

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 REPLY BRIEF

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NOW COMES the Petitioner, Edwin Miller Investments, LLC, ("EMI"), by counsel, and files this Petitioner's Reply Brief in opposition to Respondents' Brief ("RB") and in further support of the relief requested by Petitioner in its Brief. (Petitioner shall adopt herein and continue to use the abbreviations identified in its Brief.)

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

Petitioner, EMI, relies upon the procedural history of the case as set forth its Brief. Respondents' Brief does not include a Statement of Facts section but makes their factual assertions in their Statement of the Case section. EMI will address any counter statement to Respondents asserted facts in the following section.

B. Statement of Facts

EMI relies upon and incorporates herein the facts previously asserted in its Brief. EMI further asserts the following counter statement of facts:

1. Respondents' Brief incorrectly states at page 5 (and numerous other locations) that "[t]he State never sought to condemn the remaining 4 acres..." The DOH condemned the access right to the remaining 4 acres (Residue) on September 27, 2010, which access right is a part of the 4 acres as an appurtenant right thereto.

2. Respondents' Brief at page 5 states that CGP "expressly reserved from the foreclosure sale the 8 condemned acres as well as any rights to the condemnation proceeds stemming from those 8 acres under the theory of equitable conversion." This statement is misleading. The reservation does not refer at all to an 8 acre parcel but instead describes the entire 12 acre parcel and reserves from the sale all "interests in real estate described in the condemnation proceedings" (the taken property and the access to the Residue) and also reserves "all proceeds from the real estate which have been equitable converted by said proceedings" (proceeds payable for the taken property and the taken appurtenant right of access to the Residue). Respondents' paraphrasing of this reservation is incorrect and self-serving.

3. Respondents' Brief at page 6 states that "the parties thought that the 4 acres not condemned by the State and now owned by CGP – also referred to as the residue- would be damaged by virtue of the State's condemnation of the adjoining 8 acres. ... what the damages to the residue are, is not yet subject to determination." Again, EMI counter asserts that an integral part of the 4 acres was condemned, i.e., the appurtenant right of access thereto. EMI does not agree that the 4 acres would be damaged at some future time or that those damages are not yet subject to determination. EMI maintains that the 4 acres was damaged upon the entry of September 27, 2010, Condemnation Orders wherein the State condemned and took title to the appurtenant right of access thereto. Those damages are easy to ascertain, the difference between the value of the 4 acres with the pre-condemnation access thereto and the reduced value of the 4 acres with the post-condemnation restricted access. On September 27, 2010, the appurtenant right of access to the 4 acres, an interest in the real estate, was taken by the State and such interest in real estate was thereby equitable converted into a personal property damage right. This right was specifically excluded from the foreclosure transfer and remains in EMI subject to CGP's right to recover the small balance due on the Secured Debt.

III. SUMMARY OF REPLY ARGUMENT

Respondent's Brief obfuscates the applicable condemnation and real property legal principles in order to support its position and demonstrates a poor understanding of these principles. On September 27, 2010, the DOH condemned and took title to 8 of EMI's 12 acres and the access right to EMI's remaining 4 acres which property was subject to a deed of trust subsequently assigned from BCBank to CGP. On that date, September 27, 2010, the DOH deposited with the court below, \$241,000 as compensation for the land taken and the damage to the Residue. Also on that date, the title to the condemned property became vested in the DOH. The \$241,000 was awarded to CGP as the priority lienholder to be applied as payment on the Secured Debt. As typically the case, the DOH underestimated the value of the land taken and the damages to the Residue warranting the continuation of the condemnation action for a proper determination of the damages incurred by EMI.

On November 17, 2010, CGP foreclosed on EMI's remaining real property and excluded from the foreclosure transaction all of the real property interests condemned and all rights in and to the proceeds payable for the real property interests condemned. It was abundantly clear from the Notice of Foreclosure that whoever purchased the property at foreclosure would be acquiring the restricted access Residue with absolutely no right in the condemnation action or the condemnation proceeds. In this foreclosure transaction CGP obviously sought to recover some additional payment towards the Secured Debt by selling the restricted access Residue but also sought to maintain all rights in the condemnation proceeds as possible further payment towards the Secured Debt. CGP, as the foreclosure purchaser, purchased the property foreclosed upon. A distinction is made between CGP, as the foreclosure purchaser, and CGP, as the lienholder, for purposes which will become apparent. After applying the condemnation proceeds of \$241,000 and the foreclosure proceeds to the payment of the Secured Debt, the Secured Debt owed to CGP, as the lienholder, was reduced to a small balance of approximately \$24,000.

