STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: October 22, 2018]

BANK OF AMERICA, N.A.,	:	
Plaintiff,	:	
	:	
VS.	:	**C.A. No. PC-2016-1618**
	:	
TIMOTHY G. FAY and DAVID N. PATRICK,	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. Before this Court is Plaintiff Bank of America, N.A.'s (Plaintiff or BOA) motion for summary judgment and entry of final judgment against Defendants Timothy G. Fay (Fay) and David N. Patrick (Patrick) (collectively, Defendants). On June 29, 2018, this Court found Defendants liable to BOA as Guarantors of a note executed by Stonestreet Hospitality Realty Company, LLC (Stonestreet or Borrower) and delivered to BOA, but declined to assign a value to the debt. BOA now seeks to find Defendants jointly and severally liable in the amount of $5,022,003.67 as of April 30, 2018, plus interest, as adjudicated by the Connecticut Superior Court on May 15, 2018 (the Connecticut Proceeding). *Bank of America, N.A. v. Stonestreet Hospitality Realty Company, LLC et al.*, Docket No. KNLCV166026981S. The Defendants have objected to the motion. The sole issue before this Court is the amount due under this guaranty. Jurisdiction is pursuant to G.L. 1956 § 8-2-13.

I

Facts and Travel

Fay and Patrick are residents of Rhode Island, as well as principals and collective one hundred percent owners of Stonestreet, a Limited Liability Company organized under the laws of Connecticut. Fay is the majority owner and manager of Stonestreet with a seventy percent interest; Patrick owns the remaining thirty percent. BOA is a national banking association organized under federal law with a place of business in Providence, Rhode Island.

On May 15, 2008, Stonestreet executed and delivered a promissory note (Note) in the amount of $21,808,000, secured by a first mortgage on a 176 room Hyatt Place Mohegan Sun Hotel, in Montville, Connecticut (the Property). (Pl.'s Compl. Ex. A, Promissory Note.) Borrower contemporaneously executed and delivered a Senior Construction and Interim Loan Agreement (the Loan Agreement) to BOA in connection with the Note.[1] Also on May 15, 2008, Defendants executed and delivered a personal guaranty (Guaranty) to BOA in connection with the Loan Agreement. The Guaranty was executed in Rhode Island and included a choice-of-law provision indicating that the agreement was to be governed, in all respects, by Rhode Island law.[2]

On November 21, 2014, payment of the Note came due in full under the terms of the Loan Agreement but payment was not made. (Pl.'s Compl. ¶ 9.) Accordingly, BOA made a demand for immediate payment from Stonestreet and Guarantors. *Id.* On September 2, 2015, BOA, Stonestreet, and Guarantors entered into a loan forbearance agreement (the Forbearance Agreement), which designated December 15, 2015 as the new maturity date for the Note and

[1] The Loan Agreement was subject to nine subsequent modifications that took place on May 31, 2011; August 1, 2011; March 27, 2012; July 27, 2012; October 23, 2012; April 29, 2013; December 20, 2013; May 14, 2014; and October 8, 2014.

[2] In its June 29, 2018 Decision, this Court found the choice-of-law provision valid and enforceable.

provided that the Guaranty remain enforceable and in effect. (Pl.'s Compl. Ex. D, Forbearance Agreement.) Borrower and Guarantors failed to repay the Note by the new maturity date. *Id.* ¶ 14.

On May 31, 2016, BOA filed a complaint in Connecticut Superior Court (Connecticut Court) to foreclose its mortgage on the Property. On September 25, 2017, the Connecticut Court granted partial summary judgment in favor of BOA, finding that Stonestreet owed $23,108,768.17 to BOA as of September 25, 2017.[3] *See Bank of America, N.A. v. Stonestreet Hospitality Realty Company*, LLC, CV 166026981S, 2018 WL 2208002 (Conn. Super. Ct. Apr. 20, 2018). Ownership of the Property transferred from Stonestreet to BOA on November 8, 2017 (the Transfer Date), memorialized by a Certificate of Foreclosure recorded by BOA. After conducting a two-day hearing on February 15 and 27, 2018, the Connecticut Court concluded the value of the Property on the Transfer Date was $18,400,000. *Id.* On May 15, 2018, the Connecticut Court found the deficiency due to BOA on the Note to be $5,022,003.67 as of April 30, 2018.[4]

On April 12, 2016, BOA filed the within Complaint against Fay and Patrick in their capacity as Guarantors of the Note. On June 29, 2018, this Court granted partial summary

[3] *See Bank of America, N.A. v. Fay et al.*, No. PC-2016-1618, 2018 WL 3536357, at *3 (R.I. Super. June 29, 2018) (Silverstein, J.).

