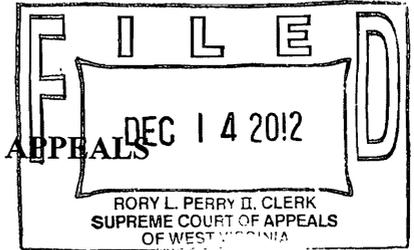


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Docket No. 12-1137



Edwin Miller Investments, L.L.C., Respondent below,
Petitioner

Vs.) No. 12-1137

An appeal from the Circuit Court
of Berkeley County
Civil Action No. 10-C-689

CGP Development Co., Inc., and Jack C. Barr, Respondents Below
Respondents

PETITIONER'S BRIEF

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NOW COMES the Petitioner, Edwin Miller Investments, LLC, (“EMI”), by counsel, and files this Petitioner’s Brief and respectfully requests the following relief against Respondents, CGP Development Co., Inc., (“CGP”) and Jack C Barr, as Trustee For CGP, with respect to the ruling below appealed herein.

I. ASSIGNMENTS OF ERROR

A. THE CIRCUIT COURT ERRONEOUSLY DETERMINED THAT CGP, AS THE FORECLOSURE PURCHASER OF THE CONDEMNATION RESIDUE PROPERTY, IS ENTITLED TO ALL CONDEMNATION PROCEEDS, IF ANY, TO BE AWARDED FOR THE RESIDUE DIMINUTION.

B. THE CIRCUIT COURT ERRONEOUSLY DETERMINED THAT CGP, AS THE LIENHOLDER AGAINST THE CONDEMNED PROPERTY, IS ENTITLED TO ALL CONDEMNATION PROCEEDS PURSUANT TO THE ASSIGNMENT PROVISION CONTAINED IN ITS DEED OF TRUST EVEN THOUGH ONLY A SMALL BALANCE REMAINS DUE ON THE DEBT SECURED BY THE DEED OF TRUST.

C. THE CIRCUIT COURT ERRONEOUSLY DISMISSED EMI FROM THIS ACTION, WITH PREJUDICE.

II. STATEMENT OF THE CASE

A. Procedural History

Three condemnation Petitions in the underlying actions were filed in the Circuit Court of Berkeley County, West Virginia, on August 25, 2010 by The West Virginia Department of Transportation, Division of Highways (“DOH”). (A.R. 13-30A, 31-42, and 43-60). On January 3, 2012, Respondent, CGP, filed its Motion for Entitlement to Condemnation Proceeds. (A.R. 117-150). Petitioner filed its Response to the Motion for Entitlement to Condemnation Proceeds on January 8, 2012 (A.R. 151-182) and Respondents filed a Reply thereto on January 11, 2012. (A.R. 183-186A). On June 27, 2012, the Petitioner and Respondent argued the Motion for Entitlement to Condemnation Proceeds before the court below (See Transcript at A.R. 187-216). On August 21,

2012, the Circuit Court of Berkeley County entered the order appealed herein granting CGP's Motion for Entitlement to Condemnation Proceeds. (A.R. 1-12)

B. Statement of Facts

1. As of August 20, 2010, EMI owned approximately 12 acres of real property located in Martinsburg, Berkeley County, West Virginia. (A.R. 2, 118, 152)

2. At that time, BCBank, Inc. ("BCBank") held the first deed of trust ("Deed of Trust") against EMI's 12 acres (A.R. 118, 152 see also Deed of Trust at A.R. 127-138) securing a \$335,000 note (hereinafter referred to as the "Note") from EMI to BCBank.

3. On August 25, 2010, the DOH filed three condemnation actions against EMI and BCBank seeking to condemn a number of parcels containing in all approximately 8 of EMI's 12 acres. (See condemnation Petitions at A.R. 13-30A, 31-42, and 43-60). The condemned 8 acres shall hereinafter be referred to as the "Condemned Property" and the remaining four acres which is comprised of two separate parcels containing approximately 1 acre and 3 acres shall hereinafter be collectively referred to as the "Residue".

4. The condemnation Petitions included as attachments thereto, plats showing the various portions of the Condemned Property and the Residue. (See A.R. 27-30A, 42 and 57-60; see also the cut and paste compilations of these Plats at A.R. 174 and 175 which were filed as attachments to *Edwin Miller Investments, LLC's Response and Objection to CGP Development Co. Inc's Motion for Entitlement to Condemnation Proceeds*) All of said plats shall hereinafter be collectively referred to as the "Condemnation Plats".) The DOH Plat at A.R. 163 also shows the entirety of the Condemned Property and the Residue. As shown on the Plat at A.R. 163 and the Condemnation Plats, the Condemned Property includes the property designated thereon as the following parcels: TR.1 (.92 Acres), TR.2 (.09 Acres), TR.3 (.03 Acres), WETLAND MITIGATION

ACQUISITION (4.83 Acres), TR. 1 (.10 Acres), TR. 2 (.23 Acres), TR. 3 (1.64 Acres) and TR. 4 (.19 Acres). The Residue includes the property designated thereon as Parcels R-1 (3 acres) and R-2 (1 acre) (also designated as 19-2).

5. The condemnation Petitions were filed against EMI as the owner of the 12 acres and BCBank and its trustee, as the holder of the Deed of Trust against the 12 acres. (A.R. 17, 35 and 47)

6. On September 16, 2010 BCBank assigned all of its interest in and to the Deed and Trust and the Note to CGP. (See Assignment of Loan Documents at A.R. 63-69)

7. On September 21, 2010, Jack C. Barr, Esquire, filed a Notice of Appearance on behalf of CGP in the place and stead of BCBank in each of the three condemnation actions. (See Notices of Appearance at A.R. 62-69, 70, and 71)

8. On or about September 27, 2010, the DOH deposited with the court below the total sum of \$241,000 in the three condemnation actions as compensation for the condemnation. (See Orders of Deposit at A.R. 72-85, 86-92 and 93-105)

9. An Order of Deposit was entered in each of the condemnation actions on September 27, 2010, pursuant to which the DOH became the owner of the Condemned Property as the Orders of Deposit stated that the Condemned Property became "vested in the West Virginia Department of Transportation, Division of Highways, a public corporation...". (See A. R. 73, 87 and 94). The Orders of Deposit also included as attachments thereto the corresponding Condemnation Plats. (See A.R. 81-85, 92 and 102-105)

10. The Condemnation Plats clearly show that the taking of the Condemned Property detrimentally affected the access to the Residue. (See A.R. 27-30A, 42, 57-60, 174 and 175)

11. The Condemnation Plats at A.R. 57-60 and 174 show the proposed access to the three acre Residue, R-1. The alleged proposed access from the new proposed road to the three acre

Residue, R-1, is shown on A.R. 57 as a narrow access approximately 20 feet wide, half of which width feeds into the condemned property designated thereon as the shaded parcel 19-1 and TR. 2 and the other half of the access feeds into the adjoining landowners condemned parcel identified as TR. 2. Not only does this proposed limited access not touch EMI's Residue property, R-1, but it only provides a 10' wide access to a portion of EMI's property which has been condemned.

