State of New Hampshire
Supreme Court

NO. 2007-0572

2008 TERM

FEBRUARY 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

REPLY BRIEF

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I. Bankruptcy Precluded Bringing RSA 479 Injunction Action

In its brief G&G alleges that not having petitioned to "enjoin the scheduled foreclosure sale" pursuant to RSA 479:25, II, Saraswati cannot now complain about any pre-foreclosure events. Not so.

G&G suggests that because the automatic bankruptcy stay was lifted, if Saraswati had complaints about events leading up to the foreclosure it had a duty to enjoin the sale. But the automatic stay pertains to *creditors'* suits against the bankrupt debtor. "The purpose of the automatic stay is to give the debtor a breathing spell from his creditors and stop, among other things, all collection efforts, harassment and foreclosure actions." *Matter of Cappadonna*, 154 B.R. 639 (D.N.J.,1993).

Causes of action possessed by the *debtor*, however, are property of the bankruptcy estate. 11 U.S.C. § 541; *Barrows v. Boles*, 141 N.H. 382 (1996); *In re Teltronics Services, Inc.*, 762 F.2d 185 (2nd Cir. 1985). Until claims are "abandoned" by the bankruptcy trustee, they remain prosecute-able only by the estate. 11 U.S.C. § 554. Abandonment generally occurs when the bankruptcy proceeding is terminated, *In re Reed*, 940 F.2d 1317 (9th Cir. 1991), or when the trustee takes some affirmative step to abandon. *Morlan v. Universal Guar. Life Ins. Co.*, 298 F.3d 609 (7th Cir. 2002). Failing to prosecute is not abandonment, *In re General Development Corp.*, 179 B.R. 335 (S.D.Fla.1995), nor is relief from the automatic stay. *Bostanian v. Liberty Savings Bank*, 61 Cal.Rptr.2d 68 (Cal.App. 1997). Thus, during the pendency of the bankruptcy proceeding the debtor is precluded from asserting such causes of action, and failure to prosecute a state-law claim during the bankruptcy cannot later be considered *res judicata*.

In *Bostanian*, the chapter 11 bankrupt debtors filed an action to set aside a foreclosure

sale of their residence. The court found that because the action was the property of the estate, it could not be prosecuted by the residents, and dismissed the action.

The bankruptcy case, which precluded Saraswati from pursuing any state-court claims, was instigated on May 12, 2006. MOTION FOR RELIEF FROM AUTOMATIC STAY, *SM Appx.*[1] at 179. As noted by G&G in its brief, New Hampshire law requires that upon notice of a foreclosure sale, a debtor must assert a claim to enjoin the foreclosure "prior to sale." RSA 479:25, II. The sale took place on November 30, 2006, but the bankruptcy proceeding was not dismissed, 11 U.S.C. § 349, until December 16. *SM Appx.* at 263. Nothing constituting abandonment is known to have occurred , and G&G never sought an explicit abandonment of the RSA 479:25 claim by the bankruptcy court.

The application of *res judicata* requires that the parties had an opportunity to litigate the issues sought to be barred. *Cook v. Sullivan*, 149 N.H. 774, 778 (2003) ("a party against whom estoppel is pleaded must have had a full and fair prior opportunity to litigate the issue or fact in question"). Here, due to the bankruptcy proceeding, Saraswati was precluded from asserting its rights under RSA 479:25, and thus did not have an opportunity to present any of its claims arising out of pre-foreclosure events.

To the extent that G&G suggests that the failure to litigate these matters in the bankruptcy proceeding itself is acts as *res judicata*, it is not. G&G's request for relief from the automatic stay was pursuant to expedited process, 11 U.S.C. 362(d), *see* MOTION FOR RELIEF FROM AUTOMATIC STAY, *SM Appx.* at 179, in which state law claims "such as breach of contract, fraud and the like," are severed and cannot be addressed. *Ford v. City State Bank of Palacios*, 44 S.W.3d 121 (Tex.App. 2001).

