

12-1137

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS, a public corporation, and
PAUL A. MATTOX, JR., P.E., Secretary/
Commissioner of Highways

UPON PROCEEDINGS TO
CONDEMN LAND FOR
PUBLIC USE

Petitioners,

v.

Civil Action no. 10-C-689

EDWIN MILLER INVESTMENTS, LLC;
MICHAEL J. NOVOTNY ,trustee for
Courthouse Square Investments, LLC.
and CATON N. HILL, JR., Trustee for
BCBank, Inc.¹

Project No. X302-9/56-0.00 00,
TIP-0956(004)D

Parcels 3, 19-1 and 19-2

Respondents.

BERKELEY COUNTY
CIRCUIT CLERK
2012 AUG 21 AM 9:39
VIRGINIA M. SINE, CLERK

ORDER GRANTING CGP DEVELOPMENT CO. INC'S MOTION FOR ENTITLEMENT
TO CONDEMNATION PROCEEDS

This matter came before the Court on Motion by CGP Development Co., Inc. ("CGP") seeking a ruling that it alone is entitled to proceeds from property condemned by Petitioners West Virginia Department of Transportation, Division of Highways and Paul A. Mattox, JR, P.E., Secretary/Commissioner of Highways, ("the State"). The matter came on for hearing on June 27, 2012. CGP was represented by counsel Wm. Richard McCune, Jr. and Alex A. Tsiatsos. The State was represented by Clarence E. Martin, III. Also present from Mr. Martin's office was Shannon Lopp. Edwin Miller Investments, LLC ("EMI") was represented by counsel

¹ By Order dated January 31, 2011, the Court substituted CGP Development Co, Inc. and Jack C. Barr, Esq. for BCBank, Inc. and Caton N. Hill, Jr.

Michael J. Novotny. Also present was Patricia Sanderson, whom Mr. Novotny represented to be one of EMI's principals.

For the reasons stated below and for good cause shown, the Court GRANTS CGP's Motion and finds and concludes as follows.

I. Background

This case involves a 12 acre piece of property ("the property") located in Martinsburg, Berkeley County, West Virginia formerly owned by EMI.² EMI used that property to secure a \$335,000.00 line of credit from BCBank, Inc. ("BCBank").

On August 20, 2010, the State filed suit seeking to condemn 8 of the 12 acres as part of the Raleigh Street extension project. The State became the legal owner of the property on September 27, 2010 when it paid \$241,000 into Court for the 8 acres. *See* W. Va. Code §54-2-14a ("Upon such payment into court, the title to the property, or interest or right therein, sought to be condemned, shall be vested in the applicant . . ."). On September 16, 2010, BCBank assigned the note, deed of trust and other loan documents to CGP. CGP therefore stands in BCBank's shoes with respect to the relevant loan documents. *See, e.g., Cook v. E. Gas & Fuel Associates*, 129 W. Va. 146, 155, 39 S.E.2d 321, 326 (1946) ("The assignee steps into the shoes of the assignor and takes the assignment subject to all prior equities between previous parties").

EMI defaulted on its loan obligations, which following the assignment, it owed to CGP. On November 17, 2010, CGP conducted a partial foreclosure sale of the remaining four non-condemned acres of property. CGP expressly reserved from the foreclosure sale any rights to the

² The property is more specifically described as "[a]ll of that certain tract of [*sic*] parcel of real property located in Martinsburg District, Berkeley County, West Virginia, containing 12.8610 acres and being identified as "Residual Parcel" on the plat of Villages @ Court House Square dated February 15, 2006 and prepared by Huron Consulting, which Plat is recorded in the said Clerk's Office in Map Cabinet 12, at page 37, along with the right of ingress and egress over the 2.6836 acres Right-of-Way as shown on said Plat and all other appurtenances thereunto belonging." April 30, 2008 deed of trust, Schedule A.

condemnation proceeds under the theory of equitable conversion. CGP purchased the four acres at the foreclosure sale for \$96,713.48 and applied that amount to EMI's indebtedness.

