**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

DIAMOND DEVELOPMENT GROUP, LLC,

Appellant

v.

CONTINENTAL BANK,

Appellee

IN THE SUPERIOR COURT OF PENNSYLVANIA

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CONTINENTAL BANK,

Appellee

v.

DIAMOND DEVELOPMENT GROUP, LLC, BABIY, P. THEODORE, AND QUINN, ANN MARIE,

Appellants

No. 1320 EDA 2011

Appeal from the Order Entered of April 28, 2011
In the Court of Common Pleas of Chester County
Civil Division at No(s): 09-07789

DIAMOND DEVELOPMENT GROUP, LLC,

Appellant

v.

CONTINENTAL BANK,

Appellee

IN THE SUPERIOR COURT OF PENNSYLVANIA

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CONTINENTAL BANK,

Appellee

v.

P. THEODORE BABIY AND ANNA MARIE QUINN, H/W AND DIAMOND DEVELOPMENT GROUPS, LLC,

Appellants

No. 1341 EDA 2011

Appeal from the Order Dated of April 28, 2011
In the Court of Common Pleas of Chester County
Civil Division at No(s): 09-05874

CONTINENTAL BANK,

Appellant

v.

P. THEODORE BABIY AND ANNE MARIE QUINN, H/W,

Appellee

IN THE SUPERIOR COURT OF PENNSYLVANIA

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CONTINENTAL BANK,

Appellant

v.

DIAMOND DEVELOPMENT GROUP, LLC,

Appellee

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CONTINENTAL BANK,

Appellant

v.

DIAMOND DEVELOPMENT GROUP, LLC,

Appellee

No. 1440 EDA 2011

Appeal from the Order Entered of April 28, 2011
In the Court of Common Pleas of Chester County
Civil Division at No(s): 09-07789

CONTINENTAL BANK,

Appellant

v.

P. THEODORE BABIY AND ANNE MARIE QUINN, H/W,

Appellee

IN THE SUPERIOR COURT OF PENNSYLVANIA

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CONTINENTAL BANK,

Appellant

v.

DIAMOND DEVELOPMENT GROUP, LLC,

Appellee

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CONTINENTAL BANK,

Appellant

v.

DIAMOND DEVELOPMENT GROUP, INC.,

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| Appellee | No. 1441 EDA 2011 |

Appeal from the Order Entered of April 28, 2011
In the Court of Common Pleas of Chester County
Civil Division at No(s): 09-07789

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| DIAMOND DEVELOPMENT GROUP, LLC,<br><br>Appellee<br><br>v.<br><br>CONTINENTAL BANK,<br><br>Appellant | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br>No. 1442 EDA 2011 |

BEFORE: BOWES, DONOHUE, and COLVILLE,* JJ.

MEMORANDUM BY BOWES, J.: **FILED DECEMBER 21, 2012**

The present consolidated appeals involve appeals and cross-appeals filed at two lower court actions. Both lawsuits pertain to a construction loan agreement entered by Continental Bank (the "Bank") and Diamond Development Group, LLC ("Diamond") on December 27, 2007, with respect to the proposed development of residential real estate located at 313 South Fairfield Road in the Main Line section of Philadelphia. The sole owner of Diamond, P. Theodore Babiy, his wife Anne Marie Quinn, and Diamond Development Group, Inc. were guarantors of the loan. We refer to Diamond and the guarantors collectively as "debtors." Under the

* Retired Senior Judge assigned to the Superior Court.

construction loan agreement,[1] the Bank agreed to lend Diamond an aggregate amount of up to $1,823,177; an initial disbursement of $782,263.17 was made to Diamond to purchase the real estate where the construction was to occur. Pursuant to the loan document, the Bank was not required to disburse any further funds unless certain events involved in the progression of the construction project occurred. Diamond also executed a mortgage note simultaneously with the loan agreement. According to that mortgage note, which was secured by the South Fairview Road property and contained a confession of judgment clause, the loan became payable in full on the maturity date of the loan. Mr. Babiy, Ms. Quinn, and Diamond Development Group, Inc. executed guarantees on the loan.

By December 11, 2008, almost one year after the parties entered into the loan agreement, construction had not yet begun on the project. On that date, the Bank informed Diamond that it would not disburse any additional funds. Its position, which was memorialized in a December 18, 2008 letter, was that Diamond had failed to satisfy conditions contained in the loan agreement that triggered the Bank's obligation to distribute more money. Thereafter, Diamond filed a lawsuit on May 22, 2009 at lower court docket number 09-05874 against the Bank, raising claims of breach of contract, promissory estoppel, and equitable estoppel.

[1] There was also a post-closing agreement that governed the conduct of the parties.

After the loan matured on June 26, 2009, Diamond failed to repay the $782,263.17 loaned to it. On July 8, 2009, the Bank filed three separate actions for confession of judgment, exercising its confession of judgment warrant in the mortgage note. That same day, it obtained a confessed judgment at lower court docket number 09-07789 against Mr. Babiy and Ms. Quinn, as guarantors of the loan. The Bank also confessed judgment against Diamond, the borrower, at lower court docket number 09-07790. Finally, at lower court docket number 09-07791, the Bank confessed judgment against Diamond Development Group, Inc. pursuant to its guaranty agreement. After the four defendants in the three confessed judgments filed petitions to open the judgments entered in their respective cases, the trial court consolidated those actions at lower court docket number 09-07789.

On April 28, 2010, the trial court issued an order opening the confessed judgments in the lawsuit at 09-07789. It concluded that the Bank was statutorily precluded from entering a confessed judgment against the real estate, which was deemed to be residential. On September 2, 2010, the court awarded $47,814.06 in attorney's fees to the debtors at 09-07789. Judgment was subsequently entered against the Bank on September 10, 2010, at that docket number in the amount of the $47,814.06.

