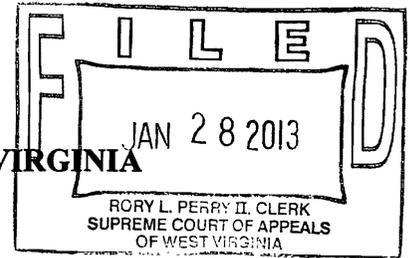


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-1137



EDWIN MILLER INVESTMENTS, LLC,

Petitioners,

v.

**CGP DEVELOPMENT CO., INC. and
JACK C. BARR, Esq.,** Trustee for CGP Development
Co., Inc.,

Respondents.

An appeal from the Circuit Court of Berkeley County, West Virginia,
Civil action no. 10-C-689

RESPONDENTS' BRIEF

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ASSIGNMENTS OF ERROR

W. Va. R. App. P. 10(d) states that a respondent’s brief need not specifically restate the petitioner’s assignments of error. It is the position of Respondents CGP Development Company, Inc. and Jack C. Barr, Esq. (together “CGP”) that the circuit court did not err.

This Court may affirm the circuit court on any ground appearing in the record, and, indeed, on any adequately supported independently sufficient ground. *Murphy v. Smallridge*, 196 W. Va. 35, 36-37, 468 S.E.2d 167, 168-69 (1996) (“An appellate court is not limited to the legal grounds relied upon by the circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support”).

STATEMENT OF THE CASE

This case involves relatively few material facts, none of which are genuinely disputed. Petitioner Edwin Miller Investments, LLC (“EMI”) formerly owned a 12 acre piece of property located in Martinsburg, Berkeley County, West Virginia.¹ EMI used that property to secure a \$335,000.00 line of credit from BCBank, Inc. (“BCBank”). Appendix, pp. 127-36, April 30, 2008 deed of trust.

¹ The property is more specifically described as “[a]ll of that certain tract of parcel [*sic*] of real property located in Martinsburg District, Berkeley County, West Virginia, containing 12.8610 acres and being identified as “Residual Parcel” on the plat of Villages @ Court House Square dated February 15, 2006 and prepared by Huron Consulting, which Plat is recorded in the said Clerk’s Office in Map Cabinet 12, at page 37, along with the right of ingress and egress over the 2.6836 acres Right-of-Way as shown on said Plat and all other appurtenances thereunto belonging.” Appendix p. 138, deed of trust.

On August 20, 2010, the State of West Virginia Division of Highways, Department of Transportation (“the State”) filed suit in the Circuit Court of Berkeley County seeking to condemn 8 of the 12 acres as part of a road extension project. The State became the legal owner of those 8 acres on September 27, 2010 when it paid \$241,000 into Court for the 8 acres. *See* W. Va. Code §54-2-14a (“Upon such payment into court, the title to the property, or interest or right therein, sought to be condemned, shall be vested in the applicant . . .”). The State never sought to condemn the remaining 4 acres which, therefore, still belonged, at the time, to EMI.

On September 16, 2010, BCBank assigned the note, deed of trust and other loan documents to CGP. Appendix, pp. 63-69, 139 assignment documents. CGP therefore stands in BCBank’s shoes with respect to the relevant loan documents. *See, e.g., Cook v. E. Gas & Fuel Associates*, 129 W. Va. 146, 155, 39 S.E.2d 321, 326 (1946) (“The assignee steps into the shoes of the assignor and takes the assignment subject to all prior equities between previous parties”).

EMI defaulted on its loan obligations, which following the assignment, were obligations that it owed to CGP. On November 17, 2010, CGP conducted a partial foreclosure sale of the remaining 4 non-condemned acres of property. Naturally, CGP could not sell the 8 acres already condemned and owned by the State, so it expressly reserved from the foreclosure sale the 8 condemned acres as well as any rights to the condemnation proceeds stemming from those 8 condemned acres under the theory of equitable conversion. Appendix, pp. 141, 149, notice of sale; deed. CGP then purchased the remaining 4 acres at the foreclosure sale for \$96,713.48 and applied that amount to EMI’s indebtedness. Appendix, p. 148.