[4] On April 20, 2018, the Connecticut Superior Court found that as of November 8, 2017, the value of the Property was $18,400,000. *Bank of America, N.A. v. Stonestreet Hospitality Realty Company, LLC et al.*, 2018 WL 2208002. The Connecticut Court based this finding on evidence presented by both parties during a procedure governed by C.G.S.A. § 49-14, by which a Connecticut court may enter a deficiency judgment in a mortgage foreclosure action. *Id.* at *6. The Connecticut Court then requested Bank of America to prepare a final calculation of the amount of the deficiency judgment, including accrued interest as well as any credits or debits, but not including counsel fees. *Id.* On May 15, 2018, the Connecticut Court approved Bank of America's calculation of $5,022,003.67, with post-judgment interest accruing after April 30, 2018, at Bank of America's prime rate plus four (4%) percent interest. *Bank of America, N.A. v. Stonestreet Hospitality Realty Company, LLC et al.*, Docket No: KNLCV166026981S (Conn. Super. Ct. May 15, 2018) (Order).

judgment in favor of BOA, holding that Rhode Island law governed the Guaranty agreement and finding Defendants liable for the indebtedness under the Guaranty. However, this Court declined to assign a value to the debt. BOA now moves for summary judgment and entry of final judgment in their favor, asking that this Court hold Guarantors liable for the final amount of indebtedness as adjudicated by the Connecticut Court. BOA seeks the deficiency from Guarantors as adjudicated by the Connecticut Court, or $5,022,003.67 as of April 30, 2018, plus interest at BOA's prime rate plus 4% per annum, or $1,255.50 per day. As of August 1, 2018, the indebtedness amounted to $5,137,230.76, using this calculation.

II

Standard of Review

It is well-settled that "[s]ummary judgment is 'a drastic remedy,' and a motion for summary judgment should be dealt with cautiously." *Estate of Giuliano v. Giuliano*, 949 A.2d 386, 390-91 (R.I. 2008) (quoting *Ardente v. Horan*, 117 R.I. 254, 256-57, 366 A.2d 162, 164 (1976)). "[S]ummary judgment is appropriate when, viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the [C]ourt determines that there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Quest Diagnostics, LLC v. Pinnacle Consortium of Higher Educ.*, 93 A.3d 949, 951 (R.I. 2014) (internal quotation marks omitted) (alterations in original).

"'[T]he moving party bears the initial burden of establishing the absence of a genuine issue of fact.'" *McGovern v. Bank of Am., N.A.*, 91 A.3d 853, 858 (R.I. 2014) (quoting Robert B. Kent et al., *Rhode Island Civil Procedure* § 56:5, VII–28 (West 2006)). Once this burden is met, the burden shifts to the nonmoving party to prove by competent evidence the existence of a genuine issue of fact. *Id.* The nonmoving party may not rely on '"mere allegations or denials in

the pleadings, mere conclusions or mere legal opinions'" to satisfy its burden. *D'Allesandro v. Tarro*, 842 A.2d 1063, 1065 (R.I. 2004) (quoting *Santucci v. Citizens Bank of R.I.*, 799 A.2d 254, 257 (R.I. 2002) (per curiam)).

III

Analysis

Plaintiff asks this Court to find Guarantors liable for the amount adjudicated by the Connecticut Proceeding.[5] In furtherance of this position, Plaintiff submits six legal theories including (1) doctrine of merger, (2) res judicata, (3) collateral estoppel, (4) the Restatement of Law on *Judgments*, (5) judicial estoppel, and (6) the doctrine of judicial admission. Defendants object to Plaintiff's motion.