CGP, as the foreclosure purchaser, acquired and now owns the restricted access Residue. CGP, as the lienholder, continues to hold a lien interest in any additional condemnation awards to secure the satisfaction of the small remaining Secured Debt. This right of satisfaction is both a legal right by law and a contractual right pursuant to a typical collateral assignment of condemnation proceeds found in the Deed of Trust. Instead of accepting the just consequences of the foregoing events, CGP now seeks (and was awarded by the court below) a windfall of all additional condemnation damages in spite of the small amount due on the Secured Debt. CGP has asserted a number of specious claims and distorted the applicable law and facts to achieve this absurd result which the court below has misguidedly sanctioned.

CGP, as the foreclosure purchaser, asserts that the condemnation of the Residue has not yet occurred and that the Residue has not yet been damaged. Further, that the condemnation and damages will not occur until some future point in time when CGP owns the Residue and thus would entitle CGP to the resulting damages. This argument is totally contrary to condemnation principles and common sense. It cannot be disputed that on September 27, 2010, when EMI owned the Residue and the Condemnation Orders were entered by the lower court, the access right to the Residue was restricted thereby causing immediate damage to EMI. This immediate damage to EMI's Residue created in EMI a personal property right to recover the Residue damages which right remains in EMI.

CGP, as the foreclosure purchaser, also claims that the Residue damage rights were transferred to CGP in the foreclosure transaction. The Notice of Foreclosure and the Trustee's Deed contain reserving and excepting language which specifically exclude and reserve from the transaction all real property interests condemned and all proceeds attributable to the real property interests condemned. It is undisputable that a real property interest in the Residue, the appurtenant right of access therewith, was condemned and reserved from the transaction. Therefore, it is also undisputable that the Residue damage claim was likewise reserved and excepted from the transaction. The right to recover Residue damages was not transferred to CGP, as the

foreclosure purchaser, in the foreclosure transaction and remains with EMI subject only to CGP's right as the lienholder to recover the small remaining Secured Debt out of said proceeds.

CGP, as the foreclosure purchaser, knowingly acquired property having a restricted access at the foreclosure. Based upon the language in the Notice of Foreclosure, CGP as the foreclosure purchaser, also knowingly acquired no condemnation rights as to the Residue in the foreclosure transaction. Accordingly, CGP, as the foreclosure purchaser, obviously discounted the bid purchase price to account for the access deficiency. This discounted purchase price was detrimental to EMI because the purchase proceeds were applied to the Secured Debt so EMI should be able to make up for this detriment through the recovery of the Residue damages. However, CGP, as the foreclosure purchaser, now seeks an improper windfall by claiming that in addition to acquiring the Residue at a discounted purchase price, it also acquired the condemnation rights to the Residue damages in the foreclosure transaction.

Next, CGP, as the lienholder, claims that the assigning language in the standard bankers form Deed of Trust gives it the right to all condemnation proceeds and not just the proceeds necessary to satisfy the small remaining Secured Debt. This assertion is not supported by the language in the Deed of Trust. A simple example demonstrates the absurdity of this argument. Assume a debtor had a debt of \$100 secured by this bankers form deed of trust against property which was condemned for the sum of \$1,000,000. CGP would have this Court believe that the lienholder would be entitled to the entire \$1,000,000 even though the secured debt was only \$100. Not only is this interpretation contrary to the language and intent of the form Deed of Trust at issue, this absurd interpretation and resulting injustice is highly repugnant to public policy. Yet the decision by lower court authorizes just such a result.

In fact, according to Respondents' skewed interpretation, even if this Deed of Trust was paid off and released, the alleged unlimited and unconditional assignment would survive the release and CGP would still be entitled to all condemnation proceeds. Again, yielding an absurd and unthinkable result. The Deed of Trust

clearly limits CGP's interest in the condemnation proceeds to the amount necessary to satisfy the Secured Debt.

