting the parties back where they were in December 2005 is not be possible, Saraswati Mandiram should be compensated for the "consequences fairly subject to contemplation" – that is, the costs in money and fees, and the resulting poor credit rating and reputation, for its default, bankruptcy, and loss of title.

Because Saraswati Mandiram stated a claim on which relief could be had, its suit should have survived G&G's motion to dismiss.

B. Breach of Good Faith and Fair Dealing Regarding the Credit Line Contract

"[E]very agreement contains an implied covenant that each of the parties will act in good faith and deal fairly with the other." *Bursey v. Clement*, 118 N.H. at 414.

Specifically, good faith requires that if one party makes a representation of material fact to the other for the purpose of inducing the other party to change its position or enter the contract, the party making the representation must tell the truth. *Id.* Refusing to perform on a contract after the other party agreed to alter its terms for the benefit of the party making the representation is a breach of the covenant of good faith and fair dealing. "[I]f a contract is such that a certain performance by one party is necessary in order to earn the compensation that has been promised him, and that performance can not be rendered without the active co-operation of the other party,

a promise to render such co-operation will usually be implied." *Great Lakes Aircraft Co., Inc. v. City of Claremont*, 135 N.H. 270, 294 (1992). "When the fundamental expectations of a party are hindered, and the act of one contracting party can restore the expectation," there is an implied "duty to act." *Id.* If a party exercises its discretion during the contract in a way that is "tantamount to a power to deprive the plaintiff of a substantial proportion of the agreement's value," the covenant of good faith and fair dealing is breached. *Centronics Corp v. Genicom Corp*. 132 N.H. 133, 144 (1989)

Here Saraswati Mandiram entered the non-revolving credit line after G&G ensured Saraswati Mandiram that G&G would pay itself out of the loan proceeds. Saraswati Mandiram agreed to alter the mortgage contract in that way based on its understanding, predicated on G&G's representation, that it could thus afford its monthly installments long enough to rebuild the school and begin producing income.

For two months, G&G paid itself out of the credit line, in accord with the contract. G&G inexplicably ceased, with no notice, forcing Saraswati Mandiram to be so cash-strapped it could not pay its bills, including its monthly loan installment, thus leading directly to default and foreclosure. G&G was aware of Saraswati Mandiram's financial situation, and by ceasing the credit line beached its duty of good faith and fair dealing.

KMC Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985), is regarded as the leading case in the area of good faith covenants in credit-line contracts. *See* 2 Madison, Dwyer & Bender, *The Law of Real Estate Financing* §14:4 (2007). In *KMC*, Irving was the lender. It refused, without prior notice, KMC's request for an advance on its line of credit loan, causing KMC to collapse. KMC sued, alleging because it got no notice, it was prevented from taking reasonable steps to

seek alternative financing. The Sixth Circuit found where the lender maintained control over the loan, the refusal to make the advance violated Irving's duty of good faith and fair dealing.

Similarly, in *Reid v. Key Bank of Southern Maine, Inc.*, 821 F.2d 9 (1st Cir. 1987), Reid had a line of credit arrangement with Key Bank, which the bank abruptly shut off. The First Circuit found that "the bank acted in bad faith in precipitously and without warning halting further advances on which it knew Reid's business depended, in failing to make a sufficient effort to negotiate alternative solutions to any problems it perceived in its relationship with Reid, and in failing to give notice that it intended to terminate the relationship entirely." *Id.* at 16.

Money damages are measured by the value of Saraswati Mandiram before and after it was divested of title to the property. *See e.g.*, *KMC Co.*, 757 F.2d at 764. When the breach is vital, as it is here, the remedy is rescission. *Patch v. Arsenault,* 139 N.H. 313 (1995).

Because Saraswati Mandiram stated a claim on which relief could be had, it's suit should not have been dismissed.

C. Fraud Regarding the Credit Line

"The party seeking to prove fraud must establish that the other party made a representation with knowledge of its falsity or with conscious indifference to its truth with the intention to cause another to rely upon it. In addition, the party seeking to prove fraud must demonstrate justifiable reliance." *Van Der Stok v. Van Voorhees*, 151 N.H. 679, 682 (2005).