A

Doctrine of Merger

Plaintiff submits that under the Doctrine of Merger, the Connecticut Court's judgment has effectively become one with BOA's claim against Stonestreet as a matter of law. As such, Plaintiff asserts that the amount due to BOA from Guarantors has been finally adjudicated in the Connecticut Proceeding. Defendants contend that this Court must conduct a trial to determine the amount of the debt owed to BOA by them in their capacity as Guarantors. Defendants further assert that the date of the Connecticut Court's valuation of the deficiency was improper, and that the value must be reassessed to foreclose the possibility that BOA receives a windfall.

[5] Prior to the Connecticut Court's entry of strict foreclosure against Stonestreet, Bank of America's original complaint against Fay and Patrick sought to recover the unpaid balance of the indebtedness due under the Guaranty in the amount of $21,245,589.14, plus interest and fees. *Bank of America, N.A. v. Stonestreet Hospitality Realty Co., LLC, et al.*, Docket No: KNLCV166026981S (Conn. Super. Ct.); Pl.'s Compl. ¶ 17 (Apr. 12, 2016).

The Restatement (First) of *Judgments* § 47 (1942) sets forth that "[w]here a valid and final personal judgment in an action for the recovery of money is rendered in favor of the plaintiff, . . . the plaintiff cannot thereafter maintain an action against the defendant on the cause of action; but . . . the plaintiff can maintain an action upon the judgment." S*ee also Washington Trust Co. v. Fatone*, 106 R.I. 168, 172, 256 A.2d 490, 493 (1969). Specifically, the original cause of action is extinguished following a valid and final judgment, and is replaced by a new cause of action on that judgment. Restatement (First) of *Judgments* § 47 cmt. a (1942). The Restatement goes on to explain that "[w]here the plaintiff has obtained a valid and final judgment . . . for the payment of money, the plaintiff is precluded from maintaining an action in another State upon the original cause of action." *Id.* at cmt. c. While a person who was not an original party is generally not bound by a judgment, there are exceptions, including when a person is in privity with a party to the original action. Restatement (Second) of *Judgments* § 62 cmt. a.

The Connecticut Superior Court rendered a final judgment in the Connecticut Proceeding, which has merged with the original cause of action. *Washington Trust Co.*, 106 R.I. at 172, 256 A.2d at 493. This judgment is not only valid in subsequent actions, but also must be recognized by states foreign to Connecticut. Restatement (First) of *Judgments* § 47. However, the parties before this Court are not identical to those of the Connecticut Proceeding. Parties to the Connecticut Proceeding included BOA and Stonestreet, whereas here, Fay and Patrick replace Stonestreet, acting in their capacity as Guarantors. Therefore, this Court must consider whether Fay and Patrick are in privity with Stonestreet, rendering them subject to the Connecticut judgment.

B

Res Judicata

Plaintiff further seeks to apply the Connecticut judgment to Defendants under the doctrine of res judicata. Plaintiff submits that res judicata bars subsequent claims when there is an identity of issues, an identity of parties, and a final judgment in an earlier action. *Plunkett v. State*, 869 A.2d 1185, 1188 (R.I. 2005) (citing *Beirne v. Barone*, 529 A.2d 154, 157 (R.I. 1987)). Plaintiff asserts that Defendants' request for a new determination of the debt is barred because there is an identity of issues (the amount of the deficiency on the Note), an identity of parties (Defendants are in privity with Stonestreet), and the Connecticut Court has rendered a final judgment.

Defendants contend that it would be fundamentally unfair to hold them liable for the Connecticut Court's judgment against Stonestreet. First, Fay and Patrick maintain that Plaintiff's choice of Rhode Island law is incorrect and that Connecticut preclusion principles apply. Furthermore, Defendants state that Plaintiff has not met its burden for summary judgment under Connecticut res judicata principles, which require a full and fair opportunity to litigate.

The Court first turns to the question of whether to apply Connecticut or Rhode Island law in its res judicata analysis. When determining the question of liability, this Court applied Rhode Island law, as directed by the choice-of-law provision in the Guaranty contract. *Bank of America, N.A. v. Fay et al.*, C.A. No. PC 2016-1618. However, "[t]he local law of the State where the judgment was rendered determines . . . to what extent the judgment is conclusive as to the issues involved in a later suit between the parties, or their privies, upon a different claim or a cause of action." Restatement (Second) of *Conflict of Laws* § 95 cmt. g (explaining that the effect of a judgment is referred to as collateral estoppel in the Restatement of *Judgments* (1942)); *see*

Restatement (First) of *Judgments* §§ 68-71 (1942). Accordingly, this Court will apply Connecticut state law to address the question of res judicata.