IV. ARGUMENT

A. Standard of Law.

EMI agrees that some of the issues to be considered in this appeal are questions of law to be reviewed de novo. Those issues include EMI's entitlement to the Residue damages as the owner of the property on the date of the condemnation and the application of the unambiguous written documents at issue. The first unambiguous document is the foreclosure and deed reservation which reserves from the foreclosure transaction all interests in property affected by the condemnation and all proceeds therefrom including the Residue and damages paid and/or to be paid therefor. The second unambiguous contract is the Deed of Trust which limits CGP's entitlement in the condemnation proceeds to the amount necessary to satisfy the Secured Debt.

However, to the extent that this Court concludes that any of said written documents are ambiguous, the interpretation of the same becomes a factual issue and any such interpretation by a lower court should be reviewed under the genuine issue of material fact standard set forth in Rule 56 of the West Virginia Rules of Civil Procedure. See *Pilling v Nationwide Mutual Fire Insurance Company*, 201 W.Va. 757, 500 S.E.2d 870 (1997). 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 (W.Va. 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 (W.Va. 1995). The Circuit 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

(W.Va. 2002). In determining whether a genuine issue of material fact exists, the presented facts should be construed in the light most favorable to the appealing party. *Alpine Property Owner's Ass'n v Mountaintop Dev. Co.*, 179 W.Va. 12, 365 S.E.2d 57 (W.Va. 1987).

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

There is no dispute concerning this issue and EMI deems that no further discussion in this Reply is necessary.

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

The only apparent dispute concerning this issue is the attorneys' fees which may be recoverable depending upon this Court's ruling. EMI maintains that Respondents pursuit of all of the condemnation proceeds based on the Deed of Trust assignment, the date of the Residue damages and/or the alleged transfer of the Residue condemnation rights are not meritorious claims especially in light of the given facts and controlling legal principles. Therefore, any attorneys' fees incurred by Respondents in the pursuit of those claims are not reasonable and should not be permitted. Although this issue may not yet be ripe for decision by this Court, if Petitioner is successful in this appeal the issue will be a later point of contention and any discussion by this Court in its final order concerning the matter would promote judicial economy.

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.

The Residue 4 acres was damaged on September 27, 2010, when the appurtenant right of access to the Residue 4 acres was taken. The appurtenant right of access undeniably constitutes an interest in real estate. When EMI's appurtenant right of access to the Residue was taken on September 27, 2010, EMI's

appurtenant real property interest was equitably converted into a personal property interest entitling EMI to damages from and against the condemnor. See CGP Development Co. Inc.'s Motion for Entitlement to Condemnation Proceeds at A.R. 120-121 wherein Respondents explain this equitable conversion whereby an interest in real estate is converted by condemnation into a personal property right. EMI owned the Residue on said date and therefore, became the owner of the converted equitable right to damages on that date. Such equitable right was never transferred from EMI (as discussed in the following section) and EMI continues to own such right.

Respondents' misguided opposition to this conclusion is that the Residue 4 acres was not affected by the condemnation at all. Respondents state the "4 acres were never condemned when EMI owned them. [i]n fact they have never been condemned at all" (RB 10), "there has been no taking at all of the 4 acres" (RB 12) and, "the 4 acres had never been condemned" (RB 13). These statements are misleading because a vital and integral part of the 4 acres, the access, was condemned. Just because Respondents state over and over in their Brief that there has been no condemnation with respect to the Residue 4 acres does not make it so. The right of access to a parcel of land is an appurtenant interest in the land and an integral and necessary part of the land. The taking of an access right to a parcel of land in a condemnation action definitely constitutes the taking of an appurtenant interest therein. Likewise the condemnation of the access to the Residue in this action constituted the condemnation of an interest in the Residue which detrimentally impacted the Residue.

The Condemnation Petitions and Orders of Deposit identify that the right of access to the Residue was taken. 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) 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)

Respondents also incorrectly conclude that since there was no compensation paid for Residue damage that there has been no condemnation of the 4 acres. Respondents state "[t]he State has not paid any money into Court for those 4 acres" (RB 10), "no damages award for the 4 acres has been paid" (RB 12), "certainly the State has not paid any compensation for those 4 acres" (RB 12) and, "the State has neither taken nor paid money into Court for those 4 acres" (RB 14). These statements are absolutely wrong. Each of the Condemnation Petitions request in the prayer for relief that the DOH be permitted "to deposit or pay into Court to the Clerk of the Court the amount which they [DOH] have estimated to be the fair value of the property, or estate, right or interest therein, which Petitioners [DOH] are seeking to condemn, including the damages, if any, to the residue..." (A.R. 18, 36 and 48 emphasis added). The Orders of Deposit, which were prepared and submitted by the DOH identified that the compensation paid was "Petitioners [DOH] estimate to be the fair value of 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)..." (A.R. 72, 86 and 93 emphasis added) The condemnation Petitions and the Orders of Deposit clearly identify that the State recognized that the condemnation detrimentally affected the Residue and accordingly paid money into court for both the value of the property taken and the damages to the Residue.

