In The

Supreme Court of Virginia

RECORD NO. 171067

CATJEN, LLC,

Appellant,

v.

HUNTER MILL WEST, L.C.,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On November 19, 2008, Hunter Mill West, L.C. executed a Note in the original principal amount of $1,000,000.00. Joint Appendix ("JA") 2-20; JA 199, § 12.7. The Note was payable to the order of BDC Capital, Inc. BDC is the predecessor in interest to Catjen LLC. Absent default, the Note provides for interest at the rate of 14% per annum. JA 3. After default, the rate of interest increases to 24% per annum. JA 5. The Note was secured by a deed of trust creating a first priority lien upon 5 acres of real property located in Fairfax, Virginia. JA 173-203. The Note designates an attorney-in-fact authorized to confess judgment upon default. JA 9.

The Note provides for the negative amortization of interest. Hunter Mill expressly recognizes in the Note that it provides for compound interest. JA 4. Pursuant to the terms of the Note, whenever interest accrues and is unpaid the principal balance due increases by the amount of unpaid interest. JA 3. Unpaid interest compounds monthly and is then "added to the total principal balance of the loan." Note, JA 4.

Hunter Mill agreed to pay the amount due in full on or before November 19, 2009. JA 2 & 11. After Hunter Mill defaulted, Catjen sent

a notice of default on September 24, 2010. JA 272:10-25. Hunter Mill continued to make sporadic payments after the notice of default but after October 3, 2011, all payments stopped. JA 286-290.

In November, 2012, Hunter Mill filed its first bankruptcy petition. BDC filed a proof of claim in the bankruptcy case asserting that the amount due on the Note was approximately $1.79 million. Hunter Mill disputed BDC's proof of claim and asserted that the amount due was approximately $1.5 million. Hunter Mill acknowledged that the amount due included accrued and unpaid interest, compounded after the date of default, but disputed other amounts. The bankruptcy court held an evidentiary hearing to resolve the claims dispute. Hunter Mill submitted evidence and expert testimony as to its calculation of the amount owed as of the date of the bankruptcy filing. Hunter Mill's expert witness summarized his testimony and Hunter Mill's position concerning the amount due in a document admitted in evidence by the bankruptcy court as Exhibit 12. JA 285-290. Hunter Mill's submission acknowledged that interest compounded monthly after the Note matured. Exhibit 12, JA 289-290. With minor modifications not relevant here, the bankruptcy court adopted Hunter Mill's calculations as set forth in Exhibit 12. 2013

Transcript, JA 272:23-25; 275:3-8. The bankruptcy court entered a Claims Order determining that the amount due on the Note as of November 9, 2012—the filing date of bankruptcy case—was $1,504,998.55. JA 66-70.

After spending more than two years under the jurisdiction of the bankruptcy court, Hunter Mill was unable to successfully reorganize. In January, 2015, the bankruptcy court dismissed Hunter Mill's petition. The bankruptcy court specifically preserved the Claims Order under 11 U.S.C. § 349, meaning that the Claims Order remained a binding adjudication. Order Granting Motion to Dismiss Ch. 11 Case, Case No. 12-11243, JA 277-280.

On July 21, 2016, Catjen foreclosed against the collateral property under the deed of trust.[1] Catjen submitted the last and final bid at the foreclosure sale in the amount of $1,300,000. Confession of Judgment ("COJ"), Ex. A, JA 24. Following the foreclosure sale, on August 11, 2016, the attorney-in-fact confessed judgment against Hunter Mill and in favor

[1] Hunter Mill filed bankruptcy again on July 2, 2015. The second filing was dismissed with prejudice on May 11, 2016, and Catjen then proceeded with the foreclosure. Other than explaining the passage of time between the original dismissal and the foreclosure, the second bankruptcy is not material to this appeal.

of Catjen in the amount of $2,402,838.30. The amount of the judgment was based upon the beginning balance due as fixed by the bankruptcy court, together with accrued and unpaid interest, compounded monthly, brought forward to August 11, 2016. The judgment also provided for post-judgment interest at the contract rate and included a request for reasonable costs and attorneys' fees to be set by the circuit court. COJ, JA 1-26.

Catjen, relying upon and bound by the prior determination of the bankruptcy court, used the same method for calculating the amount due that Hunter Mill used and that the bankruptcy court accepted. Catjen simply started with the balance established by the bankruptcy court and brought the calculation forward to the date of the entry of judgment to reflect the accrual and monthly compounding of the unpaid interest after November 9, 2012. Catjen also gave Hunter Mill credit for the $1,300,000 foreclosure credit bid. COJ, Ex. A, JA 22-24.

On September 9, 2016, Hunter Mill moved to set aside the confessed judgment. JA 27-29. Its two-page motion raised four contentions: (1) the rate of interest was "usurious"; (2) the judgment included "incorrectly calculated interest, such as accrued interest on amounts not due or

payable"; (3) the judgment was "inaccurate and includes amounts not due or payable"; and (4) the amount of attorney's fees were unreasonable. JA 27-29. Hunter Mill asked the court to set aside the confessed judgment, order a bill of particulars, and set the matter for trial. JA 29.