Here, there were three instances of fraudulent conduct. First, G&G told Pandit Ramadheen Ramsamooj that it would pay itself out of the loan proceeds, and ratified that representation by twice performing, thus leading Saraswati Mandiram to reasonably believe the representation. It relied first by not making monthly installments as it had been consistently doing

for 2 years before the credit line modification, and second by spending money on improving its facility rather than laying some away to make monthly installments. The result of the reliance was that Saraswati Mandiram defaulted on the loan, did not have the cash to cure because it had already spent it, went bankrupt, suffered a foreclosure, and lost title to its property.

Second, upon the first default, G&G told Saraswati Mandiram that the credit line would be reinstated if Saraswati Mandiram paid the amount G&G said was then owed, and entered an amended mortgage. Saraswati Mandiram believed those representations and complied. The second default quickly followed, however, belying G&G's statements.

Third, G&G flatly denied the existence of the credit line. G&G, LLC'S OPPOSITION TO DEFENDANTS' MOTION TO SET ASIDE CONFESSED JUDGMENT at 10, ***G&G LLC v. Saraswati Mandiram &a***, Alexandria Va.Cir.Ct. No. CL06001567 (June 20, 2006); PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS (July 9, 2007), ***appx.*** at 322. As above, Saraswati Mandiram relied on the arrangement to its detriment.

Damages for fraud are "actual pecuniary loss" and "consequential damages." ***Crowley v. Global Realty, Inc.***, 124 N.H. 814 (1984). When the fraud results in entering an agreement, the court may also restore the parties to "the position [they] would have occupied had the … agreement not been executed." ***East Derry Fire Precinct v. Nadeau***, __ N.H. __ (decided May 11, 2007). Rescission is an equitable remedy in the discretion of the trial court. ***Id.***

Because Saraswati Mandiram stated a claim on which relief could be had, they were erroneously dismissed.

IV. G&G Violated its Fiduciary Duty to Conduct the Foreclosure Sale with Due Diligence and in Good Faith

"[T]he mortgagee is required to conduct the foreclosure sale in the exercise of good faith and due diligence to protect the mortgagor's interest. While in exercising the power of sale granted by the mortgage, the mortgagee acts to enforce his own interest, he is required to do so with due regard for the interest of the owner of the equity. *Silver v. First Nat. Bank of Hillsborough*, 108 N.H. 390, 391-2 (1967) (quotation and citations omitted). "Because mortgage foreclosure is essentially a right to equitable relief, the element of fairness must pervade the entire foreclosure process." *Meredith v. Fisher*, 121 N.H. 856, 859 (1981). "[T]he mortgagee's duty of good faith and due diligence is essentially that of a fiduciary." *Murphy v. Financial Development Corp.*, 126 N.H. 536 (1985); *Bascom Const., Inc. v. City Bank and Trust*, 137 N.H. 472 (1993) ("the mortgagee owes the mortgagor a fiduciary duty of good faith and due diligence").

This Court thus carefully scrutinizes foreclosure sales when the mortgagee acquires the property. *Danvers Sav. Bank v. Hammer*, 122 N.H. 1, 4 (1982) ("We will review this sale with particular caution because the bank purchased the mortgaged property at its own foreclosure sale."). Saraswati Mandiram stated two causes of action upon which it deserves relief.

A. Insufficient Advertising

In *Murphy v. Financial Development Corp.*, 126 N.H. 536 (1985), this Court held that adequate advertising of a foreclosure sale depends upon the nature of the property.

> The requirement that the sale be conducted in a reasonable manner, including the advertising aspects, requires that the person conducting the sale use the ordinary methods of making buyers aware that are used when an owner is voluntarily selling his land. Thus an advertisement in the portion of a daily newspaper where these ads are placed or, in appropriate cases such as the sale of an industrial plant, a

> display advertisement in the financial sections of the daily newspaper may be the most reasonable method. In other cases employment of a professional real estate agent may be the more reasonable method. It is unlikely that an advertisement in a legal publication among other legal notices would qualify as a commercially reasonable method of sale advertising.

Murphy v. Financial Development, 126 N.H. at 544, quoting with approval Uniform Land Transaction Act §3-508 (1980). The *Murphy* court found that legal notices were insufficient advertising for a residential foreclosure.