Respondents' have even admitted that there has been a taking of an appurtenant right of access interest in the Residue and that the Residue has been damaged wherein they state, "[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). There is no *may have* about it, the September 27, 2010, taking most definitely restricted the access to and greatly reduced the value of EMI's Residue 4 acres. Respondents use the phrase *may have* because they hope to negotiate some access to

their Residue in the future through the property condemned by the DOH or some other property owned by the DOH. (See RB 12 @ Footnote 3). Whether Respondents are or are not successful in negotiating some future access to the Residue is irrelevant to the fact that the DOH took EMI's access to the 4 acres thereby causing EMI to incur substantial damages which it should be entitled to recover in this condemnation action.

Respondents improperly rely on *Newman v Bailey*, 124 W. Va. 705, 22 S.E.2d 280 (1942) for the proposition that the Residue damages did not occur when EMI owned the Residue but will occur at a later date when the road construction occurs. Petitioner's Brief fully addresses how *Newman* is not applicable because in *Newman* there was no condemnation by the DOH so the only possible way to measure the damages was when the DOH trespassed upon the subject property and constructed the road. Whereas in the case at bar, a condemnation was filed and the Residue damages occurred and were measurable immediately upon the condemnation when the access to the Residue was taken. At which time EMI owned the property and suffered the damages. Respondents' Brief fails to address this glaring inconsistency between the factual pattern in *Newman* verse those in the case at bar.

EMI's entitlement to the Residue damage is not inconsistent with Respondents current ownership of the Residue. Respondents assert that they "purchased the four acres at the foreclosure sale" (RB 11), they "pay the taxes on the property" (RB 11), they are "responsible for maintaining the property" (RB 11), "only CGP can decide what to do with those 4 acres" (RB 11) and, that "EMI has no say on what happens to those 4 acres". (RB 11) Respondents then appear to argue that if EMI were entitled to the Residue damages it would somehow be an infringement upon Respondents' current ownership right in the Residue (RB 10-13). Respondent is comparing apples to oranges. We are dealing with two entirely separate property interests. One is the entitled right to damages for the taking of the access to the Residue, a real property interest that has been equitably converted into a personal property right as of September 27, 2010, the day of the condemnation. The other is the current legal title to the Residue real property. EMI owns the former and CGP

owns the latter. EMI's is not trying to control the 4 acres or control what CGP may do with the same. EMI's entitlement to the personal property Residue damage right is not an infringement upon CGP's current real property title ownership of the Residue. CGP knowingly bought the limited access Residue at foreclosure with no rights in the condemnation action and that is what they now own- the limited access Residue without any right in the condemnation action. See *Fleming v Holt*, 12 W. Va. 143 (1877) a purchaser of property at foreclosure acquires the property as is, without warranty, governed by the principle *caveat emptor*.

Respondents misstate the law and the facts at pages 13-14 of its Brief. EMI cites West Virginia Code Section 54-2-14a in its Brief in support of EMI's right to the Residue damages as the owner of the property on the date of the condemnation. Respondents allege that the word *residue* "does not appear in the Section [14a] at all" (RB 14) and that this section "merely gives owners at the time of the condemnation the same right to "the money paid into court" that they had in the property". (RB 14) The word residue does in fact appear in Section 14a, just not the selected portion quoted by Respondents. In fact it is clear in Section 14a that "the money paid into court" refers to the money paid for the property condemned and damages to the residue.

Respondents further allege that the initial condemnation payment of \$241,000 was only paid for the "8 acres condemned" and that the State has not paid any money into court under §54-2-14a or any other section for the remaining 4 acres..." (RB 14) These assertions are incorrect as the Orders of Deposit clearly identify that the condemnation deposit was paid for the 8 acres taken and for damages to the 4 acre Residue. At the end of the aforementioned paragraph, Respondents conclude that "because the State has neither taken nor paid money into Court for those 4 acres, EMI has no right to any damages resulting to the 4 acres". (RB 14) However since the contrary is true, that the State has taken an interest in the 4 acres and the State did pay money into court for the same, all when EMI owned the property, then, EMI must be the rightful owner to the Residue damages.