On March 24, 2011, the Court heard the parties' argument concerning various lien issues and entitlement to the money deposited into Court by the State. The Court found that CGP was the priority lienholder with respect to the condemned property and accordingly ordered release of the \$241,000.00 paid into Court to CGP in partial satisfaction of CGP's lien. March 24, 2011 Order, p. 8. Both EMI and CGP agree that the total money paid into Court by the State is insufficient. However, the parties disagree as to which party is entitled to any potential additional amounts (if the State's valuation is insufficient) and therefore, which party should control the remainder of this litigation against the State.

II. Discussion of Law

A. CGP has a right to be paid out of any additional condemnation proceedings an amount equal to the outstanding principal balance and interest owed by EMI.

CGP has a right to be paid the remainder of the principal amount EMI still owes under the deed of trust. *See, e.g.,* syl. pt. 7, *Arnold v. Palmer*, 224 W. Va. 495, 686 S.E.2d 725, 727 (2009) ("A 'deed of trust' is a deed that conveys title to real property in trust as security until the grantor repays the loan. In the case of default of a debt secured by a deed of trust, the property becomes liable to sale under the power of sale conferred upon the trustee"). Not including attorneys' fees and other matters, the relevant indebtedness at the time of the foreclosure sale was \$360,208.58. *See* Report of Sale; Deed of Trust, p. 2, ¶3, ¶4. A -D (defining secured debt, in part, as the \$335,000 line of credit plus interest and other costs). CGP has applied the proceeds it obtained from the money paid by the State (\$241,000.00) and the money obtained from the foreclosure sale (\$96,713.48) to the indebtedness owed by EMI under the deed of trust relating to

the principal amount of the line of credit and applicable interest. However, even after applying those sums to EMI's indebtedness, EMI still owed approximately \$22,495.10 at the time of the November 17, 2010 foreclosure sale. With subsequently accruing interest at the 7% rate under the deed of trust, the total due is now \$24,901.59.³

EMI has conceded that CGP is entitled to this amount. Therefore, with respect to any additional proceeds obtained from the State in this litigation, CGP is entitled to the first \$24,901.59 as priority lienholder.

B. CGP has a right to be paid out of any additional condemnation proceedings an amount equal to EMI's other debts to CGP which are secured under the deed of trust.

The amount secured by the deed of trust is more than merely the amount of the loan and interest. It also includes other obligations that EMI owes to CGP and other expenses incurred by CGP. The deed of trust states:

4. SECURED DEBT DEFINED. The term "Secured Debt" includes, but is not limited to, the following;
...
 - C. All obligations Grantor owes to Lender, which now exist or may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Grantor and Lender.
 - D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Deed of Trust, plus interest at the highest rate in effect, from time to time, as provided in the Evidence of Debt.

³ The interest equals \$2,406.49 and is calculated as follows. \$22,495.10 times 7% = \$1,574.66 per year. Therefore, for the year between the Nov. 17, 2010 sale and Nov. 17, 2011, \$1,574.66 in interest accrued. For the 193 days between Nov. 17, 2011 and the June 27, 2012 hearing, the daily interest rate was \$4.31/day (\$1,574.66 divided by 365) for a total of \$831.03, which, when added to \$1,574.66 equals \$2,406.49.

Deed of Trust, p. 2, ¶4. EMI obligated itself to BCBank (and CGP as assignee) by “agree[ing] to pay all costs and expenses incurred by Lender in enforcing or protecting Lender’s rights and remedies under this Deed of Trust, including, but not limited to, attorneys’ fees, court costs, and other legal expenses.” Deed of Trust, p. 6, ¶18. Therefore, attorneys’ fees and court costs are obligations that EMI owes to CGP under the deed of trust (Deed of Trust, ¶ 4.C.) and they further are expenses incurred by CGP under this deed or trust (Deed of Trust, ¶ 4.D.). It follows by the clear terms of the document that and such fees and costs are secured under the deed of trust and thus, by statute, encumbered the property and therefore the condemnation proceeds.

At present, CGP has incurred significant attorneys’ fees, court costs and other legal expenses. These fees, costs and expenses continue to accrue. The Court finds CGP incurred these expenses because it was obligated to intervene in this action to defend its priority interest in the condemnation proceedings against EMI’s multiple and unwarranted attempts to obtain the funds, *see, e.g.*, March 24, 2011 Order denying EMI’s attempt to obtain a charging lien for its attorney, and because of the parties’ continued litigation concerning entitlement to proceeds.