The Court next addresses whether it must honor the Connecticut Court's judgment under res judicata. Connecticut law indicates that judgments are valid until appealed, are entitled to full faith and credit, and may not be subject to collateral attack. C.G.S.A. § 45a-24. Furthermore, '"an existing final judgment rendered upon the merits . . . is conclusive of causes of action and *of facts* or *issues thereby litigated* as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction . . . ."' *Efthimiou v. Smith*, 268 Conn. 499, 506, 846 A.2d 222 (Conn. 2004) (quoting *Wade's Dairy, Inc. v. Town of Fairfield*, 181 Conn. 556, 559, 436 A.2d 24 (Conn. 1980)) (emphasis in original). The issue of privity turns on whether the interest of the party to be precluded was sufficiently represented in the prior proceeding such that inequity will not result. *Wheeler v. Beachcroft, LLC*, 320 Conn. 146, 167, 129 A.3d 677 (Conn. 2016). In general, the doctrine '"prevent[s] inconsistent judgments"' and maintains '"the integrity of the judicial system."' *Efthimiou*, 268 Conn. at 506, 846 A.2d at 227 (quoting *Statewide Grievance Comm. v. Presnick*, 216 Conn. 135, 139, 577 A.2d 1058 (Conn. 1990)).

Here, the Court finds that a redetermination of the debt owed to BOA is barred by the principle of res judicata under Connecticut law. It is undisputed that the Connecticut Proceeding resulted in a final judgment on the amount owed to BOA on April 30, 2018, and a determination of the debt by this Court would require the litigation of an issue already decided. Furthermore, Stonestreet had the right to appeal the Connecticut Court's judgment, but failed to do so by the date required. Finally, the Court finds there is no issue of material fact with regard to whether Defendants are in privity with Stonestreet.

Defendants are in privity with Stonestreet because Defendants' legal rights were adequately represented in the Connecticut Proceeding. *Wheeler*, 320 Conn. at 166, 129 A.3d at 690 (privity "is . . . a shorthand statement for the principle that [res judicata] should be applied only when there exists such an identification in interest of one person with another as to represent the same legal rights so as to justify preclusion"). As collective one hundred percent owners of Stonestreet, as well as Guarantors of the Note, Defendants and Stonestreet shared the common legal interest of reducing the indebtedness as much as possible. *Mount Vernon Fire Ins. Co. v. Morris*, 90 Conn. App. 525, 536, 877 A.2d 910, 918 (Conn. 2005) (quoting *Tevolini v. Tevolini*, 66 Conn. App. 16, 22 n.6, 783 A.2d 1157, 1163 (2001)) (". . . a key consideration for [privity's] existence is the sharing of the same legal right by the parties allegedly in privity'"). Fay is both the manager and the majority owner of Stonestreet, and he stated in a prior deposition that the entity took its direction from Fay in the Connecticut Proceeding. Defendant Patrick shared these interests, adopting Fay's legal positions. *Mazziotti v. Allstate Insurance Co.*, 240 Conn. 799, 814, 695 A.2d 1010 (Conn. 1997) (the privity analysis "focuses on the functional relationship of the parties"). Defendants' legal interests, as they relate to the amount of the deficiency, were therefore adequately represented in the Connecticut Proceeding, and res judicata bars a subsequent valuation of the indebtedness by this Court. *Id.* at 813, 695 A.2d at 1017.

C

Collateral Estoppel

In conjunction with its res judicata argument, Plaintiff submits that collateral estoppel bars this Court's reconsideration of the Connecticut Court's judgment. As discussed *supra*, res judicata bars subsequent actions when there exists a common identity of parties, an identity of

issues, and a final judgment. *Gaudreau v. Blasbalg*, 618 A.2d 1272, 1275 (R.I. 1993). Collateral estoppel, on the other hand, "makes conclusive in a later action on a different claim the determination of issues that were actually litigated in a prior action" *E.W. Audet & Sons, Inc. v. Fireman's Fund Ins. Co. of Newark, New Jersey*, 635 A.2d 1181, 1186 (R.I. 1994) (*citing Providence Teachers Union, Local 958, Am. Fed'n of Teachers, AFL-CIO*, 113 R.I 169, 172, 319 A.2d 358, 361 (1974)).