12. The Condemnation Plats at A.R. 27-30A and 175 show the proposed access to the one acre Residue R-2 or 19-2. The alleged proposed access from the new proposed road is shown on A.R. 27 as the curved narrow access approximately 20 feet in width which feeds into the portion of the Condemned Property identified as *Wetland Mitigation Acquisition*. Not only does this proposed limited access not touch EMI's Residue property, R-2 (19-2), but it too only provides a limited narrow access to a portion of EMI's property which has been condemned.

13. Each of the condemnation Petitions states that "...the abutting property owners, including Respondent(s) are to have no rights of access whatsoever to or from that portion of said public road so designated as a controlled access facility, as the same is shown on said plan and map of public road." (See A.R. 16, 34 and 46)

14. Each of the Orders of Deposit state that "...abutting property owners, including the Respondent(s), are to have no rights of access whatsoever to or from the residue of their property, if any, and the Respondent(s) are hereby denied all rights of access to said controlled access facility except at designated points of access shown on said project right-of-way plans." (See A.R. 73, 87 and 94)

15. CGP admits that the condemnation has affected the value of the residue. At page 6 of *CGP Development Co., Inc. 's Motion for Entitlement to Condemnation Proceeds* ("Motion") it states, "[t]he 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.”
(A.R. 122).

16. On September 1, 2010, prior to CGP’s purchase of the Deed of Trust and Note, Notices of Lis Pendens concerning the proposed taking of EMI’s property were recorded in the Berkeley County Clerk’s Office by the DOH. Attached to the recorded Notices of Lis Pendens are copies of the Condemnation Plats which serve to notify all prospective purchasers of any interest in the 12 acre parcel of the subject condemnation and its affect upon the property to be condemned and the limiting of the access to the Residue. (A.R. 153)

17. On December 7, 2010, the court below entered an Order of Consolidation consolidating the three condemnation actions into one action thereafter designated as Civil Action No 10-C-689.

18. On October 18, 2010, Jack C. Barr, as Successor Trustee for CGP, caused a Notice of Successor Trustee’s Sale (hereinafter “Notice of Foreclosure”) to be issued for the foreclosure of EMI’s property excluding the real estate and interests therein affected by the condemnation. (See Notice of Foreclosure at A.R. 176-177 and 141)

19. The legal description of the property to be foreclosed upon as contained in the Notice of Foreclosure which description excluded from the foreclosure transaction all of the Condemned Property and all rights in and to the condemnation action stated as follows:

All of that certain tract or parcel of real property located in Martinsburg District, Berkeley County, West Virginia, containing 12.8610 acres and being identified as “Residue Parcel” on the plat of Villages @ Court House Square dated February 15, 22006 and prepared by Huron Consulting, which plat is recorded in 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.

Subject to and less the real estate and interest in real estate described in the condemnation proceedings instituted in Berkeley County, West Virginia, (Civil

Action Nos. 10-C-689 VI, 10-C-690 VI). Successor Trustee reserves from said sale the portions of the real estate which are subject to such condemnation proceedings and the liens upon the deposit by the state and/or the proceeds from the real estate which have now been equitably converted by said proceedings. (A.R. 176) *emphasis added*

20. On November 17, 2010, CGP conducted a foreclosure sale of EMI's property under its Deed of Trust and pursuant to the terms contained in the Notice of Foreclosure. CGP purchased the foreclosed property at the foreclosure sale. (A.R. 140)

21. On November 17, 2010, Jack C. Barr issued a Trustee's Deed for the transfer of the foreclosed property to CGP. The legal description of the property conveyed as described in the Trustee's Deed included the identical description and condemnation rights exclusion as contained in the Notice of Foreclosure. (See Trustee's Deed at A.R. 149-150 and 178-179).

22. CGP received copies of the condemnation petitions and the Condemnation Plats prior to the November 17, 2010, foreclosure sale and purchase. (See undenied statement of fact at A.R. 153, and condemnation Petitions at A. R. 13-30A, 31-42, and 43-60)

23. CGP was aware that the condemnation limited the access to the Residue when it purchased the Residue at the foreclosure sale on November 17, 2010. (See undenied statement of fact at A.R. 153, and condemnation Petitions at A. R. 13-30A, 31-42, and 43-60)

24. On December 20, 2010, Jack C. Barr, as counsel for CGP, filed a Supplemental Motion concerning the disbursement of the initial condemnation proceeds. In said Motion, CGP admits at Paragraph 5 (A.R. 107) that "[t]he foreclosure sale was a partial foreclosure and the Creditor [CGP as the lienholder] reserved from said sale the equitable conversion rights against the proceeds of this condemnation as occurs in accordance with West Virginia Code §54-2-14a." (See Supplemental Motion at A.R. 106-116)

25. In a letter to the court below dated March 17, 2011 from CGP's counsel, Jack C. Barr,

Mr. Barr represented to the court that if his client, CGP, were awarded the initial deposit, it would leave CGP with a small balance due on the Secured Debt and CGP would “not exercise our [CGP’s] right under the deed of trust to control the future course of the condemnation and defense.” (See A.R. 180)

26. On March 24, 2011, the court below entered its *Order Regarding Release of Deposit* in which order the court awarded the initially deposited condemnation proceeds in the amount of \$241,000 to CGP as the priority lienholder and as the priority statutory claimant pursuant to CGP’s Deed of Trust. (A.R. 3)

27. In another letter from Jack C. Barr, as CGP’s counsel, dated March 29, 2011, Mr. Barr represented to EMI’s undersigned counsel as follows: “As I advised you by telephone, we are not exercising our right to take control of this case, but will involve ourselves for the purpose of monitoring the defense of the condemnation suit.” (See A.R. 181-182)

28. CGP and EMI assert that the initial condemnation proceeds are not adequate compensation for the Condemned Property taken or the diminution to the Residue. (See *Order Granting CGP Development Co., Inc.’s Motion for Entitlement to Condemnation Proceeds* at A.R. 3 wherein the lower court concludes that “[b]oth EMI and CGP agree that the total money paid into [c]ourt by the State is insufficient [compensation]; CGP’s *Supplemental Motion* Paragraph 6, 7 and 8 at A.R.107; *CGP Development Co. Inc’s Motion for Entitlement to Condemnation Proceeds* at A.R. 119 which states [b]oth EMI and CGP agree that the total money paid ito [c]ourt by the State is insufficient; and *Edwin Miller Investments, LLC’s Response and Objection to CGP Development Co. Inc’s Motion for Entitlement to Condemnation Proceeds*, Paragraph 13 at A.R. 154-155).