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[1] *SM Appx.* refers to the appendix submitted with Saraswati Mandiram's opening brief. *G&G Appx.* refers to the appendix submitted with G&G's brief. *Reply Appx.* refers to the documents appended to this reply brief.

II. New Hampshire Proceedings Are Not Res Judicata

A. Civil Case Dismissed for Inadequate Service Not *Res Judicata*

A case dismissed for lack of service is not a bar to subsequent litigation between the same parties. *See Hall, Morse, Gallagher & Anderson v. Koch & Koch*, 119 N.H. 639 (1979); Annotation, *Res Judicata Effect of Judgment Dismissing Action, or Otherwise Denying Relief, for Lack of Jurisdiction or Venue*, 49 A.L.R.2d 1036 §§ 3 & 6 (citing numerous cases).

The prior civil case, *Saraswati Mandiram v. G&G, LLC*, Rock.Cnty.Super.Ct. No. 07-C-132, was dismissed without prejudice by the superior court because of inadequate service. FINAL ORDER, *G&G Appx.* at 29-30. That litigation provided no opportunity to address the merits, and did not address the merits. It thus acts as no bar to the case now on appeal.

B. Request for Preliminary Relief Does Not Bar Litigation of the Merits

In the same order, the superior court dismissed a companion equity case, *Saraswati Mandiram v. G&G, LLC, Rock.Cnty.Super.Ct.* No. 07-E-103, in which Saraswati had requested preliminary and temporary injunctions for the purpose of preventing G&G from alienating the property during the pendency of the underlying civil action. MOTION FOR PRELIMINARY AND TEMPORARY INJUNCTION, *G&G Appx.* at 68. The court dismissed the request upon the court finding that Saraswati had an adequate remedy at law. ORDER, *G&G Appx.* at 29.

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing, and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits,

University of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (citations omitted).

Every injunction necessarily involves the merits of the underlying case. *See, e.g., UniFirst Corp. v. City of Nashua*, 130 N.H. 11 (1987). If every request for temporary or preliminary relief resulted in a bar to ultimate litigation of the merits, parties would be forced to try their entire case at the preliminary stage – an absurd result. *See Town of Durham v. Cutter*, 121 N.H. 243 (1981).

Moreover, preliminary relief is not a "final judgment on the merits" necessary for *res judicata* to apply. *N.H. Dept. of Env. Serv. v. Mottolo*, 155 N.H. 57, 61 (2007).

Finally, the request for injunctions were filed as a motion in the then-existing superior court civil case.[2] There was no separate service. If the service for the underlying civil cause was defective as the court found, it had no jurisdiction to address the merits of the request for injunction. *Carleton v. Washington Ins. Co.*, 35 N.H. 162 (1857) ("If the court had no jurisdiction of the person of the defendant, the judgment will not be valid to sustain a subsequent suit."). Moreover, the court did not hold a hearing on the preliminary remedies. Weibusch, *Civil Practice and Procedure* § 19.15(e). As such, the ruling cannot be *res judicata*.

C. Landlord/Tenant Adjudication Has No *Res Judicata* Effect on this Appeal

1. G&G's Res Judicata Argument is Backward

Res judicata bars matters litigated in a *prior* proceeding from being re-litigated in a *subsequent* proceeding. *Eastern Marine Const. Corp. v. First Southern Leasing, Ltd.*, 129 N.H. 270, 274 (1987) ("a *subsequent* suit based upon the same cause of action as a *prior* suit is barred" by res judicata) (emphasis added). The doctrine does not, obviously, work the other way around.

[2]The equity action was filed as a *motion* in the underlying civil case. MOTION FOR PRELIMINARY AND TEMPORARY INJUNCTION, *G&G Appx.* at 68. A clerical error gave it a separate equity docket number.

2. Res Judicata Does Not Apply Because District Court Lacked Jurisdiction and Could Adjudicate Only Possessory Actions

New Hampshire landlord/tenant law provides that "[i]f the defendant shall plead a plea which *may* bring in question the title to the demanded premises," various things occur. RSA 540:17 (emphasis added). The statute does not require that the plea be made in writing, using any particular words, or be made at some certain time. It is a low burden that requires only that the tenant make a plea which "*may bring in question*" the title. Because district courts have jurisdiction in only cases where "the title to real estate is not involved," RSA 502-A:14, the consequence of a plea of title is removal to the superior court. RSA 540:17.