On March 24, 2011, the Court heard the parties’ arguments concerning various lien issues and entitlement to the \$241,000 deposited into Court by the State for the 8 acres. The Court found

that CGP was the priority lienholder with respect to the 8 condemned acres and accordingly ordered release of the \$241,000.00 paid into Court to CGP in partial satisfaction of CGP's priority lien. March 24, 2011 Order, p. 8 (cited in Appendix, p. 3). EMI has not appealed the March 24, 2011 Order and therefore does not challenge CGP's right to the \$241,000 paid by the State for the 8 condemned acres.

Earlier in this litigation, both EMI and CGP believed that the total money paid into Court by the State was insufficient. Specifically, 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. However, subsequent discussions between CGP's counsel and the State's counsel suggest the possibility of a compromise: CGP has asked the State to provide a commercially reasonable entrance to the 4 acres in exchange for settlement of this condemnation litigation. Appendix, pp. 191-92 (“CGP has been actively negotiating with the State of West Virginia in order to obtain . . . an appropriate entrance into the property. . . [w]hat the damages to the residue are, is not yet subject to determination. Those damages depend[] on the present conduct of the West Virginia Department of Transportation Division of Highways; and are solely dependent on that present conduct”). If the State agrees to this compromise, there may be no damage to the 4 acres.²

It is beyond dispute that CGP, as the property owner, has every right to negotiate with the State concerning the 4 acres that it now owns free and clear. EMI, having lost the property at a foreclosure sale that it never challenged, has no present ownership interest in those 4 acres. Nor does

² The record discloses no resolution to these negotiations and, in fact, as of this writing, the State has not responded to CGP's latest offer. CGP reserves the right to evaluate any proposed access or other settlement offer made by the State.

EMI argue that it has any present ownership interest in the 4 acres. Nevertheless, EMI argues that it has a right to control the remaining litigation related to those 4 acres based on its previous ownership of the 4 acres. The circuit court correctly rejected this argument by Order dated August 20, 2012, finding that CGP, not EMI, was entitled to any future condemnation proceeds related to the 4 acres. Appendix, pp. 001-012. It is from this Order that EMI appeals.

SUMMARY OF ARGUMENT

The circuit court correctly decided the only disputed issue in this case: CGP, as owner of the remaining 4 acres, is entitled to any damages which may have accrued to those 4 acres. Those 4 acres were never condemned when EMI owned them and, indeed, still have not been condemned. To the extent that the 4 acres are deemed a damaged residue, it is a residue owned and controlled by CGP and for which CGP alone is entitled to raise future claims for damages. CGP's rights are based on the commonsense principles of law and equity stemming from the foreclosure sale at which CGP purchased the 4 acres. That sale foreclosed any right EMI had to control the 4 acres and this litigation. Further, CGP's rights to any future condemnation proceeds related to the 4 acres are based on unambiguous language in the deed of trust which assigned "all sums" from the condemnation proceeding to CGP. Without any legal or equitable interest in the 4 acres, EMI has no standing to litigate this matter. Therefore, pursuant to the law discussed in detail in the following sections, the circuit court correctly denied EMI's attempt to control and profit from CGP's land. The circuit court's August 20, 2012 Order should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

CGP's concurs with EMI's position on oral argument: no oral argument is necessary. Pursuant to W. Va. R. App. 18(a), CGP notes that the circuit court, relying on familiar rules of law

and equity, authoritatively decided the dispositive issues. Further, the facts and legal arguments are adequately presented in the briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

A. EMI does not dispute that CGP is entitled to receive outstanding principal and interest from any future condemnation proceeds.