29. Paragraph 20 of the Deed of Trust (A.R. 133) contains a provision by which EMI collaterally assigned any condemnation proceeds or awards resulting from the secured real property

to BCBank (now CGP) as the beneficiary as follows:

Grantor [EMI] will give Lender [now CGP] 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 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.

30. Paragraph 18 of the Deed of Trust contains a provision for the release of the Deed of Trust upon payment of the Secured Debt as follows: "Once the Secured Debt is fully and finally paid, Lender agrees to release this Deed of Trust and Grantor agrees to pay for any recordation costs." (A.R. 132) The "Secured Debt" is defined in Paragraph 4 of the Deed of Trust (A.R. 128) and includes the principal and interest amount due on the Note plus costs incurred by the Deed of Trust holder to preserve and enforce its security.

31. CGP and EMI concur that the initial condemnation proceeds (\$241,000) are insufficient to satisfy the balance due on the Secured Debt. (See A.R. 4)

32. The remaining amount due on the Note as of June 27, 2012 is \$24,901.59 plus a per diem charge of \$4.31. (See A.R. 120 at footnote 3, and *Order Granting CGP Development Co., Inc.'s Motion for Entitlement to Condemnation Proceeds* at A.R. 4, footnote 3)

33. CGP filed *CGP Development Co., Inc.'s Motion for Entitlement to Condemnation Proceeds* with the court below, asking the court to determine that CGP is entitled to all further condemnation proceeds including all amounts recovered over and above the balance due on the Secured Debt including any additional award for the Condemned Property and the Residue diminution. (See *CGP Development Co., Inc.'s Motion for Entitlement to Condemnation Proceeds* at

A.R. 117-150)

34. EMI filed its opposition to CGP's Motion and asserts that CGP is only entitled to the payment of the balance due on the Secured Debt out of the condemnation proceeds and thereafter, EMI is entitled to all further condemnation proceeds including any additional award for the Condemned Property and the Residue diminution. (See *Edwin Miller Investments, LLC's Response and Objection to CGP Development Co. Inc's Motion for Entitlement to Condemnation Proceeds* at A.R. 151-182)

35. On June 27, 2012, the court below entertained oral argument of counsel on the issues presented by CGP's Motion and EMI's Response. (See Transcript at A.R. 187-216)

36. On August 21, 2012, the court below entered the *Order Granting CGP Development Co., Inc.'s Motion for Entitlement to Condemnation Proceeds* which Order awarded to CGP the sole right to all further condemnation proceeds and dismissed EMI from the action, with prejudice. (See *Order Granting CGP Development Co. Inc's Motion for Entitlement to Condemnation Proceeds* at A.R. 1-12)

III. SUMMARY OF ARGUMENT

This case involves the rights to primary and residue condemnation damages between EMI, the owner of the property on the date of the condemnation, CGP as the holder of the Deed of Trust against the property and, CGP as the purchaser of the property at a foreclosure conducted after the condemnation who knowingly purchased restricted access Residue property excluding all condemnation rights therein. EMI was the owner of the condemned property on September 27, 2010, the date of the condemnation and therefore should be entitled to all condemnation proceeds subject only to CGP's right, as the lienholder, to the payment of the balance due on the debt secured by the Deed of Trust against EMI's property.

CGP's right to the condemnation proceeds as the lien holder should be limited to the payment of the Secured Debt. Under the standard Form Deed of Trust which BCBank assigned to CGP, EMI assigned a collateral interest in the condemnation proceeds to BCBank (now CGP) as security for payment of the Secured Debt. By law and pursuant to the condemnation assignment provision, CGP should have the first right to the condemnation proceeds up to the amount necessary to satisfy the Secured Debt. Thereafter, CGP should have no interest or claim in the condemnation proceeds. However, the court below erroneously determined that the Deed of Trust unconditionally assigned all condemnation proceeds to CGP regardless of the amount due on the Secured Debt.

CGP, as the foreclosure purchaser, acquired no interest in the Residue diminution claim. The damage to the Residue occurred on September 27, 2010 at the moment of the condemnation when the access to the Residue became restricted. EMI was the owner of the Residue on that date and is entitled to the damages to its land which arose on that date. CGP subsequently purchased the Residue with no condemnation rights at the foreclosure of the property. The damages to the Residue occurred on the date of the take, not at some later unknown date when the proposed road will be constructed. CGP's subsequent ownership of the property at the time the road will be constructed does not entitle CGP to any Residue diminution damages. In addition, CGP was fully aware both actually and constructively that the property it was purchasing at the foreclosure was restricted access property with all condemnation rights excluded. CGP can not claim that it did not know that it was purchasing restricted access property. Nor can CGP claim that it was not aware that the sale terms specifically excluded all condemnation rights as to the Residue property. CGP as the foreclosure purchaser acquired no right to the Residue damages. However, the court below erroneously determined that CGP, as the foreclosure purchaser, is entitled to all Residue damages.

The court below should have determined that EMI is entitled to all further condemnation

proceeds awarded in this action subject only to CGP's claim for the payment of the Secured Debt.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that the facts and legal arguments are adequately presented in this Brief and the record on appeal and does not request an oral argument.

