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

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| FIRST REPUBLIC BANK, | : | AUGUST TERM, 2000 |
| | : | |
| Plaintiff, | : | NO. 00147 |
| | : | |
| v. | : | COMMERCE PROGRAM |
| | : | |
| STEVEN D. BRAND et al., | : | Control No. 052102 |
| | : | |
| Defendants. | : | |

**ORDER**

**AND NOW**, this 7TH day of October, 2005, upon consideration of defendants' Motion for Summary Judgment, plaintiff's response thereto, the briefs in support and opposition, and all other matters of record, and in accordance with the Opinion filed contemporaneously herewith, it is hereby **ORDERED** that said Motion is **GRANTED** and all of plaintiff's claims are **DISMISSED** with prejudice.

**BY THE COURT,**

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**HOWLAND W. ABRAMSON, J.**

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| Defendants. | : | |

**OPINION**

This action arises out of the sale through merger of Fidelity Bond and Mortgage Company (‘the “Company”) by Defendants, the individual selling shareholders, to Plaintiff, First Republic Bank. The terms of the parties’ transaction were set forth in a “Letter of Intent” dated January 7, 1998. *See* Complaint, ¶ 14. Subsequently, at the closing of the transaction on May 1, 1998 (“the “Closing”), the parties “entered into a ‘Definitive Agreement’ which referenced the terms of the Letter of Intent and the specific representations and warranties of the [Defendants].” *Id.* at ¶ 23. According to Plaintiff, a mortgage loan servicing portfolio (the “Servicing Portfolio”) was one of the major assets of the Company that Plaintiff was purchasing. *See id.* at ¶ 16. Between the execution of the Letter of Intent and the Closing, the value of the Servicing Portfolio apparently declined significantly, but Plaintiff did not become aware of it until several months after the closing, when an audit was performed. *See id.* at ¶¶ 25, 26, 28, 31. Ultimately, the Company went bankrupt, and Plaintiff brought this action against Defendants as a result.

Plaintiff has three claims remaining against Defendants in this action: Count I for breach of the Letter of Intent and the Definitive Agreement; Count II for breach of a Memorandum of Understanding between the parties; and Count III for fraud. Defendants have filed a Motion for

Summary Judgment in which they assert that all of Plaintiff's claims in this action were fully and finally litigated in a federal court action between the parties, which was entitled Powell v. First Republic Bank (the "Federal Action").[1]

It is undisputed that Plaintiff filed the same three claims against Defendants in the Federal Action that it filed in this action. *Compare* Complaint *with* Motion for Summary Judgment ("MSJ"), Ex. C. The trial court in the Federal Action found for Defendants on Count I, found for Plaintiff on Count II, and dismissed Count III as time barred. As a result, Defendants argues that the doctrine of *res judicata* bars Plaintiff from relitigating any of those claims in this action.

> Under the doctrine of *res judicata*, a final judgment on the merits is conclusive of the rights of the parties and can constitute a bar to a subsequent action involving the same claim, demand or cause of action and issues determined therein. In order for *res judicata* to bar relitigation of an action, there must be a concurrence of four conditions: 1) identity of the things sued upon; 2) identity of the cause of action; 3) identity of the parties to the action; and 4) identity of the quality or capacity of the parties. Once the concurrence of the identities is found to exist, it must be determined whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties actually had an opportunity to appear and assert their rights.

Kean v. Forman, 752 A.2d 906, 909 (Pa. Super. 2000).

In both this case and the Federal Action, the same Plaintiff sued the same Defendants, in the same capacities, on the same causes of action concerning the same contracts and transactions, and Plaintiff and Defendants clearly had an opportunity to appear and assert their rights in the Federal Action. With respect to Counts I and II, the federal court decided the ultimate and controlling issues, *i.e.* whether a breach of contract had been shown. Therefore, the doctrine of

[1] The Federal Action was filed in the United States District Court for the Eastern District of Pennsylvania. The trial court's decision in the Federal Action was reported at 274 F. Supp. 2d 660 (E.D.Pa. 2003). The parties who are Defendants in this action appealed the decision, and it was affirmed by the Third Circuit Court of Appeals in an unreported opinion, which may be found at 113 Fed. Appx. 470; 2004 U.S. App. LEXIS 22428 (3d. Cir. Sept. 23, 2004).