The Bank moved for reconsideration, seeking that the judgment be vacated and that execution be stayed. Following the denial of that motion,

the Bank filed an appeal on November 22, 2010 at docket number 3234 EDA 2010 from the order that denied its petition for reconsideration of the award of attorney's fees. The notice of appeal indicated that it was filed with respect to lower court docket numbers 09-07789, 09-07790, and 09-07791. Debtors moved to quash that appeal on the ground that it was untimely filed, observing in their motion that lower court docket numbers 09-07790 and 09-07791 were consolidated under number 09-07789. By order dated January 26, 2011, that appeal was quashed as untimely.

The parties and the trial court thereafter treated actions number 09-07789 and 09-05874 as consolidated in that all motions and decisions filed thereafter referenced both lower court docket numbers. The case then proceeded to a nonjury trial on the merits of debtors' position that the Bank had breached the construction loan agreement. Debtors maintained that the Bank had breached its contract with Diamond when it failed to fund the remainder of the loan so that the construction project could be built. Debtors took the position that they were absolved of their obligation to repay the $782,263.17 already loaned to Diamond.

They also claimed that Diamond was entitled to consequential damages from the breach of the construction loan. To that end, they presented expert testimony as to the amount of profit that Diamond lost when it failed to complete the project in question and as to the profit that Diamond would have earned from an additional project that it would have

completed had the first one proceeded. The lost profits amounted to approximately one million dollars. Debtors also sought the carrying costs associated with continued ownership of the house on South Fairfield Road and the amount of additional taxes Mr. Babiy and his wife incurred when they had to prematurely withdraw funds from their retirement accounts to meet expenses occasioned by the failure of the project.

The Bank denied breaching the loan agreement. Rather, it claimed that the debtors owed the principal sum already loaned by the Bank at the default interest rate outlined in the mortgage note, plus the attorney's fees it incurring in defending both the confessed judgment and breach of contract actions.

The evidence at trial revealed the following. At the time that the construction loan was negotiated, Diamond was the builder and developer of high-end luxury homes in the West Main Line market in the Philadelphia area, particularly Tredyffrin and Easttown Townships. Mr. Babiy started Diamond in 1995, and, by the end of 2007, had constructed about two dozen single-family residential homes.

On December 27, 2007, Diamond and the Bank executed a loan agreement whereby the Bank agreed to make a loan to Diamond for the principal amount of up to $1,823,177. The maturity date of the loan was June 26, 2009, with the option for a six-month extension, which was at the Bank's sole discretion. The loan was to be used to purchase property at 313

South Fairfield Road, Easttown Township, demolish the existing single-family residence, and construct a new residential dwelling that was to be appraised at $2.7 million. The loan agreement provided eighteen months for Diamond to demolish the existing building, construct the proposed single-family dwelling, and to market and sell that house. The parties acknowledged that it would have taken approximately ten months to complete the construction of a house on the scale of the proposed dwelling. Thus, the eighteen-month timeframe would have permitted the loan to be satisfied through the sale of the house within the maturity date because that period was sufficient to allow for construction time, marketing, and sale of the residence.

On December 27, 2007, Diamond purchased the South Fairfield property for $850,000, of which the Bank contributed $782,263.17 as the initial disbursement under the December 27, 2007 loan document. Under § 5.01 of the agreement, construction was to begin within sixty days of December 27, 2007. Loan Agreement, 12/27/07, § 5.01 ("Within sixty (60) days after the date of this Agreement, the Borrower shall commence the construction of the Improvements. The Borrower shall prosecute the construction of the Project with diligence and continuity to completion[.]"). Additionally, under a post-closing agreement also executed on December 27, 2007, Diamond was obligated to provide the Bank with a complete set of plans and specifications on or before February 29, 2009. N.T. Trial, 11/25/10, at 63. That document stated, "Lender shall not be required to

make any additional Loan Advances following Closing until the items or documents set forth in Paragraph 1 on Schedule A to the Agreement [the complete plans and specifications] are received and accepted by Lender." Post-Closing Agreement, 12/27/07, at ¶ 1.

The loan agreement also provided, in § 4.02 (i), that if Diamond failed "in any respect to comply with the provisions of this Agreement," then the Bank, "at its option, may refuse to make further Advances," or "may accelerate the indebtedness under the terms of the Note[.]" Also pertinent herein are §§ 8.03 and 8.04 of the loan agreement. Section 8.03 requires any departure from due performance by Diamond to be in writing:

> 8.03. Amendments and Waivers. The Lender and the Borrower may from time to time enter into agreements amending, modifying or supplementing any Loan Document or changing the rights of the Lender or of the Borrower under any Loan Document, and the Lender may from time to time grant waivers or consents to a departure from the due performance of the obligations of the Borrower under this Agreement. Any such agreement, waiver or consent must be in writing and shall be effective only to the extent specifically set forth in such writing. . . .

Section 8.04 specifically prevents any course of dealing and any delay or failure by the Bank in exercising its rights under the loan document from affecting any future exercise by the Bank of any right, power or privilege contained in the agreement:

> 8.04. No Implied Waiver; Cumulative Remedies. No course of dealing and no delay or failure of the Lender in exercising any right, power or privilege under any Loan Document shall affect any other or future exercise thereof or exercise of any other right, power or privilege; nor shall any single or partial exercise

> of any such right, power or privilege or any abandonment or discontinuance of steps to enforce such a right, power or privilege preclude any further exercise thereof or of any other right, power or privilege. . . .

Frank Ashmore was a senior vice-president at the Bank, and was responsible for obtaining and monitoring the loan and approving draw requests. Mr. Babiy had previously negotiated a construction loan for Diamond through the Bank in September 2006 for the completion of a single-family residence at 430 Dorset Road, Devon. Mr. Babiy approached Mr. Ashmore in September 2007 for the loan pertaining to the South Fairfield Road property. That loan was approved in November 2007, and it closed on December 27, 2007. The loan term was for eighteen months with an option for a six-month extension. The interest rate was the Wall Street Journal prime rate plus ½%, which amounted to 3.75%.