The usury statutes are inapplicable to business loans and the confessed judgment did not award any amount for attorney's fees. As a matter of law, Hunter Mill's motion raising those contentions did not raise an adequate defense. During argument on the motion, Hunter Mill agreed that the sole issue was whether the Note called for payment of simple or compound interest, and took the position that compound interest applied only before the note matured, but that after default the calculation of interest converted to simple interest. JA 41:7-42:9 & 47:8-13. Hunter Mill did not otherwise challenge Catjen's position regarding the beginning balance of the Note as previously fixed by the bankruptcy court or the rate of interest. The issue to decide was very narrow:

> JUDGE SMITH: … Is this a legal issue? Do we need evidence at all?
> Mr. DePALMA [Counsel for Catjen]: I believe it's a pure legal issue. There is no challenge of the actual calculation of the principal and interest.
> Mr. HUDSPETH [Counsel for Hunter Mill]: I agree, Your Honor.

November 8, 2016 Tr., JA 47:8-13.

After taking a recess to review submitted authorities, the court denied the motion, opining that Hunter Mill's argument "allows the defaulting party to get a better deal by default and it is logically inconsistent…." November 8, 2016 Tr., JA 54:10-15.

Hunter Mill then retained new counsel and moved to reconsider the order denying the motion to set aside. Hunter Mill again contended that interest only compounded before maturity, and that after the Note came due and was not paid the compounding of interest stopped. Hunter Mill's Mot. to Reconsider, JA 58-65; November 8, 2016 Tr., JA 37-55. Hunter Mill also for the first time provided a calculation of the amount it contended was due, which raised issues with respect to the beginning balance of the Note, the appropriate rate of interest, and the application of the foreclosure proceeds. Hunter Mill argued that its motion raised an adequate defense and the court should vacate its prior order and set the matter for a "hearing on the merits." Hunter Mill's Mot. to Reconsider, JA 65. Hunter Mill's motion to reconsider again asked that the matter be set for a hearing on the merits or, alternatively, for a "remittitur" reducing the judgment to $1,101,171.75.

The court announced during a hearing on other related matters pending between the parties that it would take the motion to reconsider under advisement. December 16, 2016 Tr., JA 96:10-11 & 98:14-21. Under Fairfax Circuit Court procedures, a party is not permitted to respond to a motion for reconsideration unless the court requests a response. The circuit informed Catjen that it would be advised if the court sought a response to the motion. December 16, 2016 Tr., JA 98:14-21. The court never asked for and accordingly Catjen did not file any response or other opposition to the motion to reconsider. Four months later, the court set a status conference for the Friday motions day docket on April 21, 2017. The court then took up the motion to reconsider during the status conference. JA 125:9-126:10. After hearing brief argument, the court reversed itself and adopted Hunter Mill's position, stating that as to the computation of interest, it was going to us Hunter Mill's numbers. *Id.* at 125:9-11.

Catjen immediately objected to Hunter Mill's proffered computation of the judgment. Catjen's counsel asserted that "I think there are serious problems with [Hunter Mill's] numbers and we have not had the opportunity to do the calculation." April 21, 2017 Tr., JA 125:18-

126:10. Hunter Mill's counsel responded that the matter should be addressed separately, and the court continued the matter to the May 19th Friday motions day docket "for entry of order regarding interest." April 21, 2017 Order, JA 141.

The ruling that compound interest only applied before default did not resolve the case because disputed issues remained unresolved, including the beginning balance, the appropriate rate of interest, and Catjen's pending request for attorney's fees.[2]

In an effort to regroup and be afforded the opportunity to present its case, Catjen moved to nonsuit. The court denied the motion. JA 142-146, and 165. Catjen then attempted to overcome the court's procedural misstep by developing a record that established the full extent and basis of Hunter Mill's liability. Catjen identified disputes that needed to be resolved before the court could enter judgment, and moved the court to "set this matter down for a bench trial…under Section 8.01-433 of the

[2] Any calculation of interest necessarily requires a determination of the beginning balance, the rate of interest, the appropriate method of calculation and the time period involved. Only the method of calculation had been determined by the court on April 21, 2017, and until the motion to reconsider was filed and argued it was the only issue preserved by Hunter Mill in its motion to set aside the confession of judgment.

Virginia Code..." JA 204; 204-208. Catjen also moved for a hearing on its claim for attorney's fees. JA 166-171.

Catjen, having never had the opportunity to submit a response to Hunter Mill's motion, also asked the court to reconsider its decision granting Hunter Mill's request for reconsideration. JA 220-224. In addition to addressing the proper interpretation of the Note, and again asserting that it expressly called for the compounding of interest, Catjen also submitted the prior bankruptcy proceedings and the prior bankruptcy court judgment fixing the method of computing interest under the Note and the amount due. Catjen asserted that the prior bankruptcy proceedings constituted *res judicata* and estopped Hunter Mill from now seeking an inconsistent ruling.