V. ARGUMENT

A. Standard of Law.

The Motion appealed herein should be reviewed as a WVRCP Rule 12(c) motion for judgment on the pleadings or a Rule 56 motion for summary judgment. Although neither the Motion nor the granting order identify the nature of the Motion or the applicable standard of law, the Motion requests a ruling on the legal effect of the given facts portrayed in the pleadings. See *Copley v. Mingo County Bd. Of Educ*, 195 W. Va. 480, 466 S.E.2d 139 (1995); a motion for judgment on the pleadings presents a challenge to the legal effect of given facts. A motion for judgment on the pleadings is reviewed under the same restrictive standard as a Rule 12(b)(6) motion to dismiss and the motion should not be granted unless the opposing party can prove no set of facts to support its claim. See *Copley*, Id; *Calvert Fire Ins. Co. v. Bauer*, 175 W. Va. 286, 332 S.E.2d 586 (1985) and; *Kopelman & Assoc. v. Collins*, 196 W. Va. 489, 473 S.E.2d 910 (1996). The standard required to overcome a motion to dismiss is a very liberal one requiring only a light burden of proof and for purposes of the motion, all allegations are to be construed in the light most favorable to the nonmoving party. *John W. Lodge Distrib. Co. v Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978). A dismissal should not be granted unless it appears beyond a doubt that nonmovant can prove no set of facts in support of his claim which would entitle him to relief. *Holbrook v Holbrook*, 196 W.Va. 729, 474 S.E.2d 900 (1996). Accordingly, the foregoing Statement of Facts (which are essentially undisputed by CGP) should be accepted as true. These facts unquestionably support the

denial of CGP's requests for relief and in fact support the awarding of all further condemnation proceeds to EMI subject only to CGP's right to recover the amount due on the Secured Debt.

When a court considers matters outside of the pleadings, a motion for judgment on the pleadings will be reviewed under the standard applicable for a summary judgment motion. A summary judgment motion under Rule 56 of the West Virginia Rules of Civil Procedure should be granted only when it is clear that there is no genuine issue of material fact to be tried. *Painter v Peavy*, 192 W. Va. 189, 451 S. E.2d 755 (1994). A material fact is one that will affect the outcome of the case and a dispute about a material fact is genuine if a reasonable jury could favor the nonmoving party on the issue. *Jividen v Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995). The court's function at summary judgment stage is not to weigh the evidence and determine the truth, but is to determine whether there is a genuine issue of material fact for trial. *Poling v Pre-Paid Legal Services, Inc.*, 212 W.Va. 589, 575 S.E.2d 199 (2002). In determining whether a genuine issue of material fact exists, the court should construe the presented facts in the light most favorable to the nonmoving party. *Alpine Property Owner's Ass'n v Mountaintop Dev. Co.*, 179 W. Va. 12, 365 S.E.2d 57 (1987). If there exists any genuine issue of material fact, the motion should be denied. *Aetna Cas. & Sur. Co. v Federal Ins. Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Even if this appeal is reviewed under the Rule 56 standard, the facts presented demonstrate that there exists no genuine issue of fact which would preclude the denial of CGP's requests for relief nor which would preclude the awarding of all further condemnation proceeds to EMI subject only to CGP's right to recover the amount due on the Secured Debt.

B. CGP Is Entitled To The Payment Of The Principal And Interest Due On The Note From The Condemnation Proceeds.

The first issue presented by CGP's Motion which is not in dispute but is briefly addressed herein for background purposes is whether CGP is entitled to recover the remaining principal and interest due and owing on the Note out of the condemnation proceeds. EMI did not and does not dispute CGP's right to payment of the remaining amount of principal and interest due on the Note from the condemnation proceeds. CGP admits that as of June 27, 2012 the principal and interest due on the Note Debt is \$24,901.59 and that said amount carries a per diem charge of \$4.31. (See Statement of Fact Paragraph 33 and A.R. 120 at footnote 6, and *Order Granting CGP Development Co., Inc.'s Motion for Entitlement to Condemnation Proceeds* Paragraph at A.R. 4, footnote 3) EMI did not and does not dispute that CGP is statutorily entitled as the priority Deed of Trust holder pursuant to W. Va. Code Section 54-2-14a to payment of said amount from the proceeds of the condemnation action. (A.R. 4) Accordingly, the court below properly concluded in its *Order Granting CGP Development Co. Inc's Motion for Entitlement to Condemnation Proceeds* that "CGP is entitled to the first \$24,901.59 [of additional condemnation damages awarded] as priority lienholder." (A.R. 4)

C. CGP Is Entitled To The Payment Of Any Other Debts Validly Secured By The Deed Of Trust From The Condemnation Proceeds.

The second issue presented by CGP's Motion which in principal is not in dispute but is also briefly addressed herein for background is whether CGP is entitled to recover "other debts" secured by the Deed of Trust out of the condemnation proceeds. Other debts refer to costs and fees incurred by CGP in preserving and enforcing its collateral as allowed under the Deed of Trust. Again, EMI did not and does dispute CGP's right to recover other costs allowable under the Deed of Trust. However, EMI did and continues to reserve its right to object to any costs or fees which should not

be included as *other debts*.

Based upon CGP's Motion, *CGP Development Co. Inc's Reply to Response and Objection to Motion for Entitlement to Condemnation Proceeds* and the arguments of CGP's counsel at the June 27, 2012 Motion hearing, the court surmised that CGP's claim for other debts constituted mainly a claim for attorneys fees. Accordingly, the court below ordered that "payment of CGP's attorneys' fees and costs from any excess condemnation proceeds in this matter is appropriate" (A.R. 5) Further, the court ordered that CGP shall submit a statement of fees and costs and allowed EMI the right to object to the fees and costs. (A.R. 5) (It seems odd that the court below would give EMI an opportunity to object to fees and costs when such objection would be irrelevant to EMI as the court awarded all condemnation proceeds to CGP.)

Although CGP has not yet disclosed what attorneys' fees it will request under the Deed of Trust, EMI reserves its right to object to any requested attorneys' fees including but not limited to attorneys' fees related to the issues presented in this appeal. In the event that this Court determines that CGP as the foreclosure purchaser is not entitled to any Residue diminution claim and that CGP as the lienholder is not entitled to *all* condemnation proceeds under the condemnation assignment provision contained in the Deed of Trust, then CGP should not be allowed to recover any attorneys' fees incurred in pursuing such claims. Otherwise, CGP would be unfairly rewarded for pursuing meritless claims at EMI's expense. As a point of clarification, any reference to the "Secured Debt" herein includes the principal and interest due on the Note and the allowable *other debts* incurred in the preservation and enforcement of the collateral which are all secured by the Deed of Trust.

D. The Circuit Court Erroneously Determined That CGP, As The Foreclosure Purchaser Of The Condemnation Residue Property, Is Entitled To All Condemnation Proceeds, If Any, To Be Awarded For The Residue Diminution.