As noted, the loan agreement mandated that construction begin by February 25, 2008, and there was no written modification of that loan term. However, during February 2008, Mr. Ashmore had a conversation with Mr. Babiy about the commencement of the South Fairfield Road project. Mr. Babiy said, "I believe it would be wise to delay the start of construction on South Fairfield Road until I complete the Dorset Road project and sell it[.]" N.T. Trial, 11/22/10, at 89. Mr. Ashmore responded that he thought that course of action "was wise and prudent." ***Id***. Mr. Ashmore sent an April 30, 2008 report on the loan to Chief Credit Officer Eric Morgan and alerted him that no work had been started on the South Fairfield Road

project because "Ted Babiy has been focused on completing and selling the Dorset Road home[.]" ***Id***. at 93.

The Dorset Road home sold on June 30, 2008, but Diamond did not immediately initiate construction on the South Fairfield Road project. Mr. Babiy did not start to apply for the permits required to begin the project, which consisted of a demolition permit, a grading permit, and a construction permit, until August 29, 2008, two months after Dorset Road was actually sold. After the financial meltdown of Lehman Brothers in mid-September 2008, Mr. Babiy called Mr. Ashmore and asked "whether Continental Bank was going to have any problems as a result of that event." ***Id***. at 105. Mr. Ashmore responded that the Bank was "fine, it's business as usual[.]" ***Id***.

At various times during the fall of 2008, Mr. Ashmore and Mr. Babiy were in contact with each other. On October 14, 2008, Mr. Babiy asked about obtaining a short-term loan to finish construction on a house that he was building for himself and his family. On October 30, 2008, Mr. Ashmore asked for tax returns for Mr. Babiy and Diamond. On November 13, 2008, Mr. Ashmore asked Mr. Babiy for real estate market information consisting of a list of existing and under-construction single-family homes for sale in the two-to-three-million-dollar range along the Philadelphia Main Line. On November 24, 2008, Mr. Ashmore received an artist's rendering of the

proposed construction and a draft proposed listing from the real estate broker.

After receipt of the rendering, Mr. Ashmore sent it to Wayne Griest, President and Chief Financial Officer of the Bank. On November 25, 2008, Mr. Griest asked Mr. Ashmore for the market analysis and stated that he wanted a final construction budget and a new appraisal. At that point, Mr. Griest told the loan officer, "I do not intend to fund this until we have gone through complete review and discussion." ***Id***. at 127. This statement was the first inkling to Mr. Ashmore that the loan might not be further funded. That same day, Mr. Ashmore responded to Mr. Griest that the market data had been received by the Bank, and he asked Mr. Babiy for the final budget and a new appraisal. Mr. Babiy replied that he was still working on the final budget and would obtain an updated appraisal. That appraisal indicated that the house would still sell for $2.7 million. At no time between June 30, 2008, and December 11, 2008, despite these various contacts, did anyone from the Bank inform Mr. Babiy that Diamond's failure to satisfy conditions precedent to the distribution of additional monies would trigger the Bank's refusal to tender any advances.

On December 5, 2008, Mr. Griest told Mr. Ashmore that the Bank would not fund the remainder of the loan. At that time, demolition of South Fairfield Road had not yet started, although Mr. Babiy had obtained the demolition permit and was planning to start destruction of the existing home

on December 12, 2008. Mr. Ashmore and Mr. Griest met later that day, and Mr. Ashmore gave Mr. Griest data that indicated that the real estate market in Easttown Township remained healthy, despite the recent economic downturn. However, Mr. Griest remained unconvinced due to the market report from the broker, which outlined the existing homes for sale and under construction in the pertinent area. Specifically, in the Main Line area in December 2008, there were twenty to thirty existing homes listed, and another eight being constructed, in the two-to-three-million-dollar price range.

Mr. Ashmore arranged for a meeting with Mr. Babiy on December 11, 2008. At that time, Mr. Babiy was informed that the Bank would not disburse any further funds under the loan because Diamond was not in compliance with the terms of the agreement. ***Id***. at 152-53. Mr. Babiy was offered a six percent interest rate on the loan, which was in conformity with the prevailing rate being offered for construction loans by the Bank. Mr. Babiy rejected this offer. Thereafter, another loan modification, as outlined *infra*, was offered to and rejected by Mr. Babiy.

Mr. Griest testified as follows. He was not personally aware that construction had not started on the South Fairfield Road project until November 19, 2008. He did not make the decision to refuse to further fund the loan until after he received the artist's rendering and asked for the final budget, market data, and updated appraisal. Mr. Griest acknowledged that

there were various reasons that he decided not to release the remainder of the monies. Those reasons included that: 1) the market conditions had changed since December 27, 2007, in that there were too many homes in the same price range on the market in the vicinity of the proposed construction; 2) the December 27, 2007 loan was "below market rate" then in existence; and 3) Mr. Babiy "hadn't built the house when he was supposed to[.]" N.T. Trial, 11/23/10, at 20. Mr. Griest conceded that "the deciding factor for [him] in the decision not to fund the loan was the market data that was provided[.]" ***Id***. at 21.

Mr. Griest explained that, after discovering that the house was not started, he decided to ask for the final budget, new appraisal, and market data because "the market was deteriorating rapidly and we had to make sure that we had a better understanding of the market conditions." ***Id***. at 31. Mr. Griest sought to ascertain "whether the house could be built and sold within the original terms of the loan," and "whether the price [Mr. Babiy] was originally going to set for it was still realistic." ***Id***.

There were other reasons underpinning Mr. Griest's decision. Mr. Griest concluded that the house could not be built within the original terms of the December 27, 2007 loan because it normally took ten to twelve months to build a home of the proposed scope of the project, which would have placed completion well outside of the loan's June 26, 2009 anticipated maturity date. Mr. Griest also discounted the validity of the updated

appraisal since Mr. Babiy did not "have a final set of plans or specs or a final budget, so I really wasn't sure how a final appraisal could be done without that information." ***Id***. at 34.

Additionally, Mr. Griest testified that at the December 11, 2008 meeting with Mr. Babiy, he informed the builder that "based on my review of the loan documents, he was basically out of compliance and that we wanted to find an alternative way to review the loan and put the financing in place." ***Id***. at 36. At trial, Mr. Griest specifically delineated that Mr. Babiy was not entitled to invoke his contractual right to obtain additional funding since he had not started construction as of December 5, 2008, and had not provided plans and specifications for the project as mandated by the post-closing agreement.