EMI does not cite §54-2-14a as a basis to "allow it to control the residue" as alleged by Respondents.

(RB 13) Nor does EMI cite *West Virginia Department of Highways v. Bartlett*, 156 W. Va. 431, 94 S.E.2d 383, (1973) in support of “*to whom* the right to such [Residue] damages accrues” as Respondents allege (RB 11). In its Brief, EMI cites *Bartlett* as authority for the rule concerning the measurement of damages in a condemnation action and at what point in time those damages are measured. *Bartlett* identifies that the damages to the land taken and the affected residue are measured at the time of the taking. In the case at bar the time of the taking was September 27, 2010. EMI's Brief then cites §14a which identifies *to whom* the damages including the Residue damages belong as follows: “[T]he owners of such property, or interest or right therein [including any affected residue], 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 any additional amounts to be paid] into court as they had in the property*.

Respondents' Brief complains of a gross inequity at page 12. However, the only gross inequity that may become of this matter would be if CGP, as the foreclosure purchaser, were allowed to buy the restricted access Residue property, presumably at a discount due to the known restricted access, and then be awarded the damages for the loss of the access. There is no doubt that the value of the residue was detrimentally impacted by the condemnation and therefore, the subsequent foreclosure sale price was also impacted. EMI was the owner of the Residue at the time of the condemnation and EMI suffered this loss in value. When CGP bought the Residue at the foreclosure, it did so knowing that the access thereto had been restricted by the condemnation and that no condemnation rights would be transferred in the foreclosure. CGP obviously accounted for this lack of access deficiency and the nontransfer of the condemnation rights in determining a

reduced foreclosure bid price. So now that CGP bought the Residue at the discount, it would be an inequitable windfall if CGP, as the foreclosure purchaser, were to get the Residue at a discount and recover compensation for the damages sustained by EMI. The State should not be able to condemn a person's property and give it to another. That is exactly what CGP is asking, for the state to take EMI's real property access right causing substantial injury to EMI and then give the right or compensation therefor to CGP.

EMI did not sleep on its rights with respect to the Residue damage as alleged by Respondents. (RB 12 @ Footnote 4) This is a misstatement of the law to assert that EMI could not recover for Residue damages without the filing of a counterclaim. Section 14a specifically instills in a condemnee the right to recover damages for the taken property and for the damages to the residue in a condemnation action. There is absolutely no requirement that a condemnee must file a counterclaim to recover residue damages.

EMI raised the prior letters from CGP's counsel as CGP's admission that CGP did not acquire any Residue rights in the foreclosure transaction. EMI did not raise these letters solely as evidence of some agreement concerning the control of the Residue litigation as the Respondents suggest.

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

Respondent's Brief cursorily responds to this subsection of the first Assignment of Error which refutes any transfer of condemnation rights in the foreclosure. Respondents cite two alleged "black letter law" principles which upon careful review support EMI's right to the Residue damages and not the Respondents.

Respondents cite 82 A.L.R. 1063 and *County v Logan*, 262 Ala. 586, 80 So. 2d 529 (1955) for the following black letter law; "where property is purchased which is subject to pending condemnation proceedings, under which title has not vested in the condemnor, and the deed conveying such property is silent as to the right to the award money to be paid, such money belongs to, and is recoverable by, the vendee." (RB 12) The key phrase in this rule is *under which title has not vested in the condemnor*. In the case at bar, title to the

condemned property most definitely became *vested* in the condemnor, DOH, on September 27, 2010, when EMI still owned it and prior to CGP's foreclosure purchase of the same in November of 2010. Accordingly, under this cited *black letter law*, the damages recoverable for the reduction in value to the Residue belong not to the vendee, CGP, they belong to the injured owner, EMI. The *Logan* opinion further supports EMI's entitlement to the Residue proceeds wherein it states (citing *Security Co. v Rice*, 215 Cal. 263, 9 P.2d 817 (1932)) "if after the order of condemnation and payment of the money into court the conveyance is made, the purchaser is not entitled to the award but it remains that of the seller unless the conveyance contains a provision to the contrary." *Logan*, Id at 588, emphasis added. The foreclosure conveyance in the case at bar occurred after the order of condemnation and payment of money and did not include any provisions conveying the award (but specifically contained language that withheld this condemnation award) so CGP is not entitled to the Residue damage award and it remains with EMI.