1. Residue Damages Are Determined As Of The Date Of The Taking And Belong To EMI As The Owner Of The Property On The Date Of The Taking.

In a condemnation proceeding, when an interest in land is taken or affected, the owner of the land taken is entitled to damages which will fairly compensate him for the land taken and any damages to the residue. See West Virginia Code Section 54-2-14a which states, “[b]efore entry, taking possession, appropriation, or use, the applicant [condemnor] shall pay into court such sum as it shall estimate to be the fair value of the property, or estate, right, or interest therein, sought to be condemned, including, where applicable, the damages, if any, to the residue beyond the benefits, if any, to such residue, by reason of the taking...” (*emphasis added*) Further, it states that “[u]pon such payment into court, the title to the property, or interest or right therein, sought to be condemned, shall be vested in the applicant.....”

In *West Virginia Department of Highways v. Bartlett*, 156 W. Va. 431, 94 S.E.2d 383, (1973), the Court reiterated the formula for determining residue damages as “the difference in the fair market value of the property claimed to be damaged immediately before and immediately after the taking, less all benefits which may accrue to the residue from the construction of the improvement for which the land was taken.” *Bartlett*, at 440. As identified in the foregoing Statement of Facts, the parties to this appeal can not dispute that the subject condemnation has damaged the Residue by limiting the access thereto. See Statement of Facts Paragraphs 10-16.

Damages to the residue are measured on the date of the taking and not some subsequent arbitrary date as held by the court below. Section 14a clearly identifies that condemnation damages, including residue damages, shall be determined as of the date of the take. The residue damages must

be determined on that date in order for the condemnor to comply with the statute which requires it to deposit with the court on the date of the taking an amount which condemnor *estimates* to be the *fair value* of the *damages to the residue*. *Strouds Creek & M.R. Co. v Herold*, 131 W. Va. 45, 45 S.E. 2d 513 (1947) confirms the well established rule that the amount of compensation for land taken is determined by the market value of the land on the date it is taken and the damage to the residue is also determined by the diminution in value to the residue which results from the taking also measured as of the date of the taking.

This well established rule is likewise applicable in the action at bar to establish that the Residue diminution damages should be assessed as of the date of the taking. The resulting damage to EMI's Residue, i.e., the access restriction, is concurrent with the taking of the Condemned Property. At the instant that EMI's Condemned Property was taken, the access to EMI's Residue became restricted. The restricting of the access to EMI's Residue had an immediate and detrimental impact on the value of EMI's Residue property. This reduction in value is the measure of damages as contemplated by Section 14a. Although Section 14a contemplates that the damages may be lessened by the reason for the taking, in this case the building of a road, this factor too is to be taken into account and determined as of the date of the taking.

As between the owner of the property on the date of the taking and a subsequent purchaser of the condemned property, the person who owns the condemned property on the date of the taking is entitled to the residue diminution damages. Section 14a confirms this proposition wherein it provides that; "the owners of such property, or interest or right therein, at the time of such payment [being the date of the taking], including lienors and conflicting claimants, shall have such title, interest or right in the money paid [and to be paid] into court as they had in the property, or interest or right therein, sought to be condemned, and all liens by deed of trust, judgment or otherwise, upon

such property, or interest or right therein, shall be transferred to such fund in court....” It is undisputed that EMI was the *owner of such property* (the Condemned Property and the Residue) *at the time of such payment* and thus, *shall have such title, interest or right in the money paid [and to be paid] into court as they had in the property*. Therefore, EMI, as the owner of the Condemned Property and the Residue on September 27, 2010, the date of the *taking* and *such payment*, is likewise the *owner of the money paid into court*. Section 14a also provides that the rights of lienholders as held in the property likewise transfer and attach to the proceeds. Accordingly, EMI is the owner of the right to all condemnation proceeds subject to CGP’s statutorily *transferred* lienholder rights under its Deed of Trust.

CGP’s right to the condemnation proceeds as the lienholder under its Deed of Trust is discussed in the foregoing sections B and C with respect to the satisfaction of the Secured Debt and, in the following section E with respect to the assignment provision contained in the Deed of Trust. CGP’s statutory right in and to the condemnation proceeds as the lienholder is the same right as they had in the property pre-condemnation, the right to recover the amount due on the Secured Debt. EMI agrees that CGP, as the lienholder, is statutorily entitled to payment of the Secured Debt out of the condemnation proceeds which amount CGP admits is \$24,901.59 plus per diem from June 27, 2012 plus allowable *other debts*. (A.R. 4) However, CGP, as the foreclosure purchaser, acquired no interest in the condemnation proceeds contrary to the finding of the court below.

The court below misapplied the decision in *Newman v Bailey*, 124 W. Va. 705, 22 S.E.2d 280 (1942) in awarding the Residue diminution to CGP. The Court below incorrectly surmised from *Newman*, that damages to the Residue occur when the roads for which the land was condemned are constructed as opposed to the date of the taking when the access to the Residue became restricted. In its order, the court below incorrectly states that “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.” (A.R. 7) This is absolutely incorrect as EMI’s Residue was damaged immediately at the time of the taking when EMI owned it and when the access right to the Residue parcels became restricted.

The *Newman* decision is not applicable to the facts at bar. In *Newman*, the state built a road on private property without any condemnation action whatsoever. Subsequent to the construction of the road, the property was sold to Plaintiff, Newman. Newman sued the state to compel condemnation of the part of the property upon which the road was built. The Court denied compensation and made the following insightful findings. First, the right to condemnation proceeds is with the original land owner who owns the property when the land is condemned and such right to proceeds does not pass to a subsequent purchaser without a specific assignment of such rights. The Court found that there was no transfer of any such rights in *Newman*. Second, the statute which vests title in the state and requires damages to be assessed upon the date of the payment of the condemnation funds and the taking of the property was not applicable in *Newman* because there was no condemnation action filed by the state. In essence, *Newman* was a trespass case not a condemnation case so the injury to the land occurred at time of the construction of road (the time of the trespass) as opposed to the date of the take. Finally, the Court held that Newman had actual notice of the state’s prior right because he could see the road before he purchased the property and therefore his knowledge of the state’s preexisting right in the property defeated his claim for damages.