In its Response to CGP’s Motion, EMI concedes that CGP “is likewise entitled to payment of all other debts validly secured by the Deed of Trust” which CGP previous stated included attorneys’ fees. EMI has reserved the right to oppose any fees which it deems unnecessary or unreasonable, but never challenged CGP’s general entitlement to attorneys’ fees under the Deed of Trust. Therefore, the Court finds that payment of CGP’s attorneys’ fees and costs from any excess condemnation proceeds in this matter is appropriate. CGP will provide a statement of fees to the Court and opposing counsel. EMI shall have 15 days after receipt of that statement to file any objections it deems appropriate. CGP shall then have 10 days after receiving EMI’s objections, if any, to file a reply.

C. CGP is entitled to any sums awarded as a result of the diminution of the value of the remaining 4 acres.

The State's taking of 8 acres may have left the remaining 4 acres effectively landlocked, thus either greatly reducing the value of those 4 acres or turning them into an uneconomic remnant.⁴ CGP is not merely the priority lienholder with respect to those 4 acres; it owns those 4 acres in its own name because it bought the 4 acres at the foreclosure sale. EMI cannot pursue damage to the residue for the obvious reason that it does not own the residue and has no legal or equitable interest in the residue. When the construction occurs and the State actually damages the 4 acres, the State will be damaging CGP's property.

EMI's primary argument is that damages to the residue were complete at the time that the State paid money into Court. Therefore, EMI argues, because EMI was the owner of the residue at the time, the damages accrue to it and not to CGP which did not own the property until later. Response, p. 8. EMI's argument is undermined, however, by the holding in *Newman v. Bailey*, 124 W. Va. 705, 22 S.E.2d 280 (1942). In *Newman*, Mr. Newman sought a writ of mandamus to force the State to institute condemnation proceedings for portions of his property over which the State had built two roads. Mr. Newman bought the land in 1938, but the roads had been built around 1933 when the land was owned by someone else. The Court held that because the roads had already been built, the damage caused by the State's taking occurred previously. The Court stated:

The new roads had been constructed for at least four years when petitioner purchased the land. The additional burden and consequential damage, if any, were

⁴ An uneconomic remnant "is a parcel of real property in which the owner is left with an interest after the [government's] partial acquisition ... [but which] has little or no value or utility to the owner." *W. Virginia Dept. of Transp., Div. of Highways v. Dodson Mobile Homes Sales & Services, Inc.*, 218 W. Va. 121, 124, 624 S.E.2d 468, 471 (2005) (quoting 42 U.S.C. § 4651(9) (2000)).

complete at the time of the conveyance to Newman. It is only reasonable to say that if the land was diminished in value by reason of the construction of the roads such diminution may have been taken into consideration by Newman in fixing the amount of the purchase price, and that the former owner or owners did likewise.

The construction of the roads may have caused injury to the land, but the injury to the land was complete when the construction of the two roads was finished.

This injury gives rise to a personal right vested in the then owner, and did not pass with the land. . . . This right is entirely independent of the title to the land, and therefore the provisions of Code, 54-2-12 are inapplicable.

22 S.E.2d 280, 282 (1942) (emphasis added) (citations omitted). Therefore, land was not damaged for condemnation purposes until the time that the roads were constructed. Similarly, the land in this case was not damaged for condemnation purposes when EMI held the land because no construction had taken place at that time. Any right stemming from the construction/damage to the land therefore is vested in CGP.

EMI argues that W. Va. Code §54-2-14a provides that “upon the date of the deposit of the finds by petition, the land is condemned and the damages shall be ascertained as of that day.”

