

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

COMMERCE BANK, N.A.,	:	FEBRUARY TERM, 2007
	:	
Plaintiff,	:	NO. 03257
	:	
v.	:	COMMERCE PROGRAM
	:	
PORTERRA, LLC,	:	Control No. 071166
	:	
Defendant.	:	

**ORDER**

**AND NOW**, this 27<sup>th</sup> day of November, 2007, upon consideration of plaintiff's Motion for Summary Judgment, the response thereto, the briefs in support and opposition, and all other matters of record, and in accord with the court's Opinion issued contemporaneously, it is hereby **ORDERED** that said Motion is **GRANTED** in part as follows:

1. Defendant is hereby declared to be in default under the terms of the construction loan made by plaintiff to defendant.
2. Plaintiff may move this court to determine the amounts due from defendant to plaintiff as a result of said default.

The remainder of said Motion is **DENIED**.

**BY THE COURT:**

\_\_\_\_\_  
**ABRAMSON, HOWLAND W., J.**

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

COMMERCE BANK, N.A.,	:	FEBRUARY TERM, 2007
	:	
Plaintiff,	:	NO. 03257
	:	
v.	:	COMMERCE PROGRAM
	:	
PORTERRA, LLC,	:	Control No. 071166
	:	
Defendant.	:	

**OPINION**

On August 24, 2005, plaintiff Commerce Bank, N.A. (“Commerce”) entered into a Construction Loan Agreement, Note, Mortgage, and related documents (collectively, the “Loan Agreement”) with defendant Porterra, LLC (“Porterra”). Under the Loan Agreement, Commerce agreed to lend Porterra up to \$5,860,000 for the construction of condominium units and townhomes at 1039-55 Frankford Avenue, Philadelphia, Pennsylvania (the “Property”), and Porterra gave Commerce a security interest in the Property.

The Loan Agreement provides that, in the event of certain non-monetary defaults, Commerce “may, by notice to [Porterra], declare the Note, all interest thereon, and all other amounts payable under this Agreement to be forthwith due and payable.”<sup>1</sup> The following events, among others, constitute “Events of Default” under the Agreement:

(2) Failure of [Porterra] to perform or comply with any of the agreements, conditions, covenants, provisions or stipulations contained in the [Loan Agreement], and continuance of such failure uncured for twenty (20) days after written notice specifying such failure and requesting that it be cured is given by [Commerce] to [Porterra] or knowledge of [Porterra], whichever shall first occur

\* \* \*

---

<sup>1</sup> Construction Loan Agreement, § 7.01.

(4) Appointment of a receiver, liquidator or trustee for [Porterra] (in general or with respect to the Mortgaged Property) or of any of the Mortgaged Property;

\* \* \*

(5) If any judgment, writ, warrant, lien or attachment or execution or similar process which calls for payment or presents liability either individually or in aggregate in excess of \$25,000 shall be rendered, issued or levied against [Porterra] or its property and such process shall not be paid, waived, stayed, vacated, discharged, settled, satisfied or fully bonded within forty-five (45) days after its issuance or levy

\* \* \*

(7) The occurrence and continued existence of a material adverse change, in the reasonable determination of [Commerce], in the financial condition of [Porterra], or a material impairment, in the reasonable determination of [Commerce], in the value or priority of [Commerce's] security interests or mortgage liens in the [Property].<sup>2</sup>

Commerce filed the present mortgage foreclosure action claiming that Porterra has committed several defaults under the Agreement. Commerce subsequently moved for summary judgment on the issue of Porterra's default. The following factual history is relevant to the determination of whether Porterra is in default under the Loan Agreement:

May 18, 2005	Commerce issued a loan commitment to Porterra.
July 20, 2005	A Joint Venture Agreement with respect to Porterra was executed by James E. Porter and Nunzio Terra.
August 24, 2005	The Loan Agreement was executed, and Commerce subsequently began to make loan advances to Porterra.
June 30, 2006	P. Marco Concrete & Masonry filed a mechanics' lien against Porterra in the amount of \$154,800.00.
July 17, 2006	Porter filed suit against Terra under the Joint Venture Agreement, alleging that "the construction loan was procured without the consent of Porter and in violation of the terms of the [Joint Venture Agreement] between Porter and Terra," and Porter filed a lis pendens against the Property.
August 14, 2006	Porter's counsel informed Commerce by letter that Porter "disputes the validity" of the Commerce loan to Porterra.
September 8, 2006	Porterra submitted its 11 <sup>th</sup> request for funds under the construction loan. Commerce never provided the requested funds.
September 11, 2006	Tru-Fit Frame & Door Corp. filed a mechanics' lien against Porterra in the amount of \$35,679.98.
December 19, 2006	Commerce sent a letter to Porterra identifying the following events of default under the Agreement: 1) the filing of <u>Porter v. Terra</u> ; 2) the filing of the Marco and Tru-Fit mechanics' liens; and 3) Porterra's failure to disclose to Commerce the existence of the Joint Venture Agreement.