During the hearing on May 19, 2017, Catjen renewed its motion to nonsuit. JA 298:19-299:2. After noting that the request to nonsuit "causes me concern" the court denied the motion. JA 299:13; 313:22-314:3. The court also overruled Catjen's request to set the matter for trial and denied Catjen's request for a hearing with respect to the determination of attorney's fees. JA 313:15-21.

Instead, without mentioning the prior position taken by Hunter Mill with respect to the compounding of interest or addressing the prior binding adjudication by the bankruptcy court, the court simply declared that "I am prepared to do what I originally prepared to do, and that is sign the order that Mr. Peterson had." JA 381:6-8. Hunter Mill handed up an order and the court entered judgment in the reduced amount of $1,101,171.75—the exact amount proffered by Hunter Mill. The Final Order: (i) stops interest from compounding after the Note matured in 2009; (ii) fixed the principal balance at $1.0 million; (iii) applied the $1.3 million credit bid to the purportedly fixed $1 million principal balance; (iv) lowered the rate of interest to the statutory rate after judgment instead of the contract rate; and (v) denied Catjen attorney's fees. JA 316-318.

The circuit court gave Catjen 21 days to note its exceptions and Catjen timely did so. May 19, 2017 Tr., JA 313:8-12; Exceptions, JA 319-325.

ASSIGNMENTS OF ERROR

(1) The circuit court erred as a matter of law when it set aside or modified a confessed judgment, but declined to place the matter on the trial docket and proceed as if an action had been filed on the Note as required by Section 8.01-433 and thus entered a confessed judgment that the creditor was unwilling to accept.

Catjen preserved this error at April 21, 2017 Tr., JA 125:9-126:10; Catjen's Mot. to Reconsider April 21, 2017 Order, JA 224; May 19, 2017 Tr., JA 310:20-311:8; Exceptions of Plaintiff Catjen, LLC to the May 19, 2017 Order ("Exceptions"), JA 319, ¶ 1).

(2) The circuit court erred as a matter of law in entering judgment in the amount proffered by the debtor because it (a) ignored the *res judicata* and collateral estoppel effect of a prior bankruptcy order; (b) disregarded the terms of the Note requiring compound interest; (c) stopped awarding interest as of the date of foreclosure; (d) reduced the interest rate in the Note to the judgment rate; and (e) denied Catjen the opportunity to recover attorney's fees despite the terms of the Note.

Catjen preserved these errors at (a) Catjen's Submission on Amounts Due, JA 205; Catjen's Mot. to Reconsider April 21, 2017 Order, JA 222, ¶7; Exceptions, JA 321, ¶ 4; (b) Catjen's Mot. to Reconsider April 21, 2017 Order, JA 223; Exceptions, JA 321, ¶ 4; (c) Catjen's Submission on Amounts Due, JA 205, ¶4; Exceptions, JA 321, ¶ 4; (d) Exceptions, JA 324, ¶ 6(g); (e) Catjen's Memo. In Support of its motion to supplement, JA 168-169; Exceptions, JA 324, ¶ 7.

(3) The circuit court erred by denying Catjen's motion to nonsuit after the court decided to set aside or modify the confessed judgment but before determining the extent of the modification of the judgment.

Catjen preserved this error at May 19, 2017 Tr., JA 299:10-13; 684:1-3; Exceptions, JA 320, ¶ 2.

ARGUMENT

1. The circuit court erred when it set aside the confessed judgment, and instead of proceeding as if an action had been filed on the Note, short circuited the case by entering judgment for an amount proffered by defendant.

(Assignment No. 1)

Virginia Code § 8.01-432 allows a debtor's attorney-in-fact to confess judgment for "only such principal and interest as his creditor may be willing to accept" and provides that a confessed judgment is as final and binding as other judgments. Catjen asked for and was willing to accept a confessed judgment for $2,402,838.20.

The Virginia Code provides a procedure whereby a debtor may move the court to set aside or modify a confessed judgment. The motion is not a mechanism to decide the merits of the case. Rather, the motion addresses whether the movant/debtor has raised grounds "which would have been an adequate defense or set-off in an action at law". Va. Code Ann. § 8.01-433.

This Court has never specifically addressed the procedure to challenge a confessed judgment, but several circuit courts have done so and have uniformly determined that what is at issue is whether the motion raises an adequate defense to be litigated. If the motion raises matters that, as a matter of law, do not constitute an adequate defense, the motion is denied. Otherwise, the merits of the defense are not at issue in determining the motion. *See generally Burdette Smith Group, P.C. v. Elza*, 65 Va. Cir. 314 (Va. Cir. 2004); *MDDC, LLC v. Lawrence*, 92 Va. Cir. 326 (Va. Cir. 2016); *Ali v. TeleScience Int'l., Inc.*, 64 Va. Cir. 60 (Va. Cir. 2004). This approach is consistent with the statutory mandate that if a confessed judgment is set aside the case is to proceed as if an action had been filed on the debt.