Under Rhode Island law, collateral estoppel applies when there is "(1) an identity of issues, (2) the previous proceeding . . . resulted in a final judgment on the merits, and (3) the party against whom collateral estoppel is asserted [is] the same or in privity with a party in the previous proceeding." *State v. Pacheco*, 161 A.3d 1166, 1172 (R.I. 2017); *see also DeCiantis v. State*, 666 A.2d 410, 412 (R.I. 1995). Connecticut law requires that "(1) the issue must have been fully and fairly litigated in the first action, (2) it must have been actually decided, and (3) the decision must have been necessary to the judgment." *Deutsche Bank AG v. Sebastian Holdings, Inc.*, 174 Conn. App. 573, 587, 166 A.3d 716 (Conn. 2017). Connecticut law further recognizes that while ''[a]lthough res judicata and collateral estoppel often appear to merge into one another in practice, analytically they are regarded as distinct." *Weiss v. Weiss*, 297 Conn. 446, 458-59, 998 A.2d 766, 775 (Conn. 2010).

Here, the Court finds that collateral estoppel precludes a new trial on the issue of the deficiency owed on the Note. The question before this Court—the amount of indebtedness owed on the Guaranty—is identical to the issue in the Connecticut Proceeding; the Connecticut Proceeding ended in a final judgment on the merits, and the Defendants were in privity with Stonestreet. *Wheeler*, 320 Conn. at 166, 129 A.3d at 690 (privity will be found "when there exists such an identification in interest of one person with another as to represent the same legal

rights so as to justify preclusion"); *see also Duffy v. Milder*, 896 A.2d 27, 36 (R.I. 2006) ("[p]arties are in privity when 'there is a commonality of interest between the two entities' and when they 'sufficiently represent' each other's interests") (quoting *Commercial Union Ins. Co. v. Pelchat*, 727 A.2d 676, 680 (R.I. 1999)). Furthermore, the issue was fully and fairly litigated in Connecticut, was actually decided, and was necessary to the judgment. *Deutsche Bank AG*, 174 Conn. App. at 587, 166 A.3d at 725. Therefore, whether applying Rhode Island or Connecticut law, this Court finds collateral estoppel applies to the judgment rendered by the Connecticut Court.

D

Restatement of Law on *Judgments*

Plaintiff likewise maintains that Defendants must be held liable for the debt as adjudicated in the Connecticut Proceeding under Restatement (Second) of *Judgments* §39 (1982). Plaintiff cites to the rule in the Restatement that "[a] person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party." Plaintiff states that Defendants sufficiently controlled Stonestreet in the Connecticut Proceeding.[6] Defendants contend that a material issue of fact exists as to the issue of control.

The Restatement (Second) of *Judgments* discusses this concept of control. Specifically, Section 39 indicates that "[to] have control of litigation requires that a person have effective choice as to the legal theories and proofs to be advanced in behalf of the party to the action." Sec. 39 cmt. c. That party "must also have control over the opportunity to obtain review." *Id.* Lastly, whether or not a party controls the proceeding is a question of fact. *Id.*

[6] *See* Transcript of Oral Argument heard before this Court (Jan. 22, 2018); Transcript of Oral Argument heard before this Court (May 15, 2018).

Although Plaintiff concedes at oral argument that no precedent exists from the Rhode Island Supreme Court interpreting Section 39, guidance for the use of this provision may be found in its accompanying comment b, Illustration 4:

> "A brings an action against B, a corporation, in which one of the issues is the value of a certain object of property. C, the principal stockholder of B, controls the defense of the action. The determination of the value of the property is conclusive upon C in a subsequent action between him and A." Sec. 39 cmt. 9.