The *Newman* opinion actually supports EMI’s position. First, the court below relies on *Newman* to establish that damages to the residue herein will occur upon the construction of the road not as of date of take. This conclusion is incorrect. *Newman* established that if no condemnation action is filed and title to property is not properly taken then the injury to the land is measured when

the construction of the road is finished. *Newman* was akin to a trespass damages case. Whereas, if property is taken properly through condemnation, the general rule holds true that the damages occur upon the date of the take. *Newman* distinguishes actions for injury to land not properly taken verse compensation for the proper taking of title to land. The case at bar is an action for damages arising from the proper taking of title to land through a condemnation action. In this case, title to EMI's land was taken on September 27, 2010, when EMI owned it and therefore, the damages should be ascertained as of that date and the right to the Residue compensation for the taking remains with EMI.

Second, as in *Newman*, there was no specific assignment of any condemnation rights to CGP as the foreclosure purchaser. In fact as discussed hereinafter, all condemnation rights were reserved in the foreclosure transaction. The reservation of all condemnation rights contained in both the Notice of Foreclosure and the Trustee's Deed completely undermines CGP's claim to the Residue damages as the foreclosure purchaser of such property.

Finally, as in *Newman*, CGP had actual and constructive notice of the damages to the Residue resulting from the condemnation. As discussed hereinafter, CGP was or should have been fully aware that the immediate result of the condemnation was the restriction of the access to the Residue. CGP was or should have been fully aware of this fact before it acquired the Deed of Trust, before it published the Notice of Foreclosure (which excepted all condemnation rights) and before it purchased the limited access Residue property at the foreclosure sale. Such knowledge precludes CGP from asserting a claim to the condemnation proceeds.

2. No Condemnation Rights Were Transferred To CGP As The Foreclosure Purchaser In The Foreclosure Transaction.

The evidence indisputably shows that CGP as the foreclosure purchaser did not acquire any right in the Residue diminution through the foreclosure transaction. First, the excepting language contained in both the Notice of Foreclosure and the subsequent Trustee's Deed specifically excludes the transfer of any condemnation rights. The first sentence of the exclusion states that the property to be sold and transferred in the foreclosure action includes the 12 acre parcel "less the real estate and interest in real estate described in the condemnation proceedings instituted in Berkeley County, West Virginia..." (A.R. 176) The "real estate and interest in real estate" excluded thereby obviously includes the condemned property and the access "interest" in the Residue. Even the *Orders of Deposit* authorizing the condemnation and vesting title in the state confirm that the interest in the residue is part of the condemnation proceedings as it awards payment to the condemnee, EMI, for "the property or estate, right or interest therein, sought to be condemned in this proceeding, including the damages, if any, to the residue of the land of the Respondent(s) beyond the benefits, if any, to any such residue by reason of the taking". (A.R. 72, 86 and 93, *emphasis added*).

The second sentence of the exclusion in the Notice of Foreclosure and Trustee's Deed states that the foreclosing trustee "reserves from said sale the portions of the real estate which are subject to such condemnation proceedings and the liens upon the deposit by the state and/or the proceeds from the real estate which have now been equitably converted by said proceedings." (A.R. 176) Clearly the access right to the residue is *a portion of the real estate which is subject to such condemnation proceedings*. In addition, this sentence reserves the *proceeds from the real estate which have now been equitably converted by such proceedings*. Again, the access to the residue which has been taken constitutes an interest in real estate that has been equitably converted by the condemnation

action and is therefore, excluded from the transfer.

Second, CGP as the foreclosure purchaser can not deny that it knew well before the foreclosure that the condemnation restricted the access to the residue. CGP was aware of this fact as a party to the condemnation proceeding. As a party, CGP received the condemnation Petitions and Orders of Deposit which both clearly stated that the access to the Residue was restricted by the condemnation. Each condemnation Petition stated that "...abutting property owners, including Respondent(s) are to have no rights of access whatsoever to or from that portion of said public road so designated as a controlled access facility, as the same is shown on said plan and map of public road." (A.R. 16, 34 and 46) Each of the Orders of Deposit stated that "...abutting property owners, including the Respondent(s), are to have no rights of access whatsoever to or from the residue of their property, if any, and the Respondent(s) are hereby denied all rights of access to said controlled access facility except at designated points of access shown on said project right-of-way plans." (A.R. 73, 87, and 94) The Condemnation Plats attached to the Petitions and the Orders of Deposit also showed in detail how the condemnation restricted the access to the Residue. Further, Notices of Lis Pendens were filed at the Berkeley County Clerk's Office with the Condemnation Plats attached thereto putting any foreclosure purchaser on notice of the restricted access. (A.R. 153)

Third, CGP's counsel represented to this Court in a written pleading that no condemnation rights were assigned in the foreclosure transaction. On December 20, 2010, CGP filed a *Supplemental Motion* seeking to recover the initially deposited condemnation funds. On page 2, ¶ 5 of said motion, CGP states as follows: "The foreclosure sale was a partial foreclosure and the Creditor [CGP as the lienholder] reserved from said sale the equitable conversion rights against the proceeds of the condemnation as occurs in accordance with West Virginia Code Section 54-2-14a." (A.R. 107) The right to the Residue diminution claim is definitely *an equitable conversion right*

against the proceeds of the condemnation as occurs in accordance with West Virginia Code Section 54-2-14a. Such admission clearly identifies that CGP, as the lienholder, excluded the transfer of the Residue diminution right in the foreclosure sale so CGP as the foreclosure purchaser acquired no Residue diminution right in the foreclosure transaction.

Finally, letters written by CGP's counsel demonstrate that CGP acknowledged that CGP as the foreclosure purchaser did not acquire any right to the condemnation proceeds and that CGP as the lienholder only retained the right to recover the small remaining amount due on the Secured Debt. In a letter to the court below dated March 17, 2011 from CGP's counsel, Jack Barr, Mr. Barr represented that if his client, CGP, were awarded the initial deposit, it would leave CGP with a small balance due on the Secured Debt and CGP would "probably not exercise our [CGP's] right under the deed of trust to control the future course of the condemnation and defense." (A.R. 180). In response to this Motion and the representations of counsel, the court below did award such funds to CGP.