After Mr. Babiy complained that the Bank's decision placed him in a bad position with his contractors, Mr. Griest offered an initial alternative financing proposal that would have increased the interest rate from 3.75% to 6%, increased the interest reserve, and imposed a fee for any loan extension. When Mr. Babiy rejected these terms, Mr. Griest offered a second alternative proposal that would have allowed the 3.75% interest rate to remain in place until the maturity date of the December 27, 2007 loan on June 26, 2009, at which point the interest rate would increase to 5.5% and no fees would be demanded for an extension. Under this latter proposal, Diamond would have incurred an additional $50,000 to $55,000 in finance

charges. That loan would have had a two-year maturity date. This second financing offer was also rejected.

Mr. Babiy made a number of admissions during his testimony. He did not submit the documents required by the post-closing agreement. N.T. 11/24/10, at 63. Specifically, Mr. Babiy acknowledged that as of December 11, 2008, he "had not provided the bank with a complete set of plans and specifications for its approval[.]" ***Id***. at 88. He further conceded that he was aware when he executed the loan document that the project was going to be delayed and construction would not start within sixty days. ***Id***. at 74. Mr. Babiy also confessed that, even though the Dorset Road project sold on June 30, 2008, he did not begin demolition on South Fairfield Road in July, and did not even apply for the necessary permits, which he was aware took time to obtain, until months after Dorset Road was sold. He applied for the grading permit on August 29, 2008, the construction permit on October 13, 2008, and the demolition permit on November 5, 2008. The latter permit was initially rejected and was not issued until December 1, 2008. ***Id***. at 85. As of December 11, 2008, the only actions performed on the South Fairfield Road home was to gut the structure of items of value and construct a silt fence, which took less than one day to install.

Finally, Mr. Babiy conceded that as of December 11, 2008, he would not have been able to complete the house by the June 26, 2009 maturity date of the loan and that it was within the Bank's sole discretion whether to

grant an extension. Specifically, he stated that it took about ten months to finish a house like the Fairfield Road project. ***See*** N.T. Trial, 11/24/10, at 33. Demolition was set to start on December 12, 2008, six and one-half months before the loan's maturity date.

Based on this evidence, the trial court first concluded that the Bank anticipatorily breached the contract by indicating it would not further fund the project. As noted, the court ruled that while the Bank "attempted to trump up a justifying cause for its conduct," its refusal to distribute more money to Diamond was wrongful because the Bank "acted solely based upon profit." Trial Court Opinion, 4/20/11, at 2. The trial court did not discuss or acknowledge the terms of the construction loan, despite the fact that the parties' relationship was governed by that contract. It ruled that the Bank was estopped from using the contract conditions because it assented to a construction delay and never told Diamond that it would not fund the project.

After finding a breach by the Bank, the trial court continued that the breach was not material in "the context of [Diamond's] obligation to repay [$782,263.17 plus interest] owed to the Bank[.]" ***Id***. at 4. Despite its finding of non-materiality with reference to the Bank's breach, the court awarded Diamond $50,000 in damages for the Bank's anticipatory breach of contract. This amount represented the difference in the interest due under the loan agreement negotiated on December 27, 2007, and the terms of a

financing that the Bank offered Diamond after December 11, 2008, so that Diamond could complete the project. In this respect, the trial court noted that, at trial, Diamond offered no explanation for refusing to accept the loan under the modified terms offered by the Bank and that it could have completed construction if it had accepted those terms. The court specifically rejected, as unsupported and speculative, the testimony of debtors' expert witness as to Diamond's lost profits.

The parties filed post-trial motions, which were denied. After entry of judgment on this verdict on May 4, 2011, the appeal at 1341 EDA 2011 and cross appeal at 1442 EDA 2011, which were filed at lower court docket number 09-05874, followed. Additionally, three appeals, two by the Bank and one by the debtors, were filed with respect to lower court docket number 09-07789. All five appeals were consolidated for our review.

In their appeals from the breach of contract action and entry of judgment against them, debtors advance the following issues:

> 1. Whether the trial court erred in finding that Continental Bank's refusal to fund construction as required by the Loan Agreement constituted substantial performance and was not a material breach despite the trial court finding that the Bank's conduct was "arbitrary, unreasonable and reckless."
>
> 2. Whether the trial court erred by disregarding [Diamond's] evidence of reasonably foreseeable damages and by limiting [Diamond's] damages to the difference between the interest costs under the Loan Agreement and the higher interest rate at which the Bank "offered" [Diamond] to refinance the Project, despite the absence of any bona fide "third party" alternative financing.

3. Whether the trial court erred in finding that Diamond Development Group is required to pay back the principal loan amounts prior to the completion of the Project after Continental Bank materially breached the Loan Agreement and in awarding Continental Bank repayment of the loan amount at an accelerated default interest rate even though the Bank's material breach of the Loan Agreement terminated that Agreement and was the sole cause of any default.

Definitive Text Brief of Appellants P. Theodore Babiy and Ann Marie Quinn, h/w, and Diamond Development Group, LLC, at 2.

In the breach of contract case at 09-05874, and the confession of judgment action at 09-07789, the Bank raises these issues before this panel:

1. Did the trial court err as a matter of law in holding that Continental Bank was equitably estopped from invoking the Loan Agreement's express provisions governing if and when [Diamond] would be entitled to obtain additional advances on its loan and that the Bank's refusal to make additional advances to [Diamond] constituted an anticipatory breach of the Loan Agreement?

2. Given the trial court's correct decision that the agreement between [Diamond] and Continental Bank was not terminated and [Diamond's] obligations remained intact, did the trial court err or otherwise abuse its discretion in failing to award to Continental Bank the attorneys' fees and costs that the Bank incurred in protecting its rights and seeking to collect on the loan, which were provided for by the parties' agreement?

