

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

TD BANK, N.A.,	:	February Term 2009
Plaintiff,	:	
v.	:	No. 3713
JOINT THEATER CENTER, LLC,	:	
Defendant.	:	Commerce Program
	:	
	:	Control Number 09121347

**ORDER**

**AND NOW**, this 23<sup>rd</sup> day of February 2010, upon consideration of Plaintiff TD Bank, N.A. Motion for Summary Judgment and all responses in opposition, it hereby is **ORDERED** that the Motion is **Granted**. Judgment of mortgage foreclosure is hereby entered in favor of TD Bank, N.A. and against Joint Theater Center, LLC in the amount of \$981,403.94, plus per diem interest of \$215.24 from February 19, 2009 until the day the real property located at 1412-14 Chestnut Street, Philadelphia, Pa. (a/k/a “Prince Theater”) is sold at sheriff’s sale.

**BY THE COURT,**

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**ARNOLD L. NEW, J.**

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JOINT THEATER CENTER, LLC,	:	
Defendant.	:	Commerce Program
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**OPINION**

This is an action in mortgage foreclosure. Defendant Joint Theater Center, Inc. (hereinafter “Joint Theater Center”) is the owner of real property located at 1412-14 Chestnut Street, Philadelphia also known as the “Prince Theater”. On February 24, 2003, Joint Theater Center executed and delivered to plaintiff TD Bank, N.A.<sup>1</sup> (hereinafter “T.D. Bank”) an open ended mortgage providing the premises located at 1412-14 Chestnut Street as security for a promissory note executed by American Music Theater Festival, Inc. in favor of TD Bank in connection with a commercial loan in the principal amount of \$500,000.00. The mortgage was recorded by the Commissioner of Records for the City of Philadelphia on or about April 23, 2003.

In addition to the mortgage, Joint Theater Center also executed a commercial guaranty in favor of TD Bank which guaranteed payment of the amounts due under the loan. On October 29, 2004, the loan was modified. The parties agreed to extend the maturity date of the loan until 2024 and to increase the principal amount of the loan to \$928,000.00. The mortgage was modified to reflect the increased principal amount and was recorded with the Commissioner of

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<sup>1</sup> TD Bank, N.A. is the successor to Commerce Bank pursuant to a merger.

Records for the City of Philadelphia on December 4, 2004.<sup>2</sup> The loans were subsequently modified on August 28, 2008.

On November 11, 2008, TD Bank advised Joint Theater Center of the monetary defaults as well as the addition of penalties, other charges, legal fees and declared the outstanding balance of the loan to be due and provided Joint Theater Center with an opportunity to cure the defaults. TD Bank alleges that \$981,403.94 is due and owing.

On December 23, 2008, TD Bank confessed judgment against Joint Theater Center and American Music Theater Festival, Inc. under the loan for \$957,717.01 in the case of TD Bank, N.A. v. American Music Theater Festival, Inc. and Joint Theater Center, LLC, Court of Common Pleas Philadelphia County Pennsylvania, case no. 081204149 for failure to pay the loan that is at issue in the instant foreclosure action. On August 5, 2009, the court denied Joint Theater Center's Petition to Open Judgment. Joint Theater Center appealed the order. On October 1, 2009, the court stayed execution pending appeal.

On March 18, 2009, a second judgment in the amount of \$4,696,608.63 was entered against Joint Theater Center in the case captioned TD Bank, N.A.,(assignee of PAID) v. Joint Theater Center, LLC and American Music Theater Festival, Inc., Court of Common Pleas of Philadelphia County, Pennsylvania, Case No. 09302930. This judgment is on the second loan issued to American Music Theater Festival, Inc. which Joint Theater Center guaranteed and for which Joint Theater Center provided a mortgage.

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<sup>2</sup> Defendant Joint Theater Center, LLC. alleges that the parties entered into agreement in January 31, 2008 to reduce the combined payments for the existing amount. Defendant Joint Theater argues that TD Bank breached this agreement. This breach in part forms the basis for Joint Theater Center's defense in this action and in the confession of judgment action. It also forms the basis of a claim filed by Joint Theater Center against TD Bank in American Music Theater Festival Inc. v. TD Bank, N.A., January Term 2010 No. 1622, which has been removed to Federal Court.

## DISCUSSION

In a mortgage foreclosure action, summary judgment is properly granted where "the mortgagors admit that the mortgage is in default, that they have failed to pay interest on the obligation, and that the recorded mortgage is in the specified amount." <sup>3</sup> "This is so even if the mortgagors have not admitted the total amount of the indebtedness in their pleadings."<sup>4</sup> Our Superior Court has further explained that "in an action on a note or bond secured by a mortgage, a plaintiff presents a prima facie case by showing 'the execution and delivery of the [note] and its nonpayment . . . .'"<sup>5</sup>

Defendant Joint Theater Center admits in its Answer and New Matter that it executed and delivered the mortgage to TD Bank on February 28, 2003.<sup>6</sup> As for the third element, nonpayment, the doctrine of collateral estoppel operates to prevent Joint Theater Center from relitigating this issue.