In a subsequent letter from CGP's counsel dated March 29, 2011, Mr. Barr represented to EMI's undersigned counsel as follows: "As I advised you by telephone, we are not exercising our right to take control of this case, but will involve ourselves for the purpose of monitoring the defense of the condemnation suit." (A.R. 181)

So, CGP's condemnation counsel, the same counsel who conducted the foreclosure, admits and confirms that no rights in the condemnation funds were transferred to CGP as the foreclosure purchaser in the foreclosure transaction and only the right to recover the remaining small balance due on the Secured Debt was retained by CGP as the lienholder. He would know because he orchestrated the foreclosure. Who better to know the intent of the transferor than the transferor himself. Yet now the court below misguidedly agrees with CGP's new counsel who argues that the right to the Residue diminution was transferred to CGP, as the foreclosure purchaser. The admissions in CGP's

Supplemental Motion and the representations in the letters from CGP's counsel that all condemnation proceeds were excluded from the foreclosure transaction, and the specific reservations excluding the condemnation rights and proceeds as contained in the Notice of Foreclosure and Trustee's Deed, all contradict CGP's claim that the Residue diminution right was transferred in the foreclosure transaction.

After consideration of all of the foregoing facts demonstrating that no condemnation rights were transferred to CGP as the foreclosure purchaser, it is inconceivable that the court below would find that the Residue diminution rights were transferred to CGP as the foreclosure purchaser. The court's conclusion that "[n]othing in the deed mentions any reservation in EMI for rights to residual damages or diminution to the residue" (A.R. 8) is clearly wrong. Although the reservation language did not specifically refer to the *residual damages or the diminution to the residue*, the language in the reservation excluding from the transfer *the proceeds from the real estate which have now been equitably converted by said proceedings* undeniably includes the Residue diminution claim resulting from the restricted access because the access to the Residue was an interest in real estate which was *equitably converted by said proceedings*.

Whether this issue is reviewed under the motion to dismiss or the summary judgment standard, the result should be the same, i.e., CGP, as the foreclosure purchaser of the Residue, acquired no interest in any damages recoverable for the diminution in value to the Residue resulting from the condemnation. The facts demonstrate without question that CGP as the lienholder reserved and excluded from the foreclosure transfer *all* condemnation rights and that CGP as the foreclosure purchaser did not acquire any Residue diminution rights in the foreclosure transaction. There is no genuine issue of fact to contradict that CGP did not acquire any Residue diminution rights in the foreclosure transaction. Accordingly, not only was the court below wrong in granting CGP's motion,

the court below should have determined contrarily that CGP as the foreclosure purchaser did not acquire any Residue diminution rights in the foreclosure transaction and that EMI retains ownership of those rights subject only to CGP's right as the lienholder to recover the Secured Debt.

E. The Circuit Court Erroneously Determined That CGP As The Lienholder Against The Condemned Property Is Entitled To All Condemnation Proceeds Pursuant To The Assignment Provision Contained In Its Deed Of Trust Even Though Only A Small Balance Remains Due On The Debt Secured By The Deed Of Trust.

The finding of the court below that, even though only a small balance remains due on the debt secured by the Deed of Trust, CGP as the lienholder is entitled to all condemnation proceeds pursuant to the condemnation assignment provision contained in the Deed of Trust is totally contrary to the language and intent of the subject provision and the totality of the Deed of Trust. The court's finding is based on its misinterpretation of the provision by which EMI assigned a limited collateral interest in the condemnation proceeds to BCBank (now CGP) contained in Paragraph 20 of the Deed of Trust. The subject provision states as follows: "Grantor [EMI] authorizes lender [BCBank (now CGP)] 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." (A.R. 133) The corollary provision dealing with how *payments will be applied* is contained in Paragraph 18 and states "[o]nce the Secured Debt is fully and finally paid, Lender agrees to release the Deed of Trust." (A.R. 132). The court below improperly interpreted these provisions to conclude that the assignment was not a limited collateral security assignment but a full and unlimited assignment of all condemnation proceeds, regardless of the amount due on the Secured Debt.

The proper interpretation of the condemnation assignment provision dictates that the condemnation proceeds assignment is a collateral assignment and is limited to the amount of funds necessary to pay the Secured Debt. A number of rules of interpretation are applicable in this query. First, a contract which expresses the intent of the parties in plain and unambiguous language should be applied as written and enforced according to such intent. *Cotiga Development Company v United Fuel Gas Company*, 147 W. Va. 484, 128 S.E. 2d 626 (1963). However, if an ambiguity exists in a contract, the contract should be construed as a whole based upon the intent of the parties as outlined in the four corners of the document. *Hall v Hartley*, 146 W. Va. 328, 119 S.E. 2d 759 (1961).

The condemnation proceeds assignment provision in the Deed of Trust is unambiguous and clearly and unequivocally expresses the intent of the parties that EMI collaterally assigned the condemnation proceeds to BCBank (now CGP) and those assigned proceeds were to be applied towards the payment of the Secured Debt. Of course, when the debt was paid the Deed of Trust, including the assignment therein, would be released.

In the first sentence of the subject provision, EMI authorizes the Deed of Trust holder (now CGP) to intervene in EMI's name and collect and receive all sums resulting from the action. This authorization allows BCBank (now CGP) to *collect and receive all sums in EMI's name* for and on behalf of EMI to be used as payment of the Secured Debt. This sentence does not allow CGP to unconditionally receive all condemnation proceeds. In the second sentence EMI *assigns the condemnation proceeds* to BCBank (now CGP). However, the third sentence qualifies this assignment of the condemnation proceeds and limits BCBank's (now CGP's) use of the proceeds by stating that *such proceeds shall be considered payments and will be applied as provided in this Deed of Trust*. Finally, under Paragraph 18 of the Deed of Trust, once these *applied proceeds* satisfy the Secured Debt, the Deed of Trust including the collateral assignment is released and BCBank (now

CGP) is entitled to no further condemnation proceeds.

Even if some ambiguity exists as to the assignment language, which EMI denies, the intent of the parties as expressed in the entirety of the document was for EMI to provide BCBank (now CGP) a collateral interest in EMI's real property including any condemnation proceeds therefrom to secure EMI's indebtedness. Under no stretch of the imagination could one argue that this language or the intent of the parties to this document was that EMI granted to BCBank (now CGP) an absolute right to the collateral and/or all condemnation proceeds therefrom regardless of the amount due on the Secured Debt. See *Halfon v Title Insurance and Trust Company*, 97 Nev. 421, 634 P.2d 660 (1981); a secured party is only entitled to the portion of the condemnation award necessary to satisfy his lien, even when the deed of trust contains an assignment of the condemnation award to the secured party.