Notably, in seeking reconsideration of the court's denial of its motion, Hunter Mill relied on this authority and argued that the merits of its defense were not at issue in the motion and that the only issue was whether its motion raised an adequate defense. JA 61. Hunter Mill then expressly argued that disputed issues regarding the method of the calculation of interest raised a colorable defense and that Catjen's calculation of the amounts due required a hearing on the merits. JA 63-64.

Putting aside any issues as to the court's decision to reconsider its prior denial of the motion to set aside, Hunter Mill asked the circuit court to set aside the confessed judgment and set the matter for trial. But rather than proceed in the manner set forth by statue, the circuit court simply entered a final judgment based on Hunter Mill's proffer. Whether the court properly interpreted and applied a statute is reviewed de novo. *See Fitzgerald v. Loudoun Cty Sheriff's Office*, 289 Va. 499, 504, 771 S.E.2d 858, 860 (2015) ("Under well-established principles, an issue of statutory interpretation is a pure question of law which we review de novo.") (citing *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007)).

A. The circuit court was required to proceed as if an action had been filed on the Note and erred by entering judgment for an amount unacceptable to Catjen.

If the court grants a motion to set aside a confessed judgment, the statute requires the court to "place the matter on the trial docket" and then proceed as if an action at law had been filed on the debt. Thus, the statute distinguishes between confessed judgments and judgments that result from a judicial adjudication.

> Whenever any such judgment is set aside or modified the case shall be placed on the trial docket of the court, and the proceedings thereon shall thereafter be the same as if an action at law had been instituted upon the bond, note or other evidence of debt upon which the judgment was confessed. After such case is so docketed the court shall make such order as to the pleadings, future proceedings and costs as to the court may seem just.

Va. Code Ann. § 8.01-433.

Here, Hunter Mill moved to set aside or modify a confessed judgment and sought as relief a bill of particulars and a trial on the merits. But the circuit court did not proceed as statutorily required, or even as requested. Instead, the circuit court simply adopted the amount proffered by Hunter Mill, without testimony or evidence, and entered final judgment.[3] Thus, the distinction between a confessed judgment and a judgment that results from the adjudicatory process was ignored.

This Court has previously affirmed the statutory mandate that a confession of judgment must be in an amount that the creditor is "willing

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[3] Hunter Mill's request for a "remittitur" is not a basis to reduce the confessed judgment to an amount proffered by the debtor. A remittitur is available when a circuit court has concluded that a *jury* verdict is excessive, and allows the circuit court to require a plaintiff to accept a reduced verdict or submit to a new trial. See § 8.01-383.1; *Reel v. Ramirez*, 243 Va. 463; 416 S.E.2d 226 (1992).

to accept." *AAA Disposal Servs., Inc. v. Eckert*, 267 Va. 442, 593 S.E.2d 260 (2004). In *Eckert*, the defendant filed a confessed judgment for the full amount of the ad damnum clause. *Id.* at 444, 593 S.E.2d at 261. The plaintiff nonsuited, and the defendant argued that the court should require the plaintiff to accept the judgment. *Id.* at 444-45, 593 S.E.2d at 261-62. The circuit court permitted the nonsuit because the plaintiff was not "willing to accept" the amount of the confessed judgment. *Id.* at 445, 593 S.E.2d at 262. This Court affirmed, noting the statutory requirement. *Id.* at 446-47, 593 S.E.2d at 264. This again recognizes the distinction between confessed judgments and those entered by the court through the adjudicatory process. The statutory mandate that if a confessed judgment is set aside the matter proceeds as if an action at law had been instituted on the debt deserves the same respect.[4]

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[4] *Eckert* was decided under the statutory requirements for confessing judgment when an action at law is pending set forth in Section 8.01-431. This case addresses a confession of judgment under Section 8.01-432, which establishes requirements when no action is pending. But the two statutory provisions include the identical requirement that the confessed judgment be for only such principal and interest as the creditor (or plaintiff) "may be willing to accept" and thus the reasoning of *Eckert* is fully applicable.

As this Court has recognized, "[c]onfessed judgments are creatures of statute in Virginia." *Westlake Legal Grp. v. Flynn*, 293 Va. 344, 798 S.E.2d 187, 190; (Va. 2017). "[T]o the extent they are in derogation of the common law, such statutes are strictly construed." *Id.* (footnote omitted). By statute, a confessed judgment is limited to the amount the creditor is "willing to accept." Va. Code Ann. § 8.01-432. When a court sets aside a confessed judgment, the statute requires the case to then proceed as if the creditor had filed an action on the debt. Va. Code Ann. § 8.01-433. Thus, the creditor receives either a confessed judgment for an amount it is willing to accept, or the opportunity and obligation to establish the full extent of the debtor's liability. The statute does not authorize the circuit court to treat a disputed debt in a summary fashion merely because the case was commenced with the entry of a confessed judgment.

B. The circuit court's acceptance of the defendant's proffer of the amount owed impermissibly short circuited the litigation.