The present case involves a limited liability company, rather than a corporation, but the circumstances here are analogous to the illustration. *See, e.g., Montgomery v. eTreppid Tech., LLC*, 548 F. Supp. 2d 1175, 1183 (D. Nev. 2008) (holding that defendant LLC should be treated as a corporation rather than a partnership under federal common law, for the purpose of attorney-client privilege). As manager and majority owner of Stonestreet, Fay controlled the action in the Connecticut Proceeding. *Duffy*, 896 A.2d at 36 ("[p]arties are in privity when 'there is a commonality of interest between the two entities' and when they 'sufficiently represent' each other's interests") (quoting *Commercial Union Ins. Co.*, 727 A.2d at 680). Furthermore, as a thirty percent owner of Stonestreet and a Guarantor of the Note, Patrick shared Fay's and Stonestreet's interest in minimizing the limited liability company's debt. *Duffy*, 896 A.2d at 36. Patrick is, therefore, also bound by the Connecticut Court's valuation of the Property.

E

Judicial Estoppel

Plaintiff next argues that the doctrine of judicial estoppel precludes this Court's finding for Defendants. Plaintiff explains that for five months, Defendants argued both at oral argument and in written memoranda to this Court the utmost importance of the Connecticut Court's decision regarding the valuation of the deficiency owed on the Note. Under the doctrine of

judicial estoppel, Plaintiff maintains that Defendants are now barred from taking a contradictory position.

"A trial justice has the discretion to invoke judicial estoppel 'when he or she finds that a party's inconsistent positions would create an unfair advantage.'" *Iadevaia v. Town of Scituate Zoning Bd. of Review*, 80 A.3d 864, 870 (R.I. 2013) (quoting *State v. Lead Indus. Ass'n, Inc.*, 69 A.3d 1304, 1310 (R.I. 2013)). This equitable doctrine focuses on the relationship of the litigant to the judicial system and is "'driven by the important motive of promoting truthfulness and fair dealing in court proceedings.'" *Gaumond v. Trinity Repertory Co.*, 909 A.2d 512, 519 (R.I. 2006) (quoting *D & H Therapy Assocs. v. Murray*, 821 A.2d 691, 693 (R.I. 2003)). In practice, judicial estoppel precludes parties from attempting to derive an unfair advantage by espousing inconsistent positions to the court. *Id.*

Plaintiff asserts that Guarantors' prior arguments in this action equate to an admission of privity between them and Stonestreet. Now that the Connecticut Court has rendered its decision, Plaintiff maintains that Defendants are estopped from taking a position inconsistent with their prior position. In objecting to the within motion, neither Fay nor Patrick offers an explanation as to the inconsistent positions taken on the importance of the Connecticut Court's decision to this action. *Gaumond*, 909 A.2d at 519 ("Of utmost importance in determining whether to apply the doctrine of judicial estoppel is whether the 'party seeking to assert an inconsistent position would derive an unfair advantage . . . if not estopped.'") (quoting *New Hampshire v. Maine*, 532 U.S. 742, 751, 121 S. Ct. 1808 (2001)). Instead, citing *JP Morgan Chase Bank, N.A. v. Winthrop Props.*, 312 Conn. 662, 94 A.3d 622 (Conn. 2014), a recent Connecticut Supreme Court case regarding judicial foreclosure, Defendants procedurally argue that they are not bound as guarantors. Defendants maintain that under *Winthrop*, they should have been joined in the

Connecticut Proceeding and, therefore, cannot now be held liable for the Connecticut Court's judgment. *Id.* at 679, 94 A.3d at 632. Defendants further submit that they did not have a full and fair opportunity to litigate the case in Connecticut.

This Court disagrees. First, Fay and Patrick misconstrue *Winthrop*, which held that a mortgagee is not required to join a guarantor in an action for strict foreclosure. 312 Conn. at 673, 94 A.3d at 629 ("[guarantors] are not 'parties to the foreclosure,' irrespective of whether the mortgagee pursues a claim against the guarantors in the same cause of action in which it pursues foreclosure of the mortgage"). Moreover, the Court is satisfied that the doctrine of judicial estoppel precludes the parties from taking inconsistent positions with the Court. Defendants made multiple pleas to this Court to respect the Connecticut Court's valuation of the Property, and are now estopped from asking the Court to reject the Connecticut Court's decision. *D & H Therapy Assocs.*, 821 A.2d at 693 (quoting *Gray v. Fitzhugh*, 576 P.2d 88, 91 (Wyo. 1978)) (judicial estoppel prevents "litigant[s] from playing fast and loose with the courts" and prohibits them from "maintain[ing] inconsistent positions"). Accordingly, the Court declines to hold a new trial on the amount of the deficiency, and finds Defendants liable on their guaranties in the amount equal to the deficiency established in the Connecticut Proceeding plus interest.