Response, p. 9. The section states that:

“Upon such payment into court, the title to the property, or interest or right therein, sought to be condemned, shall be vested in the applicant, and the court or judge shall, at the request of the applicant, make an order permitting the applicant at once to enter upon, take possession, appropriate and use the property, or interest or right therein, sought to be condemned for the purposes stated in the petition, *but the owners of such property, or interest or right therein, at the time of such payment, including lienors and conflicting claimants, shall have such title, interest, or right in the money paid into court as they had in the property, or interest or right therein, sought to be condemned*”

§54-2-14a (emphasis added). Therefore, because under *Newman* the right to claim damages from construction does not accrue until the time of completion of the construction, EMI did not have the right to claim such injury at the time payment was made into Court when no

construction had occurred. This result is also confirmed in W. Va. Code §54-2-9 which requires commissioners to ascertain just compensation

“for damage to the residue of the tract beyond all benefits to be derived, in respect to such residue, *from the work to be constructed*, or the purpose to which the land to be taken is to be appropriated, including, when less than the fee is taken, the actual damage, if any, done, or that may be done, to the fee by such construction . . .” (emphasis added).

Therefore, because damage to the residue must relate to the construction which did not occur while EMI owned the property, EMI has no right to claim damages to the residue.⁵

EMI also claims that the foreclosure sale reserved “the portions of the real estate which are subject to such condemnation proceedings.” That is correct, but the reservation does not accomplish what EMI alleges. The foreclosure deed refers to the specific case numbers involving specific parcels condemned and the deposits into which the parcels had been equitably converted. Specifically, those parcels were equitably converted into the \$241,000.00 paid into Court by the State. That money was reserved from the sale because it belonged to CGP, as this Court subsequently agreed. The reservation was in place to prevent a buyer at the foreclosure sale from buying a right to the proceeds which belonged to CGP. Nothing in the deed mentions any reservation in EMI for rights to residual damages or diminution to the residue. Therefore, CGP as fee owner of the residue has exclusive rights to raise claims for damage to that residue.⁶

⁵ EMI also cites *Strouds Creek v. Herold*, 45 S.E.2d 513 (W. Va. 1947) for the proposition that damages shall be ascertained as of the date of the taking. This may be correct as far as it goes, but as *Newman* shows, the right to *raise a claim for such damages* does not accrue until the time of construction. Therefore, even if the damages are measured as of the date the State paid money into court, there was no damage to the property on that date and therefore to right to claim damages.

⁶ EMI also mentions letters from CGP’s counsel stating that CGP did not, at the time of those letters, seek to control the course of this litigation. Since writing those letters, however, CGP has conducted

D. Any additional sums resulting from condemnation belong to CGP.

The deed of trust contemplated the possibility of condemnation. In the event of condemnation, the parties agreed as follows:

CONDEMNATION. Grantor will give Lender prompt notice of any action, real or threatened, by private or public entities to purchase or take any or all of the Property, including any easements, through condemnation, eminent domain, or any other means. Grantor further agrees to notify Lender of any proceedings instituted for the establishment of any sewer, water, conservation, ditch, drainage, or other district relating to or binding upon the Property or any part of it. *Grantor authorizes Lender to intervene in Grantor's name in any of the above described actions or claims and to collect and receive all sums resulting from the action or claim. Grantor assigns to Lender the proceeds of any award or claim for damages connected with a condemnation or other taking of all or any part of the Property.* Such proceeds shall be considered payments and will be applied as provided in this Deed of Trust. This assignment of proceeds is subject to the terms of any prior mortgage, deed of trust, security agreement or other lien document.

Deed of Trust, p. 7, §20 (emphasis added). By the unambiguous and mandatory language of the contract, therefore, EMI agreed to give BCBank "all sums" and to assign to BCBank "any award" resulting from the condemnation. CGP, as BCBank's assignee, stands in BCBank's shoes. Therefore, under the terms of the deed of trust, CGP is entitled to all condemnation sums and any awards.

The condemnation provision requires that condemnation proceeds "shall be considered payments and will be applied as provided in this Deed of Trust." Indeed, the proceeds have thus far been considered payments and have been applied to EMI's outstanding debt. Any future proceeds will be applied in like manner to EMI's outstanding debt. But the language of the deed of trust does more. It assigns "all sums" from condemnation to CGP, not just the sums which will satisfy EMI's principal indebtedness. Therefore, even after the portion of such sums are

additional research into this case and determined that it has exclusive right to the condemnation proceeds. Therefore, because it has an exclusive right to the proceeds, it is logically the only party with the right to control the litigation against the State. EMI has cited no authority to the contrary.

treated as payments and applied to EMI's debt, the remaining amount will be part of the "all sums" owed by agreement to CGP.