3. Did the trial court err in ruling that corporate borrower [Diamond] was entitled to recover its attorneys' fees for having prevented execution of Continental Bank's confessed judgment when the real property in question was owned by a corporation for investment purposes and was not being used by anyone as a personal residence?

4. In the event that this Court were to hold that Act 6 authorized an award of attorneys' fees in favor of [Diamond], did the

> trial court abuse its discretion in failing to limit its award of attorneys' fees to those reasonably justified fees and costs connected to [Diamond's] opposition to the Bank's attempted execution?

Definitive Brief of Appellee/Cross-Appellant Continental Bank, at 4-5.

For the following reasons, we reverse the award of $50,000 in damages in favor of Diamond and affirm the entry of judgment in the amount of $782,263.17, as well as unpaid interest, in favor of Bank and against debtors. Since defense of the breach of contract action pertained to Bank's efforts to validate its debt and contest debtors' position that they did not have to repay the funds loaned to Diamond, we conclude that the Bank, as provided under the clear terms of the December 27, 2007 loan agreement, is entitled to attorneys' fees in connection with its defense, on the merits, of the breach of contract action. Thus, we also remand for calculation of the Bank's attorneys' fees to the extent those fees are permitted under the language in the loan agreement and were reasonable and necessary.

**Disposition of Superior Court Docket Numbers 1320 EDA 2011, 1440 EDA 2011 , and 1441 EDA 2011 Filed at Lower Court Docket Number 09-07789**

As noted *supra*, docket number 09-07789 already has been the subject of a previous appeal. As to this lawsuit, the trial court opened the confessed judgments on April 28, 2010. Debtors then petitioned for an award of attorneys' fees and costs, which was granted on September 2, 2010. On September 10, 2010, judgment in the amount of $47,814.06 was

entered in favor of debtors and against Bank at lower court docket number 09-07789. After collection efforts were initiated, the Bank filed a motion to stay execution, which was eventually granted after it posted security. The Bank also, on October 1, 2010, filed a motion for reconsideration of the September 2, 2010 decision to award debtors their attorneys' fees.

The Bank filed an appeal, assigned docket number 3234 EDA 2010, on November 22, 2010, from the October 22, 2010 order denying its motion for reconsideration. Debtors moved to quash this appeal and specifically argued therein that it was untimely because the September 10, 2010 judgment was a final order. The Bank had until October 9, 2010 to file a timely appeal, which rendered the November 22, 2010 notice of appeal untimely. While the Bank contested that the September 10, 2010 judgment was a final order in the action, we disagreed and, by order dated January 26, 2011, the appeal at 3234 EDA 2010 was quashed.

After entry of judgment following the non-jury trial on the merits of the breach of contract action and debtors' responsibility to repay the loan, the Bank filed two appeals with respect to lower court docket number 09-07789, and they were assigned Superior Court docket numbers 1440 EDA 2011 and 1441 EDA 2011, respectively. In its argument related to those appeals, the Bank assails the award of attorneys' fees to debtors in the confessed judgment lawsuit with lower court docket number 09-07789.

Herein, we conclude that the Bank's appeals filed at 1440 EDA 2011, and 1441 EDA 2011, with respect to lower court docket number 09-07789, are untimely and must be quashed. We have previously determined that the September 10, 2010 judgment entered against Bank in the amount of $47,814.06 was final with respect to the Bank and had to be appealed by October 9, 2010. This ruling cannot be circumvented by filing another appeal at that same docket number after trial on matters unrelated to debtors' right to obtain attorneys' fees for successfully opening the confessed judgments. The trial did not concern the matter of the attorneys' fees awarded to debtors and against Bank at 09-07789. The doctrine of collateral estoppel is implicated herein:

> Collateral estoppel applies when the following four conditions are present: (1) the issue decided in a prior adjudication is identical to the one presented in the current action; (2) there was a final judgment on the merits in the prior action; (3) the party to the current action was a party or in privity with a party to the prior adjudication; and (4) the party against whom a claim of collateral estoppel is asserted had a full and fair opportunity to litigate the issue in question in the prior adjudication.

***Daley v. A.W. Chesterton, Inc.***, 37 A.3d 1175, 1190 n.22 (Pa. 2012).

The question of **when** the Bank had to appeal from the order imposing attorneys' fees at 09-07789 was decided in the prior appeal. Our decision therein became final after the Bank failed to further contest the quashal of its prior appeal. The parties are identical, and the Bank had a full and fair opportunity to litigate the question, as it responded to the debtors' petition

to quash by taking the position that the September 10, 2010 judgment was not final. Hence, we quash these appeals.[2]

Furthermore, the debtors' appeal in the confessed judgment action is moot. They were not aggrieved by any of the rulings entered therein. Rather, the confessed judgments were vacated and opened and they were awarded attorneys' fees. Hence, we dismiss their appeal, 1320 EDA 2011, filed therein.

**Disposition of Appeal at 1341 EDA 2011**
**and Cross-Appeal at 1442 EDA 2011**
**Filed at Lower Court Docket Number 09-05874**

Initially, we note that the trial court's rulings herein contain a measure of inconsistency. The court found that the Bank anticipatorily breached the contract on December 11, 2008, when it refused to disburse further funds. In so doing, it ruled that the Bank was equitably estopped, based upon its conduct after the agreement was executed, to refuse to provide more money due to Diamond's non-compliance with the loan agreement, even though the contract provided that the Bank's conduct could not be used to prevent the Bank from invoking the conditions precedent for further loan disbursements.

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[2] In its original opinion filed at docket number 09-07789, the trial court concluded that the initial appeals were untimely. In its opinion issued after trial, the court did not take a position on the matter. While the debtors do not request quashal, the timeliness of an appeal relates to our jurisdiction and must be raised *sua sponte*. ***Weir v. Weir***, 631 A.2d 650, 652 (Pa.Super. 1993) ("Questions relating to jurisdiction are not waived by the failure of the parties to raise them and may properly be raised by the court *sua sponte.*").