*res judicata* bars Plaintiff from relitigating Counts I and II in this action. However, Count III for fraud was dismissed by the federal court based on the statute of limitations, which is not at issue here.[2] Therefore, the doctrine of *res judicata* does not bar Plaintiff from relitigating Count III.

Defendants make two additional arguments as to why Count III should be dismissed. Firstly, they point out that the federal court found that "[b]ecause [Plaintiff] cannot establish by clear and convincing evidence that [Defendants] committed fraud, [Defendants] would be entitled to summary judgment even if [Plaintiff] had filed [the fraud] claim within the statute of limitations." 274 F. Supp. 2d at 678, n19. However, this finding was not necessary to the court's decision to dismiss the fraud claim as time-barred, so it is *dicta* and does not have preclusive effect. *See* Restatement (Second) Judgments, § 27, Comment h (1982) ("If issues are determined, but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded.")

Secondly, Defendants argue that the doctrine of collateral estoppel bars Plaintiff from relitigating Count III because all of the issues underlying that claim were adjudicated by the Court in the Federal Action when it dismissed Count I on the merits.

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) Judgments, § 27 (1982).

Plaintiff's claim for fraud in this action is based upon Defendants' alleged "failure to disclose that the value of the Servicing Portfolio had materially declined," as well as the fact that they "affirmatively stat[ed] that the value of the Servicing Portfolio was not declining." *See*

[2] The decline in the value of the Servicing Portfolio, which is the basis for the fraud claim, was apparently discovered by audit in October, 1998. This action was filed in August, 2000, and the Federal Action was filed in July, 2002. Therefore, the two year limitations period for tort actions barred the fraud claim in the Federal Action, but not in this one.

MSJ, Ex. C, ¶¶ 21-32, 43. However, these same misrepresentations form part of the basis for Plaintiff's Count I for breach of contract, which the court in the Federal Action dismissed on the merits.

In dismissing Count I, the federal court found that Plaintiff

> has also failed to establish that [Defendants] breached the [contracts] by representing and warranting that there had been no material change in the financial condition of [the Company] from the date of execution of the Letter of Intent when, in fact both the net worth of [the Company] and the value of the Servicing Portfolio had decline[d] materially.

274 F. Supp. 2d at 676. The court reached this conclusion based on the terms of the Letter of Intent and the Definitive Agreement, which "constituted the entire agreement between the parties and superseded any prior understandings, agreements or representations by or among the parties, written or oral, to the extent they related in any way to the subject matter [of those agreements.]" *Id.* at 677. The court further found that the Letter of Intent provided that the

> merger was conditioned upon, among other things, 'the accuracy of the representations and warranties contained in the Purchase Agreement as of the Closing Date and the absence of any material adverse change in the business, financial condition, property or prospects of [the Company] (other than as may be caused by general economic conditions of the mortgage banking industry).'

*Id.* at p. 677. The court then found that the decline in the value of the Servicing Portfolio was "due to the low interest rates and the general economic condition of the mortgage industry." *Id.* Therefore, the court found that Defendants had not misrepresented the condition of the Servicing Portfolio because, under the terms of the parties' agreements, Defendants had no duty to inform Plaintiff of changes in the Servicing Portfolio that were based on market factors.

The parties chose, in their written contracts, to set forth the duties that they owed to one another with respect to the merger. It is, therefore, improper for the Plaintiff to attempt to impose additional tort duties upon Defendants in its claim for fraud. *See* Etoll, Inc. v.

Elias/Savion Advertising, Inc., 811 A.2d 10, 14-19 (Pa. Super. 2002) ("Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals. . . . [A tort claim is barred] where the duties allegedly breached were created and grounded in the contract itself.") Since the court in the Federal Action already determined that Defendants did not breach their representational duties to Plaintiff under the relevant contracts, Plaintiff's redundant fraud claim must also be dismissed.

**CONCLUSION**

For all the foregoing reasons, Defendants' Motion for Summary Judgment is granted, and this case is dismissed.

**BY THE COURT,**

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**HOWLAND W. ABRAMSON, J.**