---

<sup>2</sup> Construction Loan Agreement, §7.01.

February 26, 2007	The court in <u>Porter v. Terra</u> appointed a Receiver for Porterra and the Property.
February 27, 2007	AAA Welding Service, Inc. filed a mechanics' lien against Porterra in the amount of \$54,570.00.
February 28, 2007	Commerce filed this action in which it identified the following events of default under the Agreement: 1) the filing of <u>Porter v. Terra</u> ; 2) the filing of the Marco and Tru-Fit mechanics' liens; and 3) Porterra's failure to disclose to Commerce the existence of the Joint Venture Agreement.

In its Motion for Summary Judgment, Commerce argues that the following are events of default that entitle it to foreclose on the Property and to recover the balance due on the construction loan, plus interest and attorneys fees: 1) the filing of the Marco, Tru-Fit and Welding mechanics' liens; 2) the failure to disclose to Commerce the existence of the Joint Venture Agreement; 3) the filing of Porter v. Terra; and 4) the appointment of a Receiver. The Receiver, acting on behalf of Porterra, opposes the granting of summary judgment to Commerce.

**I. Disputed Issues Of Material Fact Exist With Respect To The Alleged Defaults Based On The Joint Venture Agreement And The Marco Mechanics' Lien.**

Commerce claims that, when it made the loan to Porterra, Porterra failed to tell Commerce that there was a Joint Venture Agreement governing Porterra. Commerce claims that Porterra's failure to provide Commerce with the Joint Venture Agreement constitutes a material misrepresentation by Porterra. Commerce asserts that it made the loan to Porterra based on the provisions of Porterra's Operating Agreement, which stated that Terra was the controlling member of Porterra, and based on Porterra's representation in the Loan Agreement that

the execution, delivery and performance by [Porterra] of the Loan Documents to which it is a party have been duly authorized by all necessary action of [Porterra] and does not and will not (1) require any consent or approval of any shareholder or other creditor of [Porterra]; (2) contravene [Porterra's] certificate of organization or limited liability company agreement . . . (4) result in a breach of or constitute a default under any . . . material agreement . . . to which [Porterra] is a party or by which it or its properties may be bound or affected . . .<sup>3</sup>

---

<sup>3</sup> Construction Loan Agreement, § 4.02

Unlike the Operating Agreement, the Joint Venture Agreement requires the unanimous consent of Porter and Terra before Porterra may borrow money and pledge the Property as security.<sup>4</sup> Proof of such consent apparently was not provided to Commerce, and, according to the allegations made by Porter in Porter v. Terra, Porter's consent to the Commerce construction loan was never obtained. As a result, the validity of the loan is in question.

The Receiver, in its response on behalf of Porterra, claims that Commerce was well aware of the terms of the Joint Venture Agreement when it made the loan to Porterra because Commerce prepared certain Subordination and Standstill Agreements and Mortgage Releases with respect to mortgages provided for in the Joint Venture Agreement. Commerce's knowledge, or notice, regarding the Joint Venture Agreement constitutes a disputed issue of fact. This factual dispute precludes the court from granting summary judgment based on Porterra's alleged failure to inform Commerce of the Joint Venture Agreement.

Commerce next claims that the filing of the Marco mechanic's lien constitutes a default under the Loan Agreement because it is a "lien . . . in excess of \$25,000 . . . issued . . . against [Porterra] or its property . . . [that has not been] satisfied . . . within 45 days after its issuance."<sup>5</sup> In his response, the Receiver argues that Commerce was aware both of the Marco lien and its lack of merit, that Commerce approved Porterra's defense against the lien, and that Commerce otherwise waived its right to claim this lien as an event of default. The issue of whether Commerce waived this event of default is a disputed issue of material fact that precludes the court from granting summary judgment based on the Marco lien.

---

<sup>4</sup> Joint Venture Agreement, ¶ 2.2.

<sup>5</sup> *Id.*, ¶ 7.01(5).