In Saraswati Mandiram's case, it is believed that G&G placed notices in the legal sections of a number of newspapers. AFFIDAVIT OF THERESE LANDRY (Nov. 27, 2006), *appx.* at 197. It did not employ a real estate agent, or seek wide public notification in places where those interested in this sort of property – 100 acres of mostly undeveloped land with river and road frontage near the bustling Rt. 125 Epping interchange – would notice it. G&G's own appraisal made clear that the land's value was in its development potential, yet made no effort to publicize the sale among developers. It didn't even put post a "for sale" sign on the property.

In *First NH Mortgage Corp. v. Greene*, 139 N.H. 321 (1995), the property was several hundred acres in New Boston, and a crucial component of its value was its proximity to population centers. The auctioneer (the very same who conducted Saraswati Mandiram's auction) "advertised the property in regional newspapers, distributed fliers, and posted a sign on the subject property." This Court nonetheless found his efforts insufficient because "[a]lthough the property was only a 7.5-mile drive from all of the major north-south and east-west commuter routes in the area, through a desirable section of Bedford, the advertisements made no mention of this fact. Indeed, the advertisements directed interested parties to reach the parcel via Route 13, a course that would take a potential buyer from the densely populated parts of the region over a

circuitous route through Milford or Goffstown." *Id.* at 322.

In Saraswati Mandiram's case, there was even less attention to publicity than in *First NH Mortgage*. As G&G's advertising efforts were thus insufficient, it violated its fiduciary duty to conduct the sale using "the ordinary methods of making buyers aware that are used when an owner is voluntarily selling his land." *Murphy v. Financial Development*, 126 N.H. at 544.

B. Insufficient Price

There were 10 appraisals and estimates of value of Saraswati Mandiram's property, noted *supra*, some within months of the foreclosure sale, and some prepared without any bias toward the current dispute. All are relevant to establishing value. *Bartage, Inc. v. Manchester Housing Authority*, 114 N.H. 203 (1974); *Olbres v. Hampton Co-op. Bank*, 142 N.H. 227, 234 (1997) (out of date valuations are useful, though "not conclusive of what constitute[s] a fair price").

The mortgagee's fiduciary duty requires that it sell the property for the highest possible price, *Bascom v. City Bank*, 137 N.H. at 472, and at the minimum, a fair price. *Murphy v. Financial Development*, 126 N.H. at 536. A mortgagee must make every reasonable effort to get a fair price. *Premier Capital, LLC v. Skaltsis*, 155 N.H. 110 (2007).

Despite the plethora of estimates of value far higher, G&G sold the land for just $2 million, the amount it set as its minimum bid. G&G made no effort to get a better price, and sold for an amount far below any appraisal, even its own. *See First NH Mortgage*, 139 N.H. at 323 (sale for less than mortgagee's own estimate found "commercially unreasonable"). G&G therefore breached its fiduciary duty.

C. Damages for Insufficient Advertising and Price

Damages for an insufficient foreclosure price depend upon the attitude of the mortgagee. If the forecloser is innocent of bad faith, the damages are the difference between foreclosure price and "fair price." *Murphy v. Financial Development*, 126 N.H. at 544. If there is bad faith, damages are the difference between foreclosure price and fair market value. *Id.* If the mortgagee prevented the attendance of a buyer for an even higher price, damages are the difference between foreclosure price and the amount of the higher offer. *Lakes Region v. Goodhue Boat*, 118 N.H. at 103; *First NH Mortgage*, 139 N.H. at 324 ("the manner in which the plaintiff advertised this parcel actually discouraged potential bidders").

The sale can be set aside unless the property has passed to a innocent purchaser. *Danvers Bank v. Hammer*, 122 N.H. at 1. A court can order a new sale when the foreclosure was not conducted according to the fiduciary duties the mortgagee owes. *Meredith v. Fisher*, 121 N.H. 856 (1981). Rescission is available when the buyer took under false pretenses. *Bursey v. Clement*, 118 N.H. at 412; *Dugan v. Manchester Federal Sav. & Loan Ass'n*, 92 N.H. 44 (1942).

