In The

Supreme Court of Virginia

RECORD NO. 171067

CATJEN, LLC,

Appellant,

v.

HUNTER MILL WEST, L.C.,

Appellee.

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The brief of appellee Hunter Mill West, L.C. is marked by an after-the-fact effort to shoehorn the circuit court's decision into the statutory procedural framework for resolving a debtor's challenge to a confessed judgment, and an insistence that it be allowed to re-litigate matters that had been fully and finally resolved in prior bankruptcy proceedings in which Hunter Mill took the opposite position from that advanced in this case. But it is the circuit court's failure to proceed in accordance with the actual procedural posture that led to the court's multiple errors in entering a final judgment based simply on a debtor's proffer of a judgment amount the debtor would concede. And this Court has consistently reaffirmed the principle that a party is neither entitled to multiple opportunities to litigate its claims nor allowed to "play fast and loose" with its contentions depending on the needs of the moment.

Hunter Mill's brief does not provide any meaningful support for its request that the Court approve the circuit court's judgment. First, Hunter Mill seeks to avoid any consideration of both its prior position and the adjudication of its asserted defense in the bankruptcy court by invoking the maxim that a court speaks only through its orders. This attempt ignores long-established law holding that the court reviews the record of the proceedings in a prior adjudication to determine the scope of the resulting estoppel. Second, the appeal does not present any discretionary

decisions rendered by the circuit court. Whether the circuit court properly followed the governing statute should be reviewed de novo. Third, the contention that the circuit court followed Section 8.01-432 and held a trial is internally contradictory, and ignores both the statutory language and the actual procedural history below. Finally, Hunter Mill misinterprets the terms of the Note and Virginia law regarding the computation of interest.

ARGUMENT

1. The prior bankruptcy court determination of the amount owed on the Note and the proper manner of computing and compounding interest is dispositive of the asserted defense.

The grounds Hunter Mill asserted as a defense to the confessed judgment is premised entirely on the contention that interest on the Note ceases to compound after maturity. But in the prior bankruptcy court proceeding, Hunter Mill presented testimony and other evidence by which it unequivocally acknowledged that interest continued to compound after the Note matured, and the bankruptcy court's Order establishing the debt calculated the amount due using that formula.

Hunter Mill now argues that the bankruptcy court order did not expressly distinguish between principal and interest or specifically explain the calculation of interest, and, because courts speak only through written orders, the prior determination by the bankruptcy court is somehow irrelevant. *Hunter Mill Br. p. 18.* Thus, Hunter Mill asserts that the prior judgment simply plays no role in

determining the amount owed on the Note and whether Hunter Mill raised an adequate defense.

The maxim that courts speak through their orders is a laudatory rule, but has little application when determining the res judicata or other estoppel impacts of prior judicial adjudications. This Court held long ago that in determining what has been adjudicated and in ascertaining the scope of the resulting estoppel, the court's inquiry is not so limited and "may extend to the evidence and instructions as well as to pleadings and judgment." *Ouner Anderson Patterson v. Rosetta Anderson*, 194 Va. 557, 565, 74 S.E.2d 195, 200 (1953). Indeed, this Court has recognized that the inquiry into the estoppel impact of a prior adjudication requires examination not just of the final order but also of the record of the underlying proceedings. *Bernau v. Nealon*, 219 Va. 1039, 254 S.E.2d 82 (1979). In *Bernau*, the circuit court sustained a plea of res judicata. On review, this Court reversed because the record consisted solely of the final order of the prior proceedings. While the trial judge hearing the plea was also the judge who entered the final order in the prior proceeding, this Court determined that merely reviewing the final order from the prior case was insufficient and that the entire record of the prior adjudication was appropriate and necessary in determining the estoppel impact of the judgment. *Id.* at 1041, 254 S.E.2d at 84.

These holdings are no surprise, and are not inconsistent with principles intended to avoid arguments over the potential meaning of a circuit court's orders.

