

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ADVEST BANK,  
Plaintiff,

v.

ZVI and NURIT HERSKOVITZ, DANIEL  
and RINA BEN-DAVID, JACOB and  
JUDITH GABBAY, MORRIS and DALIA  
GABBAY, GABRIEL and LENI ELKHAIM,  
Defendants.

Civil Action  
No. 97-1801

Gawthrop, J.

February 26, 1998

M E M O R A N D U M

Before the court is a Motion to Set Aside, Strike, or Open the Confessed Judgment and Stay Execution, by all defendants except Gabriel and Leni Elkhaim. I shall deny this motion since I find that the preclusive effect of a parallel action in the state court may bar the movants from proceeding in the federal court. However, because the status of the state court judgment is unclear, I shall stay, rather than dismiss, the present action. The case shall be placed in administrative suspense until the parties report to the court the status of the state court judgment.

## **I. Background**

On October 25, 1988, Plaintiff Advest Bank made a loan to Sansom Exchange in the principal amount of \$1,750,000. Sansom Exchange, through its general partners, Jacob and Morris Gabbay ("J & M") and H.D.E. Partnership ("H.D.E."), promised to repay Advest Bank the amount of the loan. Five married couples comprise the general partners of these two partnerships. Eight of these partners, Zvi and Nurit Herskovitz, Daniel and Rina Ben-David, Jacob and Judith Gabbay, Morris and Dalia Gabbay, are the movants in the current action.

The partnerships also agreed to act as the full and unconditional sureties for the obligations of Sansom Exchange to Advest Bank. Sansom Exchange later defaulted on the note. On or about March 11, 1997, Advest Bank entered a judgment by confession against Sansom Exchange, H.D.E. and J & M in the Court of Common Pleas of Philadelphia County. The movants also defaulted under the terms of the Guaranty. As a result of this default, Advest Bank exercised its rights by declaring all amounts due to be immediately due and payable. Advest Bank also filed the judgment by confession in its favor and against the defendants, jointly and severally. The movants request that the court strike or open the confessed judgment and stay execution.

Advest Bank argues that the movants cannot proceed with the federal cause of action because the Court of Common Pleas of Philadelphia County has previously considered and rejected the identical arguments twice. To support this contention, Advest Bank attached to its response, the petition to strike or open confessed judgment and stay execution filed in the state court. Indeed, Counts I, II and V in that petition correspond to Counts I, II, and III in the current petition with one exception, the substitution of the word "Guaranty" for the word "Note."

In the state court action, Sansom Exchange, H.D.E. and J & M filed a petition to strike or open the judgment raising the same issues that appear in the Movants' motion here. The Court of Common Pleas of Philadelphia County conducted a hearing on the issue and entered an order on June 26, 1997, denying the petition in its entirety. H.D.E. and J & M then filed a motion to vacate and for reconsideration of the court's order. After vacating the order, examining the hearing transcripts, and reviewing additional briefs, the court denied the motion to vacate and for reconsideration in its entirety on August 4, 1997. The partnerships have filed an appeal of the order dated August 4, 1997. The movants filed the pending motion on August 26, 1997. This court has diversity jurisdiction pursuant to 28 U.S.C. § 1332.

## II. Standard of Review

The Third Circuit Court of Appeals has articulated a test for the application of the doctrine of res judicata. United States v. Athlone Industries, Inc., 746 F.2d 977 (3d Cir. 1984). In Athlone, the court held that a party must show "(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same causes of action." Id. at 983.

## III. Discussion

The movants first argue that the state court action and the present action involve different parties. The defendants in the state action were Sansom Exchange and its two general partner, J & M and H.D.E., which are also general partnerships. The movants claim that because the general partnerships, not the individual partners, were parties in the state action, there is insufficient identity of parties for preclusion to apply. The law is otherwise. General partners are in privity with the partnership for preclusive purposes. See Colonial Acquisition Partnership v. Colonial at Lynnfield, Inc., 697 F. Supp. 714, 719 (S.D.N.Y. 1988) (finding sufficient identity of parties for res judicata purposes between general partners and partnership itself); see also Sports Factory, Inc. v. Chanoff, 586 F. Supp.

342, 347-48 (E.D. Pa. 1984) (holding general partner could assert res judicata based on prior award against partnership).

Jacob and Judith Gabbay make a separate argument as to why they should not be bound by the state court judgment. They claim that they withdrew as partners of Jacob and Morris Gabbay prior to the filing of the state action. However, they were partners at the time of the transaction at issue. Moreover, it is the partnership's opportunity to litigate its claims that is important, "not the opportunities of its partner to litigate on its behalf." Continental Waste Sys., Inc. v. Zoso Partners, 727 F. Supp. 1143 (N.D. Ill. 1989) (finding res judicata barred relitigation of partnership's counterclaims, even if different partner had asserted those claims in the prior litigation). "Allowing repeated litigation by general partners who are dissatisfied with earlier dispositions would unduly burden both the courts and defendants." Id. at 1152 (footnote omitted). I thus find their argument without merit.

The movants also dispute that the decision in the state court was final. They note that the state court did not explicitly reinstate its order of June 26, 1997, although since it denied the motion to vacate along with the motion for

reconsideration, it appears the court intended that order to remain in effect.

A federal court should give a state court judgment full faith and credit only to the extent that the state court would give preclusive effect to that judgment. See Migra v. Warren City Sch. Dist. Bd. of Ed., 465 U.S. 75 (1984); see also Davis v. United States Steel Supply, 688 F.2d 166, 170 (3d Cir. 1982) (en banc) ("When a party relies on a state court judgment to preclude relitigation in federal court, a federal court must look to the state law and its appraisal of the collateral estoppel doctrine to ascertain the extent to which the state would give its own judgment collateral estoppel effect."). Thus, Pennsylvania state preclusion law applies to this case. Migra, 465 U.S. at 81 ("[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."). However, Pennsylvania law is unclear on the res judicata effects of a vacated order from which there is a pending appeal. When confronted with a similar situation, the Ninth Circuit Court of Appeals remanded to the district court with instructions to stay the federal action pending final disposition of the case in state court, or until appeals were time barred in state court. See Ollie v. Riggin, 848 F.2d 1016 (9th Cir. 1988) (per curiam). The

Third Circuit Court of Appeals has held that where there is uncertainty in Pennsylvania preclusion law, the proper course of action for a district court to take is to stay the federal court proceedings. See Bailey v. Ness, 733 F.2d 279 (3d Cir. 1984) (citing Occidental Life Ins. Co. of Cal. v. Nichols, 216 F.2d 839 (5th Cir. 1954)). Accordingly, I shall stay, rather than dismiss, the action during the pendency of the parallel action in the state court.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ADVEST BANK,  
Plaintiff,

v.

ZVI and NURIT HERSKOVITZ, DANIEL  
and RINA BEN-DAVID, JACOB and  
JUDITH GABBAY, MORRIS and DALIA  
GABBAY, GABRIEL and LENI ELKHAIM,  
Defendants.

Civil Action  
No. 97-1801

**O R D E R**

AND NOW, this            day of February, 1998, for the reasons set forth in the accompanying memorandum, the movants' Motion to Set Aside, Strike, or Open the Confessed Judgment and Stay Execution is DENIED. Further, this action is STAYED pending resolution of the parties' parallel state action. The Clerk of the Court is directed to place civil action 97-1801 in the Civil Suspense Docket. The parties shall promptly advise the court of any change in the status of the pending state court action.

BY THE COURT:

---

Robert S. Gawthrop, III            J.