The circuit court essentially entered summary judgment for Hunter Mill, but did so on a disputed and incomplete factual record. While the circuit court did not proceed under Rule 3:20, its decision contravened the well-established principles that factual disputes are not to be

resolved on a summary basis and that courts should not short-circuit the litigation process. *See* Va. Sup. Ct. R. 3:20 ("Summary judgment shall not be entered if any material fact is genuinely in dispute."); *Fultz v. Delhaize Am., Inc.*, 278 Va. 84, 88, 677 S.E.2d 272, 279 (2009) ("we have repeatedly held that summary judgment is a drastic remedy, available only when there are no material facts genuinely in dispute.").

By ignoring the requirements of Section 8.01-433, the circuit court deprived Catjen of its right to establish Hunter Mill's full liability. The circuit court deprived Catjen of the ability to demonstrate the collateral and judicial estoppel impact of the prior bankruptcy adjudication. It denied Catjen the ability to show Hunter Mill's prior inconsistent interpretation of the meaning of the contract. The court deprived Catjen of the ability to establish Hunter Mill's liability for other amounts due on the Note that were not included in the confessed judgment.

This case presents another situation where a circuit court has "incorrectly… short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits." *Id.* at 88, 677 S.E.2d at 274 (citing *Renner v. Stafford*, 245 Va. 351, 352, 429 S.E.2d 218, 219 (1993)). Although this case arises in the context of a

confessed judgment proceeding, the principle is equally applicable to the litigants deprived of the opportunity to establish their rights.

2. The circuit court erred when it entered a judgment that ignored a prior binding and final adjudication of the amount due and was contrary to the terms of the Note and Virginia law.

(Assignment No. 2)

A. The amount due on the Note and the manner to calculate interest had been judicially determined and could not be revisited.

Hunter Mill and Catjen fully litigated the balance due under the Note during Hunter Mill's first bankruptcy case. Following an evidentiary hearing, the bankruptcy court accepted Hunter Mill's position and fixed the amount owed as of November 9, 2012 at $1,504,998.55. Hunter Mill acknowledged that accrued and unpaid interest was to be compounded and added to the principal balance monthly. After that ruling, the only determination that ever needed to or could be made with regard to the balance of the Note was the amount of interest accrued and unpaid each month after November 9, 2012. When Catjen confessed judgment, it started with the principal amount determined by the bankruptcy court and then brought the accrual and compounding of interest forward on a monthly basis.

Hunter Mill's argument that interest stopped compounding after its failure to pay the Note when due is barred by principles of res judicata. As this Court recently explained "Res judicata involves both issue and claim preclusion." *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 142, 795 S.E.2d 887, 890 (2017). Issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Lee v. Spoden*, 290 Va. 235, 246 (2015) quoting *Taylor v. Sturgill*, 553 U.S. 880, 892 (2008). While res judicata encompasses four preclusive effects, there is a straightforward underlying principle:

> For all of the legal argot making the doctrine sound tiresomely erudite, the thought is really no more complicated than saying that, as Henry Black put it, litigants must "make the most of their day in court." 2 Black, *supra* note 5, § 731, at 1096. With equal clarity, it could also be said: "The law should afford one full, fair hearing relating to a particular problem—but not two."

Lecego, 293 Va. at 142, citing Kent Sinclair, Guide to Virginia Law & Equity Reform and Other Landmark Changes § 11.01, at 246 (2006).

The preclusive effect of res judicata and collateral estoppel apply equally to bankruptcy orders. *See Bill Greever Corp. v. Tazewell Nat'l.*

Bank, 256 Va. 250, 259, 504 S.E.2d 854, 859 (1998) (applying *res judicata* to prior bankruptcy proceedings) (citing *Bates*, 214 Va. 667, 670, 202 S.E.2d 917, 920 (1974)); *In re Baudoin*, 981 F.2d 736, 742 (5th Cir. 1993); *see also In re Brady*, 200 B.R. 178, 180 (S.D. Ohio 1996) (prior bankruptcy court order overruling debtor's objections and allowing proof of claim was a "final judgment" for *res judicata* purposes). If Hunter Mill wanted to argue that accrued interest due under the Note stopped compounding after maturity it had both every opportunity and incentive to do so in the bankruptcy court. Instead, Hunter Mill construed the Note as requiring accrued and unpaid interest to be compounded monthly, urged that construction upon the bankruptcy court, and prevailed in its argument. It cannot reverse position at its whim.[5]

Here, both the amount owed on the Note and the method by which to compute interest were fully and finally adjudicated. The bankruptcy court fixed the balance of the Note as of November 9, 2012 at $1,504,998.55. In fixing that balance, the bankruptcy court computed the

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[5] In addressing principles of judicial estoppel, the Court has recognized that parties cannot "play[ ] fast and loose" with the courts, changing positions depending on perceived self-interest. *Wooten v. Bank of America*, 290 Va. 306, 777 S.E.2d 848 (2015).

amount due by compounding accrued and unpaid interest monthly after the date of maturity, as requested by Hunter Mill. Claims Order, JA 67; Claims Objection hearing, Exhibit 12, JA 286-290.