Respondents also cite 29A C.J.S. Eminent Domain §244 for the following *commonsense black letter law proposition*: "Generally, where property is conveyed after the commencement of a condemnation proceeding but before the time when the taking is complete, or the award has been paid, the purchaser is entitled to the compensation." (RB 12) This rule similarly provides that the purchaser is entitled to the compensation if the property is conveyed *before the taking is complete or the award has been paid*. In the case at bar, the property was not conveyed to CGP *before the taking or before the award had been paid*. The taking of EMI's property and the payment of the award therefor occurred on September 27, 2010 and the conveyance to CGP did not occur until November 17, 2010. Accordingly, under this cited *commonsense black letter law*, the damages recoverable for the reduction in value to the Residue belong to EMI and not the post condemnation purchaser, CGP.

Respondents also fail to address the requirement stated in *Newman*, that 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. Respondents do not and can not point to any specific assignment of the Residue condemnation rights in the foreclosure transaction. Not only is there not a specific assignment of condemnation rights in the Trustee's Deed, Respondents admit that the Trustee's Deed is "silent about any condemnation money with respect to the 4 acres". (RB 12-13) Such silence, according to *Newman*, is indicative of the fact that no condemnation rights were transferred to CGP, as the foreclosure purchaser, in the Trustee's Deed.

Respondents' limited analysis of the reservation language contained in the Notice of Foreclosure and the Trustee's Deed is unpersuasive. Again, Respondents incorrectly conclude that since the Residue was not condemned and no compensation was paid for the Residue, the reference in the reservation to *real estate subject to the condemnation proceedings and the proceeds therefrom which have now been now equitably converted* only refers to the 8 acres and the proceeds payable therefor. As previously explained herein, this conclusion is incorrect because the 4 acres was subject to the condemnation proceedings. An interest in the 4 acres, the appurtenant right of access, was condemned and the compensation paid definitely included compensation for the damages to the 4 acre Residue. Accordingly, the reserving language definitely reserved all interests in the 4 acre Residue which were condemned and all proceeds payable therefor.

Even the lower court found in its order that "CGP expressly reserved from the foreclosure sale any rights to the condemnation proceeds under the theory of equitable conversion." (A.R. 1-2) Based on the condemnation Petitions and Orders of Deposit, the condemnation proceeds included payment for the damaged Residue. Accordingly, the lower court should have concluded that the condemnation rights with respect to the Residue were in fact reserved.

EMI maintains that there was no ambiguity in the reserving language and that such reserving language reserved all rights in the condemnation action including damages recoverable for the Residue. Accordingly, a de novo review of the same is warranted. However, should this Court find some ambiguity in the reserving

language and determine that a genuine issue of material fact review is in order, then EMI maintains that there exists no genuine issue of material fact disputing the ultimate conclusion that the reserving language reserved all rights in the condemnation action including damages recoverable for the Residue.

EMI owned the Residue property on the date of the condemnation taking on September 27, 2010. No condemnation rights were transferred to CGP in the foreclosure transaction. Therefore, as a matter of law, EMI is entitled to the damages to the Residue resulting from the condemnation.

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 plain, ordinary, clear and unambiguous language in the Deed of Trust provides that CGP, as the lienholder, is only entitled to payment of the Secured Debt from the condemnation proceeds. CGP is not entitled to all condemnation proceeds including amounts over and above the amount of the Secured Debt. CGP's pigeonholed focus on the terms *all sums* and *any award* contained in the assignment provision is nothing but a distorted and out of context interpretation of the assignment provision. What is clear from the assignment provision is that *all sums* and *any award from a condemnation or other taking of all or any part of the Property* are collaterally assigned to CGP to be used and *applied as payment* toward the Secured Debt. The reference to *all sums*, *any award* and *partial taking* in this provision clarifies that in the event *any taking award* is less than the full amount of the Secured Debt then all such sums would be applied to the Secured Debt. This prevents a prorata fight for the proceeds in the event that a condemnation award is less than the Secured Debt.