Further, any ambiguity in the Deed of Trust should be strictly construed against BCBank (Now CGP). Ambiguous contract provisions, especially in contracts of adhesion, must be construed against the drafter. See *State ex rel. Richmond American Homes of West Virginia, Inc. v Sanders*, 228 W. Va. 125, 717 S.E. 2d 909 (2011). As the assignee of the Deed of Trust, CGP "steps into the shoes of the assignee, BCBank, and is therefore, treated as the drafter of the Deed of Trust. See *Cook v E. Gas & Fuel Associates*, 129 W. Va. 146, 39 S.E.2d 321(1946). Moreover, the Deed of Trust is a contract of adhesion and it should be strictly construed against CGP as the successor to BCBank, the drafter of the form document. See *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 613 S.E.2d 914 (2005); a standard form contract submitted by one party to another party on a "take it or leave it" basis is a contract of adhesion. The Deed of Trust at issue herein is a standard banking form take it or leave it contract. The Deed of Trust is identified on each page as "Banker Systems, Inc.,... Form AGCO-RESI-WV 1/27/2003". Based upon these rules of contract interpretation, the assignment provision must be strictly construed against CGP. When the assignment provision is

interpreted in favor of EMI, there can be no doubt that the assignment provision only assigned to CGP the right to recover the amount of condemnation proceeds necessary to satisfy the Secured Debt and no more.

The finding of the court below is contrary to the overall intent of the Deed of Trust which must be construed against CGP, who, by assignment, now stands in the shoes of BCBank, the drafter of the Deed of Trust. The Deed of Trust is not an unlimited assignment of any property rights. It is a limited collateral transfer and assignment of real property and condemnation rights therewith solely for the purpose of securing the payment of the Secured Debt. The Secured Debt is defined in Paragraph 4 of the Deed of Trust (A.R. 128) and includes only the contemplated secured indebtedness and definitely does not include *all* condemnation proceeds regardless of the remaining Note indebtedness. Upon the payment of the Secured Debt, the collateral transfers and assignments therein must be released pursuant to Paragraph 18. Additionally, Paragraph 17 requires any foreclosure surplus to be paid to Grantor, EMI. (A.R. 132) Likewise, EMI should be entitled to retain any condemnation surplus.

F. The Circuit Court Erroneously Dismissed EMI From This Action, With Prejudice.

Based upon the foregoing arguments, EMI is the rightful owner of the further condemnation proceeds which may be recovered in this action subject only to GGP's claim as the lienholder for the payment of the small remaining balance due on the Secured Debt. As such owner, EMI is entitled to remain as a party to this action and be allowed to pursue its claim for condemnation damages. Accordingly, the dismissal of EMI, with prejudice, was improper and should be reversed by this Court.

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G. The August 21, 2012, Order Granting CGP Development Co., Inc.'s Motion For Entitlement To Condemnation Proceeds Is A Final Appealable Order.

The order appealed herein is a final appealable order with respect to EMI and is proper and timely for this Court to consider upon appeal. The order appealed herein does not dispose of the case in its entirety and does not include the WVRCP Rule 54(b) language proclaiming *that there is no just reason for delay* with respect to the entry of the order. However, the appealed order dismisses EMI from the action, with prejudice, and definitely is a final order in its nature and effect with respect to EMI. See *Durm v. Heck's Inc.*, 184 W.Va. 562, 401 S.E.2d 908 (1991); a final order which dismisses a party from an action, with prejudice, and approximates a final order in its nature and effect with respect to such party is ripe for appeal. Accordingly, the order dismissing EMI with prejudice from this action appealed herein does constitute a final appealable order under Rule 54 and pursuant to *Durm* and is, therefore, proper for this Court to consider in this appeal.

VI. CONCLUSION

The underlying condemnation action includes claims for further compensation for the taking of the Condemned Property and the damages to the Residue. EMI owned the Condemned Property and Residue on September 27, 2010, the date of the condemnation order awarding the Condemned property to the DOH. At the time of the taking, EMI's property was subject to a Deed of Trust held by BCBank. As a result of the taking, the access to the Residue property became restricted on September 27, 2010. After the taking, BCBank assigned its interest in the Deed of Trust to CGP. CGP subsequently conducted a foreclosure on the Residue property in which foreclosure CGP purchased the Residue property. EMI and CGP seek a determination of their entitlement to the additional compensation which may be recovered in the condemnation action.

Pursuant to the assignment provision contained in the Deed of Trust and pursuant to law, CGP is entitled to recover the payment of the amount due on its Secured Debt from the condemnation proceeds. The assignment provision contained in the Deed of Trust is clearly a limited collateral assignment not a unilateral assignment and CGP should only be entitled to recover thereunder the payment of the amount due on its Secured debt. However, the court below erroneously found that the assignment provision unconditionally assigned all condemnation proceeds to CGP, regardless of the amount due on the Secured Debt.

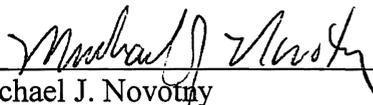
EMI is the owner of the Residue damage claim because the damages to the Residue occurred on the date of the condemnation when the access to the Residue was restricted at which time EMI owned the Residue. However, the court below erroneously determined that CGP is entitled to the Residue damages because such damages did not occur and are not measured at the moment of condemnation when EMI owned the Residue but will occur and should be measured at the time the road is built when CGP will own the Residue.

Based upon the terms of the Notice of Foreclosure and the Trustee's Deed, CGP as the foreclosure purchaser acquired no right in the condemnation action, nor in the Residue diminution claim. However, the lower court erroneously determined that the Residue diminution rights were transferred to CGP as the foreclosure purchaser in the foreclosure transaction.

The findings and conclusions with respect to the distribution of further condemnation proceeds should be the same whether the facts presented are reviewed under a motion for judgment on the pleadings, motion to dismiss or motion for summary judgment standard. Based upon the given facts, the court below should have determined that the assignment was a collateral assignment limited to the amount necessary to satisfy the Secured Debt, that the damages to the Residue occur at the time of the taking of the property and belong to EMI and, that no condemnation rights were

transferred to CGP in the foreclosure transaction. Accordingly, the court below should have ruled that EMI is entitled to all further condemnation proceeds subject only to the payment to CGP of the Secured Debt.

Wherefore, EMI respectfully requests that this Court reverse the ruling of the court below and determine that EMI is entitled to all further condemnation proceeds recovered in this action, subject only to the payment of CGP's Secured Debt.

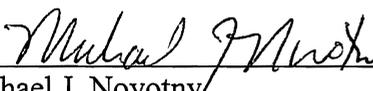


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VII. CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 2012, I served a copy of the foregoing *Petitioner's Brief* and *Appendix* upon Respondents counsel of record by United States mail, first-class postage prepaid as follows:

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