The Claims Order meets every requirement of *res judicata*. It is a final judgment of the amount due as of November 9, 2012. It expressly survived the dismissal of Hunter Mill's bankruptcy proceeding under 11 U.S.C. § 349. Likewise, the manner of calculating interest, including the monthly compounding of accrued and unpaid interest after maturity, was determined, and that determination was essential to the bankruptcy court determination of the amount due and finalized in the judgment. Accordingly, Hunter Mill was barred from raising or arguing for some different or more favorable way of calculating interest. *See* Va. Sup. Ct. R. 1:6; *Funny Guy,* 293 Va. at 155, 795 S.E.2d at 897 ("Reasonable commercial parties would not expect, much less want, a mere payment dispute to disintegrate into multiple lawsuits.").

Because the matters were conclusively established, the circuit court simply should have taken the amount due as determined by the bankruptcy court and added interest for the intervening years.

B. The circuit court erred in accepting Hunter Mill's claim that only simple interest was allowed after Hunter Mill's default.

Even if the circuit court had been free to revisit the manner to calculate interest, it was required to do so in accordance with the terms of the Note. The parties' contract creates the law of the case. *Marina Shores, Ltd. v. Cohn-Phillips, Ltd.*, 246 Va. 222, 225, 435 S.E.2d 136, 138 (1993). The court's construction of a contract raises a question of law that is reviewed de novo. *PMA Capital Ins. Co. v. US Airways, Inc.*, 271 Va. 352, 357-58, 626 S.E.2d 369, 372 (2006) (citing *Bentley Funding Group, L.L.C. v. SK & R Group, L.L.C.*, 269 Va. 315, 324, 609 S.E.2d 49, 53 (2005)).

Whether a note bears simple or compound interest is a matter of contract. *Blanchard v. Dominion Nat'l. Bank*, 130 Va. 633, 108 S.E. 649, 651 (1921). Under Virginia law, a lender must contractually provide for compound interest; "If the note makes no provision as to whether the interest due thereon is simple or compound, only simple interest may be assessed." *Cunningham v. Johnson*, 241 Fed. Appx. 913 (4th Cir. 2007).

Here, interest payments were due on the first of the month for each month "until maturity." If the interest was not paid, the Note provides for compound interest:

> Borrower hereby expressly acknowledges and agrees that this Note provides for payment of compound interest, and that the principle balance of this loan shall increase wherever, and every time, that a monthly payment due hereunder is not received by Lender, that month's late fee, as well as interest due and payable for that month, shall be added to the total principle balance of the Loan. The principle balance shall thus increase, and failure to make any subsequent monthly payment(s) shall also have the effect of increasing the principle balance of the debt due hereunder.

JA 4.

The Note thus requires unpaid interest to be compounded monthly "every time, that a monthly payment due here under is not received by the Lender." JA 4. Interest in arrears was due on the first day of each month "continuing on the same day of each and every calendar month thereafter until maturity." JA 2. Hunter Mill defaulted and did not pay the amount due on November 19, 2009. The circuit court held that the compounding of accrued and unpaid interest stopped on that date, accepting Hunter Mill's contention that the language "until maturity"

meant that accrued and unpaid interest stopped compounding after November 19, 2009. The ruling is at odds with longstanding Virginia law.

Incidents of a debt which apply until "maturity"—such as the interest rate—continue to apply until payment. See *Cecil & Perry v. Hicks*, 70 Va. 1 (1877). In *Cecil & Perry*, the parties' note provided for a 12% interest rate "until maturity." *Id.* at 3-4. The borrower defaulted and the creditor sued to collect. The borrower argued that the lower statutory interest rate should apply after default because the contract stated that interest at 12% ran only until "maturity" and not "until payment." *Id.* This Court disagreed—holding that interest was "an incident of the debt" and construed the contract "precisely as if the words 'till paid' had been inserted therein" because "such was their obvious meaning." *Id.* at 6 (emphasis added). In reaching its decision, this Court rhetorically asked: "Would one man in a hundred have supposed that his default in paying his debt at maturity would entitle him to withhold the principal indefinitely thereafter at one-half the contract rate of interest for the agreed period of the loan?" *Id.* at 7.

This Court has repeatedly affirmed this principle. *See Evans v. Rice*, 96 Va. 50, 56, 30 S.E. 463, 465 (1898) ("[T]he rate of interest

reserved in the contract continues as an incident of the debt due, in the absence of any stipulation to the contrary."); *Richmond, Fredericksburg & Potomac R.R. Co. v. City of Richmond*, 145 Va. 225, 244, 133 S.E. 800, 805 (1926); *see also Fleming v. Bank of Va.*, 231 Va. 299, 307, 343 S.E.2d 341, 345 (1986) ("Where a specified rate of interest is contracted for… that rate will continue to apply after maturity of the obligation, and even after judgment, until the debt is fully paid.").