Bad faith can be shown by a too low price, *Lakes Region v. Goodhue Boat*, 118 N.H. at 103, by a "grossly disproportionate" price, *Danvers Bank v. Hammer*, 122 N.H. at 1, by a party's own appraisal that values the land "at a price disproportionate to their own belief of its true value," *Tyler v. Flanders*, 57 N.H. 618 (1876), by a foreclosure price that "is so low as to shock the judicial conscience," *Murphy v. Financial Development*, 126 N.H. at 541, or by insufficient publicity that discourages potential bidders. *First NH Mortgage*, 139 N.H. at 324.

Here G&G violated its fiduciary duties to adequately advertise the foreclosure sale, and to get a fair price, both of which may be addressed by money damages and rescission. Accordingly, Saraswati Mandiram has shown claims upon which relief could be granted on the facts plead, and the court below erred in dismissing them.

V. G&G Slandered Saraswati Mandiram's Title

Despite its name, the tort slander of title is not a defamation, but "is more closely related to the torts of trespass to land or interference with economic relations." 11 CAUSES OF ACTION, *Cause of Action for Slander of Title to Real Property* 649 (2007). Saraswati Mandiram plead sufficient facts on this cause of action to get past a motion to dismiss.

"The elements of the slander of title are (1) a publication of a slanderous statement disparaging claimant's title; (2) that was false; (3) made with malice or with reckless disregard of its falsity; and (4) that caused actual or special damages." *Raymond v. Lyden*, 728 A.2d 124 (Me. 1999). The tort is recognized in New Hampshire. *Wilko of Nashua, Inc. v. TAP Realty, Inc.*, 117 N.H. 843 (1977). Recording constitutes publication. *Recording of Instrument Purporting to Affect Title as Slander of Title*, 39 A.L.R.2d 840. "Malice … is an intention to vex, injure, or annoy. As a basis for the recovery of actual damages … it means only that the act is deliberate conduct. The question of malice [is] for the trier of fact." *Wilko v. TAP*, 117 N.H. at 848-49.

Here, G&G Epping recorded a foreclosure deed purporting to have won the bidding at the foreclosure sale even though it did not exist at the time, thus making publication clearly false.

G&G created G&G Epping[5] to take title to Saraswati Mandiram's land. In effect, there was a backdating; G&G created the transaction ***before*** the entity receiving title existed. There were several reasons for doing this. First, a foreclosure sale cannot be set aside if there is a bonafide purchaser. *Danvers Bank v. Hammer*, 122 N.H. at 1. G&G Epping purported to be a bona fide purchaser for value, and therefore immune from rescission. *Lewis v. Dudley*, 70 N.H. 594 (1901); WILLIAM FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5477

[5]G&G and G&G Epping share the same corporate officers, the same address, their website refers to both collectively, their pleadings refer to both collectively, and they are represented by the same attorney.

(2007) (explaining rights of bona fide purchaser under UCC article 8). Second, it is believed that G&G as a lender has significant assets, whereas G&G Epping owns only this piece of property. Thus, it appears that the creation of G&G Epping was fabricated to make G&G unreachable not only legally, but financially as well. Third, New Hampshire law requires that a foreclosure deed be recorded within 60 days or the sale is void. RSA 479:26. Given the delay caused by the health problems of Ms. Giddis and Mr. Bozeman, G&G was butting up against that deadline, and thereby risking the opportunity to gain for itself Saraswati Mandiram's land at the "firesale" price being the "next highest bidder at the auction" provided.

Whichever explanation is employed, malice pervades the fabrication.[6]

The backdating caused Saraswati Mandiram damage. Saraswati Mandiram will have lost a unique property which has been organically farmed for over 50 years, and which caters to a Hindu religious environment that includes a Temple from which their own priests will be evicted. It has already lost public donations because its reputation was damaged due to bankruptcy and foreclosure. Moreover, Saraswati Mandiram has lost opportunities. It could not fund religious events and its educational facilities, both of which bring it money, and could not alienate its land to willing buyers. These damages are on-going. *See generally*, *What Constitutes Special Damages in Action for Slander of Title*, 4 A.L.R.4th 532.

Accordingly, the court's dismissal of the claim was in error.

[6] It is a criminal act as well. "A person is guilty of a class B felony if, with a purpose to deceive or injure anyone, he falsifies, destroys, removes or conceals any will, deed, mortgage, security instrument or other writing for which the law provides public recording." RSA 638:2.