What a court has ordered is to be determined from within the four corners of the order. Res judicata has much broad application, applying not only to matters actually decided, but to those that might have been decided or asserted arising from the same conduct, occurrence, or transaction. Rule 1:6; *Funny Guy, LLC v. Lecego*, 293 Va. 135, 795 S.E.2d 887 (2017). Likewise, issue preclusion requires the court to determine what positions were taken by the parties and whether a particular issue was addressed, in order to give preclusive effect to issues actually decided. *See D'Ambrosio v. Wolf*, 809 S.E.2d 625, 630 (Va. 2018). Judicial estoppel applies to positions taken in the prior litigation, to prevent litigants from "'playing fast and loose' with the courts ... or 'blowing hot and cold' depending on perceived self-interest." *Id.* at 631 (quoting *Wooten v. Bank of Am., N.A.*, 290 Va. 306, 310, 777 S.E.2d 848, 850 (2015)). All require the review of the record of the prior proceedings.

Here, after the circuit court indicated it was reconsidering its prior ruling, Catjen submitted the record from the bankruptcy court. It shows the prior inconsistent position taken by Hunter Mill in the bankruptcy court and demonstrates that the determination of the judgment as submitted by Hunter Mill included the compounding of interest after default. Hunter Mill does not—and cannot—dispute that the bankruptcy court judgment established the amount due on the Note as of the date of bankruptcy filing and that the amount was calculated by compounding

interest after default. JA 289-290. Hunter Mill does not—and cannot—dispute that its own evidence and calculations, as submitted to and accepted by the bankruptcy court, recognized that the amount due under the Note included compound interest after default. JA 289-290; 272:23-25; and 275:3-8. Finally, Hunter Mill does not—and cannot—dispute that in confessing judgment, Catjen started with the balance established by the bankruptcy court and simply carried the interest calculation forward, using the same method of calculation that Hunter Mill told the bankruptcy court was appropriate. JA 289-290; 272:23-25; and 275:3-8.

Because these facts are not subject to debate, Hunter Mill simply contends that the bankruptcy proceeding should be ignored, attempting to put blinders on the Court as to issues previously decided by invoking the inapplicable rule that circuit courts speak only through their written orders.

2. The statutory framework for resolving challenges to confessed judgments is not discretionary.

Hunter Mill argues that the statute governing challenges to confessed judgments vests broad discretion in the circuit court and, accordingly, its actions should be reviewed under an abuse of discretion standard. This argument ignores the actual statutory framework. Section 8.01-433 provides that the circuit court may set aside or modify a confessed judgment if a debtor has raised grounds which would have been an adequate defense or set-off if an action at law had been instituted upon the note or debt. The statute then mandates that if the confessed 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." Va. Code Ann. §8.01-433 (emphasis added). The word "shall" in a statute is typically mandatory and directive. *Zinone v. Lee's Crossing Homeowner's Ass'n*., 282 Va. 330, 336, 714 S.E.2d 922, 925 (2011). Whether to follow a statutory directive is not discretionary.

Hunter Mill's argument rests upon the final sentence of the statute. It provides that "[a]fter the 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 (emphasis added). This sentence recognizes that after a confessed judgment is set aside an action at law is now pending in which there has not been a complaint, answer, or other pleadings setting forth the parameters of the claim. Accordingly, the court is granted discretion as to how best to posture the case for trial. For example, if the court has determined that a debtor has asserted facts that, if proven, would be an adequate defense in an action at law, the court may decide that an answer or grounds of defense setting forth the facts supporting the claimed defense is appropriate. The court likewise might require the creditor/plaintiff to file a bill of particulars or require the debtor/defendant to file an answer or raise a set off or affirmative defense by other appropriate pleadings. The sentence relied upon by

Hunter Mill simply recognizes the circuit court's inherent right to manage its trial docket and direct the procedures in the case going forward.

Nothing in that sentence negates the directive that once a confessed judgment is set aside, the matter is to be placed on the trial docket and thereafter proceed as if an action at law had been filed. The directive is particularly important since Hunter Mill argued below—and repeats the argument in its brief—that the merits of the defense are not at issue in deciding whether to set aside the judgment; the issue is only whether an adequate defense has been raised.[1] But once adequate grounds are raised that set forth a defense, the confessed judgment should be set aside and the matter placed upon the trial docket with further proceedings as if an action at law had been filed on the debt. The circuit court erred in not following that directive.

