

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

TD BANK, N.A.,	:	February Term 2009
Plaintiff,	:	
v.	:	No. 4008
JOINT THEATER CENTER, LLC,	:	
Defendant.	:	COMMERCE PROGRAM
	:	
	:	Control Number 10043966

ORDER

AND NOW, this 8th day of July, 2010, upon consideration of Plaintiff TD Bank, N.A.'s Motion of Summary Judgment and Defendant Joint Theater Center, LLC's response 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 \$\$4,666,330.49, plus per diem interest of \$860.64 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,

ARNOLD L. NEW, J.

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Plaintiff,	:	
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JOINT THEATER CENTER, LLC,	:	
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Defendant.	:	COMMERCE PROGRAM
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OPINION

This is an action in mortgage foreclosure. Defendant Joint Theater Center, Inc. (hereinafter "JTC") is the owner of real property located at 1412-14 Chestnut Street, Philadelphia also known as the "Prince Theater". On February 24, 2003, JTC executed and delivered to Philadelphia Authority for Industrial Development (hereinafter "Authority") a mortgage. JTC pledged the Prince Theater property as security for a promissory note memorializing a \$5,300,056.28 commercial loan issued by the Authority to JTC. The mortgage was recorded on or about April 1, 2002. The Authority assigned all of its rights, title and interest in the loan including the Mortgage and Note to plaintiff TD Bank, N.A. (hereinafter "TD Bank").

JTC defaulted under its obligations under the Note and Mortgage as modified by failing to make the monthly interest only payments due on August 27, 2008, September 10, 2008 and October 1, 2008 and the payment of principal due on November 1, 2008. JTC also failed to make the payment of principal and accrued interest from November 1, 2008 to December 1, 2009.

On February 26, 2009, TD Bank filed this complaint in mortgage foreclosure against JTC. On March 18, 2009, TD Bank confessed judgment against JTC and AMTFI for \$4,696,608.63 in 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. 0903-2930 (hereinafter “0903-2930”) on the same loan at issue here. JTC filed a Petition to Open and or Strike the Confessed Judgment raising the same defenses as those relied upon here by JTC. On June 17, 2010, the court denied the Petition to Open and Strike.

TD Bank also confessed judgment in TD Bank, N.A. v. Joint Theater Center, LLC and American Music Theater Festival, Inc., Court of Common Pleas of Philadelphia County, Pennsylvania, 0812-4149(hereinafter “0812-4149”) against JTC and AMTFI on a separate loan it issued to AMTFI which was secured by a mortgage and guaranty given to TD Bank by JTC. A petition to open and strike the confessed judgment was denied on August 5, 2009. The loan was also subject to a mortgage foreclosure action in TD Bank, N.A. v. Joint Theater Center, LLC, Court of Common Pleas of Philadelphia County, Pennsylvania, 0902-3713 (“hereinafter 0902-3713”). On February 23, 2010, this court granted TD Bank’s Motion for Summary Judgment and judgment in mortgage foreclosure was entered against JTC.

On December 22, 2009, TD Bank filed a Motion for Summary Judgment in this matter. In the motion, TD Bank argued that JTC was collaterally estopped from challenging the allegation of default because of the confessed judgment in case no. 0903-2930 on the same loan and by the judgment entered in case no. 0812-4149. On March 10, 2010, the court denied the motion for summary judgment and in a footnote concluded “Collateral Estoppel can not exist since the Petition to Open and Strike the Confessed Judgment is pending in TD Bank, N.A. v. American Music Theater Festival, Inc. and Joint Theater Center, LLC, March 2009 No. 2930.”

Presently before the court is TD Bank’s second motion for summary judgment. TD Bank now seeks summary judgment on the ground that this court’s February 23, 2010 order granting

summary judgment in case no. 0902-3713 is an event of default under the mortgage at issue in this case which entitles TD Bank to judgment as a matter of law.¹

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."² "This is so even if the mortgagors have not admitted the total amount of the indebtedness in their pleadings."³ 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'"⁴ The only issue in dispute is whether a default occurred.⁵

Paragraph 20.9 of the Mortgage states:

Events of Default. The occurrence of any one or more of the following shall constitute an "Event of Default" hereunder:

The entry or filing of any judgment of \$15,000 or more or any lien, encumbrance, notice of lien, attachment, levy or any other adverse charge against the Mortgaged Property or any portion thereof which is not discharged or bonded against within twenty (20) days.⁶

¹ Alternatively, TD Bank moves for the grant of partial summary judgment limiting the trial of this case to the sole issue of whether TD Bank can establish the element of default by *prima facie* evidence.

² 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).

³ Id.

⁴ 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).

⁵ JTC admits in its Answer and New Matter that it executed and delivered the Mortgage to the Authority, TD Bank's predecessor in interest on or about November 6, 2001. Answer and New Matter at ¶ 8.

⁶ Mortgage ¶ 20.9.

Pursuant to the unambiguous language of paragraph 20.9, if a judgment, lien, encumbrance, attachment or any other adverse charge is placed against the mortgage property, which is not discharged or bonded against within twenty days, an event of default occurs. In case no. 0902-3713, TD Bank instituted a mortgage foreclosure action against JTC on a separate loan and mortgage. In a mortgage foreclosure action, the nature of the judgment sought is *in rem*, against the property. The sole purpose of the judgment obtained through an action in mortgage foreclosure is to effect a judicial sale of the mortgaged property.⁷ In case no. 0902-3713, the court entered a judgment of mortgage foreclosure against the Prince Theater Property.

The judgment of mortgage foreclosure in case no. 0902-3713 constitutes an event of default since it is an adverse charge against the mortgaged property here, the judgment is for more than \$15,000.00 and JTC did not discharge or bond the judgment as required by paragraph 20.9 of the mortgage.⁸ As such, JTC is in default of the mortgage and TD Bank's motion for summary judgment is granted.⁹

⁷ Insilco Corp. v. Rayburn, 374 Pa. Super. 362, 543 A.2d 120, 122 (Pa. Super. 1988); Standard Pa. Practice 2d. § 121:79 (2003).

⁸ This argument could not have been raised in the prior motion for summary judgment since a judgment was required against the mortgaged property. A judgment of confession is against the person.

⁹ Although not raised by TD Bank, the court's order in case no. 0903-2930, the confession of judgment action on the same loan and mortgage at issue here, dated June 17, 2010 denying the Petition to Open and Strike the Confession of Judgment collaterally estopps JTC from relitigating the issue of default. As such, all the elements necessary for a judgment of mortgage foreclosure have been satisfied.

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,

ARNOLD L. NEW, J.