A necessary condition to applying *res judicata* is that the court in the prior proceeding had subject-matter jurisdiction. *See e.g., Cook v. Sullivan*, 149 N.H. 774, 777 (2003) ("Under res judicata, a final judgment by *a court of competent jurisdiction* is conclusive upon the parties in a subsequent litigation involving the same cause of action.") (emphasis added). Thus a judgment by a court without subject-matter jurisdiction "may be impeached collaterally or otherwise." *Eaton v. Badger*, 33 N.H. 228 (1856). Anything the district court decided regarding title was outside its jurisdiction and not subject to *res judicata* analysis.

Finally, landlord/tenant cases arising after a foreclosure are "possessory actions," limited to adjudication of who gets possession of the premises. RSA 540:12 ("purchaser at a mortgage foreclosure sale of any … real estate may recover possession thereof"). Possession is not an element of any cause of action at issue in this appeal. Thus, even if *res judicata* could stem from the district court action, it would not act as a bar to any issue relevant here.

III. Virginia Cognovit Judgment Should Not Be Recognized by New Hampshire Courts

A. No Full Faith and Credit Because Virginia Court Lacked Jurisdiction

Virginia law requires that a confessed judgment contract must contain a certain disclosure, the language of which is specified in the statute. VA.CODE ANN. § 8.01-433.1.[3] The original indebtedness, in the amount of $1.2 million, is based on the original note which contains the confessed judgment clause with the required disclosure. *SM Appx.* at 26. The amended note was for $1.705 million. *SM Appx.* at 64 ¶ R.5. The *amended* note, however, contains neither a confessed judgment clause, nor comports with the Virginia disclosure requirement. Rather it purports to incorporate the original loan document. *SM Appx.* at 64, 65.

A confessed judgment which is beyond the jurisdiction of the issuing court does not get full faith and credit in a receiving state. *Grover & Baker Co. v. Radcliffe*, 137 U.S. 287 (1890); *Brito v. Ryan*, 151 N.H. 635 (2005); *Strick Lease v. Cutler*, 759 S.W.2d 776 (Tex.App 1988).

G&G got a confessed judgment in Virginia for $2.535 million, *SM Appx.* at 82 (including interest and attorneys fees), which is based on the amount of the *amended* note. But the amended note is not a confessed judgment contract because it does not contain 1) a cognovit clause, or 2) the statutory disclosure.

For these reasons, confessed judgment clauses are not valid if done by incorporation. *Jordan v. Fox, Rothschild*, 20 F.3d 1250 (3rd Cir. 1994) ("a confession of judgment clause contained in one document will not become a part of another document that incorporates the

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[3]Va.Code Ann. § 8.01-433.1 provides: "No judgment shall be confessed upon a note, bond, or other evidence of debt pursuant to a confession of judgment provision contained therein which does not contain a statement typed in boldface print of not less than eight point type on its face:

IMPORTANT NOTICE

THIS INSTRUMENT CONTAINS A CONFESSION OF JUDGMENT PROVISION WHICH CONSTITUTES A WAIVER OF IMPORTANT RIGHTS YOU MAY HAVE AS A DEBTOR AND ALLOWS THE CREDITOR TO OBTAIN A JUDGMENT AGAINST YOU WITHOUT ANY FURTHER NOTICE."

terms of the document setting out the power to confess judgment by general reference"); *Bell v. Staren & Co.*, 534 S.W.2d 238 (Ark. 1976); *Keyes v. Peterson*, 260 N.W. 518 (Minn. 1935).

Thus the Virginia court had no jurisdiction for a confessed judgment on the amended note.

B. No Full Faith and Credit Because Cognovit is Against New Hampshire Policy

Although foreign judgments normally are given full faith and credit, as G&G says, cognovits do not produce normal judgments, and are controlled to their own body of law.