F

Judicial Admission Doctrine

Plaintiff further argues that under the judicial admission doctrine, Defendants—in contrast to their previous contentions otherwise—admitted privity with Stonestreet in Attorney Henzy's pro hac vice application. In this document, Mr. Henzy stated that he "represent[ed] the interests of Defendant [Fay] in a companion case, with substantially similar issues in the State of Connecticut." Plaintiff further explains that Henzy had the opportunity to present all relevant

defenses in the Connecticut Proceeding, and that Henzy's statement demonstrated that Fay controlled that "companion" case.

The judicial admission doctrine is similar to the doctrine of judicial estoppel and precludes litigants from challenging statements they have previously made to a court. *State v. Rice*, 986 A.2d 247, 249 (R.I. 2010) (litigant was judicially estopped from taking a position contrary to one that had amounted to a judicial admission and was conclusively established); *see also Crafford Precision Prods. Co. v. Equilasers, Inc.*, 850 A.2d 958, 963 (R.I. 2004) (judicial admission precludes "the pleader who admitted the fact from challenging it later during the lawsuit in which it has been admitted").

Here, Plaintiff asserts that Fay is bound to and cannot now contest the fact that Attorney Henzy represented his interest in the self-described "companion case," the Connecticut Proceeding. Specifically, Plaintiff equates Henzy's statement to an admission that Fay was essentially one with Stonestreet in the Connecticut Proceeding. Fay and Patrick were joint and several Guarantors to BOA, and Patrick adopted and relied upon Fay's positions. Therefore, Plaintiff maintains that Patrick's interest was also adequately represented, and he is estopped from taking a new position as well.

The Court finds that Defendants have judicially admitted control over the Connecticut litigation. In both Henzy's pro hac vice application and in subsequent pleadings to this Court, Defendants have admitted privity with, and control over, Stonestreet. *Wheeler*, 320 Conn. at 166, 129 A.3d at 690 (privity is established "when there exists such an identification in interest in one person with another as to represent the same legal rights so as to justify preclusion"); *see also Martin v. Lilly*, 505 A.2d 1156, 1161 (R.I. 1986) ("[a] judicially admitted fact is conclusively established"). These judicial admissions further support the Court's application of

res judicata and collateral estoppel principles to find Defendants liable as Guarantors for the amount of the deficiency established in the Connecticut Proceeding. Accordingly, the Court finds that no issue of material fact exists with respect to Defendants' privity with, and control over, Stonestreet, and Plaintiff is entitled to judgment as a matter of law.

IV

Conclusion

For the reasons stated herein, this Court finds Defendants jointly and severally liable as Guarantors to BOA for $5,022,003.67 as of April 30, 2018, plus interest at BOA's prime rate plus four (4%) percent interest per annum, as determined by the Connecticut Superior Court in *Bank of America, N.A. v. Stonestreet Hospitality Realty Co., LLC, et al.*, Docket No. KNLCV166026981S (Conn. Super. Ct. May 15, 2018). The Court determines that no genuine issue of material fact exists with respect to the applicability of the Connecticut judgment to the instant action under res judicata, collateral estoppel, and judicial estoppel principles. Accordingly, Plaintiff's motion for summary judgment is granted in the form of a final judgment in favor of BOA against each of the Defendants.

Prevailing counsel shall present an appropriate order consistent herewith which shall be settled after due notice of counsel of record.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Bank of America, N.A. v. Timothy G. Fay and David N. Patrick
CASE NO:	PC-2016-1618
COURT:	Providence County Superior Court
DATE DECISION FILED:	October 22, 2018
JUSTICE/MAGISTRATE:	Silverstein, J.
ATTORNEYS:	
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For Defendant:	Timothy J. Morgan, Esq.; W. Kenneth O'Donnell, Esq.