Although it concluded that the Bank breached the contract, the court then ruled that the breach was not material in terms of debtors' obligation to repay the amount of the original loan. However, the obligation to fund the construction loan was the sole obligation of the Bank under the loan agreement; thus, the finding of non-materiality of breach appears to be untenable. Then, after finding the breach was not material, the trial court nevertheless awarded Diamond damages for that breach.

Regardless of these rulings, we must provide the correct framework for analysis of the issues presented. In this case, debtors proceeded under theories of breach of contract, promissory estoppel, and equitable estoppel. The court ruled that promissory estoppel was inapplicable herein due to the fact that there was an express agreement governing the parties' relationship. ***See Cardamone v. University of Pittsburgh***, 384 A.2d 1228, 1233 n.9 (Pa.Super. 1978). Debtors do not contest that finding.

Additionally, equitable estoppel is not an independent cause of action, although it was pled as such herein. ***Paul v. Lankenau Hospital***, 3543 A.2d 1148, 1152 (Pa.Super. 1988), *reversed on other grounds*, 569 A.2d 346 (Pa. 1990) ("[E]quitable estoppel is not an independent cause of action. It may be used as an affirmative defense or a plaintiff may use it to preclude a defense from being raised. It may prove useful during litigation, but it is ancillary by nature. Though it may aid a party in recovering upon his legal theory, it may not serve as a substitute for such a theory."). Equitable

estoppel, although advanced as an independent cause of action, also was invoked by debtors as an aid in seeking recovery on the primary legal theory of breach of contract. Debtors asserted estoppel in order to prevent Bank from raising Diamond's noncompliance with loan provisions as a defense in the breach of contract action. Thus, we will determine if the evidence supports its application herein in light of the contractual language at issue. However, to the extent that debtors invoke equitable estoppel as an independent basis for recovery, apart from the breach of contract, we reject their position. ***See*** Reply brief of the Appellants/ Brief of the Cross-Appellees P. Theodore Babiy and Anne Marie Quinn, h/w, and Diamond Development Group, LLC., at 20-21 (In attempting to avoid application of § 8.04 of the loan agreement, debtors argue that Diamond "did not attempt to enforce a contractual right, and the trial court's holding the Bank was estopped does not lie in contract law, but rather in equity[.]").

Thus, in conclusion, this action must be considered solely an action for breach of contract where the debtors have invoked equitable estoppel for purposes of their failure to satisfy conditions precedent to the Bank's contractual duty to disburse additional funds under the loan document. In conducting appellate review of this matter, we are guided by the following principles. "Because contract interpretation is a question of law, this Court is not bound by the trial court's interpretation." ***Miller v. Poole***, 45 A.3d 1143, 1145 (Pa.Super. 2012) (citation omitted). "[T]he mutual intention of

the parties at the time they formed the contract governs its interpretation. Such intent is to be inferred from the written provisions of the contract." ***Id***. at 1146 (citation omitted). If the language of an accord is "clear and unambiguous, the intent of the parties is to be ascertained from the language used in the agreement, which will be given its commonly accepted and plain meaning." ***Id***. (citation omitted).

We first address whether the court correctly ruled that the Bank anticipatorily breached the loan agreement entered on December 27, 2007. To recover for breach of contract, the plaintiff must prove that the contract exists, the agreement was breached, and the breach caused damages. ***See Liss & Marion, P.C. v. Recordex Acquisition Corp.***, 983 A.2d 652, 662 (Pa. 2009). The trial court found that the Bank committed a breach of contract when it refused to further fund the loan on December 11, 2008. We disagree.

Section 4.02 (i) of the loan agreement provides that if Diamond "fails in any respect to comply with the provisions of this Agreement," then the Bank "at its options, may refuse to make further Advances[.]" Under § 5.01, construction of the project had to "commence" within sixty days "after the date of this Agreement," and construction had to be prosecuted "with diligence and continuity to completion." Mr. Babiy acknowledged that the construction had not started on the project as of December 11, 2008, when the Bank refused to make further advances under the loan agreement.

Under the post-closing agreement, as admitted by Mr. Babiy, Diamond had to supply to the Bank the specifications and plans for the proposed construction by February 25, 2008. The post-closing agreement stated that the Bank "shall not be required to make any additional Loan Advances following Closing until" the specifications and plans for the house were submitted to the Bank. As of December 11, 2008, as admitted by Mr. Babiy, Diamond had yet to forward the plans and specifications required by the post-closing agreement. When the Bank refused to further fund the construction of 313 South Fairfield Road on December 1, 2008, it did not breach the contract in question because it was not contractually obligated to disburse further funds under the clear terms of the loan agreement due to Diamond's failure to satisfy these two contractual provisions. Indeed, on December 11, 2008, Diamond conceded that it did not even have a final budget prepared.

In advancing a theory of equitable estoppel, debtors assert that the Bank was foreclosed, by its conduct, from relying upon Diamond's failure to satisfy the terms and conditions necessary to trigger the Bank's obligation to distribute additional monies. First, Mr. Ashmore expressly agreed to permit a delay in construction until the Dorset Road property was sold. Second, no one from the Bank told Diamond that further funds would not be released from June 2008 until December 11, 2008, during the myriad communications between Mr. Babiy and Mr. Ashmore. Instead, debtors

propose, Mr. Ashmore signaled that the money would be forthcoming when he said the Bank was operating normally after the Lehman Brothers collapse and then asked for an updated appraisal, final budget, and current market data. Third, debtors point to the fact that Mr. Griest admitted that two of the reasons that the project was not funded were that market conditions for luxury homes in the Main Line had changed between December 2007 and December 2008 and that the market rate on construction loan agreements had increased during that time frame. Mr. Greist further acknowledged that neither of those factors provided a valid ground to avoid distribution of further monies. Thus, debtors assert that the Bank is equitably estopped from invoking Diamond's failure to satisfy its contractual obligations because the Bank's true motivation behind its decision was a profit motive.