This same principle applies when considering the method to compute interest. Compound interest applies only if contractually agreed. But once contracted for, the method to calculate interest is—like the rate of interest— "an incident of the debt." It likewise should continue "until the debt is paid." The circuit court followed this law when it first denied the motion to set aside the confessed judgment. November 8, 2016 Tr., JA 54:10-15. It committed error when it reversed itself.

C. The final Order proffered by Hunter Mill improperly minimized Hunter Mill's obligation by not following the terms of the contract and Virginia law regarding the computation of interest.

Essentially given a free hand to set the amount of the judgment, Hunter Mill looked to minimize its obligation and in doing so its proffered final Order ignored the terms of the Note and Virginia law. The order

submitted by Hunter Mill first provides that no interest whatsoever accrued on the Note for 10 months; from July 22, 2016—the date Catjen foreclosed on the collateral property—until the entry of the final Order on May 19, 2017. The final Order then provides that the judgment would bear interest only at the lower statutory judgment rate rather than the contract rate set forth in the Note, clearly contrary to what the parties stipulated to in the Note and governing Virginia law.

To accomplish this result, the proffered final Order contradicted two separate provisions of the Note. First, Hunter Mill created the artifice of a fixed and never changing $1 million "principal" balance—notwithstanding the prior judicial determination of a $1.5 million balance— and then labeled all other amounts accrued and unpaid under the Note as "interest." Second, Hunter Mill ignored the terms of the Note governing the application of payments. Pursuant to the express terms of the Note payments apply to interest first, then to principal. Note, JA 3 ("Payments… shall be applied first to the payment of … interest, and the remainder shall be credited to principal").

Catjen of course agrees that Hunter Mill was entitled to a credit for the $1.3 million foreclosure bid, and gave Hunter Mill the credit when

entering the confessed judgment. Hunter Mill improperly used that credit to claim that the entire "principal" balance was paid, and therefore no further interest could be awarded on the outstanding balance because interest could not accrue on unpaid interest. Thus, the proffered final Order called the difference between the credit amount and the unpaid balance solely "unpaid interest." JA 317 ("judgment be and hereby is entered… in the amount of $1,101,171.75, which represents "unpaid interest" under the terms of the Note. Judgment shall run on that amount at the judgment rate."). The circuit court should have simply followed the Note, applied the credit to the amount due, and awarded Catjen interest on the unpaid balance.

The final judgment also provided for interest "at the judgment rate" on the proffered judgment of $1,101,171.75. JA 317. The Note stipulated that interest on any judgment rendered thereon would accrue at the default rate set forth in the Note.

> If judgment is entered against the Borrower on this Note, the amount of such judgment entered (which may include principal, interest, fees, and costs) shall bear interest at such Default Rate as of the date of entry of judgment.

JA 5; *see also id.* at 9.

By statute, when a contract stipulates an interest rate, a judgment on the contract carries interest at the contract rate: "The judgment rate of interest shall be an annual rate of six percent, except that a money judgment entered in an action arising from a contract shall carry interest at the rate lawfully charged on such contract… " Va. Code Ann. § 6.2-302. The proffered judgment ignored Virginia law.

D. The Court can enter final judgment based on the current record.

When the circuit court initially decided to reconsider Hunter Mill's motion, the record of the bankruptcy court was not before it. But that record was submitted before the final judgment was entered and is now before this Court. The record establishes beyond debate that the bankruptcy court set the balance due on the Note as of November 9, 2012 at $1,504,998.55. This amount is undisputed. JA 66-70. Thus the amount of the judgment —derived by simply computing and compounding interest based upon the beginning balance $1,504,998.55 from November 9, 2012, to the date of the entry of judgment is a mathematical calculation. The confessed judgment order demonstrates that is exactly what Catjen did. COJ, JA 1-26. Carrying the calculation forward at the interest rate set forth in the Note and in a manner consistent with the

determination of the bankruptcy court, this Court can enter a final judgment in favor of Catjen.

When there is a sufficient record this Court can enter final judgment on behalf of one of the parties. *See e.g. Wright v. Bryan,* 226 Va. 557, 561-62; 331 S.E.2d 776, 778-779 (1984) (reversing the circuit court's judgment in dispute regarding the validity of a real estate contract and entering final judgment on the main claim for the seller and realtor); *Village Motors, Inc. v. Am. Fed. Sav. And Loan Ass'n*, 231 Va. 408, 413-14, 345 S.E.2d 288, 291 (1986) (reversing the circuit court's grant of summary judgment and entering final judgment in favor of appellant where the facts were undisputed the Court could interpret the law at issue); *Orgain v. Butler*, 255 Va. 129, 131; 496 S.E. 433, 435-36 (1998) (reversing the chancellor's decree and entering final judgment to confirm the commissioner's report where the evidence did not support the chancellor's conclusions that the parties' interests would be promoted by this method of sale).

3. The circuit court erred in refusing Catjen's request to nonsuit.

(Assignment No. 3)

The Court reviews de novo whether a plaintiff was entitled to a nonsuit of right. *Wilby v. Gostel,* 265 Va. 437, 440, 578 S.E.2d 796, 798 (2003). Here, the circuit court's failure to appreciate the procedural posture of the case again led to error.