Collateral estoppel is based upon the policy that "a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise."<sup>7</sup> Collateral estoppel is applicable when the issue decided in a prior adjudication is identical to that presented in the later action; there was a final judgment on the merits; the party against whom the doctrine is asserted was a party to the prior adjudication or was in privity with such a party; and the party against whom it is asserted had a full and fair

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<sup>3</sup> Cunningham v. McWilliams, 714 A.2d 1054, 1057 (Pa. Super. 1998), *citing* Landau v. Western Pennsylvania National Bank, 445 Pa. 217, 225-26, 282 A.2d 335, 340 (1971).

<sup>4</sup> Id.

<sup>5</sup> Corestates Bank, N.A. v. Cutillo, 1999 PA Super 14, 723 A.2d 1053, 1056 (Pa. Super. 1999), *citing* Philadelphia Workingmen's Sav. Loan & Bldg. Ass'n v. Wurzel, 355 Pa. 86, 90, 49 A.2d 55, 57 (1946).

<sup>6</sup> Answer and New Matter at ¶ 6.

<sup>7</sup> Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107, 115 L. Ed. 2d 96, 111 S. Ct. 2166 (1991).

opportunity to litigate the issue in the prior adjudication.<sup>8</sup> Hence, collateral estoppel prevents "a question of law or an issue of fact which has once been litigated and adjudicated finally in a court of competent jurisdiction from being relitigated in a subsequent suit."<sup>9</sup> For the purposes of collateral estoppel, "a final judgment includes any prior adjudication of an issue in another action that is sufficiently firm to be accorded conclusive effect."<sup>10</sup>

Here, the issue of default for failing to pay has already been fully and fairly litigated in the confession of judgment action, TD Bank, N.A. v. American Music Theater Festival, Inc. and Joint Theater Center, LLC, Court of Common Pleas of Philadelphia County, Pennsylvania, Case No. 081204149, where Joint Theater Center was a defendant.<sup>11</sup> Joint Theater Center filed a petition to open judgment attaching all relevant documentation within its possession wherein it raised the same defenses on payment as those raised herein. Those defenses included TD Bank's alleged wrongful repudiation and breach of an agreement dated January 31, 2008, TD Bank's assertion of default being barred by promissory estoppel, TD Bank's breach of its fiduciary duty as it pertains to the loans and TD Bank's fraudulent and negligent misrepresentations as it pertains to the loans. The court denied the petition without opinion. By denying the petition, the court concluded that the defenses raised in the petition were without merit.<sup>12</sup> As such the order denying the petition to open judgment became final.<sup>13</sup>

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<sup>8</sup> Krosnowski v. Ward, 836 A.2d 143, 148 (Pa.Super. 2003) (en banc) (citing Murphy v. Duquesne University, 565 Pa. 571, 599, 777 A.2d 418, 435 (2001)).

<sup>9</sup> Capobianchi v. Bic Corporation, 446 Pa. Super. 130, 666 A.2d 344, 348 (Pa.Super. 1995) (quoting Day v. Volkswagenwerk Aktiengesellschaft, 318 Pa. Super. 225, 464 A.2d 1313, 1318 (Pa.Super. 1983)).

<sup>10</sup> Comm. v. Holder, 569 Pa. 474, 805 A.2d 499, 504 (Pa. 2002) citing RESTATEMENT (SECOND) OF JUDGMENT § 13 cmt. g; see also Comm. v. States, 891 A.2d 737, 743 (Pa. Super. 2005).

<sup>11</sup> Failing to pay was not the only grounds for default.

<sup>12</sup> A confession of judgment will stand unless a petitioner advances sufficient relevant evidence which in a jury trial would require the issues to be submitted to the jury. Pa. R. Civ. P. 2959 (e).

Since Joint Theater Center litigated the same issue fully and completely in the confession of judgment action and a final judgment on the merits was entered against Joint Theater Center, this court finds that Joint Theater Center is collaterally estopped from relitigating the issue of default for failing to pay. In light of the foregoing, all the elements necessary for a mortgage foreclosure action have been satisfied and summary judgment is granted in favor of the plaintiff TD Bank and against defendant Joint Theater Center.

### **CONCLUSION**

For the foregoing reasons, plaintiff TD Bank N.A.'s Motion for Summary Judgment is granted and judgment is entered in favor of plaintiff and against defendant.

**BY THE COURT,**

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**ARNOLD L. NEW, J.**

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<sup>13</sup> Although the order denying the petition to open has been appealed, the order is final for purposes of collateral estoppel until and unless it is reversed. See Shaffer v. Smith, 543 Pa. 526, 673 A.2d 872, 876 (1996).