EMI agrees that it still owes CGP \$24,901.59 in principal and interest (with interest accruing at the rate of \$4.31 per day) under the deed of trust, and that CGP, therefore, is entitled to that amount from any future condemnation proceeds. Petitioner’s Brief, p. 13. Because EMI does not dispute or appeal this portion of the Circuit Court’s Order, this issue is not before the Court.

B. The circuit court correctly found that CGP is entitled to be paid out of any additional condemnation proceedings an amount equal to EMI’s other debts to CGP which are secured under the deed of trust, including attorneys’ fees.

The circuit court held that the deed of trust secured not only the payment of principal and interest, but also payment of other obligations owed by EMI to CGP, specifically, attorneys’ fees incurred in enforcing or protecting CGP’s rights under the deed of trust. Appendix, pp. 4-5.

The Court’s conclusion was plainly correct. The deed of trust states:

4. SECURED DEBT DEFINED. The term “Secured Debt” includes, but is not limited to, the following;

...

C. All obligations Grantor owes to Lender, which now exist or may later arise, to the extent not prohibited by law, including, but not limited to, liabilities for overdrafts relating to any deposit account agreement between Grantor and Lender.

D. All additional sums advanced and expenses incurred by Lender for insuring, preserving or otherwise protecting the Property and its value and any other sums advanced and expenses incurred by Lender under the terms of this Deed of Trust, plus interest at the highest rate in effect, from time to time, as provided in the Evidence of Debt.

Appendix p. 128, p. 2, ¶4. EMI obligated itself to BCBank (and CGP as assignee) by “agree[ing] to pay all costs and expenses incurred by Lender in enforcing or protecting Lender’s rights and remedies under this Deed of Trust, including, but not limited to, attorneys’ fees, court costs, and other legal expenses.” Appendix, p. 132, ¶18. Therefore, attorneys’ fees and court costs are obligations that EMI owes to CGP under the deed of trust (Appendix p. 128, ¶ 4.C.) and they further are expenses incurred by CGP under this deed or trust (*id.*, ¶ 4.D.). It follows by the clear terms of the document that and such fees and costs are secured under the deed of trust and are thus obligations that EMI owes to CGP which would be payable from any additional condemnation proceeds.

CGP has incurred significant attorneys’ fees, court costs and other legal expenses to protect its property and rights under the deed of trust from EMI’s claims. EMI does not dispute CGP’s right to payment from the condemnation proceeds of “any other debt validly secured by the deed of trust” which, EMI seems to understand, will include attorneys’ fees. Petitioner’s Brief, pp. 13-14. At the appropriate time before the circuit court, CGP will file a fee petition. EMI has preserved the right to challenge that petition. Appendix, p. 5. However, because no fee petition has been filed the circuit court has never had occasion to consider this matter. Therefore, there is not yet any ripe dispute, let alone appealable issue, for this Court to consider. *See* syl. pt. 4, *State v. Redman*, 213 W. Va. 175, 176, 578 S.E.2d 369, 370 (2003) (“This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance”) (citation omitted).

C. The circuit court correctly determined that CGP is entitled to all condemnation proceeds.

As its first assignment of error, EMI argues that “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.” Petitioner’s Brief, pp. i, 15-27. Pursuant to W. Va. R. App. P. 10(d), the next section of this brief specifically responds in opposition to this assignment of error. Because the circuit court’s order involved legal questions about the parties’ entitlement to proceeds, this Court’s review is de novo. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995) (“Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review”).

1. As foreclosure purchaser of property never condemned by the State, CGP alone is entitled to compensation for any damage to the 4 acre remainder not condemned by the State.

After the State condemned 8 of the 12 acres owned by EMI and secured by a deed of trust given by EMI and assigned to CGP, EMI defaulted under the deed of trust and lost the remaining 4 acres at a foreclosure sale where they were purchased by CGP. CGP is now the sole, undisputed owner of those 4 acres. Only CGP can decide what to do with those 4 acres. EMI does not suggest – nor could it plausibly suggest – that it can tell CGP what to do with respect to those 4 acres. If CGP wishes to settle litigation over damage to the remainder with the State in exchange, for example, for commercial access to the 4 acres, it is CGP’s right to do so. EMI simply has no say on what happens to those 4 acres.

