State of New Hampshire
Supreme Court

SARASWATI MANDIRAM, INC. &
PANDIT RAMADHEEN RAMSAMOOJ

v.

G & G, LLC.

N.H. Sup.Ct.No. 2007-0572

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REPLY TO OBJECTION TO MOTION FOR RECONSIDERATION

NOW COMES Saraswati Mandiram, Inc. and Pandit Ramadheen Ramsamooj, by and through their attorney, Joshua L. Gordon, and respectfully request this honorable court to reconsider a portion of its March 21, 2008 order.

As grounds it is stated:

1. Both parties in this appeal have filed briefs. On March 21, 2008 this Court issued an order dismissing portions of the suit, and setting the remainder for argument before a future 3JX panel. Saraswati Mandiram filed a Motion for Reconsideration, to which G&G objected, and here Saraswati Mandiram replies to that objection.

I. Jurisdiction Was Preserved, and Can be Raised at Any Time

2. G&G has suggested in its Objection that Saraswati Mandiram has not before raised the issue of the Virginia Court's lack of subject matter jurisdiction. Not so. Although artlessly, the issue was raised below: "The Virginia Court had personal jurisdiction over the parties but it did not have subject matter jurisdiction over the subject contract." PLAINTIFFS' SUPPLEMENT TO

MOTION TO RECONSIDER, *Saraswati Appx.* at 356. The issue was also argued in Saraswati Mandiram's reply brief. REPLY BRF. at 6.

3. More important, the subject-matter jurisdiction of a court may be raised at any time, even on appeal. In *Singh v. Mooney*, 541 S.E.2d 549 (Va. 2001), the Virginia Supreme Court wrote that "[t]he lack of jurisdiction to enter an order … renders the order a complete nullity and it may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner." *Singh*, 541 S.E. at 551 (quotations omitted). In *Morrison v. Nestler*, 387 S.E.2d 753 (Va.1990), the Virginia Supreme Court wrote, "the lack of subject matter jurisdiction can be raised at any time in the proceedings, even for the first time on appeal by the court *sua sponte*."

4. The New Hampshire Supreme Court has similarly written: "Ordinarily, we will not review arguments that were not timely raised before the trial court. This rule is not absolute, however. We will, for instance, review subject matter jurisdiction claims, even if raised for the first time on appeal." *Baines v. New Hampshire Senate President*, 152 N.H. 124, 128 (2005); *Boston & M.R.R. v. State*, 77 N.H. 437 (1915).

II. Confessed Judgment Clause Not Contained in Amended Note

5. In Saraswati Mandiram's case, the parties originally entered a note for $1.2 million. *Saraswati Appx.* at 26. The original note contained a confessed judgment clause printed in the statutorily-required language and type-style, VA.CODE ANN. § 8.01-433.1,[1] and appointed an

[1]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."

attorney-in-fact to confess judgment on behalf of Saraswati Mandiram. *Saraswati Appx.* at 30.

6. The *amended* note was in the greater amount of $1.7 million plus fees and costs. *Saraswati Appx.* at 64 ¶ R.5. The amended note does not contain a confessed judgment clause, does not appoint an attorney-in-fact, and does not comport with the Virginia disclosure requirements. Rather it purports to incorporate the original loan document. *Saraswati Appx.* at 64, 65.

7. The Virginia order confessing judgment is a document worth looking at carefully, as it contains a revealing internal inconsistency regarding the original and amended notes. ORDER CONFESSING JUDGMENT (Virginia Court, Mar. 6, 2006), *Saraswati Appx.* at 82, *also attached.*

8. In the first paragraph, the order says that Chris Beatley (who was appointed attorney-in-fact in the original note) came before the court "acting under the provisions of a Power of Attorney for confessing judgment, *embraced in the instrument creating the debt.*" (Emphasis added). The words "embraced in the instrument creating the debt" can theoretically refer to either the original note or the amended note, as either arguably created the debt. But there is no attorney-in-fact provision in the amended note, such as there is in the original note. Thus the order confessing judgment indicates that it is being granted pursuant to authority conferred on Mr. Beatley in the *original* note.

9. In the second paragraph of the Order Confessing Judgment, the amount of judgment is specified as "the sum of $2,535,783.90." That amount is calculated with reference to the *amended* note, however. *See* G&G BRF. at 3-4 ("As provided in the Amended Loan Documents, a confessed Judgment was entered … in the amount of $2,535, 783.90.… This amount

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encompassed principal, interest through March 6, 2006, penalty fees, and attorney's fees and expenses *as set forth the Amended Loan Documents.*") (emphasis added).

10. Thus the order confessing judgment contains an inconsistency. The *authority* for the confessed judgment comes from the original note, but the *amount* comes from the amended note. When G&G procured the confessed judgment from the Virginia court, it claimed attorney-in-fact authority from one instrument, but the amount of the debt from another.