Respondents claim that this standard form Deed of Trust unilaterally assigns all condemnation proceeds to CGP regardless of the small amount due on the Secured Debt is quite audacious. How many hundreds or thousands of deeds of trust with condemnation assignment provisions identical to this standard

form Deed of Trust are in existence? Does CGP really think that all trustors subject to a deed of trust which mirrors this standard form Deed of Trust bargained away all condemnation proceeds to which they may be entitled? The notion of such thought is repugnant to public policy, borders on usurious and should not be tolerated. Even more egregious, according to CGP's skewed interpretation of the Deed of Trust, CGP would be entitled to all condemnation proceeds even if the Deed of Trust had been released.

EMI maintains that the Deed of Trust is not ambiguous as to the entitlement to condemnation proceeds. The ruling of the court below does not identify any ambiguity and apparently concludes that the Deed of trust is not ambiguous. Accordingly, a de novo review of the same is warranted. However, should this Court conclude that the Deed of Trust is ambiguous and determine that a genuine issue of material fact review is in order, there exists no genuine issue of material fact which would support CGP's position. Simply put, it is inconceivable that a reasonable jury could or would find based upon the language in the Deed of Trust that CGP is entitled to all condemnation proceeds regardless of the small amount due on the Secured Debt. A reasonable jury could only find that CGP is entitled to the amount of condemnation proceeds necessary to pay the Secured Debt and no more.

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

As argued herein, EMI is entitled to pursue its right to receive proper compensation for the real property and interests in real property taken from EMI in the condemnation action. Respondents' assertion that EMI lacks standing in this action, is again based upon Respondent's faulty premise that EMI is no longer the owner of the condemned property and therefore can suffer no injury. EMI owned the 8 acres that was taken at the time it was taken and EMI now owns the equitably converted right to proper compensation for the taking of the same. EMI also owned the Residue at the time the appurtenant right of access thereto was taken and now owns the equitably converted right to proper compensation for the taking of such right of access. Although these current rights for compensation held by EMI are subject to CGP's right to recover the small balance due

on the Secured Debt, there is no doubt that these current rights held by EMI constitute an "injury-in-fact" or an invasion of a legally protected interest giving EMI standing to pursue such rights in this action.

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

Respondents do not dispute that the order appealed herein is a final appealable order with respect to EMI and therefore, no further discussion on this matter is warranted.

V. CONCLUSION

On September 27, 2010 the DOH acquired through condemnation 8 of the 12 acres then owned by EMI which property was subject to a deed of trust subsequently assigned to CGP. In addition, on that date the DOH condemned and took EMI's appurtenant right of access to the Residue 4 acres. Also on that date, September 27, 2010, the DOH deposited with the court below, \$241,000 as its estimate of the fair compensation for EMI's land taken and the damage to EMI's Residue. The \$241,000 was awarded to CGP as the priority lienholder to be applied as payment on the Secured Debt. As typically the case, the DOH underestimated the value of the land taken and the damages to the Residue warranting the continuation of this condemnation action for a proper determination of the damages incurred by EMI.

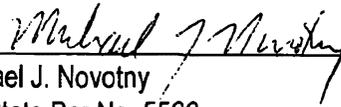
On November 17, 2010, CGP foreclosed on EMI's remaining real property and excluded from the foreclosure transaction all of the real property interests condemned and all rights in and to the proceeds payable for the real property interests condemned. CGP, as the foreclosure purchaser, purchased the property foreclosed upon. No rights whatsoever in the condemnation proceeds were transferred to CGP, as the foreclosure purchaser, in the foreclosure transaction and those rights remain with EMI.

Pursuant to the Deed of Trust, CGP, as the lienholder, is only entitled to so much of the condemnation proceeds as necessary to pay the Secured Debt. After applying the condemnation proceeds of \$241,000 and the foreclosure proceeds to the payment of the Secured Debt, the Secured Debt owed to CGP, as the

lienholder, was reduced to a small balance of approximately \$24,000.

Based upon the given facts, the court below should have determined that the damages to the Residue occurred on September 27, 2010, at the time of the taking of the property and the taking of the access right to the Residue and those damages belong to EMI as the owner; that no condemnation rights were transferred to CGP, as the foreclosure purchaser, in the foreclosure transaction and; that the assignment provision in the Deed of Trust was a collateral assignment limited to the amount necessary to satisfy the Secured Debt. 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 small balance due on 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 the Secured Debt.

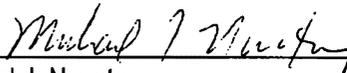


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IV. CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of February, 2013, I served a copy of the foregoing *Petitioner's Reply Brief* upon Respondents' counsel of record by United States mail, first-class postage prepaid as follows:

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