The reason that CGP rather than EMI controls the 4 acres is because the 4 acres were never condemned when EMI owned them. In fact, they have never been condemned at all. The State has not paid any money into Court for those 4 acres, nor has it entered on or performed any construction on those 4 acres. Nevertheless, in support of its claim that it has some right to control the 4 acres, EMI quotes the following syllabus point from *W. Virginia Dept. of Highways v. Bartlett*, 156 W. Va.

431, 432, 194 S.E.2d 383, 384 (1973):

“The approved and general rule for the measure of damages in an eminent domain proceeding where parts of the land are taken is the fair market value for the land at the time it was taken, plus the difference in the fair market value of the residue 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.”

Id. at syl. pt. 3. EMI owned all 12 acres at the time of the taking in this case. And, indeed, it is clear that some damages are measured at the time of the taking. But this syllabus point says nothing about *to whom* the right to such damages accrues. It is safe to assume that, in most instances, the owner at the time of the condemnation is likely still to own the land at the time that the residue is actually damaged. However, under the unusual facts of this case, EMI failed to preserve its rights to the 4 acre residue. It lost those rights when it defaulted under its obligations to the security holder, CGP.

Even merely as security holder, CGP would have had a right to the condemnation proceeds pursuant to the deed of trust. (*See discussions infra*). However, when CGP subsequently purchased the four acres at the foreclosure sale, CGP obtained full equitable interest in the land and perfected its legal interest with the subsequent deed. *In re Bardell*, 374 B.R. 588, 591-92 (N.D.W. Va. 2007) *aff'd sub nom. Bardell v. Branch Banking & Trust Co.*, 294 F. App'x 47 (4th Cir. 2008) (“after the property is knocked down by the auctioneer and a memorandum of sale is executed, the equitable title to the property passes to the purchaser”); Appendix, pp. 149-50.

CGP owns all title and rights to the 4 acres including any rights accruing from any damage possibly caused by the State. CGP pays taxes on the property. CGP is responsible for maintaining the property. CGP is responsible for the familiar obligations associated with property ownership under local and state law. Additionally, CGP continues to incur attorneys’ fees negotiating with the State with respect to the property. Following EMI’s default and the subsequent foreclosure sale,

there is simply no interest in the 4 acres left for EMI to claim. It would therefore be grossly inequitable for EMI to reap a benefit from those 4 acres.

This commonsense proposition is black letter law. “Generally, where property is conveyed after the commencement of a condemnation proceeding but before the time when the taking is complete, or before the award has been paid, the purchaser is entitled to the compensation.” 29A C.J.S. Eminent Domain §244. *See also Newman v. Bailey*, 124 W. Va. 705, 22 S.E.2d 280 (1942) (holding that injury to land taken by the State was not complete until time of construction).³ In this case, there has been no taking at all of the 4 acres and no damages award for the 4 acres has been paid. Even if EMI were to argue that it was effectively taken,⁴ certainly the State has not paid any compensation for those 4 acres. Therefore, in either case, any future award belongs to CGP as sole legal and equitable owner.

Similarly, it is black letter law that “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.” 82 A.L.R. 1063; *County v. Logan*, 262 Ala. 586, 80 So. 2d 529 (1955). The foreclosure deed to CGP is, naturally, silent about any condemnation money with

³ EMI argues that *Newman* is inapplicable because, in EMI’s opinion, *Newman* was more akin to a trespass case than a condemnation case such as this. However, regardless of whether one styles the injury a trespass or condemnation, the extent of the injury will not be known and fully actionable until CGP’s settlement negotiations have reached their conclusion. Only CGP as the present owner of the property, will have a right to claim damages should the negotiations prove unsuccessful.

