

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

COMMONWEALTH UNITED MORTGAGE,	:	November Term, 2009
	:	
a division of National City Bank of Indiana	:	Case No. 02269
	:	
<i>Plaintiff</i>	:	
	:	
v.	:	
	:	
JOHN A. BENNETT	:	
	:	Commerce Program
and	:	
	:	
KADIR GENCER	:	
	:	
<i>Defendants</i>	:	

OPINION

The Findings-of-Fact and Conclusions-of-Law requires this Court to determine priority between two mortgage liens held respectively by Plaintiff, Commonwealth United Mortgage (“Commonwealth,”) and Defendant, John A. Bennett (“Bennett.”) For the reasons below, the mortgage of Commonwealth has priority over the mortgage of Bennett.

Findings-of-Fact¹

1. In January 2006, Historical Enterprises, Inc., the prior name of Bennett Enterprises, Inc. (“Bennett Enterprises,”) entered into an agreement with Defendant Kadir Gencer (“Gencer,”) for the sale of eleven parking spaces located in Philadelphia, Pennsylvania (the “Agreement of Sale.”)

¹ Unless otherwise stated, all findings of fact are gleaned from the Amended Joint Statement of Stipulated Facts submitted by the parties.

2. At all times relevant to the Agreement of Sale, Bennett was president and secretary of Bennett Enterprises.
3. On March 16, 2006, Gencer as borrower/mortgagor, and Commonwealth as lender/mortgagee, executed a mortgage (the “Commonwealth Mortgage,”) which gave Commonwealth title to the parking lots until Gencer repaid the loan.² This mortgage identified Commonwealth as “a division of National City Bank of Indiana” (“National City Bank.”)
4. Before closing on the sale of the parking lots, Bennett received Title Commitment, Schedules A and B, No. LBA—23554R.
5. The Title Commitment identified National City Bank as the lender, mortgagee, and insured party in the transaction involving the sale of the parking lots.³ The Title Commitment identified no lender, mortgagee or insured party, other than National City Bank.
6. On March 21, 2006, Bennett received a proposed HUD—1 Uniform Settlement Statement Form (the “Settlement Sheet”).
7. The Settlement Sheet identified Gencer as buyer, Bennett Enterprises as seller, and National City Bank of Indiana as lender.⁴ The Settlement Sheet identified no lender other than National City Bank.
8. Closing and settlement on the sale of the parking lots was held on March 22, 2006, at the offices of Devon International Group, an entity affiliated with Defendant Bennett.

² Mortgage between Kadir Gencer and Commonwealth United Mortgage, Joint Exhibit J-1.

³ Title Commitment Schedules A and B, No. LBA—23554R, Plaintiff’s Exhibit P-1 attached to the Amended Joint Statement of Stipulated Facts.

⁴ HUD—1 Uniform Settlement Statement, Boxes D, E, F, Joint Exhibit J-3, attached to the Amended Joint Statement of Stipulated Facts.

9. Bennett was present as the closing. At the closing, Bennett reviewed and signed the Settlement Sheet.⁵
10. Gencer used the proceeds from the Commonwealth Mortgage to acquire the parking lots.
11. On the same day of closing and settlement, March 22, 2006, Gencer as borrower/mortgagor, and Bennett as lender/mortgagee, executed a mortgage (the “Bennett Mortgage,”) which gave Bennett title interest in the parking lots until repayment of the “Bennett Loan.”⁶
12. After closing, the Commonwealth Mortgage and the Bennett Mortgage were recorded. However, the Commonwealth Mortgage, though older than the Bennett Mortgage, was recorded second.
13. Gencer defaulted on the Commonwealth Mortgage, and Commonwealth began foreclosure proceedings against Gencer on July 11, 2008.
14. After commencement of foreclosure proceedings, Bennett, through counsel, asserted that the Bennett Mortgage had priority over the Commonwealth Mortgage because the Bennett Mortgage was recorded first.
15. Trial in this matter was held on July 13-14, 2011.
16. Defendant Bennett was present at the closing and knew of the existence of the Commonwealth Mortgage before he executed the Bennett Mortgage with Defendant Gencer.

Conclusions-of-Law

17. “The legal effect of the recording of [mortgages] ... shall be to give

⁵ Deposition Testimony of Defendant Bennett, Exhibit, G attached to the Post-Trial Memorandum of Plaintiff Commonwealth, p. 57: 3–20.

⁶ Mortgage between Kadir Gencer and John A. Bennett, Joint Exhibit J-2, attached to the Amended Joint Statement of Stipulated Facts.

constructive notice to subsequent ... mortgagees ... [that] ... the rights of the subsequent ... mortgagees ... shall be limited ... as if said subsequent ... mortgagees ... had actually joined in the execution of the agreement or agreements....”⁷

18. “[A]ctual notice of an unrecorded instrument, if received by a subsequent lienor before his interest attaches, is equivalent to the constructive notice which recording provides.”⁸
19. The Title Commitment, which Bennett received prior to his execution of the Bennett Mortgage, clearly and unambiguously identified Commonwealth as a division of National City Bank, and as the sole lender, mortgagee and insured party in the transaction involving the sale of the parking lots. Thus, the Title Commitment provided Bennett with actual and constructive notice that Commonwealth Mortgage exerted a lien upon the parking lots.
20. Prior to the execution of the Bennett Mortgage, Bennett signed a Settlement Sheet which clearly and unambiguously identified National City Bank as lender in the agreement for the sale of the parking lots. Bennett received actual as well as constructive notice that Commonwealth, a division of National City Bank, exerted a lien upon the parking lots.
21. Finally, Defendant Bennett testified at trial that he was aware of the existence of the Commonwealth Mortgage, before he and Gencer executed the Bennett Mortgage.
22. The Court finds in favor of Plaintiff, Commonwealth United Mortgage, and

⁷ Pennsylvania Statutes, Title 21: Deeds and Mortgages, P.S. § 357 (2001).

⁸ In re Distribution of Proceeds from Sheriff's Sale of Premises 250 Bell Road, Lower Merion Township, Montgomery County, Pennsylvania. Appeal of John H. McCoy. Appeal of Boenning & Scattergood, Inc., 479 Pa. 222, 226; 388 A.2d 297, 299 (Pa. 1978).

against Defendant, John A. Bennett.

By The Court,

Mark I. Bernstein, J.

DATED: August 9, 2011