A confessed judgment occurs backward. *First* the enforcing party first gets a judgment: "The striking feature of the confession of judgment at common law lies in its authorization for entry of final judgment against a debtor without notice, hearing, or opportunity to defend." *Isbell v. County of Sonoma*, 577 P.2d 188, 191-92 (Cal. 1978). *Then* the debtor may attack it.

> We reject [the] contention that a debtor's opportunity to attack a confessed judgment by motion filed after entry of judgment is an adequate remedy. Few liberties in America have been more zealously guarded than the right to protect one's property in a court of law. This nation has long realized that none of our freedoms would be secure if any person could be deprived of his possessions without an opportunity to defend them at a meaningful time and in a meaningful manner.

Isbell v. County of Sonoma, 577 P.2d at 194. The process, although not facially unconstitutional, has a rank of exploitation. *Overmyer Co. Inc., of Ohio v. Frick Co.*, 405 U.S. 174 (1972). It is not provided for by the law of many jurisdictions, and many states ban it.

The Full Faith and Credit clause allows states to refuse recognition of a foreign judgment that is beyond the public policy of the state called on to enforce it.[4] *Monarch Refrigerating Co. v. Faulk*, 155 So. 74 (Ala. 1934); *Isbell v. County of Sonoma*, 577 P.2d at 188; *Roman Automobile Co. v. Miller*, 95 A. 654 (Del.Super. 1915); *Angle v. Manchester*, 91 N.W. 501 (Neb. 1902); *Pearson v. Friedman*, 112 So.2d 894, 896 (Fla.App. 1959) ("neither comity nor the full faith and

[4]Before the Civil War, this issue was repeatedly raised in courts of northern states before Congress passed the fugitive slave act. *See e.g., In re Booth*, 3 Wis. 1 (1854).

credit clause … required the courts of Florida to recognize confession judgment"); *Ashby v. Manley*, 181 N.W. 869 (Iowa 1921); *Acme Feeds v. Berg*, 4 N.W.2d 430 (Iowa 1942); *Atlas Credit Corp. v. Ezrine*, 250 N.E.2d 474 (N.Y. 1969); *Hutson v. Christensen*, 203 N.W.2d 535 (Minn. 1972); *Betts v. Johnson*, 35 A. 489 (Vt. 1896).

New Hampshire's policy is flatly against confessed judgments for small loans. RSA 399 ("No 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."). For other loans, New Hampshire's policy depends upon such matters as the sophistication of the borrower, the oppressiveness of the contract, and whether the borrower was deprived of its remedies. *Chemical Bank v. Rinden Professional Ass'n*, 126 N.H. 688 (1985).

C. Virginia Judgment not Recognized Because it was not Domesticated

As claimed, G&G initially registered the Virginia judgment in New Hampshire, but then failed to perfect it. The domestication process was stayed by the Superior Court, "subject to reactivation, if appropriate, upon the filing of a motion by any party." ORDER (June 13, 2006), *Reply Appx.* at 18. The domestication process was never resumed. Failure to comply with registration requirements results in a judgment not being recognized in the receiving state. *Ward v. Price*, 814 A.2d 262 (Pa.Super. 2002); *Wu v Walnut Equip. Leasing Co.*, 909 SW2d 273a (Tex.App. 1995); *English v English*, 592 S.W.2d 297 (Mo.App. 1979).

IV. Line of Credit Outlives Amended Note

A. Oral Modification of Amended Note Does Not Extinguish Line of Credit

G&G argues that when the parties entered the Amended Loan, its no-oral-modifications clause undid the line of credit. *G&G Brf.* at 24. No-oral-modifications clauses bar oral changes during the performance of the contract going forward; they are not look-back clauses such as

incorporation or integration. *See Kentucky Fried Chicken Corp. v. Collectramatic, Inc.*, 130 N.H. 680 (1988). Thus, even if the line of credit was oral – which it was not – the oral-modifications clause does not address it.