⁴ EMI’s claimed interest in the 4 acres is further undermined by the fact that it slept on its rights when it owned the 4 acres. Not only did it lose all interest at the foreclosure sale, but had EMI thought that the 4 acres had been sufficiently damaged when it still owned the property, it could have and should have filed a counterclaim for damage to the residue. *See W. Virginia Dept. of Transp., Div. of Highways v. Dodson Mobile Homes Sales & Services, Inc.*, 218 W. Va. 121, 624 S.E.2d 468 (2005). There is no evidence in the record that EMI filed such a claim.

respect to the 4 acres because those 4 acres had never been condemned and no money for those acres has been deposited by the State. The deed discusses “the real estate and interest in real estate described in the condemnation proceedings . . .” and “reserves from said sale the portions of 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.” Appendix, p. 149.

Despite the language of the reservation clause, EMI claims that the deed reserved “all condemnation rights.” But clearly this is not correct. As demonstrated by the plain text of the deed, the reservation was limited to funds stemming from property already condemned: namely, the \$241,000 that was paid into Court and awarded to CGP without objection. Because the 4 acres had never been condemned, no funds related to those 4 acres could have been reserved. Therefore, because the deed says nothing about any nonexistent proceeds from non-condemned 4 acres, CGP, as vendee, is alone entitled to any such proceeds in the future.⁵

EMI also suggests that §54-2-14a allows it to control the 4 acre residue. That section states:

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

⁵ EMI’s misreading of the reservation language would bring about an absurd result. This is so because, naturally, the sale could not transfer interest in the 8 acres condemned and owned by the State. However, if the sale also reserved and did not transfer the remaining 4 acres as EMI seems to claim, then it would follow that no meaningful interest at all was transferred.

to the provisions of this section. The title in the applicant shall be defeasible until the compensation and any damages are determined in the condemnation proceedings and the applicant has paid any excess amount into court.”

W. Va. Code §54-2-14a (emphasis added). But the word “residue,” so emphasized by EMI, does not appear in the section at all. The section merely gives owners at the time of condemnation the same right to “the money paid into court” that they had in the property. The only money paid into Court in this case was the \$241,000 previously paid to the State for the 8 acres condemned. CGP, rather than EMI, was entitled to that money because CGP held the deed of trust and was entitled to priority payment. The Court awarded CGP that \$241,000 and EMI has never objected to or appealed that award. The State has not paid any money into Court under §54-2-14a or any other section for the remaining 4 acres. Therefore, 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.

Finally on this topic, EMI attempts to make much of CGP’s counsel’s earlier letters concerning his client’s previous understanding of this litigation. Specifically, those letters suggested that CGP may not want to control future litigation over the residue. Petitioner’s Brief, p. 22. After writing those letters, however, CGP conducted additional research into this case and successfully argued before the circuit court that it has exclusive right to the condemnation proceeds. Therefore, because it has an exclusive right to the proceeds, it is logically the only party with the right to control the litigation against the State. EMI has not suggested that letters constituted a binding agreement with EMI – after all, what consideration is EMI supposed to have given to create a binding agreement? Nor, despite EMI’s cursory allegation, is it plausible that CGP obtained the \$241,000 in initial condemnation proceeds on the basis of such earlier representations. After all, that \$241,000 deposit does not even constitute the face value of the secured debt owed to CGP. The Court awarded

that amount because it was part of what EMI still owed CGP as priority lienholder. As it admits, EMI owed CGP the \$241,000 and the remainder of the full value of the secured debt regardless of any representations made by CGP's counsel. Petitioner's Brief, p. 13.

2. Any additional sums resulting from condemnation belong to CGP by virtue of the deed of trust.

In its second assignment of error, EMI alleges that "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." Petitioner's Brief, pp. 1, 24. Pursuant to W. Va. R. App. P. 10(d), the next section of this brief specifically responds in opposition to that assignment of error.