The Court need not necessarily reach this error if it decides to enter final judgment in Catjen's favor. But the circuit court's refusal to allow a nonsuit compounded the need for this Court's review. Allowing the nonsuit simply would have afforded Catjen an opportunity to then pursue its rights under the confessed judgment statute; an action on the Note to be decided on evidence and full submissions.

A party may take one nonsuit "as a matter of right." Va. Code Ann. § 8.01-380(B). "A party shall not be allowed to suffer a nonsuit… unless he does so before a motion to strike the evidence has been sustained or before the jury retires from the bar or before the action has been submitted to the court for decision." *Id.* at § 8.01-380(A).

Given the posture of this case, the only question is whether the matter had been "submitted to the court for decision." It had not. After

the circuit court granted Hunter Mill's motion to reconsider and set aside the confession of judgment—but held the matter open for further submissions—Catjen moved to nonsuit. This Court has repeatedly held that "when further submissions from the parties are contemplated, a matter has not been fully yielded for decision or finally determined." *Liddle v. Phipps*, 263 Va. 391, 394, 559 S.E.2d 690, 692 (2002); *see also City of Hopewell v. Cogar*, 237 Va. 264, 377 S.E.2d 385 (1989) (holding that there was no submission of the issue when the circuit court permitted litigants to file additional memoranda in support of their positions on summary judgment). Notably for this case, a confession of judgment for less than what the plaintiff is "willing to accept," does not end the case or constitute a submission to the Court precluding a nonsuit. *See AAA Disposal Servs., Inc. v. Eckert*, 267 Va. 442, 593 S.E.2d 260 (2004) (affirming nonsuit order granted where the plaintiff was not willing to accept confession of judgment).

Here, after granting Hunter Mill's motion to set aside the confessed judgment, the circuit court set the matter down for a hearing and further submissions regarding the amounts due under the Note. April 21, 2017 Tr., JA 125:9-126:19. Catjen moved to nonsuit before the parties made

any submissions and renewed its motion at the final argument. Because Catjen was entitled to a nonsuit of right, the circuit court erred by not granting Catjen's motion for nonsuit.

CONCLUSION

The circuit court's failure to appreciate the actual procedural posture of a confessed judgment proceeding led to multiple reversible errors. The circuit court failed to follow the statutory mandate, and instead treated a contested confessed judgment as a summary proceeding. The error deprived Catjen of the opportunity to establish Hunter Mill's full liability and ignored the distinction between confessed judgments and those resulting from the judicial adjudication of a disputed claim. The circuit court's decision to accept Hunter Mill's proffer of the amount owed ignored the prior position advanced by Hunter Mill to the bankruptcy court as well as the bankruptcy court's final and binding adjudication of Hunter Mill's liability. The circuit court also misconstrued the terms of the Note and misapplied Virginia law. The terms of the Note, the proper application of Virginia law, and the recognition of the impact of the prior binding adjudication, conclusively establishes that the amount due is properly set forth in the confession of

judgment order. Hunter Mill has not raised any adequate defense to the confessed judgment. Finally, the circuit court failed to grant Catjen a nonsuit of right, which would have allowed Catjen to then proceed with an action on the Note.

Based on these errors, Catjen requests the following relief:

(1) That the Court reverse and vacate the circuit court's Order of May 19, 2017 and enter final judgment in favor of Catjen in the amount of $2,402,838.20, as of August 11, 2016, with interest thereon computed and compounded monthly as set forth in the Note, until paid, because the amount sought in the confessed judgment can be ascertained with finality; or

(2) Alternatively, if the Court declines to enter final judgment at this time, reverse the circuit court's Order of May 19, 2017 and remand for further proceedings with instructions that; (i) the circuit court should proceed in accordance with 8.01-433 by treating the matter as if an action had been filed on the Note; (ii) the denial of Catjen's request to nonsuit was error; and (iii) the denial of Catjen's request for a hearing with respect to the recovery of attorney's fees was error; and

(3) For such further relief as the Court may deem just and proper.

Dated: January 23, 2018

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CERTIFICATE

I hereby certify that on this 23rd day of January, 2018, pursuant to Rules 5:26 and 5:32(a)(3)(i), three paper copies of the Brief of Appellant and three paper copies of the Appendix have hand-filed with the Clerk of the Supreme Court of Virginia and electronic copies of the Brief and Appendix were filed, via VACES. On this same day, an electronic copy of the Brief of Appellant was served, via email, and electronic copies on CD of the Brief and Appendix were served, via UPS Ground Transportation, upon:

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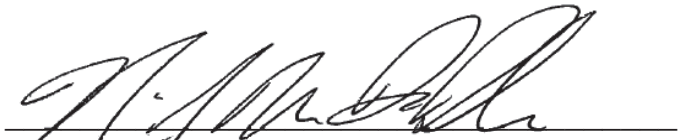

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