> "Equitable estoppel is a doctrine whereby a party will be bound by its representations if they are justifiably relied upon by another party." ***Northcraft v. Edward C. Michener Associates, Inc.***, 319 Pa.Super. 432, 466 A.2d 620, 626 (1983). "Equitable estoppel arises when a party by acts or representation intentionally or through culpable negligence, induces another to believe that certain facts exist and the other justifiably relies and acts upon such belief, so that the latter will be prejudiced if the former is permitted to deny the existence of such facts." ***Id***.

***Guerra v. Redevelopment Authority of City of Philadelphia***, 27 A.3d 1284, 1290 (Pa.Super. 2011).

We conclude that equitable estoppel cannot be applied in this case. There were two representations made by Mr. Ashmore. First, he agreed that Diamond could delay construction until Dorset Road was sold. However, this

event occurred on June 30, 2008, while construction not only failed to start in July 2008, it did not begin within sixty days of June 30, 2008. In fact, Diamond did not start to apply for the permits necessary to initiate the project, a process that Mr. Babiy acknowledged took months, until August 29, 2008, two months later. Mr. Ashmore's apparent assent to delay of the construction until Dorset Road was sold this cannot operate as an estoppel until December 11, 2008, because Diamond did not promptly initiate the project after Dorset Road was sold. Nearly six months after that event occurred, Diamond had not started to demolish South Fairfield Road. Furthermore, nothing said by Mr. Ashmore can be construed as an agreement to absolve Diamond of its responsibility to provide plans and specifications for the project in question. This was a separate failure by Diamond that was never expressly waived or extended by anyone from the Bank.

The second representation occurred in September 2008, when Mr. Babiy inquired into the Bank's liquidity, and Mr. Ashmore responded that the Bank's operations were sound. During this conversation, Mr. Ashmore did not affirmatively represent or even imply that further disbursements would be made under the loan document or that any terms and conditions required for disbursement were being waived or extended by the Bank.

Finally, debtors base their estoppel position on the fact that Diamond was never expressly informed Diamond between June 30, 2008 and

December 11, 2008, that it was not in compliance with the loan terms and that the Bank would not make further disbursements. Equitable estoppel can be applied to a party's silence only when the party has a duty to speak. ***See Zitelli v. Dermatology Education and Research Foundation***, 633 A.2d 134, 139 (Pa. 1993) (Equitable estoppel "arises when one . . . by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist[.]").

In this case, the debtors fail to substantiate why the Bank had a duty to speak. The Bank was not under an obligation to tell Diamond that it was not in compliance with the terms and conditions necessary to invoke distribution rights. Mr. Babiy was fully aware that he had not started construction within sixty days, or even in a prompt fashion after the purported extension of construction inception to June 30, 2008. Mr. Babiy also knew, as evidenced by his testimony, that he never submitted plans and specifications to the Bank. During his testimony, Mr. Babiy acknowledged that he was a loan officer before becoming a real estate developer and also admitted that he was aware of and understood the terms of the loan agreements that he executed on behalf of Diamond. Mr. Babiy was cognizant that he was not in compliance with the contract terms and had no contractual right to distribution of any more money.

More importantly, however, the document executed and understood by Mr. Babiy expressly forbade application of an estoppel theory based upon

the Bank's conduct. It states that "[n]o course of dealing and no delay or failure of the Lender in exercising any right, power or privilege under any Loan Document shall affect any other or future exercise thereof[.]" Loan Agreement, 12/27/07, at § 8.04. This contract term clearly prohibits debtors from raising a theory of estoppel based upon the Bank's conduct from December 27, 2007 to December 11, 2008. As noted, debtors attempt to avoid application of § 8.04 by maintaining that somehow this lawsuit was not premised upon breach of contract, but instead on equitable estoppel. However, as stated above, equitable estoppel is not an independent cause of action. Hence, herein, equitable estoppel could only be used as ancillary to the breach of contract action. Significantly, however, the contract at issue prevents application of estoppel against Bank based on either its conduct or its previous failure to exercise any contractual rights it had. The contract itself precludes an estoppel position.

Finally, we reject any finding that the Bank breached the contract due to the fact that its decision not to fund was premised upon a profit motive. This action was a breach of contract case, and debtors had to establish a breach of the terms of the document in question. The Bank was not contractually obligated to release any further money because Diamond had not met two express and unequivocal terms and conditions necessary to invoke the Bank's obligation to do so. The motivation behind the failure to

perform under a contract does not subject one to liability unless the default constitutes a breach of the terms of the agreement.

To summarize, debtors cannot prevail in a breach of contract action due to the contract language at issue. The disbursement of further funds was contingent upon compliance with certain terms and conditions. Diamond had not begun construction within sixty days of December 27, 2007, and had failed to diligently pursue construction. There was no written or oral modification of that document permitting an extension of that obligation until December 11, 2008. The record permits of no other conclusion but that delay in the inception of construction was forgiven, if at all, only until June 30, 2008. Diamond failed to promptly initiate construction after that date. Additionally, Diamond never provided the plans and specifications for the home, which unequivocally absolved the Bank, under the terms of the post-closing agreement, from making any further disbursement of funds. These contract provisions cannot be viewed as "trumped out" reasons for not funding when this action was for breach of contract and when, contractually, Diamond's right to draw down more money under the loan agreement was contingent upon its satisfaction of these clear terms of the construction loan document.

We conclude that debtors' position that they have a viable breach of contract action is untenable for an additional reason. Mr. Babiy testified that it would have taken about ten months to complete a home of the size and

scope of the proposed project. Diamond planned to start demolition on December 12, 2008, and it could not have completed the construction of the South Fairfield project by the loan's June 26, 2009 maturity date, six and one-half months later. Meanwhile, any loan extensions were completely within the discretion of the Bank. In this respect, the agreement states:

> 2.03. Maturity Date. All principal and interest under the Loan, together with any other amounts due under the other Loan Documents, shall be payable in full on the Loan Maturity Date provided, however, that so long as no Event of Default has occurred, the Borrower may extend the Maturity Date once for 180 days, upon (a) written notice to the Lender given within thirty (30) days of the Maturity Date, (b) provision by Borrower of an interest reserve for the extended Maturity Date in an amount satisfactory to Lender in its sole discretion, (c) the Project progress is satisfactory to Lender in its sole discretion, and (d) payment to the Lender of an extension fee of Four Thousand Five Hundred Fifty-Eight Dollars ($4,558.00). In no event shall the Maturity Date be later than December 26, 2009.