It is CGP's position, supported by its foreclosure deed and its sole ownership of the 4 acres, that it has exclusive right to those 4 acres or any money paid by the State into court for those four acres. But even if CGP were not the fee owner of the 4 acres but merely a secured creditor, the deed of trust assigned to CGP and secured by those 4 acres grants CGP the right to any condemnation proceeds. In the event of condemnation, the parties agreed as follows:

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

Appendix, p. 133 (emphasis added). By this clear, controlling language, EMI agreed to give BCBank “all sums” and to assign to BCBank “any award” resulting from the condemnation. CGP, as BCBank’s assignee, stands in BCBank’s shoes and therefore is entitled to all condemnation sums and any awards in this litigation, including any awards related to the 4 acres.

As the circuit court found, the proceeds have thus far been considered payments and have been applied to EMI’s outstanding debt. Any future proceeds will be applied in like manner to EMI’s outstanding debt. But the deed of trust goes further: it assigns “all sums” from condemnation to CGP, not just the sums which will satisfy EMI’s principal indebtedness. Therefore, there is no contradiction or ambiguity in the deed of trust’s condemnation language: even after EMI’s debt has been paid, the remaining amount will be part of the “all sums” owed by agreement to CGP. The “shall be considered payment” language merely is to prevent the lender from keeping the proceeds but not applying them to the debt.

BCBank, CGP’s predecessor in interest, had good reason to bargain for this contractual provision. As described above, there are secured sums in addition to the principal balance and interest, *e.g.*, attorneys’ fees, which EMI owes to CGP. But, as principal lienholder, CGP’s assignor also had a right to demand as benefit for its investment the right to any additional condemnation proceedings. BCBank and EMI bargained at arms length for this provision. EMI was and remains a sophisticated commercial entity represented by counsel. It could have chosen not to assign any condemnation surplus to BCBank. Instead it agreed to give the condemnation award to BCBank (and to CGP, as BCBank’s assignee) as part of the loan agreement. It is now bound by the plain terms of the agreement. *Kanawha Banking & Trust Co. v. Gilbert*, 131 W. Va. 88, 110, 46 S.E.2d 225, 237 (1947) (“When the terms of a written contract are clear and unambiguous, full force and

effect will be given to the language used by the parties”).

The clear and convincing language in the deed of trust permits CGP to retain any excess condemnation proceedings, should the State ever pay any money into Court for the 4 acres. This Court allows parties to make such agreements on the basis of such clear and convincing language. *Lilly v. Lincoln Fin. Co.*, 112 W. Va. 351, 164 S.E. 794 (1932) (“A trustee making sale of property held under a deed of trust will not be permitted to retain the excess after payment of the secured debt and the usual costs, except he establish an agreement to such effect between himself and the grantor by clear and convincing proof”); 59A C.J.S. Mortgages § 850 (noting that, while ordinarily, any surplus belongs to the mortgagor, “[t]he disposition of the surplus may be provided for in the mortgage or trust deed or by agreement of the parties”).

EMI in fact agrees that the deed of trust is unambiguous. Petitioner’s Brief, p. 25. Yet it seems nevertheless to want to interpret the document by eliminating the phrase authorizing CGP to “receive all sums resulting from the action or claim.” If the document is unambiguous, as the parties agree, there is no authority to delete clear text, indeed, there is no authority to construe the document at all. Syl. pt. 3, *Waddy v. Riggelman*, 216 W.Va. 250, 606 S.E.2d 222 (2004) (“Where the terms of a contract are clear and unambiguous, they must be applied and not construed”) (quotations and citations omitted); *Cabot Oil & Gas Corp. v. Huffman*, 227 W. Va. 109, 117, 705 S.E.2d 806, 814 (2010) (“Where the contractual language is clear, then, such language should be construed as reflecting the intent of the parties; courts are not at liberty to, sua sponte, add to or detract from the parties’ agreement. It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them”) (citation and internal punctuation omitted)