## **II. Summary Judgment Is Granted With Respect To The Defaults Based On The Filing Of Porter v. Terra.**

Commerce claims that the filing of Porter v. Terra constitutes an event of default under the Loan Agreement because it is “a material adverse change, in the reasonable determination of [Commerce], in the financial condition of [Porterra], or a material impairment, in the reasonable determination of [Commerce], in the value or priority of [Commerce’s] security interests or mortgage liens in the [Property].”<sup>6</sup> As Commerce sees it, Porter v. Terra represents a breakdown in the relationship between the two principals of Porterra which jeopardizes the construction project.

In addition, the lawsuit calls into question the validity of Commerce’s loan to Porterra because Porter claims that he never approved the loan and mortgage as required under the terms of the Joint Venture Agreement between him and Terra. Furthermore, as even the Receiver admits, the lis pendens filed by Porter in conjunction with his lawsuit “may affect Porterra’s ability to close” on the sale of individual condominium units<sup>7</sup> and thereby necessarily affects Porterra’s long-term financial condition. Finally, the court’s appointment of a Receiver in Porter v. Terra constitutes a separate event of default under the Loan Agreement.<sup>8</sup>

The Receiver objects to Commerce’s claim that the proceedings in Porter v. Terra are events of default. The Receiver claims that Commerce’s failure to approve Porterra’s 11<sup>th</sup> draw request was the reason that construction ground to a halt and the project was placed in jeopardy.<sup>9</sup> However, the 11th draw request was not submitted to Commerce until after Porter v. Terra and

---

<sup>6</sup> Construction Loan Agreement, § 7.01(7).

<sup>7</sup> Memorandum of Law in Response to Motion for Summary Judgment, p. 10.

<sup>8</sup> *Id.*, § 7.01(4).

<sup>9</sup> This argument may have some merit with respect to the Tru-Fit and AAA Welding mechanics liens because Porterra might have been able to satisfy both liens if additional moneys had been advanced by Commerce under the loan.

the accompanying lis pendens were filed, so Commerce's failure to fund the request cannot be viewed as having caused such events to occur. Furthermore, Commerce's failure to continue funding the project was not cited as a basis for the court's appointment of a Receiver. Instead, the court's decision to appoint a Receiver was based on the following:

[Porter and Terra] are unable to work together and/or through counsel to ensure that the construction of condominiums and townhomes at [the Property] (the "Project") is completed safely, timely and efficiently; and  
The interactions, outside the courtroom, of the parties and other persons concerned with the Project pose a threat to public safety and the public fisc.<sup>10</sup>

Porterra's claim that Commerce, rather than Porter and Terra, caused Porterra's defaults is not borne out by the facts of record. The filing of Porter v. Terra, the accompanying lis pendens, and, most importantly, the court's appointment of a Receiver in that case are clearly events of default entitling Commerce to stop funding the loan and to call due the amounts it already funded, along with interest and attorneys fees.

### **CONCLUSION**

For all the foregoing reasons, Commerce's Motion for Summary Judgment is granted in part and denied in part.

**BY THE COURT:**

---

**ABRAMSON, HOWLAND W., J.**

---

<sup>10</sup> The appointment of a Receiver was not cited by Commerce in its Complaint as an event of default, perhaps because the Receiver was appointed a mere two days before the Complaint was filed. The appointment of the Receiver, and the reasons for it, are part of the public record in Porter v. Terra and, as such, this court may take judicial notice of the appointment. As previously stated, the appointment of a Receiver for Porterra and the Property is clearly an event of default under the Loan Agreement

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

COMMERCE BANK, N.A.,	:	FEBRUARY TERM, 2007
	:	
Plaintiff,	:	NO. 03260
	:	
v.	:	COMMERCE PROGRAM
	:	
1101 FRANKFORD, LLC,	:	Control No. 071167
	:	
Defendant.	:	

**ORDER**

**AND NOW**, this 27<sup>th</sup> day of November, 2007, upon consideration of plaintiff's Motion for Summary Judgment, the response thereto, the briefs in support and opposition, and all other matters of record, it is hereby **ORDERED** that said Motion is **GRANTED** in part as follows:

1. Defendant is hereby declared to be in default under the terms of the construction loan made by plaintiff to defendant.
2. Plaintiff may move this court to determine the amounts due from defendant to plaintiff as a result of said default.

The remainder of said Motion is **DENIED**.

**BY THE COURT:**

---

**ABRAMSON, HOWLAND W., J.**