VI. G&G Intentionally Interfered With Advantageous Contracts

"The elements necessary successfully to plead a cause of action for tortious interference with contractual relations are that (1) the plaintiff had an economic relationship with a third party; (2) the defendant knew of this relationship; (3) the defendant intentionally and improperly interfered with this relationship; and (4) the plaintiff was damaged by such interference." *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 46 (1987) (quotations and emphasis omitted).

Saraswati Mandiram's had two opportunities to refinance or sell portions of its land on advantageous terms, one with TCRM, EMAIL FROM PANDIT RAMSAMOOJ TO STEVEN NOTINGER (May 2, 2006), *appx.* at 171, and one with New Stream Real Estate, LETTER FROM NEW STREAM REAL ESTATE LLC TO PANDIT RAMADHEEN RAMSAMOOJ (Nov. 1, 2006), *appx.* at 196, both of whom expressed readiness to deal. It is believed that G&G contacted TCRM and New Stream, informed them of their low-ball appraisal and the existence of a confessed judgment, and discussed other matters. Either of these opportunities would have offered Saraswati Mandiram relief, and possibly the ability to get out from under the disadvantageous G&G mortgage. After the contact, both lost interest.

In its pleadings Saraswati Mandiram stated this cause of action and the facts to support it, and the court was erred in dismissing it.

VII. G&G Presented Saraswati Mandiram with an Unconscionable Contract

A. Unconscionable Contracts

"It has long been the law in this state that contracts may be declared void because unconscionable and oppressive." *Morrill v. Amoskeag Sav. Bank*, 90 N.H. 358 (1939). This Court has been reluctant to provide cohesive definitions of the terms, because "[i]t is not possible to define unconscionability. It is not a concept, but a determination to be made in light of a variety of factors not unifiable into a formula." *Pittsfield Weaving Co., Inc. v. Grove Textiles, Inc.*, 121 N.H. 344, 346 (1981). This Court's decisions, however, offer some guidance.

In *Pittsfield Weaving*, 121 N.H. at 347, this Court found that "the imbalance in bargaining power of the parties rendered the contract so coercive and one-sided as to prevent the plaintiff from having voluntarily assented to its terms so that it constituted a contract of adhesion." Thus "[t]he existence of gross inequality of bargaining power is … a factor to be considered." *Id*.

In *Hydraform Products Corp. v. American Steel & Aluminum Corp.*, 127 N.H. 187, 195 (1985), this Court wrote that contract "overreaching may occur when one party is vastly more experienced than the other" such that "the bargaining power is so disparate that the weaker party is left without any genuine choice." Unless there are no willing competitors in the industry, "with whom the other party may deal," there is likely to be such overreaching.

Long standard-form contracts are indicia of unconscionability. *American Home Imp., Inc. v. MacIver*, 105 N.H. 435 (1964).

B. Cognovit Clauses are Generally Unconscionable

A cognovit clause is one that confesses judgment without any warning or process – the party against whom it is exercised confesses error at the time of signing, and waives any right to

present defenses. As a practical matter, the judgment-seeker goes to court *ex parte* – often with a lawyer supposedly representing the other party but chosen by the judgment-seeker – gets the automatic judgment, and then presents it to the other party. Although they are not facially unconstitutional, in *Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174 (1972), the parties had roughly equal bargaining power, and the Supreme Court indicated in other contexts a cognovit clause might violated due process. Some courts have ruled that confessed-judgment clauses are so lopsided that the existence of one demonstrates non-parity in bargaining, and that the debtor cannot have voluntarily, knowingly and intelligently waived its due process rights. *See e.g.*, *Isbell v. County of Sonoma*, 577 P.2d 188 (Cal. 1978) ("The New York Court of Appeals described confessed judgments as 'the loosest way of binding a man's property that ever was devised in any civilized country.'") (citations omitted).

In New Hampshire, such contracts are unconscionable if they "deprive [the borrower] of all its remedies." *Chemical Bank v. Rinden Professional Ass'n*, 126 N.H. 688, 697 (1985). In *Chemical Bank v. Rinden*, this Court held that the contract was enforceable only because it was not a complete waiver of defenses, and both sides were sophisticated businesses.