3. Section 8.01-433 does not contemplate adjudication of final judgments through party proffers.

Hunter Mill contends that the circuit court followed the statutory procedures by setting the matter on the trial docket and holding a trial on November 8, 2016. The argument is self-contradictory, as November 8th actually is the date the circuit court first heard—and denied—the motion to set aside the confessed judgment. In

[1] The legislature used the word "adequate" for an obvious reason. If the defense can be determined to be inadequate as a matter of law there is no reason to set aside the judgment or place the matter on the trial docket.

any event this Court need not resolve the inherent inconsistency, as both contentions are wrong.

A. The initial hearing on the motion to set aside was not a trial.

There was no trial either before or after the circuit court decided the motion to set aside the confessed judgment. The statute provides that if a confessed judgment is set aside or modified "the case shall be placed on the trial docket of the court. . . ." Va. Ann. §8.01-433. Thus, placing it on the trial docket for further proceedings *follows* setting aside the judgment. Hunter Mill argues that the circuit court followed this procedure by setting the matter for trial on November 8, 2016. The record is clear. The only thing heard on November 8, 2016 was the motion to set aside the confessed judgment.

The circuit court initially determined that an adequate defense had not been raised and denied the motion to set aside the judgment. JA 36. While it later reconsidered that decision, the November 8th hearing on the motion cannot temporally or logically be a trial on the merits. Likewise, it cannot constitute the court's action in setting the matter on the trial docket <u>after</u> granting a motion because the motion was not granted until more than five months after the November 8th hearing. Simply put, the hearing on November 8th was a motions hearing. This point is illustrated by the fact that almost every time Hunter Mill refers to the November

8th hearing as a trial, it sets the word trial within quotation marks; an implicit recognition that there was no trial. *See Hunter Mill Br., p. 1, 6, & 13*.

B. The circuit court did not proceed as if an action at law had been filed on the debt.

Hunter Mill also argues that Catjen is simply wrong in contending that Section 8.01-433 requires the case to proceed as if the creditor had filed an action on the debt. That directive is taken directly from the statute; after a matter is placed on the trial docket, "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 judgment was confessed." Va. Code Ann. §8.01-433.

The statute mandates that if a confessed judgment is set aside the action proceeds as if the creditor was suing on the debt. Thus, a creditor can confess a judgment for an amount it is willing to accept. If the confessed judgment is set aside or modified, it is incumbent upon the creditor to establish its right to a judgment in the face of any adequate defense or set off raised by the debtor. Of course, a trial also permits the creditor to establish the full extent of the debtor's liability, not just the amount the creditor was willing to accept in a confessed judgment.[2]

As applied here, once the circuit court determined to set aside the confessed judgment, Catjen should have been given the right to proceed as a plaintiff on its

[2] Using the formula approved by the bankruptcy court, Catjen confessed judgment only for principal and interest. Other amounts were also due under the Note.

claim on the Note. It should have been allowed to seek to establish the full extent of the debtor's liability. Late charges, attorney's fees and other lawful amounts due and owing under the governing loan documents should have been permitted, if proven at trial.

C. Catjen has not assumed inconsistent positions regarding the need for a trial.

Hunter Mill argues that Catjen's position that the matter should have been set for trial is inconsistent with (a) Catjen's statement during the November 8th hearing that the issue before the court presented a question of law, and (b) Catjen's request that this Court enter final judgment. There is no purported approbation and reprobation here because there simply is no inconsistency.

The parties' agreement during the November 8th hearing that the sole issue presented was a legal question for determination by the circuit court must be viewed in the context of the hearing. Hunter Mill filed a short motion to set aside the confessed judgment that raised four issues in a perfunctory fashion. At the hearing, Hunter Mill pursued only one argument—its contention that the Note called for simple interest as opposed to compound interest. On that issue, Catjen correctly pointed out that the proper interpretation of the contract raised a question of law. However, Hunter Mill subsequently raised in its reconsideration request new issues, not addressed by that previous straight-forward assertion regarding the interpretation

of a contract. In any event, if the circuit court determined that any grounds raised an adequate defense, the law requires that the matter proceed as if an action had been filed on the Note, and thus allow Catjen to establish the debtor's full liability. Those issues involve more than the mere determination of whether interest continued to compound after default.