III. Confessed Judgment Issued Without Jurisdiction is Void

11. In Virginia, confessed judgment clauses, and the statute that authorizes them, "will be strictly construed." *Bank of Marion v. Spence*, 154 S.E. 488, 489 (Va. 1930). This is because the "purpose of the statutory requirements is to ensure that the makers of the note are aware that a confession of judgment provision is included." *Moyer v. Catlin*, 36 Va. Cir. 209, 1995 WL 1055827 (Va.Cir.Ct. 1995).

12. Virginia courts do not have jurisdiction to confess judgment unless the confessed judgment clause, with the statutorily-required disclosure printed in the statutorily-required language and style, is contained in the note on which judgment is being sought.

> [T]he entire procedure for confession of judgment by an attorney-in-fact is predicated upon, and presupposes, a valid authorization in a note or bond containing the cognovit clause. Without such authorization the attorney-in-fact is without authority to act and the *court is without jurisdiction to enter judgment.*

Pate v. Southern Bank & Trust Co., 203 S.E.2d 126, 128 (Va. 1974) (emphasis added); *Bank of Marion v. Spence*, 154 S.E. 488, 489 (Va. 1930).

13. The Virginia confession of judgment statute is the basis for the jurisdictional issue

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highlighted in the quote immediately above from *Pate v. Southern Bank & Trust.* The statute provides that "*No judgment shall be confessed* upon a note *which does not contain a statement* typed in boldface print of not less than eight point type" in the specified language. VA.CODE ANN. § 8.01-433.1 (emphasis added).

14. Confessed judgment clauses cannot be incorporated, attached, or referenced – they must be in the document on which judgment is sought. *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 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). The rule is sensible in cases such as this where the amended note was signed 2½ years after the original, making a borrower unlikely to recall the wavier of due process rights to contest debts that a confessed judgment clause entails. Moreover, incorporation by reference would contravene Virginia's stated purpose of strictly construing its confessed judgment statute, *Bank of Marion v. Spence*, 154 S.E. at 489, which is to "ensure that the makers of the note are aware that a confession of judgment provision is included." *Moyer v. Catlin*, 36 Va. Cir. at 209.

15. In Saraswati Mandiram's case there is no confessed judgment clause in the amended note. The terms and amount of the confessed judgment, however, make clear that it was a product of the amended note, and not the original. The Virginia court thus had no

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jurisdiction to issue the confessed judgment,[2] and this Court cannot give it any credence.

16. While not directly on point, *Trimark Partners, L.L.C. v. Harrison*, 39 Va. Cir. 415 (Va.Cir.Ct. 1996), is closely analogous to Saraswati Mandiram's case. In *Trimark*, Smerbeck executed a note containing a confessed judgment clause to Trimark which authorized Mitchell to confess the judgment. Harrison executed an allonge[3] to the note "whereby he consented to the obligations memorialized by the note." Applying the jurisdictional strictures the Virginia Supreme Court set out in *Pate v. Southern Bank & Trust*, the court wrote:

> Trimark asserts that Harrison's execution of the Allonge authorized Mitchell to confess judgment against him. The Court disagrees. Although the Note was executed and acknowledged before an officer authorized to take acknowledgments of writings, the Allonge was not. As Harrison never signed the Note, he could not have appointed Mitchell as his attorney-in-fact as required by this statute.

Trimark Partners, 39 Va. Cir. at 415.

17. Although technically not an allonge because it contains more than just signatures, the amended note in Saraswati Mandiram's case, like the allonge in *Trimark Partners*, did not contain the confessed judgment clause, and did not appoint the attorney-in-fact as required by statute. Thus, even if Saraswati Mandiram in the amended note "consented to the obligations memorialized by the [original] note," it is not a document upon which a confessed judgment can be had.

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[2]Saraswati Mandiram has recently retained a Virginia lawyer to address this matter in Virginia. There is no time-bar to raising the issue. *Citibank, N.A. v. Aburish*, 59 Va. Cir. 58, 2002 WL 598437 (Va.Cir.Ct. 2002) (confessed judgment set aside long after statute of limitations expired because court had no jurisdiction to issue confessed judgment on note which lacked confessed judgment clause).

[3]*In re Redden*, 234 B.R. 49, 51 n.6 (Bkrtcy.D.Del. 1999) ("allonge is a written modification of the promissory note, signed by the parties and notarized."); *Town of Freeport v. Ring*,727 A.2d 901, 905 n.7 (Me. 1999) ("An indorsement on a separate sheet of paper is technically called an allonge.").

IV. Void Judgments Do Not Have Res Judicata Effect

18. 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).

19. Accordingly, the Virginia confessed judgment cannot operate as *res judicata*.

20. The issues before this Court in this case are not settled in New Hampshire, and should therefore be heard at oral argument.

WHEREFORE, Saraswati Mandiram and Pandit Ramadheen Ramsamooj respectfully request this honorable Court to reconsider that portion of its order giving the Virginia confessed judgment *res judicata* effect, and further, to schedule the case for oral argument before the full court.

Respectfully submitted
for Saraswati Mandiram, &a.
by their attorney,

Dated: April 25, 2008

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I hereby certify on this 25st day of April 2008, a copy of the foregoing is being forwarded and to Christopher T. Hilson, Esq.

Dated: April 25, 2008

Joshua L. Gordon, Esq.