Similarly, in *First NH Mortgage Corp. v. Greene*, 139 N.H. 321, 323 (1995), this Court ruled that agreements "which relieve the mortgagee from liability for negligence are valid and enforceable; but such provisions which purport to relieve from bad faith or intentional wrongs are considered to be against public policy and will not be enforced." Further, "where a breach of the fiduciary duty owed a … mortgagor by a mortgagee is the result of affirmative negligence, the defense of commercial unreasonableness cannot be waived." *Id.* at 324. This holding was in the context, moreover, of a clearly commercial contract by two equal parties.

Here, G&G is an obviously sophisticated lender, capable of writing closely-worded contracts, taking advantage of technical violations of their terms, and conveniently situated in one of the few states[7] that have not banned or regulated cognovit contracts.[8] Pandit Ramadheen Ramsamooj was an obviously naive borrower, with little English, little knowledge of business, and a trusting soul. To be viable, Saraswati Mandiram's school needed physical improvement, it faced imminent ballooning of a prior mortgage, and its year-and-a-half long search for a loan had been repeatedly unsuccessful. The cognovit clause here barred all process, all defenses, and all remedies. G&G obtained a confession of judgment, with an attorney G&G appointed supposedly on Saraswati Mandiram's behalf, before Saraswati Mandiram was aware of any judicial process.

C. Process and Remedy

The Uniform Commercial Code provides that "[w]hen it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination." RSA 382-A:2-302(2). "Whether a contract is unconscionable is a matter of law which must be determined on a case by case basis giving particular attention to whether, at the time of execution of the agreement, the contract provision … was oppressive to the allegedly disadvantaged party." *Chemical Bank v. Rinden*, 126 N.H. at 697 (quotations omitted).

As for remedy, "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the

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[7]*See Confessions of Judgment*, 102U.Pa.L.Rev.524 nn.5-8 (1954), *cited in Overmyer v. Frick*, 405 U.S. at 177.

[8]New Hampshire law provides that "[n]o person shall include … in a small loan … [a] confession of judgment or other waiver of the right to notice and the opportunity to be heard in an action." RSA 399-A:11, VII (b).

contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." RSA 382-A:2-302(1).

Saraswati Mandiram plead sufficient facts to put the issue of an unconscionable contract before the court, and relief is available. It should have had an opportunity to present its evidence regarding the balance of power at the time of execution, the extent to which there were no others to whom it could have turned for a loan, the situation it faced when it entered the contract, and other matters. Accordingly the court's dismissal of the action was in error.

CONCLUSION

In accordance with the foregoing, Saraswati Mandiram and Pandit Ramadheen Ramsamooj request this honorable Court to reinstate its causes of action, or in the alternative, to order damages, rescission of the contract, and reinstatement of Saraswati Mandiram's title to the property.

As to at what point in time is appropriate to rescind to, Saraswati Mandiram and Pandit Ramadheen Ramsamooj suggest there are three possibilities: 1) to the time they were divested of their title, 2) to the time of the second default, just before foreclosure, and 3) to the time just before judgment was confessed. Depending upon the nature of the reinstated causes of action Saraswati Mandiram and Pandit Ramadheen Ramsamooj request either that this court rescind to the appropriate time, or remand for a determination by the trial court in the first instance.

Further, as the foregoing demonstrates, title to the property is at issue. Thus Saraswati Mandiram and Pandit Ramadheen Ramsamooj request that this Court order the Rockingham County Superior Court to rescind its order informing the Exeter District Court in the associated Landlord/Tenant action that it "should not accept a plea of title."

Respectfully submitted,

Saraswati Mandiram, and
Pandit Ramadheen Ramsamooj
By their Attorney,

Law Office of Joshua L. Gordon

Dated: December 3, 2007

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Saraswati Mandiram, and Pandit Ramadheen Ramsamooj request that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the facts in this case are complex, the issues are raised in an unusual context and are novel in this jurisdiction, and because the injustices to Saraswati Mandiram are great.

I hereby certify that on December 3, 2007, copies of the foregoing will be forwarded to Christopher T. Hilson, Esq. Copies will also be forwarded to the Rockingham County Superior Court and to the Exeter District Court.

Dated: December 3, 2007

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