Likewise, there is no inconsistency with the position that this Court can now enter judgment in Catjen's favor. After the circuit court reversed its initial interpretation of the Note and indicated its intention to enter a reduced final judgment, Catjen placed before the court the record of the bankruptcy court proceedings. That bankruptcy court record establishes the prior binding judicial adjudication establishing the amount due on the Note based upon the manner in which Hunter Mill had asserted that post-default interest was to be calculated. Questions of res judicata or the estoppel impact of prior adjudications are questions of law subject to this Court's de novo review. The prior record is before the Court and, as addressed in Section 1 above, Hunter Mill does not challenge the facts that were established, it challenges only whether this Court should look at the record. Since that adjudication is clearly relevant to the issues—and legally dispositive of the question presented—judgment may be entered.

4. The final judgment misapplied Virginia law.

Even if Hunter Mill's argument that the Note called for simple interest after default was not foreclosed by the prior bankruptcy court adjudication, the Note expressly provides for the compounding of interest.[3] JA 4. Hunter Mill's argument for "simple interest only" after default is premised on the notion that since the Note does not expressly provide for "monthly payments" after maturity, and therefore interest on amounts unpaid after maturity do not compound. Such a tortured reading of the Note ignores the agreement of the parties that when a "payment due" is not received by the creditor unpaid interest is compounded. After default, the *entire* amount was due, and due every day. As addressed in Catjen's opening brief, interest on the Note—and the manner to calculate that interest—are incidents of the debt. Incidents of the debt continue until the debt is paid.

5. The parties had not yielded the issues to the circuit court and therefore denial of the nonsuit was improper.

Hunter Mill contends that Catjen was not entitled to a nonsuit because the parties had submitted the issue to the circuit court. But Hunter Mill also recognizes that the circuit court actually left open for argument the determination of the amount

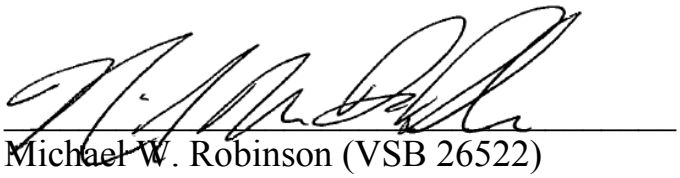
[3] The Note provides "Borrower hereby expressly acknowledges that this Note provides for the payment of compound interest, and that the principal balance of this Loan shall increase whenever, and every time that, a monthly payment due here under is not received…and interest payable for that month shall be added to the total principal balance of the Loan."

owed. *Hunter Mill Br. p. 25*. When Catjen raised the fact that it had not been given the opportunity to address the calculations Hunter Mill presented for the first time in its motion for reconsideration, the court set the matter down for further argument. When the court has left open matters for argument or further submissions, it is error to deny a nonsuit. *Liddle v. Phipps*, 263 Va. 391, 394, 559 S.E.2d 690, 692 (2002).

CONCLUSION

Because the circuit court failed to appreciate the actual procedural posture of the matter, it improperly entered judgment based on the defendant's proffer. That proffer, in turn, was wholly inconsistent with the position Hunter Mill asserted in the bankruptcy court, and contrary to the actual determination of the bankruptcy court. If Hunter Mill had raised grounds constituting an adequate defense, Catjen's should have been given a trial in order to establish Hunter Mill's liability, or given the right to take a non-suit. But those rights were denied. For the reasons set forth in Catjen's opening brief and in this reply, the decision of the circuit court should be reversed, the May 19, 2017 Order vacated, and Catjen awarded the relief requested in its opening brief, along with such further relief or orders as the Court may deem just and proper.

Dated: April 23, 2018



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CERTIFICATE

I hereby certify that on this 23rd day of April, 2018, pursuant to Rule 5:26, three paper copies of the Reply Brief of Appellant have hand-filed with the Clerk of the Supreme Court of Virginia and an electronic copy of the Reply Brief was filed, via VACES. On this same day, an electronic copy of the Reply Brief of Appellant was served, via email, upon:

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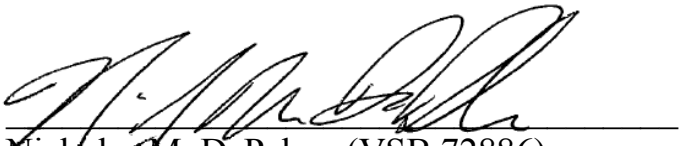

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