G&G also claims the amended loan documents extinguished the line of credit. This claim contradicts its assertion at the time. G&G said then that the purpose of the amendment was to collateralize a $300,000 draw it had given to Saraswati in 2004. MEMO FROM CONEIN TO RAMSAMOOJ (Aug. 3, 2005), *SM Appx.* at 60 ("The Draw of $300,000 and the payment from principal draws of the monthly interest … are contingent upon the execution of a Modification Agreement … to properly secure the increased loan amount."). This was Saraswati's understanding at the time. DEFENDANT'S MOTION TO SET ASIDE OR REDUCE, *SM Appx.* at 172-74; EMAIL FROM LAMANNA TO SINCERE (Dec. 30, 2005), *SM Appx.* at 79 (G&G making $300,000 draw contingent on signing amended loan).

B. Release Clause of Amended Note Does Not Extinguish Line of Credit

G&G claims that the amended loan documents released G&G from liability. *G&G Brf.* at 19. Releases are by their nature backward-looking. 29 *Williston on Contracts* § 73:10 (4th ed.). Here, however, the alleged default occurred *after* the amended loan. The release, contained in the amended note, is dated December 9, 2005, *SM Appx.* at 64, whereas the second default is dated December 21, 2005. *SM Appx.* at 76. Thus, the release does not apply to G&G's refusal to honor the line-of-credit arrangement, which caused the second, post-release, default.

Moreover, reinstatement of the credit line was part of the negotiations that lead to the second loan. EMAIL FROM LAMANNA TO SINCERE (Dec. 30, 2005), *SM Appx.* at 79 ("the new loan allows sufficient additional funds on the line of credit to pay" upcoming installments); MOTION TO SET ASIDE OR REDUCE ORDER CONFESSING JUDGMENT, *SM Appx.* at 172-74; MEMO

FROM CONEIN TO RAMSAMOOJ (Aug. 3, 2005), *SM Appx*. at 60. Far from undoing it, the amended loan ratified the credit line.

C. Cure Clause of Amended Note Do Not Extinguish Line of Credit

Saraswati concedes a non-payment default has a 3-day cure period, and not the 15 days suggested. The number of days does not matter, however, because the default was manufactured. Saraswati made arrangements to pay from the line of credit, which G&G terminated without notice and without apparent reason. The important issue is not whether a cure was timely, but whether there was a real default.

V. Conduct of the Foreclosure Sale

A. G&G Epping Did not "Purchase at the High Bid Amount"

In its brief G&G quotes the notice of foreclosure: the mortgagee "reserves the right to purchase at the high bid amount should the high bidder default." *G&G Brf.* at 5. Although this language was not noted in Saraswati's brief, it does not change matters. G&G Epping did not purchase for the "high bid amount"; it paid $50 less. Though the difference on a $2 million purchase would otherwise be *de minimus*, it demonstrates the foreclosure notice was not the basis on which G&G Epping acquired. Moreover, G&G, and not G&G Epping, was the "mortgagee." Had it been G&G that purchased, and had the purchase been for the same price Giddis/Bozman bid, the foreclosure notice quotation might provide support for the acquisition. But because of the difference in entities and price, G&G Epping cannot have been a legitimate buyer.

B. Inadequate Advertising

Although Saraswati has not seen the purported advertisements, it has a copy of the brochure. The land is advertised as being worth about $1.4 million, BROCHURE, *Reply Appx.* at 2, about half the amount of the loan, and a tenth of the development potential mentioned both in the brochure and in G&G's appraisal.

VI. Issues Were Preserved

Violation of duties regarding conduct of the sale was preserved. *See* MOTION TO RECONSIDER, *SM Appx.* at 316, 317, 320; OPPOSITION, *SM Appx.* at 329, 341-344. Slander of title was preserved. *Id.* at 336-38. Fiduciary duty was preserved. *Id.* at 341-345.

Respectfully submitted,

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Dated: February 1, 2008

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CERTIFICATION

I hereby certify that on February 1, 2008, copies of the foregoing will be forwarded to Christopher T. Hilson, Esq.

Dated: February 1, 2008

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APPENDIX