The circuit court properly gave effect to each word of the deed of trust. Syl. pt. 6, *Henderson Dev. Co. v. United Fuel Gas Co.*, 121 W. Va. 284, 3 S.E.2d 217 (1939) (“Force and effect must be given to every word, phrase, and clause employed in a contract, if possible”). The deed of trust’s condemnation language clearly harmonizes the parties’ desire to apply any condemnation proceeds, first to payments owned by EMI, with the remainder to CGP. Every word makes sense to further the parties’ intent. There is no apparent or latent ambiguity here and no need for interpretation: the deed of trust must be applied as written. Therefore, after any future, hypothetical condemnation proceeds are applied to pay down EMI’s debt, CGP is entitled to the remainder.⁶

D. The Circuit Court correctly dismissed EMI from the action with prejudice because, without interest in the condemnation proceeds or remaining 4 acres, EMI lacks standing.

In its final assignment of error, EMI states that “the circuit court erroneously dismissed EMI from this action, with prejudice.” Pursuant to W. Va. R. App. P. 10(d), the next section of this brief specifically responds in opposition to this assignment of error.

As demonstrated by EMI’s cursory, one-paragraph treatment of this assignment of error, it is clear that it is a derivative assignment of error. That is, if the circuit court correctly ruled against EMI on the other points (thus effectively finding that EMI has no right to the condemnation proceeds), then the court was right to dismiss EMI. As argued *supra*, the circuit court correctly ruled against EMI on every point: CGP is entitled to all condemnation proceeds, including any future

⁶ Even had EMI alleged an ambiguity which would permit the Court to interpret the deed of trust, “[a]n interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable.” 11 Williston on Contracts §32:5 (4th ed.) (also stating “[a] court will interpret a contract in a manner that gives reasonable meaning to all of its provisions, if possible”); *Henderson Dev. Co, supra*, at syl. pt. 7 (“The primary consideration in the construction of a contract is the intention of the parties. This intention must be gathered from an examination of the whole instrument, which should be so construed, if possible, as to give meaning to every word, phrase and clause and also render all its provisions consistent and harmonious”).

proceeds from the thus far not condemned 4 acres, by virtue of its ownership of those 4 acres following the foreclosure sale and by virtue of the deed of trust's condemnation provision.

Simply put, EMI is no longer the property owner and has no claim to any proceeds stemming from the property. It has no role to play in the condemnation suit before the circuit court, and it has no statutory authority to advance any claims in that litigation. W. Va. Code §54-2-14a (discussing as parties "owners of such property" or those who have "interest or right therein"). Moreover, because EMI can suffer no injury with respect to land it doesn't own and because any order of the circuit court concerning that land will not affect EMI, this Court's jurisprudence establishes that EMI lacks standing generally. Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 84, 576 S.E.2d 807, 811 (2002) ("Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an "injury-in-fact"-an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court"). Because EMI lacked standing, the circuit court correctly dismissed EMI from this case.⁷

⁷ CGP does not contest EMI's assertion that, pursuant to W. Va. R. Civ. P. 54(b), this matter is ripe for appeal. *Durm v. Heck's, Inc.*, 184 W. Va. 562, 566, 401 S.E.2d 908, 912 (1991) (noting that "an order may be final [for appellate purposes] prior to the ending of the entire litigation on its merits if the order resolves the litigation as to a claim or a party").

CONCLUSION

CGP asks this Honorable Court to affirm the circuit court's August 20, 2012 Order which correctly rejected EMI's attempts to control property it does not own and which correctly dismissed EMI from this action.

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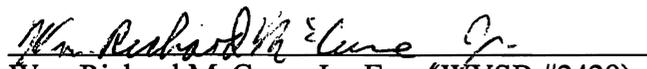


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CERTIFICATE OF SERVICE

I, undersigned counsel for Defendant CGP Development Co, Inc. in the above-styled matter, hereby certify that I served a true and accurate copy of the foregoing *Respondents' Brief* on the following by first class United States mail, postage pre-paid, on this 25th day of January, 2012:

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