Loan Agreement, 12/27/07, at § 2.03.

After the maturity date of the loan, which would not have been extended by the Bank in light of the facts in question, Diamond's obligation to repay the full loan amount was absolute. ***See*** Open-End Mortgage Note, 12/27/07, at 1 (obligating Diamond to pay the principal sum borrowed under the construction loan agreement in full "on the Maturity Date"). Thus, when the house was four months from completion and was not even on the market, much less under an agreement of sale, Diamond would have been obligated to fully repay anything loaned to it by the Bank. Debtors offer no explanation of how they could have paid the Bank any outstanding principal

and accrued interest on June 26, 2009, and still have been able to finish a sixty-percent completed construction project.

Indeed, debtors admit that they could not have paid the loan on its maturity date. Definitive Text Brief of Appellants P. Theodore Babiy and Ann Marie Quinn, h/w, and Diamond Development Group, LLC, at 11 ("Until all phases [of the project at South Fairfield Road] were complete, and the new home sold, [Diamond] had no capacity to repay the Loan."). Debtors do suggest that since the Bank agreed to delay construction, they impliedly agreed to extend the maturity date. This position is not supported by the record, as no discussions to extend the maturity date occurred. Furthermore, the construction start date was delayed, if at all, only until June 30, 2008, giving Diamond time to complete and place the home on the market before the June 26, 2009 loan maturity date.

The Bank made an offer to permit the outstanding interest rate to remain in place until June 26, 2009, when Diamond would have been obligated to fully satisfy any outstanding loan balance and any loan extension would have been at the Bank's sole discretion and when it could have demanded a higher interest reserve. Mr. Babiy offered no explanation for his refusal to accept this proposal by the Bank, despite significant defaults in performance by Diamond and Mr. Babiy's inability to secure funds elsewhere.

Debtors continually highlight that Mr. Griest admitted that he was motivated by financial considerations and that he acknowledged that funding was withheld due to the fact that the loan was below market in terms of rate and the real estate market had declined. However, debtors ignore the fact that Mr. Griest also stated that he was not contractually obligated to advance more money as Diamond was not in compliance with the loan document. They overlook the December 18, 2008 letter explaining that the Bank was not obligated to disburse more money based upon Diamond's non-compliance with the loan agreement. They incorrectly assert that Mr. Griest did not point to noncompliance. ***E.g.*** Reply brief of the Appellants/ Brief of the Cross-Appellees P. Theodore Babiy and Anne Marie Quinn, h/w, and Diamond Development Group, LLC. at 21 ("Griest relied only upon changed market conditions as the reasons for the refusal to continue funding"). However, Mr. Griest testified that a justification for refusing Diamond more money was that Mr. Babiy "hadn't built the house when he was supposed to[.]" N.T. Trial, 11/23/10, at 20.

In the end, Mr. Greist could not have refused to disburse more money to Diamond based upon market conditions if Diamond had completed its obligations to begin and diligently proceed with construction, as required by the loan agreement, and if Diamond had supplied the Bank with plans, specifications, and a final budget, as required by that document.

In light of the fact that the Bank did not breach its funding obligation due to Diamond's failure to meet the terms and conditions necessary to trigger that obligation, the Bank did not anticipatorily breach the loan on December 11, 2008. Thus, we need not examine the materiality of any purported breach, and we conclude that the debtors are not entitled to any damages. Moreover, since the Bank was not contractually obligated to dispense any further construction loans to Diamond, we reject the court's finding that the Bank's conduct was arbitrary, unreasonable and reckless as well as debtors' repeated reliance upon his unsupported factual determination.

We also hold that the Bank is entitled to an award of attorneys' fees in the breach of contract action. The agreement in question provides:

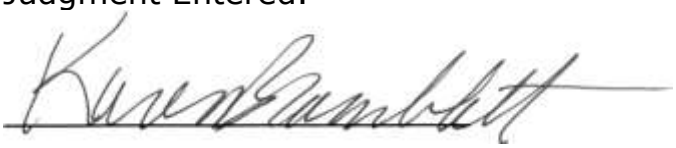
> The Lender shall also have the right to commence, appear in, or defend any action or proceeding purporting to affect the rights, duties, or liabilities of the parties to this Agreement, or the disbursement of funds from the Loan Fund. In connection with the right, the Lender may incur and pay reasonable costs and expenses, including, but not limited to, attorney's fees, for both trial and appellate proceedings.

***Id***. at § 4.03(f). In this action, the Bank was defending its right to collect on the amount owed to it by debtors. It is thus contractually entitled to attorneys' fees herein. We therefore remand for calculation and award of reasonable and necessary attorneys' fees to Bank to the extent that the attorneys' fees fall within the parameters of that permitted under § 4.03. While the Bank did present bills for its fees, the trial court refused to make

an award in that respect, and, therefore, it made no determination as to whether the amounts claimed by the Bank were reasonable and necessary and were encompassed by the contract language. Therefore, a hearing and factual findings are required with respect to this item of damages.

Appeal numbers at docket numbers 1440 EDA 2011, and 1441 EDA 2011 are quashed. The appeal at 1320 EDA 2011 is dismissed. With respect to the appeals at 1341 EDA 2011 and 1442 EDA 2011: 1) we affirm entry of the award in favor of Continental Bank and against Diamond Development Group, Inc., Diamond Development Group, LLC, P. Theodore Babiy and Ann Marie Quinn in the amount of $782,263.17, plus accrued interest in the amount of $90,352.39 through November 22, 2010 and such additional interest as may accrue until paid; 2) we vacate the award of $50,000 in damages in favor of Diamond Development Group, LLC, and against Continental Bank; and 3) we remand for an award of attorneys' fees to the Bank in accordance with this adjudication. Jurisdiction relinquished.

Judgment Entered.



Prothonotary

Date: 12/21/2012