There was good reason for CGP's assignor to bargain for this contractual provision. As described above, there are sums in addition to the principal balance and interest, *e.g.*, attorneys' fees, which EMI owes to CGP and which are payable from the condemnation award. But, as principal lienholder, CGP's assignor also had a right to demand as benefit for its investment the right to any additional condemnation proceedings. BCBank and EMI bargained at arm's length for this provision. EMI was and remains a sophisticated commercial entity represented by counsel. It could have chosen not to assign any condemnation surplus to BCBank. Instead it agreed to give the condemnation award to BCBank (and to CGP, as BCBank's assignee) as part of the loan agreement. It is now bound by the plain terms of the agreement. *Kanawha Banking & Trust Co. v. Gilbert*, 131 W. Va. 88, 110, 46 S.E.2d 225, 237 (1947) ("When the terms of a written contract are clear and unambiguous, full force and effect will be given to the language used by the parties"); *syl. pt. 3, Waddy v. Riggleman*, 216 W.Va. 250, 606 S.E.2d 222 (2004) ("Where the terms of a contract are clear and unambiguous, they must be applied and not construed") (quotations and citations omitted); *see also* 13A Michie's Jurisprudence, Mortgages and Deeds of Trust, §144, (2011) p. 483 ("this rule [making surplus of sale under deeds of trust subject to grantor's redemption interest] has no application where the deed of trust makes a final disposition of the surplus") (citing *Commercial Sav. & Loan Corp. v. Kemp*, 149 Va. 68, 74, 140 S.E. 113, 114 (1927)).⁷

EMI objects to CGP's claim to any additional proceeds under language in the deed of trust which gives CGP a right to "all sums" and "any award" arising from condemnation. EMI

⁷EMI attempted to distinguish *Kemp* at the June 17, 2012 hearing but did not address the rule as articulated by Michie's nor did it offer any contrary authority of its own.

calls CGP's claim incredulous, but it does not dispute that that is what the deed of trust says, nor does EMI cite any legal authority to the contrary. EMI and CGP's assignor bargained for the right to this specific condemnation provision. That provision was only to become material in the very specific circumstances of condemnation. It does not represent "an unlimited assignment of any property rights" by deed of trust as EMI claims. It so happened that condemnation occurred and the specific deed of trust provision became operative. Under familiar rules of contract interpretation, therefore, CGP is entitled to the benefit of its bargain.

III. Conclusion

For the reasons stated above, the Court rules as follows. CGP is entitled to the first \$24,901.59, and an additional \$4.31 per day from June 27, 2012 until paid, from any additional condemnation proceeds for amounts unpaid under the Deed of Trust and applicable interest.

CGP is also entitled attorneys' fees and costs from any excess condemnation proceeds. CGP will provide a statement of fees to the Court and opposing counsel. EMI shall have 15 days after receipt of that statement to file any objections. CGP shall then have 10 days after receiving EMI's objections, if any, to file a reply.

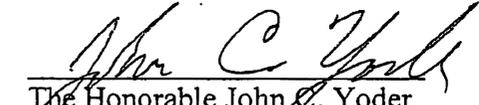
CGP, as the owner at the time of construction and damage to the residue, is alone entitled to all damages which may accrue as a result of damage to the residue.

CGP is further entitled to any proceeds obtained in this condemnation proceeding pursuant to language in the deed of trust assigned to CGP.

EMI has no further interest in the property or this proceeding or any condemnation proceeds paid by the State. EMI is dismissed from this case with prejudice.

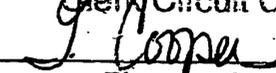
The Court notes for the record EMI's objection to any adverse rulings contained herein.
The Clerk is directed to transmit copies of this Order to all counsel and pro se parties of record.

Entered: 8/20/12


The Honorable John C. Yoder
Circuit Judge

**A TRUE COPY
ATTEST**

Virginia M. Sine
Clerk Circuit Court

By: 
Deputy Clerk